

4-1-1974

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Recommended Citation

Rubin, Eva Redfield (1974) "The Abortion Cases: A Study in Law and Social Change," *North Carolina Central Law Review*: Vol. 5 : No. 2, Article 6.

Available at: <https://archives.law.nccu.edu/ncclr/vol5/iss2/6>

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THE ABORTION CASES: A STUDY IN LAW AND SOCIAL CHANGE

EVA REDFIELD RUBIN*

On January 22, 1973, the United States Supreme Court handed down two decisions which overturned abortion laws in Texas and Georgia and threw doubt on the constitutionality of similar laws in most of the other states. Before the decision, abortion, unless performed under very exceptional circumstances, was an offense against the criminal law; now the operation could be had legally throughout the United States. This dramatic change had come through judicial decision rather than through legislative action.

The Supreme Court which made this decision was largely a Nixon Court—three Justices and the Chief Justice had been appointed by the Republican President after an extensive search for conservative, non-activist Justices. Justice Harry A. Blackmun, one of the Nixon appointees, former counsel for the Mayo Foundation and an expert on medical law, and former Court of Appeals Judge, wrote the majority opinion. Chief Justice Warren E. Burger and Justice Lewis F. Powell, Jr., both appointed by President Nixon, voted with the majority. The only Nixon appointee to dissent was Justice William H. Rehnquist; he was joined in dissent by Kennedy appointee Byron R. White.

The decisions in *Roe v. Wade*¹ and *Doe v. Bolton*² ended a decade of clamor for reform of state abortion laws. Ever since the medical advances of the twentieth century made early abortions safe and simple, there had been an increasing gap between law and public opinion on the subject of abortion. If Professor Cyril C. Means of the New York Law School was correct in thinking that many of the states, like New York, had originally passed anti-abortion laws to protect women from careless and dangerous surgery, then the reason for the legal protection had disappeared now that medicine had progressed to the point where abortions performed by skilled practitioners were actually safer than childbirth. The legal maxim *Cessante razione legis, cessat et ipsa lex* (when the reason for a law has ceased, the law itself ceases) applied exactly.³ Because legitimate surgeons were forbidden to perform this operation, the existence of the criminal abortion law began to force women into the hands of illegal abortionists,

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¹ 410 U.S. 113 (1973).

² 410 U.S. 179 (1973).

³ Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968).

so that the law itself became a source of danger to the women it was passed to protect. Its effect was not to keep abortions from taking place, since possibly a million were performed each year in spite of the law, but to guarantee that women would bear the risks and dangers of illegal operations.

It seems clear, however, that the proscription of abortion involved much more than medical technique and the safety of the woman. The subject of abortion is closely tied both to religious views and to attitudes toward the family, which are themselves based on religious beliefs. As religion has moved from its position of central importance in the life of the individual, and as economic and other changes have recast the role of the family in society, so the status of women has begun to change. A general liberalization of public views on sex, on contraception and abortion have accompanied these other changes. As women have become freer as individuals to move out from the family, they have wanted fewer children, wanted to hold jobs and enter the professions. They have begun to feel that the satisfactory fulfillment of their own individual lives has depended on their freedom to choose whether to bear children, and whether to stay in the home and rear them. As one author put it, the forces which make women want fewer children, later, are part of the general flow of change in our society and cannot be checked by the criminal law.⁴

But the criminal law has been slow to adjust to these changing social patterns. Faced with the fact that prohibition did not prevent recourse to abortion, legal institutions reacted in several different ways. In many cases, prosecutors and law enforcement officials have ignored illegal abortions, either because it was too difficult to convict participants or because too great an expenditure of effort by police was involved. Where women of means were determined to get legal abortions, the law was stretched. Doctors and psychiatrists could testify that an abortion was "necessary" to preserve a woman's health or life; women could go to jurisdictions in the United States where illegal abortions were tolerated, or abroad where legal abortions were obtainable. Such relief from the harshness of the law was often available to the rich, but not to the poor. One is struck by the parallels between abortion and divorce law, where the same kinds of gaps developed between law and social demands. Changes in the status of women were behind problems in both areas. Some of the same types of adjustments were used where practice and theory were too far apart. Like abortion law, divorce law was kept intact only by sacrificing its integrity. Divorces could be obtained by elastic interpretation of available grounds, perjury, faked evidence, and by the flight of the wealthy to jurisdictions where divorce could be obtained easily

⁴ Sigworth, *Abortion Laws in the Federal Courts—The Supreme Court as Supreme Platonic Guardian*, 5 IND. LEGAL F. 130 (1971).

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for those with money. "The facade of a semi-puritan ethics is preserved at the cost of sacrificing the integrity of the law and often creating one law for the rich, another for the poor."⁵ The failure of abortion law to reflect social realities had similar social costs: law enforcement was dishonest or non-existent, respect for the law suffered, injuries and deaths from improper abortions caused a severe problem of public health, and women themselves paid a high price in physical well-being and self-respect.

At some point during the 1950's and 1960's individual yearnings and the increased social costs of existing policies intersected with rising demands for population limitation. As early as 1955, the Planned Parenthood Federation came out for a revision of the abortion laws. Abortion was looked to, along with contraception and voluntary sterilization, as a means of checking the population explosion. The stringent criminal abortion laws were not only unduly harsh on individuals, but many organizations now began to see them as contrary to correct public policy.

In the decade 1960-1970 more than half the population had come to believe that abortion ought to be allowed, at least where the mother's life was in danger.⁶ But if pro-abortion groups were to be able to take advantage of this shift in attitudes, they would have to organize, mobilize public opinion, and lobby vigorously for the necessary changes in state law, rather than merely sitting back and hoping for reform. Enough pressure had to be generated to counteract the conservative and Roman Catholic forces in state legislatures which opposed any change at all. Increasingly, groups became willing to do this. In hearings before the Kentucky legislature in 1972 a list of sixty organizations was presented as supporting the reform proposal.⁷ Such groups ran the gamut from the American Association of University Women to Zero Population Growth, but mostly they fell into four categories: women's, church, medical, and conservation groups. Women's groups and *ad hoc* pro-abortion organizations like the Women's National Abortion Act Coalition helped supply some of the loudest and most vigorous lobbying efforts, almost managing to get a pro-abortion plank in the 1972 Democratic Platform.

Another significant element in the movement for change was the existence after 1959 of the American Law Institute's model abortion reform proposal, which gave state legislators a definite and well-drafted provision to introduce, and gave reform groups a specific proposal to support. Once the first few states had broken the ice and passed such a measure, legislatures throughout the country began to consider reform, even though in some cases it was rejected.

⁵ W. FRIEDMANN, *LAW IN A CHANGING SOCIETY* 219 (1959).

⁶ Blake, *Abortion and Public Opinion: The 1960-1970 Decade*, 171 *SCIENCE* 540, 540-9 (1971).

⁷ *Hearings on the 1972 Abortion Act Before the Special Subcomm. of Ky. House of Rep.*, 1972 Sess., Legislative Research Comm., Info. Bull., No. 95, at 23 (1972).

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Writing in 1959, Professor Wolfgang Friedmann predicted that western countries would probably move in gradual stages from the outright prohibitions of abortion laws to limited reforms, allowing abortion for "medical indications":

The only reason for advocating the more limited extension of the legitimacy of abortion . . . is that public opinion, in most countries of the Western World, would not presently support the radical jump from a narrowly confined legalization of abortion to the complete abolition of criminal sanction. Hence, the more cautious and controlled extension of the Scandinavian pattern seems to be a more realistic approach to the problem.⁸

This prediction, indeed, fit the facts in the United States. Gallup and other public opinion surveys throughout the 1960's showed that while the public had come to accept the idea of abortion to protect the mother's life, it was still opposed to abortion on demand, or abortion for economic reasons alone.⁹ The instincts of the members of the American Law Institute and those in state legislatures who were willing to support abortion law revision, were correct in reading the public's demand for change as a demand for conservative reforms. However, by 1966, even though some movement toward modification was visible, an advance guard of humanitarian, medical, and feminist groups was already beginning to see moderate change as inadequate both in terms of women's rights and aspirations and in its ability to achieve the desired social ends. When they perceived, also, that a long, hard legislative struggle was likely to result only in very modest relaxation of restrictions on abortion, they turned to the courts.

In spite of our theoretical convictions, in this country, that legislatures should innovate and courts apply the law, pressure groups are often less particular about separation of powers (or division of functions) and will seek to influence policy in any forum available. Courts, indeed, may afford a quicker response to social demands since individual parties can activate judicial machinery, and the courts need not approach social maladjustments in their broadest and most complicated aspects, but can look at them in relation to individual problems in the narrowest possible focus. American courts, in recent years, have been accessible to claims which have been denied representation in legislative bodies. Pro-abortion forces were quick to see that if they were accorded standing and could make arguable constitutional claims in the courts, a judicial ruling that abortion laws denied constitutional rights would have more desirable results than piecemeal and limited reform measures inched through state legislatures. On the problem of standing and the definition of appropriate constitutional claims, undoubtedly the long struggle to get contraception cases into the

⁸ W. FRIEDMANN, *supra* note 5, at 238.

⁹ Blake, *supra* note 6, at 542.

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courts had made it easier to get a judicial test of abortion laws. Without these preliminary victories and the establishment of a right to privacy in *Griswold v. Connecticut*, there would have been no basis for lower court decisions, appeals from which bombarded the Supreme Court in the early 1970's.

When the Supreme Court finally took and decided the two abortion cases, it possibly jumped slightly ahead of the majority consensus, although it was clear that public opinion had for a long time been moving toward a more liberal position on abortion. The Court's decision did not, however, settle the issue, since conservative forces were unwilling to accept its ruling as definitive and were prepared to attack to limit its impact, or possibly to overturn it by constitutional amendment. The decision did shift the scene of battle and change the balance of forces, injecting a number of new factors into the controversy, although the proper relation of law to abortion, even after the Court's ruling, was still to be settled.

The account which follows is an attempt to give some of the details of this chapter in the dispute over abortion law modification and to describe the interplay of public opinion, politics, law, and governmental institutions as society struggled to find an accommodation among conflicting demands on an extremely complex and explosive topic.

The Issue Emerges: The Movement for Abortion Law Reform

It is interesting, at the outset of this account, to speculate as to just why abortion reform became a political issue when it did. Most of the laws on state statute books making abortions criminal had been put there during the last half of the nineteenth century. Such laws usually were extremely restrictive, allowing legal abortions only where necessary to save the mother's life.¹⁰ Yet in spite of extremely repressive legislation, abortions were being performed by the thousands, or hundreds of thousands and society was ignoring the fact that, according to one doctor, one out of five pregnancies were ending in illegal abortions. "Never in history," he wrote, "has there been such a frank and universal disregard for a criminal law."¹¹

A good many of those seeking abortions were married women. The toll in pain and suffering from illegal abortions was very high. Figures on the total number of illegal abortions performed each year varied, but estimates ran as high as one million, with perhaps 5,000 of these ending in death.¹² Yet criminal prosecutions were not numerous, abortion being what some observers have labelled a consensual crime, an act which has been declared contrary to public policy, yet has no "victim" willing to

¹⁰ Leavy and Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 S. CAL. L. REV. 126 (1962).

¹¹ *Id.*, at 126 quoting Dr. F. J. Taussig.

¹² *Id.*

start criminal proceedings with a complaint. It was up to the state to investigate, collect evidence, and prosecute, and often it was very difficult to get the women involved to testify as witnesses.

A look at the *Index to Legal Periodicals* attests to the lack of interest in the subject of abortion law reform by the legal profession until the late 1960's. No more than one or two articles per year are listed throughout the 1950's, mostly on criminal law or torts. The 1958-61 volume, however, lists ten entries, several on therapeutic abortion. Twelve are listed in 1961-64, twenty-five in 1964-67, and in 1967-70 there were two full columns of entries, single spaced. Somewhere in the 1960's abortion reform had become a matter of widespread discussion.

The earliest critics of existing legislation were the doctors, many of whom listened to heart-rending stories from women patients but were unable to take any helpful action without subjecting themselves to legal penalties. Whenever the subject came up, there were accounts of terrible tragedies—rapes and incest, deformed children, mothers who could not be helped because the law allowed abortion only to "save the life" of the mother. These incidents and the conflicts which many doctors felt between the existing law and what they considered to be proper treatment for their patients raised the question of abortion law reform in medical groups. Religious counselors, feeling the same kinds of conflicts, also began to discuss reform. Lawyers were shocked by the widespread disregard for the law and the rigidity of existing statutes.

Although reform was being considered by individuals and groups privately, only a small group was ready, at first, to discuss the matter in public. Women generally, whose interests were the most vitally involved, would not speak out because of the aura of social stigma surrounding the subject. When the prestigious American Law Institute recommended, in 1959, a tentative uniform state abortion law which would give broader grounds for legal abortions, discussions became more open.¹³

The proposed Uniform Abortion Act would have allowed legal abortions for three reasons: 1—pregnancy resulting from rape or incest, 2—evidence that the child would be born deformed, or 3—grave impairment of the mother's physical or mental health.¹⁴ This tentative draft became a Proposed Official Draft in 1962. But by 1966 no state had adopted it, though there had been proposals of similar legislation in two states.¹⁵

The emergence of the abortion issue as a full scale controversy in the 1960's was probably due to the fact that at this time individual demands

¹³ Cisler, *Unfinished Business: Birth Control and Women's Liberation*, in *SISTERHOOD IS POWERFUL* 274 (R. Morgan ed., 1970).

¹⁴ *Id.* The final text of the A.L.I. MODEL PENAL CODE Provisions on Abortion is reprinted following *Doe v. Bolton*, 410 U.S. 179 (1973). Appendix B.

¹⁵ *The Law of Therapeutic Abortion, A Social Commentary on Proposed Reform*, 15 J. PUB. L. 396 (1966).

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for alleviation of the harshness of the law intersected with society's awakening interest in such matters as population control. Changes in medical techniques had by this time made abortions a relatively safe medical procedure; the "pill" was being introduced widely, as were I.U.D.s and other contraceptive devices. Throughout the world both abortion and contraception were seen as desirable in the light of concern over the population explosion and the degradation of the environment. In every country people were asking, "Will the world be able to accommodate ever increasing additions to its population?" Abortion laws in the United States were far stricter than in most non-catholic countries throughout the world. The most liberal group, Japan and Eastern Europe, allowed abortion virtually on demand. A more moderate group, including the Scandinavian countries and Great Britain, permitted abortions to protect the mother's health. Only the Catholic countries prohibited the practice as completely as the United States, although illegal abortions were extremely numerous in those countries, as they were here.¹⁶

Within the United States there were many groups advocating the limitation of human reproduction for a variety of reasons: environmental, stopping a decline in the "quality of living", decreasing additions to welfare rolls, decreasing the numbers of illegitimate births or the number of illegal abortions. The thalidomide tragedy in Europe and a German Measles (rubella) epidemic in the United States during 1963-65 made it imperative to provide more elasticity to the law to accommodate women who were afraid they might give birth to deformed or retarded children.¹⁷

The Beginnings of Legislative Reform

It was possibly the measles epidemic which acted as the proximate cause of the reform movement. Although the A.L.I. draft bill and proposed reform law was followed by the introduction of bills in the California legislature in 1961, and again in 1963, and although reform was supported by grand juries in the counties, thirteen District Attorneys, and the California Medical Association,¹⁸ these bills did not have either organized backing or a ground swell of public opinion behind them. In the 1962-65 period, however, an epidemic of German Measles swept the country; about 82,000 pregnant women contracted the disease and many of these sought abortions, mostly without success. An estimated 15,000 defective babies were born.¹⁹ California hospitals, among others, felt the pressure of demands from frightened mothers and many hospitals in the State complied, illegally, with their requests. Existing California law allowed abortion

¹⁶ Graham, *Review of Abortion*, N.Y. Times, Sept. 10, 1967, § 4, at 11.

¹⁷ Moyers, *Abortion Laws: A Study in Social Change*, 7 SAN DIEGO L. REV. 237 (1970).

¹⁸ Monroe, *How California's Abortion Law Isn't Working*, N.Y. Times, Dec. 29, 1968 (Magazine) at 11.

¹⁹ *Id.*

only to save the life of the mother. In 1965, state officials investigated some of these hospitals and ordered nine doctors from the San Francisco area to appear before the State Board on charges of unprofessional conduct.²⁰ It was rumored that another 39 would soon be called to account.

Although the charges brought against these doctors served to stop further abortions from being performed in California hospitals, they raised public consciousness about the problem. A Citizens Defense Fund on Therapeutic Abortions was launched in California and in other states to defend the San Francisco Nine.²¹ Medical school deans and medical society leaders signed a brief in their defense. California State Senator Anthony C. Beilenson introduced a new reform bill in the legislature.²² This bill had the support of the Episcopal and Jewish churches, women's organizations, and abortion counselling services, as well as medical groups and individual doctors. Many of these groups lobbied for the bill in Sacramento.²³ In spite of strong Catholic opposition which hired a public relations firm²⁴ to fight for the maintenance of the old law, the legislature was convinced that public support was there for reform, and the bill was passed and signed by Governor Reagan in 1967.²⁵

By this time the Colorado legislature had already acted to pass a similar law, the first in the nation.²⁶ Other states were also introducing legislation of this type: Delaware, Maryland, Georgia, Oklahoma, Florida, New York, New Jersey, Pennsylvania, and North Carolina. In 1967 the American Medical Association backed the liberalized bills.²⁷ Between 1967 and 1970, 12 states adopted some version of the reform bill, usually basing the legislation on the American Law Institute's Model Code.²⁸ There were also setbacks in several legislatures, with Connecticut and Maine rejecting change. New York, Alaska, and Hawaii went even further than the model law, rejecting reform in favor of outright repeal, with the only restriction left on abortions the requirement that they be performed before the 20th week (in New York, the 24th).²⁹

The fight in the New York legislature was particularly bitter. It began in March, 1966, when the legislature held hearings on the Sutton bill which would have reformed New York's 85 year old anti-abortion statute.³⁰

²⁰ *Id.*, at 17.

²¹ N.Y. Times, March 12, 1967.

²² Monroe, *supra* note 18, at 17.

²³ Moyers, *supra* note 17, at 239.

²⁴ Monroe, *supra* note 18, at 17.

²⁵ *Id.*

²⁶ Graham, *Colorado Pioneers on Legal Abortions*, N.Y. Times, April 30, 1967, § 4, at 6. Although California had been the pioneer in introducing abortion reform legislation, Colorado, with fewer Catholics in the state, had less difficulty passing a reform law.

²⁷ N.Y. Times, June 22 and June 25, 1967.

²⁸ Congressional Quarterly Fact Sheet, July 24, 1970, at 1914.

²⁹ *Id.*

³⁰ N.Y. Times, March 7, 1966.

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Governor Rockefeller came out in favor of liberalization, but the bill was defeated.³¹ Another reform bill, the so-called Blumenthal bill, a mild reform measure, was introduced in January, 1967, but was eventually defeated after a year of ferocious battling, in 1969. In 1970 reform forces finally succeeded, over intense opposition by the Catholic Church, in enacting an extremely permissive law. A new factor which may have helped swing the balance in New York was the emergence of activist, highly visible womens groups, ready to take to the streets in support of abortion reform.

Women's Liberation and Abortion Reform

Organized women's liberation groups springing up in the late 1960's ranged from the moderate National Organization for Women (NOW) to various radical feminist groups such as Redstockings, WITCH, and the Feminists.³² Betty Friedan's book *The Feminine Mystique*, published in 1963, seems to have been one of the catalysts which set the women's movement to sizzling and bubbling. Once the "problem without a name" had been identified, namely that many women were unhappy with roles which kept them in the home and suddenly realized that their feelings of frustration and non-fulfillment were not unique, a wide variety of political activity began to take place, some of it an offshoot of radical politics, some of it inspired by the civil rights movement. One of the issues on which almost all of these new women's groups could agree was that the woman who wanted a legal abortion should have the right to one.³³

Since the beginning of World War II, women had been moving out of the home into jobs and into the professions; now they began to recognize that two essential prerequisites to job equality were the ability to limit reproduction and the provision of suitable child care for working women, state supported if necessary. A woman who had to leave her job or career to give birth to a child, or who did not have a reliable place to leave existing children, could not compete on the same level with male workers. Lucinda Cisler, an activist in the birth control movement emphasized the right of women to limit their reproduction:

Without the full capacity to limit her own reproduction, a woman's other "freedoms" are tantalizing mockeries that cannot be exercised. With it, others cannot long be denied, since the chief rationale for denial disappears.³⁴

The New York fight brought vocal and dramatic pressures from the women's organizations. While women had been reluctant to speak out before, the existence of Women's Lib made the experience less traumatic.

³¹ N.Y. Times, Dec. 22, 1966.

³² See C. WARE, WOMAN POWER: THE MOVEMENT FOR WOMEN'S LIBERATION (1970).

³³ *Id.* at 121.

³⁴ Cisler, *supra* note 13, at 246.

Actresses told of their abortions in news conferences and magazine articles. Women appeared, now, whenever there was a public discussion of abortion to protest the domination of panels by male "experts". NOW charged that a prestigious conference on abortion co-sponsored by the Kennedy Foundation and the Harvard Theological School was controlled by academicians and Roman Catholics, and included only three women.³⁵ Women also took to the streets, marching and picketing. The Redstockings, a radical group, stormed a New York legislative hearing in which fifteen "experts" were testifying (fourteen men and one woman, a nun), shouting, "We are the experts!"³⁶ To prove it they held an open meeting in which women got up before the audience to tell of their own abortions.³⁷ Later, in 1970, lobbying for passage of the bill then being considered in the legislature, women's groups demonstrated near Bellevue Hospital, St. Patrick's Cathedral, and in Union Square,³⁸ held a guerilla theatre performance in the streets, and handed out wire coat hangers, lacquered blood red.³⁹ Such activities dramatized the abortion issue and helped overcome the feelings of shame and guilt which surrounded the subject of abortion, allowing women to break loose to assert their interests in the political arena.

On April 3, 1970, only a few days after these demonstrations, the New York legislature passed the law it had been debating, one which took off all controls from abortions performed before the 24th week. The women's groups were convinced that they had made an important contribution to this decision. Certainly they had not only helped publicize the issue—their protests and marches, and their rhetoric, made good newspaper copy and good television news clips—but they had helped to mobilize and organize support to counteract the strong pro-Church pressures.

Repeal Not Reform. Dissatisfaction With The Legislative Approach

The entry of the women's groups into the abortion controversy also helped change the nature of the reform movement. Many of the women were not satisfied with abortion reform along the lines laid out in the A.L.I. type statutes. They felt that the rationale behind the reform legislation was wrong; it should not be a matter of "allowing" women who had been raped, were ill, or who might bear deformed children to have abortions, rather, it was a matter of women having a right to control their own bodies and their own destinies.⁴⁰ Not only were reform statutes too restrictive, not only did they operate unfairly, but they were built upon the wrong

³⁵ N.Y. Times, Sept. 9, 1967.

³⁶ D. SCHULDER AND F. KENNEDY, ABORTION RAP 3-4 (1971).

³⁷ *Id.*

³⁸ *Id.* at 178-9.

³⁹ *Id.* at 179.

⁴⁰ Cisler, *supra* note 13, at 274-81.

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major premise. An anti-abortion law was nothing but a "compulsory pregnancy" law, forcing a woman to bear children when in her opinion it was unwise or undesirable. These laws should not be reformed, but repealed altogether:

Public opinion polls have repeatedly posed the wrong questions to their samples ("In what circumstances would you allow a woman to have an abortion?"), reinforcing the presumptuous notion that someone has a right to disallow a woman to choose, and getting the same tiny percentages "favoring liberalization," again and again. Usually they have not even offered repeal as an alternative choice. This is like asking, "Do you favor freeing a slave when his bondage is (1) injurious to his health, (2) . . .?"⁴¹

In 1969 and 1970 the demand came to be not for reform of the abortion laws, but for outright repeal.

Experience with the reform laws in states which had passed them seemed to indicate that they would have very little positive impact. It was becoming clear that the reform bills on the A.L.I. model would allow legal abortions only in a very narrow range of cases, and that it would be difficult, if not impossible for any great number of women to qualify for legal abortions. Fred P. Graham, writing for the *New York Times* in 1967, foresaw the problem, predicting that, "Even if abortion reform proceeds at an accelerated pace as predicted, the changes will be so minor that this nation's laws will remain among the most restrictive in the world."⁴² Not only did the laws allow abortion only in an extremely narrow set of circumstances, but they probably only helped fairly well educated, middle-class women. The bureaucratic routines required by hospital abortion committees, and the statements by doctors and psychiatrists, and the fees, kept all but persistent and knowledgeable women from utilizing the new laws. "Where will the ghetto-dweller find a psychiatrist to testify that she runs a grave risk of emotional impairment if she is forced to give birth to her *n*th baby?"⁴³ Even when cases seemed clearly within the limits allowable for legal abortions, women were often turned down or turned away by hospitals; it was much safer to resolve any doubt *against* the woman suppliant. And so it became clear to the women's groups that repeal of existing abortion laws would be much more beneficial to their cause than further efforts in favor of "reform", which they began actively to oppose. Repeal the laws and leave the subject to the woman and her physician; remove the state and its coercive powers from the picture entirely:

Great things were expected of "reform": the illegal abortion racket would die, only wanted, healthy children would be born, and we

⁴¹ *Id.* at 277.

⁴² Graham, *Review of Abortion*, N.Y. Times, Sept. 10, 1967, § 4, at 11.

⁴³ H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 344 (1968).

would all be happy. Of course it didn't turn out like that: "reform" states were afraid of becoming "abortion mills" and their hospitals began, probably unconstitutionally, to refuse help to anyone who didn't come from their state or even from their city; the more prosperous women who used to fly to foreign parts or to New York City for illegal abortions could now stay closer to home and be attended by the family doctor, while poor women often didn't even know the new law existed, much less how to stretch it for their own purposes; city women tended to get more legal abortions than women served only by the smaller, more conservative town or rural hospitals; and we were hardly much happier.⁴⁴

Into The Courts

Not only were the efforts made after 1969 by pro-abortion forces directed towards repeal, but by this time it also appeared that the courts might be a more promising avenue than the legislature. If legal grounds could be found for invalidating state abortion laws, the whole restrictive structure would fall at one blow, and the bitter, local engagements in 47 state legislatures (Hawaii, Alaska, and New York had permissive legislation by 1970), which only produced minimal changes at best, could be avoided. But how were women to go about getting these cases into court?

A case decided in the Supreme Court in 1965 suggested some possibilities to potential litigants. *Griswold v. Connecticut*⁴⁵ was the outcome of years of litigation over the Connecticut birth control statute, a law which prevented the sale, use, or dissemination of information about contraceptives. After twenty-five years of efforts to get a court test of this law, a project hindered by the fact that the state did not actively prosecute under the law but still used the legal prohibition to discourage birth control clinics or any other means or spreading information about contraception, problems of standing had finally been overcome and a decision handed down on the merits. Several of the doctrines established in the *Griswold* case were to open the door to later challenges of the anti-abortion laws. First of all, *Griswold* established a right of "marital privacy"; many of the rights in the Bill of Rights exude faint exhalations of privacy, and these taken together, according to Justice Douglas' majority opinion, establish a "zone of privacy." The marriage relationship lies within this zone of privacy, and the state may not regulate in such a way as to invade this zone unnecessarily. "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."⁴⁶ The State must have a sub-

⁴⁴ Cisler, *supra* note 13, at 275. See also Monroe, *supra* note 18, at 10.

⁴⁵ 381 U.S. 479 (1965).

⁴⁶ 381 U.S. 479, 486 (1965).

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stantial "governmental purpose" for infringing this ancient liberty; it may not invade this right for trivial reasons.

Justice Goldberg's concurring opinion in *Griswold* suggested another constitutional basis for protecting the rights of privacy in marriage. The Ninth Amendment states that "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." This provision can be read to protect the whole area of fundamental and traditional rights which predate the Constitution and which were not intended to be waived by its adoption. One of the dissenters labelled this interpretation of the Ninth Amendment as turning "somer-saults with history"; it was however, to be picked up in briefs, lower court decisions, and ultimately by the majority in *Roe v. Wade* and *Doe v. Bolton* as establishing a right to marital privacy protected from state invasion without substantial reason.

If the *Griswold* case established rights of marital privacy whose infringement could be argued in challenges to state abortion laws, other thinking was also laying a foundation for future court challenges. In 1968 a young law professor, Roy Lucas, published an influential article in the *North Carolina Law Review*.⁴⁷ Although he drew on material in earlier articles by other authors, this was the first time there had been an attempt to work out a consistent constitutional attack on state abortion statutes. Isolating four different interests of the parties involved in abortion controversies—those of the woman, the fetus, the physician, and the state—he drew up a list of possible avenues of vindicating the interests he thought were predominant, those of the woman and the physician.

Lucas felt that existing state legislation was open to attack because it was not uniformly enforced, the scope of these criminal statutes was uncertain and their standards were vague, the older laws were out of phase with modern medical standards, they were discriminatory in effect (since some women could get abortions under the laws and others could not), and they violated the First Amendment's religious clauses by putting criminal sanctions behind religious values. The *Griswold* case and earlier birth control cases had opened up the possibility of raising the right to privacy as a constitutional argument in abortion cases. Now Lucas' article suggested several other fruitful bases for attacking the constitutionality of state abortion statutes.

Also about this time, the courts were beginning to be more tolerant of the use of declaratory judgment proceedings in criminal cases, opening the way for interested parties to test these laws without becoming enmeshed in criminal prosecutions.⁴⁸ In 1962, when Sherri Finkbine had

⁴⁷ Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. REV. 730 (1968).

⁴⁸ *Declaratory Relief in Criminal Law*, 80 HARV. L. REV. 1490 (1967); see also Lucas, *supra* note 47, at 753, n. 94.

gone to the Arizona courts to contest a law which would not allow her to have a thalidomide baby aborted, the Court had dismissed her petition for declaratory relief without considering the merits, holding that there was no legal controversy. The state prosecutor had refused to state that there was any danger of her being prosecuted under the Arizona anti-abortion laws. If she was in no danger of prosecution, there was no legal dispute, and she had no grounds for challenging the statute.⁴⁹ She was forced to go abroad for her abortion. As had been clear in the Connecticut birth control litigation, a state could block the testing of a law by showing an unwillingness to prosecute under it, therefore making it difficult for anyone to show *standing*. Until the courts began to allow parties to bring suits for declaratory judgments to test the constitutionality of laws, rather than making them raise their claims in criminal prosecutions, it was very difficult to test abortion laws. Although tort actions would have been possible against hospitals, or malpractice suits by women against doctors, most of the early cases where their constitutionality was challenged were in criminal prosecutions involving doctors.

Indeed, an appeal from a criminal conviction gave rise to one of the earliest successful attacks on a state abortion statute. In *People v. Belous*⁵⁰ the California Supreme Court overturned the conviction of a physician under the pre-reform California statute which forbade abortions except where the operation was necessary to preserve the woman's life. The California Court held that this was too vague a standard for a criminal law. In its opinion the court supplied building blocks for later attacks on state laws, asserting that the woman has "a fundamental right . . . to choose to bear children" and also that state abortion laws originally designed to preserve maternal health, now frequently did just the opposite by making safe, legal abortions unavailable.

The indictment on abortion charges of another doctor, this time in the District of Columbia, provided another building block for attorneys anxious to bring abortion law challenges into court. The United States District Court for the District of Columbia dismissed the indictments on grounds that this statute was also unconstitutionally vague. A badly split Supreme Court decided an appeal from this dismissal in 1971.⁵¹ The Court could easily have rejected this case on jurisdictional grounds, but as Justice Black wrote for the majority:

In the last several years, abortion laws have been repeatedly attacked as unconstitutionally vague in both state and federal courts with widely varying results. A number of these cases are now pending on our docket. A refusal to accept jurisdiction here would only compound confusion for doctors, their patients, and law enforcement officials.⁵²

⁴⁹ *Id.* at 1490.

⁵⁰ 71 Cal.2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

⁵¹ *United States v. Vuitch*, 402 U.S. 62 (1971).

⁵² *Id.* at 66.

Although the *Vuitch* case decided merely that the statute could not put the burden of proving that an abortion was necessary on the doctor, but rather that the burden of proving it was *not* would have to be undertaken by the state, this additional favorable anti-abortion decision further encouraged litigation.

At this point, armed with the favorable precedent of the *Belous* case plus the suggestions of Roy Lucas,⁵³ several suits were introduced in the New York federal courts seeking declaratory and injunctive relief from the state's abortion laws. One of these suits, *Abramowicz v. Lefkowitz*⁵⁴ was a class action by various women, married and unmarried; another was a suit by the Clergyman's Consultation Service on Abortion; a third was begun by a community law firm; and a fourth, by four physicians. All these suits represented a large number of individuals and organizations, and challenged the New York law on a wide variety of grounds. Initiated by forces which had been only narrowly defeated in the state legislature, these suits were declared moot when New York passed its reform law in 1970, but they were typical of suits now coming into state and federal courts in other parts of the country, in that they no longer relied exclusively on raising abortion challenges in criminal prosecutions, but were trying to use declaratory judgment and injunction procedures, and also in their assertions of such rights as the right to privacy, the Ninth Amendment, rights of association and information protected by the First Amendment, the right to bear children, the right to speedy medical care, life and liberty protected by due process, equal protection, rights to religious freedom, the prohibition against establishing a church, the prohibition against cruel and unusual punishment, the right to a career, the taxpayer's right to equal access to medical services, and the Thirteenth Amendment's protection against involuntary servitude. A veritable smorgäsbord of constitutional claims now appeared to have, at least, possibilities.

By the summer of 1970, legal actions, civil and criminal, were pending in 20 states.⁵⁵ During the 1970 term, appeals and petitions for *certiorari* bombarded the Supreme Court.⁵⁶ Obviously the Supreme Court's narrowly technical decision in the *Vuitch* case was not going to be the end of its involvement with the abortion controversy.

Into the Supreme Court: Roe v. Wade and Doe v. Bolton

Appeals from District Court decisions invalidating abortion laws in

⁵³ Lucas was an attorney for the doctors' group in *Hall v. Lefkowitz*, a companion case to *Abramowicz v. Lefkowitz*.

⁵⁴ This case was brought in the fall of 1969 in the United States District Court, Southern District, New York (69 Civ. 4469, 1969); it was declared moot upon passage of New York's abortion reform law in 1970. The case is discussed in D. SCHULDER AND F. KENNEDY, *supra* note 35.

⁵⁵ Congressional Quarterly Fact Sheet, July 24, 1970, at 1913.

⁵⁶ Sigworth, *supra* note 4, at 132. This article discusses cases coming to the Supreme Court during the 1970 Term and some of the jurisdictional problems they presented

Texas and Georgia finally brought the issue back into the Supreme Court. These two cases involved both the older and the reform versions of state anti-abortion statutes. First argued in December, 1971, and reargued in October, 1972, the cases had been before the Court for over a year. According to some sources, the long wait had reflected disagreement within the Court as to how the cases should be handled. In conference, after the initial argument in 1971, the vote seems to have been five to two to strike down the abortion laws; at this time Justices Hugo Black and John Marshall Harlan had left the Court and their replacements had not yet been sworn in. According to *Time* magazine Chief Justice Burger had taken the unprecedented step of assigning the majority opinion, even though he himself was on the dissenting side.⁵⁷ According to Supreme Court custom, this should have been the responsibility of Justice William O. Douglas, the senior member of the majority. The assignment was made to Justice Harry A. Blackmun, a former Court of Appeals Judge who had served as counsel to the Mayo Clinic from 1950 to 1959 before ascending the federal bench.⁵⁸ Justice Blackmun may have been chosen to write this opinion because of his medical-legal background; it could also be true that the Chief Justice wanted to avoid the kind of broadly written right to privacy opinion which Justice Douglas had composed in *Griswold v. Connecticut* (and which, indeed, he wrote as a concurrence, in these cases).

In any event, Blackmun's draft opinion, circulated at the end of the year, did not satisfy other members of the majority, and he withdrew it, asking that the case be set for reargument in the fall. By this time, the two newest Nixon appointees, Justices Powell and Rehnquist, had taken their seats and it was a possibility that their votes could affect the outcome of the case. According to *Time*, Justice Douglas was so angered by what he saw as unjustified interference and maneuvering with the Court's procedures that he threatened to make the dispute public.⁵⁹ However, as it turned out, the majority's vote after reargument was enhanced rather than diminished. Newly appointed Justice Powell joined the majority, and then the Chief Justice himself, possibly to help form a more unified Court on such a controversial issue, changed his vote and supported Justice Blackmun's rewritten opinion. Justices Byron R. White and William H. Rehnquist dissented.

The first case, *Roe v. Wade*, involved a challenge to a Texas law passed in 1857 which made the procuring of an abortion a crime except where the act was done to save the life of the mother. Jane Roe, a pregnant woman, sought a declaratory judgment that the Texas law was unconstitutional because it denied her access to a safe, legal abortion, performed

⁵⁷ *TIME*, Feb. 5, 1973, at 51.

⁵⁸ *Wash. Post*, April 18, 1970, § C, at 1-2.

⁵⁹ *TIME*, Feb. 5, 1973, at 51.

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by a competent physician. She challenged it under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

The second case, *Doe v. Bolton*, attacked the Georgia statute of the A.L.I. type, though the Georgia statute wrapped the process of obtaining an abortion in considerably more red tape than did the A.L.I. model. Mary Doe alleged that she was a pregnant woman who had been advised that her health would be endangered if she gave birth, but who had been denied an abortion by the Abortion Committee of the Grady Memorial Hospital in Atlanta. She sought a declaratory judgment holding that the Georgia statute was unconstitutional, as well as injunctive relief.

Both cases presented a unique problem of standing. Since pregnancies last only nine months, and the complicated process of challenging a state law can hardly be completed in that short a time, this type of case raises a question of whether abortion statutes can ever be challenged, since the delivery of the babies will render the controversy moot each time. Justice Blackmun, for the majority, agreed that abortion cases should be treated as exceptions to the general rule that an actual controversy must exist at appellate stages of a case, and not simply at the date the action was initiated.⁶⁰

Once the issue of standing had been decided, Justice Blackmun's task was to find a strategy for deciding these cases which would not get the Court too deeply involved in highly controversial, non-legal issues. He and the Court wanted to avoid, on the one hand, issues of morality and religion which were basically insoluble except in terms of individual belief and religious preferences. On the other hand, it was also desirable to avoid too direct a confrontation with straight issues of social policy, matters such as population growth, birth rates, illegitimacy, welfare, the roles of the sexes, family planning, and the like. The Supreme Court had been roundly criticised for taking a sociological approach in *Brown v. Board of Education*, and certainly with a full complement of Nixon appointees it would veer away from a decision based on psychology or sociology or any of the "softer" sciences. As it was, the Chief Justice felt that Blackmun's opinion ventured too far from legal principles, grumbling in his concurring opinion that, "I am somewhat troubled that the Court has taken notice of various scientific and medical data in reaching its conclusion; however, I do not believe that the Court has exceeded the scope of judicial notice accepted in other contexts."⁶¹

Justice Blackmun, however, was very obviously aware of the reefs and shoals lying below the legal issues in these cases. He stated this concern early in his opinion:

⁶⁰ *Roe v. Wade*, 410 U.S. 113 (1973). Further citations to *Roe v. Wade* and *Doe v. Bolton* will be to the Supreme Court Reporter, advance sheets, since the official edition was not available when this article was written. Standing is discussed, 93 S.Ct. 705, 712-13.

⁶¹ *Id.* at 755.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing view, 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.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement free of emotion and predilection . . .⁶²

It was, however, one thing to search for a constitutional yardstick to measure these issues and another to find one. The Constitution had nothing very obvious to say on the subject of abortion, so if the Court could find legal authority which demonstrated that abortion had always been considered a crime which governments might legitimately prevent, or that the moral weight of the ages had been against abortion, then it would be very difficult to hold that the right to have an abortion lay in an area of protected individual liberties.

One of the troubling obstacles to a holding in favor of liberalized abortion laws was the traditional Hippocratic oath, sworn by generations of medical practitioners. This oath, an ethical guide bearing the name of Hippocrates, the great physician of ancient Greece, included a prohibition against abortion—"I will not give to a woman a pessary to produce abortion." What was the lesson for the law, if any, of this ancient oath? Secondly, it might be instructive, before ruling on modern statutes regulating it, to find how abortion had been treated at common law. Thirdly, since most state statutes prohibiting or limiting abortion were of nineteenth century vintage, what had been the legal rules before these statutes were passed? Why, indeed, had they been enacted in the first place? If Justice Blackmun could find authoritative answers to some or any of these questions in legal history, he might be able to decide the case without having to break new legal ground. The Court would be very reluctant to overturn state statutes if there were a venerable and consistent legal tradition lying behind them; it could follow a conservative course, uphold the power of state legislatures to resolve the abortion controversy, and avoid having to reach a decision whereby the Court would inevitably be charged, as in *Brown v. Board of Education*, with subjective policy making. After the publicity given President Nixon's search for strict constructionists, the four new Nixon appointees would be unusually sensitive to the possibility

⁶² *Id.* at 709.

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of such charges. The President had himself come out in opposition to abortion, and one might expect his new appointees to think twice before declaring the right to this operation to be of constitutional dimensions.

The Supreme Court has often gone to the past in the hopes of finding historical authority for solving legal problems. In one of the most famous instances, *Adamson v. California*,⁶³ Justices Black and Frankfurter delved into the history of the passage of the 14th Amendment in the hopes of finding whether its authors "intended" to "incorporate" the Bill of Rights under the rubric of due process. Justice Black's interpretation of Article 1, Section 2 that representatives "be chosen by the People of the several States" in order to support the one-man, one vote principle was also based on a backward journey into constitutional meaning.⁶⁴ Researches into the Framers' views of "separation of church and state" and racial segregation involved this kind of historical research, a type of exercise which has been termed "law office history." Justice Arthur J. Goldberg had showed himself to be an *ex post facto* researcher *par excellence* by his discovery in 1965 that the authors of the Bill of Rights had intended the Ninth Amendment to indicate that "there are fundamental personal rights" such as the right to privacy in marriage, "which are protected from abridgment by the Government though not specifically mentioned in the Constitution."⁶⁵ As Professor Alfred H. Kelly, a constitutional historian has put it, history as interpreted by the Supreme Court is often special pleading, rather than "pedigreed historical truth."⁶⁶ Justice Blackmun's researches, however, seem to have been more of a search for authority than an attempt to use history to substantiate a thesis already formed. In the absence of precedent or clear constitutional guidance in answering the constitutional claims made by the appellants, Justice Blackmun was anxious to find legal or historical tradition on which to base his holding. Presumably, if he had found that state anti-abortion laws were clearly built on a strong tradition coming from common law or early American law, he would have been reluctant to overturn the state statutes, unless they denied equal protection or procedural due process. But Justice Blackmun did not find clear guidance in any of his historical researches. The ancient world, he learned, practiced abortion freely, and while some opposed it, it was a common practice and not universally considered a crime against nature. The Hippocratic oath reflected only one of the ancient attitudes on the subject, that of the Pythagorean school of philosophy, the ethical teachings of which later appealed strongly to the Christian Church. Under Common law, abortion before quickening was not regarded as homicide and was not

⁶³ 332 U.S. at 46 (1947).

⁶⁴ *Wesberry v. Sanders*, 376 U.S. 1 (1964).

⁶⁵ *Griswold v. Connecticut*, 381 U.S. 479 (1965). Concurring opinion.

⁶⁶ All of these historical forays are discussed in Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 S.Ct. REV. 119 (1965).

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an indictable offense. The quickening (the first recognizable movement of the fetus in the womb was called quickening) distinction seems to have been important to some legal commentators, though where abortion of a quickened fetus was involved, it is unclear how it was generally regarded. Such writings as remain treat it inconsistently, some as a misdemeanor, and some do not see it as a problem with which the courts are concerned. Justice Blackmun was forced to conclude that "whether abortion of a *quick* fetus was a felony at common law, or even a lesser crime, is still disputed."⁶⁷ And as for American courts, the few reported cases indicate that it is doubtful "that abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus."⁶⁸

Attitudes towards abortion began to change significantly, Justice Blackmun discovered, in the 19th century. Abortion after quickening was made a crime by Act of Parliament in 1803, and by statute in several of the American states beginning with Connecticut in 1821. It was not until after the Civil War, however, that legislation generally replaced the common law. By the 1950's most American states had banned abortion, except where necessary to save the life of the mother.⁶⁹ Justice Blackmun was forced, after this survey, to conclude that "At common law, at the time of the adoption of the Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect." At the time the Constitution was written, he found, women "enjoyed a substantially broader right to terminate a pregnancy" than they had in most states in 1973.⁷⁰ It was the American Medical Association that probably helped bring about the change to a more restrictive treatment of abortion. From 1857 to 1871 various reports and conferences and resolutions railed against the destruction of fetal life and urged changes in the laws to protect it.⁷¹ Some legislatures may also have acted, as did New York's, to protect women from the butchery of abortionists⁷² and it is likely that doctors were active in urging anti-abortion laws for this reason, too.

Justice Blackmun's opinion is unsatisfactory, however, in presenting an historical picture of the range and motivation of forces behind a movement which brought legislative change in state after state. In doing his research he did not find any kind of state-by-state historical study of early anti-abortion legislation. The scanty materials he did discover leave the reader wondering if this is the whole story. Certainly the medical profession itself was one of the principal proponents of change, but what other

⁶⁷ *Roe v. Wade*, 93 S.Ct. 705, 717 (1973).

⁶⁸ *Id.* at 718.

⁶⁹ *Id.* at 720.

⁷⁰ *Id.*

⁷¹ *Id.* at 721.

⁷² *Id.* at 724-5.

interest groups and social forces were working behind the scenes? What was the role of the Catholic Church, which, in 1869, changed its teaching to hold that life begins at conception rather than at "ensoulment", which was supposed to take place at 40 days if the embryo were a male, 80 days if it were a female.⁷³ To what extent did the need to populate the frontier, or the increasing power of the middle class, work to produce such legislative changes?

But although Justice Blackmun's discussion of the causal forces is unsatisfactory, it is clear from his researches that the 19th century produced a clear legislative prohibition of abortion in almost all states. The law was no longer neutral in the matter; abortion except to save the life of the mother was now a crime.

Having gone to history and found that it showed changing attitudes towards abortion but did not give clear guidance to the Court, Blackmun now was ready to face the legal issues. These were basically three:

1. Was there any basis to the appellant woman's claims to a constitutional right, infringed by the abortion laws?
2. Were the state's interests in legislating substantial enough to warrant invasion of this right, if it existed?
3. Did the Constitution protect the life of the fetus under its protection of "persons" in the due process clause?

The answers, in brief, were that the woman did have constitutionally protected rights which restricted the state's power to prohibit abortions. There was a right to privacy in the Constitution, as well as a guarantee of liberty which must not be unnecessarily invaded. The guarantee of privacy or personal liberty protects an area of private decision-making which includes marriage, procreation, contraception, family relationships, child-rearing and education, a realm into which the state should not intrude without a "compelling" interest. This realm or right is broad enough to include the abortion decision.

The state's interest in limiting abortion is two-fold (at least as verbalized in state legislatures and legal briefs): protecting the health of the mother and the life or potential life of the unborn. The Court did not feel that the asserted rights of the state, however, were sufficient to warrant intrusion into this area of private decision. "Where certain 'fundamental rights' are involved, the Court has held that regulation may be justified only by a 'compelling state interest.'"⁷⁴ Changes in medical technology had made hospital abortions even safer than childbirth; there were some doubts, therefore, about the validity of a legislative purpose keyed to the mother's health or safety. And as for the protection of potential life, there was no basis in law for a holding that this value outweighed the mother's

⁷³ *Id.* at 717.

⁷⁴ *Id.* at 728.

health and welfare, at least during the early weeks of embryonic or fetal development. Traditionally, the fetus had not been protected before "quickening"; to hold that early, developing fetuses had life, or rights, which took precedence over the mother's right to make decisions affecting her own life and health, would involve value judgments which could not be based on objective standards:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.⁷⁵

If medical and ethical opinion was split on the question of when life begins, still there was general agreement on "viability," the point at which the developing child could live apart from the mother. Justice Blackmun felt that if the unborn child has interests, it is only at this point that they become tangible.

The mother's right to privacy, however, was not absolute, and the Court rejected any view that the state had no interests in the abortion decision, or that the woman had complete freedom of self determination on the matter, or any right to abortion on demand.

The holding was that in the first trimester of pregnancy, a woman might decide to have an abortion for medical reasons (including psychological reasons affecting her mental health) and that she and her physician should make the decision free from state interference.⁷⁶ A state decision which overrides the woman's rights entirely in the early stages of pregnancy violates due process of law.⁷⁷ Between the end of the first trimester until the 24th week, the time when by general agreement the fetus is "viable," because of the increasing danger of abortion to the mother, the state's interests in maternal health give it the right to regulate for that purpose. When, from the 24th week on the fetus is "viable" and "presumably has the capacity of meaningful life outside the mother's womb," then the state may, if it chooses, regulate, and even prohibit abortion altogether except where the mother's life is endangered.⁷⁸ With the exception that it could not prohibit abortions necessary to save the mother's life, the state might if it wished forbid all abortions after viability. It might also regulate the qualifications of persons performing abortions and the facilities where they could be performed.⁷⁹ It could not forbid all abortions without regard for the stage of pregnancy or without considering other interests involved.

⁷⁵ *Id.* at 730.

⁷⁶ *Id.* at 732.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

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In the companion case, *Doe v. Bolton*, the Court used the same rationale to overturn a Georgia statute which placed exceedingly complicated safeguards around the few justifiable abortions it was willing to permit. Abortion was possible only if pregnancy would endanger a woman's life or injure her health, if the fetus was likely to be born with serious defects, or if the pregnancy resulted from rape. But the Georgia law set up an apparatus of restrictive regulations, consultations, abortion review boards, court actions and requirements that abortions be performed only in certain accredited hospitals which made this law more restrictive than most of the A.L.I. type reform bills. It would allow a minimal number of abortions.

The District Court had invalidated part of this law, and the Supreme Court now rejected additional restrictions, building on the holding in *Roe* that abortions during the first trimester must be left more fully to private decision.

In the two cases there were three concurrences and two dissents from other members of the Court. The Chief Justice was troubled by the range of Blackmun's historical and medical background materials, and would have preferred a more narrowly legal and constitutional opinion, although he voted with the majority. Justice Stewart also concurred. He felt that the Court was correct in its ruling, but should have been forthright enough to recognize that it was invoking substantive due process, albeit under another name. The Court needs a substantive due process doctrine, he argued, and quoted the late Justice Harlan's concept of liberty:

[liberty is] . . . a rational continuum which, broadly speaking, includes a freedom from all arbitrary impositions and purposeless restraints, . . . and which also recognizes what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.⁸⁰

Justice Douglas' concurrence elaborated on the right to privacy, working out a series of categories in which he felt individual life must be left free from state interference.

Justices Rehnquist and White entered separate dissents, both feeling that state legislatures, rather than courts, could better resolve the conflicts over abortion laws.

Justice Blackmun's opinion was joined by three other members of the Court, Justices Brennan, Marshall and Powell. Taken as a whole it was a complex, confusing and interesting opinion, composed of a number of elements somewhat roughly combined. There is a considerable likelihood that it was the result of several drafts by Justice Blackmun himself,⁸¹

⁸⁰ *Poe v. Ullman*, 367 U.S. 497 at 543 (1961) (Harlan, J., dissenting).

⁸¹ *TIME*, Feb. 5, 1973, at 51.

changed, modified and added to in places to incorporate the ideas and objections advanced by other Justices. Standard procedure in opinion writing involves circulating the majority opinion to other members of the Court. The other Justices return it to the author with notes and comments in the margin.⁸² It is unlikely that an opinion of this importance would not have received considerable comment, and perhaps demands for modification. Some of the loose-jointedness of the opinion may reflect the author's attempts to meet criticisms from his colleagues; the number of different elements and dimensions may very well be the result of bargaining and compromise. Points worth commenting on include the following:

1. *The right to privacy.* Even though Blackmun's historical researches turned up the fact that abortion (at least before quickening) was probably not a criminal act in early American law, he still had to find that anti-abortion laws infringed some right in order to find a basis for overturning them. He found this in the right to privacy enunciated in *Griswold v. Connecticut* in 1965. The right to privacy is not a right clearly articulated in the body of the Constitution or the Bill of Rights; rather it is a right derived or implied from many parts of the document. Critics in fact have claimed that such a right does not exist. Justice Black, dissenting in the *Griswold* case, wrote the following:

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not.⁸³

In spite of Justice Black's objections, a majority of the Justices held in *Griswold* that a right to privacy did exist and that a Connecticut law which imposed sanctions on the use of contraceptives invaded a zone of protected private rights. A state statute prohibiting abortions clearly does not invade privacy in the same way. As Justice Rehnquist dissenting in *Roe* pointed out, there is very little that is "private" about an abortion. There is considerable difference between an operation performed in a hospital and the intrusion of government agents into the boudoir to search for contraceptives. *Griswold* could easily have been distinguished on this ground. Several of the lower courts, however, building on the *Griswold* precedent,⁸⁴ had invoked the right to privacy in a different sense in overturning anti-abortion statutes, holding that if a right to privacy exists it must protect against more than the physical intrusions of governmental agents. A right to privacy must also guarantee the reservation of intimate

⁸² W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY, Chap. 3 (1964).

⁸³ *Griswold v. Connecticut*, 381 U.S. 479, 508 (1965) (Black, J., dissenting).

⁸⁴ See e.g., *People v. Belous*, 71 Cal 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969). The holding in the case was that the statute was unconstitutionally vague, but the right of privacy argument was developed in the Court's opinion. See also *Y.W.C.A. v. Kugler*, 342 F. Supp. 1048 (D.C. N.J. 1972).

and personal decisions to private decision-making. The decision to have sexual intercourse with one's mate, to practice contraception or not, to have children, to postpone procreation until children can be cared for properly, and to raise and educate children according to the family's own standards and values—these decisions should be left to the individuals involved and not dictated by government policy. This view of the concept is elaborated at length in Justice Douglas' concurrence. Behind this view one senses a laissez-faire optimism that if the implementation of population control can only be left to private choice dictated by individual self-interest, the automatic workings and adjustments of the natural order will solve the problem with a minimum of state meddling. While the Court's action in these cases in negating state prohibitions on abortion advances the cause of population limitation, it should not be seen as a victory for planned population control. It is an old-fashioned, libertarian decision, attuned to the philosophy of individualism. The rationale for leaving abortion decisions in private hands could also be used to cut down any future state attempts to regulate population by compulsory limitation of family size or compulsory sterilization laws.⁸⁵

2. *The Ninth Amendment.* The Ninth Amendment's statement that the enumeration of certain rights in the Constitution should not be taken to mean that others, not mentioned, are denied, has for the most part of our history been regarded as a statement of the obvious, namely that men retain their normal complement of "natural" rights even though the Constitution singles out some, such as freedom of speech, for special protection. As late as 1947, the only "right" which had been explicitly acknowledged under this clause was the "right to engage in political activity."⁸⁶ Rescued from neglect by Justice Goldberg in his concurring opinion in the *Griswold* case, the Ninth Amendment was seen as protecting a right of marital privacy as one of these rights "not mentioned." The Ninth Amendment was, therefore, another "available constitutional channel"⁸⁷ for the development of a right to privacy, in addition to, or instead of, the emanations and penumbras fancied by Mr. Justice Douglas in his majority opinion in *Griswold*. State and lower federal courts involved in abortion suits picked up the argument for this purpose. Here again, litigants and courts were searching for a substitute for the discredited substantive due process doctrine, which in earlier days would have allowed them to ask whether a law was an "unconstitutional invasion of liberty."

⁸⁵ See Gray, *Compulsory Sterilization in a Free Society: Choices and Dilemmas*, 41 U. CIN. L. REV. 529 (1972).

⁸⁶ *United Public Workers v. Mitchell*, 330 U.S. 75, 94 (1947). "... we accept appellant's contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments are involved. The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views."

⁸⁷ See S. FRIEDELBAUM, *CONTEMPORARY CONSTITUTIONAL LAW* 522-3 (1972).

3. *Substantive due process.* Justice Stewart, in his concurring opinion, argues that this decision would make more sense if reached under substantive due process—the theory that the Supreme Court has the power to invalidate not only procedurally defective legislation, but also laws which make substantively improper and unreasonable incursions on personal liberty.⁸⁸ Unfortunately, the Court had repudiated the due process approach during the 1940's (and reiterated that repudiation as late as 1963 in *Ferguson v. Skrupa*⁸⁹) because of its use in early New Deal days to invalidate economic regulation in the name of liberty. But Justice Stewart is persuasive in his argument that due process is a much more suitable vehicle for invalidating unwarranted governmental intrusions on personal privacy—the right to be let alone is essentially the right not to be burdened by “substantial arbitrary impositions and purposeless restraints.”⁹⁰ The privacy argument is really only a new way of phrasing this familiar concept.

In *Roe v. Wade*, however, the Court veered away from the discredited due process holding, when it might have decided that in the modern context of improved medical procedures and social imperatives, such a restrictive law was unfair and oppressive and deprived women of their liberty without due process. The right to be let alone is essentially liberty which should not be invaded without substantial governmental reason, and it makes more sense to argue this in the name of liberty than in the name of privacy, though there is an element of both. The right to privacy phrasing, like the right to travel and the right of association, are modern expressions of liberties felt to be essential by modern men and women. Judicial constructs of fairly recent vintage, they are designed to protect the individual in the context of all-encompassing and constantly encroaching governmental interference. As Bernard Schwartz writes in his *Commentary on the Constitution*, the Framers included the Fourth Amendment to protect our privacy, but today “the serious dangers in this country are not of the type against which the Fourth Amendment was directed . . . but from less invidious encroachments upon the inner self . . .”⁹¹ One of these is the invasion by government of private life to such an extent that a constantly diminishing area of privacy is left to the individual.

4. *Church and State.* The Court avoided several very difficult issues in its opinion, undoubtedly as a matter of conscious strategy. One of the most obvious evasions was that of an unconstitutional church-state relationship. The Catholic Church opposes abortion as immoral. On the other hand, many individuals and religious groups in this country feel that terminating the development of the embryo at an early stage does not involve a moral problem, or certainly not one of the caliber presented

⁸⁸ *Roe v. Wade*, 93 S.Ct. at 733-4 (Stewart, J., concurring).

⁸⁹ 372 U.S. 726 (1963).

⁹⁰ *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

⁹¹ 1 B. SCHWARTZ, *RIGHTS OF THE PERSON* 253 (1968).

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by the birth of unwanted, unloved, children or by some of the other side effects of unwanted pregnancies. There is thus a division of opinion between those who believe the issue presents a moral problem and those who believe that it does not.

For the Court to decide or to support Texas' decision that the developing embryo was "life" and that the existence and value of this life was to be valued over the mother's interests might have involved the Court in "establishment" or "freedom of religion" problems, although the Court is careful to avoid a direct statement of this issue. The Court did touch on the rights of the pregnant woman, however:

In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are now at stake.⁹²

Epperson v. Arkansas,⁹³ decided in 1968, had held that a state might not adopt one theologically-based view of the evolution of man and prohibit the teaching of other views in its public schools. Government must be neutral in matters of religious theory, doctrine and practice. The Court stressed the following points about the First Amendment:

[The First Amendment] . . . forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma. As Mr. Justice Clark stated in *Joseph Burstyn, Inc. v. Wilson*, "the state has no legitimate interest in protecting any or all religions from views distasteful to them. . . ."⁹⁴

The reasoning in *Roe*, not spelled out explicitly, seems to be that for the state to decide that immediately after conception the embryo constitutes actual human life, and to protect it without additional statement of a compelling state interest, would, in effect, be to adopt a theologically-based ethical standard with which many, perhaps a majority of the citizens, do not agree. As in the Arkansas case, where the only state reason for forbidding the teaching of evolution was religious and no substantial state interest other than this was advanced, the law is open to challenge on grounds of religious neutrality. Though this is not dealt with overtly, the Roman Catholic Church's insistent support of the sanctity of early fetal life and its heavy lobbying efforts in state legislatures may have made the Court wary of upholding a "right to life" view not supported either by history, precedent, or by a strong statement of tangible state interests.

5. *Medical emphasis of the opinion.* Throughout the majority opinion there is an emphasis on medical factors. The "viability" distinction, which

⁹² *Roe v. Wade*, 93 S.Ct. at 731.

⁹³ 393 U.S. 97 (1968).

⁹⁴ *Id.*, at 106-7.

supplies the dividing line between permissible and impermissible abortions, is based on medical knowledge and technique. The woman's health and welfare, as evaluated by her physician, must supply the excuse for an abortion. The Court does not support "abortion on demand," or abortion for economic reasons. A woman's desire for an abortion for frivolous reasons (that she wants a fur coat instead of a baby, or that having a baby would spoil her trip to Gstaad) would not be sufficiently substantial to outweigh the legislative valuing of embryonic life over the mother's interests. A decision based on the mother's health and welfare and made in consultation with her doctor has a different weight. The abortion decision, in essence, must be a medical decision, and in summarizing the Court's holding in *Roe v. Wade*, Justice Blackmun states that:

The decision vindicates the right of the 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 those points *the abortion decision in all its aspects is inherently, and primarily a medical decision and basic responsibility for it must rest with the physician*. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.⁹⁵

In some ways he almost seems to be appealing to the medical profession to supply the authority which he cannot find in the lawbooks.

There are, in addition, an unusually large number of references to physicians and medical matters in the two opinions. The discussion of the Hippocratic oath, interesting though it is, is probably unnecessary to the opinion. There are sections of *Roe v. Wade* which canvass the views of the American Medical Association and the American Public Health Association on abortion. When the appellants in *Doe v. Bolton* criticize the bureaucratic routines required by the Georgia law because they fear that these procedures will allow physicians to decide against abortions on subjective grounds (e.g. disapproval of premarital sex), Justice Blackmun rises to the defense of the medical profession. He takes this occasion to express his admiration and confidence in the objectivity, good judgment, high principles, love of humanity and integrity of medical men:

The appellants suggestion is necessarily somewhat degrading to the conscientious physician, particularly to the obstetrician, whose professional activity is concerned with the physical and mental welfare, the woes, the emotions, and the concern for his female

⁹⁵ *Roe v. Wade*, 93 S.Ct. at 733 (my italics).

patients. He, perhaps more than anyone else, is knowledgeable in this area of patient care, and he is aware of human frailty, so-called "error," and needs. The good physician—despite the presence of rascals in the medical profession, as in all others, we trust that most physicians are "good"—will have a sympathy and an understanding for the pregnant patient that probably is not exceeded by those who participate in other areas of professional counseling.⁹⁶

It is hard to see what the function of this encomium might be, except perhaps to import some of the authority on medical matters which physicians command ("Doctors do . . .", as the television commercial has it) to substitute for the lack of legal authority. However, this emphasis on doctors' integrity and the medical nature of abortion has the salutary effect of taking the abortion decision, at least when made early in pregnancy, out of the realm of morality and supporting it as a decision which is primarily medical. There is no reason why it should not be made, as decisions to perform other operations are by doctors, without the help of government.

6. *Criticism of the viability distinction.* In many ways the Court's decision to use "viability" as the key to solution of the abortion dispute was a compromise. It allowed some abortions, under the most favorable conditions, and sustained the right to life of the developing child at the stage when it had achieved some chance of survival. But the compromise did not please either extreme among the disputants. The Roman Catholic Church insisted that the fetus was indeed a human being and denied the morality of taking any human life.⁹⁷ The women's groups and some others declared that governmental manipulation of the individual's reproductive life was totally reprehensible, and that both "compulsory pregnancy" and compulsory sterilization laws involved state interference in what should be completely a matter of private decision. Since they felt that there was not justification for state regulation of any kind, Justice Blackmun's division of the pregnancy into trimesters, with the state's interest becoming significant when the fetus became "viable," was unacceptable. Among other things, Blackmun's distinction involved a doctrine of "contingent constitutionality," where the woman has a right to choose only until a certain point in time; after that "the woman and her fetus revert to state ownership."⁹⁸ The viability distinction also had the objectionable result of tying the woman's rights to the current state of science and medicine:

. . . viability is usually defined, quite cavalierly and imprecisely, as the capacity of the fetus to survive outside the woman's body. For how long? With what heroic medical assistance and devices? Recent developments in technology now permit fetal surgery (not

⁹⁶ *Doe v. Bolton*, 93 S.Ct. at 750.

⁹⁷ Drinan, *The Inviolability of the Right to be Born*, in *ABORTION AND THE LAW* 107-23 (1967).

⁹⁸ Cisler, *supra* note 13, at 273.

always on wanted fetuses) and will soon permit in ovulation—the removal of a fertilized egg or of a fetus from one woman and its implantation in another—and even extrauterine gestation. How soon will it be before a twelve-week-old, or a one-week old, fetus can be considered viable? Women's right to abort *cannot* hinge on the state of technology, and we are left with the inescapable conclusion that the only event in the sequence of pregnancy that can be assigned a specific time is birth itself, at the time that it occurs. All else is mystique and conjecture.⁹⁹

This is approximately what Chief Justice Burger said in another context, in *Eisenstadt v. Baird*, namely that "The commands of the Constitution cannot fluctuate with the shifting tides of scientific opinion."¹⁰⁰

7. *Avoiding the social issues and deference to the legislature.* Many of the real issues in this case never surface, as the Court struggles to dispose of the controversy on purely legal and constitutional rather than on policy grounds. But the almost complete failure to mention issues of policy gives the opinion and some of the dissents a feeling of unreality. We never read, for instance, that illegal abortions are performed each year by the hundreds of thousands, for this is legally irrelevant to the case.

It is in the area of social policy, of course, that the legislature can weigh and measure alternatives and the courts cannot—how is potential life to be balanced against the imperatives of population control, the depletion of resources, the child's right to decent care? The one social issue which emerges, though couched in legal terms, is the woman's right to have her rights considered in the regulation of abortion. Since it is possible at this time in history to have a safe, early abortion, why should she be forced by law to risk her life and sacrifice her interests when those interests are opposed to the bearing of a child? Why should she not have the right to decide (although this is very cautiously stated in terms of health), since she bears so great a proportion of the risks and burdens of parenthood, whether it is a good idea to bring a particular baby to term at a particular time?

Justices White and Rehnquist, in dissent, suggest that in controversies of this type, where there is no clear constitutional command, the courts should defer "to the people and to the political processes the people have devised to govern their affairs."¹⁰¹ What would have been the results of deferring to state legislatures on this matter? If the Court had refused to decide these cases on privacy or due process grounds, undoubtedly challenges would have been brought under some of the other constitutional phrases and clauses. A good case could have been made under the

⁹⁹ *Id.*, at 273-4.

¹⁰⁰ 405 U.S. 438, 470 (1972).

¹⁰¹ *Roe v. Wade*, 93 S.Ct. at 763 (White, J., dissenting).

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Equal Protection clause, showing both that abortion laws are inherently discriminatory, having an unequal impact on women, and that they in effect deny abortions to poor women. One of the lawyers in the New York case, *Abramowicz v. Lefkowitz*, prepared a brief arguing that since simple abortion procedures are medically possible, forcing a woman to bear the pains and risks of motherhood against her will by a criminal abortion law discriminates against her, and since pregnancy and the status of motherhood, especially when unmarried, carries many legal disabilities, then depriving the woman of her ability to choose involves an invasion of her Fourteenth Amendment rights.¹⁰²

Recent lower court cases overturning sex discrimination in jury duty¹⁰³ and differential punishment for men and women,¹⁰⁴ as well as the recent Supreme Court decision of sex discrimination in the armed services,¹⁰⁵ lay a basis for challenges along these lines.

Other possible challenges suggested in briefs and law review articles indicate that failure to take jurisdiction, or rejection of the right to privacy arguments in favor of deference to the legislature, would not have ended judicial involvement with abortion. There were other arguments: some of them raising much clearer constitutional claims. The separation of church and state challenge, especially in view of intense lobbying against legalization of abortion by the Roman Catholic Church, might form the basis for a fruitful lawsuit in those states where the legislature had clearly been subjected to a high pressure campaign. The argument here would be that criminalization of abortion, rather than its regulation, reflects a theological position rather than a rational social policy decision. Certainly, many legislatures would weigh the policy alternatives differently if some of the extreme emotionalism generated by the Right to Life forces were removed, and more information on related social values considered in a neutral setting.

The point here is that deference to the legislature in *Roe* and in *Doe* probably would not have kept abortion cases from appearing on court dockets. One has only to look back at *Colegrove v. Green*¹⁰⁶ and *Poe v. Ullman*¹⁰⁷ to see the futility of trying to avoid a clear determination of constitutional rights on an issue that is pushing so strongly for judicial settlement. The fact that legislatures are generally more competent than courts to weigh

¹⁰² Stearns, *Abortion Brief*, reprinted in *RADICAL LAWYERS* 264 (J. Black ed., 1971). See also "Plaintiffs Brief," in Scholder and Kennedy, *supra* note 36, at 208.

¹⁰³ *White v. Crook*, 251 F. Supp. 401 (1966).

¹⁰⁴ *U.S. ex rel. Robinson v. York*, 281 F. Supp. 955 (1968).

¹⁰⁵ *Frontiero v. Richardson*, 93 S.Ct. 1764 (1973).

¹⁰⁶ 328 U.S. 549 (1946).

¹⁰⁷ 367 U.S. 497 (1961). In *Colegrove* the Court tried to avoid meeting the issue of legislative reapportionment, but only succeeded in delaying a solution for over a decade; in *Poe*, it turned away litigation on the Connecticut birth control statute on an issue of standing, but was forced to decide the case in another form in *Griswold*, in 1965.

and to measure social costs and benefits does not mean that they always do the job entrusted to them. The history of abortion legislation has often shown that judicial trumpeting about legislative expertise can be a legal fiction.

Some in depth studies of legislative deliberations reveal the shortcomings of legislative handling of particular problems. A case study of the passage of the Georgia law which was challenged in *Doe v. Bolton* shows that instead of being a careful weighing of competing interests, the legislature was primarily concerned with two very narrow aspects of the abortion picture: (a) the protection of doctors from prosecution and (b) a desire that any abortion laws on the statute books be extremely rigorous in allowing as few abortions as possible in order to forestall the possibility of Georgia becoming an abortion mill.¹⁰⁸

The Georgia abortion reform bill did not even begin as a reform proposal, but was part of the revision of the state's criminal code. That code provided as an "affirmative defense" in prosecutions of doctors for abortion, the defense that the abortion had been performed in response to certain extraordinary circumstances (to protect the life of the mother, to prevent deformity or following a rape). The bill tried to simplify the law by exempting certain abortions from the general criminal prohibition, thus keeping the doctors from having to go to court and defend against prosecutions, if they performed these abortions. The bill was treated throughout its legislative history as a bill to protect physicians, and many of the exquisitely restrictive safeguards in it were designed to keep this "protection" from becoming a "license" to perform abortions. Since the bill was not primarily an abortion bill, women's groups were not alerted nor represented in the process at all, nor were their interests presented in any direct form. A study of the legislative process showed the following:

The origin of the bill and its defense throughout its course—whether in informal or public hearings, on the floor of one of the two houses of the legislature, or in committee—was primarily aimed at protecting doctors who at some time, and for any of a variety of reasons, might feel the performance of an abortion was necessary. The health, happiness, comfort and convenience of the prospective abortee were rarely injected into the debate.¹⁰⁹

In other words, the weighing of competing interests was done very poorly by the Georgia legislature, because some of the interests were not even represented in the legislative process. Naturally these interests might feel, later, that as individuals, they had a right to fight for recognition of their rights in the courts. Church groups, lawyers, and physicians had

¹⁰⁸ S. JAIN & L. GOOCH, *GEORGIA ABORTION ACT 1968: A STUDY IN LEGISLATIVE PROCESS* (1972).

¹⁰⁹ *Id.* at 62.

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worked out the solution which was finally adopted. Women, not represented in the legislative process, took their case to the courts:

All that this probably means is that in times when law lags behind social change, all governmental institutions are likely to be pressed into service to help solve the conflicts. Legislatures are the most open to inputs of all kinds, factual, political, representational; they are also likely to be dominated by the best organized and well-funded groups on one side of an issue, and may be as out of touch with long-term changes taking place in society as the courts are. While the courts have the disadvantage of having to consider issues in a narrow context of courtroom procedure, the adversary system, and existing laws and constitutional provisions, they have the advantage of being removed from immediate pressures, and can often see the relation of legal principles to the social problems presented in individual lawsuits. Deference to the legislature is certainly always wise; but just as Justice Stone's warning in *United States v. Butler* that "Courts are not the only agency of government that must be assumed to have the capacity to govern,"¹¹⁰ cautioned against an excess of reliance on the judicial branch, the same must be said of other branches also. Each branch has its deficiencies as well as its strengths and our system of separation of powers demands that each act as a corrective force.

Impact

A Supreme Court decision is hardly ever the end of a dispute. Possibly when it involves an individual's income tax or the question of whether a prisoner was or was not given a fair trial, the Court's answer may be final, though even here the fact that an individual dispute is heard at all probably means that it reflects deeper and broader consequences and is merely representative of these.

Jane Roe, a divorced waitress, and Mary Doe, an Atlanta housewife, helped develop a new constitutional principle: that because of the serious impact of unwanted pregnancies on individual women, the states might not preclude the abortion alternative altogether without depriving them of their liberty or privacy. But this decision was hardly announced before political pressures to use alternative means to reverse and to limit it began to be felt. Individuals and groups dissatisfied with the decision began to search for ways of attacking it in other forums.

Predictably, the Roman Catholic reaction was violent. In a pastoral message issued February 13th, 1973, Roman Catholic bishops called for civil disobedience of any law requiring abortion.¹¹¹ In no other situation

¹¹⁰ 297 U.S. 1, 87 (1936).

¹¹¹ Heyer, *Catholic Bishops Urged Defiance of Any Law Requiring Abortion*, Wash. Post, Feb. 14, 1973.

in recent times has the hierarchy felt that other moral issues outweighed the obligation to obey the law.¹¹² The Church was worried that this decision might lead to laws requiring Catholic doctors or hospitals to perform abortions. According to *Commonweal*, a bill in the Oregon legislature would require all hospitals to admit patients for abortions, and a bill in Wisconsin threatened loss of license to individual doctors who refused to perform abortions.¹¹³ Of course proposed legislation often puts forward plans which are never passed into law, but these prospects frightened Catholics. In Congress, Senator Frank Church of Idaho moved to protect Catholic hospitals against loss of funds under the Hill-Burton Act by introducing a resolution (S.J.R. 64) which would protect hospitals from performing operations which violated religious beliefs.¹¹⁴

The Catholic hierarchy reaffirmed its position that any person who underwent an abortion would be subject to excommunication.¹¹⁵ The bishops also urged Catholics to use all means possible to reverse the decision. A citizen's group in Virginia suggested that Justice William Brennan, the Court's only Catholic Justice and a member of the majority, be excommunicated.¹¹⁶

Catholic and Right to Life (mostly Catholic) forces which had been active in opposing the modernization of abortion laws in state legislatures, now urged the states to block the Court's decision in any way possible. Legislatures in fifteen states were prevailed upon to introduce resolutions which would give the fetus constitutional rights.¹¹⁷ The Rhode Island legislature ultimately adopted an abortion statute declaring that human life begins at the moment of conception and that such life is a "person" within the meaning of the Fourteenth Amendment.¹¹⁸ By May 1973, fifty resolutions had been introduced in twenty state legislatures; all of these were designed to permit hospitals to refuse to perform abortions, or otherwise to put obstacles in the way of women wishing to have the operation.¹¹⁹ In Nebraska, legislators began to work on a law which would tie up abortions during the second trimester with tight restrictions, and require that the names of all persons having abortions be reported.¹²⁰ In Louisiana,

¹¹² *Id.*

¹¹³ *Abortion: Next Round*, COMMONWEAL, Mar. 23, 1973, at 51-2.

¹¹⁴ *Id.*

¹¹⁵ Heyer, *supra* note 111.

¹¹⁶ TIME, Feb. 5, 1973, at 51.

¹¹⁷ N.Y. Times, Feb. 16, 1973, at 1.

¹¹⁸ *Doe v. Israel* (decided May 16, 1973). A federal District Court for the District of Rhode Island ruled this law invalid in May, 1973, holding that a state cannot legislate a presumption that violates the constitutional rights of persons affected and that the State has no right to determine who is a "person" within the meaning of the Fourteenth Amendment.

¹¹⁹ Randal, *Anti-Abortion Forces Fight Court Decision*, Raleigh News and Observer, May 13, 1973.

¹²⁰ Brody, *States and Doctors Wary on Eased Abortion Ruling*, N.Y. Times, Feb. 16, 1973, at 46.

state authorities refused to accept the Court's ruling and promised a long fight before complying. The State Attorney General said that the state still had authority to revoke a doctor's license for performing an abortion.¹²¹

As we learned during the aftermath of *Brown v. Board of Education*, there are many ways in which implementation of a controversial Supreme Court decision may be delayed or avoided. There was a great deal of uncertainty as to the exact scope and meaning of the Court's decision in *Roe v. Wade*. Was any regulation to be allowed in the first trimester of pregnancy? Certainly the state could require that abortions be performed only by licensed practitioners. Could it also require that they be performed in hospitals, rather than in clinics or doctors' offices? Since hospitals in many states are crowded, the requirement that abortions be performed in hospitals might make them more costly and difficult to obtain—only those patients who could reserve beds and operating facilities would be served, and a hospital abortion could end up being as expensive as a normal delivery. If clinics or doctors' offices could be used, what might the state require in the way of preoperative examinations and evaluations, emotional and contraceptive counseling, inspection, record keeping, reporting or other procedures? All of these uncertainties could be exploited by opponents of the abortion decision.

It was not surprising that some hospitals decided to wait until guidelines were more clearly marked out before opening their doors to abortion patients. Breckenridge Hospital in Austin, Texas, refused to allow abortions even though it had favorable rulings both by the United States Supreme Court and from the State Attorney General; it wanted a ruling from the City Attorney in Austin to be certain.¹²² At least one judge decided that he would not be in the forefront of change; ten days after the *Roe* ruling, a state court in Cook County, Illinois, issued a restraining order blocking three physicians from performing thirty abortions.¹²³ Doctors themselves would have a good deal to say about the manner in which a given state would comply with the new ruling. It seemed clear that professional regulations might replace official state standards in some areas. This had happened in Maryland when the legislature failed by one vote to pass a new abortion law, leaving the state, in the opinion of the Maryland Attorney General, with no laws on the subject. The Maryland medical society stepped in and began to draw up a comprehensive set of guidelines; it could enforce these standards by revoking the licenses of non-cooperating doctors.¹²⁴ Where medical leaders shared the views of anti-abortion groups, they would probably be able to delay the implementation of more lenient procedures. Even where they were not opposed to abortion,

¹²¹ *Id.*

¹²² N.Y. Times, Feb. 16, 1973, at 46.

¹²³ *Id.*

¹²⁴ Huth, *Maryland Doctors Draft Abortion Standards*, Wash. Post, Apr. 27, 1973.

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the medical profession might act as a conservative force to keep change from taking place very rapidly. Abortion counseling services in the states, noting the reluctance of doctors and hospitals to change their policies, were still sending their clients to well-established contacts in New York and Washington.¹²⁵

Not all states set about trying to circumvent the Supreme Court decision. Some states moved to conform their laws to the new ruling. North Carolina revised its abortion statute along lines suggested in the decision. Maryland failed by one vote to do the same, possibly because anti-abortion forces added some complicating amendments.¹²⁶ In all, nine states introduced new legislation to bring their laws into conformity with the decision. Nine more were working on new legislation by the middle of February.¹²⁷ In twelve states the Attorney General had declared existing laws null and void, and in several others Attorneys General were waiting for the legislature or courts to act. Only Virginia and Maryland had rejected a bill which would have brought their laws into line with the Court's ruling.¹²⁸

In addition to action in state legislatures, there were a number of proposed Constitutional Amendments introduced in Congress. These took several forms. One type would hand the regulation of abortions back to the states. Another type flatly prohibited abortion after the moment of conception.¹²⁹ In the end of May, six United States Senators backed a "Human Life Amendment," sponsored by Senator James L. Buckley (R., N.Y.), which would prohibit abortions except where the mother's life was endangered. Buckley's amendment took the form of extending the category of "person" to all "human beings including their unborn offspring at every stage of their biological development irrespective of age, health, function or condition of dependency."¹³⁰ According to Buckley, his amendment would also protect against mercy killing.

The Supreme Court itself still had loose ends to tie up in the abortion cases. Several weeks after the decisions in *Roe* and *Doe*, the Court sent nine state challenges back to lower courts for action along the lines it had delineated. These cases were pending when the decision was handed down, and they involved challenges to laws in Connecticut, Missouri, Illinois, North Carolina, Utah, Kentucky, Ohio and South Carolina.¹³¹ In February, the Court refused to reconsider its January ruling,¹³² and

¹²⁵ N.Y. Times, Feb. 16, 1973, at 46.

¹²⁶ Walsh, *Abortion Bill Fails by 1 Vote*, Wash. Post, Apr. 3, 1973.

¹²⁷ N.Y. Times, Feb. 16, 1973, at 1.

¹²⁸ *Id.* See also Walsh, *supra* note 126.

¹²⁹ Russell, *Anti-Abortion Measures Grow*, Wash. Post, June 1, 1973.

¹³⁰ *Six Senators Propose Amendment that Would Ban Most Abortions*, Chapel Hill Newspaper, May 31, 1973.

¹³¹ *Decision Ordered on Abortion Laws*, Raleigh News and Observer, Feb. 27, 1973.

¹³² FACTS ON FILE, Feb. 26, 1973, 190 C 2.

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later dismissed without a hearing a suit arguing that the fetus has a right to life as involving no "substantial federal question."¹³³ In April the Court denied rehearings to groups in New York and Connecticut who claimed they had found new evidence concerning the exact time when the life of a fetus begins.¹³⁴ In June, the Court set aside a District Court ruling that gave indigent women in New York state a constitutional right to abortion at federal (Medicaid) expense, sending the ruling back for reconsideration in light of its January guidelines.¹³⁵ This action may have reflected the Court's unwillingness to protect any right to a non-medical abortion.

In spite of objections to the limiting aspects of the opinion in *Roe v. Wade*, women's rights groups greeted the Court's decision with elation. It was the most far-reaching constitutional and legal step for women since they had gained the right to vote.¹³⁶ Women congratulated themselves on having had a great deal to do with producing this favorable decision. The teach-ins, speak-outs, picket lines, demonstrations, lobbying and class-action suits had paid off handsomely. The secret to success had been the change from the futility of ladylike lobbying efforts in legislative committee rooms to dramatic, direct-action tactics which demonstrated the strength of public opinion in favor of legal change and also helped give women, singly and in groups, courage to bring the problem out into the open.¹³⁷

There were a number of other side effects resulting from the decision. There had already been concern about the use of fetuses for medical research, and this concern was heightened by the prospect of a larger number of abortions. Although fetuses from abortions performed in the United States have rarely been used, researchers have gone to other countries, Finland for example, to experiment on fetuses obtained there. After the Supreme Court's decision, the National Institutes of Health began to work on guidelines which would limit the kinds of research possible on live, aborted fetuses. These included the forbidding of research on viable fetuses, or any of a certain size, or the keeping of a fetus alive by artificial means, for experimentation.¹³⁸ The fear that aborted fetuses would be subject to improper experimentation, as well as distaste at the very idea of experimentation, led Congress to accept as a rider to a federally-funded medical research bill the proviso that no funds would be used for any

¹³³ *Id.* See *Byrn v. New York City Health and Hospitals Corp.* (appeal dismissed) 73 S.Ct. 1414 (1973).

¹³⁴ FACTS ON FILE, Apr. 16, 1973, 314 B 3.

¹³⁵ Mackensie, *Court Limits Right to Abortion*, Wash. Post, June 5, 1973.

¹³⁶ Mutnick & La Mont, *The Meaning of the Supreme Court Decision*, WONAAC (Women's National Abortion Action Coalition) Newsletter, Feb.-Mar., 1973, at 3.

¹³⁷ WONAAC Newsletter, Feb.-Mar., 1973, at 6. This newsletter is published in New York City.

¹³⁸ Cohn, *Scientists and Fetus Research*, Wash. Post, Apr. 15, 1973.

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research on a live fetus.¹³⁹

Other dimensions of the impact of this decision were not immediately evident. It was impossible to tell how many abortions would now take place or what effect they might have on population growth, feminine health, the number of babies available for adoption, or other matters. It was, however, interesting to note that some of the Eastern European countries which had allowed abortion on demand were reinstituting controls because of a declining birth rate and because medical evidence seemed to indicate that previous abortions caused some women to deliver prematurely when they later decided to have children. Although obviously there exists a different situation with sparsely populated Bulgaria than with more populous nations, that Eastern European country had recently put restrictions on its liberal abortion policy, allowing abortions only within the first ten weeks, to women with two or more children, or unmarried women under 18. Over 18, unmarried women would not be allowed to terminate a pregnancy except for grave illness.¹⁴⁰ Romania had also recently changed its abortion laws, instituting a more restrictive policy. In Yugoslavia and Hungary, liberal abortion policies were causing abortions to outnumber live births. In Czechoslovakia, Poland and Bulgaria there was only a slight percentage of live births over abortions.¹⁴¹ In many of these countries, however, birth control methods other than abortion were non-existent.

Another country, Japan, was beginning to worry about the 700,000 abortions performed annually for "economic reasons," though this worry seemed to stem from a fear of a worker shortage. The Japanese population was still growing in spite of the large numbers of abortions. In Japan, as in Eastern Europe, abortion frequently took the place of other birth control measures, which were not readily available. In Japan, also, the government had certain policy objectives; its goal was "stabilizing the net reproduction of females" to one daughter per mother.¹⁴²

In the United States, even before the Supreme Court's decision had any impact, the birth rate seemed to be slowing, with both birth and fertility rates dropping to a new low. The drop seemed to be substantially the result of the lower fertility rates, births per thousand women in the 15-44 age group. Population stabilization due to this factor was undependable, however, because these women might decide, unpredictably, to have more babies at any time. Nor were population totals at a complete standstill, in spite of the falling off of the birth rate; an estimated current population of 208.7 million was due to reach 251-300 million by the year 2000.¹⁴³

¹³⁹ Lyons, *President Rebuffed on Health*, Wash. Post, July 1, 1973.

¹⁴⁰ Morgan, *Bulgaria Restricts Abortions*, Wash. Post, May 5, 1973.

¹⁴¹ *Id.*

¹⁴² World Environment Newsletter, WORLD 12/5/72, Dec. 5, 1972, at 50.

¹⁴³ The News and Observer (Raleigh, N.C.), May 4, 1973.

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The full impact of the Supreme Court's decision was yet to be felt. Strong Roman Catholic opposition could still keep a liberal abortion policy from being implemented on a practical level. The effect on the birth rate and other social effects would not be felt for several years. Closing the gap between practice and legal rules could only have good effects in so far as respect for the law, the burdens on law enforcement officers, and the decline in illegal operations were involved. It seems likely, however, that on an issue such as this, in which complex and controversial questions of public and private morality, religious conviction and constitutional rights are bound up with far-reaching legal and political considerations, it will be some time before the returns are all in.