# *NOTE*

# BURYING THE DEAD: THE CASE AGAINST REVIVAL OF PRE-*ROE* AND PRE-*CASEY*[1] ABORTION STATUTES IN A POST-*CASEY* WORLD

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## INTRODUCTION

On June 29, 1992, the United States Supreme Court handed down its opinion in *Planned Parenthood v. Casey*,[2] a decision decried by both pro- and anti-choice forces as unsatisfactory and unworkable. The Court's majority opinion, which upheld numerous restrictions on the abortion decision while "retain[ing] the outer shell"[3] of *Roe v. Wade*,[4] was written by Justices O'Connor, Kennedy, and Souter; the remainder of the Court submitted a variety of differing opinions. The *Casey* decision failed to provide a clear and workable standard and instead created confusion, anger, and hope among proponents and opponents of choice such that the debate over the fate of *Roe* will continue.

The majority, while refusing to accept the Third Circuit's reasoning that *Roe* was dead,[5] did agree that the "undue burden" standard was appropriate,

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1. "Pre-*Casey* statutes" refers to both those statutes that were passed prior to *Roe* and held invalid under *Roe*'s framework ("pre-*Roe* statutes") and those statutes passed after *Roe* and held invalid under a then-evolving, and now extinct, *Roe* framework. Any such laws that remain on the statute books may be revivable and enforceable under changed standards. For instance, the Court in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), acknowledged that *Casey*'s reformulation of the *Roe* framework altered the holdings in City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) [hereinafter *Akron I*] and Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) and explicitly overturned those decisions. These laws may be revivable if still in existence.

2. 112 S. Ct. 2791.

3. *Casey*, 112 S. Ct. 2855 (Rehnquist, C.J., dissenting).

4. Roe v. Wade, 410 U.S. 113 (1973).

5. The Third Circuit Court of Appeals, in upholding the law, had cited the earlier Supreme Court decisions of Webster v. Reproductive Health Services, 492 U.S. 490 (1989) and Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) as establishing a new standard of review over state regulation of abortion — that of "undue burden" which would invalidate only "severe limitations on the abortion decision." Planned Parenthood v. Casey, 947 F.2d 682, 690, 697 (3d

albeit redefined.[6] Under *Casey*, most restrictions on pre-viability abortions will be upheld as long as they do not create an outright ban or impose a "substantial obstacle"; most post-viability restrictions and even bans will be permitted, provided there are exceptions for the life and health of the woman. Thus, the *Casey* decision gives broad latitude to the states to regulate abortion.[7]

*Casey* has made the November 1992 elections crucial for the future of abortion rights — a change of a single justice could either save or destroy *Roe*. The precarious position of *Roe v. Wade* was best expressed by Justice Blackmun:

> But now, just when so many expected the darkness to fall, the flame has grown bright. I do not underestimate the significance of today's joint opinion. Yet I remain steadfast in my belief that the right to reproductive choice is entitled to the full protection afforded by this Court before *Webster*. And I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light.[8]

All that is needed for *Roe*'s final demise is a single vote. While *Casey* preserved *Roe* in name, the majority effectively stripped it of its greatest protective force by upholding most of the provisions of the disputed Pennsylvania law.[9] The abandonment of *Roe*'s trimester framework and the imposition of the new *Casey* rule will not only lead to a flurry of legislative activity to restrict access to abortion,[10] it will also lead to attempts to resurrect enjoined or

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Cir. 1991). In light of *Webster* and *Hodgson*, the Third Circuit reasoned that women no longer had a fundamental right to choose abortion because *Roe*, 410 U.S. 113, *Akron I*, 462 U.S. 416 and *Thornburgh*, 476 U.S. 747 were no longer the law of the land. *Casey*, 947 F.2d at 697.

6. Justice O'Connor first set forth the undue burden standard in her dissents in *Akron I*, 462 U.S. at 453, 461-64 and *Thornburgh*, 476 U.S. at 828-29. Most statutes would be upheld under the *Akron I* and *Thornburgh* standard because an undue burden generally would be found only "in situations involving absolute obstacles or severe limitations on the abortion decision," not wherever a state regulation "may 'inhibit' abortions to some degree." *Thornburgh*, 476 U.S. at 828 (quoting *Akron I*, 462 U.S. at 464 (O'Connor, J., dissenting)). However, the *Casey* majority redefined this standard to find an undue burden when "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 112 S. Ct. 2820. As to what is meant by a "substantial obstacle" remains to be litigated.

7. *Casey*, 112 S. Ct. at 2818 ("It follows that states are free to enact laws to provide a reasonable framework for a woman to make a decision that has profound and lasting meaning."); *see also* Dick Lehr, *Court Affirms Abortion Right, 5-4, But Lets States Apply Restrictions*, THE BOSTON GLOBE, June 30, 1992, at 1.

8. 112 S. Ct. at 2844 (Blackmun, J., dissenting) (citations omitted).

9. The Court considered five provisions of the Pennsylvania Abortion Control Act of 1982 as amended in 1988 and 1989: §§ 3205, 3206, 3209 and §§ 3207(b), 3214(a) and 3214(f). 18 Pa. Cons. Stat. §§ 3203-3220 (1990).

10. For instance, after *Webster* in 1989, many anti-choice advocates accepted the "invitation to bring a case that gives the court an opportunity to deal with abortion squarely." Eileen McNamara, *In Louisiana, Abortion Foes on Fast Forward to the Past*, THE BOSTON GLOBE, July 15, 1989, at 1; *see also* Sheila Grissett, *Restore La. Abortion Ban, Connick Asks*, THE TIMES-PICAYUNE, July 11, 1989, at A1 [hereinafter Grissett, *Restore La. Abortion Ban*]. Over 600 anti-choice bills were introduced in state legislatures across the country, although the vast ma-

otherwise unenforced criminal abortion statutes.

Revival of old statutes is more constitutionally problematic than the passage of new legislative restrictions because it is done by prosecutors with little or no notice to potential defendants. An extreme, but possible, scenario would permit prosecutorial revival through arrests within minutes of a Supreme Court decision. The appropriateness and constitutionality of such "revivals"[11] of pre-*Casey* abortion statutes, and the prosecutions which would result, is the focus of this Note.[12]

Should states opt to revive pre-*Casey* criminal abortion statutes, individuals facing prosecution under those statutes[13] will find it difficult to determine what is, and is not, legal. The anticipated confusion is particularly troubling considering the fact that these are criminal statutes and involve the unique factor of pregnancy. Our legal system has long held that in order to avoid ensnaring the innocent, criminal statutes must be clear and must provide adequate notice.[14] Prohibitions against ex post facto laws and laws which are vague or confusing are designed to ensure certainty and fair warning in the criminal law.[15] Clarity in the law allows individuals to conform their behavior to the law. This clarity is essential in the context of abortion; lack of certainty

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jority were defeated. NATIONAL ABORTION RIGHTS ACTION LEAGUE, WHO DECIDES? A STATE-BY-STATE REVIEW OF ABORTION RIGHTS 1992 (3d ed. 1992) [hereinafter NARAL III].

11. I use this term throughout this Note to refer to the resumed enforcement of a criminal statute which had been unenforced or ruled unconstitutional and presumed dead.

12. "The question is whether a statute that has never been enforced and that has not been obeyed for three-quarters of a century may suddenly be resurrected and applied." ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 148 (1962) [hereinafter BICKEL, THE LEAST DANGEROUS BRANCH]. I have chosen not to address possible retroactive applications of these statutes because the prohibition on ex post facto laws should inhibit such prosecutions.

13. In most states, these individuals will be doctors and other practitioners, not the women seeking abortions. Of the states with pre-*Roe* statutes, three allow prosecution of the woman: Arizona ("A woman who solicits from any person any medicine, drug or substance whatever . . . , or who submits to an operation, or to the use of any means whatever, with the intent to procure [an abortion], unless it is necessary to preserve her life, shall be [imprisoned for between one and five years]." ARIZ. REV. STAT. ANN. § 13-3604 (1991)); Delaware ("A woman is guilty of self-abortion when she, being pregnant, commits or submits to an abortion . . . , unless the abortion is a therapeutic abortion. Self-abortion is a class A misdemeanor." DEL. CODE ANN. tit. 11, § 652 (Supp. 1990)); and Oklahoma ("Every woman who solicits of any person [an abortion], unless the same is necessary to preserve her life, is punishable by imprisonment . . . not exceeding one year, or by fine not exceeding One Thousand Dollars ($1,000), or by both." OKLA. STAT. tit. 21, § 862 (1981)). The majority of states refuse to recognize a woman as capable of making a free choice and prefer to view her as a victim of the doctor's coercion.

14. "It would be contrary to American theories of 'ordered liberty' to permit the law to act as a snare for the unwary or to be used to persecute particular persons for extraneous reasons." Arthur E. Bonfield, *The Abrogation of Penal Statutes and Nonenforcement*, 49 IOWA L. REV. 389, 392 (1964). *See also* Mark Peter Henriques, *Desuetude and Declaratory Judgment: A New Challenge to Obsolete Laws*, 76 VA. L. REV. 1057, 1069 (1990). While many people know that ignorance of the law is no defense, they generally rely on enforcement to make them aware of the law.

15. Marks v. United States, 430 U.S. 188 (1977); United States v. Harriss, 347 U.S. 612, 617 (1954).

as to what is, and is not, legal could unnecessarily chill abortion activities, resulting in unwanted pregnancies being carried to term and even death from unsafe illegal abortions. The courts will have to decide whether revival of statutes in this particular instance, never before confronted, is fair and constitutional.

Given the number of states which have retained their pre-*Roe* laws, the variety of possible revival scenarios is great. Revivability of pre-*Roe* statutes in any particular state will depend on a number of factors: the validity of a statute's provisions under *Casey*, any previous injunctions or court decisions regarding the statute, current legislative and executive views, state constitutional and other statutory provisions, and the content of any future decisions overturning *Roe*. For example, some state constitutions provide stronger protections of the abortion right than does the United States Constitution. The highest courts in both California[16] and Florida[17] have held that their state constitutions protect a woman's fundamental right to choose an abortion, and the highest court in Louisiana has construed a stronger separation of powers doctrine in the Louisiana Constitution than that of the United States Constitution.[18] Many states also have an assortment of laws that govern the process of repeal and revival.[19] The views of the legislatures and the governors also will play a significant role in determining how the revival scenarios will play out. Given the novelty of such a situation, previous rationales for and against revival must be carefully analyzed as they relate to such attempts under *Casey* or under any future *Roe*-overturning decision.

This Note argues that the sudden resurrection of criminal abortion statutes through renewed prosecutions or the removal of injunctions would violate constitutional principles of fair notice and due process.[20] An entire generation of people have grown to maturity under the protection of *Roe*; millions of women, doctors, and other practitioners have relied upon it.[21] Many of those who will be prosecuted under these revived statutes will have been unaware of the continued existence of such laws and thus will not fear their enforcement.

16. People v. Belous, 458 P.2d 194 (Cal. 1969), *cert. denied*, 397 U.S. 915 (1970).

17. *In re* T.W., 551 So. 2d 1186 (Fla. 1989).

18. LA. CONST. art. 2, § 2; *see* State v. Broom, 439 So. 2d 357, 366-67 (La. 1983).

19. Those states which have laws that expressly forbid revival of repealed statutes include: Delaware (DEL. CODE ANN. tit. 11 § 106 (1991)); Kansas (KAN. CONST. art. II, § 16 (1990) and KAN. STAT. ANN. § 77-201 (1990)); Massachusetts (MASS. GEN. L. ANN. ch. 4, § 6 (West 1986)); Oklahoma (OKLA. CONST. art. v, § 54 (1991) and OKLA. STAT. ANN. tit. 25, § 32 (West 1981)); Texas (TEX. GOV'T CODE ANN. § 311.030 (West 1991)); Wisconsin (WIS. STAT. § 990.03(1) (1989-90)).

20. *See infra* section III. To permit revival would suggest that any Supreme Court case holding a statute unconstitutional is not final. Under this view, if even the remotest possibility existed for later reversal, people would have to work for repeal of the statute rather than rely on the Supreme Court as the final arbiter. In the future, perhaps we should consider either a mechanism of automatic repeal of a statute when it is found unconstitutional, or a revival of the doctrine of *void ab initio*, in order to avoid the unjust consequences of later reversal and revival. *See infra* note 189.

21. *See infra* note 49.

Revival of pre-*Casey* statutes also may violate other constitutional norms, such as the separation of powers doctrine and equal protection, as well as the necessity for proper legislative consideration as a basis for the legitimacy of a statute.[22] However, these constitutional arguments may be unavailing given today's judicially conservative climate. Moreover, under the current legal system, statutes on the books are presumed legitimate and enforceable until repealed or invalidated.[23]

Should available constitutional doctrines fail, proposals by scholars such as Guido Calabresi[24] and Alexander Bickel[25] should be examined carefully and used by the courts to nullify these statutes. Nullification of pre-*Casey* statutes would return the issue of abortion to legislatures for open and careful deliberation,[26] insuring that any abortion legislation enacted reflects the true desire of the majority.[27] Any other result would violate the people's trust in government.

The proposals in this Note may strike some as radical and unorthodox, but they are necessary in this unique situation. Both conservative and liberal scholars have advanced these alternatives to revival of obsolete or long-unenforced statutes.[28] I urge readers to think carefully about the principles which underlie the democratic process, the specter of being bound by decisions of past legislatures, and whether revival in this particular context is consistent with those principles. Courts must examine these issues carefully; judges called on to enforce these pre-*Casey* statutes must acknowledge that individuals will be acting within a completely new legal framework, with uncertain constitutional standards[29] and unknown legislative positions.

This Note analyzes possible scenarios for the revival of pre-*Casey* statutes and presents arguments against revival. Section I presents a brief history of abortion statutes in the United States since *Roe*, culminating in the *Casey*

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22. *See infra* section III.

23. *See infra* notes 96-98 and accompanying text.

24. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) [hereinafter CALABRESI, A COMMON LAW].

25. BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 12.

26. *See infra* section IV.

27. I do not discount the possibility that the majority might enact some restrictions or even a complete ban on abortion, but citizens of today rather than those of bygone eras should voice that preference.

28. Henriques, *supra* note 14, at 1059 n.20 (citing William Safire, *On Language; The Penumbra of Desuetude*, N.Y. TIMES, Oct. 4, 1987, § 6 (Magazine), at 16 (Robert Bork indicating that there is a strong argument for desuetude in the context of Griswold v. Connecticut, 381 U.S. 479 (1965)); *Rarely Used Statute Bars Policy Dealings By Citizens Abroad*, N.Y. TIMES, July 5, 1984, at A11 (Laurence Tribe commenting that the Logan Act might be desuetudinal since there had not been a prosecution for over one hundred years)).

29. *Casey* has raised several unanswered questions to be resolved by future litigation. (So too would any decision overturning *Roe*.) Such questions will focus on the extent of a privacy right still remaining in the context of abortion and what is meant by "substantial obstacle." Litigation will involve challenges to legislation as advocates on both sides seek to define how a state can interfere with private decision-making. Thus, *Casey* does not, and any overturn of *Roe* would not, leave a clean and even playing field; but instead a murky and untrodden path.

decision. Section II examines the political and legal processes through which statutes become obsolete and are then revived in the context of American constitutional democracy. Section III contends that, although revival is an accepted practice in America, it raises constitutional problems concerning violations of due process, fair notice, separation of powers, and equal protection. These problems, as well as questions of proper legislative consideration, are particularly egregious in the context of criminal abortion statutes. Alternatives to revival are explored in Section IV. Specifically, I propose that Guido Calabresi's second look doctrine,[30] which aims to promote greater dialogue between the courts and the legislatures, will better address the problems posed by revival of obsolete statutes and promote the goals of democracy. This Note concludes that revival in the context of abortion demands caution. Should pre-*Casey* abortion statutes be revived by courts, it should only be a result of deliberate legislative reenactment.

## I

## THE RETREAT FROM *ROE*

Over the past twenty years, anti-choice groups have worked relentlessly to weaken and overturn *Roe*. Several states passed regulations which severely restricted the freedom of choice, while two and the territory of Guam passed outright abortion bans.[31] Numerous cases were brought challenging these attempts to fashion laws that would provide the Court an opportunity to strike *Roe* down. Gradually, and with significant changes in the Court's composition, *Roe* was weakened as the Court upheld a variety of restrictions on the abortion decision.[32] Yet the Court continued to reaffirm that "[a] woman's right to make that choice [to end her pregnancy] freely is fundamental."[33]

30. CALABRESI, A COMMON LAW, *supra* note 24, at 2.

31. Guam (9 GUAM CODE ANN. §§ 31.20-23 (1990) (banning all abortions except those to save the woman's life or prevent grave impairments to her health)); Louisiana (1991 La. Acts 26 (codified as amended at LA. REV. STAT. ANN. § 14:87) (West Supp. 1992) (banning all abortions except those "for the express purpose of saving the life of the mother, . . . to preserve the life or health of the unborn child," or for rape and incest victims who have reported the incident within five days of its occurrence)); Utah (UTAH CODE ANN. §§ 76-7-301, 302 (Supp. 1991) (permitting abortions only "to save the pregnant woman's life [or] prevent grave damage to the pregnant woman's medical health," or when pregnancy occurs as a result of rape or incest, or "to prevent the birth of a child that would be born with grave defects")).

32. *See* Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) (upholding two-parent notification with judicial by-pass and a 48-hour waiting period for minors); Ohio v. Akron Ctr. for Reprod. Health, 110 S. Ct. 2972 (1990) (upholding one-parent notification by doctor with burdensome judicial by-pass); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (upholding declaration that life begins from moment of conception, prohibition on performance of abortion in public facilities, and requirements of viability testing); Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983) (upholding parental notification requirement for minors); Harris v. McRae, 448 U.S. 297 (1980) (holding that federal and state governments do not have to provide public funds for abortions, even if such funds are provided for childbearing); and Maher v. Roe, 432 U.S. 464 (1977) (holding that state denial of Medicaid funds for nontherapeutic abortions does not violate the Equal Protection Clause of the Fourteenth Amendment).

33. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986).

The tension between the Court's position of reaffirming *Roe* while permitting restrictions has only increased confusion and prompted attempts to fashion *the* statute that would overturn *Roe*.[34]

Previous decisions had weakened *Roe* by bestowing greater recognition of a state interest in "protecting potential human life . . . 'throughout pregnancy' . . . ."[35] The *Casey* majority took this principle one step further, stating that "[t]hat portion of the decision in *Roe* has been given too little acknowledgement and implementation by the Court in its subsequent cases."[36] The *Casey* Court rejected the trimester framework of *Roe* in favor of what it viewed to be the "essential holding" of *Roe*. Three principles of *Roe* were articulated by the Court: women have the right to an abortion before viability without "undue interference" (a prohibition or "substantial obstacle") from the State; post-viability abortions can be restricted by the State with exceptions for the woman's life and health; and the State has legitimate interests in potential life from the moment of conception. It is clear that the State's interest is the shaping force of the *Casey* rule. This reformulation of *Roe* required the explicit reversal of prior cases and calls into question other holdings by the Supreme Court and other courts across the country.[37]

The plurality opinion effectively stripped away *Roe*'s protective framework and left in its place an unclear standard of "undue burden." Chief Justice Rehnquist decried this maneuver, stating:

> *Roe v. Wade* stands as a sort of judicial Potemkin village, which may be pointed out to passers by as a monument to the importance of adhering to precedent. But behind the facade, an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion.[38]

The dissenters expressed their extreme dissatisfaction with both *Roe* and *Casey* as unworkable decisions and declared their willingness to overturn *Roe* and return the matter to the states.

The Court will likely consider cases challenging abortion bans in Guam,[39]

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34. *See supra* note 10.

35. *Webster*, 492 U.S. at 519 (citing *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting)).

36. 112 S. Ct. at 2817.

37. Restrictions on the abortion choice, including an anti-choice lecture accompanied by pictures and descriptions of fetal development and a mandatory 24-hour waiting period were upheld by the Court. Only the spousal notification requirement was struck. *Casey*, 112 S. Ct. at 2831. Similar provisions to the anti-choice lecture with pictures and descriptions of fetal development were previously struck in *Akron I*, 462 U.S. 444 (1983) and *Thornburgh*, 476 U.S. at 762 (1986). The court in *Akron I* had also previously struck down 24-hour waiting period restrictions. 462 U.S. at 450.

38. 112 S. Ct. at 2866-67 (Rehnquist, C.J., dissenting).

39. Guam Society of Obstetricians & Gynecologists v. Ada, 776 F. Supp. 1422 (D. Guam 1990), *aff'd*, 962 F.2d 1366 (9th Cir. 1992), *petition for cert. filed*, No. 92-104 (July 1992).

Louisiana,[40] and Utah,[41] which will present opportunities to reconsider *Roe* yet again.[42] A single vote is all that is needed to overturn *Roe* and the winner of the 1992 presidential election will almost certainly have the opportunity to replace at least one of the members of the *Casey* majority.[43] While the Democrats have pledged to preserve a woman's right to choose, the Republicans have explicitly stated their intention to appoint judges who will work to overturn *Roe*.[44]

A modification or outright reversal of *Roe* would be the first instance in history that the United States Supreme Court, in reversing itself, took away a fundamental right and in so doing left individuals exposed to criminal prosecution.[45] This is not to say that the Court has not reversed itself before;[46] however, most previous reversals have worked to enlarge fundamental rights.[47] Of those reversals which have narrowed the scope of fundamental

40. Sojourner T. v. Roemer, 772 F. Supp. 930 (E.D. La. 1991), *aff'd*, No. 91-3677 (5th Cir. Sept. 22, 1992).

41. Jane L. v. Bangerter, No. 91-C 345-G (D. Utah filed Apr. 26, 1991).

42. Linda Greenhouse, *High Court Takes Pennsylvania Case on Abortion Right*, N.Y. TIMES, Jan. 22, 1992, at A1, A17; NARAL III, *supra* note 10, at i.

43. Justice Blackmun stressed this point throughout his opinion in *Casey* and concluded by stating:

> I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor may well focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.

Planned Parenthood v. Casey, 112 S. Ct. 2791, 2854-55 (1992) (Blackmun, J., concurring in part and dissenting in part).

44. *See* David E. Rosenbaum, *The 1992 Campaign: Parties' Core Differences in Platforms*, N.Y. TIMES, Aug. 16, 1992, at A26.

45. NARAL III, *supra* note 10, at i. A fundamental right has been overturned by the Supreme Court before, but never in the criminal context where an individual exercising previously recognized fundamental rights faces imprisonment and heavy fines. The court in Lochner v. New York, 198 U.S. 45 (1905) struck down a statute limiting work hours for bakers as a violation of the fundamental "liberty of contract." However, drastic changes in the nation's economy and shifts in court personnel led to the demise of *Lochner* and the fundamental right of contract. *See* United States v. Carolene Products Co., 304 U.S. 144 (1938); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934).

The *Roe* court acknowledged that they were "deal[ing] with fundamental rights and liberties," 410 U.S. at 220 (Douglas, J., concurring), and held that "[t]his right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153. However, the dissents in *Casey* do not agree that a woman's right to choose is fundamental as it is not expressly guaranteed by the Constitution nor is it part of their notion of tradition. Given such a view, they would refuse to recognize overturning *Roe* as removing a fundamental right.

46. Well known examples include: Minersville v. Gobitis, 310 U.S. 586 (1940) (holding that the Free Exercise Clause did not permit an exemption from saluting the flag), *overruled by* West Virginia v. Barnette, 319 U.S. 624 (1942) (holding that a state rule requiring students to salute the flag violated the Free Exercise Clause as applied to children of Jehovah's Witnesses); Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991) (holding the Eighth Amendment does not bar the admission of victim impact evidence during the penalty phase of a capital trial); and Breedlove v. Suttles, 302 U.S. 277 (1937), *overruled by* Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) (holding poll taxes violate the Equal Protection Clause).

47. For example, in Brown v. Board of Education, 347 U.S. 483 (1954), the Court overturned Plessy v. Ferguson, 163 U.S. 537 (1896), and the doctrine of "separate but equal," giving

rights,[48] the Court has never completely removed from federal protection a right upon which millions have relied.[49]

Currently, abortion bans passed prior to *Roe* remain on the books in eighteen states, the District of Columbia, and Puerto Rico, although they had been ruled unconstitutional and unenforceable under *Roe*.[50] These statutes, which date from as early as 1845 and as late as 1971, have widely diverse purposes, such as preserving the health and vigor of "strictly Americans,"[51] forcing women to fulfill their "proper" and "natural" role,[52] and punishing

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African-Americans greater rights than they had been accorded under previous interpretations of the Fourteenth Amendment. *See also* West Virginia v. Barnette, 319 U.S. 624 (1942).

48. *See supra* note 32 for cases narrowing *Roe*; *see also* Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1990) (narrowing Wisconsin v. Yoder, 406 U.S. 205 (1972) (First Amendment right to exemption from facially neutral statues which interfere with the practice of one's religion)); Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988) (narrowing Tinker v. Des Moines School District, 393 U.S. 503 (1969) (First Amendment rights of students in public schools)); United States v. Leon, 468 U.S. 897 (1984) (narrowing Mapp v. Ohio, 367 U.S. 643, 677 (1961) (Fourth Amendment exclusionary rule for illegally seized evidence)).

49. 1.6 million abortions are performed each year. Tamar Lewin, *An Abortion-Rights Idea That Backfired*, N.Y. TIMES, Mar. 22, 1992, at 4.

50. NARAL III, *supra* note 10, at v. Alabama (ALA. CODE § 13A-13-7 (1982 & Supp. 1990) (enacted 1852)); Arizona (ARIZ. REV. STAT. ANN. §§ 13-3603, -3604 (1989) (enacted 1901)); Arkansas (ARK. CODE ANN. § 5-61-102 (Michie 1987) (enacted 1969); California (CAL. HEALTH & SAFETY CODE §§ 2591, 2592, 2594 (West 1984 & Supp. 1991) (enacted 1967)); Colorado (COLO. REV. STAT. §§ 18-6-101-02 & 18-6-105 (1986 & Supp. 1990) (enacted 1963)); Delaware (DEL. CODE ANN. tit. 24, § 1790; tit. 11, §§ 651 to 653 (1987 & Supp. 1990) (enacted 1953)); District of Columbia (D.C. CODE ANN. § 22-201 (1989) (enacted 1901)); Kansas (KAN. STAT. ANN. § 21-3407 (1988 & Supp. 1990) (enacted 1969)); Maryland (MD. CODE ANN., HEALTH-GEN. § 20-208 (1990 & Supp. 1991) (enacted 1968) (this law has been repealed by 1991 MD. LAWS, ch. 1 but is subject to approval by referendum in November 1992)); Massachusetts (MASS. GEN. LAWS ANN. ch. 272, § 19 (West 1990 & Supp. 1991) (enacted 1845)); Michigan (MICH. COMP. LAWS ANN. § 750.14 (West 1991) (enacted 1931, last amended 1970)); Mississippi (MISS. CODE ANN. § 97-3-3 (1973 & Supp. 1990) (enacted 1942, last amended 1966)); New Hampshire (N.H. REV. STAT. ANN. § 585:12 (1986) (enacted 1848)); New Mexico (N.M. STAT. ANN. §§ 30-5-1 to -3 (Michie 1984 & Supp. 1991) (enacted 1969)); Oklahoma (OKLA. STAT. ANN. tit. 21, §§ 861 & 862 (West 1983) (enacted 1910, amended 1961 to increase penalty)); Texas (TEX. REV. CIV. STAT. ANN. art. 4512.1 to 4512.4 (West 1976 & Supp. 1991) (enacted 1879)); Vermont (VT. STAT. ANN. tit. 13, § 101 (1974 & Supp. 1991) (enacted 1947, last amended 1971)); West Virginia (W. VA. CODE § 61-2-8 (1989) (enacted 1849)); Wisconsin (WIS. STAT. ANN. § 940.04 (West 1982 & Supp. 1991) & § 940.13 (West Supp. 1991) (enacted 1849)); and Puerto Rico (P.R. LAWS ANN. tit. 33, §§ 1051 & 1052 (1983) (enacted 1937)). NARAL III, *supra* note 10, at v, 1, 6, 8, 10, 14, 18, 21, 40, 51, 56, 60, 66, 79, 83, 98, 119, 125, 133, 136, 141.

51. The most important change of all . . . is the increasing proportion of children of a foreign descent, compared with the relative decrease of those of strictly American origin. It is a question of no ordinary interest whether there really is now, or is likely hereafter, a natural increase among the regular descendents [sic] of the first or the early settlers of our country. . . .

. . . .

It should be stated that believers in the Roman Catholic faith never resort to any such practices; the strictly Americans are almost alone guilty of this great crime.

*Changes in Population*, HARPER'S WEEKLY, Feb. 1869, at 386, *quoted in* BARBARA MILBAUER, THE LAW GIVETH: LEGAL ASPECTS OF THE ABORTION CONTROVERSY 118-119 (1983).

52. NARAL III, *supra* note 10, at v.

women for immoral acts. Many statutes allow abortion to protect the woman's life but do not include similar provisions concerning the woman's health.[53] Furthermore, these statutes fail to distinguish between pre- and post-viability abortions and would thus continue to be unconstitutional under *Casey*. However, should *Roe* be overturned, such statutes may be enforceable.

Given that under *Roe*, these criminal statutes were deemed to be unconstitutional, supporters of choice have not actively sought their repeal. After the *Roe* decision, the debate over abortion shifted away from these presumably defunct statutes to new legislation and the courts. Pre-*Roe* criminal abortion bans suffered a number of fates: they were ignored;[54] courts invalidated them either before,[55] or as a result of, *Roe*;[56] they were enjoined;[57] or state attorneys general declared them unenforceable.[58] However, because American legal doctrine holds that a law is binding until repealed or invalidated,[59] these extant statutes could be revived if the federal protections contained in *Roe* were to be withdrawn.[60] Similarly, laws ruled unconstitutional between *Roe* and *Casey* which have been retained, albeit unenforced, may be revivable now, particularly those that do not absolutely ban abortion. These revivals could take

53. Many believe that statutes without exception for the life of the mother are likely to be invalidated. Proponents of this view rely on Chief Justice Rehnquist's dissent in *Roe* in which he suggested that such an absolute ban would be irrational. "[I]f the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective. . . ." Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting). The Chief Justice seemed to reiterate such a stance in *Casey* when he stated that "[a] woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest." 112 S. Ct. at 2867 (Rehnquist, C.J., dissenting). Justice Scalia joined this dissent but also penned his own in which he compared abortion with bigamy — an important liberty to some, but one not protected by the Constitution. *Id.* at 2874 (Scalia, J., dissenting). Such statements cause many to fear that outright bans may be upheld.

54. Alabama, District of Columbia, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, and Puerto Rico.

55. California (People v. Barksdale, 503 P.2d 257 (Cal. 1972); People v. Belous, 458 P.2d 194 (Cal. 1969), *cert. denied*, 397 U.S. 915 (1969)); Vermont (Beecham v. Leahy, 287 A.2d 836 (Vt. 1972) (unconstitutional as applied to physicians)); and Wisconsin (Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970), *appeal dismissed*, 400 U.S. 1 (1970)).

56. Arizona (Nelson v. Planned Parenthood of Tucson, Inc., 505 P.2d 580, *modified on reh'g*, 505 P.2d 580, 590 (Ariz. Ct. App. 1973)); Colorado (People v. Norton, 507 P.2d 862 (Colo. 1973) (unconstitutional in part)); Maryland (Coleman v. Coleman, 471 A.2d 1115 (Md. 1984)); New Mexico (State v. Strance, 506 P.2d 1217 (N.M. Ct. App. 1973)); Oklahoma (Jobe v. State, 509 P.2d 481 (Okla. Crim. App. 1973)); Texas (Roe v. Wade, 410 U.S. 113 (1973)); and West Virginia (Doe v. Charleston Area Medical Ctr., 529 F.2d 638 (4th Cir. 1975)).

57. Arkansas (Smith v. Bentley, 493 F. Supp. 916 (E.D. Ark. 1980)). NARAL III, *supra* note 10, at 8.

58. Delaware (Statement of Policy, Attorney General of Delaware (Mar. 24, 1977), Op. Att'y Gen. 73-030 (Apr. 12, 1973) (Delaware laws are invalid to the extent to which they conflict with Roe v. Wade)); Kansas (Op. Att'y Gen. 89-98 (Aug. 7, 1989)). NARAL III, *supra* note 10, at 18, 40.

59. *See infra* notes 96-98 and accompanying text.

60. *See* NARAL III, *supra* note 10, at v. The threat is greater in certain states, depending on the views of the legislature and governor and the various state constitutional protections.

a variety of forms, ranging from simply resuming prosecutions to seeking court orders lifting injunctions or reversing previous decisions.

The threat of revival is very real. One attempt has been made in the past. In 1989, Harry Connick, District Attorney of New Orleans[61] filed suit in federal district court to reopen a case[62] that had invalidated Louisiana's abortion statutes on constitutional grounds.[63] The statutes carried very stiff penalties: six months in prison and/or a $500 fine for advertising abortifacients, a year in prison and/or a $5,000 fine for advertising abortion services, and up to ten years hard labor for anyone convicted of performing an abortion.[64]

In *Weeks v. Connick*,[65] Connick asked the judge to lift a thirteen year old injunction and thereby revive the state's criminal statutes banning abortion.[66] Connick argued that *Roe* had been overturned by *Webster* and "represent[ed] a change in law which . . . require[d] a different outcome in this case."[67] The district court disagreed and ruled that the statutory provision banning abortion could not be revived as it had been implicitly repealed by subsequent legislation[68] and that *Roe*, still the law of the land, mandated a continued injunction against the latter two provisions prohibiting advertising of abortion services.[69] Although this revival attempt failed, other such attempts are likely to occur given that *Casey* permits certain restrictions previously held to be invalid under the now-dismantled trimester framework, and particularly if *Roe* is explicitly overturned.[70]

## II

## THE POLITICAL PROCESS AND STATUTORY OBSOLESCENCE

Legal obsolescence is defined as "[t]he combination of lack of fit and lack

61. Since many people ask about Connick's relation to the singer, Harry Connick, Jr., I will answer it: they are father and son. *See* Stephen Holden, *Harry Connick, Jr.: The New Sinatra or Boy in a Bubble?*, N.Y. TIMES, Nov. 3, 1991, § 2, at 1.

62. Weeks v. Connick and consolidated cases (E.D. La. Jan. 26, 1976).

63. Sheila Grissett, *ACLU Prepares to Fight Connick on Abortion*, THE TIMES-PICAYUNE, July 12, 1989, at A1; Eileen McNamara, *In Louisiana, Abortion Foes on Fast Forward to Past*, BOSTON GLOBE, July 15, 1989, at A1.

64. LA. REV. STAT. ANN. §§ 14:87, :87.4, :88 (West 1986); *see also* McNamara, *supra* note 63, at 1; NATIONAL ABORTION RIGHTS ACTION LEAGUE, WHO DECIDES? A STATE-BY-STATE REVIEW OF ABORTION RIGHTS 1991 61 (2d ed. 1991) [hereinafter NARAL II].

65. 733 F. Supp. 1036 (E.D. La. 1990).

66. *Id.* at 1037. The statutes at issue were LA. REV. STAT. ANN. §§ 14:87, 88 (West 1986) and § 40:1299.35.4 (West Supp. 1988). Abortion was only allowed to preserve the woman's life or health. *Id.*

67. Grissett, *Restore La. Abortion Ban*, *supra* note 10, at A8.

68. 733 F. Supp. at 1037.

69. *Id.* at 1039.

70. *See* Rachael Pine, DRAFT, The Status of Antiquated Abortion Restrictive Laws in the Event of a Material Change in Constitutional Standards: Annotated Summary of Luncheon Discussion Sponsored by the ACLU Reproductive Freedom Project 1 (May 16, 1989) (on file with the author) [hereinafter Pine, DRAFT]. *Contra* NARAL III, *supra* note 10, at v (assumes that most statutes will be struck down because of an invalid purpose, i.e., health concerns which are no longer pertinent because abortion is safer than delivery, or preserving woman's "natural role of mother").

of current legislative support. . . ."[71] Many laws in America become obsolete through disuse.[72] Statutes which at one time served a valid purpose or reflected societal values can become anachronistic over time and fall into disuse. Long forgotten, these statutes remain on the books unchanged. Some are simply overlooked by the legislature; their repeal would not be controversial, but would take up time better devoted to other matters. Examples of such statutes would include prohibitions on movies depicting felonious acts, prohibitions on kite flying, and prohibitions on the use of profane language.[73] Other statutes may be ignored as the practice they proscribe becomes legitimate due to changes in the law or social mores. Examples of such statutes are those criminalizing adultery.[74] Their voidance is expressed through nonenforcement; repeal may seem to legislators unnecessary or likely to stir up unwanted controversy.[75] The continued survival of obsolete statutes "on the books" reveals how our complex political system often lags behind political, technological, and social changes.

Today, law is created primarily by the legislature through the enactment of statutes. The courts' role is to interpret and apply the law. In contrast, under the common law system which existed prior to the early 1900s, the courts were the primary lawmaking authorities.[76] The law was to be ascertained by courts — they were to seek the "truth" and to determine the law therefrom.[77] Because the courts both interpreted and applied the law they had made, they were able to constantly reevaluate and make changes to the law when necessary or appropriate.

Increased codification and the concomitant rise of the legislature as the primary lawmaker has greatly diminished the courts' role in making new law;

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71. CALABRESI, A COMMON LAW, *supra* note 24, at 2.

72. *E.g.*, CONN. GEN. STAT. § 53-242 (1958) (barring profane swearing) (*repealed* 1969); CONN. GEN. STAT. § 53-246 (1958) (punishing any person found intoxicated) (*repealed* 1969); D.C. CODE ANN. § 22-1117 (1961) (prohibiting kite flying); MICH. STAT. ANN. § 18.854 (Callaghan 1957) (prohibiting "entertainment" on Sunday evenings) (*repealed* 1984); MONT. CODE ANN. § 94-3573 (1947) (prohibiting exhibition of movies depicting felonies) (*repealed by* 1959 MONT. LAWS 52 § 1); N.D. CENT. CODE §§ 12-21- 01, -04 (1960) (barring profane swearing); N.D. CENT. CODE § 19-02- 14.1 (1960) (prohibiting candy cigarettes); OHIO REV. CODE ANN. § 3773.25, (Anderson 1953) (prohibiting engaging in sports on Sunday except baseball) (*repealed by* 1959 OHIO LAWS 826, 864, § 2); UTAH CODE ANN. § 76-11-2 (1953) (prohibiting businesses from permitting minors under nineteen to smoke on premises); *see* Bonfield, *supra* note 14, at 389-90 n.2; *see also* Newman F. Baker, *Legislative Crimes*, 23 MINN. L. REV. 135 (1939).

73. *See supra* note 72.

74. *See infra* text accompanying notes 99-106.

75. "There may often be no reason for individuals to believe they can obtain success by asking legislators for help, and there is frequently no self-starting legislative mechanism for law reform in controversial areas." CALABRESI, A COMMON LAW, *supra* note 24, at 166 n.4.

76. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977).

77. Justice Holmes contended that the Court, in Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), viewed the common law as a "brooding omnipresence in the sky." Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917).

they are now seen as interpreters only.[78] Today, the role of courts has become so circumscribed that decisions which appear to go beyond "appropriate" interpretation are decried by many as "judicial activism." Critics of "judicial activism" increasingly call for conservative courts.[79] However, proponents of judicial conservatism fail to recognize the structural limitations of this view: because legislators only make new law, and do not apply it, they are unable to see a law's deficiencies and to keep up with change. Legislating today has become a full-time job,[80] with legislatures passing thousands of laws each year. Only those issues constantly in the public eye are kept up to date; others fall by the wayside.[81]

A natural inertia within our political system ensures that the enactment of statutes is easier than their repeal.[82] "The fundamental fact about any legislature is that it responds rather than leads."[83] As majoritarian opinion or will changes, statutes often fall into disuse. Rather than repeal or amend these statutes to bring them in line with popular opinion, legislators often prefer to rely on their non-enforcement. This inaction strikes a balance of political forces which appeases both those in favor and those opposed to the law.[84] Proponents of the law can assure themselves that it at least remains on the books, if only symbolically; opponents know they need not fear its application, especially as time passes with no enforcement.[85] Any attempt to repeal the law threatens to upset this precarious balance. Thus, legislators avoid any movement to repeal these statutes, and these old laws begin to clog the books.

The reality of legislative inertia leads most people to believe that the possibility of state officials reviving a statute that has long been unenforced and that has not been "the center of a continuing controversy in the State"[86] is

78. Henry J. Friendly, *The Gap in Lawmaking — Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 791 (1963); *see also* CALABRESI, A COMMON LAW, *supra* note 24, at 1; Grant Gilmore, *Putting Senator Davies in Context*, 4 VT. L. REV. 233, 234 (1979) [hereinafter Gilmore, *Putting Senator Davies in Context*].

79. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 1-11 (1971); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

80. Most legislatures now meet throughout the year, a practice particular to the twentieth century; legislatures formerly met only briefly and occasionally. *See* Gilmore, *Putting Senator Davies in Context*, *supra* note 78, at 237.

81. *See* Friendly, *supra* note 78, at 801-02.

82. *See* CALABRESI, A COMMON LAW, *supra* note 24, at 6; GRANT GILMORE, THE AGES OF AMERICAN LAW 95 (1977) [hereinafter GILMORE, THE AGES OF AMERICAN LAW]; Bonfield, *supra* note 14, at 389.

83. Jack Davies, *A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act*, 4 VT. L. REV. 203, 228-29 (1979).

84. *See* BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 12, at 153-54.

85. Obsolete statutes "have even inspired an aphorism among lawyers: 'They [statutes] are on the books to help preserve our morality, . . . at the same time they are not enforced in order to preserve our conduct.' " William E. Schmidt, *Adultery as a Crime: Old Laws Dusted Off in a Wisconsin Case*, N.Y. TIMES, Apr. 30, 1990, at A1, A14.

86. Poe v. Ullman, 367 U.S. 497, 512 (1961) (Douglas, J., dissenting). In *Poe*, the Court held that a married couple lacked standing to challenge a statute prohibiting the use of contra-

simply not realistic. There is a common sense notion that enforcement or continued legislative debate reflect current thinking. Without these factors, there is no evidence of current concerns. People fear being bound by past legislatures and being caught unaware.

Due to this legislative inertia, whether an obsolete statute truly represents majoritarian consensus may be unclear. Legislatures act in response to perceived shifts in power that may not accurately reflect shifts in morality or viewpoint.[87] Legislators may fear the political clout of well-organized minority factions willing to actively lobby for statutes that advance their views.[88] Rather than repeal obsolete statutes, legislators may prefer to leave well enough alone and thus avoid controversy.

This may explain why pre-*Casey* statutes remain on the books today.[89] Anti-choice forces were outraged by the *Roe* decision and pledged to work to overturn it.[90] In response to anti-choice proponents' aggressive lobbying, some legislatures expressed their indignation and defied the Court ruling by leaving statutes on the books, passing new statutes to test the limits of *Roe* and its progeny, or enacting legislative declarations of intent to criminalize abortion if *Roe* were overturned.[91] While anti-choice forces marshalled their efforts in the legislative arena, pro-choice advocates concentrated on challenging this new legislation in the courts. Because of these divergent approaches, the political process surrounding abortion became extremely distorted.

The Solicitor General in *Webster v. Reproductive Health Services*[92] noted this distortion favoring anti-choice forces:

> The Court's continuing effort to oversee virtually all elements of the abortion controversy has seriously distorted the nature of abortion legislation . . . . And because legislators know that whatever they

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ceptives on the ground that no immediate threat of enforcement existed. Justice Douglas pointed to many repeal efforts and reenactments as evidence of a continuing controversy which affected the revivability of a law. *Id.* The fact that the subject of abortion is controversial is not the meaning of controversy under Douglas' criteria.

87. Harry H. Wellington & Lee A. Albert, *Statutory Interpretation and the Political Process: A Comment on* Sinclair v. Atkinson, 72 YALE L.J. 1547, 1563 (1963).

88. *See* Bonfield, *supra* note 14, at 390; Wellington & Albert, *supra* note 87, at 1562; Robert C. Berry, *Spirits of the Past — Coping with Old Laws*, 19 U. FLA. L. REV. 24, 25-26 (1966).

89. It may also be that a majority of citizens in a particular state are anti-choice, but it is unlikely that a full consideration of these statutes has occurred in recent history since they were considered invalid and presumed dead. Indeed, those statutes passed after *Roe* as challenges to its provisions were often not strongly countered by pro-choice groups who relied on the courts to protect choice under *Roe*.

90. Jeffrey A. Tannenbaum, *A New Cause: Many Americans Join Move to Ban Abortion: Legislators Take Note*, WALL ST. J., Aug. 2, 1973, at 1; MILBAUER, *supra* note 51, at 60.

91. These legislative and executive viewpoints may have been manifested in anti-choice declarations of intent. These declarations are intended to allow the statute to keep up with the Court's decisions in this area. NARAL III, *supra* note 10, at v. The constitutionality and legal validity of such statements is unclear; many contend that they do not have the force of law and are merely policy statements. *Id.* The legality of such declarations will certainly be the subject of litigation.

92. 492 U.S. 490 (1989).

> enact in this area will be subject to de novo review by the courts, they have little incentive to try to moderate their positions. The result, all too often, has been statutes that are significant primarily because of their highly "inflammatory" symbolic content . . . . This process has undermined the accountability of legislative bodies, and has disserved the courts and the Constitution.[93]

Since *Roe*, anti-choice forces have worked hard to pass anti-abortion statutes, while pro-choice advocates have largely ignored that aspect of the political process.[94] Pro-choice advocates' neglect of the legislative arena in the wake of *Roe* should not be interpreted as an acceptance of the viability of pre-*Casey* statutes; in fact, the statutes were commonly viewed as dead.[95] Because of this distortion in the political process, statutes passed after *Roe* do not represent the majority will arrived at through careful legislative deliberation.

The American legal system does not accept the idea that statutes die from disuse, but instead holds the view that "a law is a law."[96] Once enacted, a law is considered binding until repealed or invalidated, regardless of the frequency of its enforcement. Theoretically, an obsolete statute derives legitimacy from the majority support it once commanded and the fact that the legislature has not repealed it.[97] Each new legislature "rejects" past laws only by the repeal or enactment of new laws. Thus, mere silence by the legislature is interpreted as "acceptance" of old statutes.[98]

Given this framework, revival is theoretically permissible, though problematic in practice. For example, criminal adultery statutes[99] have recently been revived in Wisconsin[100] and Connecticut.[101] In both cases, prosecutions were brought at the behest of upset spouses. Many citizens expressed uneasi-

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93. Brief of the United States as Amicus Curiae at 21 n.15, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).

94. NATIONAL ABORTION RIGHTS ACTION LEAGUE, WHO DECIDES? A STATE-BY-STATE REVIEW OF ABORTION RIGHTS 1989 iii (1st ed. 1989) [hereinafter NARAL I].

95. For consistent failure to enforce is itself a political concession to the opposition, and will satisfy at least some portions of it. . . .

. . . .

When the law is consistently not enforced, the chance of mustering opposition sufficient to move the legislature is reduced to the vanishing point. The unenforced statute is not, in the normal way, a continuing reflection of the balance of political pressures.

Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 63 (1961) [hereinafter Bickel, *The Supreme Court*].

96. A woman who had her husband charged with adultery in Connecticut was told by officials that "it was a stupid law, that nobody wants to deal with it . . . . But a law is a law." Elizabeth Kolbert, *Using Blue Laws to Keep Spouses from Scarlet Life*, N.Y. TIMES, Sept. 21, 1990, at B1.

97. CALABRESI, A COMMON LAW, *supra* note 24, at 105-06.

98. *Compare*, Girouard v. United States, 328 U.S. 61 (1946) (rejecting silence as an indicator that the legislature acquiesced in the statute). "The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases." *Id.* at 69-70.

99. Such statutes exist in 27 states. Schmidt, *supra* note 85, at A14.

100. *Id.*

101. Kolbert, *supra* note 96, at B1.

ness at the prosecutions;[102] they felt that these statutes were of another era and that adultery, while not commonly condoned, had in fact become a fairly widespread practice[103] and certainly was not one to be criminalized.[104] However, the legislature was unwilling to repeal the law out of fear that to introduce and vote for such an action would be deemed anti-family[105] or pro-adultery.[106]

In a different context, the Supreme Court's decision in *Bowers v. Hardwick*[107] has led to revival of long-unenforced anti-sodomy statutes in several states, including Idaho and Michigan.[108] The *Bowers* Court supported its decision to allow the statute to stand by noting that sodomy was a crime at common law and a statutory crime in 32 of the 37 states at the time the Fourteenth Amendment was ratified.[109] Such nineteenth-century anti-sodomy statutes were also used to justify the rejection of equal protection on the basis of sexual orientation in *High Tech Gays v. Defense Industrial Security Clearance Office*.[110] The *Bowers* and *High Tech Gays* opinions illustrate the modern judiciary's willingness to presume the legitimacy of statutes on the books, even those penned in a previous era and within a different political and social context.

It should be remembered that pre-*Casey* statutes, like the recently revived adultery and anti-sodomy statutes, are criminal ones. Doctors, and in some cases women, would face criminal prosecution and penalties. Revival would undermine certainty in the criminal context and would chill activities that many consider appropriate. But, the abortion statutes differ in a very fundamental way — they were invalidated by the courts as unconstitutional. Regardless of the particular scenario confronted by a court, the consequences for individuals will be harsh. Courts should not impose such punishments on citizens without clear direction from the legislature.

## III
## REVIVAL OF CRIMINAL ABORTION LAWS IS UNCONSTITUTIONAL

The decision in *Casey* (and any possible future decision reversing *Roe*) narrows what had been considered a fundamental constitutional guarantee of

102. *Id.*

103. "[S]ome studies estimate that 30 to 70 percent of married people have engaged in extramarital sex." Schmidt, *supra* note 85, at A14.

104. Kolbert, *supra* note 96, at B1.

105. Schmidt, *supra* note 85, at A14.

106. Kolbert, *supra* note 96, at B1.

107. 478 U.S. 186 (1986) (upholding an 1816 Georgia anti-sodomy statute as not violative of due process).

108. *See* State v. Hayes, 324 P.2d 163 (Idaho 1992); People v. Austin, 460 N.W.2d 607 (Mich. 1990).

109. Criminal abortion laws do not have such deep roots because abortion was not illegal under the common law. *See* MILBAUER, *supra* note 51, at 119.

110. 895 F.2d 563 (9th Cir. 1990).

privacy and bodily integrity. As noted before, the courts have never before taken such a step.[111] Nor has such a situation ever been confronted by the people, the executive branches, or the legislatures. Just how the Court may structure a future decision reversing *Roe* remains unclear; they may or may not continue to recognize, as *Casey* does, that the pregnant woman has some rights or interests in choosing an abortion.[112] *Casey* has certainly limited women's rights in favor of the State's interest and has strengthened the ability of state legislatures to regulate abortion. Legislators may seek to enact restrictive legislation,[113] but in the meantime zealous prosecutors will likely attempt to enforce the criminal statutes already at their disposal.

Courts should not consider these statutes to be valid and repealable but instead void and reenactable. Revival of several of these statutes would violate the separation of powers doctrine, equal protection, and due process due to lack of fair warning, administrative discretion, and ad hoc decision-making.[114] The sections which follow will examine these problems in light of the federal Constitution; however, it should be remembered that individual state constitutions may provide even greater protections.[115]

### *A. Due Process*

Revival of statutes raises several due process concerns. Each statute creates different problems, depending on when the statute was passed, the specific language of its provisions, its purpose, and whether it conflicts with other statutes in the state. Due process requires clear and consistent statutory enactments; revival of pre-*Casey* statutes would violate both of these requirements.

Lack of fair notice is the most problematic due process issue in the revival of pre-*Casey* statutes. Fair notice encompasses the idea that people should not have to guess at the meaning of a penal statute and should have reasonable opportunity to know that the statute exists. It is impermissible for a law to "trap the innocent by not providing fair warning."[116] In American jurisprudence, lack of fair notice may constitute grounds for invalidating a statute.[117]

Fair notice problems may arise in a statute which uses vague terms that

111. *See supra* notes 45-48 and accompanying text.

112. *See supra* note 53.

113. For instance, Kentucky has enacted an anti-choice legislative declaration, KY. REV. STAT. ANN. § 311.710(5) (Michie/Bobbs-Merrill 1990), which states: "If . . . the United States Constitution is amended or relevant judicial decisions are reversed or modified, the declared policy of this Commonwealth to recognize and to protect the lives of all human beings regardless of their degree of biological development shall be fully restored." *Id.*

The Republican Party platform currently calls for a "human life amendment" overturning *Roe* and the appointment of judges who "respect the sanctity of innocent human life." Rosenbaum, *supra* note 44, at A26.

114. Bonfield, *supra* note 14, at 391.

115. *See supra* notes 16-18 and accompanying text.

116. Grayned v. Rockford, 408 U.S. 104, 108-09 (1972) (upholding an anti-noise ordinance because "it is clear what the ordinance as a whole prohibits").

117. Colautti v. Franklin, 439 U.S. 379, 390 (1979); United States v. Harriss, 347 U.S. 612, 617 (1954).

do not clearly define the crime,[118] thereby allowing prosecutors great discretion in the statute's application.[119] Vague language in statutes makes it difficult for citizens to conform their practices to the law. Many pre-*Casey* statutes use imprecise, vague terms that fail to "give that certainty which due process of law considers essential in a criminal statute."[120] Even very recent abortion statutes have failed to resolve problems of vagueness. Broad terms such as "medical emergency,"[121] "premature delivery,"[122] and the use of "any substance" for abortion[123] could be used by prosecutors to ensnare conduct such as contraceptive use and cesarean sections that reasonable people would find difficult to believe illegal. Assurances by prosecutors that these terms would not be interpreted so broadly are not adequate — a statute may not "set a net large enough to catch all offenders, and leave it to courts to step inside and say who could be rightfully detained and who could be set at large"[124] — the statute itself must be clear.[125]

A fair warning problem may also arise in states which have more than one restrictive abortion law, or one restrictive and one permissive law. Con-

118. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); *see also Harriss*, 347 U.S. at 617.

119. "The absence of specificity in a criminal statute invites abuse on the part of prosecuting officials who are left free to harass any individuals or groups who may be the object of official displeasure." Parker v. Levy, 417 U.S. 773, 775 (1974) (Stewart, J., dissenting).

120. United States v. Vuitch, 402 U.S. 62, 73 (1971) (quoting Vuitch v. United States, 305 F. Supp. 1032, 1034 (1970)). *See, e.g., Colautti*, 439 U.S. 379 (striking for vagueness a viability determination without a scienter requirement and a clear standard of care as to whom duty is owed).

121. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 3203 (1988) (defining "medical emergency" as "that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function."). The phrase "serious risk of substantial and irreversible impairment of major bodily function" is itself subject to conflicting interpretations, and the dispute was at the heart of the *Casey* case. The district court and the court of appeals in *Casey* differed over whether an inevitable abortion, a premature ruptured membrane, or a preeclampsia (toxemia of pregnancy) would constitute an emergency under the statute. Planned Parenthood v. Casey, 947 F.2d 682, 699-701 (3d Cir. 1991), *aff'g in part and rev'g in part*, 744 F. Supp. 1323 (E.D. Pa. 1990). The Supreme Court ruled that *Casey* should be interpreted to include such situations, but will subsequent statutes have to slavishly follow the words of the Pennsylvania legislature to avoid further litigation on the subject or will they be able to add new twists?

122. This term has been interpreted to prohibit cesarean sections of a premature fetus for maternal or fetal health reasons. *See* Brief of the National Abortion Rights Action League and Fifteen Other Organizations as Amicus Curiae in Weeks v. Connick, 733 F. Supp. 1036 (E.D. La. 1990), at 20.

123. Such a blanket prohibition could be interpreted to cover use of the IUD and some oral contraceptives that act as abortifacients. *Id.*

124. United States v. Reese, 92 U.S. 214, 221 (1876), *quoted in* Houston v. Hill, 482 U.S. 462, 466 (1987).

125. *See* Poe v. Ullman, 367 U.S. 497, 512 (1961) (Douglas, J., dissenting). Douglas noted that a "tacit agreement" not to enforce portions of a Connecticut statute, which prohibited the use of contraceptive devices and the providing of medical advice regarding contraception, was not sufficient protection against the enforcement of an unreasonable statute. *Id.*

flicting statutes "would create doubt, ambiguity, and uncertainty, making it impossible for citizens to know which one of the . . . conflicting laws to follow, and would thus violate one of the first principles of due process."[126] People would be unable to look at the statutes to determine what was legal, and instead would have to rely on post hoc decisions by prosecutors and judges.[127] As a result, the average citizen would be unable to conform her behavior to the law.[128]

Conflicting criminal penalty provisions within a 1917 immigration statute caused the statute to be struck in *United States v. Evans*.[129] A unanimous Court held that "[i]t is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make. That task it can do with precision."[130] In the *Evans* situation, the prosecutor was able to choose between penalties, thereby usurping a legislative function. Although prosecutors have great discretion in choosing the crime under which a defendant is charged, and what sentence to seek, they should be guided by certain standards within the particular statute. When no such standards are specified, prosecutors can more easily abuse this discretion. Such abuse would be a clear violation of *Kolender v. Lawson*, which held that there must be "minimal guidelines to govern law enforcement."[131] Unguided prosecutorial discretion could potentially lead to targeted persecution of certain groups or individuals.[132]

In the confusion created by the revival of pre-*Casey* laws, the prosecutor would not simply be choosing between different penalties to apply to the same behavior; she would be determining exactly what behavior constituted a crime. This violates fundamental principles of due process by delegating "basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[133] Citizens do not have to rely on that type of decision-making. Even if the revived statute itself is clear, if the effect of conflicting statutes is to mislead or confuse, the statute is unconstitutional.[134]

In the context of abortion, revival of pre-*Casey* criminal statutes presents

126. North Carolina v. Pearce, 395 U.S. 711, 738-39 (1969).

127. Brief Amicus of the National Abortion Rights Action League, *supra* note 122, at 14-15.

128. *Id.* at 17. *Cf.* United States v. Cardiff, 344 U.S. 174, 176 (1952) (holding that a factory owner who refused to consent to an inspection by the Food and Drug Administration was not criminally liable because the statute was vague and fluid, thereby providing the person with no fair warning).

129. 333 U.S. 483 (1948). At issue in *Evans* was a section of the Immigration Act of 1917 intended to criminalize concealing or harboring aliens. However, the statute was ambiguously worded, creating a "problem . . . of multiple choice, presenting at least three, and perhaps four, possible yet inconsistent answers on the statute's wording." *Id.* at 484-85.

130. *Id.* at 495.

131. 461 U.S. 352, 358 (1983) (citing Smith v. Goguen, 415 U.S. 566, 574 (1974)).

132. Bonfield, *supra* note 14, at 410-11, n.134.

133. Grayned v. Rockford, 408 U.S. 104, 108-09 (1972).

134. United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655, 674 (1973).

unique fair notice problems. People have certain reliance interests in the rights established by *Roe*; they have ordered their lives around the existence of these rights and abortion has become a widespread practice in our society.[135] Due to reliance upon *Roe*, and ignorance of the existence of such statutes, many people will be able to strongly argue that prosecutions are invalid under the Due Process Clause.[136]

> Where both the community and its law-enforcement agencies have notoriously ignored an enactment for an unduly protracted period, it should be constitutionally impermissible to suddenly prosecute its violation because the act's proscriptions have disappeared from the legal consciousness of the body politic. The statute has neither been obeyed nor applied for such an extended period that ample justification has long existed for the public's feeling that the act has lost the force of binding law.[137]

To suddenly announce that abortion is illegal would chill abortion activities and punish others who justifiably relied on the right to choose. The reversal of precedent must acknowledge this reliance interest. As the Court noted in *Casey*, such reliance interests should receive protection.[138]

> [F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on Roe cannot be exactly measured neither can the certain cost of overruling Roe for people who have ordered their thinking and living around that case be dismissed.[139]

Some argue that declaration of prospective enforcement cures fair-notice problems.[140] However, such a declaration must have certain attributes: it

135. In the United States, about two-thirds of women will have an unintended pregnancy in their lifetime and about 45% will have an abortion. Robin C. Duke & J. Joseph Speidel, MD, MPH, *Women's Reproductive Health: A Chronic Crisis*, 266 JAMA 1846-47 (1991) (citing R.B. GOLD, ABORTION AND WOMEN'S HEALTH: A TURNING POINT FOR AMERICA? (Alan Guttmacher Institute ed., 1990)).

136. Lambert v. California, 355 U.S. 225 (1957) (holding that an ordinance requiring felons entering Los Angeles to register with the city authorities was invalid because the average person could not be expected to know of its existence).

137. Bonfield, *supra* note 14, at 415-16.

138. *See also* Hilton v. South Carolina R.R. Comm'n, 112 S. Ct. 560 (1991). Hilton involved statutory interpretation, which the Court asserted was different from constitutional interpretation. The Court still acknowledged special consideration to be given when "overruling the decision would dislodge settled rights and expectations or require an extensive legislative response [from many states]." *Id.* at 564.

139. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2809 (1992) (citations omitted).

140. Bonfield, *supra* note 14, at 421.

must be public, announced by the legislature, and of such character to ensure that the average citizen could learn of it and have the opportunity to express her approval or disapproval. In the context of abortion, fair warning would require notice that the law will change and a sufficient period of time to allow people to conform their behavior to the new law or to act politically to repeal the pre-*Casey* statutes.

A simple announcement of the intent to resume prosecutions would be insufficient, particularly since a criminal statute would be at stake.[141] Criminalizing abortion and then repealing the laws would carry substantial penalties. Many women would be forced to go through unwanted pregnancies and others would die from illegal abortions. Such consequences go beyond those of other statutes and require new legislative consideration.[142]

### *B. Separation of Powers*

Revival typically occurs with resumed prosecutions under long-disused statutes. This practice threatens principles of separation of powers because a revival by prosecution is not necessarily indicative of legislative will and is therefore an inappropriate "trigger."[143] Resumed prosecutions indicate that the inertial balance has shifted, but they do not indicate whether this shift is due to popular demand or the decision of one person within the executive branch.

Bickel suggests that when revival takes place through prosecution it is by the wrong branch of government. "When a prosecution at last occurs, it denotes at least the beginning of the imbalance natural to operational government, but it reflects it irresponsibly, through the wrong institution and process, precisely as does a prosecution under a vague statute."[144] He also emphasizes the individualized nature of the prosecutor's decision to revive. "When [a statute] is resurrected and enforced, it represents the *ad hoc* decision of the prosecutor, unrelated to anything that may realistically be taken as

141. Some have suggested that press conferences and advertisements would solve such a notice problem. This may be true, but questions remain as to what would be adequate notice in terms of time and method. Moreover, announcing such revival places the onus of repeal on pro-choice forces and presumes a majority of anti-choice voters rather than starting from scratch and allowing each side to be heard and compromise to follow.

142. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects — with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature of both the statute and of its previous application, demand examination.

Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940). *See also* Warring v. Colpoys, 122 F.2d 642, 645-46 (D.C. Cir. 1941) ("When a case is decided it is expected that people will make their behavior conform to the rule it lays down" . . . and observing that "law loses its vital meaning if it is not correlated to the organic society in which it lives.").

143. Bonfield, *supra* note 14, at 423.

144. BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 12, at 153.

present legislative policy."[145] However, given the legal system's presumption that the law is valid regardless of disuse, this argument may not be persuasive because the law at one time did indicate the legislature's will. In fact, one district attorney in Wisconsin felt it would violate the separation of powers for him not to prosecute because that decision "would be, in effect, to declare the statute null and void. And that is not my role as district attorney."[146]

However, in states where revival would create a conflict between statutes, as discussed in section III-A, such discretion on the part of the executive and judiciary would be inappropriate and would usurp a traditionally legislative function; only the legislature introduces and passes statutes to determine what is legal and what is not. Prosecution under pre-*Casey* statutes will infringe on what was formerly recognized as a fundamental right; these statutes will also impose significant criminal penalties on a practice which is controversial and subject to constantly changing public opinion. Revival should only occur through legislative reenactment to insure that the people have voiced their opinions through their legislators.

### *C. Equal Protection*

Many contend that regulation of the abortion decision violates guarantees of equal protection because it prohibits women from exercising the same control over their bodies that men exercise over theirs. It is contended that pregnancy is no different from other medical conditions over which people have complete control. The mere fact that pregnancy occurs only in women is insufficient to justify differential treatment. Statutes which impose a burden merely on the basis of gender constitute gender-based classifications and should be closely examined by the courts. Since *Reed v. Reed*,[147] the Court has applied heightened scrutiny to statutes which distinguish on the basis of gender.[148]

Many pre-*Roe* statutes were based on "archaic or stereotypic[al] notions"[149] of women. Eight of the twenty pre-*Roe* statutes[150] were passed before the Nineteenth Amendment gave women the right to vote.[151] The va-

145. Bickel, *The Supreme Court*, *supra* note 95, at 63.

146. Schmidt, *supra* note 85, at A14.

147. 404 U.S. 71 (1971) (holding that Idaho probate code giving preference to men over women as administrators for decedent's estate was discriminatory and violated the Equal Protection Clause).

148. Mississippi Univ. for Women v. Hogan, 458 U.S. 710 (1982); Califano v. Goldfarb, 430 U.S. 199, 211 (1977) (plurality opinion); Craig v. Boren, 429 U.S. 190 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Weisenfeld, 420 U.S. 636 (1975); and Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion).

149. *Hogan*, 458 U.S. at 725.

150. This count does not include the 1910 Oklahoma statute, which was amended in 1961. *See supra* note 50.

151. Of the 12 statutes passed after 1919, 10 were enacted or modified in the 10 years prior to *Roe*. *See supra* note 50. While these statutes probably reflect women's voices in their consideration, the number of women in the legislatures has never been large. Jane Cross, *The 1992 Campaign: Women, Where Ambition Meets Opportunity*, N.Y. TIMES, May 29, 1992, at A19.

lidity of these statutes may be seriously questioned because women, whose lives will be profoundly affected by such statutes, had little influence on the legislative process at the time they were enacted. Moreover, many of these statutes are based on "stereotypic notions"[152] of women and women's roles prevalent in the nineteenth century.[153] The Supreme Court has ruled that statutes motivated by, or tending to perpetuate, gender stereotypes violate the Equal Protection Clause.[154]

To determine whether a discriminatory intent lies behind a challenged law, courts have looked at other statutes passed at the time which affect the particular group.[155] Gender classifications that are arbitrary are unconstitutional, and the government must "carry the burden of showing an exceedingly persuasive justification for the classification."[156] However, courts sometimes overlook an archaic and discriminatory past purpose and impute a rational governmental purpose to a statute. For example, in *Michael M. v. Sonoma County Superior Court*,[157] the Supreme Court held that a statutory rape statute which punished only males did not violate equal protection. The Court ignored the legislature's stated purpose at enactment, to punish males who were assumed to be the aggressor in sexual relations, and instead imputed to the statute the purpose of preventing illegitimate teenage pregnancies.[158]

The Supreme Court's tendency to impute a rational basis to otherwise

152. *Hogan*, 458 U.S. at 725 (1982) (holding that a state-supported all-women's nursing school violated equal protection).

153. Reasons given for outlawing abortion were often racist and sexist. Dr. Ely Van de Warker expressed the opinion that "[t]he married woman who gives to society the womanhood she ought to give to humanity, seeks the abortionist, and by the outlay of a few dollars shirks the high destiny of a mother." MILBAUER, *supra* note 51, at 126 n.29 (quoting Ely Van de Warker, *Detection of Criminal Abortion*, 4 J. OF THE GYNECOLOGICAL SOC'Y OF BOSTON 292-93 (1871)). Other people expressed fear that the "strictly Americans" would soon become a minority due to the influx of immigrants, particularly those of Irish Catholic and Chinese descent. MILBAUER, *supra* note 51, at 117-18, 132-33.

154. *See infra* note 148. "A virtually identical 'archaic and overbroad' generalization, 'not . . . tolerated under the Constitution' underlies the distinction drawn by [the statute]. . . ." Weinberger v. Weisenfeld, 420 U.S. 636, 643 (quoting Schlessinger v. Ballard, 419 U.S. 498, 507-08 (1975)). "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (striking down statute which established different standards for female and male Air Force officers claiming spouse's benefits). "[C]lassifications based upon sex . . . are inherently suspect, and must be subjected to strict judicial scrutiny." *Id.* at 688.

155. Hunter v. Underwood, 471 U.S. 222, 228-29 (1985). Justice Rehnquist, for a unanimous Court, stated that the Alabama constitutional convention of 1901, at which the challenged moral turpitude statute was adopted, had a racially discriminatory intent. The racially discriminatory intent of the constitutional convention supported the finding that the statute violated equal protection; a non-discriminatory explanation offered by the state could not save the statute. *Id.* at 229-30.

156. *Hogan*, 458 U.S. at 724 (quoting Personnel Administration of Mass. v. Feeney, 442 U.S. 256, 273 (1979)).

157. 450 U.S. 464 (1981).

158. *Id.* at 471.

invalid statutes should not be followed in the case of pre-*Casey* statutes. Instead the Court should remain true to their reasoning in *Hunter*,[159] in which a non-discriminatory reason could not save the statute. These pre-*Casey* statutes have been considered dead and have not been reconsidered in any rational fashion.

### *D. Legislative Consideration*

A common principle in American jurisprudence is that courts will not examine the legislative process for deficiencies; there is a presumption that the legislature acted in good faith with proper consideration given to the interests at stake.[160] A legislature is presumed to have enacted laws conforming to the Constitution.[161]

However, courts have asserted that "[j]udicial deference to [legislative] judgment is predicated on the confidence courts have that they are just resolutions of conflicting interests."[162] In *Greene v. McElroy*,[163] the Supreme Court refused to defer to a constitutionally suspect security proceeding that threatened the employment rights of military contractors because neither Congress nor the President had specifically approved them.[164] In the strong words of Chief Justice Warren, the Court held that lawmakers must demonstrate "careful and purposeful consideration" to "decisions of great constitutional import and effect" before a court may approve the abridgement of individual rights.[165]

Justice Stevens' dissent in *Fullilove v. Klutznick*[166] suggested precisely this need for judicial scrutiny of the legislative deliberation behind old or constitutionally suspect statutes. Stevens contended that:

> If the general language of the Due Process Clause authorizes the Court to review Acts of Congress under the standards of Equal Protection, there can be no separation of powers objection to a more tentative holding of unconstitutionality based on a failure to follow procedures that guarantee the kind of deliberation that a fundamental constitutional issue of this kind obviously merits.[167]

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159. *Hunter*, 471 U.S. at 229-30.

160. "Laws are presumed to have been passed with deliberation." 73 AM. JUR. 2D Statutes § 56 (1974).

161. Charles Stuart Lyon, *Old Statutes and New Constitution*, 44 COLUM. L. REV. 599, 601 (1944).

162. Michael J. Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191, 1241 (1978) (quoting Hobson v. Hanson, 269 F. Supp. 401, 507 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969)).

163. 360 U.S. 474 (1959).

164. *Id.* at 507.

165. *Id.*

166. 448 U.S. 448 (1980) (concerning an affirmative action program for minority contractors; at issue was whether the legislature had failed to adequately consider various alternatives or answer questions raised by the statute).

167. 448 U.S. at 550.

Pre-*Casey* statutes could be challenged on the grounds that legislatures did not properly deliberate and consider the various interests at stake. Abortion laws from the nineteenth and early twentieth centuries were passed when individual rights were not fully recognized by the courts or legislatures. Women's rights were particularly underdeveloped — until 1919 women could not vote, and until the 1960s, the Equal Protection Clause was not recognized as enforceable against gender-based discrimination. Furthermore, these early abortion statutes were considered unconstitutional after *Roe*, so no proper political debate occurred over whether to repeal them. Other pre-*Casey* statutes were passed merely to challenge *Roe*; because pro-choice constituents tended to rely on the courts, it is unclear whether full debate and thorough consideration took place.

The "clear statement" doctrine could be used to challenge pre-*Casey* abortion statutes which were passed in earlier eras. According to the Supreme Court, "the requirement of clear statement insures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."[168] The doctrine has been employed by the Court to require legislatures to review the policy behind a constitutionally suspect statute and clearly articulate it.

Justice O'Connor used a form of the clear statement rule in *Thompson v. Oklahoma*,[169] a death penalty case involving a fifteen-year old defendant. O'Connor asserted that the statute lacked "the earmarks of careful consideration."[170] Given the unclear intent to impose such a penalty on a fifteen-year old, the Court sent the statute back to the legislature for clarification of its intended application.

In the 1972 case of *Abele v. Markle*,[171] which struck down a 110-year old Connecticut statute banning abortion, Judge Newman's concurrence stated that where "legislative determination has not been shown to have been made . . . it is inappropriate to decide the constitutional issue that would be posed if such legislative justification was before us."[172] Judge Newman concluded that "where a statute raises severe constitutional doubts, and where it can no longer be supported on the grounds for which it was passed, the Courts are justified in nullifying the law and forcing a legislative reconsideration."[173] In *Greene v. McElroy*[174] and *Kent v. Dulles*[175] the Supreme Court did not reach

168. United States v. Bass, 404 U.S. 336, 349 (1971) (adopting a narrow reading of the Omnibus Crime Control and Safe Streets Act punishing the possession of firearms because the statute was ambiguous).

169. 487 U.S. 815 (1988).

170. *Id.* at 857.

171. 342 F. Supp. 800 (D. Conn. 1972), *vacated and remanded*, 410 U.S. 951 (1973) (the Court remanded "for consideration of the question of the mootness of [the] appeal" due to the intervening decision in *Roe*).

172. *Id.* at 810.

173. CALABRESI, A COMMON LAW, *supra* note 24, at 22.

174. 360 U.S. 474 (1959) (finding it unclear whether Congress intended to authorize possible constitutional infringements on due process).

the constitutionality of the challenged action because it was not convinced that Congress had made a considered judgement. Thus, courts have sent statutes back to the legislature for re-evaluation when there are questions as to the statute's validity.

In a majority of pre-*Roe* statutes, the original purpose declared by the legislature is no longer valid. For example, abortion bans which sought to protect the mother's health may reflect the fact that abortion at one time was extremely dangerous. Today, however, legal abortion is safer than childbirth.[176] The doctrine of *cessante ratione legis, cessat et ipsa lex*[177] may apply to nullify these laws where the statute can no longer be supported on the grounds for which it was originally passed. However, as in *Michael M. v. Sonoma County Superior Court*,[178] the Supreme Court has become more likely to impute a valid legislative purpose to statutes to avoid striking them down.

It can be argued that many pre-*Roe* statutes have been repealed "by implication." Many states have passed licensing guidelines for abortion clinics and private doctors who perform abortions. Other states have simply allowed abortions to be performed without enacting specific regulations. If clinics or doctors had to be licensed by the state, the statutes could be struck down due to implied state endorsement of the outlawed practice. Where states have acted inconsistently with their pre-*Roe* laws or are unable to repeal the laws due to legislative inertia or "gridlock," these pre-*Roe* laws should be regarded as invalid.

Finally, states may have passed comprehensive legislation regulating abortion within the confines of *Roe* and its progeny. Canons of statutory interpretation mandate that two statutes addressing the same subject are to be reconciled if possible because repeal by implication is not a favored doctrine.[179] However, plain language of these pre-*Roe* laws is often in direct conflict with that of later acts. If the statutes are wholly inconsistent and cannot be reconciled, the latest in time prevails and the pre-*Roe* statutes are void.[180]

The problems posed by revival of pre-*Casey* statutes go to the very heart of our democracy as they implicate norms of society and government we have worked to forge. Revival of such laws is surely unconstitutional, for it violates what we believe to be an inherent principle of this nation — the right as a people to speak to an issue and express those opinions through the ballot. These laws are not necessarily the choice of today's voters — perhaps they

175. 357 U.S. 116 (1958) (finding it unclear whether Congress intended to authorize possible constitutional infringements on the right to travel).

176. NARAL III, *supra* note 10, at v.

177. "The reason of the law ceasing, the law itself also ceases." BLACK'S LAW DICTIONARY 228 (6th ed. 1990).

178. 450 U.S. 464 (1989); *see supra* text accompanying note 157.

179. United States v. Rodriguez, 480 U.S. 522, 524 (1987); Pasadas v. National City Bank, 296 U.S. 497, 503 (1936).

180. United States v. Fausto, 484 U.S. 439, 453 (1988); Town of Red Rock v. Henry, 106 U.S. 596, 601-02 (1883); Wilmot v. Mudge, 103 U.S. 217, 219 (1880).

would be, but a vote is necessary. Revival permits representatives of previous generations to govern people today.

## IV
## ALTERNATIVES TO REVIVAL

Currently, courts use constitutional doctrines, such as equal protection and due process, to invalidate statutes on the grounds of vagueness or lack of fair notice. However, such doctrines do not deal adequately with the problems these obsolete statutes pose, as evidenced by the courts' and legislatures' willingness to permit revival. Given the numerous problems revival would entail, and the fact that American courts presume statutes legitimate until repealed, alternative proposals should be considered. Dissatisfaction with the techniques currently recognized by the courts to deal with obsolete statutes has led many commentators to suggest a variety of alternative methods by which a court could legitimately confront the revived statutes and act accordingly.[181] The proposals that may be most helpful are those of desuetude and Dean Guido Calabresi's second look doctrine.

In section IV-A, the doctrine of desuetude, its historical applications and its limitations will be explored. The doctrine of desuetude (literally "disuse" or "discontinuance of use")[182] recognizes that "under some circumstances statutes may be abrogated or repealed by a long-continued failure to enforce them."[183] Noting both the need for citizens to be free of obsolete statutes and for courts to be honest, many have called for American courts to use the doctrine of desuetude in appropriate circumstances.[184] Through desuetude, courts would exercise some of their proper authority by employing a kind of common law process of incremental change[185] by which they could update the law or encourage legislative reconsideration.[186] Desuetude in its purest form has been rejected as a valid legal doctrine in America. Nevertheless, I propose that the doctrine could be modified and combined with proposals of Calabresi and Bickel to enable courts to avoid reviving dead laws.

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181. Jack Davies proposes the use of "sunset laws" that would permit judicial modification of statutes after a certain number of years. He asserts that in the current state of legislative primacy, laws become obsolete because the judiciary lacks the ability to modify them appropriately. Davies, *supra* note 83, at 204; *see also* Gilmore, *Putting Senator Davies in Context*, *supra* note 78, at 245; Guido Calabresi, *The Nonprimacy of Statutes Act: A Comment*, 4 VT. L. REV. 247 (1979) [hereinafter Calabresi, *The Nonprimacy of Statutes Act*].

Some have proposed radical changes to our legislatures and the system of checks and balances. *See* CALABRESI, A COMMON LAW, *supra* note 24, at 69. Two approaches to reform have been suggested. The first would structure the legislature to recognize that the United States has become a statutory state and therefore to allow easy revision of statutes. The second would be a full return to the common law era, making enactment unlikely. *Id.*

182. BLACK'S LAW DICTIONARY 449 (6th ed. 1990).

183. Bonfield, *supra* note 14, at 394; *see also* Henriques, *supra* note 14, at 1058.

184. CALABRESI, A COMMON LAW, *supra* note 24; Bickel, *The Supreme Court*, *supra* note 95, at 64; Bonfield, *supra* note 14, at 439-40.

185. CALABRESI, A COMMON LAW, *supra* note 24, at 4.

186. *Id.* at 2.

In section IV-B, I examine Guido Calabresi's second look doctrine. Calabresi proposes that we grant courts the authority to determine whether a statute is obsolete and "whether in one way or another it should be consciously reviewed."[187] Calabresi urges courts to avoid ultimate constitutional adjudication and instead to engage in active dialogue with legislatures. Constitutionally questionable statutes should be thoroughly reexamined by the courts. If a court determines that a statute is obsolete or out of touch with the current legal landscape, it should be nullified, and the court should state specifically the problems with the statute in order to provide guidance to legislators' attempts to draft replacement legislation.

### *A. Desuetude — General Theory and History*[188]

Desuetude is one of several techniques a court could use to nullify a statute, but it has yet to be accepted by modern American courts.[189] American courts used a form of desuetude in the early nineteenth century,[190] "suggest[ing] from time to time that statutes could become so obsolete as no longer to be in force. . . ."[191] During the latter half of the nineteenth century, the courts turned away from this doctrine,[192] and modern courts have explicitly rejected the practice.[193]

The most recent Supreme Court opinion to explore the concept of desuetude was *District of Columbia v. John R. Thompson Co.*,[194] a 1953 case concerning a restaurateur who was prosecuted under nineteenth century anti-discrimination statutes for refusing to serve African Americans. The *Thompson* Court strongly rejected the doctrine of desuetude, holding that "[t]he fail-

187. CALABRESI, A COMMON LAW, *supra* note 24, at 2.

188. For a more thorough examination of the historical evolution of desuetude, *see* Bonfield, *supra* note 14 and Henriques, *supra* note 14.

189. A similar doctrine is that of *void ab initio*. Like desuetude, the *void ab initio* theory was used in this country for some time but has become increasingly disfavored. Under *void ab initio*, a statute held unconstitutional cannot be revived because it is considered void and nonexistent. "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." Norton v. Shelby County, 118 U.S. 425, 442 (1886). However, courts can only rule that statutes are unconstitutional; they cannot expunge a law from the books. Thus, the view that these statutes were merely dormant and revivable gained favor. *See* Erica Frohman Plave, *The Phenomenon of Antique Laws: Can a State Revive Old Abortion Laws in a New Era?*, 58 GEO. WASH. L. REV. 111, 113 (1989). Plave concludes that abortion laws can be revived under current statutory methods but she does not examine the various constitutional issues or the adequacy of the legislative process, which may necessitate a second look.

190. Wright v. Crane, 13 Serg. & Rawle 447, 452 (Pa. 1826); Porter's Appeals, 30 Pa. 496, 499 (1858); O'Hanlon v. Myers, 10 Rich. 128 (S.C. 1856); Watson v. Blaylock, 2 Mills 351 (S.C. Const. Ct. 1818); Williamson v. Bacot, 1 Bay 62 (S.C. 1787); Hill v. Smith, 1 Morris 95 (Iowa 1840); James v. Commonwealth, 12 Serg. & Rawle 220 (Pa. 1825).

191. *Judicial Abrogation of the Obsolete Statute: A Comparative Study*, 64 HARV. L. REV. 1181, 1186 (1951) [hereinafter *Judicial Abrogation*].

192. Pearson v. International Distillery, 72 Iowa 348, 34 N.W. 1 (1887); Homer v. Commonwealth, 106 Pa. 221 (1884).

193. Bonfield, *supra* note 14, at 423.

194. 346 U.S. 100 (1953).

ure of the executive branch to enforce a law does not result in its modification or repeal."[195] However, *Thompson* involved neither lack of fair warning nor separation of powers concerns.[196] Some judges and scholars believe that in certain situations the use of the doctrine would be proper.[197]

Several commentators contend that *Poe v. Ullman*[198] represents an implicit acceptance of desuetude.[199] The plaintiffs in *Poe* sought declaratory relief from Connecticut statutes prohibiting the use of contraceptive devices and the giving of medical advice concerning them.[200] The Court refused to adjudicate the constitutionality of the statutes on grounds that the statutes posed no immediate threat of actual hardship to the litigants.[201] Justice Frankfurter's opinion stated that

> [t]he undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis. "Deeply embedded traditional ways of carrying out state policy . . . " — or not carrying it out — "are often tougher and truer law than the dead words of the written text."[202]

In contrast, Justice Douglas argued in his dissent that the Court's implicit acceptance of desuetude was "contrary to every principle of American and English law."[203] Furthermore, Douglas noted that the doctrine was particularly inapplicable in *Poe* because "[t]his is not a law which is a dead letter."[204] Connecticut's legislature had twice re-enacted the statute and introduced bills to repeal the law during the previous twenty years had been rejected.[205] Douglas indicated that such actions provided notice and saved the statute

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195. *Id.* at 113-14; *see also* Bonfield, *supra* note 14, at 433; Henriques, *supra* note 14, at 1072 (citing *Thompson*, 346 U.S. at 113-14).

196. Bonfield, *supra* note 14, at 433-35. Fair warning was not at issue because the defendant had been explicitly warned about possible enforcement, not only through public announcements, but by prior prosecutions against him. Separation of powers was not violated either because the administrators of this particular act had also been delegated legislative powers.

197. As Judge Cooper noted in United States v. Elliott, 266 F. Supp. 318 (S.D.N.Y. 1967), "[i]n some situations a desuetudinal statute could prevent serious problems of fair notice." *Id.* at 326. *See also Ex parte* Dillin, 160 F. 751 (M.D. Tenn. 1908).

198. 367 U.S. 497 (1961).

199. *See* Bickel, *The Supreme Court, supra* note 95, at 61-64. "The consequence of the opinion, nevertheless, must be that a prosecution of persons situated as are Dr. Buxton and his patients would fail on the ground of desuetude." *Id.* at 64; *see also* Bonfield, *supra* note 14, at 435-38. *But see* Gerald Gunther, *The Subtle Vice of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 19 (1964) (criticizing Bickel's desuetude argument for evading the Court's failure to decide *Poe v. Ullman* on obligatory jurisdictional grounds).

200. 367 U.S. at 498-99.

201. *Id.* at 507-09.

202. *Id.* at 502 (quoting Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 369 (1940)).

203. *Id.* at 511.

204. *Id.* at 512.

205. *Id.*

"from being the accidental left-over of another era."[206]

If desuetude were a vital doctrine in the American legal system, a strong argument could be made that the pre-*Casey* statutes are dead and buried. Not only had they been commonly assumed to be unconstitutional and invalid, they were unenforced for almost twenty years as people behaved as *Roe* allowed. The public debate before *Casey* assumed that *Roe* was the standard and that abortion was legal within certain limitations. Any inroads on that standard were assumed to be a shift in current legal opinion, not an expression of what once was. Given these factors, desuetude would not permit the revival of pre-*Casey* statutes, but would demand new legislative action either affirming the validity of the statute or formally repealing it.

### *B. The Allocation of Legislative Inertia*[207] *— the Second Look Doctrine*

Many scholars posit that American courts, as in *Poe v. Ullman*, often use desuetude in a variety of forms under different labels[208] such as reinterpreting or constitutionalizing issues and utilizing the doctrines of vagueness, equal protection, overbreadth, and due process.[209] Both Calabresi and Bickel have criticized the courts' current treatment of suspect statutes, arguing that courts should instead be honest and principled[210] and utilize techniques that will encourage legislative reconsideration.[211] They urge the courts to engage in an active dialogue with the other governing bodies[212] and give honestly reasoned decisions in order to better inform the legislature as to the problems with a particular statute.

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206. *Id.*

207. I conclude that we should recognize openly that courts are exercising the power to allocate legislative inertia and to decide whether statutes deserve a retentionist or a revisionist bias. To deny what we are doing, to use tricks here, is to destroy by overuse a language that is easily cheapened, a language that should be reserved for the Court, in matters of high principle, and not the courts in low-level tasks.

CALABRESI, A COMMON LAW, *supra* note 24, at 180.

208. CALABRESI, A COMMON LAW, *supra* note 24, at 17-24; BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 12, at 149; Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 39 (1957) (proposing a "remanding function" enabling the Court to return certain issues of statutory interpretation to Congress for clarification of legislative intent).

209. Gilmore, *Putting Senator Davies in Context*, *supra* note 78, at 245; CALABRESI, A COMMON LAW, *supra* note 24, at 17; "[T]he concept of vagueness is an available instrument in the service of other more determinative judicially felt needs and pressures." Anthony G. Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court: A Means to an End*, 109 U. PA. L. REV. 67, 75 (1960).

210. BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 12, at 149; Perry, *supra* note 162.

211. Calabresi, *The Nonprimacy of Statutes Act*, *supra* note 181, at 251.

212. *See* Bickel, *The Supreme Court*, *supra* note 95, at 60.

The point is that the job of the Court, even in a perfectly real, concrete, and fully developed controversy, is not to resolve issues on which the political processes are in deadlock, but to do what it can to break that deadlock, so that the political institutions may make their decision before the Court is required to pass judgement on its validity.

*Id.*

Calabresi proposes the second look doctrine as a variation of the doctrine of desuetude. Second look allows the judiciary to call a statute into question if it is out of phase with the current legal landscape. The court must then determine whether to allocate the burden of inertia in favor of retention or revision of the statute. Either decision will place a burden on some group of constituents, who must then petition their legislators to either repeal or reenact the statute.[213] Unlike desuetude, which allows courts to repeal a statute after a set period of years of nonuse, second look recognizes that a long period of nonuse is merely one indicator that a statute may not represent the majority will correctly.

Although Calabresi looks mainly at the areas of criminal laws, negligence standards and fundamental rights, his analysis applies to the revival of pre-*Casey* statutes as well.

> The notion that, at the very least, the majoritarian bodies should be made to speak to their constituents in open and candid ways, before actions involving the penumbra of constitutional rights are upheld, seems to have been widely accepted. . . . [T]he object of the second look was to force majoritarian bodies like legislatures to face the issues and state openly whether or not they intended to abridge what, over time, had become near-constitutional guarantees."[214]

A law should not be retained when few rely on it. In fact, many may rely on its absence and will be harmed by its renewal. A second look is appropriate "to assure [the judiciary] that, to the extent that the law clashes with the legal topography in a fundamental way, the clash is the result of the genuine and *considered* wishes of majoritarian bodies."[215]

Calabresi calls for courts and legislatures to engage in an active dialogue to ensure that law is principled and reflective of society's desires. Given the interest in an informed and honest dialogue, courts should ask, cajole, or force the legislature, either to more clearly define the rule, or to reaffirm the old.[216] A court could change or nullify a statute, without declaring the statute unconstitutional, and thereby send it back to the legislature for a second look.[217] Calabresi suggests that when dealing with criminal laws or fundamental rights, which is precisely the situation with the pre-*Casey* abortion laws, the court should nullify a questionable law and put nothing new in its place.[218] However, Calabresi advises judicial restraint in application of the second look doctrine; he argues that a court should allow a statute to remain unless it finds

213. Larry Zelenak, *Calabresi: "Second Look" May Prevent Choking on Statutes*, HARV. L. REC., Mar. 18, 1977, at 5.

214. CALABRESI, A COMMON LAW, *supra* note 24, at 18-19. Calabresi notes that this principle has been formally incorporated into the Canadian legal system.

215. *Id.* at 136.

216. *Id.* at 166.

217. Zelenak, *supra* note 213, at 5; Bickel & Wellington, *supra* note 208, at 34.

218. CALABRESI, A COMMON LAW, *supra* note 24, at 156.

absolutely no reason to retain it because he finds few situations in which a law is truly out of touch.

Commentators critical of Calabresi's second look doctrine have responded that courts are isolated bodies whose function is to objectively apply the law according to the mandates of justice. However, courts do not exist in a vacuum. Calabresi emphasizes judges' understanding of the overall legal landscape as a factor.

> The answer must lie in the belief that the legal fabric and the principles that form it, are good approximations of one aspect of the popular will, of what a majority in some sense desires. . . . [I]t follows that those who by training and selection are relatively good at exploring and mapping the legal landscape can appropriately be given the task of evolving the law, and inevitably of allocating the burden of overcoming the inertia of that law.[219]

Judges deal with the applications of the law every day and are thereby made aware of the need for either change of the law or maintenance of the status quo. They are best able to discern how change should be made and how to "allocate the burden of inertia."[220]

Critics also contend that such a function would violate separation of powers and give too much authority to the courts, which are unelected, unrepresentative bodies.[221] However, nullifying the law to allow the legislature a second look, without putting a new one in its place, does not violate any fundamental principle of our constitutional democracy.[222] Both legislative reversal of the courts and judicial review have long been accepted, although judicial review has its critics.[223] The judiciary does not go beyond its authority by forcing legislative reconsideration. Courts must "leave to the legislatures the last say, unless constitutional guarantees are involved,"[224] but they do have a role to play in determining the validity of statutes as "the allocator of that burden of inertia which our system of separation of powers and checks and balances mandates."[225] An inappropriate court decision could be overridden by the legislature; this possibility makes courts more likely to be cautious so as not to be frequently overridden or have their authority questioned or diminished. In contrast, judicial modification, or judicial creation of a new rule, would be inappropriate because the court would be unsure of what a new rule

219. *Id.* at 96-97.

220. *Id.* at 164.

221. Gunther, *supra* note 199. Gunther is primarily concerned with the exercise of authority by the Supreme Court and other federal courts. Because state courts are often elected, they fall outside of his criticism.

222. CALABRESI, A COMMON LAW, *supra* note 24, at 156.

223. *See, e.g.*, Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

224. CALABRESI, A COMMON LAW, *supra* note 24, at 164.

225. *Id.*

should look like, not to mention the possible separation of powers problems such a practice might entail.

Although there is a danger that the legislature will be unable to pass new legislation in the place of the questioned law, nullification is appropriate; if a clear majority cannot be obtained to pass the rule then such a rule should not exist. The milder technique of threatening to nullify unless the legislature acts would not be appropriate in a criminal context, especially with regard to abortion laws, because the law's operation would send doctors to jail and chill activities with no clear majoritarian approval.

Calabresi states that "[i]t usually takes a series of constitutional decisions, ideological changes, technological innovations, or intellectual revolutions to make an old rule anachronistic."[226] Unless such drastic changes have occurred, the courts should exercise their power conservatively.

Just such a series of changes have occurred in the abortion context which necessitates a second look. Significant social, technological, political, and constitutional changes have occurred since *Roe*. Social changes most profoundly affected the place of women in society[227] and their ability to organize and participate in the political process.[228] Women have entered the workplace in increasing numbers and have become elected officials.[229] Another significant social change is the increased importance of the right to choose.[230] The technological changes that have taken place in the last two decades are staggering: *in vitro* fertilization, RU 486, safer abortion techniques, and genetic counseling are among them.[231] Statutes passed any time before 1973 certainly do not reflect these changes. While statutes passed since 1973 were reflective of the social, political, and constitutional changes that were ever-escalating and confusing, they did not reflect thorough debate as legislatures passed laws simply to challenge *Roe*. It is unclear how present citizens would vote on the myriad of issues surrounding abortion, particularly knowing the laws would actually take effect rather than be enjoined while a court battle rages.

Pre-*Casey* restrictions and declarations of legislative intent could be ex-

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226. *Id.* at 131.

227. *See Poll Finds New View of Women*, N.Y. TIMES, Jan. 6, 1981, at B12. 1980 was the first time a majority of Americans stated that it did not matter if a woman was mayor, a lawyer, or their boss. *Id.*

228. Statutes predating the passage of the Nineteenth Amendment (1919) are particularly suspect. Women before 1919 had significantly less effect on the political process because they were denied the right to vote.

229. The percentage of married couples in which both persons work increased from 29% in 1960 to 47% in 1980 to 59% in 1990. E.J. Dionne, Jr., *Speeches, Statistics, and Some Unsettling Facts About America's Changed Prospects*, THE WASHINGTON POST, Jan. 26, 1992, at C1.

230. "A more compelling case for relief is presented where the moral sense of the community toward the subject matter of a statute has undergone a great change." *Judicial Abrogation*, *supra* note 191, at 1187.

231. THE BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, THE NEW OUR BODIES, OUR SELVES 291-324 (1984); REPRODUCTIVE HEALTH TECHNOLOGIES PROJECT, THE PROGRESS OF RU 486 IN 1990 AND SUMMARY OF THE WORK OF THE REPRODUCTIVE HEALTH TECHNOLOGIES PROJECT, 1990 ANNUAL REPORT (1990).

amined under the second look doctrine. Five states anticipated the overturn of *Roe* by enacting these "trigger laws." These declarations were passed after *Roe* to express disagreement with the decision but were not vigorously opposed because they were thought to have no legal effect. For example, Illinois has the following statement:

> Further, the General Assembly finds and declares that longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.[232]

South Dakota's declaration merely states that "[t]his chapter is repealed on that specific date upon which the states are given exclusive authority to regulate abortion."[233] The legality of such statutes is highly suspect. Proponents of these provisions contend that immediately upon *Roe*'s demise, abortion will be illegal. However, some of these laws require other events to occur to become effective or are considered mere statements of policy and do not have the force of law. Any attempt to effectuate such statements should be subject to legislative reconsideration.[234]

The adoption of these statutes and declarations occurred without the requisite deliberation or consideration due a statute which would significantly infringe on personal liberties. Courts should decline to enforce these statutes "on the grounds of statements of legislative intent made when the legislature was restricted and 'distorted' by hostility toward precedent."[235]

As with the declarations of intent, other provisions of pre-*Casey* statutes suffer from many constitutional problems. Even in the instance of *Roe*'s complete reversal, such statutes should not be given new life. While they may be technically constitutional, they may not appropriately reflect societal values. Such laws should be sent back to the legislatures for a second look rather than risk the injustices that would result from their enforcement.

## CONCLUSION

Before enforcement of abortion restrictions begins again, people should have the opportunity to know of the statute and to register their approval or disapproval; the current legislature must make it clear that it endorses the law

232. ILL. ANN. STAT. ch. 38, para. 81-21 (Smith-Hurd 1991).

233. S.D. CODIFIED LAWS ANN. § 34-23A-21 (1986).

234. Letter from Rachael Pine, formerly Senior Staff Attorney, ACLU Reproductive Freedom Project, to State Civil Liberties Unions Directors 1, 2 (June 28, 1989) (on file with author).

235. Pine, DRAFT, *supra* note 70, at 8.

and that the statute does not remain on the books through legislative inertia alone. Allowing prosecutions to resume upon providing notice which may spark debate and possible repeal is inappropriate, particularly in the criminal context. Laws should only be enforced if there are clear and current indications that the law is an expression of contemporary majority will.

Reviving these obsolete statutes can wreak serious injustice on those prosecuted and chill the actions of those uncertain if prosecution will occur. People's expectations would be drastically altered — many are unaware that such criminal statutes continue to exist. Revival would create a confusing array of conflicting statutes such that people would be unable to conform their behavior to the law and prosecutors and judges would be able to selectively choose which laws to enforce.[236]

Abortion is a very controversial issue in America. Every move by a legislature, executive, or court is closely monitored and stokes the fires of the debate. Considering the uniqueness of revival in this context (never before has the Supreme Court taken away a fundamental right), techniques that promote a dialogue between the courts and the legislature should be embraced. To protect democratic processes, the people must have an opportunity to speak to the issue. Careful deliberation of the interests at stake and the injustices that would result from hasty decision making mandate that courts nullify these laws to induce the legislature to take a second look. Courts should not shy away from adjudicating this issue, but instead should step in and ensure that the political process is working as it should.

236. Brief Amicus of the National Abortion Rights Action League, *supra* note 122, at 12.