The Heritage Foundation Backgrounder

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THE ABORTION RIGHT: "A CONSTITUTIONAL RIGHT OF UNIQUE CHARACTER"

SHORT HISTORICAL SUMMARY

Before the American abortion movement began in the 1960s, abortion was solely a matter of state criminal law and almost all of the state laws had remained unchanged for a century. At the beginning of the American Republic, abortion was one of the many areas of the law controlled by the traditions of the English common law and, therefore, was not a matter for state statutes. Throughout its history, which began with William the Conqueror's conquest of Britain in 1066, the common law regarded deliberate, direct abortion as a crime, with the severity of the crime varying in different centuries. William Blackstone (1723-1780), the great English jurist, neatly summarized the history of the common law's attitude:

> For if a woman is quick with child with, and by a potion, or otherwise killeth it in her womb; or if anyone beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the antient law homicide or manslaughter. But at present, it is not looked upon in quite so atrocious a light, though it remains a very heinous misdemeanor.[1]

With the development of the science of biology in the first quarter of the nineteenth century, individual states of the United States began to enact statutes providing clear legal protection for the unborn. And by the end of the century, all the several states had criminal penalties of some kind for induced

1. William Blackstone, Commentaries on the Laws of England, Vol. 1, pp. 125-126.

abortions. By 1965 when the abortion movement started to gain momentum, there were criminal abortion statutes in all fifty states. Forty-six states and the District of Columbia permitted abortion to save the mother's life. Seven states permitted abortion to save the child's life. And four states permitted it for the sake of the health of the mother.

The reason for nineteenth century changes in the laws concerning abortion was of fundamental importance to judges when they began deciding abortion cases in the late 1960s and early 1970s. Cyril Means, Professor of Law at New York Law School, published what became the most influential article on the subject in the New York Law Forum in 1968[2]. There, Means purported to prove that the reason for the change was that the abortion procedure itself was so dangerous to women that the state intervened to protect women's lives, that abortion was riskier than childbirth in those days, and that state legislators had no concern for the welfare of pre-natal human life when they acted. Means's thesis immediately became a factor in every abortion case. It was adopted almost intact by Supreme Court Justice Blackmun in his long historical survey of abortion in the 1973 Roe v. Wade abortion decision. Shortly after publication of his article, Means became one of the founding directors of the National Association for the Repeal of Abortion Laws, now the National Abortion Rights Action League.

In 1978, a comprehensive historical account, in which all of Means's conclusions were refuted, was published by historian James Mohr.[3] In his work, the first complete history of the abortion reform movement in the nineteenth century, Mohr showed that the major force leading to state legislation to establish strict criminal penalties for abortion was the American Medical Association which had an anti-abortion policy from 1859, twelve years after its founding, until 1967 when it endorsed a loosening of the abortion laws. The doctors of the AMA were motivated by concerns about dangerous medical practitioners, by new biological knowledge about the beginning of life at conception,[4] and by a

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2. "The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality," New York Law Forum, Volume XIV, Number 3.
3. James C. Mohr, Abortion in America, The Origins and Evolution of National Policy, 1800-1900 (Oxford University Press, 1978).
4. In an interview with The Washington Star (March 7, 1973), soon after the Supreme Court's Roe and Doe decisions, the late Dr. Andre Hellegers mentioned "that conception was only discovered in the 19th century. The ovum wasn't discovered until 1827. The Court said that the Pythagoreans held as a matter of dogma that the embryo was animate from the moment of conception. Well, we didn't even know about conception until 150 years ago....The American Medical Association took its stand against abortion when it became known what the process of conception was and what the ovum was. When they found out when life began, they thought it imperative to protect it from the beginning." Hellegers was the former director of the Kennedy Institute for the Study of Human Reproduction and Bio-Ethics and the past president of the Society for Gynecological Research.

duty to defend human life. Additionally, Mohr showed that abortion was as safe as other surgical procedures in the nineteenth century. Furthermore, Mohr recounted that the nineteenth century feminists, including the most prominent, Elizabeth Cady Stanton, universally condemned abortion.

BEFORE 1973: ABORTION IN THE STATES

Only one state changed its abortion law before 1967. The Mississippi law was modified in 1966 to allow an abortion to save the mother's life or to abort a pregnancy resulting from rape. By the end of 1968, five states had liberalized their abortion laws: California, Colorado, North Carolina, Maryland, and Georgia. All except the Georgia statute allowed abortions for the purpose of saving the life of the mother, for the sake of the mental health of the mother, and for pregnancies caused by rape and incest. The California act did not allow abortion because of some congenital defect in the child; the other four states did. California prohibited abortions for any reason after twenty weeks of pregnancy and Maryland prohibited abortions after twenty-six weeks. The other three states permitted abortions throughout pregnancy subject to the above-mentioned conditions. The Colorado and North Carolina laws required a married woman seeking an abortion to get the consent of her husband and a minor to get the consent of a parent. For all five states, the conditions under which an abortion was legal were qualified and limited in various ways. No state allowed abortion on demand.

In 1970, Washington passed a law allowing abortion on demand for the first seventeen weeks of pregnancy with three conditions: a 90-day residency requirement, the father's consent if living with his wife, and the consent of a legal guardian for a girl under eighteen. In the same year New York, Hawaii, and Alaska passed more liberal bills with Alaska extending the abortion-on-demand requirement till the 20th week and New York until the 24th week. For all four states, abortions after the cutoff period had to be justified on physical or mental health grounds.

By the Supreme Court decisions of 1973, nine more states had liberalized their statutes: Arkansas, Delaware, Kansas, New Mexico, Oregon, South Carolina, Virginia, Connecticut, and Florida. Thus, a total of nineteen states had acted to permit abortion with varying degrees of limitation in the late 1960s and early 1970s. But only the previously mentioned four states, New York, Washington, Alaska, and Hawaii, had abortion on demand up until a certain time of pregnancy. In the other states, access to abortion was qualified, that is, it had to be justified for some reason of physical or mental health.

BEFORE 1973: ABORTION IN THE COURTS

In Griswold v. Connecticut (1965),[5] the Supreme Court overturned a Connecticut law that forbade the use of contraceptives by married couples. Justice Douglas, writing the majority opinion, said that "specific guarantees"[6] in the First, Third, Fourth, Fifth, and Ninth amendments have "penumbras formed by emanations from these guarantees that help give them life and substance." These "penumbras" could also be described as "zones of privacy" which government is not allowed to cross. The Connecticut law unconstitutionally intruded into the "right of privacy" of the "sacred precincts of the marital bedroom,"[7] a right "older than the Bill of Rights--older than our political parties, older than our school system."

The case was a landmark in constitutional law in that it was the first time that a right of privacy, in and of itself, and not connected to some other constitutional right, was recognized by the court.[8] Thomas Y. Emerson, professor of law at Yale Law School, argued the case for Planned Parenthood. In an interview with Family Planning/Population Reporter,[9] a publication of Planned Parenthood's Alan Guttmacher Institute, Emerson had the following to say about the connection between Griswold and abortion: "...it seemed to me that abortion legislation was next on the agenda. If the right of privacy included matters relating to procreation, the home, the family and marriage, than it was a logical step to say that it included the right to decide whether or not to have children."[10] As will be seen, this is what happened.

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5. 381 U.S. 479. Griswold was executive director of the Planned Parenthood League of Connecticut.
6. at 484.
7. at 485-486.
8. The vote was 7-2 in favor of overturning the Connecticut law, but the Court was badly splintered concerning the reason for the decision. Douglas spoke for himself, Brennan, Warren, Goldberg, and Clark in finding the right of privacy in the "penumbras" of several amendments. In a concurring opinion Goldberg, speaking for himself, Brennan and Warren, located the right of privacy in the Ninth Amendment. White, who concurred in the result, separately claimed that the liberty clause of the Fourteenth Amendment was the basis of the decision. In still another concurring opinion, Harlan, who voted with the majority but did not join the majority opinion, decided that the Fourteenth Amendment contained "an implicit concept of ordered liberty" which was the real basis of the decision. In dissent, Stewart and Black could discover no right of privacy guaranteed by the Constitution.
9. Volume 4, Number 5, October, 1975, pp. 94-95.
10. In the same interview, Emerson stated that Griswold "set off a chain of events which has led quite far and perhaps further than some people thought or intended at the time." He mentioned that the "right of privacy," as defined in Griswold could be used (or has already been used) to seek judicial vindication of "the right to die or the right not to live," the "constitutional right to use drugs," other "life-style" rights, the right to have public funds available for abortions and sterilizations, the right to force private hospitals to perform abortions if such a hospital is "sufficiently aided with state funds and sufficiently involved in the public aspects of the community," the right of adults "to engage in consensual sexual relations of any kind."

The political movement to repeal criminal abortion statutes, which organized itself as N.A.R.A.L. (The National Association for Repeal of Abortion Laws) in the middle of the 1960s, agreed that Griswold was the means to overthrow abortion statutes in the courts. Lawrence Lader, one of the founding leaders of the abortion movement, stated that "Our basis was the landmark Griswold v. Connecticut decision in 1965 in the U.S. Supreme Court, which overthrew Connecticut's birth control law...."[11] And, in his recent book, Aborting America, Dr. Bernard Nathanson, another of the important early leaders, said that "the right of privacy...was the only one that would work for us in the courts. We cited in particular the Griswold v. Connecticut ruling...."[12]

Two questions dominated the test cases[13] brought primarily in federal courts leading up to the Supreme Court's Roe and Doe cases in 1973: whether the Constitution protected pre-natal human life and whether the Griswold "privacy" could be extended to include pregnancy.

Concerning the latter, a 1968 law review article by former Supreme Court Justice Tom Clark became an influence in nearly every case. In attempting to lay the constitutional groundwork for the judicial legalization of abortion, Clark formulated the principle that, "Griswold's act was to prevent formation of the fetus. This the Court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention has failed?"[14]

At about the same time, the California Supreme Court decided the first case in which "a constitutional right to abortion" was discovered. In People v. Belous,[15] the California high court threw out the California criminal abortion statute,[16] and cited

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11. Lawrence Lader, Abortion II, Making the Revolution (Beacon Press, 1973), p. 12.
12. Bernard Nathanson, Aborting America (Doubleday, 1979), p. 192. The bookjacket of Aborting America includes the following about Nathanson's background: "...a co-founder of the National Association for Repeal of Abortion Laws (now the National Abortion Rights Action League). From February 1971 to September 1972, he was director of the Center for Reproductive and Sexual Health, the largest and busiest abortion clinic in the world. By 1973, when the Supreme Court handed down its revolutionary decision on the rights to abortion, Dr. Nathanson was Chief of Obstetrical Services at St. Luke's Hospital in New York City.
13. Almost all of the test cases leading to the Supreme Court's 1973 Roe and Doe decisions were brought by the Planned Parenthood Federation of America and the American Civil Liberties Union. Since 1973, those two organizations have remained in the courts defending the abortion right promulgated by the court.
14. Tom Clark, Religion, Morality, and Abortion: Constitutional Appraisal 2 Loyola U.L.R. (1969) at 9.
15. 458 P. 2d 194.
16. The statute had already been repealed but the repeal did not figure in the case extending the privacy right to abortions.

Griswold as the basis for the following statement: "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgement of a right of privacy or liberty in matters related to marriage, family and sex."[17] The California statute, the court said, forced a woman to bear the "risks of childbirth"[18] and this was an "an invalid infringement upon the woman's constitutional rights." The court also said that an "embryo or fetus" was not "equivalent to a born child."[19] With this statement, the California high court became the first court to remove constitutional protection from the unborn. Belous, Griswold and the Tom Clark article became the foundation of many subsequent decisions, as will be seen below.

The Belous case, relying substantially on Griswold, was relied upon substantially by the District Court of the District of Columbia in another case, U.S. v. Vuitch (1969),[20] that has defined a great portion of the abortion issue. The District Court ruled that the phrase from the District of Columbia abortion statute "as necessary for the preservation of the mother's life or health" was unconstitutionally vague in that it lacked the certainty required by due process and impinged on the constitutional rights of both mothers and physicians. In deciding that a woman had a constitutional right to decide whether to bear a child after conception as well as before conception, the District Court relied on the Griswold contraception decision.

The Vuitch case was upheld by the Supreme Court in 1971, but the decision affected the District of Columbia only. The Court, scrutinizing the "health" clause, ruled that health is the state of being sound in body or mind and includes psychological as well as physical well-being. Further, the Court stated that abortion is permitted for mental health reasons whether or not the patient has had a previous history of mental defects. Thus, a prohibition of abortions except for reasons of physical or mental health was rendered effectively meaningless by turning a lack of mental health into a feeling of mental well-being. An exception where an abortion would be allowed by law was changed into a broad indication for abortion on demand. Additionally, a medical physician, not a psychiatrist, could approve of abortion for mental health reasons.

Extending the Griswold privacy to include abortion became the chief tool for the federal judiciary in overturning state criminal abortion statutes. In the case that eventually reached the Supreme Court, Doe v. Bolton (1970),[21] the district court of

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17. at 199.
18. at 203.
19. at 202.
20. 305 F.Supp. 1032.
21. 319 F. Supp 1048.

Georgia threw out the Georgia statute saying "...the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy."[22] The Illinois statute was overturned in Doe v. Scott (1971)[23]: "We cannot distinguish the interests asserted by the plaintiffs in this case from those asserted in Griswold."[24] The Wisconsin statute fell in Babbitz v. McCann (1970)[25] in which the court said that abortion is a "private decision whether to bear an unquickened child."[26]

During this time when "abortion rights" were beginning to win approval in the federal courts, the Supreme Court handed down another contraception decision Eisenstadt v. Band (March 22, 1972).[27] In that case, the court overturned the Massachusetts conviction (and the Massachusetts statute upon which it was based) of birth control and abortion activist Bill Baird for illegally distributing contraceptives to unmarried persons. The Court said that such a law was unconstitutional under the Fourteenth Amendment.[28] The Griswold decision had been based on the "zone of privacy" existing in marriage, which Justice Douglas described as "a coming together."[29] In Eisenstadt, Brennan, writing the majority opinion, stated that the right of privacy actually existed in the individual partners not in the relationship itself, for marriage was not "an independent entity with a mind and heart of its own but an association of two individuals each with a separate intellectual and emotional makeup."[30] Therefore, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[31] (Emphasis in original.)

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22. at 1055.
23. 321 F. Supp 1385.
24. at 1389
25. 310 F. Supp. 293.
26. at 299.
27. 405 U.S. 438.
28. The vote was 7-1 (a vacancy existed in the Court with the retirement of Harlan). In Eisenstadt, the splintered justification of Griswold was completely rejected. Brennan, writing the opinion of the Court in which Douglas, Marshall, and Stewart joined, found the reason for the decision in the Equal Protection Clause of the Fourteenth Amendment. In a separate concurring opinion, Douglas called it "a simple First Amendment case." White, writing for himself and Black concurred in the result but not the reason. He did not locate his own reason in the clauses of the Constitution, but merely stated the Massachusetts law must fall to "settled constitutional doctrine" and to the Griswold decision. Burger dissented claiming that the decision invaded "the constitutional prerogatives of the States."
29. Griswold at 486.
30. Eisenstadt at 453.
31. at 453.

The Eisenstadt decision took its place alongside Griswold and Belous as the means for federal courts to declare state abortion statutes unconstitutional.[32] It was used just twenty days later by the federal district court of Connecticut to overturn the Connecticut abortion statute in Abele v. Markle (April 18, 1972).[33] In citing the "If the right of privacy means anything..." sentence (quoted above) from Eisenstadt, the Abele court said that the Connecticut law must fall because "The Connecticut anti-abortion laws take from women the power to determine whether or not to have a child once conception has occurred."[34]

In YWCA v. Hughes (1972),[35] the New Jersey abortion statute fell to the federal district court which, citing Griswold and Belous, stated that "we hold a woman has a constitutional right of privacy cognizable under the Ninth and Fourteenth Amendments to determine for herself whether to bear a child or to terminate a pregnancy in its early stages...."[36]

On the question of the humanity of the unborn and whether the unborn were, or should be, protected by the Constitution and laws of the United States, the same group of decisions discussed

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32. The recent book The Brethren reports that the Eisenstadt opinion was written for the sake of the Roe and Doe abortion cases which the Supreme Court had already accepted and heard argued:

> Brennan too had little choice but to wait for Blackmun's draft. But in the interval, he spotted a case that he felt might help Blackmun develop a constitutional grounding for a right to abortion. Brennan was writing a majority opinion overturning birth-control activist Bill Baird's conviction for distributing birth-control devices without a license (Eisenstadt v. Baird). He wanted to use the case to extend to individuals the right to privacy that was given to married couples by the 1965 Connecticut birth-control case.
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> Brennan was aware that he was unlikely to get agreement on such a sweeping extension. He circulated his opinion with a carefully worded paragraph at the end. "If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."
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> That case dealt only with contraception -- the decision to "beget" a child. He included the reference to the decision to "bear" a child with the abortion case in mind. Brennan hoped the language would help establish a constitutional basis, under the right to privacy, for a woman's right to abortion.

Bob Woodward and Scott Armstrong, The Brethren, (Simon and Schuster, 1979), pp. 175-176.

33. 342 F. Supp 800.
34. Abele at 802.
35 342 F. Supp. 1048.
36. at 1072.

above were in substantial agreement. The Doe v. Bolton court refused to "posit" the "existence of a new being with its own identity and federal constitutional rights."[37] The Doe v. Scott court said that the state does not have "a compelling interest in preserving all fetal life" which justifies an invasion of the woman's privacy (at 1391).

The YWCA v. Hughes court maintained that the definition of human life was "beyond the competence of judicial resolution,"[38] while the Babbitz v. McCann court asserted that the right of privacy made the humanity question irrelevant: "...it is sufficient to conclude that the mother's interests are superior to that of an unquickened embryo, whether the embryo is mere protoplasm, as the plaintiff contends, or a human being, as the Wisconsin statute declares."[39] (Emphasis in original.)

In the Abele case (decided on April 18, 1972), the court was silent about the humanity of the unborn because, the judges maintained, the Connecticut statute was also silent. The court then explicitly challenged the state government to define the value of fetal life. This challenge was immediately accepted by Governor Meskill who called a special session of the legislature. Thirty-five days after the Abele decision,[40] the governor and the legislature had agreed and passed into law a comprehensive new statute, Section One of which read, "The public policy of the state and the intent of the legislature is to protect and preserve human life from the moment of conception...." The next day, the same plantiff, Abele, brought a new case before the same three judges who had handed down the original decision. Abele sought a decision rendering the new statute unconstitutional, and in addition, sought to have the court hold the governor in contempt of court for advocating the new statute -- a complaint dismissed as "frivolous" by the court.

On September 20, 1972, in its new Abele v. Markle[41] decision, the court answered the state's acceptance of its challenge to assign value to fetal life. Saying that "Baird (i.e., Eisenstadt v. Baird) may have anticipated the outcome of cases such as this,"[42] the court ruled that a "fetus is not a person within the meaning of the Fourteenth Amendment."[43] The court gave its permission for the state to grant rights to a fetus even though it was not a person, but any such rights could not be granted at the expense of the right to privacy which was supreme.

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37. at 1055.
38. at 1075.
39. at 301.
40. (May 23).
41. 351 F. Supp. 224.
42. at 227.
43. at 228.

In two additional cases, McGarvey v. Magie-Women's Hospital (1972)[44] and Byrn v. New York City Health and Hospitals (1972),[45] complaints were brought by parties deliberately seeking to get the courts to accord constitutional citizenship and personhood upon the unborn. Both claims were rejected. The McGarvey court stated that the fetus was neither a person nor a citizen and that protection of fetal life "by virtue of the Fourteenth Amendment or the Civil Rights Act could not be justified."[46] The Byrn court said that "The Constitution does not confer or require legal personality for the unborn."[47]

As has already been stated, the Supreme Court used the cases discussed above as the basis of its Roe v. Wade and Doe v. Bolton decisions and, in the main, accepted the ideas explicitly enunciated in them. In doing that, the Court rejected the decisions of four lower federal courts: the cases of Rosen v. Louisiana State Board of Medical Examiners (1970),[48] Steinberg v. Brown (1970),[49] Corkey v. Edwards (1971),[50] and Crossen v. Attorney General of Commonwealth of Kentucky (1972).[51].

In these cases, the four courts refused to throw out the criminal abortion statutes of Louisiana, Ohio, North Carolina and Kentucky, respectively. All four courts upheld any state's right to assert that unborn human life is valuable and worthy of protection by law -- and that such a determination was properly a legislative, not a judicial, authority. The Steinberg court ruled, that, over and above any legislative act, the Constitution mandated that human life be protected under the "express provisions of the Fifth and Fourteenth Amendments that no person shall be deprived of life without due process of law."[52]

Concerning the Griswold/Eisenstadt "right of privacy," the Rosen court stated that the superiority of a woman's right of privacy was "not mandated by the Constitution,"[53] because the right of a woman "to destroy the embryo or fetus she carries was not so rooted in the tradition and collective conscience of our people that it must be ranked as fundamental."[54]

The Steinberg court stated that since Griswold was only an "implied or deduced"[55] right, it was inferior to the Fifth and

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44. 340 F. Supp 751 (Pa.).
45. 286 N.E. 2d 887.
46. at 754.
47. at 890.
48. 318 F. Supp. 1217.
49. 321 F. Supp. 741.
50. 322 F. Supp. 1248.
51. 344 F. Supp. 587.
52. at 745.
53. at 1231.
54. at 1232.
55. at 745.

Fourteenth Amendments' explicit statements that no person shall be deprived of life without due process of law. The court went on to say that judicial rulings equating abortion and contraception were based on "ignorance of the laws of nature" and paid "no attention to the facts of biology"[56] and that the real difference between the two was that "here there is an embryo incapable of protecting itself. There the only lives were those of two competent adults."[57]

The Corkey court said, "The basic distinction between a decision whether to bear children which is made before conception and one which is made after conception is that the first contemplates the creation of a new human organism, but the latter contemplates the destruction of such an organism already created... the choice whether or not to bear children is made in circumstances quite different from those in which such a choice might be made after conception."[58]

The Crossen court, in considering Griswold, decided that "This right is not absolute" in abortion cases because "the state's interest in the preservation of potential human life outweighs and supercedes any right to privacy a woman or family may claim."[59]

1973: THE SUPREME COURT DECIDES

The stage was set for the Supreme Court to decide Roe v. Wade, 410 U.S. 113, and Doe v. Bolton, 410 U.S. 179, both handed down on the same day, January 22, 1973.[60] The majority said that the right of privacy was not "absolute" or "unqualified,"[61] but was "subject to some limitations."[62] But so "fundamental" a right could only be limited by a "compelling state interest."[63] "At some point in time"[64] during pregnancy, a state is allowed to decide that "the health of the mother or that of potential human life"[65] is compelling. The Court further decreed that a compelling point in pregnancy is the end of the first trimester. Up to that point, the woman's right of privacy, and her physician's also, is absolute and unqualified. From the third through the sixth month of pregnancy, the two rights of privacy can be abridged

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56. at 746
57. at 746.
58. at 252.
59. at 591.
60. For both decisions, Blackmun wrote the decision of the Court for himself, Brennan, Marshall, Douglas, Stewart, Powell, and Burger. White and Rehnquist dissented.
61. at 154.
62. at 155.
63. at 155.
64. at 159.
65. at 159

only by state regulation of the abortion "procedure,"[66] not of the freedom to abort. After the sixth month, another "compelling point" justifying state interest (the point of viability), a state can (but need not) "proscribe abortions...except when it is necessary in appropriate medical judgement, for the preservation of the life or health of the mother."[67]

The Court gave ample evidence of what it considered "the life or health of the mother" to include. Blackmun,[68] speaking for the Roe majority, cited the Court's own U.S. v. Vuitch[69] decision in which the Court defined "health" to include "psychological as well as physical well-being."[70] In addition, in Vuitch, the Court stated that an abortion for mental health reasons was legal "whether or not the patient had a previous history of mental defects."[71]

Speaking for the Doe majority, Blackmun mentioned that "the medical judgment may be exercised in the light of all factors -physical, emotional, psychological, familial, and the woman's age - relevant to the well-being of the patient. All these factors may relate to health."[72] Chief Justice Burger, concurring in Doe, also ratified Vuitch by stating that doctors must interpret "health in its broadest medical context."[73] Douglas, concurring in Doe, elaborated further by stating that the only standard for a health-threatening abortion is the judgment, of a "person of insight."[74] He added that, under "health," an abortion may be indicated because of "vicissitudes of life," "suffering, dislocations, misery or tragedy," and even a "judgment based on what is appropriate in a given case, though perhaps not necessary in a strict sense." For all these reasons, an abortion might be "the only civilized step to take."[75]

Thus having already said that a doctor has the absolute right to abort and a woman an equally absolute right to receive an abortion (subject only to state regulation of the "procedure" in the second trimester) throughout the first six months of pregnancy, the Court, despite its disclaimers, extended the same absoluteness to the last trimester of pregnancy by making it almost impossible to exclude anything from the realm of "health."[76]

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66. at 163.
67. at 165.
68. at 164.
69. 402 U.S. 62 (1971).
70. Vuitch at 72.
71. Vuitch at 72.
72. at 192.
73. at 208.
74. at 216.
75. at 215-216.
76. "This 'health of the mother' standard amounts to virtual elective abortion throughout the nine months because of the sweeping way in which 'health' is used by pro-abortionists to cover every possible problem of mind and situation (recall the infinite elasticity of psychiatric grounds), and because the court nowhere offers a medical refinement for the term." Aborting America, p. 210.

And, after explicitly attempting to make a distinction between the abortion right to privacy and the Griswold and Eisenstadt right to privacy, the Court in the end found no distinction at all. Both were absolute under the Fourteenth Amendment. To Justice Douglas's mind there really was no difference anyway: "We held in Griswold that the states may not preclude spouses from attempting to avoid the joinder of sperm and egg. If this is true, it is difficult to perceive any overriding public necessity which might attach precisely at the moment of conception."[77]

This conclusion prompted Justice White, in a single dissent to both Roe and Doe, to declare that the Court had invested mothers and doctors with the "constitutionally protected right to exterminate" "human life" for reasons of "convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc.," and for reasons of "whim or caprice."[78]

The Court claimed that it could only "speculate" about "when life begins," and that, therefore, such an issue was irrelevant: "We need not resolve the difficult question...."[79] At any rate, the Court said, "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[80] In ratifying the McGarvey, Byrn, and Abele decisions, the Court stated that it had already so ruled in its Vuitch decision: "for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection."[81] The Roe Court further accused Texas of impermissibly "adopting one theory of life,"[82] and throughout both decisions repeatedly stated that the only kind of human life a state could recognize was "potential life" -- with the caveat that such life could be recognized only after the sixth month of pregnancy[83] and only if it did not interfere with a woman's "life or health."

There had been little legislative action in the state legislatures in 1972, the year immediately preceding the Supreme Court's

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77. Doe at 217.
78. at 221-222.
79. at 159.
80. at 158.
81. at 159.
82. at 162.
83. "Stewart had one more change that he insisted on before he would join the opinion. It was imperative that they say more clearly that a fetus was not -- as far as the Fourteenth Amendment was concerned -- a person. If the fetus were a person, it had rights protected by the Constitution, including 'life, liberty, and property.' Then the Court would be saying that a woman's rights outweighed those of the fetus. Weighing two sets of rights to protect...Stewart was insistent, and Blackmun finally agreed to say clearly that a fetus was not a person." The Brethren, p. 223.

dual abortion discussions. The campaign for liberalization of state laws governing abortion had ground to a halt. Only five states passed legislation dealing with abortion. Florida liberalized its statute at the order of the federal district court. Connecticut lost two statutes at the hands of the federal district court in the Abele cases, as has already been described. The New York law passed in 1970 making abortion on request legal up to twenty-four weeks of pregnancy was completely repealed by the state legislature in 1972 but saved by Governor Rockefeller's veto. In Massachusetts, Governor Francis Sargent vetoed a bill protecting the life of children from the moment of conception.

The Pennsylvania legislature passed a new law by an overwhelming margin in both houses (139-9 and 127-50) that read in its Declaration of Policy that the state "reaffirmed its immemorial recognition that all human life is inviolable regardless of its age or form, whether possessed by the aged, the physically or mentally ill, the handicapped or the unborn in the womb."[84] The law was vetoed by Governor Milton Shapp, overriden in the state senate but sustained in the state house. Thus, in 1972, not one policy-making body in the states liberalized state criminal abortion laws with respect to abortion on its own initiative.

The effect of the Supreme Court's decisions was to wipe out the laws of all fifty states and make irrelevant the conclusions of the state legislatures that had acted on their criminal abortion statutes in the five years preceding 1973.[85]

All state statutes which prohibited abortion except to save the life of the mother or which prohibited abortion completely became invalid. Thirty states had laws of this kind in January 1973, although some had already been thrown out by lower federal courts by that date. For the nineteen states that had liberalized their laws in varying degrees, those statutes that qualified the right to an abortion for any reason in the first or second trimester became null.

Even in the four states that had promulgated abortion on request, New York, Alaska, Hawaii, and Washington, a woman's access to abortion was not absolute enough. Washington limited abortion on request to the first four months of pregnancy; New

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84. Family Planning/Population Reporter Vol. 2, No. 1. (hereinafter FP/PR)
85. "I was pleased with Justice Harry Blackmun's abortion decisions, which were an unbelievably sweeping triumph for our cause, far broader than our 1970 victory in New York or the advances since then. I was pleased with Blackmun's conclusions, that is. I could not plumb the ethical or medical reasoning that has produced the conclusions. Our final victory had been propped up on a misreading of obstetrics, gynecology, and embryology, and that's a dangerous way to win. But as Vince Lombardi said, 'Winning isn't everything - it's the only thing.'" (Emphasis in original.) Aborting America, p. 159.

York to the first twenty-four weeks; Alaska and Hawaii prohibited abortions after viability. As can be seen, none of the four states allowed for abortion for both life and health reasons in the last trimester of pregnancy.

The Supreme Court left the states with little authority to take an interest in pre-natal human life. The Court ruled that states may not regulate abortion in the first trimester except to require performance by a licensed physician, may regulate abortion in the second trimester only with respect to the procedure or maternal health but not with respect to the reason for abortions, which must be unquestioned, may prohibit abortion on request in the third trimester but must allow abortion for the broad "life or health" reasons prescribed in detail by the Court. The Court allowed states to require that abortions be performed by licensed physicians, that abortion clinics be licensed, but disallowed a requirement that abortions be performed in hospitals during the first trimester.

The Court's decisions were so sweeping and definitive that there was no necessity for the states to pass any new legislation at all.[86] State health departments were able to use the decisions themselves as the basis for promulgating regulations.

Some questions were left open by the Court. For example, could a state require that a woman have the consent of her husband or parent before having an abortion? May hospitals, public and private, refuse to make their facilities available for abortions? What measures could states, forbidden by the Court to protect the life of the fetus before viability, take to protect the fetus' life after viability, this is, after the sixth month of pregnancy?[87]

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86. The breadth of the Roe and Doe decisions has not been widely reported. The day after the decision, The New York Times, in a front page story, reported that the Supreme Court overruled state prohibitions of abortions in the "first three months of pregnancy." (January 23, 1973) Time reported that the new abortion right existed for "six months" (February 3, 1973, p. 50), but, four years later, was reporting that "The U.S. Supreme Court in 1973 gave women the right to have an abortion for any reason during the first three months of pregnancy." (December 5, 1977, p. 20.) More recently, The Washington Post reported that "Seven years ago yesterday the Supreme Court ruled that mothers had the right to determine during the first three months of pregnancy whether to continue a pregnancy and bear a child." (January 23, 1980, p. A10.) The New York Times carried a front-page story on January 16, 1980 that stated that "the Supreme Court of the United States extensively broadened the general rights of women to have abortions...," and on January 23, 1980 mentioned the "seventh anniversary of the Supreme Court decision that limited government regulation of abortion." (p. A12.)

87. "I have stated earlier that the court here invented 'abortion' between viability and birth, previously unknown to obstetrics and gynecology. All of these 'abortions' necessarily result in the live births of viable infants, unless the physician is unaware of the clinical definition of abortion and mistakenly tries to terminate the life. The fate of these newborns is nowhere explained. This is all medical nonsense. There is no accepted obstetrical procedure for intrauterine death after twenty-two weeks." Aborting America, p. 210.

The first wave of state legislation occurred between the January 1973 Roe and Doe decisions and the July 1976 Planned Parenthood v. Danforth decision.

Despite the chilling effect on possible state legislation that was the result of the Court's 1973 decisions, many states decided to make the attempt. One of the first issues to be addressed was that of requiring a woman to get the consent of her husband or the father of the child before an abortion. By July 1976 twelve states had enacted such requirements. By the same date, twenty states had enacted laws specifically requiring minor females, still living with their parents, to obtain parental consent before undergoing an abortion. An additional two states enacted laws requiring that the husband or parent be notified before abortion. These laws were passed specifically regarding the abortion procedure. Before July 1976 there was not a state in the union that allowed a girl, still under the care and protection of her parents, to undergo an operation or operative procedure without her parents' consent. The other thirty states assumed that such longstanding laws were sufficient to cover the abortion procedure.

Since the Court found such an emphatic, sweeping right to abortion residing in women, the question of whether doctors, nurses and hospitals could be required to perform or provide abortions became an immediate concern of the states.

By July 1976, thirty states had enacted "conscience clauses" relieving individuals and institutions of any liability for refusing to perform or participate in abortions. Most of these statutes did not make any distinction between public, private, or religious hospitals. Eight of the statutes, however, were limited to private and/or religious hospitals. In addition, thirty-one states passed statutes protecting the rights of physicians and other medical personnel to refuse to participate in abortions.

With the Supreme Court sanctioning abortion after viability for "life and health" reasons throughout the entire nine months of pregnancy, the question of whether the states had any rights to protect late-term unborn children arose. By July 1976, laws requiring fetal protection measures had been adopted in a total of twenty-two states. Twelve of those states restricted scientific experimentations on aborted fetuses, but only six of those twelve limited such restriction to live-born babies. Fourteen of the twenty-two states passed laws requiring abortionists to take measures to preserve the lives of fetuses aborted after viability. And four more states required abortionists to give sustenance to babies who had survived the abortion procedure.

The lower courts began to act to enforce and establish the high court's new right.[88] In California, a state court of appeals held on April 11, 1973, that a state statute that prohibited

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88. People v. Orser.

the advertising or publication of information on how and where to obtain an abortion was an unconstitutional violation of freedom of speech because it did not take into account that the Supreme Court had made most abortions legal. At the same time, a federal district court[89] overturned the longstanding federal statute prohibiting sending information on abortions through the mail. The reasoning was the same.

Some governors tried to prevent state legislators from passing laws dealing with abortions. As noted earlier, in the summer of 1974 the governors of Massachusetts and Pennsylvania both vetoed bills providing for fetal protection, spousal and parental protection, and conscientious refusal. The vetoes were overridden by resounding margins: Massachusetts voted 197-13 in the House and 30-3 in the Senate to override while Pennsylvania voted 41-8 in the Senate and 157-37 in the House to override.

In October 1973, the Supreme Court followed its Roe and Doe decisions by letting stand without comment a U.S. Court of Appeals ruling that a municipal hospital may not constitutionally prohibit the use of its facilities for nontherapeutic abortions. In Louisiana State Board of Medical Examiners v. Guste,[90] the high court, ruling that its Roe and Doe decisions applied retroactively, prohibited the Louisiana State Board of Medical Examiners from suspending the license of a doctor accused of performing an illegal abortion in 1969.[91] Additionally, a federal appeals court in New York released a doctor convicted of a 1966 criminal abortion in which the mother died. In Bums v. Alcale[92] the Court decided that unborn children were not dependent children within the meaning of the Social Security Act and that states participating in the Aid to Families with Dependent Children were not required to pay benefits to pregnant women for their unborn children.

The lower federal courts did not look favorably on the states' attempts to legislate in any way concerning abortion. In the three years after the Roe and Doe decisions, major decisions of lower federal courts repealed parental and/or spousal consent requirements in Colorado, Florida, Kentucky, Indiana, Massachusetts, Minnesota, Missouri, Nebraska, and Pennsylvania. These decisions chilled the initiative of other states in enacting such laws. State laws enabling hospitals to decline to perform abortions were also declared invalid by federal courts in Arizona, Kentucky, and Minnesota. Additionally, federal courts ordered individual public hospitals to perform abortions after these hospitals had declared policies against performance of abortions. This happened

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89. Atlanta Cooperative News Project v. U.S. Postal Service.
90. January 13, 1975.
91. May 9, 1974 Preiser v. Williams.
92. March 18, 1975.

in Massachusetts, Nebraska, Wisconsin, the District of Columbia, Virginia and Minnesota.

The most famous case involved Milwaukee County General Hospital, a public hospital that as a matter of policy refused to allow abortions. The physician staff of the hospital also refused. Interested parties went to court to get the policy ruled invalid. The issue lasted more than two years and involved seven court decisions, in which the Wisconsin state courts supported the hospital's decision while the lower federal courts and the U.S. Supreme Court ruled it invalid. At one stage, a federal district judge threatened the staff of the hospital and county officials with fines if they did not relent. Only when the hospital hired a doctor who, on his own initiative, performed an abortion did the issue become partially resolved.

A number of suits were brought seeking to force both denominational and other private hospitals to perform abortions. Federal district courts in Oregon, New Jersey, Texas, Montana, and West Virginia all ruled that even though such non-publicly-owned hospitals had received federal assistance of one kind or another, they could still refuse abortions. To head off such suits Congress passed a law to allow private hospitals receiving money from the federal government to refuse to perform abortions on religious or moral grounds. A constitutional challenge was mounted but failed in the Ninth Federal Court of Appeals.[93]

State statutes designed to force abortionists to protect late-term fetuses were also struck down in Rhode Island, Minnesota, Missouri, and Pennsylvania. The issue concerned the definition of viability and whether a state could force an abortionist to make a decision whether a fetus scheduled to be aborted could survive outside the womb, albeit with artificial means.

SPOUSAL AND PARENTAL CONSENT; ABORTIONS IN LATE-TERM PREGNANCIES

In its next major abortion case, Planned Parenthood v. Danforth (1976),[94] the Court began to elaborate about how absolute the

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93. Chrisman v. Sisters of St. Joseph of Peace.

94. 428 U.S. 52. A majority of the Court, Blackmun, Brennan, Marshall, Stewart and Powell, voted to strike down the Missouri law. Blackmun wrote the opinion of the Court but was joined in his opinion by Brennan and Marshall only. Stewart, joined by Powell, wrote a separate concurring opinion. As has been the pattern in the Court's decisions, Stewart agreed with the result but not with the reasons. White, joined by Burger and Rehnquist, concurred in part but dissented on the grounds that the spousal consent, parental consent, and prohibition of saline amniocentesis provisions of the Missouri law were all valid. Stevens, concurred in part, but dissented on the grounds that the spousal and parental consent provisions were valid.

right to abortion was intended to be. Missouri had passed a sweeping abortion control act designed to regulate abortion as much as possible under the Roe and Doe decisions. The new statute was challenged three days later in federal district court by Planned Parenthood and two physicians who performed abortions. There was no female plaintiff. Both the federal district court and the federal circuit court of appeals summarily declared the act unconstitutional.

The Supreme Court ruled that while it was acceptable for the state of Missouri to require a woman's written consent before an abortion, the guarantees outlined in Roe and Eisenstadt made it unconstitutional for the state to require that a woman get her spouse's consent before an abortion.[95] The Court again reiterated its Eisenstadt dictum that marriage was an association of "individuals" each of whom had a right of privacy. Now, in Planned Parenthood, the Court stated that a woman could use this right against her husband. Similarly, a minor girl could use the right of privacy against her parents; therefore, the provision of the Missouri statute requiring a minor girl to get the consent of her parents before an abortion was also unconstitutional.

The Court said that Missouri could not prohibit the use of saline amniocentesis[96] as an abortion method in the second trimester even though Missouri had found that the method was deleterious to the mother's health. The Court concluded that since saline amniocentesis was the most common method of abortion after the first twelve weeks of pregnancy, its proscription would in effect proscribe abortion itself during the second and third trimesters.

Finally the Court concluded that a provision of the Missouri statute requiring a physician to use as much care to preserve the life and health of a fetus intended to be aborted as a physician would do "to preserve the life and health of any fetus intended to be born and not aborted"[97] was impermissible because it required the physician to "preserve the life and health of the fetus whatever the stage of pregnancy."[98] The Court stated that its Roe decision mandated that a state could take an interest in the life and health of the fetus only after viability, that is, after the second trimester.

In a companion case decided the same day, Singleton v. Wulff,[99] the Court turned down, on procedural grounds, an attempt by two

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95. at 70-71.
96. Section 9 of the Act described saline amnocentesis as an abortion method whereby "the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor." Cited at 87.
97. at 82.
98. at 83.
99. 428 U.S.106.

Missouri physicians to get the Court to say that the Constitution demanded that public monies be available for Medicaid abortions.

In still another companion case of the same day, Bellotti v. Baird,[100] the Court, again on procedural grounds, declined to rule on the constitutionality of a Massachusetts statute of 1974, similar to the Missouri statute, requiring parental consent before minors could receive abortions. Baird, the winner of the Eisenstadt case, as previously noted, now owned an abortion clinic and sought to get the parental consent provision overturned.

The Court hinted that it might accept some kind of restriction on the access of minor females to abortion and thus might accept some legislative attempt to put abortion on the same footing as all other operations performed on minor females. "The constitutional issue cannot now be defined, however, for the degree of distinction between the consent procedure for abortions and the consent procedure for other medical procedures cannot be established until the nature of the consent required for abortions is established."[101]

PUBLIC FUNDING OF ABORTIONS

In two companion cases, Beal v. Doe[102] and Maher v. Roe,[103] both decided on June 20, 1977, the Supreme Court held that neither Title XIX of the Social Security Act nor the Equal Protection Clause of the Fourteenth Amendment required individual states to pay for the non-therapeutic abortions of indigent women under the Medicaid program. The Court reasoned that Title XIX was passed by Congress before abortion was legal in the United States and that, therefore, the Title could not possibly be construed as mandating abortion funding. From a constitutional view, poverty was not a "suspect category" that denied indigent women the equal protection of the laws.

In both cases, the Court concluded that "unnecessary," "non-therapeutic" abortions need not be funded under state Medicaid plans. But the Court opined that Title XIX might require the

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100. 428U.S.132.
101. at 150.
102. 432 U.S. 438.
103. 432 U.S. 464. For both the Maher and Beal decisions, Powell delivered the opinion of the Court in which Burger, Stewart, White, Rehnquist, and Stevens joined. Blackmun, Marshall, and Brennan dissented in both cases. Dissenting in Maher, Brennan, writing for himself, Marshall, and Blackmun, claimed that the Court had overturned its Roe decision. Writing for the same group in Beal, Brennan claimed that the Court had also overturned its Doe decision. In separate angry dissents to both decisions, Blackmun and Marshall each agreed that the majority had repealed the Roe and Doe decisions and added that it had also repealed the Constitution itself.

funding of "necessary"[104] abortions, thus setting the stage for future cases. And the court gave no indication that it would retreat from its wide-open "life and health" indications for "necessary" abortions as outlined in Roe v. Wade and Doe v. Bolton. Thus, the Court left open the possibility that it would, in the future, affirm that since these "life and health" indications are necessary if a woman and her physician agree that they are necessary, therefore, both the state and federal governments are obliged to fund such abortions under Medicaid. (This possibility has now been seized upon by a federal district court judge, John Dooling, who on January 15 of this year ruled that all legislative restrictions on public fundings of abortions were unconstitutional since any abortion was "necessary" that a woman claimed was necessary. McRae et al. v. Califano)

Finally in both cases the Court rejected the "equal protection" argument that a state must fund abortions if it funds childbirth.

VIABILITY AND LATE-TERM PREGNANCIES

In Colautti v. Franklin (January 9, 1979),[105] the high court took on a comprehensive Pennsylvania statute, the major purpose of which was to provide as much protection as possible to the unborn in the latter stage of pregnancy. The statute had been passed by the legislature in 1974 over the governor's veto. Under the statute, a physician was required to make a determination of whether a fetus slated for abortion was viable or not viable. If "based on his experience, judgment, or professional competence," he determined that the fetus was viable or "may be" viable, he was required to exercise the same concern for the fetus' "life and health" as he would for a fetus at the same gestational age slated for birth.[106]

The Court said that these provisions were vague and ambiguous and therefore void. In Roe the Court had defined viability as the gestational stage at which a fetus is "potentially able to live outside the mother's womb, albeit with artificial aid."[107] Up to the point of viability the woman's and physician's judgment were supreme and absolute -- although as has already been shown, the Court also extended that absoluteness to the "life and health of the woman" exceptions by way of "appropriate medical judgment." Nevertheless, the Roe Court recognized a state interest in the life of the fetus after viability and a limitation on the supremacy of medical judgment: "The decision vindicates the right of the

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104. Beal at 444.
105. 439 U.S. 379. Blackmun delivered the opinion of the Court, in which Brennan, Marshall, Stewart, Powell, and Stevens joined. White wrote a dissenting opinion in which Burger and Rehnquist joined.
106. Statute cited at 380, 381.
107. at 163.

physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to these points the abortion decisons in all its aspects is inherently, and primarily a medical decision, and basic responsibility for it must rest with the physician."[108] Thus, by its logic, the court seemed to say that, after viability, the physician's role could be qualified by a state role.

In Planned Parenthood v. Danforth, the Court approved Missouri's definition of viability, to wit, "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems."[109] The Court said that such a definition was completely compatible with the Roe definition of viability, one of the reasons being that Missouri's viability definition was less inclusive -- "continued indefinitely outside the womb" being stricter than "potentially able to live outside the mother's womb." But, the Court said that the determination of viability must be flexible and was "a matter for the judgement of the responsible attending physician."[110]

With both the Roe and Planned Parenthood decisions in mind, the Pennsylvania legislature attempted to take the Court at its word that a state could intervene in the abortion decision after viability (roughly, the third trimester of pregnancy). The statute did not proscribe abortion at all at any time during pregnancy but merely stated a physician should try to preserve the life of the fetus, and choose an appropriate life-protective abortion technique when he aborted after viability. And the determination of viability was to be left up to his judgment. Stated in another way, Pennsylvania declared that a woman in the latter stages of pregnancy did not have a right to a dead fetus but only a right to have that fetus removed from her body.

The Court neatly sidestepped this latter question by asserting that the statute was too ambiguous and vague to allow an abortionist to understand it. Since there was a criminal penalty for violations, the Court decided that the statute subjected abortionists to too much risk of interpretation. Most of the Court's opinion was a long semantic discussion about the clarity and meaning of different words and clauses of the statute.

In dissent, Justice White, writing for himself, Justice Burger, and Justice Rehnquist, called the decision "incredible" and accused the Court of mounting a "determined attack on the Pennsylvania statute" by withdrawing from the states "a substantial measure of the power to protect fetal life that was reserved

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108. Roe at 165, 166.
109. P.P. v. Danforth 428 U.S. at 63.
110. P.P. v.Danforth at 64.

to them in Roe v. Wade and Planned Parenthood v. Danforth."[111] White maintained that both the Pennsylvania statute and the Missouri statute of the Planned Parenthood case strictly adhered to the original viability guidelines set down in Roe.

PARENTS, CHILDREN, JUDGES, AND ABORTION

On July 2, 1979, a final decison was handed down in Bellotti v. Baird,[112] which had come back to the Court from Massachusetts. By a 8-1 vote the Court ruled unconstitutional a statute that had been carefully crafted to win Supreme Court approval. The law, passed and passed again over the governor's veto in 1974, had been enjoined by a federal district court even before it went into effect, subsequently ruled unconstitutional, reviewed and sent back to the district court by the Supreme Court with instructions to allow the Supreme Judicial Court of Massachusetts to rule, upheld by the Massachusetts court, immediately ruled unconstitutional again by the same federal district court, and then passed back to the Supreme Court.

The law required parental consent before a minor female could obtain an abortion. But, failing that, the minor female was allowed to seek the approval of a court if she could prove "good cause," which was not defined, and therefore presumably was as unrestricted as the "life and health of the mother" standards as laid out in Roe v. Wade and Doe v. Bolton.

In considering the status of parents in society, the Court extolled parents at great length, even going so far as to admit that the "child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[113]

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111. at 401, 407, 408. Concerning the Colautti decision, Nathanson observed that, "All of this reinforced my prior conviction that the court propped up its abortion policy on an impossibly vague and unstable concept: viability. Because of this vagueness, it now appears quite likely that any future law written to protect 'viable' fetuses may be struck down because it, too, is vague, as any law or any Supreme Court decision on viability must be." Aborting America, p. 209.

112. 99 S. Ct. 3035. The Court overturned the Massachusetts law by a 8-1 vote but was divided into separate four-man factions as to the reason. By 1970, the abortion right had been so well established by the Court that there was no longer any need to base the decision on any clauses of the Constitution. Thus, the two factions disagreed not about interpretation of clauses of the Constitution but about interpretation of the meaning of the abortion right. In dissent, White based his dissent on his previous dissent in Planned Parenthood v. Danforth.

113. at 3045.

The position of parents over their children is "deeply rooted in our nations's history and tradition"; the parental tasks of guiding children by "precept and example" is "beyond the competence of impersonal political institutions." Moreover, "it is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither apply nor hinder."[114]

Nevertheless, the traditional authority of parents over their daughters must fall because "we are concerned here with the exercise of a constitutional right of unique character."[115] "The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity"[116] about abortion. Massachusetts had not shown enough of this sensitivity.

The state's primary mistake was to accord too much power to parents by requiring that they be notified before their daughters get abortions and before daughters have access to court. The Court warned parents that the exercise of parental influence "should be in the best interests of their daughter" but admitted that parents were only "normally" supportive of these interests while many daughters were "particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court."[117] Thus, even though the Massachusetts law allowed minor daughters to supersede their parents by going to court, it was unconstitutional to allow parents first access to influencing the decisions. The Court ratified the lower court's opinion that parental involvement was desirable only if "the parents were "compassionate and supportive."[118]

Thus, Justice Powell, writing for the Court (but only for three other Justices) proposed the following model statute as a substitution for that of Massachusetts:

> We conclude, therefore, that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity--if she so desires--to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well-informed enough to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is

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114. at 3045.
114. at 3045.
115. at 3052.
116. at 3047.
117. at 3050, 3051.
118. at 3047 Note 20.

> competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interest. If the court is persuaded that it is, the court must authorize the abortion. If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interest, it may decline to sanction the operation.[119]

Nevertheless, this model statute cannot be considered unassailable since the four other Justices (Brennan, Stevens, Marshall, and Blackmun), while agreeing that the Massachusetts law was unconstitutional, opined that neither parents nor courts had any justification for interfering in any way in "the right to make the abortion decision."[120] These four Justices rejected Powell's conclusion that a judge was better able to decide what was in the "best interest" of a minor female rather than the minor's parents because a judge's decision, like that of parents, "must necessarily reflect personal and societal values and mores"[121] and this, presumably, was not necessarily "compassionate and supportive" either.

Significantly, neither of the two separate four-man opinions found any need to cite the Eisenstadt or Griswold "right of privacy" decisions nor any need to consider any clauses of the Constitution in their opinions. The sole concern was "the constitutional right to decide whether or not to terminate a pregnancy," "this right of unique character"[122] as it had been defined by the Court in Roe v. Wade, Doe v. Bolton, and Planned Parenthood v. Danforth. Justice White, the lone dissenter, found it "inconceivable"[123] that Bellotti had anything to do with the Constitution. Justice Rehnquist mentioned that he joined the judgment of the Court only because "literally thousands of judges cannot be left with nothing more than the guidance offered by a truly fragmented holding of this Court."[124]

A COMPARISON: THE ABORTION QUESTION IN THE HIGHEST COURT OF WEST GERMANY

The American experience of having abortion declared as national policy by its highest court is unique. No other country with a constitutional or parliamentary system of government has a court of highest appeals with the comprehensive policy-making powers of the U.S. Supreme Court. Since World War II, abortion has become legal in most Western countries (South America excepted)

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119. at 3050.
120. at 3054.
121. at 3054.
122. at 3054.
123. at 3055.
124. at 3053.

but normally by legislative decision. And nowhere in the world is abortion legal thoughout all nine months of pregnancy.

In 1974, West Germany's highest court, the Federal Constitutional Court, had an opportunity to face the issue of abortion that the Supreme Court resolved in its Roe and Doe cases. But, the circumstances surrounding the German case were vastly different. In Roe, the Texas statute that had been law for over 100 years was challenged by a group of antagonists who were seeking a Supreme Court ruling rendering it, and the abortion laws of all other states as well, void. In June 1974, the Federal Constitutional Court reviewed a law liberalizing abortion that had been passed by the Bundestag, the German national parliament. The suit was brought by 193 members of the Bundestag (about 40 percent of that body) and by four of the states of the German Federal Republic. The court, under the German scheme of government, was obliged to hear a case so brought. The Bundestag had revised the German criminal abortion statute to provide for abortion-on-request through the first twelve weeks of pregnancy, and for narrow "medical and eugenic indications" up to the twenty-second week of pregnancy, after which no abortions were permitted. The revised law included no permission for abortions for psychological or "mental" reasons.

The Federal Constitutional Court recognized legal issues different from the Supreme Court. The Supreme court concerned itself with the right of privacy of the woman, the right of a doctor to practice his profession according to his own principles, and the rights of states to protect the unborn. As a solution to these questions, the Supreme Court decreed that a woman's right to have, and a doctor's right to perform, an abortion is absolute throughout the first six months of pregnancy and absolute in fact, because of the insignificance of the qualifications, in the last three months of pregnancy. The state's interest in what the Court called "potential life" was never sufficient to abridge this solution -- a solution based on a woman's right of privacy -- what the Bellotti Court later labeled "a constitutional right of unique character."

Article II of the German Constitution (the Constitution adopted after World War II) explicitly guarantees the right to life. It begins "Each has the right to life...." The Constitutional Court immediately looked to this provision for the definition of the legal issue before it. But prior to interpreting the meaning of this constitutional provision with regard to abortion, the Constitutional Court, like the Supreme Court, looked to history. But German history was marked by an event perhaps more compelling than any in American history: the rise and fall of the Nazi regime. The Court remembered that event as the basis of the constitutional right to life:

> The express inclusion of the right to life in the Constitution --otherwise self-evident -- in contrast, for example to the Weimar Constitution, is to be explained primarily as a reaction to the "destruction of

> life that is not worthy of living," to the "final solution" and to "liquidations" carried out by the Nationalist Socialist regime as governmental measures. Article 2 II 1 of the Constitution contains, in addition to the abolition of the death penalty in Article 102, a profession of commitment to the fundamental value of human life and to a concept of the state that places it in decisive opposition to the views of a political regime to which an individual life meant little and which for this reason engaged in unlimited abuse of the right it had usurped over the life and death of the citizen.[125]

But, in addition to this historical basis for the right to life guaranteed by the German Constitution, the Constitutional Court stated that it must consider "norms" and "the scales of values"[126] that are, in fact, pre-constitutional and pre-governmental. In opposition to the statement of the Roe Court that "We need not resolve the question of when life begins," and to its conclusion that the state might possibly have an interest only in "potential life," the German Court maintained that "this is a question of the protection of human life, a central value of every legal system."[127]

The Constitutional Court decided that the right to life was a right antedating any founding documents of government and that it was a "subjective"[128] right, that is, it belonged to each individual himself. It was not a right derived from, or granted by, government or any institutionalized social compact.

The Supreme Court did not consider whether each human being has "subjective" rights, that is to say, natural rights. It confined itself to inquiring into what rights are expressed in, and thereby protected by, the Constitution and concluded that "the word, 'person,' as used in the Fourteenth Amendment, does not include the unborn." The German Court, having found that the right to life is inherent in each individual and thus pre-dates any written expression of this right, also found that the German Constitution positively and objectively guaranteed this right: "the norms of the Constitution contain not only subjective rights of defense for the individual against the state, but in addition incorporate an objective system of values which stand as a fundamental constitutional decision for all areas of law...."[129]

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125. HLR, 77-78. The translation of the Constitutional Court's decision by Harold O.J. Brown, quoted here and below, appeared in Volume I, Number 3 (Summer 1975) of the Human Life Review (HLR). Numerical references are to pages of that publication.
126. HLR, 77.
127. HLR, 77.
128. HLR, 79.
129. HLR, 79.

Yet, the Supreme Court did pay important attention to what the German Court called the "norms" upon which constitutions and governments are based. The Griswold Court, unable to locate the right of privacy within any specific clauses of the Constitution, had placed it in marriage itself, the right of privacy in marriage being "older than the Bill of Rights, older than our political parties, older than our school system." The Eisenstadt Court withdrew the basis of the right of privacy from the marriage relationship and placed it in the individual, stating that the right of privacy was fundamental to each person, not a right granted by constitutional government. The Roe Court states that the right of privacy was "fundamental" and "implicit in the concept of ordered liberty." And this line of reasoning, labeling the right of privacy as pre-constitutional or extra-constitutional, was finally consummated by the Bellotti Court which made the right super-constitutional: "We are concerned here with a constitutional right of unique character."[130] Thus, overall, the Supreme Court has ruled that the right of privacy which "includes the abortion decision," is nearly an absolute a priori American value. Justice Rehnquist, in his dissent to Roe explained the decision by saying that the Court had promulgated the right to an abortion as "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[131]

The German Court reached the same kind of conclusion but for the sake of a different object: "Human life, as it is not necessary to demonstrate further, represents a maximum value with the constitutional order; it is the vital basis of human dignity and the presupposition of all other fundamental rights."[132]

The Roe Court accused the state of Texas of adopting "one theory" of life ("Texas urges that...life begins at conception and is present thoughout pregnancy."[133]) but found itself unable to recognize any personhood or human life -- or even any life of any kind -- before birth. Although the Court admitted that the facts of "fetal development" were "well-known,"[134] it was tentative

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130. In his recent decision concluding that a woman not only has a constitutional right to an abortion but also a constitutional right to have her abortion paid for with public monies, Judge John J. Dooling of the U.S. District Court of the Eastern District of New York has taken the abortion right even farther: "Abortion has become a dimension of the country's social structure and legal order" (page 308); Abortion is a "basic necessity of life" (page 314); Abortion is "a doubly protected" religious right (page 328); "A woman's conscientious decision, in consultation with her physician, to terminate her pregnancy because that is medically necessary to her health, is an exercise of the most fundamental of rights, nearly allied to her right to be" (page 328). (McRae et al. v. Califano, Memorandum and Order for Judgement Number 76 C 1805, January 15, 1980.)

131. Roe at 174.

132. HLR, 79.

133. Roe at 159.

134. Roe at 157.

in accepting even biological facts, saying that a pregnant woman "carries an embryo and, later, a fetus if one accepts the medical definitions of the developing young in the human uterus."[135] (Emphasis added.) And the facts of biology, the Court concluded, could testify only to the existence of "potential life" before birth. Thus, unable to recognize the beginning of human life, ("We need not resolve the difficult question of when life begins."), the Court proved equally unable to recognize the existence of human life already begun. Only life "outside the womb" was "meaningful,"[136] the Court seemed to imply, when it used such words in talking about the point of viability, that is, the presumed point when the potential life was capable of living outside the womb, that is to say, the point when potential life becomes life.

In oppositon to the Supreme Court, the German Court concluded that what the Supreme Court called the "well-known facts of fetal development" were highly relevant and inseparable from the right to life. To the Constitutional Court, human life was the existence of a human individual: "Life in the sense of the historical existence of a human individual exists, according to established biological and physiological facts, at all events from the fourteenth day after conception (implantation, individuation)."[137] And thus, the Constitutional Court continued, this life was meaningful: "Where human life exists, it possesses human dignity. It is not determinative whether the bearer of this dignity is conscious of it and knows how to preserve it himself. The potential abilities placed within the human being from the beginning suffice to establish human dignity."[138]

The Supreme Court divided pregnancy into trimesters; talked about significant turning "points," especially the point of "viability," in pregnancy; and maintained that such considerations had legal consequences. The German Court disagreed:

> The process of development that begins therewith is a continuous process that displays no sharp breaks and does not permit an exact delimitation of different levels of development of human life. Further, it is not finished with birth: for example, the specific forms of consciousness characterizing human personality make their first appearance some time after birth. For this reason, the protection of Article 2 II 1 of the Constitution can neither be limited to the "finished" human being after birth nor to the nasciturus independently capable of life. The right to life is attributed to everyone who "lives"; no distinction can be made between stages of developing life or between the unborn and born life. "Each," in the sense of Article 2 II 1,

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135. Roe at 159.
136. Roe at 163.
137. HLR, 78.
138. HLR, 79.

> is "each living one," or, to put it differently, each human individual possessing life; "each" therefore means also the still-unborn human being.
>
> In opposition to the objection that "each" in ordinary speech as well as in the language of law, generally refers to a "finished" human person, and that therefore purely linguistic interpretations speak against including unborn life in the scope of Article 2 II 1, we emphasize that in all events the sense and purpose of this constitutional provision require that the protection of life also be extended to developing life. The protection of human existence from excesses by the state would be incomplete if it did not also embrace the preliminary state of "finished life," unborn life.
>
> Unborn life is a legal entity that is to be considered fundamentally equivalent to born life. This conclusion is self-evident for the period during which the unborn life would be capable of life outside the mother's womb. However, it is also justified for the earlier period, beginning approximately fourteen days after conception, as Hinrichsen among others has convincingly demonstrated in the Public Hearings....It is the altogether overwhelming persuasion of medical, anthropological, and theological science that the whole subsequent development presents no further distinction of comparable significance....
>
> For this reason it is forbidden to negate unborn life after implantation or even merely to consider it with indifference. For this purpose it is not necessary to answer here the question whether and in the event to what extent the Constitution takes it under its protection. At all events it corresponds to the general conception of justice, apart from the extreme views of individual groups, to evaluate unborn life as a legal entity of high degree.[139]

The Constitutional Court did deal with the right of privacy, but, again, reached a different conclusion from the Supreme Court. Calling pregnancy "a part of the woman's private sphere,"[140] the German Court recognized that abortion was a unique area of the criminal law. "Indubitably, the natural ties between the unborn life and that of the mother creates a distinctively articulated relationship for which there is no parallel in other spheres of human life."[141] But, the Court found, the

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139. HLR, 78-79.
140. HLR, 79.
141. HLR, 79.

unborn child is not "part of the maternal organism," but "a distinctive human being," and thus "termination of pregnancy becomes a social issue, making it subject to and requiring regulation by the state."[142] A woman, the Court ruled, has a right "to the free development of her personality....However, this right is not accorded without limits...since termination always means the destruction of unborn life...the legal system may not make the woman's right of self-determination the sole legal principle of such regulation....A compromise that preserves both the protection of life and the nasciturus (i.e., the unborn child) as well as the freedom of the woman to terminate her pregnancy is not possible."[143]

The Supreme Court, of course, was not attempting to reach any kind of compromise between rights. Since it recognized no right to life, only vaguely recognized that the child in the womb was even alive, and at any rate only "meaningful" when it had the chance to live outside the womb, the Court had only the rights of women with which to contend. And this right of womanly privacy was conclusive and definitive since, as both Justices Blackmun and Douglas listed at such great length, there were many compelling reasons based on the self-interest of the woman to support it.

Since "no distinction can be made between stages of developing life or between unborn and born life,"[144] the law legalizing abortion in the first three months of pregnancy was unconstitutional, the Court concluded. "The termination of pregnancy is an act of killing"[145] and must be prohibited and punished by the law. It was the duty of the national legislature to prescribe the penalties for this crime, the Court added, but, in certain unique and rare cases, the legislature might establish less severe penalties for women who aborted their children. "In all other cases, the termination of pregnancy remains punishable injustice for in such cases the destruction of a legal value of the highest degree is subject to the free choice of another party, not motivated by any necessity."[146]

Overall: "In the legal system, disapproval of the termination of pregnancy must be clearly expressed. It is necessary to avoid the false impression that the termination of pregnancy is the same sort of social action as going to a physician to be healed of a sickness or even that it is a legally indifferent alternative to contraception...it is evident that we cannot refrain from a clear legal designation of this procedure as 'injustice'....The protection of human existence from excesses by the state would be incomplete if it did not also embrace the preliminary stage of 'finished life,' unborn life....The gross

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142. HLR, 80.
143. HLR, 80.
144. HLR, 78.
145. HLR, 81.
146. HLR, 84.

balancing of life against life, which leads to accepting the destruction of the supposedly lesser number in the interest of preservation of the supposedly greater number, cannot be reconciled with the duty of the individual protection of each single, concrete life.... This understanding of justice underlies this draft."[147]

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147. HLR, 78, 80, 82, 85.