Notes

IS SELF-ABORTION A FUNDAMENTAL RIGHT?

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INTRODUCTION

Kawana Ashley, an unwed, pregnant teenager, had reasons for wanting to terminate her pregnancy.[1] Unfortunately for Ashley, she was twenty-five weeks pregnant and could no longer obtain a legal abortion because the fetus was viable.[2] So, on March 27, 1994, she obtained a gun and shot herself across the abdomen in an attempt to terminate her pregnancy.[3] Ashley was rushed to the hospital and survived her self-inflicted gunshot wound.[4] Her fetus, however, had been struck by the bullet and died fifteen days later.[5] Ashley was prosecuted for manslaughter and third-degree murder,[6] but the Florida Supreme Court held that a pregnant woman cannot be charged with these crimes for self-aborting.[7] The court held that, under Florida law, Ashley could self-abort at any time during her pregnancy, even when the fetus was viable.[8]

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1. *See* State v. Ashley, 701 So. 2d 338, 339 (Fla. 1997) (stating that Ashley's grandmother would not assist Ashley in caring for another baby if Ashley became pregnant again).

2. *Id*.; FLA. STAT. ch. 390.001(2) (LEXIS through 1994 Legis. Sess.) (providing that "[n]o termination of pregnancy shall be performed on any human being in the last trimester of pregnancy [except] in cases in which the termination is "necessary to save the life or protect the health of a pregnant woman").

3. *Ashley*, 701 So. 2d at 339–40.

4. *Id.* at 339.

5. *Id*.

6. *Id*.

7. *Id.* at 342.

8. *Id*.

The United States Supreme Court's jurisprudence on abortion does not clearly address the issue of self-abortion.[9] The Court's decision in *Planned Parenthood v. Casey*[10] established a woman's right to terminate her pregnancy before the fetus is viable through a surgical abortion.[11] *Casey* created a basic framework for understanding the legal status of abortion, but it also left certain aspects of a woman's right to terminate her pregnancy a mystery. A woman's right to self-abort is one of these aspects.

The lack of attention paid to self-abortion by the Supreme Court, however, does not mean that self-abortion is not a real and pressing problem. Self-abortion may be thought of as an antiquated form of abortion that was only necessary in the days before *Roe v. Wade*,[12] when women were often unable to obtain the assistance of doctors in terminating a pregnancy. Self-abortions, however, still occur in American society. As evidenced by Kawana's story, desperate women take various measures to abort their fetuses. Methods range from inserting coat hangers into the cervix[13] to utilizing at-home abortion kits found on the Internet.[14] Not only are self-abortions currently being practiced in the United States, but the danger they pose to both the women and the fetuses is real. Women who perform self-abortions

9. The term "self-abortion" refers to methods of abortion that women create and use without the assistance of a medical professional. Examples of self-abortion include the use of drugs (kerosene, lead, herbs), instrumentation (injection of air or insertion of hangers), cervical dilation, and trauma (blows to the abdomen). Benjamin Honigman et al., *Reemergence of Self-Induced Abortions*, 11 J. EMERGENCY MED. 105, 107 (1993). The term does not include the morning-after pill, which is taken within seventy-two hours of possible conception of the same hormones found in birth control pills. *Few Private Physicians Offer Women Abortion Pill*, L.A.TIMES, Sept. 25, 2001, at 3. The term also excludes "medical abortions," which are a method of abortion by which a woman takes a series of pills (commonly known as RU-486) that first cause the uterus to be unable to support the fertilized egg and then cause the uterus to contract and expel the egg. Stacey Schultz, *Long-Awaited Abortion Pill Will Offer More Privacy—But No Less Controversy*, U.S. NEWS & WORLD REP., Feb. 28, 2000, at 79. Although a woman takes the pills with a medical abortion, this method of terminating pregnancy is distinguishable from other methods of self-abortion, because a woman may only take the drug with a prescription from a licensed doctor, and must visit the doctor a few times during the abortion process. Liza Mundy, *The Quiet Afterlife of RU-486*, WASH. POST., June 10, 2001, at W19.

10. 505 U.S. 833 (1992).

11. *Id.* at 870.

12. 410 U.S. 113 (1973).

13. Honigman et al., *supra* note 9, at 105.

14. *Don't Buy Abortion Kits Over the Net, FDA Warns*, FDA CONSUMER, Sept./Oct. 1997, at 3 (discussing the dangers of self-abortion kits).

risk, among other things, infection, sepsis,[15] septic shock, future infertility, and even death.[16] Moreover, women who self-abort may also injure the fetus while failing to terminate the pregnancy, which could result in a child being born with defects.[17]

Despite the seriousness of this issue, a thorough analysis of whether self-abortion is a fundamental right has not been conducted by either the courts or by legal scholars. This Note attempts to fill this gap. It examines whether there is a fundamental right to self-abort at any stage of a pregnancy. Part I establishes that self-abortion still occurs in America, and that a state supreme court recently suggested that self-abortion may be a right. Part II shows that America's current abortion framework under *Roe* and *Casey* implies that a woman does not have a right to self-abort. Given that the courts have not squarely addressed the issue of whether self-abortion is a fundamental right, Part III undertakes this analysis. Applying the fundamental rights test, Part III concludes that the Fourteenth Amendment Due Process Clause does not encompass a fundamental right to self-abort during any stage of a woman's pregnancy. Finally, Part IV buttresses the conclusion drawn in Part III by drawing an analogy between self-abortions and a state's right to proscribe a person from harming himself.

I. SELF-ABORTION IN AMERICA TODAY

After the Supreme Court's ruling in *Roe v. Wade*, which permits a woman to obtain an abortion legally,[18] it might appear that self-abortion is no longer an issue in American society. This appearance is misleading. Although it is difficult to obtain empirical data on self-abortions because the act is secretive by nature, various sources indicate that self-abortions continue to occur in American society post-

15. Sepsis is a "toxic condition resulting from the spread of bacteria or their products from a focus of infection." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1064 (10th ed. 2001).

16. *See* Honigman et al., *supra* note 9, at 106–08 (cataloging the possible injuries that can result from legal and illegal abortions).

17. *Don't Buy Abortion Kits Over the Net, FDA Warns*, *supra* note 14, at 3.

18. 410 U.S. 113, 164–65 (1973).

Roe.[19] For example, in 1993, three hospital physicians[20] in Denver, Colorado, wrote that they witnessed a resurgence in injuries from self-abortion.[21] Further, in 1997, the Food and Drug Administration issued a public warning about the dangers of self-abortion kits available for purchase on the Internet.[22] Moreover, a simple Internet search for home abortion information yields several websites discussing various inexpensive herbal self-abortion techniques.[23]

Because self-abortion continues to occur in American society, the legal system must be prepared to address whether it is a fundamental right. Few courts and scholars have addressed the issue directly. But, in a rare decision addressing self-abortion, the Florida Supreme Court recently ruled that, based on a reading of common law, a woman may self-abort at any time during pregnancy.[24] The court reasoned:

> At common law, while a third party could be held criminally liable for causing injury or death to a fetus, the pregnant woman could not be: "At common law an operation on the body of a woman quick with child, with intent thereby to cause her miscarriage, was an indictable offense, but it was not an offense in her to so treat her own body . . . ."[25]

Thus, the Florida Supreme Court case suggests that self-abortion was

19. *See* Richard Guzman, *Planned Parenthood Receives $500,000 Grant*, DESERT SUN (Palm Springs), Nov. 26, 2002, at 3B (asserting that Sylvia Feliciano, a Planned Parenthood worker, has "seen girls who have performed self-abortions"); Honigman et al., *supra* note 9, at 105–06 (discussing the medical injuries suffered by two women who attempted self-abortion); Dan Luzadder, *Lawsuit Targets New Restriction on Abortions*, ROCKY MTN. NEWS (Denver), Dec. 23, 1998, at 7A ("Sylvia Clark, Planned Parenthood president and CEO in Colorado, warned that the [parental notification] law will force girls who are afraid to tell parents of a pregnancy into self-abortion . . . ."); Kate Michelman, *26 Years Later, Abortion Debate Still Raging*, PLAIN DEALER (Cleveland), Jan. 22, 1999, at 9B (asserting that abortion providers are concerned that obstacles limiting abortion access lead to self-abortion).

20. The group of three authors consisted of an emergency room surgeon, an obstetrics and gynecology specialist, and a psychiatrist. Honigman et al., *supra* note 9, at 105.

21. *Id*.

22. *Don't Buy Abortion Kits Over the Net, FDA Warns*, *supra* note 14, at 3.

23. *See, e.g.*, *Herbal Abortion*, Henriette's Herbal Homepage, *at* http://ibiblio.org/herbmed/archives/Best/1995/herbal-abortion.html (Nov. 17, 1995) (on file with the *Duke Law Journal*) (describing "a formula that is intended to induce a miscarriage"); *Self-Help: Abortion Remedy—Vitamin-C*, *at* http://www.sisterzeus.com/Hsp1shlp.htm (last visited Mar. 20, 2003) (on file with the *Duke Law Journal*) (explaining how to use Vitamin C to induce a miscarriage).

24. State v. Ashley, 701 So. 2d 338, 340–42 (Fla. 1997).

25. *Id.* at 340 (quoting State v. Carey, 56 A. 632, 636 (Conn. 1904)).

traditionally legal and continues to be legal today.[26] This does not, however, mean that self-abortion is a fundamental right.

II. THE *ROE-CASEY* FRAMEWORK'S IMPLICATIONS ON SELF-ABORTION

Though the Florida Supreme Court's ruling suggests that self-abortion was legal under common law, that does not answer the question as to whether self-abortion is a fundamental right. While the United States Supreme Court has not addressed the issue directly, the Court's abortion jurisprudence suggests that a woman does not have a fundamental right to self-abort. America's current legal framework governing abortion is established by two Supreme Court decisions: *Roe v. Wade* and *Planned Parenthood v. Casey*. These two cases did not directly address the issue of self-abortion, but they asserted that physician-provided abortions are a fundamental, albeit limited, right. The *Roe-Casey* framework also implied that a woman does not have a fundamental right to self-abort.

In *Roe*, the Court found unconstitutional a Texas law that criminalized the performance of an abortion upon a pregnant woman.[27] The Court concluded that a woman's right to terminate her pregnancy is included within the Fourteenth Amendment's implied right to privacy, but it also held that the right to abort was limited. "[T]he right of personal privacy includes the abortion decision, but . . . this right is not unqualified and must be considered against important state interests in regulation."[28] Consequently, "the State does have an important and legitimate interest in [both] preserving and protecting

26. *See id.* at 342–43 ("This Court cannot abrogate willy-nilly a centuries-old principle of the common law—which is grounded in the wisdom of experience and has been adopted by the legislature—and install in its place a contrary rule bristling with red flags and followed by no other court in the nation.").

27. 410 U.S. 113, 166 (1973). The pertinent portion of the statute stated

> [i]f any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

Id. at 117 n.1 (quoting TEX. PENAL CODE ANN. § 1191 (Vernon 1961)).

28. *Id.* at 154.

the health of the pregnant woman . . . and . . . in protecting the potentiality of human life."[29]

In *Planned Parenthood v. Casey*, the Court expanded on the ruling in *Roe*. The Court held that a state could proscribe abortion after the viability point if it provided an exception for the mother's health.[30] The Court also held that, before viability, a state may enact regulations designed to protect the mother's health and inform her decision to abort,[31] so long as the regulations do not pose an undue burden on a woman seeking an abortion.[32] The Court concluded that "an undue burden exists" if the regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[33]

Although *Casey* did not specifically address self-abortion, its holding implies that a woman does not have a constitutional right to self-abort. The Court concluded that, after a fetus is viable, "the independent existence of the second life can in reason and all fairness be the object of state protection that now *overrides the rights of the woman* [to abort]."[34] The Court further reasoned: "In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child."[35] Thus, because a woman does not have a constitutional right to terminate her pregnancy after her fetus is viable, it logically follows that she does not have the right to self-abort after the viability point.

Casey further implies that a woman does not have a constitutional right to self-abort even before viability. The *Casey* Court held that a state may enact regulations "designed to foster the health of a woman seeking an abortion" and to ensure that the decision to abort is "thoughtful and informed,"[36] so long as the regulations "do not constitute an undue burden."[37] Thus, abortion regulations aimed at protecting a woman's health are valid if they do not constitute a "substantial obstacle" to a woman's ability to abort.[38] Further, *Casey*

29. *Id.* at 162.
30. 505 U.S. 833, 879 (1992).
31. *Id.* at 872.
32. *Id.* at 878.
33. *Id*.
34. *Id.* at 870 (emphasis added).
35. *Id*.
36. *Id.* at 872.
37. *Id.* at 878.
38. *Id*.

implies that regulations not aimed at protecting the life of the mother can also pass the undue burden test. The Court concluded that a state regulation requiring a woman to wait twenty-four hours before undergoing an abortion was not a substantial obstacle.[39] Thus, a measure which posed financial burdens and inconvenience to some women seeking abortions, yet was unrelated to the goal of promoting the mother's health, passed the undue burden test.

The Court explained its decision to uphold the waiting period by reasoning that *Roe* did not guarantee the right to "abortion on demand," but rather, established "a right to decide to terminate a pregnancy free of undue interference by the State."[40] Under this interpretation of the constitutional right to abort, a woman does not have the right to abort in any manner that she chooses, even before viability. Consequently, a state probably has the power to proscribe self-abortion as a means of aborting, even before viability, so long as this restriction does not create a substantial obstacle to women seeking to terminate their pregnancies. *Casey* upheld a twenty-four-hour waiting period, which was both burdensome and arguably unrelated to protecting the mother's health. Therefore, it is likely that regulations prohibiting self-abortions would also be permitted under this framework because they are intended to protect the mother's health from the serious potential health hazards of self-abortions.

III. APPLYING THE FUNDAMENTAL RIGHTS TEST TO SELF-ABORTION

The *Roe-Casey* framework establishes a right to a doctor-provided abortion at certain stages of pregnancy, but it leaves unanswered the question of whether there is a fundamental right to self-abort. Though the *Roe-Casey* framework implies that self-abortion is not a fundamental right, the cases do not address the point directly. At first glance, it may appear that the right to self-abortion should simply mirror that of surgical and medical abortions, which would mean that self-abortion is a protected right up to the point of fetal viability. However, self-abortion more strongly implicates the state's interest in the mother's health than medical and surgical abortions. A state may wish to proscribe self-abortions at all stages of pregnancy because of its concern that a pregnant woman will seriously injure

39. *Id.* at 887.
40. *Id.*

herself, whereas surgical and medical abortions are considered relatively safe medical procedures.[41] Moreover, a state may also have an interest in protecting a fetus from being injured in a self-abortion that fails to terminate the pregnancy. For these reasons, self-abortion is distinguishable from surgical and medical abortion. Therefore, a separate analysis is needed to determine whether a fundamental right to self-abort exists at any time during pregnancy.

The Supreme Court has found that the Due Process Clause of the Fourteenth Amendment protects certain "fundamental rights and liberty interests."[42] Although the practice of identifying fundamental rights "has neither rested on any single textual basis nor expressed a consistent theory,"[43] the Court has relied on an examination of America's history and tradition to find such rights. In *Washington v. Glucksberg*, the Court articulated a two-part test to determine whether a right is fundamental.[44] First, the Court held that "we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed . . . .'"[45] Second, the Court required a "'careful description' of the asserted fundamental liberty interest."[46]

Consequently, a two-pronged test should be applied to determine whether self-abortion is a fundamental right. First, there must be a careful description of the right at issue.[47] Second, there must be a

41. *See* Laurie D. Elam-Evans et al., *Abortion Surveillance—United States, 1999*, MORBIDITY & MORTALITY WKLY. REP.: CDC SURVEILLANCE SUMMARIES, Nov. 29, 2002, at 28 tbl.19 (reflecting 0.6 deaths per 100,000 legal abortions in 1997).

42. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

43. *Id.* at 756 (Souter, J., concurring).

44. *Id.* at 720–21.

45. *Id.* (citations omitted) (quoting Moore v. E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)). However, the *Glucksberg* Court appears to collapse these two elements together, such that if the potential fundamental right is not "deeply rooted" in American history and tradition, it is almost certainly not implicit in the concept of ordered liberty. Similarly, this Note relies on the analysis of whether self-abortion and the larger right to harm one's self are firmly embedded in American history and tradition. If one concludes that self-abortion and self-harm are not deeply rooted in American history and tradition, there is no need to ask whether self-abortion is essential to ordered liberty.

46. *Id.* at 721 (quoting Reno v. Flores, 507 U. S. 292, 302 (1993); Collins v. Harker Heights, 503 U.S. 115, 125 (1992); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 277–78 (1990)).

47. *Glucksberg*, 521 U.S. at 721.

thorough examination of whether self-abortion is "deeply rooted in this Nation's history and tradition."[48]

A. "Careful Description" of the Asserted Right

Self-abortion is the right of a pregnant woman to terminate her pregnancy by herself. This right does not include the situation where a woman receives medical help in terminating the pregnancy—such as where a woman takes a prescription medication intended to induce miscarriage. Rather, the right of self-abortion only includes instances where a woman completes the abortion herself without assistance. Moreover, the right permits a woman to self-abort at any time during her pregnancy, even after the fetus is viable.

B. Is Self-Abortion Firmly Rooted in American History and Tradition?

A close examination of common law in both England and the United States reveals that women could be held criminally liable for self-aborting or even for submitting to abortions performed on them. Indeed, some legal scholars and courts throughout English and American history have concluded that women may be tried criminally for self-aborting.

1. *English common and statutory law*. Early English common law provided very limited criminal punishment for abortion. In 1648, Edward Coke asserted that "quickening," the point at which a mother becomes aware of the fetus through its motion, was the dividing line between noncriminal and criminal abortion.[49] He wrote: "If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprison, and no murder . . . ."[50] Thus, abortion after quickening, which usually occurred late in the fourth or early in the fifth month of pregnancy, was only considered a misdemeanor at early common law.[51]

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48. *Id.* (quoting *Moore*, 431 U.S. at 503 (plurality opinion)).

49. EDWARD COKE, THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50 (London, W. Clarke 1817).

50. *Id.*

51. *See* JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900, at 3 (1978) (explaining the concept and timing of quickening).

English common law also addressed the issue of whether a woman could be held criminally liable for self-aborting after quickening. Although it has been contended that the common law did not permit punishment of women who self-aborted or submitted to abortion,[52] there is case law to the contrary. In the 1602 case of *Regina v. Webb*,[53] a woman was indicted for self-aborting through the use of poison.[54] Although the defendant received a general pardon—it is unclear whether she was pardoned before or after conviction—this case illustrates that, from an early point in the development of British common law, a woman could be criminally prosecuted for self-aborting.[55]

In 1803, the passage of Lord Ellenborough's Act[56] clarified that British law permitted the prosecution of women committing or submitting to abortion performed upon themselves. The Act not only reinforced the common law idea that postquickening abortion was a capital crime, but also declared that prequickening abortion was a transportable offense that entailed deportation to a penal colony.[57] Thus, the Act ensured tough criminal punishments for both prequickening and postquickening abortions.

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52. *See* Samuel W. Buell, Note, *Criminal Abortion Revisited*, 66 N.Y.U. L. REV. 1774, 1783 (1991) ("[S]ociety consistently refused to condemn women's participation in the abortion crime.").

53. JOHN KEOWN, ABORTION, DOCTORS AND THE LAW: SOME ASPECTS OF THE LEGAL REGULATION OF ABORTION IN ENGLAND FROM 1803 TO 1982, at 7 (1988) (citing 5 CALENDAR OF ASSIZE RECORDS, SURREY INDICTMENTS, ELIZABETH I, at 512 (J.S. Cockburn ed., 1980)).

54. The woman ingested poison "with the intention of spoiling and destroying the infant in the womb . . . [and] by reason of eating the aforesaid poison, spoiled and destroyed then and there the infant in her womb, as a pernicious example to all malefactors offending in like manner . . . ." *Id.*

55. *Id.*

56. 43 Geo. 3, c. 58, §2 (1803) (Eng.).

57. The Act provided:

> any person or persons . . . [who] willfully and maliciously administer to, or cause to be administered to, or taken by any woman, any medicines, drug, or other substance or thing whatsoever, or shall use or employ, or cause or procure to be used or employed any instrument or other means whatsoever, with intent thereby to cause or procure the miscarriage of any woman not being, or not being proved to be, quick with child at the time of administering such things or using such means, that then and in every such case the person or persons so offending, their counselors, aiders, and abettors, knowing of and privy to such offence, shall be and are hereby declared to be guilty of felony, and shall be liable to be fined, imprisoned, set in and upon the pillory, publickly [*sic*] or privately whipped . . . or to be transported beyond the seas for any term not exceeding fourteen years, at the discretion of the court before which such offender shall be tried and convicted.

43 Geo. 3, c. 58, §2 (1803) (Eng.).

Further, case law following the passage of Ellenborough's Act cemented the criminal culpability of women who self-aborted. In *Rex v. Russell*,[58] the court debated the legality of self-aborting.[59] The prosecutor in this case argued that England's abortion statute "makes it criminal to administer any poison or other noxious thing to a woman with child, *whether quick or not*, with intent to procure abortion, is general, and includes all persons; it therefore applies as well to the woman herself as to another person administering to her."[60] The prosecutor further argued that "[i]ndependent of that statute, it was a misdemeanor at common law in a woman to take any substance with intent to procure abortion."[61] Eight of the twelve judges agreed with the prosecutor's assertions, and held that the woman taking the poisonous substance with the intent to abort was *felo de se*—a felon against herself—in the crime of abortion.[62] However, because the woman who aborted her fetus died as a result of the procedure, the court's comments on self-abortion are dicta.[63] Interestingly, the court apparently considered the woman's actions a felony against herself rather than a crime against the fetus. This approach could be analogized to self-abortion under the *Roe-Casey* framework, which permits prohibition of self-abortion based on the state's interest in protecting the health of the mother.[64]

2. *American common and statutory law*. Unlike the English common and statutory law, the historical treatment of self-abortion rights in American common and statutory law is ambiguous. In its earliest days, the United States lacked abortion statutes. Instead, states derived their abortion laws from the British common law.[65] At this stage, states commonly adopted the early British common law concept that self-aborting or submitting to abortion was not a crime if it occurred before quickening.[66] Connecticut became the first state to

58. 168 Eng. Rep. 1302 (K.B. 1832) (emphasis added).
59. *Id*.
60. *Id.* at 1305 (emphasis added).
61. *Id*.
62. *Id.* at 1306.
63. *Id*.
64. *See supra* Part II.
65. MOHR, *supra* note 51, at 3.
66. *See* Cyril C. Means, Jr., *The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411, 500 n.226 (1968) (asserting that at common law a woman was not criminally liable for aborting before quickening).

criminalize abortion through statute in 1821.[67] The provision, which was primarily a poison control law, criminalized the administration of a poisonous substance "to cause or procure the miscarriage of any woman, then being quick with child."[68] The law was aimed primarily at apothecaries who sold the poisons to women, and did not punish the women who ingested the toxins.[69] Indeed, such early abortion statutes appeared to consider women seeking abortions as victims of their own moral weaknesses who needed state protection, rather than as felons.[70]

The legal consequences of a woman's participation in abortion, however, soon changed markedly in many states. In 1845, New York criminalized a woman's participation in her own abortion through statute.[71] Fourteen other states ultimately adopted similar provisions in their abortion laws.[72] The New York statute provided:

> Every woman who shall solicit of any person any medicine, drug, or substance or thing whatever, and shall take the same, or shall submit to any operation, or other means whatever, with intent thereby to procure a miscarriage, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by imprisonment in the county jail, not less than three months nor more than one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.[73]

This statute was similar to Ellenborough's Act because it provided criminal punishment for women self-aborting or submitting to abortion, regardless of whether the fetus was quick.

In addition to statutes providing criminal penalties for self-aborting, cases in at least two other states show that the common law also permitted prosecution for self-aborting after the fetus had quickened. In *Smith v. State*,[74] Maine's highest court stated that, at common law, if a woman takes poison to induce a miscarriage or permits a man to beat her for the same purpose, both of the acts are criminal if they

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67. MOHR, *supra* note 51, at 20–21.

68. *Id.* at 21 (quoting THE PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT 152–53 (Hartford, S.G. Goodrich, & Huntington & Hopkins 1821)).

69. *Id.* at 22.

70. Buell, *supra* note 52, at 1783.

71. *Id.* at 1785.

72. *Id*.

73. Means, *supra* note 66, at 454 n.101 (quoting Act of May 13, 1845, ch. 260, § 3, 1845 N.Y. Laws 285–86).

74. 33 Me. 48 (1851).

are intended to and in fact do injure the fetus.[75] However, the court narrowed its conclusion by stating that the fetus must be quick at the time of the self-abortion.[76] Nearly a century later, the New Jersey Supreme Court similarly held in *In re Vince* that, at common law, a woman could be prosecuted for self-aborting her fetus if the fetus had quickened.[77] The comments on the illegality of self-abortion in *Smith* and *In re Vince* were mere dicta, however, because women were not actually prosecuted for their abortions in those cases.[78]

However, other states rejected the notion that women could be criminally liable for aborting their fetuses. In *State v. Carey*,[79] Connecticut's highest court discussed the right of a man to injure his own body without criminal penalty, and applied this same reasoning to abortion.[80] The Court held:

> At common law an operation on the body of a woman quick with child, with intent thereby to cause her miscarriage, was an indictable offense, but it was not an offense in her to so treat her own body, or to assent to such treatment from another; and the aid she might give to the offender in the physical performance of the operation did not make her an accomplice in his crime.[81]

In 1963, the Michigan Supreme Court agreed with the court's holding in *Carey* that a woman cannot be guilty of self-aborting or submitting to abortion.[82]

The conflicting views of state supreme courts and state abortion statutes show that self-abortion was neither clearly permitted nor uniformly prohibited. Thus the right to self-abort was not traditionally accepted in American legal history. According to the *Glucksberg* analysis, a right cannot be considered fundamental unless it is "deeply

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75. *Id.* at 55.

76. *Id*. The court explained, "[i]f, before the mother had become sensible of its motion in the womb, it was not a crime; if afterwards, when it was considered by the common law, that the child had a separate and independent existence, it was held highly criminal." *Id*.

77. *In re* Vince, 67 A.2d 141, 144 (N.J. 1949).

78. *See Smith*, 33 Me. at 53 (noting that the woman in question had died from the abortion procedure; although the court never expressly addresses the notion, it can be inferred that there was no postmortem prosecution of the woman); *In re* Vince, 67 A.2d at 144 ("Since respondent was not quick with child at the time of the alleged abortion she cannot be indicted for the common law crime or for conspiracy to commit common law abortion . . . .").

79. 56 A. 632 (Conn. 1904).

80. *Id.* at 635–36.

81. *Id.* at 636.

82. *In re* Vickers, 123 N.W.2d 253, 254 (Mich. 1963).

rooted" in American history and tradition. Consequently, because there was no traditional right to self-abort in American history, self-abortion is not a fundamental right.

IV. A STATE'S RIGHT TO PROSCRIBE HARMS TO ONE'S SELF

The above analysis showed that self-abortion is not a fundamental right under the *Glucksberg* analysis. One can reach the same conclusion by analogizing self-abortions in relation to suicide laws. A state's right to prohibit self-abortion is based not only on its interest in the potential life of the fetus, but also on its interest in protecting the mother. A survey of common law suggests that governments have traditionally been able to prohibit a person from harming himself. The crime of suicide is the most important illustration of this right. A historical analysis of suicide in English and American common law shows that an individual has not traditionally had the power to kill himself. The historical right of government to prohibit a person from harming himself implies that a state today could likewise proscribe self-abortion.

A. Suicide as a Crime in English Common Law

An examination of English common law reveals that England traditionally had the power to criminalize suicide. The prohibition of suicide in English history began in 673 when the Catholic Church condemned the act in its canon of law.[83] King Edgar formally proscribed suicide in 969, stating: "It is neither lawful to celebrate Mass for the soul of one who by any diabolical instigation hath voluntarily committed murder on himself, nor to commit his body to the ground with hymns and psalmody or any rites of honorable sepulture."[84]

Legal scholars also contemplated the crime of suicide early in the formation of the common law. In his authoritative treatise written approximately between the years of 1220 and 1260,[85] Henry de Bracton argued that suicide was a serious crime under the common law:

83. G. STEVEN NEELEY, THE CONSTITUTIONAL RIGHT TO SUICIDE 45 (1996).

84. *Id.* at 45–46 (quoting JAMES J. O'DEA, SUICIDE: STUDIES ON ITS PHILOSOPHY, CAUSES, AND PREVENTION 311–12 (New York, G.P. Putnam's Sons 1882)).

85. *See* Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 57 (1985) (estimating the date of de Bracton's treatise).

"Just as a man may commit felony by slaying another so he may do so by slaying himself, the felony is said to be done to himself."[86]

The first judicial decision explaining the crime of suicide was *Hales v. Petit*,[87] decided by the Court of King's Bench in 1562. In *Hales*, the court considered the conduct of a man who voluntarily entered a river and purposefully permitted himself to drown.[88] The court considered his conduct to be a felony equal to the murder of another person: "this act which he has done to himself, is to be considered in the same light as if he had done it to another."[89] The court determined that the appropriate punishment for suicide was the forfeiture of a person's remaining goods, debts, and chattels to the king.[90]

Although the court strongly analogized suicide to felonious murder, it further discussed the unique nature of the crime, labeling it "an offence against nature, against God, and against the King."[91] The court's analysis further shows the gravity of the offense of suicide, in that it is morally considered a "greater offence" than the murder of another.[92] The many justifications offered by the *Hales* court for the condemnation of suicide, therefore, suggest that a state has a strong interest in criminalizing self-murder and a right to do so.

In the mid-seventeenth century, Edward Coke examined the common law's treatment of suicide.[93] He argued that suicide was a felony against one's self that was similar to murder of another.[94] "*Felo de se* is a man, or woman, which being *compos mentis*, of sound memory, and of the age of discretion, killeth himself, which being lawfully found by the oath of twelve men, all the goods and chattels of the party so offending are forfeited."[95] Coke incorporated elements of the common law's treatment of murder into his analysis of suicide. For instance, he stated that a person must be of sound mind to be criminally

86. 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 423 (Samuel E. Thorne trans., Belknap Press of the Harvard Univ. Press 1968) (n.d.).

87. 75 Eng. Rep. 387 (C.B. 1562); NEELEY, *supra* note 83, at 47.

88. *Hales*, 75 Eng. Rep. at 390.

89. *Id.* at 395.

90. *Id.* at 399.

91. *Id.* at 400.

92. *Id*.

93. *See* Marzen et al., *supra* note 85, at 60–61 (discussing the influence of Coke's treatise).

94. *Id*.

95. COKE, *supra* note 49, at 54.

liable for suicide, just as a person must be of sound mind to be convicted of murder.[96]

More recent legal historians have articulated similar rules regarding suicide. Matthew Hale, writing nearly a century later than Coke, described the law's treatment of suicide in similar terms. Like Coke, he labeled suicide a *felo de se* "where a man of the age of discretion, and *compos mentis*, voluntarily kills himself by stabbing, poison, or any other way."[97] Hale determined that, as long as a person was not insane when committing suicide, the person had committed a felony and his "goods and chattles" were subject to forfeiture.[98] Similarly, William Blackstone acknowledged the felonious nature of suicide in his authoritative *Commentaries on the Laws of England*.[99] He wrote that one who commits suicide is guilty of a "double offence; one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects."[100] He noted that a person who commits suicide deserved harsh punishment. Not only should one who commits suicide forfeit his goods and chattels, but also his remaining legacy should be tarnished by "an ignomious burial in the highway, with a stake driven through his body."[101] Blackstone noted that these punishments would serve as a deterrent, explaining that "his care for either his own reputation, or the welfare of his family, would be some motive to restrain him from so desperate and wicked an act."[102] Thus, from early in English history through the time of American colonization, the common law considered suicide a felonious act, and the government had an interest in protecting its citizens from carrying out this crime against themselves.

B. Suicide as a Crime in American Common Law

English common law played a significant role in the development of early American law, although its influence varied widely from col-

96. *See id.* ("If a man lose his memory by the rage of sickness or infirmity, or otherwise, and kill himself while he is not *compos mentis*, he is not *felo de se*: for, as he cannot commit murder upon another, so in that case he cannot commit murder upon himself.").

97. 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 411 (George Wilson ed., Dublin, E. Lynch 1778).

98. *See id.* at 412–13 ("[A] lunatic killing himself in the fit of lunacy is not *felo de se* . . . .").

99. 4 WILLIAM BLACKSTONE, COMMENTARIES *189.

100. *Id*.

101. *Id.* at *190.

102. *Id*.

ony to colony.[103] The colonies of Virginia, North Carolina, South Carolina, Georgia, New Hampshire, New York, and Maryland all accepted the English common law's treatment of suicide as a punishable crime.[104] Virginia followed the English common law tradition of punishing suicide by the confiscation of goods and chattels and ignominious burial.[105] Indeed, Pennsylvania was the only colony that did not follow the lead of the English common law in criminalizing suicide. Pennsylvania adopted a law in 1701 that decriminalized suicide by eliminating forfeiture as a punishment for the act.[106]

However, with the end of colonial times came a gradual phasing out of suicide laws.[107] The elimination of legal penalties for suicide was not, however, based upon the belief that a person had a fundamental and uninhibited right to harm himself. A treatise written in 1796 by Zephaniah Swift, later chief justice of Connecticut's highest court, explains the reasons for eliminating legal punishment of suicide:

> There can be no act more contemptible, than to attempt to punish an offender for a crime, by exercising a mean act of revenge upon lifeless clay, that is insensible of the punishment. There can be no greater cruelty, than the inflicting a punishment, as the forfeiture of goods, which must fall solely on the innocent offspring of the offender. This odious practice has been attempted to be justified upon the principle, that such forfeiture will tend to deter mankind from

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103. Keith Burgess-Jackson, *The Legal Status of Suicide in Early America: A Comparison with the English Experience*, 29 WAYNE L. REV. 57, 60–61 (1982).

104. *Id.* at 61; *see also* Marzen et al., *supra* note 85, at 65 (stating that Maryland adopted the common law penalties for suicide). Connecticut applied the common law treatment as well, but did not enforce any confiscations of property for suicide. Marzen et al., *supra* note 85, at 65. Massachusetts prohibited the confiscation of a suicide's property but enacted a statute that required ignominious burial of a suicide's body, thus punishing the person who committed suicide but not his heirs. *Id*. The Massachusetts statute read in part: "This Court considering how far Satan doth prevail upon several persons within this Jurisdiction, to make away themselves, judgeth that God calls them to bear testimony against such wicked and unnatural practices, that others may be deterred therefrom . . . ." Burgess-Jackson, *supra* note 103, at 64 (quoting THE COLONIAL LAWS OF MASSACHUSETTS 137 (William H. Whitmore ed., Boston, Rockwell & Churchill 1887)).

105. Burgess-Jackson, *supra* note 103, at 61.

106. *Id.* at 65. The pertinent part of the statute read: "If any person, through Temptation or melancholly, shall Destroy himself, his Estate, Real & Personal, shall, notwithstanding, Descend to his wife and Children or Relations as if he had Died a natural death . . . ." *Id.* (quoting THE EARLIEST PRINTED LAWS OF PENNSYLVANIA, 1681–1713 (John D. Cushing ed., 1978)).

107. Penalties for suicide were abolished in Maryland and New Jersey in 1776, North Carolina in 1778, New Hampshire in 1783, Delaware in 1792, Rhode Island in 1798, and Virginia in 1847. Marzen et al., *supra* note 85, at 67.

> the commission of such crimes, from a regard to their families. But it is evident that where a person is so destitute of affection for his family, and regardless of the pleasures of life, as to wish to put an end to his existence, that he will not be deterred by a consideration of their future subsistence.[108]

Thus, the states eliminated the legal prohibitions against suicide in order to avoid punishing a suicide victim's family, not because they thought a person had a right to kill himself.

In recent years, the Supreme Court has examined suicide in the context of physician-assisted suicide. In *Washington v. Glucksberg*,[109] the Court upheld Washington's ban on assisted suicide.[110] Crucial to the Court's reasoning was its determination that the United States Constitution did not afford an individual a fundamental right to commit suicide: "we are confronted with a consistent and almost universal tradition that has long rejected the asserted right [to commit suicide], and continues explicitly to reject it today."[111] The Court further noted that "for over 700 years, the Anglo-American common law tradition has punished or otherwise disapproved of both suicide and assisting suicide."[112] While acknowledging that legal punishment of suicide has been eliminated in all states, it concluded that this trend in the law did not reflect a right to commit suicide or even acceptance of the act, but rather showed the states' desire to not punish a suicide's family.[113] Thus, the Court suggests that a person does not have a constitutionally protected right to kill himself.

There is a strong analogy between a state's right to proscribe suicide and a state's right to proscribe self-abortion. The common law history of suicide and the modern interpretation of this history set forth important limitations on a person's right to self-autonomy. Although a person is guaranteed great personal liberty under the federal constitution, there are bounds on that autonomy, even when a person's conduct does not impede the rights of others. Indeed, the Supreme Court has recognized that a state has an "unqualified interest in the preservation of human life" that limits a person's right to

108. *Id*. at 68–69 (quoting S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 32 (2d ed. 1982)).

109. 521 U.S. 702 (1997).

110. *Id.* at 705–06.

111. *Id.* at 723.

112. *Id.* at 711.

113. *Id.* at 713.

autonomy such that he has no right to kill himself.[114] Similarly, although a woman has a right to terminate her pregnancy before her fetus is viable, there are bounds on this liberty interest, based on a state's interest in the preservation of a woman's life.[115] Abortion poses great danger to the woman who performs it upon herself.[116] Consequently, although a woman has a right to personal autonomy, the state's interest in her life can proscribe activities that endanger it, including self-abortion.

CONCLUSION

Self-abortion is a personal act performed by a woman on her own body. Despite its private nature, self-abortion is not a fundamental right. Under the *Glucksberg* analysis, a right cannot be considered fundamental unless it is "deeply rooted" in American history and tradition. The history of abortion law in England and the United States shows that self-abortion was not a "deeply rooted" right. Moreover, a state has also traditionally been able to enact paternalistic laws protecting a citizen from himself, as seen through the legal history of suicide. This traditional power of a state to protect a woman from herself further shows that self-abortion, an act that can result in serious injury to one's self, is not a fundamental right. Although the wisdom of criminally sanctioning a woman who would resort to such a dangerous and desperate measure is questionable, the Due Process Clause of the Fourteenth Amendment does not encompass a right to self-abort at any time during pregnancy.

114. *Id.* at 728 (quoting Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 282 (1990)).

115. *See supra* notes 28–33 and accompanying text.

116. *See supra* note 16 and accompanying text.