University of Richmond Law Review

Volume 8 | Issue 1 Article 6

1972

The Cumulation of the Abortion Reform Movement

COMMENTS

THE CULMINATION OF THE ABORTION REFORM MOVEMENT—*ROE v. WADE* AND *DOE v. BOLTON*

"We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

. . . .

Our task, of course, is to resolve the issue by constitutional measurement free of emotion and of predilection."[1]

This extended introduction is necessary here and was necessary in *Roe v. Wade*[2] in order to inform the public of the Court's awareness of the volatile nature of the subject of abortion. With the decisions of *Roe v. Wade*[3] and *Doe v. Bolton*,[4] the constitutionality of the abortion issue was decided, and only the moral[5] issues remain to be discussed. It is the purpose of this comment to discuss the history of the abortion laws which led to the climactic decisions in *Roe* and *Doe*, and to analyze these decisions to determine what now controls the abortion decision.

I. HISTORY OF ABORTION AND THE LAW

The inception of abortion[6] can be traced to the earliest of civilizations.[7]

---

1. Roe v. Wade, 410 U.S. 113, at 116 (1973).
2. 410 U.S. 113 (1973).
3. *Id.*
4. 410 U.S. 179 (1973).
5. *See* Drinan, *The Inviolability of the Right to Be Born*, 17 WESTERN RESERVE L. REV. 465 (1965-66). "However convenient, convincing, or compelling the arguments in favor of abortion may be, the fact remains that the taking of a life, even though it is unborn, cuts out the very heart of the principle that *no one's* life, however unwanted and useless it may be, may be terminated in order to promote the health or happiness of another human being." *Id.* at 479.
6. BLACK'S LAW DICTIONARY 20 (Revised 4th ed. 1968). As defined in *Black's*, an abortion is the expulsion of the foetus at a period of utero-gestation so early that it has not acquired the power of sustaining an independent life.
7. *See, e.g.*, Niswander, *Medical Abortion Practices in the United States*, in ABORTION AND THE LAW 37, 38-40 (D. Smith ed. 1967); Devereaux, *A Typological Study of Abortion in 350 Primitive, Ancient, and Pre-Industrial Societies*, in ABORTION IN AMERICA 97-152 (H. Rosen

The Greek and Roman civilizations regarded abortion as a sound policy for population control.[8] However, this rationale soon began to conflict with the emerging Christian movement which assailed as infanticide the act of abortion.[9] "As articulated by early Christianity and the Roman Catholic Church, the reasoning lay within two precepts: (1) The doctrine of 'original sin' suggested that an unbaptized human who dies will never attain complete salvation; (2) that the merging of soul and body created a human being."[10] This latter precept sowed the seeds for our modern day controversy.

It is well established that at common law an abortion before "quickening"[11] was not an indictable offense.[12] However, there is no absolute authority as to whether an abortion of a *quick* fetus at common law was a felony, or even a lesser crime.[13]

The early English statutory response to this problem was Lord Ellenborough's Act[14] in 1803, which made abortion of a *quick* fetus a capital crime but provided for lesser penalties where an abortion was performed before quickening.[15]

Initially, American law generally incorporated the English common law and did not proscribe abortion during early stages of pregnancy.[16] However,

---

ed. 1967). For a further and all encompassing survey of the history of the laws of abortion, *see* B. DICKENS, ABORTION AND THE LAW 11-28 (1966).

8. L. LADER, ABORTION 76 (1966).

9. *Id.*

10. *See* Sands, *The Therapeutic Abortion Act: An Answer to the Opposition*, 13 U.C.L.A. L. REV. 285 at 293-94 (1966).

11. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1261 (24th ed. 1965).

"Quickening" has been defined as the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy.

12. E. COKE, INSTITUTES III *50; 1 W. HAWKINS, PLEAS OF THE CROWN, c. 31, § 16 (1762); 1 W. BLACKSTONE, COMMENTARIES *129-130; M. HALE, PLEAS OF THE CROWN 433 (1847). For discussions of the role of the quickening concept in English common law, *see* LADER, *supra* note 8 at 78; Stern, *Abortion: Reform and the Law*, J. CRIM. L.C. & P.S. 84 (1968).

13. *See* 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 341 (S. Thorne ed. 1968); Quay, *Justifiable Abortion—Medical and Legal Foundations* (pt. 2), 49 GEO. L.J. 395, 431 (1961).

14. 43 Geo. 3, c. 58.

15. *See* DICKENS, *supra* note 7, at 23-24.

It becomes evident that the pre- and post-quickening distinction of the common law was maintained by these early statutes which provided for capital punishment for abortions performed after quickening and for a lesser punishment for those performed prior to quickening.

16. Connecticut was the first state to enact abortion legislation in 1821. *See* CONN. STAT., Tit. 20, § 14 (1821). Compare the New York statutory enactment in 1829 which was to serve as a model for early anti-abortion statutes. *See* N.Y. REV. STAT., pt. IV, ch. 1, Tit. II, Art.

by the mid-19th century, for various reasons,[17] restrictive abortion laws similar to those found in numerous states today were enacted.[18] The overriding disadvantage of such laws was that they permitted abortion in only one situation—to save the life of the mother.[19] These strict laws actually resulted in numerous deaths of women who relied on a thriving illegal abortion business.[20] Many of these early laws remained in force in the vast majority of states[21] until 1967, when some legislatures began to respond to the cry for reform.[22]

Those who advocated restrictive abortion laws and their continued existence relied upon three arguments. Some urged that they were a part of a Victorian social concern to discourage illicit sexual conduct.[23] Others contended that criminal abortion laws were necessary to protect the health of

---

1, § 9, at 661, and Tit. VI, § 21, at 694 (1829). *See also*, Harper, *Abortion Laws in the United States*, in ABORTION IN THE UNITED STATES 189-92 (Calderone ed. 1958).

17. *See* LADER, *supra* note 8, at 86. "At that time in our history medical science was stymied by infections that made almost any surgery fatally dangerous." *See also*, State v. Murphy, 27 N.J.L. 112 (Sup. Ct. 1858) ". . . its abortion law was not to prevent the procuring of abortions so much as to protect the life and health of the mother against the possibly fatal consequences of an attempted abortion." *Id.* at 114.

It is obvious that chief among these various reasons was to protect the health and safety of the mother.

18. It was during the mid-19th century that a statute which proscribed abortion for any purpose, with only one exception—to save the life of the mother, was enacted in Texas. That statute has undergone few changes and was therefore under attack in *Roe v. Wade*.

19. American courts have generally interpreted this exception by following the rule of *Rex v. Bourne*, [1939] 1 K.B. 687., where the jury was instructed that a woman need not be close to death before her pregnancy could be lawfully terminated, and that in any case, a woman's longevity would most likely be shortened by serious injury, though noting that this defense would not be available to the professional abortionist. *Id.*

It is also important to note that it is this type of statute which was challenged in Texas in *Roe*.

20. Note, *Abortion Reform: History, Status and Prognosis*, 21 CASE W. RES. L. REV. 521 at 529 (1970).

21. "It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy then than she does in most States today." 410 U.S. 113 at 140.

22. Regarding the events which resulted in these reforms, *see generally* N.Y. Times, April 30, 1967, at 60, col. 1 (city ed.) (Colo. act); *id.*, May 9, 1967, at 36, col. 4 (N.C. act); *id.*, June 14, 1967, at 19, col. 1 (city ed.) (Calif. act).

23. *See, e.g.*, YWCA v. Kugler, 342 F. Supp. 1048, 1074 (N.J. 1972); Abele v. Markle, 342 F. Supp. 800, 805-806 (Conn. 1972) (Newman, J., concurring in result), *appeal docketed*, No. 72-56; Walsingham v. State, 250 So. 2d 857, 863 (Fla. 1971) (Ervin, J., concurring); State v. Gadicke, 43 N.J.L. 86, 90 (1881). It appears very few adherents have taken this argument seriously, including the plaintiffs in *Roe* and *Doe*.

the mother since the procedure was regarded as quite hazardous.[24] Modern medical achievements render this second contention invalid as mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low or lower than the rates for normal childbirth.[25] Despite this fact, the state still retains a definite interest in protecting the health of a woman should an abortion be proposed at a later stage of pregnancy when the procedure is more hazardous. The final justification for these laws seems to be the state's interest or duty in protecting prenatal life.[26] For many years these arguments seemed to be sufficient to justify the retention of restrictive abortion laws. However, a growing outcry for reform resulted in an escalating attack upon these restrictive statutes.[27]

There was much evidence in the preceding decade of an increasing awareness of the need for abortion reform.[28] Upon the recognition by a large number of the population that an abortion could safely be performed, it was realized that strict statutes did nothing but prevent competent physicians from acting. Public pressure was applied in the hope of attaining some legislative response. One result of this public response was the inclusion of an abortion section in the Model Penal Code adopted by the Ameri-

24. *See* C. HAAGENSEA & W. LLOYD, A HUNDRED YEARS OF MEDICINE 19 (1943). *See also* Robert E. Hall, *Abortion Laws: A Call For Reform*, 18 DEPAUL L. REV. 584 (1969). "Thus it would appear that our forbearers narrowly restricted the practice of abortion primarily to protect pregnant women from the risks of surgery; and rightly so, for the risk of even hospital abortions in the nineteenth century was formidable." *Id.* at 585.

25. *Abortion Mortality*, 20 MORBIDITY AND MORTALITY 208, 209 (June 12, 1971) (U.S. Dept. of HEW, Public Health Service) (New York City); Tietze, *United States: Therapeutic Abortions, 1963-1968*, 59 STUDIES IN FAMILY PLANNING 5, 7 (1970). *See also* LADER, *supra* note 8, at 17-23.

26. With this proposition comes the very arguable point concerning the complex medical and legal theories of when a new human life is present. *See generally* R. Drinan, *The Inviolability of the Right to be Born*, in ABORTION AND THE LAW 107 (D. Smith ed. 1967); Louisell, *Abortion, The Practice of Medicine and the Due Process of Law*, 16 U.C.L.A. L. REV. 233 (1969).

27. "Clearly, these statutes restrict the freedom of the woman who desires an abortion and the doctor who may be willing to treat her. By restricting her freedom these laws appear to infringe upon her constitutional right of privacy, the doctor-patient relationship, and—at least in the case of a married woman—the family relationship. The contention may be made, however, that the fetus also has certain constitutonal rights which require protection." Luis Kutner, *Due Process of Abortion*, 53 MINN. L. REV. 1 (1968-69).

28. During this time many people were beginning to realize that an abortion might prevent the psychological trauma that victims of a rape might experience.

It was also becoming quite obvious to many that an abortion could prevent the physical and mental pain and suffering that all parties undergo in the birth of a deformed child; or perhaps be an adequate method to control the spiraling population. These are some of the numerous reasons which lead people to question if an abortion should not be allowed under proper circumstances.

can Law Institute.[29] Many states[30] have since enacted new statutes patterned after this Code which allows an abortion in three situations:

1. When necessary to protect the life or health of the mother;
2. When there is a substantial risk that the child will be born defective; and
3. If the pregnancy resulted from rape or incest.[31]

A practical analysis of this Model Penal Code revealed that even its liberalized provisions remained too restrictive. Although it eliminated the choice between childbirth or maternal death, and reduced the number of births of deformed children and those born as a result of forcible rape or incest, the Code neither offered a complete solution to the growing population crisis nor deterred women from submitting to dangerous and illegal abortions,[32] since it failed to establish adequate guidelines by which a physician could counsel his patient regarding an abortion. Additionally, the constitutional issues raised by these statutes remained undecided. Thus, another method of reform would have to achieve the demands of the public.[33]

---

29. MODEL PENAL CODE § 230.3 (Proposed Official Draft, 1962).

This Code provides that one who willfully and without justification aborts a pregnant woman during the first twenty-six weeks of pregnancy commits a felony of the third degree. Beyond the twenty-sixth week, it is a felony of the second degree. This illustrates the distinction based on the time of quickening.

An abortion is allowed by a licensed physician under the following circumstances:

(1) If the physician believes that there is a substantial risk to the mother's health or that her mental health would severely deteriorate if pregnancy were to continue; or
(2) If the child would be born seriously crippled in mind or body; or
(3) If the pregnancy was the result of forcible rape or incest.

30. Fourteen states have adopted some form of the ALI statute. *See* ARK. STAT. ANN. §§ 41-303 to 41-310 (Supp. 1971); CALIF. HEALTH AND SAFETY CODE §§ 25950-25955.5 (Supp. 1972); COLO. REV. STAT. ANN. §§ 40-2-50 to 40-2-53 (Cum. Supp. 1967); DEL. CODE ANN., Tit. 24 § 1790-1793 (Supp. 1972); FLORIDA LAW OF APRIL 13, 1972 c. 72-196, 1972 FLA. SESS. LAW SERV., pp. 380-382; GA. CODE §§ 26-1201 to 26-1203 (1972); KAN. STAT. ANN. § 21-3407 (Supp. 1971); MD. ANN. CODE, Art. 43, §§ 137-139 (1971); MISS. CODE ANN. § 2223 (Supp. 1972); N.M. STAT. ANN. §§ 40A-5-1 to 40A-5-3 (1972); N.C. GEN. STAT. § 14-45.1 (Supp. 1971); ORE. REV. STAT. §§ 435.405 to 435.495 (1971); S.C. CODE ANN. §§ 16-82 to 16-89 (1962 and Supp. 1971); VA. CODE ANN. §§ 18.1-62 to 18.1-62.3 (Supp. 1972).

31. *See generally* Zad Leavy and Jerome M. Kummer, *Abortion and the Population Crisis, Therapeutic Abortion and the Law; Some New Approaches*, 27 OHIO STATE L.J. 647 (1966).

32. The annual income from illegal abortions has been estimated at over $350,000,000 and they are considered to be the third largest criminal activity in the United States, surpassed only by gambling and narcotics. *See* D. LOWE, ABORTION AND THE LAW 3-5 (1966).

33. It is interesting to note that later in 1972 the American Bar Association reacted by approving the Uniform Abortion Act that had been drafted and approved the preceding August by the Conference of Commissioners on Uniform State Laws. 58 A.B.A.J. 380 (1972).

II. Constitutional Attacks Upon These Statutes

Initially, the courts were slow to respond to the pro abortion movement. However, "[a]s the trend toward liberal interpretation of the Constitution has gathered momentum, protagonists of abortion reform, riding on a wave of public sentiment, have met with increasing success in the courts."[34] The current reform movement was triggered by a growing belief that a pregnant woman, after consulting with her physician, should be allowed to decide if her pregnancy should be terminated, and that this decision should not be controlled by any social or moral norm.[35] As discussed previously, legislative abortion liberalization was neither sufficient nor entirely successful.[36] As a result, the proponents of reform turned to the courts in their attempt to declare all restrictions upon the right to abort unconstitutional. With the trend of court decisions in their favor and much public sentiment at their back, these groups soon began to experience long awaited courtroom victories.[37] As a basis of attack upon these statutes, the plaintiffs relied upon the vagueness of the statute, or overbreadth and abridgement of rights,[38] and a woman's fundamental constitutional right to privacy in matters relating to marriage, sex and family.[39]

A. *Vagueness*

An early and unsuccessful attack on the vagueness of an abortion statute was *People v. Rankin*,[40] in which the defendant claimed that the statutory phrase "to procure the miscarriage of such woman"[41] failed to inform

34. Note, *Abortion Reform: History, Status, and Prognosis*, 21 Case W. Res. L. Rev. 521, 536 (1970).

35. *See* Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C. L. Rev. 730 (1968).

36. For a discussion of legislative reform and the New York law, *see* Hall, *The Abortion Revolution*, Playboy, Sept. 1970, at 112.

37. *See* Moyers, *Abortion Laws; A Study In Social Change*, 7 San Diego L. Rev. 237 (1970).

38. *E.g.*, United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969). *See also* Abele v. Markle, 342 F. Supp. 800 (D.C. Conn. 1972), *appeal pending*; Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971), *appeal pending*; Poe v. Menghini, 339 F. Supp. 986 (D.C. Kan. 1972); Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970), *appeal dismissed*, 400 U.S.1 (1970); People v. Belous, 71 Cal. 2d 954, 80 Cal. Rptr. 354, 458 P.2d 194 (1969), *cert. denied*, 397 U.S. 915 (1970).

Cases which have sustained state statutes include: Crossea v. Attorney General, 344 F. Supp. 587 (E.D. Ky. 1972), *appeal pending*; Rosen v. Louisiana State Board of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970), *appeal pending*; State v. Munson, ___ S.D. ___, 201 N.W. 2d 123 (1972), *appeal pending*.

39. These cases include *Belous, Vuitch*, and *Babbitz, supra* note 38. *See also* Griswold v. Connecticutt, 381 U.S. 479 (1965).

40. 10 Cal. 2d 198, 74 P.2d 71 (1937).

41. Cal. Penal Code § 274 (West 1970).

him with reasonable certainty of the act prohibited and was therefore unconstitutionally vague. The court rejected the defendant's contentions, citing two law dictionary definitions of the "procurement of miscarrage" as "the criminal act of destroying the fetus at any time before birth is termed,"[42] and concluding that the statute's phrase "was sufficiently explicit to inform persons of common intelligence and understanding of the acts which were prohibited."[43] The plaintiff was more successful in *People v. Belous*[44] in which the court reasoned that the statutory language was so pervaded with uncertainty that those subject to criminal sanctions were forced to speculate as to its meaning, and held that the California abortion statute offended constitutional safeguards against unreasonably vague and overbroad legislation.[45]

The abortion statute in the District of Columbia, which allowed an abortion only "when necessary for the preservation of the mother's life or *health*,"[46] was rejected as unconstitutionally vague in *United States v. Vuitch*.[47] The court concluded that "[t]he word 'health' is not defined and in fact remains so vague in its interpretation and practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health. There is no clear standard to guide either the doctor, the jury or the court."[48] Although the proponents of reform enjoyed some success with this approach, there was some judicial disagreement[49] which served as a warning that perhaps another constitutional avenue of attack should be considered.

B. *Rights of the Mother to Decide Whether or Not to Bear Children*

It is pregnant women whose rights and interests are most affected since illegal abortions kill or maim thousands of women each year.[50]

---

42. 10 Cal. 2d at 202, 74 P.2d at 73.

43. *Id.*

44. 80 Cal. Rptr. 354, 458 P.2d 194 (1969), *cert. denied*, 397 U.S. 915 (1970).

45. *See* P. KAUPER, CONSTITUTIONAL LAW: CASES AND MATERIALS 856, n. 4 (3d ed. 1966). Kauper explores how a criminal statute may be void if it "either on its face or as authoritatively construed, while reaching conduct that may lawfully be punished, is nevertheless so broad in its sweep that it may be used to punish constitutionally protected conduct." *Id.*

46. The statute in question was originally enacted as part of the District of Columbia Code of 1901, and it remained in effect until this case.

47. 305 F. Supp. 1032 (D.D.C. 1969).

48. *Id.* at 1034.

49. *See* note 38, *supra*, which indicates the cases contra to those which found in favor of this vagueness argument.

50. It has been estimated that illegal abortions may take as many as 5,000 lives annually. *See* Leavy and Kummer, *Criminal Abortion: A Failure of Law*, 50 A.B.A.J. 52 (1964).

> [T]he numerical inconsistency between the number of instances in which abortion is sought and received and the number of instances in which it is "legally" performed refutes any pretense that statutory prohibition of abortion achieves or can ever achieve its aim of safeguarding the prospective mother.[51]

The paramount issue needing clarification was whether a woman has a constitutionally protected right to make an abortion decision.

The right to freedom, the right of an individual to be left alone by the government was guaranteed by *Olmstead v. United States*.[52] In expanding this basic right to freedom, guaranteed by *Olmstead*, the Supreme Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. The Court has found the roots of this right in the first amendment, *Stanley v. George*;[53] in the fourth and fifth amendments, *Terry v. Ohio*,[54] *Katz v. United States*,[55] and *Boyd v. United States*;[56] in the penumbras of the Bill of Rights, *Griswold v. Connecticut*;[57] in the ninth amendment, *Griswold v. Connecticut*;[58] and in the concept of liberty guaranteed by the first section of the fourteenth amendment, *Meyer v. Nebraska*.[59] Thus the question to be decided was whether this guaranteed zone of privacy included the right of a woman to make the decision to abort, subject, of course, to certain valid and compelling state interests.

Many writers agree that *Griswold v. Connecticut*[60] most significantly affected the restrictive abortion statutes. The issue there was the constitutionality of a Connecticut statute[61] which outlawed the use of contraceptives and punished physicans who aided and abetted such use.[62] The Court in holding this statute unconstitutional recognized the right to privacy as an independent constitutional right. It stated that the marital relationship involved in the case was a relationship "within the zone of privacy created

---

51. E. SCHUR, CRIMES WITHOUT VICTIMS 25, 28 (1965).
52. 277 U.S. 438, 471 (1928).
53. 394 U.S. 557 (1969).
54. 392 U.S. 1, 8-9 (1968).
55. 389 U.S. 347, 350 (1967).
56. 116 U.S. 616 (1886).
57. 381 U.S. 479 (1965).
58. *Id.* at 486 (Goldberg, J., concurring).
59. 262 U.S. 390 (1923).
60. 381 U.S. 479 (1965).
61. CONN. GEN. STAT. §§ 53-52 and 54-196 (1958 rev.).
62. *See* Lucas, *supra* note 35. "Much like the abortion statutes, this anti-contraceptive measure was publicly ignored and symbolized only the timidity and election-mindedness of lawmakers." *Id.* at 763.

by several fundamental constitutional guarantees"[63] and was therefore not subject to unjustified governmental intrusion. As has frequently been argued, the issues raised in *Griswold* concerning contraception so closely parallel those raised by abortion that it too must similarly be protected from transgression by the state.[64] This has led to a logical conclusion reached by many courts,[65] that this right of privacy, however based, is broad enough to cover the abortion decision:

> The result of these decisions is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children, and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution.[66]

Assuming that this right to privacy does encompass the decision of abortion, the remaining question is whether this right can be superseded by a compelling state interest. Where certain fundamental rights are involved, the Court has held that regulation limiting these rights may be justified only by a compelling state interest,[67] and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.[68] As to what might exist today as a compelling state interest, the state will contend, among others, (1) the discouragement of nonmarital sexual relations, (2) the protection of the woman's health, and (3) the protection of the unborn fetus. The courts should have little trouble disposing of these arguments, with the exception of the issue of the protection of the unborn

63. *Griswold* at 485.

64. *See* note 34, at 545, *supra*.

65. Babbitz v. McCann, *supra* note 38, drew this conclusion as the federal court held that the state may not deprive a woman of her *private* choice of whether or not to bear an unquickened fetus. Following *Griswold*, the court pointed out that the Bill of Rights contains both penumbral and specific guarantees that protect one's home and life from governmental intrusion.

66. Comment, *The Right To Privacy, Does It Allow A Woman the Right to Determine Whether to Bear Children*, 20 AM. U.L. REV. 136, at 139 (1970-71). Former Supreme Court Justice Tom C. Clark summarized the holding of the Court in *Griswold* and other cases which expanded the right to privacy into a full-fledged independent constitutional right.

67. *See* Kramer v. Union Free School District, 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

68. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964); Cantwell v. Connecticut, 310 U.S. 296, 307-308 (1940).

fetus.[69] If the courts should regard the unborn fetus as a person, the state would be justified in protecting its right to life.[70]

III. The Supreme Court Decides The Issue

In *Roe v. Wade*,[71] a pregnant single woman, Jane Roe, challenged the constitutionality of the Texas criminal abortion statutes[72] which made it a crime to procure an abortion, or to attempt one, except for one procured or attempted on the basis of medical advice for the purpose of saving the life of the mother. The case was extremely important as similar statutes were in existence in a majority of states.[73] The plaintiff contended that the Texas statutes were unconstitutionally vague and abridged her right of personal privacy, protected by the first, fourth, fifth, ninth and fourteenth amendments.[74] In response to this, the State of Texas argued that its determination to recognize and protect prenatal life from and after conception constituted a compelling state interest which justified state control of abortion by legislation.

In *Doe v. Bolton*,[75] Mary Doe, a married pregnant woman challenged the constitutonality of a recently enacted Georgia abortion statute.[76] This law proscribed an abortion except where performed by a duly licensed Georgia

---

69. Of those who oppose a liberalization of our current abortion laws, the primary argument is the idea of the right of the fetus to be born, and the fact that the law does afford some rights to unborn children. *See* comment, Am. U.L. Rev. *supra*, note 66.

70. Should a state argue that a fetus is entitled to fourteenth amendment rights as a person,then that state would face a dilemma as no single state prohibits abortions under all circumstances. An exception always exists. *See* note 84, *infra* as the Court decided the unborn fetus was not a person under the Constitution.

71. 410 U.S. 113 (1973).

72. Texas Rev. Crim. Stat., Arts. 1191-94, and 1196.

73. Ariz. Rev. Stat. Ann. § 13-211 (1956); Conn. Pub. Act No. 1 (May 1972 special session) (in 4 Conn. Leg. Serv. 677 (1972), and Conn. Gen. Stat. Rev. §§ 53-29, 53-30 (1968) (or unborn child); Idaho Code § 18-601 (1948); Ill. Rev. Stat. c. 38, § 23-1 (1971); Ind. Code § 35-1-58-1 (1971); Iowa Code § 701.1 (1971); Ky. Rev. Stat. § 436.020 (1962); La. Rev. Stat. § 37:1285 (6) (1964); Me. Rev. Stat. Ann., Tit. 17, § 51 (1964); Mass. Gen. Laws Ann. c. 272, § 219 (1970); Minn. Stat. § 617.18 (1971); Mo. Rev. Stat. § 559.100 (1969); Mont. Rev. Code Ann. § 94-401 (1969); Neb. Rev. Stat. § 28-405 (1964); Nev. Rev. Stat. § 200.220 (1967); N.H. Rev. Stat. Ann. § 585:13 (1955); N.J. Stat. Ann. § 2A:87-1 (1969); N.D. Cert. Code §§ 12-25-01, 12-25-02 (1960); Ohio Rev. Code Ann. § 2901.16 (1953); Okla. Stat. Ann., Tit. 21, § 861 (1972-1973 Supp.); Pa. Stat. Ann., Tit. 18, §§ 4718, 4719 (1963); R.I. Gen. Laws Ann. § 11-3-1 (1969); S.D. Comp. Laws Ann. § 22-17-1 (1967); Tenn. Code Ann. §§ 39-301, 39-302 (1956); Utah Code Ann. §§ 76-2-1, 76-2-2 (1953); Vt. Stat. Ann., Tit. 13, § 101 (1958); W. Va. Code Ann. § 61-2-8 (1966); Wis. Stat. § 940.04 (1969); Wyo. Stat. Ann. §§ 6-77, 6-78 (1957).

74. 410 U.S. at 120.

75. 410 U.S. 179 (1973).

76. Ga. Code § 26-1202(a) and (b) (1972).

physician, and necessitated by, in his best clinical judgment, the danger of continued pregnancy to the pregnant woman's life or health. The statute also made exceptions in those cases where the fetus would likely be born with serious defects; or the pregnancy resulted from rape. In addition to a requirement that the patient be a Georgia resident, three procedural conditions had to be met under the state law: (1) the abortion be performed in a hospital accredited by the Joint Committee on Accreditation of Hospitals; (2) the procedure be approved by the hospital staff abortion committee; and (3) the performing physician's judgment be confirmed by an independent examination of the woman by two other licensed physicians. Unlike the Texas statute which was old and typical of those found in most states, this was a new legislative product[77] which reflected the influences of recent attitudinal change, of advancing medical knowledge and techniques and of new thinking about an old issue.[78]

The plaintiff in *Doe* contended that this statute abridged her rights of privacy and liberty in matters related to family, marriage, and sex and thus deprived her of the right to choose whether to bear children. She grounded her contention on the charge that the Georgia abortion statute violated her rights guaranteed her by the first, fourth, fifth, ninth and fourteenth amendments of the United States Constitution, that it denied her equal protection and procedural due process, and that it deterred hospitals and doctors from performing abortions[79] since it was unconstitutionally vague.

As the two cases basically dealt with the same issues, they were decided as companion cases, thereby establishing a precedent to be followed by all the states. The Supreme Court concluded in both, relying in part on the earlier decisions discussed in this comment,[80] that the right of personal privacy included the decision to have an abortion, but that this right was not unqualified and had to be weighed against the important state interests in the regulation of abortion.[81] Not only does the state have an important and legitimate interest in preserving and protecting the health of the pregnant woman, but it has still another important and legitimate interest in protecting potentiality of human life. These separate and distinct interests grow in substantiality as the woman approaches term, and at some point during pregnancy, each becomes "compelling."

The Court balanced the constitutionally guaranteed right of the woman against the "compelling" interests of the state in reaching its conclusion.

77. *See* note 30, *supra*.
78. 410 U.S. at 116.
79. 410 U.S. at 186.
80. *See* note 66, *supra*.
81. 410 U.S. 113, 152-164 (1973).

It decided that a state criminal abortion statute of the Texas type, which excepts from criminal prosecution only a life saving procedure on behalf of the mother without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the fourteenth amendment of the Constitution. Furthermore, recognizing the "compelling" state interests involved, the Court concluded that for the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. And finally, for the stage subsequent to viability, the State, in promoting its interests in the potentiality of human life, may, if it chooses, regulate and even proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[82] *Doe* also decided that various procedural conditions set forth in the Georgia statute were violative of the fourteenth amendment.[83]

These two cases are landmark decisions which have finally established specific guidelines upon which states may rely in the regulation of the abortion procedure. Thus, the limited right of the woman to decide upon an abortion is now firmly embedded in our constitutional law, subject only to state regulation in the second and third trimesters of pregnancy when the state's "compelling" interests may prevail and result in valid regulations.[84]

IV. Conclusion

Whether one agrees with these decisions or not, the Court should be commended for its scholarly work in undertaking such a difficult issue. Despite the fact that one's moral and religious beliefs may cause disagreement, it should be conceded that the Court's decision on abortion is constitutionally sound. Although most issues are now conclusively decided, remaining unanswered is a father's rights, if any exist in the constitutional context, in the abortion decision.[85] However, the proponents of less restric-

82. *Id.*

83. 410 U.S. 179, 191-201 (1973).

84. The Court also decided that the word "person," as used in the fourteenth amendment, did not include the unborn. *Id.* at 156-159. *See also* McGarvey v. Magee—Womens Hosp., 340 F. Supp. 751 (W.D. Pa. 1972); Byrn v. New York City Health and Hospitals Corp., 31 N.Y.2d 194, 335 N.Y.S.2d 390, 286 N.E.2d 881 (1972). Thus the rights of the unborn fetus are not subject to Constitutional protection.

85. *See* Roe v. Wade, 410 U.S. 113, 165, n.67.

tive abortion laws have been awarded with what they have impatiently requested, the established constitutional right to make an abortion decision.[86]

W.D.B.

86. In light of these decisions many states, including Virginia, will find their abortion laws unconstitutional.

Virginia made an effort to follow the guidelines established by these cases when the legislature attempted to enact House Bill No. 1698 (Jan. 24, 1973). However, our abortion law remains unconstitutional since the proposal failed to pass.