NOTES

ABORTION AS MURDER: WHY SHOULD WOMEN GET OFF?
USING SCARE TACTICS TO PRESERVE CHOICE

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I. INTRODUCTION

Almost as soon as the words were out of George Bush's mouth, his aides were scrambling to control the damage. It was the first presidential debate of the 1988 campaign, and in response to a question from one of the moderators, the then-Vice President had just implied that he supported imposing criminal penalties on women who had abortions should such procedures become illegal again.

"Well, I think what the Vice President is saying is that he's prepared to brand a woman a criminal for making this decision," retorted his opponent, Massachusetts Governor Michael Dukakis. It was, many commentators would later agree, one of the high points of the campaign for Dukakis.

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2. The Candidates on Abortion, WASH. POST, Oct. 18, 1988, at Z18. In response to a question on whether he thought women who had illegal abortions should go to jail, Bush had said: "I'm for the sanctity of life and, once that illegality is established, then we can come to grips with the penalty side and, of course, there's got to be some penalties to enforce the law." Id.
3. Id.
4. See, e.g., Richard Brookhiser, The Establishment Man, NAT'L REV., Nov. 7, 1988, at 34 ("The Wake Forest debate was discouraging [for Bush partisans]. Bush ... fell with a thump into the trap, laid by one of the reporters and sprung by Dukakis, of seeming to consider criminal penalties for women who have abortions."); Hendrik Hertzberg, A Prig or a Fool: First Bush-Dukakis
The following morning Bush campaign chairman James A. Baker III took the extraordinary step of calling a press conference just to "clarify" what his candidate had said during the debate. Baker told the assembled reporters that after pondering the question overnight, Bush had come to the "new" conclusion that "women who have abortions should not suffer any criminal penalties, but doctors who perform them should. [Bush] thinks a woman in a situation like that would more properly be considered an additional victim."

As political commentator Michael Kinsley has noted, "That sounds compassionate, but it is nonsense. If every fetus is a fully human being [as Bush had said], a woman who procures an abortion is exactly like someone who hires a gunman to murder her child" and should be prosecuted for the crime. The Washington Post's Judy Mann branded Bush's compromise "nothing more than cold-blooded politics."

The uproar over Bush's statement—despite its logical appeal for those who believe a fetus is a human being—hints at a potent, albeit risky, weapon prochoice activists have in their arsenal but thus far have made little use of. What if prolife advocates across the country were forced to grapple with the ultimate consequences of their argument that human life begins at conception? What if the Supreme Court were one

6. Mann, supra note 1, at B3.
7. Michael Kinsley, Life Terms, NEW REPUBLIC, July 15, 1991, at 4. The argument that a woman's autonomy/privacy interest might justify exempting her from criminal liability for having an illegal abortion is explored infra notes 179-80 and accompanying text.
8. Mann, supra note 1, at B3.
9. This Note does not address the obvious inconsistency of antiabortion forces who contend that life begins at conception and yet are agreeable to exempting rape and incest victims from antiabortion laws. Laurence Tribe argues that their position demonstrates that they actually seek not to protect innocent life but to make women who have sex voluntarily—as opposed to rape and incest victims, who are forced to engage in the sexual intercourse that leads to pregnancy—bear the consequences of their actions. TRIBE, supra note 5, at 233-34. Prolife advocates contend that they are forced politically to make the exception in order to get any restrictions on abortion whatsoever passed. See, e.g., TRIBE, supra note 5, at 188 (describing the shifting position of 1989 Virginia gubernatorial candidate Marshall Coleman, who backed off from his stance that antiabortion bills should contain no exceptions for rape and incest victims on the ground that such bills "were not politically viable"); Paul Kolimas, The Practical Tack of Abortion Opponents, WASH. POST, July 7, 1991, at B6 (letter to the editor). Another possible way to justify exempting rape and incest victims from any law prohibiting abortion is to argue that to compel them to carry a fetus to term would be to force them to act as "good samaritans," something American law generally does not require. RESTATEMENT (SECOND) OF TORTS § 315 (1989). However, the same argument can be applied to women who become pregnant after engaging in sex voluntarily, even though theoretically they might have a "special relation" with the fetus and would therefore owe a good samaritan duty to it when otherwise one would not
day to rule that the decision on whether to criminalize abortion should be left to the states? State legislators could then be pressured—legally and politically—to include in any proposed antiabortion bills provisions that make abortion clients criminally liable.

The Bush fiasco hints that such bills would prove harder to pass than measures penalizing only abortion providers, and abortion might therefore remain legal in more states than it would otherwise. Also, the prospect of being sent to jail for having an abortion might serve to mobilize inactive prochoice women to fight all antiabortion legislation. This Note takes the position that prochoice activists should consider a strategy of forcing prolife advocates to deal with the political consequences of including penalties for women who have illegal abortions in any antiabortion legislation. It is an entirely different argument—and certainly not one that I make—that women should actually be prosecuted under such laws. To make their point, prochoice activists need not argue that abortion customers should be prosecuted, merely that proposed antiabortion laws should be required to subject them to prosecution.

Part II of this Note surveys the probable future of abortion law in America and its likely implications for the criminal liability of women. Part III discusses why it is normatively desirable, from certain prochoice and prolife perspectives, to seek criminal liability for women who have illegal abortions. Part IV examines whether it is constitutional to subject abortion providers to criminal liability but exempt their clients.

II. THE FUTURE OF ABORTION LAW IN AMERICA

Perhaps no U.S. Supreme Court decision of the twentieth century has proved to be as controversial as Roe v. Wade, the 1973 ruling legalizing most abortions. When Clarence Thomas stated during his Supreme
Court confirmation hearings that he had never discussed the decision with anyone, some incredulous observers argued that this was reason enough for the Senate not to confirm him: Thomas had to be lying, they said, because it was inconceivable that anyone, much less someone who aspired to the highest court in the land, had never shown enough interest to discuss one of its most divisive, inflammatory rulings.

Justice Thomas aside, much of America has been debating the merits of *Roe* since it was handed down two decades ago. In the *Roe* decision, written by Justice Blackmun, a majority of the Court decreed that a woman has an absolute right to an abortion during the first trimester of pregnancy; that the State could regulate abortion during approximately the second trimester in ways that are "reasonably related to maternal health"; and that after viability the State could go as far as proscribing abortion except when the mother's life or health was in danger.

Criticism of *Roe* has come from all camps, from prolifers who claim that it sanctions murder by failing to recognize that human life begins at conception to prochoice activists who decry its allowance of any curbs on abortion. Between the two extremes lie millions of Americans, some content with the law as it stands, others uneasy about the ready availability of abortion under certain circumstances.

The unrest over the decision among those who oppose free access to abortion has given rise to innumerable efforts to stem *Roe*'s impact—by either overruling or emasculating it—dating almost from the day it was handed down. Though such efforts were largely ineffective in the years immediately following the ruling, the shifting composition of the Court

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12. *See, e.g.*, Richard Cohen, *Squandered Credibility*, WASH. POST, Oct. 10, 1991, at A23 ("[A] man who spent days upon days before the Senate Judiciary Committee professing not to have thought about one of the most controversial legal cases of his time is not believable."); David G. Savage, *Democrats Skeptical on Thomas Testimony*, L.A. TIMES, Sept. 12, 1991, at A1, A18 ("[Thomas] is apparently one of only two lawyers in the country who do not have an opinion on [Roe]. The other, of course, is David Souter." (quoting Patricia Ireland of the National Organization for Women)).


15. *See, e.g.*, TRIBE, supra note 5, at 142 (relating the post-*Roe* efforts of 30 New York legislators to pass a bill making abortion strictly the choice of the pregnant woman at any stage of the pregnancy).

toward a more conservative viewpoint has in recent years resulted in several decisions and opinions encouraging to those who seek Roe's reversal. With the election in November 1992 of Bill Clinton as President, however, a woman's right to a legal abortion will most likely be safeguarded for the foreseeable future. But the erosion of that right throughout the 1980s signals that women should never take it for granted and must always be prepared to defend it as effectively as possible from those who would take it way.

A. THE FUTURE OF ROE

The current Court has stopped short of overruling Roe outright. In Planned Parenthood v. Casey, decided in June 1992, the Court stated that it was reaffirming Roe's basic holding that "a state may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." The Court upheld numerous restrictions on that right, however, including the imposition of a twenty-four-hour waiting period, the requirement that a teenager obtain the consent of a parent or judge before having an abortion, and the right of a state to require abortion facilities to report data about their clients to the state. None of these restrictions, said the Court, appeared to place an "undue burden" on a woman seeking an abortion and hence were permissible. Nevertheless, the Court's decision largely eviscerated Roe by opening the door for state legislatures to pass laws even more restrictive of a woman's right to an abortion.

Perhaps even more ominous for prochoice advocates, four of the Court's members stated that they would overturn Roe. "We believe that Roe was wrongly decided, and that it can and should be overruled," wrote Chief Justice Rehnquist, whose dissenting opinion was joined by Justices Scalia, Thomas, and White.

Only one more vote is needed to overrule Roe. During the presidential campaign, Bill Clinton pledged to appoint only choice supporters to

17. See infra notes 18-38 and accompanying text.
19. Id. at 2821.
20. Id. at 2791.
21. Id.
22. See infra text accompanying notes 31-33.
23. 112 S. Ct. at 2855 (Rehnquist, C.J., Scalia, Thomas & White, JJ., dissenting).
the Court, so the Court coalition to overrule Roe is unlikely to reach a majority anytime soon.24

As a result, several other recent cases challenging Roe are unlikely to result in its reversal, but they illustrate how close abortion came in the early 1990s to being outlawed, at least for some women. Three cases concerned the legality of statutes that explicitly outlawed abortion except in very limited circumstances and were therefore seemingly insupportable under Roe.

Before a federal district court judge in Utah25 was a challenge to a Utah law that banned abortion except when pregnancy threatened the woman's life, posed a grave danger to her health, resulted from a case of rape or incest that was quickly reported, or was likely to result in a fetus with "grave defects."26 In September 1992, the Court of Appeals for the Fifth Circuit upheld a lower court ruling striking down as unconstitutional a Louisiana statute27 that restricted legal abortion to situations when the mother's life—not merely her health—was in danger, or when the pregnant woman had been raped and had reported the crime to authorities within seven days.28 The State filed a petition for certiorari in December 1992 despite Clinton's election and Casey. A third recent case involved a Guam law that prohibited abortion except when necessary to save the woman's life or to prevent grave danger to her health.29 That law was declared unconstitutional by a three-judge panel of the Ninth Circuit Court of Appeals.30

Even though the Court has declined to overrule Roe explicitly, some contend that it is nonetheless no longer good law. Although the Pennsylvania statute that the Casey Court almost entirely validated does not expressly outlaw abortion, Third Circuit Court of Appeals Judge Walter Stapleton, whose lower-court ruling was upheld by the Justices, "found

24. "I'll not make you worry about the one justice," Clinton told a prochoice rally after the Casey decision was handed down. Clinton Says He Won't Appoint Anti-Abortion Justices, L.A. TIMES, July 1, 1992, at A14.
[that] the Roe standard was dead." The Los Angeles Times noted that "[d]espite the majority's assertions to the contrary, the absolute right to an abortion during the first trimester of pregnancy, as defined by 1973's Roe vs. Wade decision, is now dead law." And Professor Laurence Tribe said after the decision: "[Casey] gave a green light to every state and city to restrict abortion in any way that judges appointed by Presidents Ronald Reagan and Bush do not find an 'undue burden.'"

In its 1989 decision in Webster v. Reproductive Health Services, the Court upheld a Missouri statute that conflicted with Roe in that it regulated abortion during the second trimester not in the interests of maternal health—the sole exception allowed by Roe—but to protect potential human life. The statute also stated in its preamble that "the life of each human being begins at conception," contrary to what Roe held was permissible. After Webster, many commentators argued that it at least partially overruled Roe and that any restrictions on abortion were thus constitutional as long as they were rationally related to a legitimate state goal. Others disputed the importance of the decision in limiting Roe.

Such arguments will likely become academic when and if Bill Clinton makes an appointment or two to the Court. But Webster and Casey signal the inclination of even a nominally prochoice Court to chip away at Roe. In 1991, Richard G. Wilkins, a law professor at Brigham Young University who advised Utah and Idaho on the constitutionality of abortion laws that they considered, wrote that Roe would more likely die a slow, lingering death as a result of the cumulative effect of many adverse rulings, rather than be put to rest by a sudden, mortal blow struck by the

34. 492 U.S. 490 (1989) (upholding Mo. REV. STAT. § 188.029 (1988)). In Casey, the Court stated flatly that it was rejecting Roe's "rigid trimester framework." Planned Parenthood v. Casey, 112 S. Ct. 2791, 2818 (1992).
36. The Webster Court found that any determination of the preamble's legal significance should be left to the state supreme court, however, and thus did not pass on its constitutionality. 492 U.S. at 506-07. The preamble appears contrary to Roe in that Roe held that a State could not adopt the theory that life begins at conception. 410 U.S. 113, 162 (1973).
Court in overruling it. After all, he pointed out, "Lochner ... was never reversed. Instead, the Court simply backed away from strict scrutiny in a series of cases that lowered the standard of review." Of course, even were the Roe standard to be abandoned, legal abortion would not automatically become unavailable in the United States. As long as the Court stops short of declaring that a fetus is a person and as such is entitled to the Fourteenth Amendment's right to life, Congress could enact legislation guaranteeing a woman's right to an abortion, at least prior to the fetus' viability.

Another scenario that might unfold should Roe's demise come about would be a campaign to amend the U.S. Constitution to guarantee a woman's right to abortion. The possibility of success for such an effort is doubtful, however, given the failure to pass of such a broader proposal as the Equal Rights Amendment. It is most likely that any wholesale diminution of the force of Roe would result in returning the regulation of abortion to state control. In such an event, previability abortion would remain legal in at least some states, including those that have passed legislation guaranteeing the right should Roe be reversed. But in many other states, perhaps a majority of them, abortion would likely be banned or severely restricted. Immediately before Roe was handed down, only four states allowed abortion at will, and just one of

40. Id. at 422-24. Others who have been deeply involved in the abortion debate share this view. See, e.g., Eileen McNamara, Abortion and Congress, BOSTON GLOBE, June 20, 1991, at 1 (quoting Tribe to the effect that "[t]he court may never say the magic words: 'Roe' is hereby reversed,' but the constitutional protection could be so chipped away, so eroded that the same end is achieved without that one apocalyptic decision").

41. Wilkins et al., supra note 39, at 426. In Lochner v. New York, one of the Court's most infamous decisions, the Justices struck down a state law regulating workers' hours on the ground that it infringed on the liberty of contract protected by the Due Process Clause. 198 U.S. 45 (1905).

42. See TRIBE, supra note 5, at 191-92.

43. See, e.g., Elliot Pinsley, Roe's Warrior, MANHATTAN LAW., Nov. 1991, at 19 (quoting the ACLU's Janet Benshoof as advocating a constitutional amendment to ensure women the right to an abortion).


45. See, e.g., CONN. GEN. STAT. § 19a-602 (1990) (guaranteeing that "the decision to terminate a pregnancy prior to the viability of the fetus shall be solely that of the pregnant woman in consultation with her physician"); Abortion Foe Governor Signs Bill Allowing Procedure, L.A. TIMES, Apr. 24, 1992, at 4 (describing Kansas Gov. Joan Finney's signing of a bill that guarantees a woman's right to abortion as long as she undergoes an eight-hour waiting period).


47. NANETTE J. DAVIS, FROM CRIME TO CHOICE: THE TRANSFORMATION OF ABORTION IN AMERICA 260 (1985).
those states—New York—had a statute broad enough to meet all of Roe’s guarantees.  

In mid-1992, the threat of abortion once again becoming illegal was very real. Only with the election of Bill Clinton did that danger recede and the question of whether to subject women who have illegal abortions to criminal liability become largely academic once again. Abortion has essentially been illegal for most of this country’s existence, however, and may very well become so again—if not next year, then perhaps in the next century. It is more than just a scholarly exercise, then, to explore how the law can and should be expected to treat women who voluntarily undergo illegal abortions.

B. CRIMINAL LIABILITY FOR ILLEGAL ABORTIONS

If abortion ever becomes illegal in some states, an obvious question arises: Illegal for whom? Though one might expect the women who procure illegal abortions as well as the people who perform them to be held criminally liable, in fact an overwhelming majority of the laws ever passed in this country outlawing abortion have exempted the pregnant clients from liability. According to one prolife group, “[I]n the history of American law, no woman has ever been convicted for undergoing an illegal abortion; only two women have ever been charged.” The almost nonexistent role that criminal liability for abortion patients has played in American history is underlined by the way the issue has been addressed—or, more precisely, not addressed—by the media and in scholarship on the subject of abortion. Rarely is it explicitly made clear that only the people who perform abortions have been prosecuted in connection with abortions; apparently most writers and commentators consider it obvious that only abortionists and not their clients would ever be subject to criminal liability.

Women seem no more likely to face criminal prosecution for illegal abortions in the future. Of the three statutes banning abortion passed by legislatures in the early ’90s, only one statute—Guam’s—imposed any

52. See, e.g., Rodman et al., supra note 50; Tribe, supra note 5.
criminal liability on abortion procurers, and it did so at a misdemeanor level rather than the felony charges abortion performers would have faced. The Louisiana and Utah statutes expressly exempted women customers from criminal liability. Justices O'Connor, Kennedy, and Souter, writing for the Court in Casey, said that any statute that placed an "undue burden" on a woman seeking an abortion—at least while Roe is still good law—would be unconstitutional. Little could be more burdensome upon women seeking an abortion than the threat of prosecution.

In short, even if Roe should one day cease to control the country's regulation of abortion and the procedure becomes illegal in some states, a woman is extremely unlikely to face even the threat of any sort of criminal charges should she have one—unless prochoice activists choose to lobby for such provisions for strategic purposes.

III. THE NORMATIVE DESIRABILITY OF CRIMINAL LIABILITY FOR WOMEN WHO HAVE ILLEGAL ABORTIONS

This part examines why prolife forces should consider it normatively desirable—even imperative—to provide for the prosecution of women who have illegal abortions. It then argues that because this position has proved to be politically untenable, those who seek to keep abortion legal may find it strategically advantageous to pressure their opponents into adopting such a position in any proposed legislation outlawing abortion, in the hope that as a consequence such legislation will not be enacted or, if it is, will prompt prochoice women to mobilize in greater numbers than they otherwise would.

A. THE PROLIFE PERSPECTIVE

In the early part of this century and before, many who favored the proscription of abortion claimed to have primarily the pregnant woman's interests at heart, not the fetus. Abortion was a risky procedure, and some antiabortion activists felt that desperate pregnant women must be protected from themselves by making abortion unavailable, at least legally.
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Today, however, a woman who has a legal abortion during the first trimester of pregnancy faces on average far fewer medical risks than if she carries her pregnancy to term and goes through childbirth. As a result, modern-day antiabortion forces have dropped any pretense of acting to protect women from physical harm. Their agenda is plain from the word they have adopted to describe themselves: prolife. Those working to outlaw abortion claim to believe that human life begins at conception and that abortion is, therefore, murder. All three of the statutes restricting abortion that were contested in federal court in the early '90s contained language to the effect that human life begins at conception.

Prolife forces have waged their campaign against abortion by basing their opposition to it on the syllogism that killing innocent human life is murder, fetal life is innocent human life, and therefore abortion is murder. Such a contention leads inexorably to the conclusion that women who procure illegal abortions should be subject to criminal prosecution for homicide, for many reasons: to deter women from having abortions, both to save unborn children and to protect the women themselves from potentially fatal, unregulated illegal abortions; to punish moral transgressors and their accomplices; to enable prosecutors to threaten women with criminal charges in order to gain their cooperation in prosecuting illegal abortion providers; and to maintain a logical consistency in the law.

58. Tribe, supra note 5, at 103.
60. See, e.g., Ed Anderson, 2 Abortion Bills Passed by House, Senate, Roemer to Decide, New Orleans Times-Picayune, May 14, 1991, at A1 (quoting Louisiana antiabortion-bill sponsor Rep. Sam Theriot to the effect that his bill would “stop the callous murder of 15,000 babies a year in Louisiana”). Several commentators have argued that despite their abortion-is-murder rhetoric, prolife forces actually have agendas other than protecting fetal life. Michael Kinsley suggests that those who believe human life actually begins sometime after conception but before birth have adopted such language because “abandoning abortion-is-baby-killing would mean giving up the best weapon in the propaganda battle.” Kinsley, supra note 7, at 4. Susan Faludi has written that at least some prolife activists are motivated by a desire to keep women out of the job force and otherwise oppressed. Faludi, supra note 59, at 402-03. Because the strategy outlined in this Note depends on pressuring prolife forces to accept the consequences of their life-begins-at-conception rhetoric, such possible ulterior motives behind their words and actions will not be addressed.
61. 9 Guam Code Ann. § 31.21 (1990) (“The legislature finds that for the purposes of this Act life of every human being begins at conception.”); LA. Rev. Stat. Ann. § 40:1299.35.0 (West 1991) (“The Legislature does solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child’s right to life and is entitled to the right to life from conception under the laws and Constitution of this State.”); Utah Code Ann. § 76-7-301.1 (1991) (“[L]ife founded on inherent and inalienable rights is entitled to protection of law and due process; and . . . unborn children have inherent and inalienable rights that are entitled to protection.”).
1. **Deterrence**

One of the purposes of imposing punishment on those who violate the law is deterrence, both "special" or "specific" deterrence and "general" deterrence. Specific deterrence arises when a particular actor who has been punished for a crime refrains from committing the illegal act again to avoid being punished once more. General deterrence works to prevent others from committing the crime because they fear the punishment that would be imposed on them were they caught.

If fetuses are human beings and aborting them is akin to murder, as proifers assert, then the criminal law should do all it can to deter women from having illegal abortions in order to protect unborn children. Subjecting such women to the possibility of jail terms or fines for their actions would surely prevent some from going through with the procedure.

Some argue that the widespread incidence of back-alley abortions before *Roe* indicates that few women are deterred by the criminalization of abortion and hence that enabling abortion clients to be prosecuted would save very few fetuses. Such reasoning is imperfect because, as previously noted, in about only a third of the forty-six states where abortion was illegal in the years before *Roe* were clients subject to prosecution. In most, only abortion providers faced criminal liability.

Another argument against the deterrent effect of subjecting abortion clients to prosecution is that because abortion is a consensual crime, its proscription is almost impossible to enforce and hence criminalizing it prevents few who are intent on going through with an abortion from doing so. This argument is not particularly convincing for several reasons. First, many crimes, such as prostitution and drug offenses, are consensual activities, but nonetheless those who engage in them are frequently arrested and prosecuted. Further, in the years before *Roe*,

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63. *Id.*
64. *Id.*
65. *See, e.g., Mohr, supra* note 49, at 254-55. According to Mohr, "[B]y the late 1960s estimates of the number of illegal abortions performed in the United States each year ranged from 200,000 to 1,200,000." *Id.* In 1974, the first full year after the *Roe* decision, 763,476 legal abortions were reported to the Center for Disease Control in Atlanta. *Id.* at 315 n.15. Because several states had not yet implemented reporting systems until midway through the year, the figure is probably low by approximately 100,000. *Carolina Population Ctr., Liberalization of Abortion Laws: Implications* 2 (Abdel R. Omran ed., 1976).
abortion providers were frequently tried for the crime of abortion, and even a few abortion customers were prosecuted as well. It is not difficult to imagine a father or grandparent of an unborn child who opposed the woman’s decision to have an abortion turning in the woman or the doctor—or both—to the authorities in order to prevent the procedure. Once an illegal abortionist were arrested, his or her files could be seized by the police and used to help prosecute past clients. In short, while the fact that illegal abortion is a consensual crime might make it harder to prosecute those who engage in it, it certainly does not make it impossible.

Hence, although it may be difficult to gauge the deterrent effect of threatening women who have illegal abortions with criminal sanctions, the practice would almost assuredly prevent at least some fetuses from being aborted.

Of course, abortion would undoubtedly remain legal in some states, so women in states where it had been banned could simply travel to a “free” state to undergo the procedure. For example, “[I]n the 2 1/2 years preceding Roe, nearly 350,000 women traveled for that reason to New York.” However, any state that has declared fetuses to be persons could conceivably forcibly restrain a pregnant woman from “kidnaping” the unborn child and taking it to another state to “murder” it there. As Laurence Tribe points out, “[T]he possibility is not altogether farfetched. In the years before Roe at least one state in fact prosecuted a travel agent for arranging out-of-state trips for women who wanted to have abortions.”

The Court has recognized a constitutional right of “all citizens [to] be free to travel throughout the length and breadth of our land.” Thus, in order to withstand a challenge to any such law, a state would have to show that saving fetuses’ lives constituted a compelling interest that could be accomplished only by restricting a woman’s right to travel across state lines. Even were the state unable to do so, many women would be prevented from traveling outside their state for an abortion for a variety of personal reasons, including youth, lack of funds, and ill

67. See generally 1 AM. JUR. 2D Abortion (1962) (listing cases involving prosecutions of illegal-abortion providers and of a few patients).
68. Savage, supra note 46, at A3.
70. TRIBE, supra note 5, at 127 (quoting Brief for 608 state legislators from 32 states as amicus curiae for Appellees, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (No. 88-605)). In early 1993, a science fiction film with a similar plot was released to theaters across the country. RAIN WITHOUT THUNDER (Orion Classics 1993).
health. Consequently, the deterrent effect of providing for the prosecution of women who undergo illegal abortions would be greatest upon them. They tend to be among the least politically powerful and active, however, so it is unlikely that the threat of prosecution would spur them to mobilize to overturn or lobby against antiabortion laws. Nonetheless, the specter of prosecution—what one woman has called “the prospect of bleeding women carted off to jail by men in suits”\(^\text{72}\)—would remain for all women and might well serve as the spark to turn the country’s prochoice sentiment into action.

The prevalence of illegal abortions in the years before Roe gives rise to another deterrence-related reason why prolife forces should insist that women who have illegal abortions be subject to prosecution. Because illegal abortionists before Roe were not licensed or regulated by the state in any way, they were often incompetent, untrained laypeople working under dangerously unsanitary conditions.\(^\text{73}\) Before the Court’s decision in Roe, the leading cause of maternal mortality in the United States was illegal abortions.\(^\text{74}\) Among the most dangerous were self-induced abortions, which all but one of the recent statutes criminalizing abortion encouraged by exempting women who performed abortions on themselves from any liability.\(^\text{75}\) Terri Bartlett, executive director of Planned Parenthood of Louisiana, said that the only way a woman would be able to have a legal abortion in that state if its antiabortion law went into effect would be to “induce it herself and then seek medical treatment. In that case . . . the person providing the treatment could not be prosecuted.”\(^\text{76}\) Of course, because self-induced abortions are more dangerous than those administered by a third party—even an illegal abortionist—the statutes arguably increased the risk of serious harm for women.

If prolife forces seek to safeguard all human life, they should want to protect women as well as their unborn children from untimely death. Threatening women with the possibility of criminal liability should they


\(^{73}\) Davis, *supra* note 47, at 89; Mohr, *supra* note 49, at 255.

\(^{74}\) Davis, *supra* note 47, at 99. Molly Yard, the former president of the National Organization for Women, has been quoted as saying that illegal abortion “was the leading cause of death among women before Roe v. Wade.” Harriet Chiang & Nanette Asimov, *Both Sides of Abortion Debate Galvanized by Webster*, S.F. CHRON., June 30, 1990, at A12 (emphasis added).

\(^{75}\) See LA. REV. STAT. ANN. § 14:87 (West 1991) (“It is intended that the usual rule, which also prevails in Louisiana, to the effect that the female herself is not criminally responsible, shall continue.”); UTAH STAT. ANN. § 76-7-314 (1991) (“[A] woman who seeks to have or obtains an abortion for herself is not criminally liable.”). But see 9 GUAM CODE ANN. § 31.20 (1990) (“‘Abortion’ means the purposeful termination of a human pregnancy after implantation of a fertilized ovum by any person including the pregnant woman herself.”).

have an illegal abortion may deter some women from doing so. Therefore, legislation that calls for punishment of women who undergo illegal abortions or perform them on themselves would almost certainly have the effect of saving some women's and fetuses' lives.

2. Moral Accountability

Another of the primary purposes of the criminal law is to impose sanctions on moral transgressors. In the words of one scholar, criminal sentences and convictions serve "as an affirmation and re-enforcement of moral standards." The purposeful, unwarranted taking of innocent life, which prolife forces contend abortion is, is universally condemned and subject to severe punishment. Even those found to have killed unintentionally or involuntarily are often convicted of a crime and sentenced to some penalty.

Prolife forces are fond of referring to abortion patients as "victims" of the procedure, along with the fetuses they help destroy. As several commentators have noted, that view is nonsensical: "There is no logical theory of criminality that can brand an activity as criminal while labeling someone who willfully procures that activity as a 'victim.'" Anna Quindlen has written that the refusal to impute moral culpability to illegal-abortion clients is part of the prolife forces' systematic patronization of women: "Those opposed to legal abortion dance around the inevitability of [criminal liability for abortion clients] by characterizing the woman as 'the other victim,' sold a bill of goods, temporarily insane by the very nature of the choice she made. It is a view that is condescending and insulting."

If abortion truly is the crime prolife forces assert it is, then a civilized society and its system of criminal law demand that those who are instrumental in bringing it about be punished. "These provisions to punish the woman . . . fulfill[ ] the need of some to punish the aborting woman for her immoral transgression against society." Branding abortion as murder and yet neglecting to penalize some of the crime's prime perpetrators, the women who have abortions, can be seen as merely

79. Lohr & Linton, supra note 51, at C16.
81. Quindlen, supra note 72, at A25.
82. RODMAN ET AL., supra note 50, at 175.
the codification of a truly empty promise, one whose vision is belied by the people's day-to-day experience, one that is utterly at variance with the substance of the law in which it is contained; it can take an unacceptably high toll on confidence in the rule of law and in the integrity of the legal system as a whole.83

3. Facilitating Prosecution and Conviction of Abortion Providers

Even if it is conceded for the sake of argument that the law should seek to punish only those who perform illegal abortions and not their clients, prolife forces should advocate providing for the criminal prosecution of customers as a way to facilitate the conviction of illegal-abortion performers.

If women were not criminally liable they could be subpoenaed to testify against abortionists, but the only sanction they would face for failing to do so would be contempt of court. The threat of being prosecuted along with the abortionists for their much more serious crime would be more likely to ensure women's cooperation. Nonetheless, it is true that were women who had unlawful abortions subject to prosecution, they could almost always refuse to testify in any criminal proceeding against abortion providers on the ground that their testimony might tend to incriminate them.84 This consideration brings the matter around full circle to about where it would be if the woman were not considered a criminal in the first place . . . . [But] there may be some . . . practical advantage to the prosecution in being able to coerce cooperation from the woman by threatening to prosecute her if she does not cooperate, while promising her immunity from prosecution if she cooperates.85

Hence, prolife advocates should seek to enact laws that allow for the prosecution of illegal-abortion clients in order to enable law enforcement agents to prosecute underground abortionists more successfully.

4. Maintaining Logical Consistency in the Law

Federal and state laws are rife with inconsistencies, both with each other and internally. But fairness and "justice" dictate that uniformity in the law—that like actors be treated alike—should be one goal of a civilized society. Despite the historical reluctance of the common law to

83. TRIBE, supra note 5, at 73-74.
84. U.S. CONST. amend. V.
85. George, supra note 66, at 382.
impose criminal sanctions on women who have procured illegal abortions, our nation’s criminal justice system has frequently penalized actors in other analogous legal situations.

In contract crimes, the actual perpetrator and the person who paid to have the crime committed are subject to equal liability under the law. People who patronize prostitutes as well as the prostitutes themselves are subject to prosecution, and while manufacturers and sellers of obscene materials do face criminal liability not imposed on those who keep the same materials in the privacy of their own home, significantly, the exemption does not apply to private citizens who harbor child pornography. Finally, in a still-developing area of the law, women are increasingly being prosecuted for endangering their fetuses through excessive drug or alcohol use or other potentially injurious behavior, albeit so far with little success.

a. Contract killings, solicitation, and liability for nonprincipal actors: If human life begins at conception, as prolife legislators have declared in the antiabortion laws recently passed in several states, the woman who has had [an abortion] has ordered up a contract killing and “is exactly like a woman who hires a contract killer to knock off her child.” Such talk may be hyperbolic, but every state in the country holds someone who has arranged for another party to kill a third person just as guilty of murder as the person who actually committed the slaying. When money changes hands, as it almost always does when a woman solicits someone to perform an illegal abortion on her, the penalties may increase for the party who has gained financially. At least one state court has held that the financial-gain aggravating circumstance may be applied to defendants who paid to have someone killed as well as to those who received remuneration as a result of the death, which by analogy would increase the penalties for a woman who pays an abortionist to operate on her.

86. See supra note 61 and accompanying text.
87. Quindlen, supra note 72, at A25.
88. Instant Philosopher, supra note 80, at 4.
89. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 486 (2d ed. 1986); Kinsley, supra note 7, at 4.
91. See People v. Freeman, 238 Cal. Rptr. 257 (Ct. App. 2d Dist. 1987), which was followed by a different California appeals court in People v. Singer, 275 Cal. Rptr. 911 (Ct. App. 1st Dist. 1990).
Furthermore, if the party hired to commit the killing backs out before the deed is done, he or she may escape all liability while the one who sought to arrange the murder is still guilty of the crime of solicitation. Thus, if antiabortion laws were construed according to the general principles of criminal law, a woman who asked someone to perform an abortion on her would be guilty of a crime even if the act were never carried out.

Finally, assuming arguendo that a woman who voluntarily undergoes an illegal abortion should not be considered as morally or legally culpable as the abortionist, the prolifers' "synthesis on abortion would require throwing out all the standard doctrines of criminal law relating to accessories, accomplices, coconspirators, etc.," most of which would subject the woman to lesser penalties but nonetheless criminalize her actions. Under all of the criminal law's traditional principles of party liability, a woman who solicits or voluntarily undergoes an illegal abortion should be guilty of a crime.

b. Prostitution and other sex-related crimes: An examination of the laws regulating prostitution provides insight into how one might expect—and desire, if logical consistency in the law is a goal—illegal abortion to be criminalized, because the two transactions share many attributes. Both generally require at least two participants, one who provides a service and another who pays for it. In each context, one of the actors is usually a man and the other a woman, although the genders of the roles are reversed: Prostitutes (the service providers) are overwhelmingly female and their customers male, while abortion customers are always women and those who provide the service to them often men. Finally, prostitution and abortion each consists of the undertaking of an intimate act linked to or directly involving sex.

Until recently, "anti-prostitution statutes were rarely, if ever, used to punish a prostitute's clients." In the past few decades this trend has reversed itself, primarily because of stepped-up efforts to wipe out vice and because such selective prosecution has increasingly come under

92. LAFAVE & SCOTT, supra note 89, at 486.
93. Instant Philosopher, supra note 80, at 4.
94. The argument that a state could justify exempting women from all criminal liability for illegal abortions on the ground that women have a fundamental interest in personal autonomy that trumps fetuses' fundamental interest in having their "murderers" punished and their would-be murderers deterred is explored infra notes 178-80 and accompanying text.
95. Of course, abortion can be self-induced. See supra notes 75-76 and accompanying text.
USING SCARE TACTICS TO PRESERVE CHOICE

Today many jurisdictions, including Louisiana and Utah, expressly provide in their penal codes that those who solicit prostitutes are guilty of a crime. In addition, statutes that allow for the prosecution of those who solicit an act of prostitution—a provision originally intended to cover streetwalkers themselves—have recently been held by several state courts to apply to customers as well. As a last resort, prostitute patronizers can be prosecuted under laws proscribing fornication.

For all practical purposes, then, those who patronize prostitutes are now uniformly subject to prosecution throughout the nation. This development has come about in the interests of deterrence, fairness, gender equality, consistency in the law, and prosecutorial flexibility, all concerns that are present in the illegal-abortion context.

Furthermore, the silence over laws regulating prostitutes who are controlled by pimps or other panderers makes clear that one of the prolife forces' main arguments justifying the exemption from criminal liability of women who have illegal abortions—that they too are "victims" of the procedure and of the abortionist—is pretextual. Many female prostitutes are lorded over by pimps, male companions who lure the women onto the street and into the trade, take all or part of their earnings, often supply them with drugs, and frequently physically abuse them. Yet there is no widespread call—particularly not from prolife forces—to treat such prostitutes as "victims" and offer them understanding instead of a jail term or fine, even though they are far less in control of their actions than adult women who voluntarily engage in sexual intercourse, become pregnant, and actively seek out someone to perform an abortion on them. In fact, two of the main groups calling for the decriminalization of prostitution and the protection of prostitutes are

98. Id.
101. Id. § 11 n.44.
102. DECKER, supra note 96, at 107-08. Such similar prosecution by analogy would usually not be possible in the abortion context because most antiabortion laws expressly exempt abortion patients from all criminal liability. See supra note 75 and accompanying text. Therefore, women who underwent illegal abortions could not be prosecuted under murder statutes.
103. See supra notes 6-7, 79-81, and accompanying text.
104. DECKER, supra note 96, at 240.
105. A vocal minority has through the years called for the decriminalization and even the legalization of so-called victimless crimes, including prostitution. Among these proponents are many abortion supporters. See, e.g., EDWIN M. SCHUR & HUGO ADAM BEDAU, VICTIMLESS CRIMES: TWO SIDES OF A CONTROVERSY (1974); David A.J. Richards, Commercial Sex and the Rights of the
feminists and prostitutes themselves, some of the primary supporters of abortion rights. 106

Women who voluntarily engage in federally regulated, illegal sex-related activities have traditionally been considered victims of crime and have not been subject to prosecution. Under the terms of the Mann Act, 107 anyone who knowingly transports another across state lines for the purposes of prostitution or any other sexual activity chargeable as a criminal offense has himself or herself committed an offense, as has anyone who aids and abets such a person. 108 In United States v. Gebardi, the Supreme Court held that a woman who had voluntarily accompanied a man across state lines for the purpose of engaging in illicit sexual activities could not be prosecuted under the statute, 109 and other courts have referred to such women as victims. 110

There are several reasons, however, why analogies to the enforcement of the Mann Act offer little support for prolife arguments that women who pursue illegal abortions should be exempt from criminal liability. First, the Mann Act has become increasingly irrelevant in the administration of criminal justice in the years since Gebardi. Whereas


Tribe finds the prolife forces' claims that they are looking out for the interests of helpless "victims" to be dubious. He points out that many so-called proliers fought vigorously in 1977 for passage of the Hyde Amendment, which limited indigent women's access to federal funds for abortions. This demonstrated a callous disregard for the physical well-being of those women, Tribe argues, because the Amendment's backers insisted that it was unnecessary to write an exception into the bill for those mothers whose lives were threatened by their pregnancy on the ground that the doctrine of self-defense is also applicable here." TRIBE, supra note 5, at 157 (quoting Sen. Jesse Helms (R-N.C.)).

Perhaps commentator Sally Quinn said it best when she wrote,

Often that decision to abort is nothing less than a pro-life decision. Anyone who has walked through a neonatal ward in a hospital and seen the half-pound "babies" with dark glasses on and tubes coming out of everywhere, or crack babies, AIDS babies, abandoned babies and babies who will grow up to be retarded or emotionally disturbed, can't help wondering about the life they will live. It seems to me that those who are pro-choice may know what lies in store for these children—and care more about life—than many of those who call themselves "pro-life."

Sally Quinn, Perspective on Abortion: Only the Easy Answers Are Painless, L.A. TIMES, Apr. 5, 1992, at M5.

108. Before 1986, the statute prohibited transporting a woman (no mention was made of men) across state lines for a wider range of illicit sexual purposes, including debauchery. This was changed in the Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 5(b)(1), 100 Stat. 3510, 3511.
110. 63A AM. JUR. 2D PROSTITUTION § 38 n.8 (1984).
ninety-nine criminal cases were commenced in U.S. district courts in fis-
cal year 1966 for violations of the Act, by 1977 the total had dropped to
twenty.\footnote{111} By the next year, such prosecutions had dwindled to the point
that the Administrative Office of the U.S. Courts no longer separately
categorized them.\footnote{112} The Mann Act's protective, almost patronizing
stance toward women and their criminal culpability, or lack thereof,
reflects an outmoded view of another era and does not represent current
law enforcement goals.\footnote{113}

Further, \textit{Gebardi} itself recognized that there are "possible instances
in which the woman might violate the act,"\footnote{114} and many subsequent
prosecutions have been of women who voluntarily accompanied men
across state lines for illicit purposes.\footnote{115} One of the main ways the
\textit{Gebardi} Court said a woman could implicate herself in the crime, abro-
gating her presumptive immunity, would be to spend money in further-
ance of it.\footnote{116} In the illegal abortion context, money almost always
changes hands from the pregnant woman to the abortionist.

In virtually all modern-day policing of consensual sex-related
Crimes, federal and state, the law punishes participants on both sides of
the transaction. The only time any sort of exemption from criminal lia-
\textit{bility is recognized for those who \textit{voluntarily} partake in such proscribed
activities is when the consent is deemed to be invalid because the actor
was under age, as in statutory rape prosecutions, or otherwise incompe-
tent.\footnote{117} In order to maintain a logical consistency in the law, competent
adult women who voluntarily undergo illegal abortions should be subject
to criminal liability.

c. \textit{Sale and possession of obscenity:} Until recently, analogies to the
law governing the sale and possession of obscene materials offered little
support for arguments that illegal-abortion customers as well as provid-
ers should be subject to criminal liability. Sellers and other distributors

\footnote{111} Administrative Office of the U.S. Courts, Criminal Statistical Tables, tbl. D2
\footnote{112} Id.
\footnote{113} See infra part III.A.4.d.
\footnote{114} 287 U.S. at 117.
\footnote{115} See generally Marlene D. Beckman, Note, \textit{The White Slave Traffic Act: The Historical
enforcement of the Mann Act have shifted to the point that the statute is now used primarily to
police the morals of women rather than to protect them from commercial sexual exploitation, as was
the statute's original intent).
\footnote{116} See 287 U.S. at 117.
of "obscene" materials have long been vulnerable to prosecution,\textsuperscript{118} while those who possess the same items in the privacy of their home are generally constitutionally exempt from any sort of criminal liability.\textsuperscript{119}

In 1990, however, the Supreme Court carved out an exception that has significant ramifications for the discussion of whether women who procure illegal abortions should be subject to prosecution. In \textit{Osborne v. Ohio},\textsuperscript{120} the Court held that a state statute prohibiting the private possession of child pornography—whether or not it was obscene—was constitutional because "the state’s interest in protecting children from the harm resulting from the possession of child pornography far outweighed the protection of first amendment interests."\textsuperscript{121} Many states have similar laws, including Louisiana and Utah.\textsuperscript{122}

Thus, when the interests of children are concerned, the Court has found that compelling reasons exist for a state to criminalize an activity that is not usually or traditionally illegal for certain actors—in this instance, those who view pornographic materials in their own home. Abortion could be outlawed nationally or in some states on the grounds that human life begins at conception and fetuses are therefore entitled to the Fourteenth Amendment’s guarantee of "life."\textsuperscript{123} If so, deterring women from having abortions—that is, from killing unborn children—would certainly be a sufficiently compelling reason to subject abortion customers to criminal liability despite their traditional exemption.

d. \textit{Fetal endangerment:} In the civil law arena, courts have long held that fetuses have interests that deserve to be recognized under some circumstances. A New Hampshire court has ruled that a fetus is a "household resident" entitled to collect on an insurance policy, and the Louisiana legislature has legally defined fertilized ova as fully formed human beings.\textsuperscript{124}

Sometimes, the fetuses’ interests have been held to trump the mothers’. Tort actions have been sustained on behalf of fetuses who were injured in the womb, by either their mother or a third party, and family

\textsuperscript{118} Roth v. United States, 354 U.S. 476 (1957).
\textsuperscript{120} 495 U.S. 103 (1990).
\textsuperscript{122} LA. REV. STAT. ANN. § 14:81.1 (West 1992); UTAH CODE ANN. § 76-5a-1 (1990).
\textsuperscript{123} U.S. CONST. amend. XIV, § 1.
\textsuperscript{124} FALUDI, supra note 59, at 423.
courts have removed newborns from their mothers' custody upon evidence that the women used drugs or alcohol during their pregnancy.\textsuperscript{125} Several states have recently amended their child neglect laws to encompass drug or alcohol use by expectant mothers.\textsuperscript{126} As Tribe points out, such actions "suggest[] that a woman's conduct \textit{during pregnancy} may result in her loss of custody of her child \textit{after it is born}," even though she may since have stopped engaging in the objectionable behavior.\textsuperscript{127}

Recently, states have begun to prosecute women under existing \textit{criminal} statutes for endangering their fetuses, usually by ingesting drugs during pregnancy. Although the first such charges appear to have been brought—unsuccessfully—by prosecutors in California in 1977,\textsuperscript{128} the number of these prosecutions greatly increased after the Court handed down its decision in \textit{Webster}.\textsuperscript{129} That case may have encouraged such prosecutions because in it the Court looked favorably upon the state's interest in protecting "potential human life," and the Court referred frequently to the "unborn child," the terminology for fetuses favored by the prolife movement.\textsuperscript{130} A year after the ruling, the National District Attorneys Association "sponsored a two-day workshop to encourage prosecutors to wage legal war on pregnant women who took drugs."\textsuperscript{131}

Their efforts finally paid off—at least temporarily—in 1991, when a state appeals court for the first time upheld the conviction of a woman whose baby was allegedly subjected to potential harm by drugs the mother ingested during pregnancy.\textsuperscript{132} Jennifer Johnson had been charged under a Florida statute that outlawed the distribution of controlled substances to minors and was convicted on the theory that some of the cocaine she used during labor in each of her pregnancies passed to

\begin{enumerate}
\item \textsuperscript{125} See James Denison, Note, \textit{The Efficacy and Constitutionality of Criminal Punishment for Maternal Substance Abuse}, 64 S. CAL. L. REV. 1103, 1114 n.81 (1991) (citing proceedings from across the country in which judges liberally construed statutes protecting children to include the unborn).
\item \textsuperscript{127} TRIBE, supra note 5, at 236.
\item \textsuperscript{128} Reyes v. Superior Court, 141 Cal. Rptr. 912 (Ct. App. 1977).
\item \textsuperscript{129} Catherine Foster, \textit{Fetal Endangerment Cases Increase}, CHRISTIAN SCI. MONITOR, Oct. 10, 1989, at 8.
\item \textsuperscript{130} Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).
\item \textsuperscript{131} FALUDI, supra note 59, at 429.
\item \textsuperscript{132} Johnson v. State, 578 So. 2d 419, 424 (Fla. Dist. Ct. App. 1991) [hereinafter \textit{Johnson I}], \textit{overruled by} 602 So. 2d 1288 (Fla. 1992) [hereinafter \textit{Johnson II}].
\end{enumerate}
the infants after they were born but before their umbilical cord was cut.\textsuperscript{133}

In July 1992, the Florida Supreme Court overturned Johnson's conviction.\textsuperscript{134} An examination of the appellate court's decision, however, might elucidate the thinking behind fetal endangerment prosecutions and their implications in the abortion context. Technically the court did not recognize any right of the fetus itself, to be born drug-free or otherwise. The infant's rights came into existence only at birth. With an abortion, the fetus almost never emerges alive from the mother, so any analogy of the appeals court's decision to the abortion context is arguably inapposite.

There are several reasons why the case has ramifications for the battle to outlaw abortion, however. The language the court used implied that, despite the narrow reasoning upon which it based its holding, it was concerned with the interests of the fetus before birth. "Appellant voluntarily took cocaine into her body, knowing it would pass to her fetus," wrote the majority, \textit{not} "to her baby after birth."\textsuperscript{135} And the decision arguably stood for the broader principle that a woman's behavior while pregnant could subject her to criminal liability for its potential adverse impact on her child—whether born alive, stillborn, or aborted.\textsuperscript{136} This is especially true when the decision is considered alongside several others that have upheld feticide statutes imposing homicide penalties on third parties whose conduct resulted in the death of a viable fetus before live birth.\textsuperscript{137}

\begin{itemize}
\item \textsuperscript{133} \textit{Id.} Other state appellate courts subsequently rejected the reasoning in the Johnson case, including one in Florida. \textit{See}, e.g., State v. Gethers, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991); People v. Hardy, 469 N.W.2d 50 (Mich. Ct. App. 1991); State v. Gray, 584 N.E.2d 710 (Ohio Ct. App. 1992).
\item \textsuperscript{134} \textit{Johnson II,} 602 So. 2d at 1288.
\item \textsuperscript{135} \textit{Johnson I,} 578 So. 2d at 420.
\item \textsuperscript{136} In 1989, a state for the first time ever charged a woman with manslaughter for allegedly killing her fetus by using drugs (specifically cocaine) during pregnancy. The charges were ultimately dropped after an Illinois grand jury refused to indict the woman. \textit{People v. Green, in REPRODUCTIVE FREEDOM PROJECT, AMERICAN CIVIL LIBERTIES UNION, LEGAL DOCKET 217 (Charlotte Levine & Norma Davenport eds., 1991). In the spring of 1992, California filed second-degree murder charges against a Hollister woman whose baby was stillborn shortly after she allegedly used cocaine and alcohol. After a Hollister judge refused to dismiss the case, the ACLU, which is representing the defendant-mother, said it would appeal. Philip Hager, \textit{Case Against Mother Spurs Debate on Fetal Murder}, L.A. TIMES, June 17, 1992, at A1, A18.
\item \textsuperscript{137} \textit{LaFAVE & SCOTT, supra note 89, at 608-09. LaFave and Scott note, however, that "[t]here is a trend away from feticide statutes." Id. at 609 n.33.}
\end{itemize}
The swelling tide of criminal prosecutions of mothers for their conduct while pregnant has given rise to another legal trend with implications in the abortion arena. In the past several years, many federal and state legislators have attempted, so far unsuccessfully, to pass bills that would directly subject women who abuse drugs or alcohol during their pregnancy to criminal liability. To date, such women have been prosecuted under existing laws governing child abuse, drug trafficking, contributing to the delinquency of a minor, involuntary manslaughter, and murder.

Ironically, much of the opposition to these legislative proposals comes from prolife advocates, who fear that drug abusers will simply resort to abortion rather than risk prosecution for endangering their fetuses. "I felt, I still feel, there has to be some punishment if someone harms an innocent life but now I'm fearful that more of these women will get abortions," said an Illinois state legislator who had considered and then rejected introducing a fetal-abuse bill with criminal penalties. If abortion itself were criminalized, it is likely that much of this opposition would dissipate and such bills would have a greater chance of passing. Otherwise, in the words of Sandra Garcia, a psychologist at the University of South Florida who testified on Jennifer Johnson's behalf, "[a] judge can hold you liable for the prenatal care of the fetus as if it is a separate person but during the lunch break you could leave the courthouse and have an abortion."

As the law now stands, it is very difficult to prosecute a woman for fetal endangerment successfully, which seems to weigh against arguments that women who have illegal abortions should be subject to criminal liability. But the trend across the country is toward greater acceptance and even pursuit of the criminal prosecution of women whose behavior endangers their fetus, although so far the movement has met with little success. If abortion were criminalized, however, these efforts might pay off. If the trend does indeed continue and women are routinely subject to criminal liability for endangering their fetus, then logic

138. FALUDI, supra note 59, at 423; Denison, supra note 125, at 1107 n.22.
139. See Foster, supra note 129, at 8; supra note 136.
140. Johnson v. State, 578 So. 2d 419, 426-27 (Fla. Dist. Ct. App. 1991) (Sharp, J., dissenting), overruled by 602 So.2d 1288 (Fla. 1992); Foster, supra note 129, at 8 (quoting Walter Connolly Jr., a lawyer for the National Association for Peri-Natal Addiction Research and Education, as saying that "[i]f you criminalize this type of activity, it will increase the number of abortions substantially").
142. Id.
dictates that illegal-abortion clients should face criminal charges as well.\textsuperscript{143} If women are held criminally liable for harming their fetuses, then surely they must face criminal sanctions for killing them.

**B. THE PROCHOICE PERSPECTIVE**

All of the concerns discussed earlier—deterring abortion, punishing moral wrongdoing, facilitating prosecution of lawbreakers, and maintaining logical consistency in law enforcement—dictate that prolife forces should support criminal liability for women who have illegal abortions.\textsuperscript{144} The reasons prolife advocates usually give for not doing so—that the woman is herself a victim or that she must be exempted from liability to secure her testimony against the abortionist—have been shown to be logically and practically insupportable.\textsuperscript{145}

1. Why Antiabortion Forces Do Not Want Women Punished

Though they may be loath to admit it, most antiabortion activists eschew advocating criminal liability for women who have illegal abortions no matter how much they like the idea because they recognize—

\textsuperscript{143} This Note in no way advocates that women who abuse drugs or engage in other potentially hazardous behavior while pregnant should be subject to criminal liability. It merely takes notice that such prosecutions represent a growing trend in law enforcement and argues that if criminal liability for pregnant women who engage in such behavior becomes the rule rather than the exception, then logically even more compelling reasons exist to prosecute women who have illegal abortions, since they are killing their fetuses rather than merely subjecting them to potential harm.

I believe, in the words of Laurence Tribe, that the growing interest in the protection of the fetus at a time when child abuse protections are still undertaken only in the most extreme and unusual circumstances...[stems in part from the fact that] society is not really treating pregnant women as “parents” of “unborn” children but rather is trying to exert a kind of power over women who happen to be pregnant that it does not wish to exert over parents in general.

\textsuperscript{144} See supra part III.A.

\textsuperscript{145} Id. See also Lohr & Linton, supra note 51, at C16 (“If the woman were also charged, she could not be forced to testify against the abortionist. ... Traditionally, women who have undergone abortions have been considered second victims of the crime.”); Colman McCarthy, When Pro-Choice Is No-Choice, WASH. POST, July 20, 1991, at A23 (“A large grouping of people who believe that abortion is taking a life don’t want to criminalize those involved because they believe that arresting, fingerprinting, convicting and imprisoning people is not an effective or humane way to deal with anyone who is violent in any situation.”).
like former President Bush—that such a position is politically untenable. It is precisely for this reason that prochoice forces may want to pressure prolife legislators to make abortion customers criminally liable in any bills they propose outlawing abortion.

Recent history has shown that measures criminalizing women's actions in the abortion arena are too unpopular to gain enough support to be passed into law. Consider, for example, Bush's "balanc[ing] himself on the point where ambiguity intersects with hypocrisy and schizophrenia" by refusing to endorse criminal penalties for women who have illegal abortions. In 1990, a prochoice legislator in Louisiana tried to amend the state's proposed bill that banned most abortions to include criminal liability for clients as well as providers. "The prolife majority saw this—quite accurately—as sabotage and it got only two votes."

In a more telling example, an attorney for the ACLU's Reproductive Freedom Project, Janet Benshoof, almost waylaid the Utah legislation by publicly pointing out a loophole in it that would allow women who were convicted of violating the law to be put to death by firing squad. After the ACLU took out a full-page ad in the New York Times proclaiming, "In Utah, they know how to punish a woman who has an abortion. Shoot her," the Utah legislature met in special session to amend the law to expressly exempt women from any criminal responsibility.

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146. See supra notes 1-6 and accompanying text. Early in his presidency, Bill Clinton sought to use the issue of criminal liability for women who have abortions to his advantage at a public forum much like one where George Bush was tripped up by the subject, but his efforts proved no more successful than his predecessor's. At a "town meeting" in Chillicothe, Ohio, in February 1993, a young man asked the President how he could condone the murder of children through abortion, to considerable applause. Hoping to catch the teenager off-guard, Clinton responded, "Do you believe that women who have abortions should be tried for first-degree murder?" When the young man answered, "Yes, I do"—to no applause—Clinton went on the answer the question directly. Muriel Dobbin, President on Spot on Road, SACRAMENTO BEE, Feb. 20, 1993, at A1.

147. In the words of one prolife citizen who wrote to the Washington Post to express his views, "[I]t does not take much analysis to realize that [antiabortion activists'] failure to call for criminal penalties for women who solicit illegal abortions results from] a matter of political practicality and not because they are unsure of the correctness of their belief. . . . It would be foolish for such people to contend that they must have all or nothing."

Kolimas, supra note 9, at B6. In the same newspaper, commentator Judy Mann called Bush's waffling on the abortion-penalties issue "politics, and it's the most bloodless kind of politics to come along in a very long time." Mann, supra note 1, at B3.

148. Instant Philosopher, supra note 80, at 4.

149. Kinsley, supra note 7, at 4.

150. In May 1992, the Reproductive Freedom Project severed its ties to the ACLU, rechristened itself the Center for Reproductive Law and Policy, and installed Benshoof as head of the new entity. Abortion-Rights Team to Leave ACLU to Form Independent Group, ST. LOUIS POST-DISPATCH, May 24, 1992, at 11D.


152. Id.
liability.153 Anna Quindlen had predicted the Utah legislature's actions: "In its refurbished form, [the Utah law] will likely exempt women from prosecution, and not because [women] are victims. It will do so for the very cynical and political reason that you cannot sell a law that does otherwise to the public."154

"That was a dramatic, creative, and provocative thing to do," said another ACLU lawyer of Benshoof's tactic. "It's something that many other people would not do. [Benshoof] was accused of being inflammatory, but it was effective and it was brilliant."155

The tactic was effective, but only in a limited way: by delaying the law's implementation. Ultimately it had no impact on whether a woman had the right to an abortion in Utah because the prochoice activists allowed the legislation's supporters to back away from the logical consequences of their contention that human life begins at conception and abortion is therefore murder.

2. The Strategy's Risks for Prochoice Forces

There is, of course, a very grave risk involved for prochoice forces in pursuing the strategy outlined in this Note. Elucidating the hypocrisy and possible unconstitutionality inherent in exempting women who undergo illegal abortions from criminal liability could result not in a weakening of prolife support but rather in increased calls for illegal-abortion patients to be prosecuted. But although that result would be horrible indeed, the likelihood of the strategy backfiring in such a manner is very slim. Prolife forces refrain from publicly seeking criminal liability for abortion patients precisely because they know that to do so would be political and popular suicide:156 Witness George Bush's 1988 gaffe and the Utah snafu. The latter incident is particularly significant because it shows that even in a state conservative enough to give serious consideration to a bill outlawing abortion, there is virtually no support for treating abortion patients under the law in the same way as abortion providers. Furthermore, the strategy outlined in this Note is not an all-or-nothing proposition: It could be implemented in states where support for outlawing abortion is tenuous, and ignored in more conservative parts of the

154. Quindlen, supra note 72, at A25.
156. See supra part III.B.1.
country where there is a more serious risk that the public and state legislators would go along with a law that subjects women who have illegal abortions to prosecution.

Another, albeit less serious, risk involved in making women criminally liable for having illegal abortions is that some women who would otherwise seek out an abortion and who were unable to travel to a state where abortion was legal might be deterred from having the procedure done. As a result, more unwanted babies would be born and the lives of more women would be grievously disrupted.

These negative consequences would be more than mitigated, however, by the fact that such deterrence would undoubtedly save many lives. Illegal abortion is often a very dangerous procedure, and women die as a result of it. Immediately before Clinton's election there were several movements afoot to educate women on how to perform safe abortions on themselves, but they were limited in their reach and would have had to move underground had abortion become illegal again, thereby ensuring that not all women would have been familiar with them. Furthermore, several knowledgeable prochoice activists dispute whether a home abortion can ever be truly safe.

Women and men who care about individual liberty should do all they can to ensure that abortion remains legal. Should the procedure someday become illegal again despite their best efforts, however, it is perhaps in women's best interests—the interest of their own lives—that they be deterred from undergoing unsafe illegal abortions.

If prochoice activists, armed with the arguments explored earlier in this part, were more resolute in their insistence that antiabortion legislation impose criminal penalties on those who undergo the procedure illegally, perhaps the backlash against such proposals would be great enough to block passage of the bills and abortion would remain legal and safe. Such arguments would carry even more force if prochoice strategists could demonstrate that it is unconstitutional to exempt women who

157. The New York Times effectively made the point that abortion-rights advocates can nonetheless ethically and morally seek to prevent illegal abortions should the procedure become illegal again. Slopping Swill in the Senate Race, N.Y. Times, Sept. 9, 1992, at A20 (editorial) (offering support to New York Senate candidate Geraldine Ferraro for her 1975 prosecution of a woman who performed an abortion on her daughter because "the mother's behavior . . . was reckless. She was, quite literally, taking her daughter's life in her hands.").


159. Id.
solicit illegal abortions from criminal liability, a proposition examined in the next part of this Note.

IV. THE CONSTITUTIONALITY OF EXEMPTING WOMEN WHO PROCURE ILLEGAL ABORTIONS FROM CRIMINAL LIABILITY

There are several convincing arguments that it is unconstitutional for a state to exempt women who undergo illegal abortions from criminal liability. When abortion is outlawed on the ground that human life begins at conception, a premise of the early-'90s antiabortion statutes, then fetuses may be presumed to be persons for the purposes of the Fourteenth Amendment's guarantee against the deprivation of life without due process of law. As plaintiffs, fetuses could make several arguments questioning the constitutionality of exempting women from criminal liability for illegal abortions.

In this part, I explore the argument that exempting women from prosecution for having an illegal abortion denies fetuses the equal protection of the law.

160. Some scholars have argued that theoretically a state could define fetuses as persons for the purposes of the Fourteenth Amendment and yet continue to allow abortions on the ground that women's privacy interests trump fetuses' life interests. See, e.g., Stephen L. Carter, Abortion, Absolutism, and Compromise, 100 YALE L.J. 2747, 2760 (1991) (reviewing Tribe's The Clash of Absolutes).

161. The discussion in this part presumes that fetuses are challenging statutes that include them as persons under the Fourteenth Amendment and that they therefore have standing to challenge them. In addition to contesting the exemption of abortion patients from all criminal liability, fetus-persons would also have a legitimate argument that any lesser degree of punishment meted out to those who murder fetuses compared with those who murder other persons violates their constitutional rights.

First and foremost, the state would be compelled to treat all abortion as murder. But abortion in the Anglo-American tradition has always been considered, if a crime at all, then a lesser crime than murder. Whatever reaction anyone might have to the pro-life position that a fetus is a human being, nearly everyone is likely to believe, even if they are reluctant to say so openly, that abortion, particularly early in pregnancy, is not really the equivalent of killing an already born person and that the woman who chooses such an abortion ought not to be punished as a murderer. TRIBE, supra note 5, at 121. Others contend that even if states choose to ban abortion on the ground that human life begins at conception, there is nothing unconstitutional in penalizing murderers who limit their victims to fetuses less harshly than those who kill others. As Stephen Carter has written, "[T]he equal protection clause [does not] require that all murders be treated the same. Many states punish the killing of peace officers in performance of their duties more severely than other killings." Carter, supra note 160, at 2760.

162. Fetuses could also attempt a due process challenge of any antiabortion law exempting abortion clients from criminal liability, arguing that the government owes them an affirmative duty to prosecute their potential murderers so as to deter them. However, in DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), the Court held that "[n]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." The Court went on to say that the Due Process
The Fourteenth Amendment provides that "[n]o State shall make . . . any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." Supra note 160, at 2760. When a law affects a suspect classification of people, the state must justify it under the strict scrutiny standard by showing that it is necessary to achieve a compelling state interest. When no suspect classification is implicated, the state can defend itself against any challenge under the rational basis test merely by showing that the statute is reasonably related to a legitimate government purpose.

A. Fetuses as a Suspect Class

Fetuses would have a better chance at prevailing with an equal protection challenge to a state statute exempting abortion procurers from prosecution if they could show that they constitute a suspect class of people.164 They would have standing as persons for the purposes of the Fourteenth Amendment in any state that outlawed abortion on the ground that human life begins at conception.

To establish themselves as a suspect class, fetuses must show that they are a discrete and insular minority that is politically powerless and has traditionally been discriminated against.165 It has proved difficult to pin down the meaning of "discrete and insular minority." Women, who make up more than half the population,166 have been held by the Supreme Court to constitute enough of a discrete and insular group that heightened scrutiny (albeit something short of strict scrutiny) must be applied to laws that discriminate against them.167 Surely fetuses as a group are both more discrete and more insular than women. In his famous attack on Roe shortly after the decision was handed down, John Hart Ely wrote, "I'm not sure I'd know a discrete and insular minority if I saw one, but confronted with a multiple choice question requiring me to designate (a) women or (b) fetuses as one, I'd expect no credit for the former answer."168

Clause does not function "as a guarantee of certain minimal levels of safety and security." Id. at 195.

In the wake of DeShaney, therefore, a due process challenge by fetuses would be highly unlikely to prevail.

More orthodox analysis also leads to the conclusion that fetuses, once their personhood had been established, would constitute a discrete and insular minority. Although fetuses have very widespread and vocal support in the political process—witness the passage of the antiabortion bills discussed previously in this Note—they themselves are completely powerless to effect any sort of political change. As Ely put it, "[N]o fetuses sit in our legislatures." And the interests of the fetuses' already-born backers are not necessarily always one with their own, or those supporters arguably would not have allowed legislation to be enacted that exempted a class of fetus murderers—illegal-abortion patients—from all criminal liability.

Furthermore, once fetuses were recognized as persons by state law, they could claim that since the Roe decision in 1973 and at various other times in our nation's history, they have faced the ultimate discrimination, denial of their personhood. In a similar fashion, such persistent government refusal to acknowledge the full personhood of slaves played an important role in the ultimate classification of blacks as a suspect class.

Once fetuses have established themselves as a suspect class, the state would have to justify its exemption of abortion customers from criminal liability under strict scrutiny. As discussed earlier, all states subject those who pay to have someone murdered to the same level of criminal liability as those who actually commit the killing. Under the strict

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169. Id. at 933.
170. See Joseph L. Lewis, Homo Sapienism: Critique of Roe v. Wade and Abortion, 39 ALB. L. REV. 856, 891-92 (1975). Lewis argues that personhood should not be the standard according to which we afford minorities protection from discrimination, but that "homo sapienism" should be.

Fourteenth amendment personhood (as interpreted in Roe) is subject to whims of ideologic politics and social rhetorics . . . But Homo sapienness is a truly inalienable status . . . [and] it constitutes an absolute safeguard of human rights which is not logically refutable . . . .

If one group of Homo sapiens can, in the course of history, be singled out and as a class have their right to life and liberty suspended, then in a historic context appropriate to the action, another group of Homo sapiens may be singled out and as a class have their right to life and liberty suspended . . . . [Roe] represents a social Darwinistic doctrine of survival of the fittest, and the Supreme Court has arrogated to itself the rationalizing power to say who is the fittest.

Id.

171. U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons . . . three fifths of all other Persons.")
172. See supra notes 87-91 and accompanying text. For the purposes of this Note, it is irrelevant whether states prosecute those who solicit murder as aggressively as those who actually commit the act. This Note considers only whether women who pay to have illegal abortions should be subject to criminal liability, not whether they should actually be prosecuted.
scrutiny test, any state that explicitly immunized women who obtained illegal abortions from criminal liability would have to show that the practice of treating murderers of fetuses differently from those of all other persons was necessary to further a compelling state interest.

None of the reasons that have traditionally been offered to justify exempting women from liability—that the woman is herself a “victim” or that she must be exempted from liability to secure her testimony against the abortionist—could survive strict scrutiny. As discussed earlier, the notion that a mentally competent adult woman who voluntarily breaks the law is a “victim” is insupportable under all the basic tenets of criminal law, and hence insulating her from criminal liability certainly does not constitute a necessary means to further a compelling state interest. Furthermore, abortion patients’ testimony could just as easily be secured by subjecting them to prosecution and then granting them immunity. Therefore, exempting them from all criminal liability in connection with their abortion is not “necessary” to gain their testimony.

Consequently, any antiabortion statute that exempts abortion patients from criminal liability would not likely survive an equal protection challenge from fetuses if fetuses were held to constitute a suspect class. Although fetuses deemed to be persons by a state would seem to have a better chance than most groups to show they constituted a suspect class, the Court has recently been very reluctant to so classify previously unrecognized groups. Hence, it is important to examine how fetuses’ equal protection challenge would fare under rational basis review.

B. RATIONAL BASIS REVIEW

If fetuses were unable to convince the Court that they should be considered a suspect class, thereby invoking strict scrutiny, the State would still have to justify treating the murderers of fetuses differently from those of other people under the rational basis test—that is, by showing that there is some rational relation between the means selected by the legislature and a legitimate goal it seeks to achieve.

In general, arguments that a statute violates equal protection because it is underinclusive—that is, it penalizes one group of people and not others who are similarly situated—fail because a legislature may act

173. See supra part III.A.2-3.
174. See supra part III.A.2.
175. See supra part III.A.3.
one step at a time to curb a problem. Obviously, however, this rule does not always hold true or the Equal Protection Clause would be completely meaningless; legislatures could always single out any group for regulation as long as doing so advanced some legitimate state goal.

In 1972 the Court invalidated a state statute that allowed contraceptives to be distributed only to married people. In holding that this "underinclusion would be invidious," the Court reasoned,

"The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.

Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected."

It is possible to argue, of course, that the doctors who perform illegal abortions and the women who undergo them are not similarly situated because the women possess an autonomy interest that the doctors do not have. On this ground, the state could argue that it can justly treat abortion patients and abortion providers differently.

Under the rational basis test, the Supreme Court has at different times and in different situations seemed to vary the level of scrutiny it applies, perhaps according to the importance of the interest at stake. The fetuses' interest in seeing their murderers punished in accord with the state's punishment of other murderers would surely be accorded great weight, although the women's autonomy interest would most likely be seriously considered as well. Under any sort of rational basis review with teeth, it is unclear whether either of the two goals usually advanced for exempting women from criminal liability would pass muster.

Exempting abortion patients from liability as a means of extracting testimony from them for use against abortion performers does not satisfy the means/end nexus because, as discussed earlier, it may actually fail to

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compel some women to testify who otherwise would be forced to do so under a grant of immunity if they were subject to prosecution.181

Protecting women because they too are "victims" of the abortion procedure, the other commonly advanced justification for an abortion-patient exemption, might well fail the "legitimate state goal" prong of the rational basis test. As discussed earlier, criminal laws rarely excuse the intentional acts of mentally competent adults.182 Additionally, they don't exempt entire classes of people, only individuals in extraordinary circumstances.183

In sum, even under rational basis review, fetuses considered persons by a state legislature might be able to make a successful equal protection challenge to any statute that banned abortions but exempted from criminal liability those who procured one.

V. CONCLUSION

In the early 1990s, a woman's right to a safe and legal abortion came perilously close to being taken away. Though prolife forces have been at least temporarily stymied in their effort to roll back abortion rights by the election of Bill Clinton to the U.S. presidency, they are unlikely to give up the fight.

History has shown that bills calling for the prosecution of women who undergo illegal abortions are politically unpopular and have rarely been enacted. If prochoice activists can pressure prolife forces to limit their efforts to such bills by showing that it is unconstitutional as well as normatively undesirable to exempt abortion patients from prosecution, perhaps far fewer antiabortion bills will ever pass. Further, women and other choice supporters might be spurred to mobilize more than they would otherwise in order to keep abortion legal everywhere.

The strategy is certainly not entirely without risk. But history also teaches us that even when states have passed laws allowing for the prosecution of abortion customers, they have virtually never enforced them.184 Draconian times just might call for drastic measures.

181. See supra part III.A.3.
182. See supra note 116 and accompanying text.
183. See supra part III.A.4.a.
184. Of course, to dilute their scare-tactic potential, prolife lobbyists could publicize the fact that antiabortion laws penalizing the actions of abortion patients have rarely been enforced and are not likely to be in the future. Nonetheless, women are unlikely to stand idly by and allow behavior in which they often engage to be made criminal.