
Back to the Future of Abortion Law: Roe's Rejection of America's History and Traditions

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Abstract: In *Roe v. Wade* much of Justice Blackmun's judgment was devoted to the history of abortion in Anglo-American law. He concluded that a constitutional right to abortion was consistent with that history. In *Webster v. Reproductive Health Services*, 281 American historians signed an amicus brief which claimed that *Roe* was consistent with the nation's history and traditions. This article respectfully questions Justice Blackmun's conclusion and the historians' claim.

Constitutional litigation, perhaps more than any other kind of legal determination, should be based on fact not fiction, truth not untruths, reality not myth. For it makes a unique contribution to shaping us as the people, the community, we constitute, and the persons, the individuals, we are.¹

In *Washington v. Glucksberg* the Supreme Court was faced with the question whether legislation prohibiting physician-assisted suicide was unconstitutional. Delivering the judgment of the Court Chief Justice Rehnquist observed: "We begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices."² In light of the fact that for over 700 years the Anglo-American common law tradition had punished or otherwise disapproved of suicide and assisted suicide³ the Court went on to reject the claim that the Constitution contains a right to assisted suicide.

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¹ John Finnis, "Shameless Acts" in *Colorado: Abuse of Scholarship in Constitutional Cases*, 7(4) ACADEMIC QUESTIONS 10 (1994) (hereafter "Finnis").

² *Washington v. Glucksberg*, 138 L. Ed. 2d 772, 781 (1997).

³ *Id.* at 782.

In determining whether the Constitution contains a right to abortion the nation's history and traditions concerning abortion are no less relevant. It is not surprising, therefore, that in *Roe v. Wade*,⁴ which established such a right, much of Justice Blackmun's leading opinion for the Court was devoted to the history of abortion in Anglo-American criminal law. Blackmun concluded that a right to abortion was consistent with that history. In *Webster v. Reproductive Health Services*,⁵ a case which was widely viewed as providing an opportunity for the Court to reconsider its holding in *Roe*, 281 American historians filed an *amicus curiae* Brief urging that *Roe v. Wade* was "consistent with the most noble and enduring understanding of our history and traditions."⁶ The Brief, which was eventually to attract the signatures of over 400 historians, was drafted by Sylvia Law, a professor of law at New York University.⁷ It proved influential in both academic and non-academic circles. It was, for example, relied upon by Ronald Dworkin in his argument rejecting constitutional personhood for the unborn.⁸

At the heart of the Brief lay three claims:

- "At the time the Federal Constitution was adopted, abortion was known and not illegal."⁹
- "Nineteenth-century abortion restrictions sought to promote objectives that are today plainly either inapplicable or constitutionally impermissible."¹⁰
- "The moral value attached to the fetus became a central issue in American culture and law only in the late twentieth century, when traditional justifications for restricting access to abortion became culturally anachronistic or constitutionally impermissible."¹¹

⁴ *Roe v. Wade* 410 U.S. 113, 35 L. Ed. 2d 147; 93 S. Ct. 705 (1973).

⁵ *Webster v. Reproductive Health Services*, 492 U.S. 490, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989).

⁶ Brief of 281 American Historians as Amici Curiae Supporting Appellees at 1, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (hereafter "Brief"). For contrasting definitions of an *amicus curiae* in American and English law, see note 158, *infra*.

⁷ See generally, *Roundtable: Historians and the Webster Case*, 12(3) PUBLIC HISTORIAN 9 (1990).

⁸ Citing the Brief Dworkin argued: "The best historical evidence shows ... that even anti-abortion laws, which were not prevalent in the United States before the middle of the nineteenth-century, were adopted to protect the health of the mother and the privileges of the medical profession, not out of any recognition of a fetus's rights." Ronald Dworkin, *The Great Abortion Debate*, 36(11) N.Y. REV. OF BOOKS (1989). For replies to Dworkin, see CHRISTOPHER COOPE, WORTH AND WELFARE IN THE ABORTION CONTROVERSY (Palgrave Macmillan, forthcoming); Gerard Bradley, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329 (1993). On the extent of the Brief's influence, see JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 1005-07 (2006) (hereafter DELLAPENNA).

⁹ Brief, *supra* note 6, at 4 (original heading in bold capitals).

¹⁰ *Id.* at 11 (original heading in bold capitals).

¹¹ *Id.* at 25 (original heading in bold capitals).

This article questions each of these claims. It concludes that *Roe* was a radical break with the law's historical protection of the unborn child and thereby with its adherence to the principle of the inviolability of human life.¹² It consists of three parts. The first part presents a short history of Anglo-American abortion law. Part two, the main body of the article, illustrates the misunderstanding of that history by Justice Blackmun in *Roe* and challenges the above three claims made by the Historians' Brief. The third part raises questions about the propriety of so-called "advocacy scholarship."

Anglo-American Law Against Abortion: A Brief History

As early as the mid-thirteenth century the common law punished abortion after fetal formation as homicide. Fetal formation, the point at which the fetus assumed a recognizably human shape and was believed to be ensouled, was thought to occur some 40 days after conception. By the mid-seventeenth century abortion was prohibited as a "great misprision" or serious misdemeanor. By the early nineteenth-century at the latest the common law appears to have prohibited abortion only after "quickening." Quickening, which occurs between the 12th and the 20th week of pregnancy, is the point at which the mother first perceives fetal movement. The later common law may have chosen this point because it was the point at which unborn life was believed to begin or because it was the point at which it could be legally proved to have begun or because the judges confused the earlier common law's prohibition of the destruction of a "quick" (formed and ensouled fetus) with the mother's experience of "quickening." In short, the common law consistently prohibited abortion at least after quickening and did so, as the offense's focus on the initiation or at least proof of fetal life illustrates, in order to protect the unborn.¹³

The nineteenth century, both in England and in the United States, witnessed statutory restriction of the prohibition. A main if not exclusive purpose of this legislation, like the common law from which it grew, was the protection of unborn life. This is evident from the nature and wording of the statutory provisions themselves. It is no less evident from the fact that the enactment and shape of the

¹² For a brief explanation of the principle in ethics and law, see John Keown, *Restoring Moral and Intellectual Shape to the Law after Bland*, 113 *LAW Q. REV.* 481 (1997).

¹³ See DELLAPENNA, *supra* note 8, at chs. 3-5; PHILIP A. RAFFERTY, *ROE V. WADE: THE BIRTH OF A CONSTITUTIONAL RIGHT*, especially Part IV (University Microfilms International, Michigan, Order Number LD02339 (1992)) (hereafter RAFFERTY); Joseph W. Dellapenna, Brief of the American Academy of Medical Ethics, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 492 U.S. 490, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1992) (hereafter Dellapenna Brief); Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 *FORDHAM L. REV.* 807, 815-27 (1973) (hereafter Byrn); Dennis J. Horan, Clarke D. Forsythe & Edward R. Grant, *Two Ships Passing in the Night: An Interpretivist Review of the White-Stevens Colloquy on Roe v. Wade*, 6 *ST. LOUIS U. L. REV.* 229, 272-300 (1987); JOHN KEOWN, *ABORTION, DOCTORS AND THE LAW*, ch. 1 (Cambridge University Press, 1988) (hereafter KEOWN). Similarly, Professor Bernard Dickens (no opponent of abortion) has written: "The protection the Common Law afforded to human life certainly extended to the unborn child." BERNARD DICKENS, *ABORTION AND THE LAW* 20 (London: MacGibbon & Kee, 1966).

legislation was influenced, most dramatically in the United States, by the emerging medical profession whose discovery that human life began at fertilization exposed the moral irrelevance of quickening. Responding to concerted pressure by the medical profession legislatures gradually abolished the quickening distinction and tightened the law so as to protect the unborn from fertilization. The rationale of the Anglo-American legislation was accurately identified in 1958 by Professor Glanville Williams, an eminent expert on criminal law at Cambridge University (and leading pro-abortion activist). He wrote:

At present both English law and the law of the great majority of the United States regard any interference with pregnancy, however early it may take place, as criminal, unless for therapeutic reasons. The foetus is a human life to be protected by the criminal law from the moment when the ovum is fertilized.¹⁴

Any suggestion that the common law did not prohibit abortion, or was “lenient” on abortion, or that women had a common law “right” or “liberty” to abort, or that the nineteenth-century statutes did not seek to protect the fetus, is groundless. Which brings us to Justice Blackmun in *Roe* and the 281 historians in *Webster*.

Justice Blackmun in *Roe* and the Historians’ Brief in *Webster*

Justice Blackmun in *Roe*

In *Roe* the Supreme Court decided, by a 7-2 majority, that an implied constitutional right to privacy, whether based on the Fourteenth Amendment’s concept of personal liberty or in the Ninth Amendment’s reservation of rights to the people, was sufficiently broad to encompass a woman’s right to terminate her pregnancy. The court summarized its decision as follows:

- (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.
- (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
- (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.¹⁵

Much of Blackmun’s opinion was devoted to the historical development of the law against abortion. He had inquired into and placed “some emphasis” upon “medical and medical-legal history and what that history reveals about man’s attitudes toward

¹⁴ GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 141 (London: Faber & Faber, 1958).

¹⁵ *Roe v. Wade*, 410 U.S. at 164-65; 35 L. Ed. 2d at 183-84.

the abortion procedure over the centuries.”¹⁶ Blackmun continued that before addressing the appellant's claim that the Texan anti-abortion statute infringed her right to abort the Court felt it “desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.”¹⁷ He asserted that it was “undisputed” that at common law abortion before quickening was not an offense and added that whether abortion even after quickening was an offense was “still disputed.”¹⁸ Although, he continued, Bracton (d. 1268) regarded post-quickening abortion as homicide and the later and predominant view of the great common law scholars such as Coke (1552-1634) and Blackstone (1723-1780) held it to be “at most” a lesser offense, a recent review of the common law authorities by Professor Cyril Means of New York Law School had argued that Coke had intentionally misrepresented the law and that even post-quickening abortion was never established as a common law offense.¹⁹ “This is of some importance,” continued the opinion, because American courts had followed Coke's exposition of the law and had stated that abortion after quickening was a common law crime. Blackmun added that their reliance on Coke was “uncritical” and that it now appeared “doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus.”²⁰ Blackmun then reviewed the development of anti-abortion legislation in England. He began with Lord Ellenborough's Act 1803 which *inter alia* made attempted post-quickening abortion a capital offense and which unambiguously criminalized attempted pre-quickening abortion, and ended with the Abortion Act 1967 which relaxed the law substantially.

Turning to U.S. law Blackmun stated:

In this country the law in effect in all but a few States until mid-19th century was the pre-existing English common law It was not until after the War Between the States [1861-1865] that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most states²¹

He concluded:

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phras-

¹⁶ *Id.* at 117; 35 L. Ed. 2d at 157.

¹⁷ *Id.* at 129; 35 L. Ed. 2d at 164.

¹⁸ *Id.* at 132-34; L. Ed. 2d at 165-66.

¹⁹ *Id.* at 134-35; L. Ed. 2d at 166-67; Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?* 17 N.Y. L. FORUM 335 (1971) (hereafter Means II).

²⁰ 410 U.S. at 135-36; 35 L. Ed. 2d at 167.

²¹ *Id.* at 138-39; 35 L. Ed. 2d at 168-69.

ing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.²²

Blackmun noted that the anti-abortion mood in the “late” nineteenth century was shared by the medical profession and that “the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period.”²³ He observed that the American Medical Association (AMA) appointed a Committee on Criminal Abortion in 1857 which in its report two years later deplored abortion and its frequency which it felt was due, first, to a widespread belief that the fetus was not alive until quickening; second, to the fact that doctors themselves were often supposed to be careless of fetal life; and, third, to the “grave defects” of both common and statute laws in recognizing the fetus and its inherent rights for civil purposes but in failing to recognize it, and denying it all protection, when “personally and as criminally affected.”²⁴ He added that the AMA adopted its committee’s resolutions which protested against “such unwarrantable destruction of human life” and which called upon state legislatures to tighten their abortion laws.²⁵

What of the purposes of the legislation? Justice Blackmun stated that those challenging the legislation’s constitutionality claimed—pointing to “the absence of legislative history” to support fetal protection—that “most” state laws were enacted not to protect fetal life but solely to protect women from the dangers of abortion.²⁶ Citing two articles by Professor Cyril Means²⁷ he noted that there was some scholarly support for this view and stated: “The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State’s interest in protecting the woman’s health rather than in preserving the embryo and fetus.”²⁸

Blackmun added that supporters of this view pointed out that in many states, including Texas, the pregnant woman could not be prosecuted for self-abortion or for co-operating in an abortion performed on her by another²⁹ and that the quickening distinction recognized the greater health hazards inherent in late abortion

²² *Id.* at 140-41; 35 L. Ed. 2d at 170.

²³ *Id.* at 141; 35 L. Ed. 2d at 170.

²⁴ *Id.* at 141-42; L. Ed. 2d at 170.

²⁵ *Id.* at 142; 35 L. Ed. 2d at 171.

²⁶ *Id.* at 151; 35 L. Ed. 2d at 175.

²⁷ Cyril C. Means Jr., *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y. L. FORUM 411 (1968) (hereafter Means I), and Means II, *supra* note 19. Dellapenna observes that Blackmun cited Means seven times, no one else more than once, and no other historian except in relation to a brief consideration of the Hippocratic Oath. DELLAPENNA, *supra* note 8, at 689, 1005.

²⁸ 410 U.S. at 151; 35 L. Ed. 2d at 176.

²⁹ *Id.*

and repudiated the notion that life begins at conception.³⁰ The Court concluded that its decision to uphold a constitutional right to abortion and strike down the anti-abortion legislation was consistent with *inter alia* “the lessons and examples of medical and legal history” and with “the lenity of the common law.”³¹ In short, Blackmun appears to have been persuaded that at common law women enjoyed a “right” to abort in early and very possibly later pregnancy and that the legislative restriction of this “right” in the last century was due to concern to protect maternal rather than fetal life.

The Historians' Brief in Webster

The misunderstanding of abortion law history by Justice Blackmun and by the Historians' Brief will become patent when the three central claims made by the Brief in defense of his historiography are subjected to scrutiny.

“At the time the federal constitution was adopted, abortion was known and not illegal.”

The Brief claimed:

As the Court demonstrated in *Roe v. Wade*, abortion was not illegal at common law. Through the nineteenth century American common law decisions uniformly reaffirmed that women committed no offense in seeking abortions. Both common law and popular American understanding drew distinctions depending upon whether the fetus was “quick,” *i.e.* whether the *woman* perceived signs of independent life. There was some dispute whether a common law misdemeanour occurred when a third party destroyed a fetus, after quickening, without the woman's consent. But early recognition of this particular crime against pregnant women did not diminish the liberty of the woman herself to end a pregnancy in its early stages.³²

This outline of the common law could have served only to mislead the Court into thinking that abortion was not illegal at common law, even after quickening. The passage stated that the common law “drew distinctions” at quickening but rather than explaining why it did so, namely, *so as to punish abortion after quickening* proceeded to state that there was some dispute whether non-consensual abortion after quickening was illegal. This distracting assertion (which is in any event erroneous³³) was likely to mislead the unwary reader into thinking that *consensual* abortion after quickening was not illegal. No less misleadingly the passage conflated two distinct questions: first, whether abortion was an offense at common law and secondly, if it was, whether the mother herself was liable. In relation to the first question the

³⁰ *Id.* at 151-52; 35 L. Ed. 2d at 176.

³¹ *Id.* at 165; 35 L. Ed. 2d at 184.

³² Brief, *supra* note 6, at 4-5 (original emphasis).

³³ A footnote accompanying this proposition stated: “Even in cases involving brutal beatings of women in the late stages of pregnancy, common-law courts refused to recognize abortion as a crime, independent of assault upon the woman, or in one case witchcraft.” The footnote cited ANGUS McLAREN, *REPRODUCTIVE RITUALS* 119-21 (London: Methuen, 1984) (hereafter “McLAREN”). Far from supporting this proposition, McLaren accepted the criminality of abortion at common law: “Seventeenth-century jurists thus recognized that a woman could be charged with procuring her own abortion, but only after the foetus had quickened.” McLAREN, *supra* at 122. See also Finnis, *supra* note 1, at 14-15.

Brief asserted that the court in *Roe* “demonstrated” that abortion was not an offense. The Court did no such thing. It simply observed that it was “doubtful” whether abortion was a common law offense even after quickening.³⁴ This doubt was, moreover, entirely misplaced. The authorities establish that abortion, at least after quickening, was an offense at common law. Indeed, as the *Roe* court itself stated, the “predominant” view, following that of the great common law scholars such as Coke and Blackstone, was to this effect.³⁵

Chief Justice Coke wrote in his *Institutes*, the first textbook of the modern common law: “If 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 misprision, and no murder.”³⁶ Similarly, Sir William Blackstone wrote in his celebrated *Commentaries* that life was a gift from God, a right inherent by nature in every individual which “begins in contemplation of law as soon as an infant is able to stir in the mother’s womb.”³⁷ These authorities lend weighty support to the historic proposition that it was illegal at common law for a woman, or a third party, to procure abortion after she was “quick with child.”

Why did the Supreme Court in *Roe* doubt such high authorities? The answer appears to lie in the Court’s reliance on Professor Means. His article (which did not disclose that he was counsel to NARAL, a national association seeking the repeal of the anti-abortion legislation) argued that Coke’s statement of the criminality of abortion was an “outrageous attempt” to create a new common-law misdemeanour³⁸ and a “masterpiece of perversion of the common law of abortion.”³⁹ It claimed that subsequent commentators such as Hawkins and Blackstone uncritically accepted Coke’s exposition of the law⁴⁰ and that there were plenty of *dicta* but no decisions supporting Coke, certainly none holding the woman herself guilty of an offense.⁴¹ As we saw earlier⁴² the Court in *Roe* regarded Means’s thesis as “of some importance” because most U.S. courts had followed Coke and held that post-quickening abortion was a common law offense.

³⁴ See text at note 20, *supra*.

³⁵ See text at note 19, *supra*.

³⁶ 3 COKE INSTITUTES 50 (1641). The passage continued: “but if the childe be borne alive, and dieth of the potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive.” For an analysis of the “born alive” rule, see Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and other Legal Anachronisms*, 21 VALPARAISO L. REV. 563 (1987).

³⁷ WILLIAM BLACKSTONE, I COMMENTARIES ON THE LAW OF ENGLAND 129 (1765-1769).

³⁸ Means II, *supra* note 19, at 346 (For non-disclosure of his affiliation, see first and second introductory footnotes).

³⁹ *Id.* at 359.

⁴⁰ *Id.* at 348-49.

⁴¹ *Id.* at 355.

⁴² See text at note 20, *supra*.

Scholarship since *Roe* has confirmed that the “masterpiece of perversion of the common law of abortion” flowed from the pen of Means not Coke. For example, exhaustive research by Philip Rafferty confirms that the early common law prohibited abortion from fetal formation, the later common law from quickening.⁴³ Examples of precedents unearthed by such scholars, precedents which Means denied existed, include the indictment in 1602 (before Coke's *Institutes*) of one Margaret Webb for taking poison with intent to destroy the infant in her womb.⁴⁴ Another is the trial and conviction of one Elizabeth Beare in 1732 (evidently reported *verbatim*) for procuring the abortion of another woman by the use of an instrument.⁴⁵ A more recent trawl of the authorities by Professor Dellapenna, in his recent volume dispelling the mythology about abortion history which has been spun by writers such as Means, confirms that abortion was an offense at common law both in England and its American colonies.⁴⁶ He points out that the precedents unearthed hitherto (in Connecticut, Delaware, Maryland, Rhode Island and Virginia) show that the prohibition on abortion was at least as strict as in England.⁴⁷

In short, the authorities support the following propositions:

- The common law consistently prohibited abortion; the early common law from fetal formation, the later common law from quickening.
- The prohibition applied to pregnant women themselves.

⁴³ RAFFERTY, *supra* note 13, at Part IV. Similarly, Byrn concluded: “at all times, the common law disapproved of abortion as *malum in se* and sought to protect the child in the womb from the moment his living biological existence could be proved.” Byrn, *supra* note 13, at 816. See also Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250, 1267-73 (1975) (hereafter Destro); KEOWN, *supra* note 13, at ch. 1.

⁴⁴ KEOWN, *supra* note 13, at 7-8.

⁴⁵ *Id.* at 8-9. Interestingly, neither of these precedents mentioned quickening. In *R v. Turner* (1755) the defendant was indicted for procuring a woman to take arsenic mixed with treacle “in order to kill and destroy a male bastard child by him begotten on her body and which she was then quick with.” *Id.* at 10. As early as 1532 a defendant was indicted for the rape of a woman on 5th September 1531 and a further indictment charged him with procuring her abortion on 1st February 1532. The abortion may well, given the passage of five months since the rape, have been post-quickening though the indictment simply alleges the killing of two living infants. Moreover, their abortion was charged as murder. Norfolk Record Office, Norwich, C/S3/1, m.45c (indictment file). I am grateful to Professor Sir John Baker for drawing this indictment to my attention. Personal communication from Professor Sir John Baker (May 3, 2000) (on file with the author).

⁴⁶ DELLAPENNA, *supra* note 8, at chs. 3-5.

⁴⁷ *Id.* at 228. He comments that “Any supposed ‘common law liberty of abortion’ is as mythical on this side of the Atlantic as on the other side.” *Id.* at 220 (footnote omitted). See also Joseph W. Dellapenna, *The History of Abortion: Technology, Morality and Law*, 40 U. PITT. L. R. 359, 366 (1979). In the *amicus* brief he filed in the *Casey* case he concluded that “The historical record shows that abortion and other killings of unwanted children were condemned by all respected legal authorities in England from the start of the common law, and those laws were applied with full rigor in the United States during the colonial era.” Dellapenna Brief, *supra* note 13, at 1. For one of the colonial precedents, *Commonwealth v. Mitchell*, 10 MD ARCHIVES 171-86 (1652; published 1891), see note 51, *infra*.

- The law's main if not exclusive purpose was, as its early focus on fetal formation and later focus on quickening indicated, the protection of the unborn child. Formation and quickening were thought to mark the point at which human life began, not the point at which abortion became dangerous to the woman.

After the paragraph in which the Brief misleadingly outlined the legal status of abortion at common law the next three paragraphs considered the incidence of abortion (although the relevance of the supposed incidence of conduct to its constitutionality was not made clear). Although this paper's focus is the Brief's treatment of legal history its unreliability as social history should not be overlooked. For example, the Brief asserted, citing social historian Angus McLaren,⁴⁸ that "Abortion was not uncommon in colonial America."⁴⁹ Leaving aside the fact that McLaren was writing about England not America, even a signatory to the Brief, Professor Estelle Freedman, has taken issue with this sweeping assertion: "I find it hard to argue," she later wrote, "that abortion was 'not uncommon,' given the economic and religious motives for childbearing within families."⁵⁰ The Brief nowhere acknowledged her concern.⁵¹

⁴⁸ McLAREN, *supra* note 33, at 114, 113-44.

⁴⁹ Brief, *supra* note 6, at 5.

⁵⁰ Estelle B. Freedman, *Historical Interpretation and Legal Advocacy: Rethinking the Webster Amicus Brief*, 12(3) PUBLIC HISTORIAN 27, 30 (1990).

⁵¹ Dellapenna also questions the alleged frequency of abortion, highlighting the absence of safe or effective methods. DELLAPENNA, *supra* note 8, at ch. 1.

The Brief went on to claim that cases of midwives prescribing abortifacient remedies were routine and unaccompanied by any particular disapproval, citing as an example the case of a midwife who in 1789 wrote in her diary that she had prescribed herbs for a patient who was suffering from obstructions. Brief, *supra* note 6, at 6 n.13. The Brief provided no evidence that the herbs were to procure abortion rather than for amenorrhoea.

It also asserted, without any substantiation, that there was an absence of legal condemnation of abortion in colonial America. *Id.* at 6. Freedman, however, states that sermons and court cases in colonial America revealed widespread condemnation of nonprocreative sexual practices and that efforts to destroy the fruits of intercourse were also condemned. Freedman, *supra* note 50, at 29.

The Brief further asserted that where abortion was noted it was not the practice itself that was the subject of comment but rather the violation of other social/sexual norms that gave rise to the perceived need to attempt to abort. Brief, *supra* note 6, at 7. In support of this assertion it cited the seventeenth-century prosecution of Captain William Mitchell who tried to abort his mistress's child but against whom the first charge was atheism. Brief, *supra* note 6, at 7 n.16 The original (and published) records of the case show that Mitchell was investigated in June 1651 on only one ground: suspicion of having attempted to abort his mistress. At his trial, Mitchell specifically argued that he must be tried only for matters that were criminal offenses. In June 1652 a jury upheld four charges against him the first of which was indeed atheism but the third of which was: "[t]hat he hath Murtherously endeavored to destroy or Murder the Child by him begotten in the Womb of the said Said Susan Warren." Browne (ed.), 10 MD ARCHIVES 183 (cited in Finnis, *supra* note 1, at 37 at n.24.) Mitchell was sentenced by the Supreme Court of the province not on the charge of atheism but only on the charge of attempted abortion and two other charges. See also DELLAPENNA, *supra* note 8, at 215-19. In short, the Brief's attempt to show an absence of legal condemnation or disapproval of abortion backfired.

To return to the Brief's treatment of legal history it is evident that proposition one, that abortion was not an offense at common law, is insupportable. Let us now turn to propositions two and three.

"Nineteenth-century abortion restrictions sought to promote objectives that are today plainly either inapplicable or constitutionally impermissible."

A major source relied on by the Brief to support this proposition was Professor James Mohr's *Abortion in America*.⁵² Since its publication in 1978 this has been widely regarded as the leading work on the statutory restriction of the abortion law in nineteenth-century America (though, as we shall see below, it has been subjected to serious criticism, not least by Professor Dellapenna's recent book *Dispelling the Myths of Abortion History*).⁵³ Quoting Mohr the Brief stated, accurately, that between 1850 and 1880 the American Medical Association (AMA) became the "single most important factor in altering the legal policies toward abortion in this country."⁵⁴ It then stated, inaccurately, that the anti-abortion legislation enacted in the nineteenth century did not have fetal protection as even *one* of its purposes. The four purposes alleged by the Brief were as follows:

- "From 1820 -1860, abortion regulation in the states rejected broader English restrictions and sought to protect women from particularly dangerous forms of abortion."⁵⁵
- "From the mid-nineteenth century, a central purpose of abortion regulation was to define who should be allowed to control medical practice."⁵⁶
- "Enforcement of sharply-differentiated concepts of the roles and choices of men and women underlay regulation of abortion and contraception in the nineteenth century."⁵⁷
- "Nineteenth-century contraception and abortion regulation also reflected ethnocentric fears about the relative birthrates of immigrants and Yankee Protestants."⁵⁸

This article does not seek to show that these were *not* legislative purposes (though neither does it accept that they were⁵⁹). It maintains, rather, that fetal protection *was*. The evidence in Mohr's book and in other sources, much of which is either omitted or misrepresented by the Brief, shows that protection of the unborn

⁵² JAMES C. MOHR, *ABORTION IN AMERICA* (Oxford University Press, 1978).

⁵³ *See, e.g.*, notes 121-22 and 198, *infra*.

⁵⁴ Brief, *supra* note 6, at 11 (original emphasis).

⁵⁵ *Id.* (original sub-heading in bold).

⁵⁶ *Id.* at 13 (original sub-heading in bold).

⁵⁷ *Id.* at 17 (original sub-heading in bold).

⁵⁸ *Id.* at 20 (original sub-heading in bold).

⁵⁹ The evidence for the alleged four purposes, whether that adduced by the Brief or by Mohr, is significantly weaker than the evidence supporting the purpose of fetal protection.

child was the primary if not sole purpose of the legislation or was, at the very least, a purpose of the legislation. Scrutiny of the first two of the Brief's alleged legislative purposes will illustrate this point.

Protection of women. The Brief claimed that the objective of legislation enacted between 1820 and 1860 (it is strangely silent about later legislation) was to protect the mother. It cited the first anti-abortion statute, enacted in Connecticut in 1821, which prohibited the administration of any noxious substance with intent to procure the miscarriage of any woman "quick with child."⁶⁰ It added, citing Mohr, that in the late 1820s three other states followed the Connecticut model in prohibiting the use of "dangerous poisons *after* quickening."⁶¹ It continued (citing Means) that in 1830 New York, "also animated by a concern for patient safety," prohibited surgical abortion. It asserted (citing *Roe*) that: "Because nineteenth-century abortion laws were drafted and justified to protect women, they did not punish women as parties to an abortion."⁶² The Brief also claimed that none of the abortion legislation from this period restricting "forms of abortion thought to be particularly unsafe" was enforced.⁶³

While concern to safeguard the life and health of the mother may have been a purpose of the legislation, the Brief's attempt to eclipse the legislative purpose of fetal protection fails. First, as Professor Witherspoon observed in his comprehensive article analyzing the nineteenth-century legislation, it does not follow that a statute which omitted to criminalize the woman was unconcerned with fetal protection. The legislature may have felt that the woman would have sought an abortion only out of desperation and that it would be inhumane to punish her.⁶⁴ Or the legislature may have wanted, by removing her fear of self-incrimination, to encourage her to testify against the abortionist.⁶⁵ In view of such considerations, he commented, "it is surprising that at least seventeen or more than one-third of the state legislatures did enact laws *expressly* incriminating the woman's participation in her own abortion."⁶⁶

Second, if the legislation were intended to protect women why did it prohibit abortion only *after* quickening and require proof of pregnancy as an element of the offense? Attempts would also have been dangerous before quickening and if the

⁶⁰ Brief, *supra* note 6, at 11-12.

⁶¹ *Id.* at 12 (original emphasis.)

⁶² *Id.*

⁶³ *Id.* at 13.

⁶⁴ James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17(1) ST. MARY'S L. J. 29, 58 (1985). He noted that those statutes that did penalize women stipulated lesser penalties than for the abortionist. *Id.* at 58-59.

⁶⁵ *Id.* at 59. He observed that statutes that did incriminate women often afforded protection from prosecution if they testified for the prosecution or provided that evidence they gave for the state could not be used against them. *Id.* Moreover, it does not follow that if a statute did not expressly incriminate the woman she was not liable. There remain the possibilities of implied incrimination, liability as a secondary party, and continuing liability at common law.

⁶⁶ *Id.* (original emphasis).

woman was not pregnant. The Brief itself stated: "Prior to scientific understanding of germ theory and antiseptics, any surgical intervention was likely to be fatal."⁶⁷

Third, the Brief's assertion that three states followed Connecticut in prohibiting abortion "*after quickening*" is contradicted by its source, Mohr, who points out that the relevant statutes (enacted in Missouri in 1825, Illinois in 1827 and New York in 1828) made no mention of quickening.⁶⁸

Fourth, the assertion, citing Means,⁶⁹ that the New York statute was, like the others, motivated solely by a concern for female safety, is mistaken. Its unsoundness was exposed as early as 1970 by Professor Grisez in his magisterial work on abortion.⁷⁰ Means, drawing on the notes of the commission which revised the New York criminal code in 1828, pointed to an unenacted section which would have criminalized the performance of any surgical operation which destroyed or endangered human life unless the operation appeared necessary to preserve life. He maintained that this unenacted section confirmed the legislature's concern for patient safety and supported the view that the anti-abortion sections were intended to protect women.⁷¹ As Grisez pointed out, however, the revisers devoted distinct clauses to abortion and to unnecessary surgery, provided different penalties for each, and justified each with different notes. Moreover, the legislature enacted the proposed abortion clause but not the "unnecessary surgery" clause.⁷² Means's suggestion that the legislature thought the surgery clause otiose because in relation to operations other than abortion a combination of patient's caution and professional conscience sufficed to prevent unnecessary surgery is undermined by the very revisers' notes on which he relied.⁷³ The revisers expressed concern about loss of life from operations *other* than abortion, stating that due to the "rashness of many young practitioners in performing the most important surgical operations for the mere purpose of distinguishing themselves" the loss of life was "alarming."⁷⁴

Further, Professor Byrn pointed out that there can be little doubt that section 9 of the statute, which punished attempts to procure abortion after quickening as *manslaughter* if either the fetus or mother died, was intended to protect the life of the fetus.⁷⁵ He also noted that the statute's therapeutic exception was limited to abortions "necessary to preserve the life" of the mother: the life of the child was not

⁶⁷ Brief, *supra* note 6, at 12. Mohr concedes that the quickening distinction in the Connecticut statute of 1821 weakened the measure as a poison control statute. MOHR, *supra* note 52, at 22.

⁶⁸ MOHR, *supra* note 52, at 25-27.

⁶⁹ Brief, *supra* note 6, at 12 n.39.

⁷⁰ GERMAIN G. GRISEZ, ABORTION: THE MYTHS, THE REALITIES AND THE ARGUMENTS (1970) 382-97 (hereafter GRISEZ). See also Byrn, *supra* note 13, at 827-35; RAFFERTY, *supra* note 13, at 47-79.

⁷¹ Means II, *supra* note 19, 388-89.

⁷² GRISEZ, *supra* note 70, at 383.

⁷³ Means II, *supra* note 19, at 389.

⁷⁴ GRISEZ, *supra* note 70, at 383.

⁷⁵ Byrn, *supra* note 13, at 831.

to be sacrificed for a value less than that of the mother.⁷⁶ Moreover, the exception was much narrower than the therapeutic exception to the unenacted section which would have prohibited surgical operations: that exception would have permitted operations performed to save life or simply on the advice of two doctors.⁷⁷ Means also failed to consider why, if concern for female safety was *the* or indeed *a* purpose of the anti-abortion provisions they punished attempted abortion only when the woman was in fact pregnant: interference would also have been dangerous if she were not pregnant.⁷⁸

Fifth, the Brief's assertions that the early anti-abortion legislation sought to restrict "forms of abortion thought to be particularly unsafe" and that it was not enforced were not substantiated.⁷⁹

In short, the legislative evidence offers scant support for the Brief's claim that the legislation sought to protect the mother but not the fetus. The quickening distinction in particular makes little sense if the law's purpose was only to protect women; it makes much sense if the purpose of the law was to protect unborn life from the time it was believed to begin.

Medical professionalization. The Brief claimed that a core purpose of the anti-abortion legislation "from the mid-nineteenth century" and of physicians in supporting it was to control medical practice in the interests of public safety.⁸⁰ It added

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Means's reasoning has also been criticized by Mohr as being less than convincing on several points. MOHR, *supra* note 52, at 29. In particular, Mohr concludes that it is difficult to imagine that the death rate from abortion in 1828 substantially exceeded that from childbirth especially since contemporary writers did not stress the great dangers of an abortion induced by mechanical means: they were, he claims, much more likely to bemoan the ease and impunity with which irregular practitioners and others were able to induce abortion. *Id.* at 30-31. Mohr's argument that abortion was not perceived as particularly dangerous would, if accurate, further undermine Means's argument. Dellapenna argues that Mohr understates the dangers of abortion but, like Grisez, Dellapenna convincingly rejects Means's thesis that fetal protection was not a purpose of the legislation: DELLAPENNA, *supra* note 8, at ch. 6.

⁷⁹ For example, the New York statute of 1828 punished the administration of any medicine, drug, substance or thing whatever and the use of any instrument or other means whatever. MOHR, *supra* note 52, at 27. The Brief cited no authority that such statutes permitted either the use of non-poisonous substances, or any safely and skillfully performed non-therapeutic abortions.

To support its allegation about absence of enforcement the Brief cited Mohr but he confines his comment that anti-abortion statutes were unenforced and unenforceable to abortion before quickening. *Id.* at 43. Moreover, Mohr's conclusion seems based solely on the difficulty of proving intent. But many crimes require proof of intent and are nevertheless regularly enforced. Mohr produces neither evidence that it was impossible, as opposed to difficult, to prove intent even before quickening nor statistics to show that there were no prosecutions. Indeed he mentions several prosecutions and convictions for abortion. For example, he states that there were 32 prosecutions for abortion in Massachusetts alone between 1849 and 1857. *Id.* at 122. This is hardly evidence of a lack of enforcement, though the failure to secure a conviction in these cases does illustrate the real obstacles facing prosecutors. That, in spite of such difficulties, legislators enacted anti-abortion legislation, and prosecutors sought to enforce it, suggests that abortion was viewed seriously.

⁸⁰ Brief, *supra* note 6, at 13.

that “the most significant explanation for the drive by medical doctors for statutes regulating abortion is the fact that these doctors were undergoing the historical process of professionalization.”⁸¹ Their campaign to tighten the abortion law “was intimately connected with professional struggles between proponents of ‘scientific medicine’ and those who practised less conventional modes of healing.”⁸² The Brief cited Mohr to the effect that educated or “regular” practitioners were worried that their patients were being poached by uneducated or “irregular” practitioners who were willing to perform abortions, a service which the regulars were precluded from performing by their Hippocratic ethics.⁸³

Whether or not the emerging medical profession's campaign for stricter abortion laws was partly intended to suppress their unqualified competitors there is a wealth of evidence that their campaign was intended to suppress abortion. That the Brief omitted this evidence is remarkable since it forms a central part of Mohr's book. Mohr's detailed account of the profession's sustained and vigorous campaign for tighter laws indicates that the protection of unborn life was not only a purpose of the campaign but was its defining purpose. Mohr relates that the regulars' opposition to abortion was “partly ideological, partly scientific, partly moral, and partly practical.”⁸⁴

Ideologically, he notes that one of the features that distinguished the regulars from irregulars was the regulars' adherence to the Hippocratic Oath. He states:

Hippocrates's creed had become one of the touchstones of regular medicine in the United States by the early nineteenth century, and the oath was considered the basic platform upon which the regulars were attempting to upgrade the ethical standards of their profession in a host of different areas, not just in regard to abortion.⁸⁵

Scientifically, he adds,

regulars had realized for some time that conception inaugurated a more or less continuous process of development, which would produce a new human being if uninterrupted. Consequently, they attacked the quickening doctrine on the logical grounds (sic) that quickening was a step neither more nor less crucial in the process of gestation than any other.⁸⁶

From this scientific reasoning flowed their “moral opposition to abortion at any stage in gestation.”⁸⁷ There was, he continues, more to the regulars' opposition to abortion than scientific logic, for there was also a firm moral opposition to the taking of life: “The nation's regular doctors, probably more than any other identifiable group in American society during the nineteenth century, including the clergy, defended the

⁸¹ *Id.* at 13.

⁸² *Id.* at 15.

⁸³ *Id.* at 16.

⁸⁴ MOHR, *supra* note 52, at 34-35.

⁸⁵ *Id.* at 35.

⁸⁶ *Id.*

⁸⁷ *Id.* at 35-36.

value of human life per se as an absolute.”⁸⁸ He adds: “regular physicians felt very strongly indeed on the issue of protecting human life. And once they had decided that human life was present to some extent in a newly fertilized ovum, however limited that extent might be, they became the fierce opponents of any attack upon it.”⁸⁹

Having identified the above three reasons for the regulars’ opposition, all of which are aspects of their fundamental *moral* objection to abortion, Mohr adds that the regulars also supported anti-abortion legislation because it would inhibit their irregular competitors who were not inhibited by moral considerations from procuring abortion and would relieve pressure by patients on regulars to provide abortions.⁹⁰ One of the Brief’s own chief sources therefore shows that protection of fetal life was *the* ostensible purpose driving the regulars’ campaign. And even if the regulars *were* partly motivated by professional self-interest this is in no way inconsistent with their commitment, which Mohr recognizes as genuine,⁹¹ to protect fetal life. The Brief grudgingly observed: “To be sure, some ‘regulars’ were morally troubled by abortion,”⁹² but this is obviously a violent understatement. That the protection of fetal life was, to put it at its lowest, a purpose of the anti-abortion legislation becomes even clearer when the Brief’s third proposition is examined in the light of the effectiveness of the regulars’ campaign in producing the anti-abortion legislation of the nineteenth century.

“The moral value attached to the fetus became a central issue in American culture and law only in the late twentieth century, when traditional justifications for restricting access to abortion became culturally anachronistic or constitutionally impermissible.”

This claim sits uneasily with abundant evidence of concern for the unborn in the doctors’ campaign for tighter laws against abortion, in judicial interpretation of the resulting legislation, and in the wording of that legislation. We shall consider each in turn.

Concern for the unborn inspiring the enactment of the legislation. The Brief asserted that the regulars’ concern for the fetus was always subsidiary to “more mundane social visions and anxieties.”⁹³ It continued that their “mid-nineteenth century” campaign sought to prohibit irregular practice and that “[p]rotection of fetal life is plainly not the driving concern of such a movement.”⁹⁴ Whether the Brief was tacitly acknowledging that protection of unborn life *was* a concern of their campaign is, like so much else in the Brief, obscure. But even if it was, it still understated the regulars’ aim to protect the unborn, which flowed from their moral opposition to abortion. The regulars’ campaign was a campaign to restrict abortion, which might

⁸⁸ *Id.* at 36.

⁸⁹ *Id.*

⁹⁰ *Id.* at 37.

⁹¹ *Id.* at 166.

⁹² Brief, *supra* note 6, at 16.

⁹³ *Id.* at 25.

⁹⁴ *Id.*

also serve to restrict irregular practice, not *vice-versa*. And, as Mohr describes it, it was a “crusade”⁹⁵ which met with striking success. Mohr observes that this crusade pushed state legislatures beyond cautious expressions of concern about abortion to “straightforward opposition to the practice”⁹⁶ and that the regulars’ “successful campaign of the 1860s and 1870s . . . produced measures that reflected the regulars’ position on the abortion issue throughout most of the United States.”⁹⁷ He writes:

Between 1860 and 1880 the regular physicians’ campaign against abortion in the United States produced the most important burst of anti-abortion legislation in the nation’s history. At least 40 anti-abortion statutes of various kinds were placed upon state and territorial lawbooks during that period; over 30 in the years from 1866 through 1877 alone. Some 13 jurisdictions formally outlawed abortion for the first time, and at least 21 states revised their already existing statutes on the subject. More significantly, most of the legislation passed between 1860 and 1880 explicitly accepted the regulars’ assertions that the interruption of gestation at any point in a pregnancy should be a crime and that the state itself should try actively to restrict the practice of abortion. The anti-abortion policies sustained in the United States through the first two-thirds of the twentieth century had their formal legislative origins, for the most part, in the wave of tough laws passed in the wake of the doctors’ crusade and the public response their campaign evoked. Though these laws were occasionally rephrased in subsequent code revisions, the fundamental legal doctrines they embodied were destined to remain little changed for a hundred years.⁹⁸

Mohr’s story of the campaign makes illuminating reading. At its meeting in 1859 the AMA received the recommendations of the Committee on abortion it had set up two years earlier to draft a position paper on abortion. The report recommended: first, that the Association should publicly protest against the “unwarrantable destruction of human life” caused by the quickening distinction; second, that it should urge states to revise their abortion laws; and, third, that state medical societies press this matter on their state legislatures.⁹⁹ These recommendations were unanimously adopted by the Association. Mohr comments that for the rest of the century the AMA would remain steadfastly committed to outlawing the practice of abortion and that the vigorous efforts of the regulars “would prove in the long run to be the single most important factor in altering the legal policies toward abortion” in the United States. He adds that, with remarkable persistence, regular state and local medical societies sustained the crusade.¹⁰⁰

An example Mohr gives of the effectiveness of the regulars’ crusade to increase the law’s protection of the unborn child is the tightening of the abortion law in New

⁹⁵ MOHR, *supra* note 52, at 147.

⁹⁶ *Id.* at 147-48.

⁹⁷ *Id.* at 230 (emphasis added).

⁹⁸ *Id.* at 200-01.

⁹⁹ *Id.* at 154-57.

¹⁰⁰ *Id.* at 157.

York in 1869 when ‘the legislature responded positively’ to the medical society’s following request made two years before:

Whereas, from the first moment of conception, there is a living creature in process of development to full maturity; and whereas, any sufficient interruption to this living process always results in the destruction of life; and whereas, the intentional arrest of this living process, eventuating in the destruction of life (being an act with intention to kill), is consequently murder; therefore, . . . *Resolved*, That this society will hail with gratitude and pleasure, the adoption of any measures or influences that will, in part or entirely, arrest this flagrant corruption of morality among women, who ought to be and unquestionably are the conservators of morals and of virtue.¹⁰¹

The legislators, comments Mohr, gave the regulars “almost exactly what they wanted” and, in a sweeping anti-abortion statute, replaced the wording “woman with a quick child” by “woman with child” and proscribed as second-degree manslaughter the destruction of a fetus at any stage of gestation.¹⁰² The medical society, he adds, had been “almost totally successful in persuading the legislature to redraft New York’s abortion laws along the lines the physicians had initially indicated in 1867.”¹⁰³ He concludes:

As the combined pressures from regular medical societies and from the shifts in public opinion that regular physicians worked to bring about began to increase, legislators dropped traditional quickening rules, revoked common law immunities for women, and enlisted the peripheral powers of the state, such as control over advertising and the definition of what was obscene, in the great battle against abortion in America.¹⁰⁴

He adds that some of the laws were unchanged until the 1960s and that others were altered only in phraseology not in basic philosophy.¹⁰⁵ Further: “The fundamental premises embodied in most of the abortion-related legislation passed by state legislatures between 1860 and 1880 continued to inform most of the anti-abortion laws” enacted from 1880-1900.¹⁰⁶ The final twenty years of the last century witnessed a confirmation in state courts of the attitudes informing the anti-abortion legislation passed in the wake of the regulars’ crusade of the 1860s and 1870s.¹⁰⁷ Finally, “[m]ost of the anti-abortion activity and all of the anti-abortion legislation passed during the first two-thirds of the twentieth century reconfirmed and reiterated the policies that regular physicians had persuaded most American state legislators to embrace by 1880.”¹⁰⁸

¹⁰¹ *Id.* at 216 (original emphasis).

¹⁰² *Id.* at 217.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 224-25.

¹⁰⁵ *Id.* at 225.

¹⁰⁶ *Id.* at 227.

¹⁰⁷ *Id.* at 237.

¹⁰⁸ *Id.*

What part did opposition to irregular practice play in the enactment of this tide of legislation? Any opposition to irregular practice was evident in the context of the regulars' "great battle against abortion" not *vice-versa*. Although Mohr states that the regulars appear to have persisted in their campaign for a number of "professional" reasons such as restricting irregular practice¹⁰⁹ and a desire to "recapture what they considered to be their ancient and rightful place among society's policymakers and servants,"¹¹⁰ he accepts that they also had compelling "personal" reasons for carrying forward their campaign.¹¹¹ The first was what he describes as a "no doubt sincere" belief that abortion was immoral. That this coincided nicely with their professional self-interest is, he recognizes, no reason to accuse physicians of hypocrisy on the issue.¹¹² He continues that "[m]ost physicians considered abortion a crime because of the inherent difficulties of determining any point at which a steadily developing embryo became somehow more alive than it had been the moment before. Furthermore, they objected strongly to snuffing out life in the making."¹¹³ It was, he adds, apparent to regulars that "*the only way to deal with this question of basic morality was to see that their position was embodied in explicit statutes of their own design.*"¹¹⁴

Mohr shows convincingly how the AMA's crusade did precisely that.¹¹⁵ By contrast, his evidence that the legislators who enacted the anti-abortion laws were motivated, either wholly or partly, by a desire to suppress irregular practitioners is distinctly lacking. It is one thing to claim that regulars may have been partly motivated by professional self-interest, quite another to show that legislators who enacted anti-abortion legislation shared this motivation. Indeed, legislatures were far quicker to proscribe abortion than irregular practice. Whereas the regulars' efforts to restrict the abortion laws were rewarded with stunning success from the first half of the nineteenth century, Mohr points out that their campaign to control medical practice and overcome *laissez-faire* attitudes to medical practice did not succeed until they gained control of medical education in the 1880s.¹¹⁶ In short, the claim that the anti-abortion legislation was enacted to protect the profession rather than the unborn seems to rest on unsupported speculation.

Moreover, some evidence that the regulars were not seeking to restrict abortion merely as a way of restricting irregular practice is the fact that in New York in 1828 the regulars successfully influenced the tightening of the abortion law even though they had already succeeded in having enacted the previous year what Mohr describes

¹⁰⁹ *Id.* at 160.

¹¹⁰ *Id.* at 163.

¹¹¹ *Id.* at 164.

¹¹² *Id.* at 165.

¹¹³ *Id.*

¹¹⁴ *Id.* at 166 (emphasis added).

¹¹⁵ *Id.* at ch. 6.

¹¹⁶ He describes a proposal by South Carolina regulars in 1883 to restrict the abortion law and also to strengthen the board of health which they hoped to dominate. The former passed, the latter did not. *Id.* at 228-29.

as “the toughest medical regulation law the state had ever had” which “granted great power to the regular physicians, who were organized as the state medical society, by declaring the unauthorized practice of medicine a misdemeanor.”¹¹⁷ The fact that anti-abortion legislation would impact more on those irregular practitioners who practiced abortion rather than those regulars who did not does not show that professional self-interest was *the* (or even *a*) driving force of the regulars’ crusade against abortion as opposed to a presumably welcome consequence. And, as Professor Finnis has asked, if professional self-interest had been the regulars’ main concern:

[W]hy were the doctors not willing to compete with the irregulars by simply supplying safer abortions under more congenial conditions and procedures? Without the support of the doctors’ respect for fetal life—a respect established on each and all of the first three grounds [identified above by Mohr on which regulars’ opposed abortion]—their desire for the professionalization of medicine could just as appropriately have led them to petition the legislators for a *legalization* of abortion by licensed physicians (or, in the Brief’s utterly imaginary world, for a medicalization of the ‘common law liberty’ of abortion).¹¹⁸

Professor Dellapenna observes in his recent book that if the regulars’ campaign against abortion was really a “conspiracy” to suppress abortion it was remarkably successful: “No one has ever turned up a smidgen of direct evidence (in a diary, a letter, or any other record) of such a plan or program”¹¹⁹ Even assuming such a conspiracy, he adds, does not explain how regulars succeeded in tightening the abortion laws in the face of Jacksonian democracy’s intense passion to democratize the professions by eliminating barriers to entry.¹²⁰ The nascent medical societies of the early to mid-nineteenth century, Dellapenna adds, did not have the influence of organized medicine today and the regulars “could achieve little legislatively unless their arguments were widely accepted as true.”¹²¹ He notes that while Mohr cites as evidence of the regulars’ conspiracy the fact of irregular opposition to statutes restricting medical practice, Mohr omits to point out that the irregulars did not attempt to repeal or modify the anti-abortion statutes.¹²² Dellapenna concludes that the evidence that the protection of the unborn was the primary purpose of the abortion legislation is “overwhelming.”¹²³

¹¹⁷ *Id.* at 38.

¹¹⁸ Finnis, *supra* note 1, at 17 (original emphasis).

¹¹⁹ DELLAPENNA, *supra* note 8, at 295.

¹²⁰ *Id.* at 296.

¹²¹ *Id.* See also *id.* at 244-45, 344-58. He comments that Mohr’s “surmise of a power grab by physicians” is not only unnecessary to explain the features of the laws which Mohr asserts support his surmise but also fails to account for the enactment of the anti-abortion statutes: “At the root of Mohr’s argument is the utter absence of the larger legal and medical historical context within which those statutes were enacted. The inclusion of the abortion provisions in the nineteenth-century codifications suggests not a desire to evade controversy, but rather a lack of controversy when the common law of abortion was clarified and carried forward as part of the general law of crimes” *Id.* at 302.

¹²² *Id.* at 303. He also notes that Mohr ignores the efforts of the regulars to weed out their own members who were performing abortions, efforts which furnish further evidence that the regulars’ concern was over abortion itself rather than over who was performing abortion. *Id.* at 355.

¹²³ *Id.* at 313.

Finally, Ramesh Ponnuru has noted that three books dealing with the professionalization of American medicine, authored by signatories to the Brief, barely mention the physician's campaign against abortion let alone ascribe key significance to it. He notes that the Brief "cites all three books in its section on professionalization without mentioning these points."¹²⁴

Concern for the unborn in judicial interpretation of the legislation. Having characterized the regulars' crusade as a campaign against irregular practice, the Brief proceeded to claim that "[n]ineteenth-century laws restricting access to abortion were not based on a belief that the fetus is a human being."¹²⁵ In support of this assertion it cited the solitary case of *Cooper v. State*, decided in 1849, and the observation by Michael Grossberg, a professor of history and law (and signatory to the Brief), that at common law a fetus "enjoyed rights only in property law and then only if successfully born. It had no standing in criminal law until quickening, and none at all in tort. The law highly prized children, not fetuses."¹²⁶ These sources do not, however, support the proposition that the unborn child was not regarded in nineteenth-century U.S. law as a human being. *Cooper* is not an authority on the "nineteenth-century laws"¹²⁷ and the passage lifted from Grossberg's book¹²⁸ (whose

¹²⁴ Ramesh Ponnuru, *Aborting History*, NAT'L REV., Oct. 23, 1995, at 29, 31, http://www.findarticles.com/p/articles/mi_m1282/is_n20_v47/ai_17443648.

¹²⁵ Brief, *supra* note 6, at 26.

¹²⁶ *Id.*

¹²⁷ In *Cooper*, 22 NJL (2 Zab) 52 (1849) the Supreme Court of New Jersey merely held that while post-quickening abortion, by the mother or by another, was illegal at common law, pre-quickening abortion was not. The court declined to extend the prohibition adding that if the good of society required that the "evil" of pre-quickening abortion be suppressed by law it was far better that it should be done by the legislature. *Id.* at 58. Far from supporting the Brief's proposition that the nineteenth-century laws did not regard the fetus as a human being *Cooper* goes the other way. While, in a passage quoted by the Brief, the court did say that the law did not "have respect to its preservation as a living being" the court was here referring simply to the fetus before quickening. As the headnote to the case accurately stated, the common law did not recognize the child as a living being until it quickened or stirred in the womb. In other words the court was clearly of the view that the criminal law *did* recognize the child as a living being from quickening onward.

Further, the common law authorities discussed by the court focussed not on the woman's safety but on the point at which the life of the child began or could be proved to have begun. Having cited Blackstone that life begins in law as soon an infant is able to stir in the mother's womb, the court observed: "In contemplation of law life commences at the moment of quickening, at that moment when the embryo gives the first physical proof of life, no matter when it first received it." *Id.* at 54 (original emphasis). The case is nothing more (and nothing less) than authority for the criminality of post-quickening abortion at common law. Far from advancing the Brief's claims about nineteenth century legislation the case serves only to undermine its assertions about the common law.

Cooper also serves to highlight the purpose of fetal protection in the New Jersey legislation that it inspired. A note appended to the report (*id.* at 58) reveals that the case induced the legislature to amend the criminal code so as to make pre-quickening abortion a crime. Clearly, the gap in the common law which the case exposed and which the legislature promptly closed was the common law's failure to protect the unborn child before quickening.

¹²⁸ MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (1985).

treatment of the history of the abortion law is hardly a model of accuracy¹²⁹) is not one that summarizes the nineteenth-century cases.¹³⁰

¹²⁹ His discussion of the common law and the early abortion legislation is, as the following five examples illustrate, flawed. *Id.* at 159-62. First, he states that Missouri (in 1825) and Illinois (in 1827) passed similar laws to Connecticut's 1821 legislation prohibiting post-quickening abortion. *Id.* at 161. However, as he states later on the same page, the former two Acts made no mention of quickening. See also MOHR, *supra* note 52, at 26. Second, he claims that this early legislation "used the common law of abortion more to protect women from the ill effects of abortifacients than to restrict access to abortion." GROSSBERG, *supra* note 128, at 161-62. Yet he has already stated that the common law used the quickening distinction to locate the point at which the fetus became a human being, not the point at which abortion became dangerous to women, and that the Connecticut legislation punished post-quickening abortion as murder. *Id.* at 160-61. Third, he asserts that Lord Lansdowne's Act 1828 (the successor to Lord Ellenborough's Act 1803) punished instrumental abortion for the first time. *Id.* at 162. It did not: instrumental abortion before quickening was prohibited by Lord Ellenborough's Act. Fourth, he asserts that under the English anti-abortion provision enacted in 1837 abortion at any time during pregnancy became illegal. Not so: abortion at any time during pregnancy had been unlawful since Lord Ellenborough's Act. Fifth, he claims that the most significant American contribution to abortion law, the New York legislation of 1828, widened rather than reduced access to abortion. *Id.* This striking claim turns out to mean merely that this anti-abortion legislation explicitly condoned therapeutic abortion to save the mother's life. Grossberg, who recognizes that such an exception may have been implicit in Lord Ellenborough's Act, misleadingly describes the 1828 legislation as an example of the priority that early abortion statutes gave to protecting the mother's health. *Id.* In fact, the New York legislation, far from widening access to abortion, did the opposite by punishing abortion before quickening.

¹³⁰ The passage, GROSSBERG, *supra* note 128, at 165, refers merely to the status of the unborn child at common law and to the reluctance of the court in *Cooper* to criminalize pre-quickening abortion. Moreover, the passage acknowledges that the fetus enjoyed standing in criminal law *after* quickening. Further, Grossberg's outline of the development of the common law recognizes that the quickening distinction was a product of the law's attempt to locate the point at which the embryo became a human being, not at which abortion became dangerous to the mother. *Id.* at 160. He adds that "[b]efore animation, according to theological and customary practice, the fetus was not a person and its destruction was not murder." *Id.* And the legal standing that Grossberg concedes to the fetus after quickening was, of course, extended throughout pregnancy by the nineteenth-century legislation that made pre-quickening abortion illegal. The passage from Grossberg cited by the Brief does not comment on any of the cases, referred to below, see notes 135-136, *infra*, holding that the protection of the fetus was at least a purpose of that legislation. The drafters of the Brief did not have far to look for evidence of such cases. The very page facing Grossberg's quotation about fetal standing discusses a case indicating the legislative purpose of fetal protection, namely, the Vermont case of *State v. Howard*, 32 Vt 380 (1859). In that case, the Chief Justice stated that that it was not easy to determine precisely which was the more important in the statute, to prevent injury to the child or to the mother. GROSSBERG, *supra* note 128, at 164.

There are other passages from Grossberg's book, also not quoted by the Brief, which would sit no less uneasily with the Brief's assertion of lack of legal concern for the unborn. Such passages would include Grossberg's recognition that the law, while granting the fetus full legal status only upon live birth, nevertheless accorded the unborn a "special legal niche." *Id.* at 186. Or his quoting of the observation of historian Carl Degler (another signatory to the Brief) that when seen against the broad canvas of humanitarian thought and practice in Western society from the 17th to the 20th century, including the reduced use of the death penalty, the peace movement, and the abolition of torture and whipping as criminal penalties "the expansion of the definition of life to include the whole career of the fetus rather than the months after quickening is quite consistent." *Id.* at 186 (quoting CARL DEGLER,

The Brief omitted relevant case law indicating the legislative purpose of fetal protection even though the authorities were discussed in readily accessible literature on the subject.¹³¹ In ignoring these precedents the Brief followed in the footsteps of Justice Blackmun in *Roe* who, relying on Means and the single case of *State v. Murphy*, concluded that “[t]he few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State’s interest in protecting the woman’s health rather than in preserving the embryo and fetus.”¹³² In arriving at this erroneous conclusion the Supreme Court overlooked Professor Grisez’s book which showed that the protection of fetal life was at least a purpose of the legislation and that this had been consistently acknowledged by the courts.¹³³ His work was also ignored by the Brief. So too was the article by Professor Byrn, published soon after *Roe*, detailing the Court’s historical errors including its mistake about judicial construction of legislative purpose.¹³⁴ More recently Philip Rafferty, reviewing the case law from the mid-nineteenth century onward, has observed that the Supreme Court in *Roe*: “failed to point out that no less than forty-four appellate court decisions, representing some thirty-two states, including Texas, stated in one form or another that protection of conceived, unborn human life was one purpose of the state’s statutory criminal abortion scheme.”¹³⁵

Finally, even *State v. Murphy* does not support the proposition that the statute before the court in that case sought to protect only maternal life.¹³⁶

AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 247 (1980)). Or the passage in which Grossberg states that the law’s more severe treatment of abortion than contraception since the 1830s paralleled social opinion and practice and that even advocates of women’s rights and birth control condoned contraception but not abortion. GROSSBERG, *supra* note 128, at 194. Or the passage in which he states that in the first half of the twentieth century, the focus of dispute over family planning was contraception, not abortion: “A fertilized egg had the right (sic) to join a family, unfertilized eggs had not.” *Id.* at 195.

¹³¹ See Byrn, *supra* note 13, at 828-29; Destro, *supra* note 43, at 1274-77.

¹³² *Roe v. Wade*, 410 U.S. 151; 35 L. Ed. 2d 176 (1973).

¹³³ GRISEZ, *supra* note 70, at chs. 5 & 7.

¹³⁴ Byrn, *supra* note 13, at 827-29. See also, Finnis, *supra* note 1, at 11: “The Court’s historical proposition in *Roe* is completely wrong: during the century beginning in 1850, there are decisions in ten states highlighting the statutory purpose of protecting the unborn child, and only two or three decisions that either focus only on maternal health or in any way advance the claim made by Means, and insinuated by the Court, that the state laws ‘were designed solely to protect the woman.’”

¹³⁵ RAFFERTY, *supra* note 13, at 76. The cases are cited in his accompanying footnote 137. See e.g., *State v. Gedicke*, 43 N.J.L. 86, 90 (1881); *State v. Siciliano*, 21 N.J. 249, 258 (1956). See also Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13(1) ST. LOUIS U. L. REV. 15, App. A (1993).

¹³⁶ In that case the New Jersey Supreme Court affirmed the appellant’s conviction under an Act of 1849 which provided that if any person or persons maliciously or without lawful justification, with intent to cause and procure the miscarriage of a woman then pregnant with child, shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine, or noxious thing, they would be liable to punishment. *State v. Murphy* 27 N.J.L. 112, 113 (1858). The court rejected the appellant’s submission that the prosecution must prove that the substance was in fact taken by the woman. To ascertain the mischief of the statute the court considered the common

A particularly glaring omission from the Brief was any reference to Professor Witherspoon's extensive analysis of the nineteenth-century legislation confirming the legislation's purpose of fetal protection.¹³⁷

law. It observed that at common law it was an offense for a third party or the mother herself to procure abortion if she were quick with child. The court added: "It was an offence only against the life of the child. The law was so held by this court in the case of *The State v. Cooper*." *Id.* at 114. The court went on that the mischief designed to be remedied by the statute was the defect of the common law identified in *Cooper*, namely, that the procuring of an abortion with the mother's consent was not an offense against her but only against the fetus. The court stated: "The design of the statute was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts." *Id.*

The court claimed that the statute sought not to prevent abortion so much as to protect the mother. But prevention of abortion was nevertheless *one* of its aims. As Grisez pointed out in his analysis of *Murphy*, "Not so much as does not mean the same as not at all. Rather, not so much as means both this and that, but more the one than the other." GRIZEZ, *supra* note 70, at 384. This is confirmed by the Chief Justice's discussion of the liability of third parties under the statute. He said that the offense of third parties was 'mainly' against her life and health: mainly not solely. *Murphy*, 27 N.J.L. at 114. So, even if the court's reasons for the statute's predominant purpose were sound the court nevertheless indicated that another purpose was the protection of the fetus. That the court did so was later recognized by the same court in *State v. Siciliano* when it stated that the object of the 1849 legislation was, according to *State v. Murphy*, not only the protection of the unborn child but also the protection of the life and health of the mother. *State v. Siciliano*, 21 N.J. 249, 258 (1956). Similarly, in a concurring opinion of the same court in *Gleitman v. Cosgrove*, Justice Francis rejected the proposition that the legislation sought only to protect the mother: "It seems to me there were two objectives, of at least equal importance. One was to provide greater protection for the child *in utero* than was given under the common law. To accomplish this, the safeguard against abortion was moved backward from the time when the child became quick, to the instant of conception." *Gleitman v. Cosgrove*, 49 N.J. 22, 41; 227 A.2d 689, 699 (1967). He also stated that the purpose of fetal protection from conception was obvious, adding: "The immediate response of the Legislature in 1849 to the circumstances of *Cooper* make plain its design that the law should accept the child as in being from the moment of conception." 227 A.2d at 696. In 1872, the New Jersey legislature made the death of the mother or child an aggravating factor. GRIZEZ, *supra* note 70, at 385. And in 1881 the New Jersey Supreme Court held that the 1872 legislation extended the law to protect the life of the child also and inflict the same punishment in the event of its death as if the mother should die. *State v. Gedicke*, 43 N.J.L. 86, 90 (1881). Earlier in its judgment, commenting on the words poison, drug, medicine or noxious thing introduced into New Jersey law by the 1849 Act, the court observed: "It is dangerous to the life and health of the mother and to the existence of the child to experiment with any drug, medicine, or noxious thing to produce a miscarriage." *Id.* at 89.

Finally, the reasons of the court in *State v. Murphy* for concluding that the purpose of the legislation was more to safeguard the mother than the unborn child are, in any event, questionable. Those reasons were that liability under the statute did not depend on the success or failure of the attempt; that it was immaterial whether the fetus was destroyed or had quickened; that the only gradation turned on whether the woman died, and that the statute did not incriminate the woman. *Murphy*, 27 N.J.L. at 114-15. But these reasons are consistent with an equal or even predominant legislative intention to protect the unborn. A legislature could to this end sensibly relieve the prosecution of the difficult burden of proving that an abortion had been successfully procured or that the fetus had been destroyed or had quickened, make the death of the mother an aggravating factor, and omit to incriminate her. And the court declared: "Her guilt or innocence remains as at common law. Her offence at the common law is against the life of the child." *Id.* at 114.

¹³⁷ Witherspoon, *supra* note 64.

Concern for the unborn in the wording and substance of the legislation. It will suffice here to summarize aspects of Professor Witherspoon's analysis which indicated the legislative purpose of fetal protection. Witherspoon concluded that the analysis of the objectives of the nineteenth-century legislation by the Supreme Court in *Roe* was "fundamentally erroneous."¹³⁸ He pointed out that Justice Blackmun was wrong to assert that "the law in all but a few States until mid-19th century was the pre-existing English common law"; that it was "not until after the War Between the States that legislation began generally to replace the common law"; and that "[m]ost of these initial statutes" treated abortion before quickening leniently.¹³⁹ By the end of 1849, Witherspoon observed, no fewer than 18 of the 30 states had enacted anti-abortion statutes; by the end of 1864, 27 of the 36; by the end of 1868, 30 out of 37.¹⁴⁰ Moreover, of those thirty, twenty-seven punished abortion before and after quickening.¹⁴¹ In twenty the punishment was the same irrespective of quickening. Witherspoon criticized the Court's suggestion¹⁴² that where a statute did provide an increased punishment after quickening this was because of greater health risks to the woman. He argued there was no evidence that post-quickening abortion was more dangerous,¹⁴³ quoted a leader of the regulars' campaign who stated that post-quickening abortion was in fact less dangerous¹⁴⁴ and noted that most of those states which did punish post-quickening abortion more severely only did so if there were proof that the attempt had killed the unborn child, a factor clearly relating to fetal rather than maternal wellbeing.¹⁴⁵

Witherspoon identified several other statutory indicators of a legislative intention to protect unborn life:

- Most of the statutes enacted by 1870 increased the penalty for abortion if it were proved to have caused the unborn child's death and a majority did so irrespective of the age of gestation.¹⁴⁶
- Many statutes punished attempts only if the woman were proved to be pregnant¹⁴⁷ though several states proceeded, in line with the recommendation by the leader of the regulars' campaign, to repeal the need to prove pregnancy in order to facilitate enforcement and "provide more complete protection to the life of the unborn child and the health of the pregnant woman."¹⁴⁸

¹³⁸ *Id.* at 70.

¹³⁹ See text at note 21, *supra*.

¹⁴⁰ Witherspoon, *supra* note 64, at 33.

¹⁴¹ *Id.* at 35.

¹⁴² See text at note 30, *supra*.

¹⁴³ Witherspoon, *supra* note 64, at 35 n.20.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 35.

¹⁴⁶ *Id.* at 36.

¹⁴⁷ *Id.* at 56.

¹⁴⁸ *Id.* at 56-57.

- Every statute required proof of an intent to procure abortion or to “destroy the child.”¹⁴⁹
- At least seventeen, or more than one-third of the state legislatures, enacted laws expressly incriminating the woman’s participation in her own abortion.¹⁵⁰
- Of the fourteen states that by the end of 1868 punished abortion causing the death of the fetus more severely, nine provided the same punishment as if the attempt killed the mother; by the end of 1883, the figures were twenty and fourteen respectively.¹⁵¹
- Seventeen states and the District of Columbia had at some time legislation classifying causing the death of an unborn child as “manslaughter,” “murder,” or “assault with intent to murder.”¹⁵²
- By the end of 1868 legislation in twenty-three states and six territories referred to the fetus as a “child.”¹⁵³

To this list may be added the fact that the U.S. legislation grew out of and sought to remedy any defects in the common law. The legislation sought, by prohibiting abortion before quickening, to promote the common law’s purpose of protecting unborn life.¹⁵⁴ Moreover, Witherspoon pointed out that Blackmun was wrong to assume that there was an “absence of legislative history”¹⁵⁵ to support the legislative purpose of fetal protection and illustrated one such history by examining in some detail the enactment of the anti-abortion statute in Ohio in 1867.¹⁵⁶

In conclusion, while the abortion law may historically have sought to protect women as well as the unborn, and while the role of the medical profession in influencing the statutory restriction of abortion law in the last century may not have been entirely disinterested, it is beyond reasonable doubt that *one* of the purposes of the common law and the legislation enacted in the last century—indeed the predominant if not the only purpose—was the protection of the unborn.¹⁵⁷ Although part

¹⁴⁹ *Id.* at 57.

¹⁵⁰ *Id.* at 59.

¹⁵¹ *Id.* at 40.

¹⁵² *Id.* at 44.

¹⁵³ *Id.* at 48.

¹⁵⁴ Means stated that all the U.S. legislation was derived from Lord Ellenborough’s Act 1803. Means II, *supra* note 19, at 359. There can be little doubt that protection of the unborn was the main if not sole purpose of that Act’s provisions against abortion. KEOWN, *supra* note 13, at ch. 1.

¹⁵⁵ See text at note 26, *supra*.

¹⁵⁶ Witherspoon, *supra* note 64, at 61-69.

¹⁵⁷ The central purpose of the anti-abortion statutes enacted in England from 1803 to 1861 was also the protection of unborn life, though they may also have sought to protect women. The emerging medical profession, perhaps partly motivated by professional self-interest as well as its overt desire to protect the unborn from conception, may well have influenced the enactment of at least some of

two has not sought to identify *all* the errors in the Historians' Brief, it has, however, sought to show, by challenging three of the Brief's central claims, that its version of history is a travesty of the truth.

Advocacy Scholarship

Friend of the Court? A Brief "Constructed to Make an Argumentative Point Rather Than to Tell the Truth."

An *amicus* brief has been defined in U.S. law as a brief "filed by someone not a party to the case but interested in the legal doctrine to be developed there because of the relevance of that doctrine for their own preferred policy or later litigation." Such briefs "almost invariably align themselves with one of the parties, making them primarily friends of the parties despite the 'friend of the court' label."¹⁵⁸ However, the Historians' Brief claimed to provide the court with a "rich and accurate description of our national history and tradition in relation to abortion."¹⁵⁹ As we have seen, this claim is impossible to sustain.

At the annual meeting of the American Historical Association in 1989 a panel of lawyers and historians involved in the drafting of the Brief engaged in a roundtable discussion. The published versions of their presentations amounted largely to an unapologetic defense of the Brief.¹⁶⁰ One of the papers was by Professor Law, the Brief's counsel of record.¹⁶¹ She revealed her involvement in drafting other *amicus* briefs defending the "pro-choice position"¹⁶² and that it was she who took the initiative in convening a working group of historian friends to produce the Brief.¹⁶³ Law stated that the Brief had three objectives: "to preclude the Court from relying on history in a stupid way, to tell the truth, and to support a political mobilization of pro-choice voices."¹⁶⁴ By the first aim she appears to have meant preventing the Court from adopting the history of abortion law as traced in part one of this article.¹⁶⁵ And was there not an inevitable tension between the second and third aims? Even Law admitted that the Brief fell short of the truth. She stated that two factors "constrained our ability to 'tell the truth,'" namely, constraints of space and

the statutes. KEOWN, *supra* note 13, at chs. 1-2. The role of the medical profession in the U.S. on the enactment of its nineteenth century abortion legislation is far more pronounced.

¹⁵⁸ Stephen L. Wasby, *Amicus Brief*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 38 (Kermit L. Hall, ed., 2nd ed. 2005). In English law, by contrast, an *amicus curiae* is 'a disinterested adviser' a person who calls the attention of the court to some decision or some point of law which would appear to have been overlooked. *I OXFORD ENGLISH DICTIONARY* 401 (2nd ed. 1989).

¹⁵⁹ Brief, *supra* note 6, at 1.

¹⁶⁰ Roundtable, *supra* note 7, at 9.

¹⁶¹ Sylvia A. Law, *Conversations Between Historians and the Constitution*, 12(3) *PUBLIC HISTORIAN* 11 (1990).

¹⁶² *Id.*

¹⁶³ *Id.* at 12.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 13-14.

a “tension between truth-telling and advocacy.”¹⁶⁶ Illustrating their “most serious deficiencies as truth-tellers” she admitted that the Brief failed to grapple with “the fact that most nineteenth-century feminists supported laws restricting access to abortion.”¹⁶⁷ This question, she added, was so serious that limits of space did not justify its exclusion, and the silence was “distorting.”¹⁶⁸

Law identified another distortion, namely, the Brief’s treatment of the incidence of and attitudes to abortion in colonial America, but explained the distortion on the ground that the Brief was “constructed to make an argumentative point rather than to tell the truth.”¹⁶⁹ Nevertheless, Law defended the Brief as having contributed to the development of “more sophisticated public understanding.”¹⁷⁰ How the Brief’s gross distortions, only a few of which she acknowledged, were thought to promote more sophisticated understanding, either by the public or by the Justices of the Supreme Court, is unclear. The Brief, and the articles by Professor Means before it,¹⁷¹ are clearly vulnerable to the accusation of being mere “law office history,” that is, an exercise in “carefully marshalling every possible scrap of evidence in favor of the desired interpretation and just as carefully doctoring all the evidence to the

¹⁶⁶ *Id.* at 14.

¹⁶⁷ *Id.* at 14-15.

¹⁶⁸ *Id.* On nineteenth-century feminists’ strong opposition to abortion, see DELLAPENNA, *supra* note 8, at ch. 8. (“Feminist leaders . . . were explicit, and uncompromising, and virtually unanimous, in condemning abortion as ‘ante-natal murder,’ ‘child-murder,’ or ‘ante-natal homicide.’” *Id.* at 374. He also notes that “women physicians in the nineteenth century were also outspoken supporters of the criminality of abortion.” *Id.* at 404.)

¹⁶⁹ Law, *supra* note 161, at 16. And as Law’s co-counsel admitted in their contribution to the roundtable: “First and foremost, it was a legal argument designed to persuade the Supreme Court that it should decide the abortion rights issues in the *Webster* case in a particular way.” Jane E. Larson & Clyde Spillenger, *That’s Not History: The Boundaries of Advocacy and Scholarship*, 12(3) PUBLIC HISTORIAN 33, 34 (1990). They added: “Probably no one, lawyers or historians, considered the brief to be primarily a work of scholarship. It was instead an essay, a view of the field, a summation of existing secondary works rather than an exercise in original research.” *Id.* at 36. Its view of the field was, as we have seen, somewhat blinkered. Referring to the Brief’s silence about the opposition to abortion by nineteenth-century feminists they explained that their “preference as legal advocates for assertive rather than tentative argument” led them to omit this inconvenient fact. *Id.* at 39-40. In so doing, they “missed the mark of good scholarly method.” *Id.* at 40.

¹⁷⁰ Law, *supra* note 161, at 16.

¹⁷¹ Commenting on Means I, a memorandum from David M. Tundermann to Roy Lucas (principal counsel to the successful side in *Roe*), during the time when both were developing the argument which was to prevail in *Roe*, stated that Means’s conclusions sometimes strained credibility: in the presence of manifest public outcry over fetal deaths just prior to the passage of New York’s 1872 abortion law, Means disclaimed any impact upon the legislature of this popular pressure (even though the statute itself copied the language of a pro-fetal group). Tundermann added: “Where the important thing is to win the case no matter how, however, I suppose I agree with Means’s technique: begin with a scholarly attempt at historical research; if it doesn’t work, fudge it as necessary; write a piece so long that others will read only your introduction and conclusion; then keep citing it until courts begin picking it up. This preserves the guise of impartial scholarship while advancing the proper ideological goals.” Quoted in DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 853-54 (1994).

contrary, either by suppressing it when that seem[s] plausible, or by distorting it when suppression [is] not possible."¹⁷²

Finally, it should by no means be assumed that all those who signed the Brief either possessed expertise in relation to its subject-matter (signatories included, for example, historians of architecture¹⁷³) or that they had even read it.¹⁷⁴

“Preserving the Guise of Impartial Scholarship While Advancing the Proper Ideological Goals”¹⁷⁵

The historians in the roundtable discussion.

To what extent did the historian contributors to the roundtable discussion defend the Brief as consistent with scholarly objectivity? Michael Grossberg did not even echo Sylvia Law's reservations about its distortions. Grossberg claimed that the Brief specifically *avoided* accusations of “law office history” and stood up quite well to the standard evaluative measures of the discipline.¹⁷⁶ He added that it fulfilled the public responsibilities of historians by being a “well-constructed, professionally legitimate document.”¹⁷⁷ In praise of the Brief as history, he claimed that its argument was drawn from a “thorough examination of the relevant secondary sources” and “quite fairly synthesizes the judgments of that literature.”¹⁷⁸ It is remarkable that Professor Grossberg, described in the introduction to the roundtable discussion as a “specialist in the nineteenth-century legal history of abortion,”¹⁷⁹ was silent about the sources the Brief either omitted or misrepresented. Moreover, he endorsed the Brief's main claims that abortion has been “tolerated and widely practiced for most of the American past”; that the nineteenth-century legislation “reversed traditional practice”; that the doctors pressed for statutes “framed as protection for women's health”;¹⁸⁰ that “[f]etal rights did not figure prominently in the debates that produced anti-abortion legislation”; and that “doctors . . . paid little attention to the status and fate of fetuses.”¹⁸¹ As part two of this article indicated, these claims simply do not withstand scrutiny. What is more, they are difficult to square with Grossberg's own book which acknowledges that for centuries abortion after quickening was a

¹⁷² Alfred H. Kelly, *Clio and the Court: an Illicit Love Affair*, 1965 S. CT. REV. 119, 144 (quoted in Finniss, *supra* note 1, at 18). Unsurprisingly, Means helped draft the Brief. Larson & Spillenger, *supra* note 169, at 34.

¹⁷³ See Ponnuru, *supra* note 124, at 32; DELLAPENNA, *supra* note 8, at 841.

¹⁷⁴ Dellapenna comments that one professor disclosed that she had recruited thirty-eight historians to sign it who had not read it, let alone another brief that presented a contrary view. DELLAPENNA, *supra* note 8, at 841-42.

¹⁷⁵ See note 171, *supra*.

¹⁷⁶ Michael Grossberg, *The Webster Brief: History as Advocacy, or Would You Sign It?* 12(3) PUBLIC HISTORIAN 45, 48 (1990).

¹⁷⁷ *Id.* at 51.

¹⁷⁸ *Id.* at 48.

¹⁷⁹ *Id.* at 10.

¹⁸⁰ *Id.* at 46.

¹⁸¹ *Id.* at 47.

crime at common law because that was when human life was believed to begin¹⁸² and that nineteenth-century legislatures tightened the law in response to lobbying by medical societies who condemned abortion from “the first moment of conception” as “murder.”¹⁸³

Professor Freedman’s endorsement of the Brief was less fulsome. She stated that she would find it hard to argue, given the economic and religious motives for childbearing, that abortion in colonial America was “not uncommon.”¹⁸⁴ She added, however, that “for the practical purposes of writing this brief, it was necessary to suspend certain critiques to make common cause and to use the legal and political grounds that are available to us.”¹⁸⁵ The goal of the Brief was, she stated, “to make a legal argument that would influence the court (not to provide a long-distance history seminar)”¹⁸⁶

Professor Mohr’s contribution did little to deflect the criticism that the Brief was indeed mere “law office history.” He began by comparing a legal brief with a historical argument and observed that lawyers tended to minimize countervailing evidence because they cared less about what the past might teach than about what the past might do to achieve a desired result in the present since that was the lawyer’s purpose in turning to the past.¹⁸⁷ Lawyers “ultimately want that version of the past which serves their desired result in the present to prevail.”¹⁸⁸ He added: “Nor do I ultimately consider the brief to be history, as I understand that craft. It was instead legal argument based on historical evidence. Ultimately, it was a political document.”¹⁸⁹ Why, then, did he sign it, particularly when it misrepresented his own book? When challenged he said that where the Brief conflicted with his book he stood by his book¹⁹⁰ but that he defended his association with the Brief because it was a “political” rather than an “academic” document.¹⁹¹ As Professor Bradley has trenchantly argued, however: “A document whose professed purpose is to address and validate *historical* analyses cannot take refuge in being a ‘political’ document. It represented matters of historical fact and put the full weight of its signatories’ professional reputations behind those representations.”¹⁹²

Even Mohr has written that those who signed it signed “as historians” as well as citizens.¹⁹³ Interestingly, when Professor Law submitted an almost identical

¹⁸² Grossberg, *supra* note 128, at 160.

¹⁸³ *Id.* at 173.

¹⁸⁴ Freedman, *supra* note 50, at 28-30.

¹⁸⁵ *Id.* at 32.

¹⁸⁶ *Id.* at 28.

¹⁸⁷ James C. Mohr, *Historically Based Legal Briefs: Observations of a Participant in the Webster Process*, 12(3) PUBLIC HISTORIAN 19, 20 (1990).

¹⁸⁸ *Id.* at 20.

¹⁸⁹ *Id.* at 25.

¹⁹⁰ Gerard V. Bradley, *Academic Integrity Betrayed*, FIRST THINGS, Aug./Sept. 1990, at 10.

¹⁹¹ *Id.* at 12.

¹⁹² *Id.* (original emphasis).

¹⁹³ Mohr, *supra* note 187, at 25.

Brief to the Supreme Court in a later abortion case, Mohr's signature was notably absent.¹⁹⁴

Mohr's book.

This article has argued that the Brief is undermined by one of its major sources, Mohr's book, which shows with impressive detail that the engine behind the nineteenth century abortion legislation was the medical profession's campaign to extend the legal protection of the unborn. Remarkably, however, in the final chapter of his book, Mohr does advance the argument (having prefaced his remarks with the qualification that "as a work of history" his book ended with the previous chapter¹⁹⁵) that *Roe* "is not as great a departure of policy in the long view as it might at first have seemed."¹⁹⁶ He writes sympathetically of the *Roe* Court's view that the nineteenth century legislation was a deviation from the norm and that its trimester guidelines "returned to American women a virtually unconditional right to terminate a pregnancy" during the first trimester.¹⁹⁷ His contention that *Roe* marked a return to an earlier norm is based on a grave misunderstanding of legal history. And, as Dellapenna has pointed out, the claim is scarcely less contentious from the perspective of social history.¹⁹⁸

¹⁹⁴ Brief of 250 American Historians as Amici Curiae in Support of Planned Parenthood of Southeastern Pennsylvania, in *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992). Dellapenna writes that the reason Mohr has given for declining to sign this virtually identical brief was lack of time and that Mohr declined to discuss the reason with him. DELLAPENNA, *supra* note 8, at 843.

¹⁹⁵ MOHR, *supra* note 52, at 247.

¹⁹⁶ *Id.* at 259.

¹⁹⁷ *Id.* at 248.

¹⁹⁸ Dellapenna argues that Mohr's twin theses, that abortion was a generally accepted and common practice in American society at the start of the nineteenth century and that the nineteenth-century anti-abortion legislation was a device used by (usually male) regular medical practitioners to oppress (usually female) irregulars, are erroneous. See, e.g., DELLAPENNA, *supra* note 8, at 1005-06. Dellapenna writes: "neither Cyril Means nor James Mohr considered abundant evidence relevant to their inquiries. Even more troubling are the major methodological errors in their approach to the evidence. Means and Mohr both characteristically project our present knowledge onto persons writing or acting in prior centuries. Thus they riddled their work with contradictions." *Id.* at 1012. As examples of such contradictions he cites Mohr's insistence that people saw nothing wrong with killing an unborn child while admitting that the people he quoted did not think a child was present early in pregnancy, and his insistence that safe and effective pharmacological methods were available while acknowledging that they were dangerous and ineffective. *Id.* at 1012, n.106; see also *id.* at 303. Dellapenna adds: "Even more troubling is Means' and Mohr's pervasive pattern of dismissing any evidence inconsistent with their theses as a ruse to conceal the person's 'true' motives – motives that support their theses, and for which, peculiarly, no evidence has survived except Means's or Mohr's own surmise." *Id.* at 1012 (see also *id.* at 19-22). Dellapenna observes that Mohr sought to avoid scrutiny of his treatment of the history of the law by shifting the focus to "the 'true' social attitudes" about abortion found in non-legal sources, not the least problem with which is its assumption that "the best way to determine the legal tradition underlying the Constitution is to examine non-legal sources . . ." *Id.* at 1043 (emphasis in original). He also contends: "At the root of Mohr's argument is the utter absence of the larger legal and medical historical context" within which the nineteenth century anti-abortion statutes were enacted. *Id.* at 302. In any event, Dellapenna observes that, far from abortion being socially accepted, a "true social

First (as Mohr knows¹⁹⁹) *Roe* did not strike down statutes prohibiting only “early” abortion. It struck down statutes prohibiting abortion even between viability and birth, provided the abortion is in the interests of the woman’s “health,” and in the companion case of *Doe v. Bolton* the Court adopted an interpretation of “health” so wide as to allow virtually any unwanted pregnancy to be terminated.²⁰⁰ In his book²⁰¹ Mohr accepts that the common law prohibited abortion after quickening (and, as we saw in part one, at least the early common law prohibited abortion before quickening, from fetal formation). *Roe*, therefore, allows abortions in the second half of pregnancy which were illegal at common law. Moreover, over 700 years of consistent prohibition, as homicide or serious misdemeanor, is hardly evidence of tolerance or lenity.

Second, Mohr writes that the basis of the quickening distinction was twofold: contemporary belief about ensoulment of the fetus and proof that the woman was indeed pregnant rather than suffering from amenorrhoea.²⁰² He therefore accepts that the common law used quickening to establish when human life had begun. To suggest that the common law tolerated the destruction of fetal life before quickening is misleading: even on Mohr’s own reading, human life was simply not thought to have begun.

Third, the restriction of the law in the nineteenth century flowed naturally from the underlying rationale of fetal protection. Once quickening was exploded as an unscientific indicator of the beginning of human life legislatures accordingly moved to tighten the law to protect the unborn from fertilization. Mohr’s detailed demonstration of the hugely influential role of regular medical practitioners in this regard serves usefully to confirm that rationale. His speculation about the possible influence of medical professionalization risks confusing alleged, hidden motives of the regulars with the patent purposes of the regulars, the legislators and the legislation.

Mohr’s senate testimony.

In 1998 Professor Mohr repeated his misinterpretation of *Roe* to a Senate Judiciary Subcommittee which was holding a hearing on *Roe* on the twenty-fifth anniversary of the decision. Far from toning down his argument in the light of Professor Bradley’s incisive criticism of his association with the Brief, Mohr went even further, contradicting his own book in the process. He testified that from the

consensus” appears to have existed in support of the anti-abortion statutes which explains why they were passed unanimously or nearly so. *Id.* at 462. Dellapenna concludes: “In sum, Mohr’s book simply does not withstand careful reading even without additional research into his claims.” *Id.* at 22.

¹⁹⁹ MOHR, *supra* note 52, at 248-49.

²⁰⁰ The doctor’s medical judgment, ruled Justice Blackmun, may be exercised “in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient. All these factors may relate to health.” *Doe v. Bolton*, 410 U.S. at 192; 35 L. Ed. 2d at 212 (1973).

²⁰¹ MOHR, *supra* note 52, at 3-4.

²⁰² *Id.* at 4.

beginning of the Republic “through the Civil War” early abortions were “not illegal” and that “[o]nly in the last third of the 19th century did early abortion become indictable in most American states”²⁰³ His book tells a somewhat different story. It states that by 1840 five of twenty-six states had proscribed abortion before quickening²⁰⁴ and that of some seventeen states or territories to enact anti-abortion legislation between 1840 and 1860 around three-quarters punished abortion before quickening.²⁰⁵ Mohr also sweepingly testified: “Even during the period when the practice of abortion was theoretically (sic) illegal, it was always the person performing the abortion who was open to indictment, not the pregnant woman.”²⁰⁶ Again, this is contradicted by his book that discusses a number of statutes that made the woman expressly liable.²⁰⁷ Further, Mohr testified that *Roe* improved the health and safety of American women, which was “something 19th century legislators had no concern about.”²⁰⁸ Yet his book tells us that protecting maternal health “was something many nineteenth-century legislators had been deeply concerned about in the various abortion laws they enacted.”²⁰⁹ Mohr’s testimony that *Roe* “resonates with the nation’s previous 200-year record of tolerance and sympathy” toward women seeking early abortion and that “every state and every court in the nation implicitly favored a degree of tolerance”²¹⁰ is flatly contradicted by the historical record, even as portrayed by his own book.

An analogy will, by way of conclusion, serve to illustrate Mohr’s skewed, and the Brief’s perverse, interpretation of abortion law history. This analogy also concerns the law’s concern to protect human life, but at the end of life rather than at its beginning. The common law has historically been concerned to protect human beings from being killed until their natural death. Imagine that, from the thirteenth century until the nineteenth century natural death had been thought to occur when

²⁰³ Constitution, Federalism and Property Rights Subcommittee of the Senate Judiciary Committee, Hearing on the 25th Anniversary of the Supreme Court’s Decision in *Roe v. Wade*, 105th Congress 13 (Jan. 21, 1998) (1998 WL 27127, Federal Document Clearing House) (hereinafter “*Roe* Anniversary Hearing”).

²⁰⁴ MOHR, *supra* note 52, at 43.

²⁰⁵ *Id.* at ch. 5. The proportion may be higher: Mohr is imprecise about the scope of some of the legislation he discusses. It will be recalled that Witherspoon pointed out that by the end of 1868, 30 out of 37 states had legislated against abortion, and that 27 of those 30 punished pre-quickening abortion. See text at notes 140-141, *supra*.

²⁰⁶ *Roe* Anniversary Hearing, *supra* note 203, at 14.

²⁰⁷ For example, his book mentions New Hampshire’s first anti-abortion statute enacted in 1849 which, writes Mohr, “revoked the long-standing immunity from punishment afforded American women who sought their own abortions prior to quickening.” MOHR, *supra* note 52, at 134. And, it will be recalled, Witherspoon pointed out that no fewer than seventeen state legislatures enacted laws expressly incriminating a woman’s participation in her own abortion. See text at note 150, *supra*. Mohr too readily assumes a long-standing immunity for women. The common law authorities discussed in part two of this article, and absent from his book, are against it.

²⁰⁸ *Roe* Anniversary Hearing, *supra* note 203, at 13.

²⁰⁹ MOHR, *supra* note 52, at 248.

²¹⁰ *Roe* Anniversary Hearing, *supra* note 203, at 14.

respiration, tested by breath misting a mirror placed close to a patient's mouth, had ceased. The law, accordingly, punished killing before, but not after, that time. Indeed, after the point at which the mirror no longer misted there was no life to be taken, or so it was thought. It was, moreover, common practice, immediately after the mirror ceased to mist, for the patients to be declared dead and for unqualified dissectors to cut them up or for relatives to cremate them. The dissectors also practiced medicine but their lack of hygiene sometimes led to their patients contracting fatal diseases. In the nineteenth century educated medical practitioners discovered through greater understanding of human physiology that, despite appearances, respiration continued for some time after the patient's breath could no longer mist the mirror and that integrated organic functioning did not in fact cease until the brain died some forty-eight hours after that point. The practitioners' professional association vociferously and repeatedly criticized the law's historic definition of death as outdated and unscientific. Legislators across the country, in response to a concerted campaign by the doctors' association, enacted legislation extending the reach of the crime of homicide until forty-eight hours after the point at which breathing could no longer mist a mirror.

In 1973 euthanasia campaigners petition the Supreme Court. They invite the Court to find a constitutional right for those in the last forty-eight hours of life to be painlessly euthanized. In support of the petition 281 historians, knowing that the Court may be influenced by the nation's history and traditions, file an *amicus* Brief. The Brief claims that euthanasia in those circumstances, far from being a break with legal tradition, would return the law to an older tradition. For, the Brief argues, the common law never prohibited *all* killing of human beings: it allowed patients during the last forty-eight hours of life to be dissected or cremated. Granting the right claimed by the petitioners would represent a return to the common law's "tolerance" of such killing and restore the relatives' "common law right" to dispose of dying relatives. As for the nineteenth century legislation redefining death, the Brief continues, it was a deviation from the norm. It was the result of an exercise in professional self-interest by a group of qualified medical practitioners whose motivation, despite appearances, was to suppress competition by unqualified dissectors whose want of hygiene was, moreover, a threat to public health. The legislation "was *really* about who should be allowed to practice medicine" not about furthering the law's purpose of protecting human beings toward the end of their lives.

Conclusions

As part one indicated, from the thirteenth century the common law, seeking to protect human life from the time it was believed to have begun (or at least could be proved to have begun) proscribed abortion as a serious offense. In the nineteenth century, improved understanding of embryological development showed the common law's criterion of quickening to be morally irrelevant. Pressed by educated medical practitioners to bring the law up to date with this advanced understand-

ing legislators across the United States filled the gap by protecting fetal life from fertilization. Professor Mohr's account of the regulars' campaign is a valuable addition to our understanding of the genesis of the nineteenth-century legislation, but his interpretation of *Roe* as a return to a tradition of "tolerance" is very wide of the mark. For anyone, judge or historian, to portray over 700 years of legal opposition to abortion as evidence of "tolerance" is, quite simply, to stand history on its head. And as for the Historians' Brief, it is so gross a misrepresentation of the nation's history and traditions that it is small wonder that it has been branded "an utter fraud, riddled with scholarly abuses and inaccurate conclusions."²¹¹

The primary purpose of the prohibition on abortion, both at common law and by statute, has been the protection of the unborn.²¹² There is, moreover, cogent evidence that the law's disapproval of abortion has reflected social mores. Professor Dellapenna's recent exhaustive study concludes: "all groups in society (viewed collectively, even though some individuals dissented within any given group), including women, people of color, lawyers, doctors, clergy, journalists, and others, supported the prohibition of abortion until very recent times."²¹³

Roe's invention of a constitutional right to abortion represented a radical rejection of America's long-standing history and traditions. The tailoring by the Historians' Brief of a historiography to clothe that new right relies on a patchwork of threadbare materials which leaves it embarrassingly exposed. It is to be hoped that just as the Supreme Court brought an accurate understanding of the nation's history and traditions to bear on the question of whether the Constitution contains a right to assisted suicide, it will do likewise on the no less important question of whether the Constitution contains a right to abortion.²¹⁴

²¹¹ "The historians mischaracterize sources. They misreport facts. They support claims with citations that have no relevance to those claims. They rip quotations out of context. They rely on discredited sources – even on sources that signatories to the brief have themselves discredited. They contradict sources on which they rely heavily and which signatories wrote, without a word of explanation or any retraction by those authors elsewhere." Ponnoru, *supra* note 124, at 32. See also Finnis, *supra* note 1, at 18. For an updated version of Ponnoru's article, see RAMESH PONNORU, THE PARTY OF DEATH ch. 9 (2006).

²¹² DELLAPENNA, *supra* note 8, at 1055.

²¹³ *Id.* at 1063.

²¹⁴ *Id.* at 1055.