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THE RIGHT TO ABORTION: EXPANSION OF THE RIGHT TO PRIVACY THROUGH THE FOURTEENTH AMENDMENT*

With unexpected definitude and surprising solidarity,¹ the Supreme Court of the United States has nullified almost every state restriction on abortion performed in the first trimester of pregnancy. In *Roe v. Wade*,² the Court struck down a Texas statute which permitted abortions only when the life of the mother was in danger.³ The Court held that: (1) during the first trimester of pregnancy the abortion decision must be made solely by mother and physician, (2) between the first trimester and fetal viability, the state may impose only those restrictions which safeguard the mother's health, and (3) when viability occurs (approximately in the seventh month of fetal development) the state may balance the competing interests of mother and unborn child, and may ban abortions unless the health of the mother is impaired.⁴

In the companion case of *Doe v. Bolton*,⁵ the Court's mandate was further delineated. In striking down Georgia's version of the American Law Institute's abortion law,⁶ the Court added: (4) the physician must be enti-

* This article is a student work prepared by David Goldenberg, a member of the ST. JOHN'S LAW REVIEW and the St. Thomas More Institute for Legal Research.

¹ The 7-2 margin and the force of the ruling were not anticipated by many "court watchers." See TIME, Feb. 5, 1973, at 50-51.

² 93 S. Ct. 705 (1973).

³ *Id.* at 732-33.

⁴ *Id.* at 732.

⁵ 93 S. Ct. 739 (1973).

⁶ MODEL PENAL CODE § 230.3 (Proposed Official Draft, 1962) allows abortion if the health of the pregnant woman is seriously endangered, if the child will be born with serious defects, or if the pregnancy resulted from felonious intercourse. Georgia's adaptation, GA. CODE ANN. § 26-1202 (1972), imposes additional requirements: the physician proposing abortion needs concurrence from two other physicians; the ultimate decision then needs approval of a hospital commission of specifically designated hospitals.

tled to act on his own independent medical judgment if he so chooses, and (5) a state may not impose a residency requirement on any patient who seeks an abortion.⁷ At the foundation of the Court's decision was an enlargement of the right to privacy which, in the words of Justice Blackmun, author of the majority opinion, is "founded in the fourteenth amendment's concept of personal liberty" and "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."⁸ In this apparent revitalization of the concept of substantive due process,⁹ the Court has fulfilled the hopes of many citizens, brought agony into the hearts of many others and has added an indelible leaf to our national history.

THE HISTORY OF THE ABORTION CONTROVERSY

Any analysis of the legal battles which foreshadowed the Supreme Court abortion ruling quickly leads one to the landmark case of *Griswold v. Connecticut*.¹⁰ In *Griswold*, the Court held that there is a fundamental right to marital privacy inferentially guaranteed by a protective penumbra created by the Bill of Rights. The Connecticut statute banning the use of contraceptives was found to intrude upon the zone of privacy and was therefore unconstitutional.¹¹ Justice Goldberg, concurring, found that a right of marital privacy existed in the much ignored and almost forgotten¹² ninth amendment: "as the Ninth Amendment expressly recognizes, there are fundamental rights such as this one, which are protected from abridgment by the Government, though not specifically mentioned in the Constitution."¹³ In both the majority and concurring opinions this right to marital privacy was apparently made applicable to the states through the fourteenth amendment.¹⁴

Once the decisional right of a family to prevent the conception of children was firmly established, it was only to be a matter of time before

⁷ 93 S. Ct. at 751-52.

⁸ *Id.* at 727.

⁹ Justice Stewart, in a concurring opinion, felt that substantive due process had been squelched by *Ferguson v. Skrupa*, 372 U.S. 726 (1963). 93 S. Ct. at 733-34. See note 113 *infra*.

¹⁰ 381 U.S. 479 (1965).

¹¹ *Id.* at 485. The Court was not disputing the state's right to control the sale of contraceptives. The Court said that the law could not remain when tested by the principle "that a 'governmental purpose to control or prevent activities, constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protective freedoms.'" *Id.* at 485, citing *NAACP v. Alabama*, 377 U.S. 288, 307 (1964). See *Eisenstadt v. Baird*, 408 U.S. 438 (1972).

¹² The possible use of the ninth amendment in this Supreme Court ruling is discussed at note 126 *infra*.

¹³ 381 U.S. at 495-96.

¹⁴ Only the concurring opinion of Justice Goldberg examines the relative roles of the Bill of Rights and the fourteenth amendment in the process of isolating and applying fundamental freedoms. *Id.* at 493.

the right to prevent childbirth after conception was propounded. The nexus between the *Griswold* opinion and the issue of abortion was cogently stated by Judge Gessel in *United States v. Vuitch*:¹⁵

There has been . . . an increasing indication in decisions of the Supreme Court. . . [that] as a secular matter a woman's liberty and right of privacy extends to family marriage and sex matters and may well include the right to remove an unwanted child at least in the early stages of pregnancy.¹⁶

But, although it was alleged that a woman had a constitutional right not to bear children, the Court ultimately substantiated an attack on a District of Columbia abortion statute primarily on grounds of vagueness.¹⁷

In reversing Judge Gessel's decision,¹⁸ the Supreme Court ignored the opportunity to apply the *Griswold* logic to the lower court decision in *Vuitch*. They chose not to confront the issue of a possible right to abortion raised essentially as dicta in the court below. And while the Court did liberalize the abortion law of the District of Columbia, it was accomplished by giving a very broad meaning to the word "health."¹⁹ It was the physician who benefitted primarily since his criminal liability under the statute was now more clearly defined. An ancillary benefit was extended to women seeking abortions, however, since they doubtlessly would find more physicians willing to perform them.

At this juncture came a rapid procession of cases challenging state abortion laws. The facts of the individual cases are often indistinguishable. The cases involved physicians seeking clarification of their potential criminal liability while contesting the right of the state to limit their professional discretion, or pregnant women alleging that a state law deprived them of a fundamental right to terminate an unwanted pregnancy. Often, women and physicians joined as plaintiffs combining these three aspects of what is essentially a single issue—is there a fundamental right to abor-

¹⁵ 305 F. Supp. 1032, 1035 (D.D.C. 1969), *rev'd*, 402 U.S. 62 (1971). At issue here was the validity of a statute, D.C. CODE ANN. § 22-201 (1967), which permitted abortions only "where done as necessary for preservation of the mother's life or health. . . ." The district court found that the word "health" was too vague to provide adequate warning to a physician as to when his performance of an abortion would subject him to criminal penalties; the statute was therefore in contravention of the fifth amendment. 305 F. Supp. at 1034.

¹⁶ 305 F. Supp. at 1033. See *Leary v. United States*, 395 U.S. 6 (1969); *United States v. Gainey*, 380 U.S. 63 (1965).

¹⁷ See note 15 *supra*.

¹⁸ 402 U.S. 62 (1971).

¹⁹ The Court, hesitant to unnecessarily direct itself to the abortion issue per se, said that "statutes should be construed, wherever possible, so as to uphold their constitutionality." 402 U.S. at 70. In essence, the Court found the statute to mean that only those abortions that serve no purpose of preserving the mother's health (physical or emotional) would be illegal. The Court felt that such an approach provided ample certainty for everyone. *Id.* at 71-73. See *Doe v. General Hosp.*, 313 F. Supp. 1170 (D.D.C. 1970), *motion for summary reversal denied*, 434 F.2d 423 (D.C. Cir. 1970).

tion? The *Vuitch* decision helped to plot the two main trajectories for the subsequent assaults on state abortion laws. First was the "void for vagueness" argument pursued in *People v. Belous*,²⁰ where the court found that the statutory term "necessary to preserve the mother's life" was unconstitutionally vague. The court raised hypothetical questions which they felt the California law on abortion had not answered. For example, if an unwanted pregnancy produced suicidal tendencies in a mother, was she then entitled to an abortion?²¹ A federal district court in *Doe v. Scott*²² also held that a law of this nature was unconstitutional. But in *Babbitz v. McCann*,²³ the court found the words "necessary to save the life of the mother," embodied in the Wisconsin statute to be reasonably clear.²⁴ Similarly, a New Jersey State Court upheld the constitutionality of its abortion statute.²⁵

But the question of vagueness did not strike at the heart of the abortion issue. Statutes stricken for vagueness could always be reworded.²⁶ The primary issue, the nature of a woman's right to an abortion, was generally left unanswered in this line of inquiry. In his dissenting opinion in *Scott* Judge Campbell made the salient point—"in the rather forced game of semantics. . . [discussions of vagueness are] merely a convenient vehicle."²⁷

By the nineteen-seventies, the pro-abortion advocates found that a more definitive approach was available in a second line of attack—the assertion that every woman has a constitutionally protected right to receive an abortion. In *Babbitz*, the very court that found the state abortion statute constitutionally clear in its meaning rendered a declaratory judgment to the effect that the Wisconsin statute, severely restricting abortions, was an invasion of a woman's right to privacy in early pregnancy.²⁸ In *Abele v. Markle*,²⁹ a similar decision held that a woman must be granted

²⁰ 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

²¹ *Id.* at 963, 458 P.2d at 204, 80 Cal. Rptr. at 364.

²² 321 F. Supp. 1385 (N.D. Ill. 1971).

²³ 310 F. Supp. 293 (E.D. Wis.), *appeal dismissed*, 400 U.S. 1 (1970), *vacated*, 402 U.S. 903 (1971).

²⁴ 310 F. Supp. at 297.

²⁵ *State v. Moretti*, 52 N.J. 182, 191, 244 A.2d 499, 504, *cert. denied*, 393 U.S. 952 (1968). *Contra*, *YWCA v. Kugler*, 342 F. Supp. 1048 (D.N.J. 1972).

²⁶ *See, e.g.*, Therapeutic Abortion Act, CAL. HEALTH & SAFETY CODE § 25950 *et seq.* (West 1972).

²⁷ 321 F. Supp. at 1392. The "void for vagueness" approach has been characterized as a buffer zone for introduction of the proposition that family planning, even if achieved through abortion, is a constitutionally protected right. 45 NOTRE DAME LAW. 329, 334 (1970).

²⁸ 310 F. Supp. at 302.

²⁹ 342 F. Supp. 800 (D. Conn. 1972), *appeal pending*, 409 U.S. 908 (1972). *See State v. Barquet*, 262 S.2d 431 (Fla. 1972); *People v. Barksdale*, 18 Cal. App. 3d 813, 96 Cal. Rptr. 265 (1971).

the power to determine, within an appropriate time after conception, whether or not she wishes to bear a child. But forceful holdings to the contrary were not uncommon. In *Steinberg v. Brown*³⁰ and *Rosen v. Louisiana Board of Medical Examiners*,³¹ the courts found that to whatever degree the right to abortion existed, since it was *in no case a fundamental right*, the state's interest in prenatal life justified the maintenance of restrictive abortion statutes.

As the confusion and inconsistency of both state and federal court rulings mounted, the Supreme Court of the United States decided to review two of the growing number of abortion rulings.³² The need for clarification was manifest.

Wade was chosen as a representative interpretation of the majority of state abortion laws which precluded abortion except when the life of the woman was imperiled. A district court had previously declared the Texas statute "void for vagueness and overbreadth" while acknowledging that a woman had a ninth amendment right to terminate her pregnancy. But injunctive relief was denied.³³ *Bolton* was chosen as exemplifying cases which decided the meaning of the less restrictive abortion statutes patterned after the American Law Institute model.³⁴ A district court had found that the Georgia statute, with its precise abortion approval and hospital accreditation requirements,³⁵ could validly regulate "the quality of decision" on which the abortion was based, but could not limit the reasons for which an abortion was performed. Here, injunctive relief was also denied.³⁶ Thus, the Supreme Court assumed the unenviable task of resolving "the issue by constitutional measurement free of emotion and predilection."³⁷

ROE V. WADE

The Texas federal appeal to the Supreme Court continued a four-plaintiff constitutional challenge to the Texas abortion statute. After examining the procedural aspects of standing and the requirement of a justiciable controversy, it was decided that both Dr. Hallford, an intervening

³⁰ 321 F. Supp. 741 (N.D. Ohio 1970).

³¹ 318 F. Supp. 1217 (E.D. La. 1970). See *Crossen v. Attorney Gen.*, 344 F. Supp. 587 (E.D. Ky. 1972); *Cheaney v. Indiana*, ___ Ind. ___, 285 N.E.2d 265 (1972); *Corkey v. Edwards*, 322 F. Supp. 1248 (W.D.N.C. 1971), *appeal pending*, 409 U.S. 975 (1972).

³² 28 U.S.C. § 1253 (1970) allows a direct appeal from a district court to the Supreme Court when injunctive relief is denied by a three-judge panel.

³³ 314 F. Supp. 1217, 1222-23 (N.D. Tex. 1970).

³⁴ See note 6 *supra*.

³⁵ *Id.*

³⁶ *Doe v. Bolton*, 319 F. Supp. 1048, 1055-57 (N.D. Ga. 1970).

³⁷ 93 S. Ct. at 709.

plaintiff physician,³⁸ and the Does, a married couple, did not have the requisite standing.³⁹ Jane Roe did have standing and would be heard by the Court.⁴⁰ The Court was now ready to begin a delicate and difficult endeavor. The nature of the task was readily appreciable:

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitude 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.⁴¹

To buttress its ultimate opinion, the Court traced the history of attitudes toward abortion back through centuries of civilization. The Court found that in ancient Greece and Rome, neither law nor religion proscribed abortion.⁴² The revered Hippocratic oath, under which a physician apparently swore not to perform an abortion procedure,⁴³ was re-examined. It was determined that the oath was, from its inception, unrepresentative of the ethics of many medical practitioners, and should not be viewed today as a standard by which to judge the morality of abortion.⁴⁴ A thorough appraisal of the contradictory records of early common law led the Court to conclude that it was "doubtful that abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus."⁴⁵

³⁸ Dr. Hallford's complaint was dismissed based on the doctrine of non-interference; Dr. Hallford was faced with pending state criminal action for violating the Texas abortion law. 93 S. Ct. 713. See *Samuels v. Mackell*, 401 U.S. 66 (1971).

³⁹ The Does were a married couple. Mrs. Doe feared that if she became pregnant she would be denied an abortion. Their complaint was too remote and lacked sufficient controversy. 93 S. Ct. at 714-15. See *Younger v. Harris*, 401 U.S. 37 (1971).

⁴⁰ Although Jane Roe was no longer pregnant, her cause was deemed to contain sufficient controversy. "[T]he normal 266 day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. It was sufficient that she was pregnant when the lower court proceedings were instituted." 93 S. Ct. at 713. See *Flast v. Cohen*, 392 U.S. 83 (1968).

⁴¹ 93 S. Ct. at 708.

⁴² *Id.* at 715, citing L. EDELSTEIN, *THE HIPPOCRATIC OATH* 10 (1943). But see A. CASTIGLIONI, *A HISTORY OF MEDICINE* 84 (2d ed. E. Krumbhaar transl. 1947).

⁴³ The Court relied on the following translation of the oath which says in pertinent part: "I will give no deadly medicine to anyone. . . . I will not give to a woman a pessary to produce an abortion. . . . I will not give a woman an abortive remedy." 93 S. Ct. at 716.

⁴⁴ The Court implied that only physicians who followed the tenets of Pythagoras abided by the oath strictly. *Id.* at 716, citing L. EDELSTEIN, *THE HIPPOCRATIC OATH* 12, 15-18 (1943). Even when ancient civilizations proscribed abortion, it was not necessarily in the interest of protecting fetal rights. The Assyrians, for example, banned abortion to foster population growth. 1 W. DURANT, *THE HISTORY OF CIVILIZATION* 275 (1954).

⁴⁵ 93 S. Ct. at 718. See R. PERRINS, *CRIMINAL LAW* 101 (1957).

Broadly speaking, the early American law was patterned after English common law until the early 1800's, when the enactment of abortion statutes began.⁴⁶ Distinctions were drawn between mothers "quick with child"⁴⁷ and those whose pregnancies were in earlier stages.⁴⁸ Heavier criminal penalties were imposed in the former instance, although some early statutes carried no penalty for aborting an unquickened fetus.⁴⁹ At the same time, the concept of therapeutic abortions (those necessary to save the life of the mother) was developed.⁵⁰ After the Civil War, statutory law supplanted most common law, and the quickening distinction gradually disappeared.⁵¹ As a general rule, abortions were allowed only to save the life of the mother.⁵² Most of the statutes enacted in the latter half of the nineteenth century have remained basically unchanged.⁵³ However, some jurisdictions, most often through adoption of the American Law Institute's model abortion law, allowed abortions when the mother's health was threatened, when the fetus would be born with a grave physical defect, or when pregnancy resulted from rape or incest.⁵⁴

The crux of the Court's analysis revealed that until relatively recent times "a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today."⁵⁵ With this historical background, the Court was now prepared to determine whether or not there was a legal right to abortion. The Court found that there was such a right embraced within an ever growing right to privacy.⁵⁶

THE HISTORY OF THE RIGHT TO PRIVACY

The concept of the right of privacy is not expressly considered in the Constitution.⁵⁷ It has only been through judicial interpretation that the right has emerged, essentially starting at the end of the nineteenth century. Many legal concepts have been employed in the development of this right, unified mainly by an underlying philosophy that an individual

⁴⁶ 93 S. Ct. at 719-20.

⁴⁷ The quickening stage occurs when fetal movement, such as kicking, is noticed by the mother. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1145 (23d ed. 1964).

⁴⁸ 93 S. Ct. at 719.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ 93 S. Ct. at 720.

⁵² *Id.*

⁵³ Texas and 30 other states have maintained the most restrictive view. 93 S. Ct. at 709 & n.2.

⁵⁴ A total of 14 states have patterned their laws after the A.L.I. model. *Id.* at 720 n.37.

⁵⁵ *Id.* at 720. Apparently, physicians themselves have been instrumental in initiating and maintaining the strict view toward abortion. *Id.* at 721-22.

⁵⁶ See note 8 and accompanying text *supra*.

⁵⁷ 93 S. Ct. at 726.

should lead his life as free from government intrusion as possible.⁵⁸ But it cannot be said that a consistent method of constitutional analysis has been used.

In the first significant case in this broad area, *Boyd v. United States*,⁵⁹ the fourth and fifth amendments were held to shield a defendant from being forced to turn over his *private* papers to the government, where a criminal action had been instituted against him.⁶⁰ And a few years later, the Court found a common law right “of every individual to the possession and control of his own person. . . [subject only to] unquestionable authority of law.”⁶¹ Subsequently, the Court in *Meyer v. Nebraska*,⁶² struck down a state statute which banned the teaching of modern foreign languages in grammar schools. Although the opinion focused on aspects of equal protection under the fourteenth amendment⁶³ and of a teacher’s fourteenth amendment “liberty” to pursue his vocation, which could not be denied without due process,⁶⁴ the Court impliedly created a right of privacy or liberty (independent of any specific reference to the Bill of Rights) within the family unit, in which a parent could decide the educational course of his child.⁶⁵ The Court made no further attempt to define this evasive concept of liberty, but did strongly affirm that it could not be denied without due process.⁶⁶

Cases in the nineteen-sixties further extended the parameters of the right of privacy. In *Stanley v. Georgia*,⁶⁷ a defendant had been convicted of private possession of obscene materials. The Court held that first amendment rights, made applicable to the states through their embodi-

⁵⁸ See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting):

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the Government the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Id.

⁵⁹ 116 U.S. 616 (1886).

⁶⁰ *Id.* at 632 (emphasis added). The Court applied fourth amendment protection from illegal search and seizure and fifth amendment protection from self-incrimination. Thus, between these two amendments, a small zone of privacy was created.

⁶¹ *Union Pacific R.R. v. Botsford*, 141 U.S. 250, 251 (1891). In *Botsford*, plaintiff in a negligence suit had refused to submit to a medical examination. The Court sustained her right to do so. However, the Court did not specify what area of the Constitution gave rise to this zone of privacy.

⁶² 262 U.S. 390 (1923).

⁶³ *Id.* at 399.

⁶⁴ *Id.*

⁶⁵ *Id.* at 400.

⁶⁶ *Id.* See *New York Life Ins. Co. v. Dodge*, 246 U.S. 357, 374-75 (1918); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

⁶⁷ 394 U.S. 557 (1969).

ment in the fourteenth amendment concept of liberty, prevented a state from encroaching upon the basic right of privacy which allowed a person to keep obscene materials in his home.⁶⁸ Lurking in the background was the "rational basis test:"⁶⁹ the state could not validate its claim that there was a causal relation between obscenity and sexually deviant practices which the state was seeking to prevent. The lack of rational relation proved fatal to the law; it was rendered arbitrary and violative of fourteenth amendment due process.⁷⁰

Other aspects of a right to privacy developed from the Court's review of illegal searches and seizures. It was held that the fourth amendment protects the privacy of people and not merely places.⁷¹ This basic right of privacy was soon made applicable to the states through the fourteenth amendment.⁷²

But merely establishing that a right of privacy did unquestionably exist did not give the Court sufficient ground to extend it into the realm of abortion. Any right, if it is to be contained in the fourteenth amendment concept of "liberty" (the tenet upon which the Court based its holding in *Wade*, must be "fundamental."⁷³ However, beginning with the private right to educate one's child, established in *Meyer*,⁷⁴ a growing number of family, marital, and sexual decisions have been held to fall within the realm of an individual's right to privacy. Among these were the right to interracial marriage,⁷⁵ to procreation,⁷⁶ and to the use of contraceptives.⁷⁷ In the light of this trend, the decision to terminate a pregnancy was, at least, a logical question for consideration.⁷⁸ And, as previously stated, the Court found that the right to this decision did exist. But the right to control

⁶⁸ *Id.* at 564-65.

⁶⁹ See note 64 *supra*.

⁷⁰ 394 U.S. at 566-67.

⁷¹ *Katz v. United States*, 289 U.S. 347, 351 (1967). See *Mapp v. Ohio*, 367 U.S. 643, 646-47 (1961).

⁷² *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968). Again, it was held that the state needed strong rational justification before it could intrude into a citizen's zone of privacy. Any encroachment upon fourth amendment rights must be substantiated as a reasonable interference. *Id.* at 19.

⁷³ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

⁷⁴ See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

⁷⁵ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁷⁶ *Skinner v. Oklahoma*, 316 U.S. 535 (1942). *But cf.* *Buck v. Bell*, 274 U.S. 200 (1927).

⁷⁷ *Eisenstadt v. Baird*, 408 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁷⁸ In *Doe v. Scott*, 321 F. Supp. 1385, 1389 (N.D. Ill. 1971), the court reasoned that with regard to a state abortion law the interests of the plaintiffs were the same as in *Griswold*, and that the protection sought was fundamentally related to an individual's privacy. But dissenting Judge Campbell thought that the *Griswold* reference was illogical and that the comparison was ludicrous. He emphasized that contraception prevents life, whereas abortion destroys it. *Id.* at 1396.

one's body has never been absolute.⁷⁹ At this point the Court needed to consider the state's interest in limiting this right.

When the proliferation of restrictive state abortion statutes was initiated after the Civil War, it was clear that one primary aspect of legislative intent was the protection of the woman's health; but after the improvement of surgical techniques and the development of antibiotics, first trimester abortion posed no greater risk than did childbirth.⁸⁰ "Thus, the State retains a definite interest in protecting the woman's own health and safety [only] when an abortion is proposed at a late stage of pregnancy."⁸¹

The remaining and more difficult problem was to determine the state's interest in protecting fetal life.⁸² The Court said:

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.⁸³

However, by inverse logic, the Court, relying on what they considered convincing scientific evidence, determined that, in any event, life did *not* begin before viability.⁸⁴

Having accepted this premise, the Court had only to resolve the issue of the state's interest in protecting viable or potential life.⁸⁵ In a radical

⁷⁹ *Buck v. Bell*, 274 U.S. 200 (1927) (forced sterilization may be justified to protect a strong state interest); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (a citizen cannot refuse a smallpox vaccination if community health is at stake).

⁸⁰ 93 S. Ct. at 725. But this safety may be less secure than the Court admits. The Court has lifted all restrictions on abortion within the first trimester, leaving the decision solely in the hands of the woman and her physician. Yet "the now established medical fact of safety during this period" that the Court considers, is based upon the "data, experience and safety record" achieved in New York City where "strict regulation" was in effect. *New York Times*, Mar. 19, 1973, at 32, col. 5-6.

⁸¹ 93 S. Ct. at 725.

⁸² Numerous commentators attempted to presage the Court's decision on this point. One of the most incisive is the following:

Since there are . . . seemingly unresolvable moral issues involved in declaring the fetus or embryo a human being, it is doubtful that there will be any mass legal recognition of the unborn's right to life. Without such recognition, any state . . . denying a woman an abortion during the early stages of pregnancy, would . . . be placing the interests of a legally non-human entity above the constitutional rights of a woman.

45 *NOTRE DAME LAW*. 329, 339 (1970).

⁸³ 93 S. Ct. at 730.

⁸⁴ *Id.* at 730-31. Viability is the stage at which a fetus can survive outside the uterus. *DORLAND'S ILLUSTRATED MEDICAL DICTIONARY* 1528 (23d ed. 1964).

⁸⁵ The Court sought both to avoid specifying a point at which life began and to establish a stage at which the state could claim an interest in the development of the unborn:

[A] legitimate state interest in this area need not stand or fall on acceptance of the

departure from past application of the fourteenth amendment, the Court proposed that a "compelling interest test" be applied to a due process concept of liberty.⁸⁶ Prior fourteenth amendment tests may be summarized as follows. The fourteenth amendment has two key protective provisions.⁸⁷ One is equal protection. If a class of citizens is to be discriminated against under the law, there must be a rational basis for doing so. For example, if a repeated criminal offender is subject to greater penalties for the same crime than is a first offender, the state can justify this discrimination on the ground that the former poses a greater threat to society than the latter.⁸⁸ But if in its discriminatory classification the state purports to deny a citizen a fundamental right, such as the right to vote, then the state's actions will be more carefully scrutinized. To justify this discrimination the state must advance a compelling interest; mere rational relationship between the goal of the statute and its effects will not be sufficient.⁸⁹

The other protection is afforded by the due process clause. In the past, when a state has attempted to deprive a citizen of life, liberty or the pursuit of happiness, it had to do so under a concept of due process. The law could not be arbitrary or capricious.⁹⁰ But in the past, states have not been called upon to show a compelling interest. In his dissent, Justice Rehnquist appeared greatly troubled by the majority's juxtaposition of criteria:

Unless I misapprehend the consequences of this transplanting of the "compelling state interest test," the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it.⁹¹

In his concurring opinion in *Bolton*, Justice Douglas echoes the majority view in *Wade*:

[This right is] fundamental and we have held that in order to support

belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the state may assert interests beyond the protection of the pregnant woman alone.

93 S. Ct. at 725.

⁸⁶ *Id.* at 731-32.

⁸⁷ U.S. CONST. amend. XIV, § 1 reads in pertinent part: ". . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

⁸⁸ See *People v. Finley*, 153 Cal. 59, 94 P. 248 (1908), *aff'd*, 222 U.S. 28 (1911), for an excellent example of this rationale.

⁸⁹ *Carrington v. Rash*, 380 U.S. 89, 96 (1965).

⁹⁰ *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957); *Palko v. Connecticut*, 302 U.S. 319, 327 (1937); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

⁹¹ 93 S. Ct. at 737.

legislative action, the statute must be narrowly and precisely drawn and that a “*compelling state interest*” must be shown in support of the limitation.⁹²

Analysis of these two opinions would seem to substantiate the criticism of Justice Rehnquist.⁹³ Nonetheless, the Court applied the compelling interest test to ascertain what areas of abortion control the states could legitimately enter.⁹⁴ Since potential life, according to the majority, is a factor only at the stage of viability, the state has no compelling interest in protecting fetal development before this point.⁹⁵

To support this view, the Court examined the Constitution and was convinced that its framers did not intend protection of the interests of the unborn and that the unborn fetus was not a person within the purview of the fourteenth amendment.⁹⁶ Most abortion laws, by their own terms, admitted that the fetus’ rights did not equal those of the mother.⁹⁷ Case law can be found in this area to substantiate the position that a fetus is *not* a person, and is without the accompanying right to life protected from government deprivation without due process.⁹⁸ But the Court admitted that “the pregnant woman cannot be isolated in her privacy.”⁹⁹ It went on to state:

⁹² *Id.* at 757 (emphasis added).

⁹³ Justice Douglas cites, for example, *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969), *Shapiro v. Thompson*, 394 U.S. 618 (1969), *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), to support his position. But *Kramer* held that a court must balance competing interests and must be especially rigid when discrimination may violate a fundamental right. 395 U.S. at 626. See *Williams v. Rhodes*, 393 U.S. 23 (1968). *Shapiro* held “any classification which serves to penalize the exercise of [the right to travel] unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.” 394 U.S. at 634 (emphasis added). *Sherbert* held that a state could not discriminate between religious groups. 374 U.S. at 404 (emphasis added). See *Thomas v. Collins*, 323 U.S. 516 (1943). In *Papachristou*, any relationship between due process and compelling interest was quite vague. See 405 U.S. at 164.

⁹⁴ 93 S. Ct. at 731-32.

⁹⁵ The Court noted that almost all uses of the word “person” had clear postnatal application. *Id.* at 729. But is this convincing? Surely, article II, section 1 of the Constitution, for example, which sets requirements for the office of President, could not be expected to have prenatal application.

⁹⁶ *Id.*

⁹⁷ The fact that all abortion laws *did* allow abortion in special cases shows that the fetus did not have an equal right to life. *Id.* at 729 n.54.

⁹⁸ *McGarvey v. Magee-Women’s Hosp.*, 340 F. Supp. 751 (W.D. Pa. 1972). The court held that there is no authority that the Constitution envisioned the protection of fetal life. Therefore, the unborn child was not a person protected by the fourteenth amendment. *Id.* at 753. *Byrn v. N.Y.C. Health and Hosp. Corp.*, 31 N.Y.2d 194, 203, 296 N.E.2d 887, 890, 335 N.Y.S.2d 390, 395 (1972). *Contra*, *Corkey v. Edwards*, 322 F. Supp. 1248, 1253-54: “the extent to which fetal life should be protected, is a value judgment . . . reposing in the legislative branch of government.”

⁹⁹ 93 S. Ct. at 730.

. . . it is reasonable and appropriate for a State to decide that at some point in time another interest . . . that of potential human life, becomes significantly involved.¹⁰⁰

And, as previously mentioned, the Court chose the stage of viability as the point of the state's compelling interest. Prior to that stage, since the fetus is at no time a person, the state cannot successfully demonstrate a compelling interest in its protection.

There is case law, however, which substantiates the notion that the state does, indeed, have a compelling interest in the developing fetus before viability. Over twenty-five years ago, tort law began to allow recovery by an unborn child for injuries suffered in the stage of viability.¹⁰¹ The rule was expanded to permit recovery for injury suffered in any period of gestation.¹⁰² Although a personal injury action is predicated on the child's live birth, the concept of recovery does confer some independent legal status upon the unborn. In some states, a wrongful death action may be maintained where pregnancy is terminated due to prenatal injury. In this area as well, the viability test has sometimes been discarded.¹⁰³ Property law has long recognized the rights of the unborn, making no distinction as to the stage of development. This recognition existed before the Constitution was written.¹⁰⁴ An argument can be made that, while no express mention was made in the Constitution of the rights of the unborn, this absence need not be conclusive. The Constitution embodies property rights and, since property law in turn recognizes rights in the unborn, it is possible to say that the Constitution does have application to fetal rights.

The Court, however, was not to be swayed. It felt that wrongful death actions existed to vindicate aggrieved parents; that the fact that perfection of most fetal interests was predicated on live birth supported a theory of "potential life" only; and "[i]n short, the unborn have never been recognized in the law as persons in the whole sense."¹⁰⁵ But since viability was a stage at which the fetus "has the capability of meaningful life outside the mother's womb," the state has a compelling interest in protecting this potential life if it does not interfere with the superior right of the mother to life or health.

¹⁰⁰ *Id.*

¹⁰¹ *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946).

¹⁰² *Kelly v. Gregory*, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953); *Von Elke v. Studebaker*, 12 Pa. D. & C. 2d 635 (1957).

¹⁰³ *Torigian v. Watertown News Co.*, 352 Mass. 446, 225 N.E.2d 926 (1967).

¹⁰⁴ *See, e.g., Doe v. Clark*, 126 Eng. Rep. 617 (C.P. 1795).

¹⁰⁵ 93 S. Ct. at 731. *But see* *Louisell, Abortion, The Practice of Medicine and Due Process of Law*, 16 U.C.L.A.L. Rev. 233, 234-35, 238 n.24 (1969); *In re Holthausen's Will*, 175 Misc. 1022, 26 N.Y.S.2d 140 (Surr. Ct. Kings County 1941).

SUBSTANTIVE DUE PROCESS

Justice Stewart, concurring in *Wade*, viewed the decision as a rebirth of substantive due process.¹⁰⁶ Substantive due process is, at best, a confusing area of the law.¹⁰⁷ Perhaps it is more readily understood by first examining broadly the various means by which fundamental rights have been held to be safeguarded from state intrusion.

The fourteenth amendment makes no reference to the Bill of Rights, which defines only the relationship between the federal government and the citizens of the United States. Thus, strictly construed, a state can deprive its citizens of a right specifically guaranteed therein. But through a long and intermittently applied process of "incorporation," the enumerated rights of the first eight amendments have been held to be implicit in the concept of "liberty," which the respective states may not withhold from their citizens without due process of law as provided in the fourteenth amendment.¹⁰⁸

Apparently, the Congress of 1789, when ratifying the Bill of Rights, rejected an amendment which would have made specific freedoms binding on the states.¹⁰⁹ *Barron v. Baltimore*¹¹⁰ held, without qualification, that the Bill of Rights did not apply to the states. This position was maintained long after the passage of the fourteenth amendment.¹¹¹ But in *Gitlow v. New York*,¹¹² the Court, in a landmark departure from its old philosophy, held that the first amendment freedom of the press was encompassed in the fourteenth amendment. Between the *Gitlow* decision, rendered in 1925, and today, almost every other guarantee in the Bill of Rights has been incorporated into the fourteenth amendment through a case-by-case method.¹¹³

Concurrent with the development of incorporation was the slow maturation of substantive due process under the fourteenth amendment. In one sense, incorporation could be viewed as a component of substantive due process. A law might violate due process because it arbitrarily restricted a guarantee of the Bill of Rights. But in another respect, a law might restrict an activity upon which the Bill of Rights is silent, but still violate due process if such activity could be considered inherent in the

¹⁰⁶ 93 S. Ct. at 734 (Stewart, J., concurring).

¹⁰⁷ *Id.* at 737 (Rehnquist, J., dissenting).

¹⁰⁸ H. ABRAHAM, *FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES* 51-62 (2d ed. 1972) (hereinafter cited as ABRAHAM).

¹⁰⁹ Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 434-35 (1926).

¹¹⁰ 32 U.S. (7 Pet.) 243 (1833).

¹¹¹ *See, e.g., Prudential Ins. Co. v. Cheek*, 259 U.S. 530 (1922).

¹¹² 268 U.S. 652 (1925).

¹¹³ *See, e.g., Benton v. Maryland*, 395 U.S. 784 (1969); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

concept of liberty. Thus, the due process clause may afford greater substantive rights than are afforded in the Bill of Rights.¹¹⁴

Substantive due process was first employed by the Court in *Allgeyer v. Louisiana*.¹¹⁵ Here a state statute which proscribed the purchase of insurance from an out-of-state company by a Louisiana resident was held to be unconstitutional. The Court found this statute to be arbitrarily restrictive as applied to a citizen attempting to make an economical purchase of insurance:

The liberty mentioned in . . . [the fourteenth] amendment means, not only the right of the citizen to be free from the mere physical restraint of his person. . . [but] . . . the right of the citizen to be free in the enjoyment of all his faculties.¹¹⁶

In *Twining v. New Jersey*,¹¹⁷ the Court added a further development to the definition of substantive due process under the fourteenth amendment:

It is possible that some of the personal rights safeguarded by the first eight amendments against National action may also be safeguarded against state action . . . not because those rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process of law.¹¹⁸

In its initial application to the states, the concept of substantive due process was limited in that it could not bestow new rights not contained under the aegis of the first eight amendments.¹¹⁹ But the concept of substantive due process became enlarged, especially in the area of economic legislation.¹²⁰ In what is sometimes regarded as an abuse of judicial power, the Court began a practice of striking down state statutes which regulated business activities, testing the economic wisdom of the state legislatures to see if their laws contained the fatal flaw of arbitrariness.¹²¹ At times, it appeared that a state statute was arbitrary if it conflicted with the social and economic philosophy of the Court.

This process was halted in the 1930's,¹²² however, when the courts apparently followed the advice offered in Justice Holmes' dissent in *Lochner v. New York*:

¹¹⁴ *Poe v. Ullman*, 367 U.S. 497, 516 (1961) (Douglas, J., dissenting).

¹¹⁵ 165 U.S. 578 (1897).

¹¹⁶ *Id.* at 589.

¹¹⁷ 211 U.S. 78 (1908).

¹¹⁸ *Id.* at 99.

¹¹⁹ *See Mobile & O. R.R. v. Tennessee*, 153 U.S. 486, 500 (1894).

¹²⁰ *See, e.g., Williams v. Standard Oil Co.*, 278 U.S. 235 (1929); *Adams v. Tanner*, 244 U.S. 590 (1917).

¹²¹ *ABRAHAM* at 8-11.

¹²² *Id.*

It [the Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.¹²³

Though relief has been continually sought by persons challenging restrictive economic statutes as denying substantive due process, the Court has been firm in refusing to intrude upon the economic philosophies of state legislatures.¹²⁴ And while civil rights have continued to grow under the incorporation doctrine,¹²⁵ the Court in *Wade* and *Bolton* has, for the first time in many years, decided an issue of fundamental liberty squarely within the doctrine of substantive due process.¹²⁶

THE RAMIFICATIONS OF THE ABORTION DECISION

Few Supreme Court decisions in the nation's history have been greeted with such intense and polarized¹²⁷ emotional response. Terence Cardinal Cooke felt that the Court was making "a tragic utilitarian judgment."¹²⁸ William Baird,¹²⁹ long in the forefront of the "liberalized" abortion movement, viewed the decision as "a triumph [giving women the] right to control their own bodies."¹³⁰ Although a firm national abortion standard¹³¹ has been created, abortion will remain "a lightning rod for intense national debate."¹³²

¹²³ 198 U.S. 45, 76 (1905).

¹²⁴ See *Seagram & Sons v. Hotstetter*, 384 U.S. 35 (1965); *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

¹²⁵ See, e.g., *Pointer v. Texas*, 380 U.S. 400 (1965).

¹²⁶ It has been argued that the ninth amendment is a more precise means by which to expand fundamental rights because it would honor the precept of construction that each part of a document be given full effect. Note, *Ninth Amendment Vindication of Unenumerated Fundamental Rights*, 42 *TEMPLE L.Q.* 46, 53 (1968). Conceivably, a right could be isolated in the ninth amendment and then incorporated through the fourteenth amendment. But Justice Stewart said in his concurring opinion in *Wade* that *Griswold* was, in essence, decided under the fourteenth amendment. 93 S. Ct. at 734. Justice Douglas, concurring in *Bolton*, felt that the ninth amendment "does not create federally enforceable rights." 93 S. Ct. at 757.

¹²⁷ A Gallup poll taken just before the Court's ruling revealed that 46 per cent of the nation felt that the question of first trimester abortion was one to be answered between mother and physician, while 45 per cent felt that it was to be answered by the state, and sharply regulated. *TIME*, Feb. 5, 1973, at 51.

¹²⁸ *Id.* at 50.

¹²⁹ Mr. Baird was a successful litigant in *Eisenstadt v. Baird*, 408 U.S. 438 (1972).

¹³⁰ *N.Y. Times*, Jan. 23, 1973, at 1, col. 2.

¹³¹ The Court did, however, leave the collateral issues of paternal consent and parental consent for minors for future decisions. 93 S. Ct. at 933 n.67.

¹³² *TIME*, Feb. 5, 1973, at 51. "We are not children and the Supreme Court is not our moral arbiter." Denegan, *The Supreme Court as Moral Arbiter*, *N.Y. Times*, Mar. 10, 1973, at 31, col. 2. "The believers in reproductive freedom all over the world can now point to the United

The impact of the Court's ruling may extend beyond the United States. The Court seems to have spurred the pro-abortion movement on an international level. West Germany has a century-old abortion law which unequivocally prohibits abortions, but recent court rulings have relaxed this ban where the mother's life was clearly in jeopardy.¹³³ And now there is a growing political battle being waged by the Social Democratic Party and the Free Democratic Party to legalize abortions performed in the first trimester.¹³⁴

Liberalization of Belgian abortion law has been forecast. The Belgium Society to Legalize Abortion has been gaining support in this predominantly Catholic country. Present Belgian law allows abortion only when childbirth clearly threatens a mother's health,¹³⁵ and if this standard is not met, both the physician and the mother are held criminally liable.¹³⁶

The growing movement to revamp abortion law in France has received significant global attention. French law also allows abortion only when the life of the mother is endangered,¹³⁷ and exposes physicians who perform illegal abortions to a 10 year jail sentence and heavy fines. Nonetheless, over 300 French physicians, to show their support for the movement, admitted publicly this year that they had performed illegal abortions. They issued a manifesto requesting abortion on demand, paid for by social insurance.¹³⁸ The doctors were joined by over 200 leading French citizens, including both Catholic and Protestant clergy, in a charter for liberalized abortion.¹³⁹

The trend toward liberalization is not universal, however. El Salvador has recently toughened its abortion laws by imposing harsher criminal

States Supreme Court's historic decision as proof that the defense of human rights is at the basis of their action." Servan-Schreiber, *France and the Abortion Struggle*, N.Y. Times, Mar. 10, 1973, at 31, Col. 2, 4.

¹³³ American Medical News, Feb. 19, 1973, at 2, col. 1.

¹³⁴ *Id.*

¹³⁵ *Id.* at col. 2.

¹³⁶ Physicians face maximum jail sentences of 20 years. Consenting mothers can be imprisoned for as many as five years. *Id.*

¹³⁷ American Medical News, Feb. 19, 1973, at 2, col. 2. As a result of this restraint, an estimated 350,000 to one million French women, unable to afford the expense of abortions in England or Holland, undergo illegal abortions. MED. WORLD NEWS, Mar. 2, 1973, at 4. The statistic is even more significant in light of the fact there are ten million women of child bearing age in France. Servan-Schreiber, *France and the Abortion Struggle*, N.Y. Times, Mar. 10, 1973, at 31, col. 2. If statistics form any basis for prediction, it would seem that Spain will soon foster growth of a pro-abortion faction although there are no overt signs that one has already started. As of 1971, it has been estimated that the number of abortions performed illegally in Spain has reached 18 per cent of live childbirths. Hospital Tribune, Feb. 19, 1973, at 6, col. 1.

¹³⁸ MEDICAL WORLD NEWS, Mar. 2, 1973, at 4.

¹³⁹ *Id.* at 5.

penalties. Physicians who abuse their professional status by performing illegal abortions can be imprisoned for twelve years. And now, women who consent to abortions can receive a four year sentence.¹⁴⁰

In the United States, however, the Court's mandate will have immediate as well as long range effects. Before the emotional turmoil subsides, the pragmatic impact will be felt by the individual, the family, the medical profession, and the law. The freedom to seek abortion will call for deep and long considered moral evaluations by many persons. Few Court edicts will have more influence upon daily life in this country than this ruling. With this freedom will come a new responsibility for millions of Americans, calling upon them to define and apply their religious and ethical values.

The states will also have to respond; no state abortion law has been left unaffected. Even the more liberal state statutes will have to be restructured to conform to the Court's ruling. Alaska and Hawaii now require that abortion patients be hospitalized.¹⁴¹ New York and the District of Columbia laws call for the licensing of out-patient abortion clinics performing first trimester abortions.¹⁴² These restrictions conflict with the holding in *Wade* that "[f]or the stage prior to approximately the end of the first trimester, the abortion decision and effectation must be left to the medical judgment of the pregnant woman's attending physician."¹⁴³ The states of Washington, Alaska and Hawaii have residency requirements¹⁴⁴ which are contradicted by the holding in *Bolton* which says that a state should not "limit to its own residents the general medical care available within its borders."¹⁴⁵ Although no state legislatures as yet have made any conforming changes, state courts and attorneys general in more than 12 states to date have stated that their own laws are invalid.¹⁴⁶

Physicians will play an important role in the acceptance and implementation of this sweeping reform. Despite the specificity of the *Wade* and *Bolton* rules, many new problems will have to be solved. For example, physicians must now grapple with ethical problems accompanying the procedure of amniocentesis.¹⁴⁷ Commercial amniocentesis clinics are antici-

¹⁴⁰ American Med. News, Feb. 19, 1973, at 2, col. 2.

¹⁴¹ MED. WORLD NEWS, Feb. 9, 1973, at 2-3.

¹⁴² *Id.* at 3.

¹⁴³ 93 S. Ct. at 732.

¹⁴⁴ MED. WORLD NEWS, Feb. 9, 1973, at 3.

¹⁴⁵ 93 S. Ct. at 751-52.

¹⁴⁶ N.Y. Times, Mar. 19, 1973, at 32, col. 5. However, many citizens of these states apparently view state legislative reaction as a formality not worth waiting for. Abortion clinics in Detroit began receiving patients within 24 hours after the Supreme Court decision. The Planned Parenthood Federation has launched plans for clinics on a nationwide basis. TIME, Feb. 5, 1973, at 50.

¹⁴⁷ Amniocentesis is a method of withdrawing fluid from the amnion, which surrounds the fetus. Examination of this fluid can determine the unborn fetus' genetic characteristics, including a determination of sex, as well as possible congenital defects.

pated—where parents will be able to learn the sex of their unborn offspring. Some experts feel that, with the liberalization of abortion laws, parents may decide to abort the fetus if it is not of the sex that they had hoped for.¹⁴⁸ The question was posed at the 1973 Jerusalem Chromosome Conference: “Does the medical profession or any other have the right, legal or ethical, to interfere with the sex selection by the parents?”¹⁴⁹ No answer was reached. Some physicians feel that amniocentesis may, however, if performed, give incentive to a mother to maintain her pregnancy where, were it denied, she might choose to terminate the pregnancy rather than chance bearing a child unwanted because of its sex.¹⁵⁰ It is quite likely that this area will require future litigation.

Hospitals are, of course, an integral part of any meaningful freedom to procure an abortion. The Court’s decision has raised the issue of the legal status of a hospital refusing to perform an abortion. The Office of Legal Affairs of the American Hospitals Association has taken the position that hospitals (as well as physicians) are not compelled to participate in abortions which are not performed to preserve the mother’s health.¹⁵¹ This position seems sound in light of the statement in *Wade* that “the abortion decision in all its aspects is inherently and primarily a medical decision, and basic responsibility for it must rest with the physician.”¹⁵² But the legal answer is uncertain where it is alleged that the mother’s health, either physical or emotional, is involved.¹⁵³ The constitutional questions may be compounded in the case of a hospital which is receiving government funds.

Most Roman Catholic hospitals have announced that they will maintain their past position—abortions will not be performed.¹⁵⁴ But some Catholic leaders have called for the federal government to designate certain areas of Catholic hospitals as government property, and to assume full responsibility for any abortion procedure if abortions are to be performed within the walls of a Catholic hospital.¹⁵⁵ Such a plan might be a practical

¹⁴⁸ Hospital Tribune, Feb. 26, 1973, at 2, col. 1.

¹⁴⁹ *Id.*

¹⁵⁰ Hospital Tribune, Mar. 12, 1973, at 4, col. 1. Apparently, not all physicians place faith in Justice Burger’s statement in *Wade* that “the Court . . . rejects any claim that the Constitution requires abortion on demand.” 93 S. Ct. at 756 (concurring opinion).

¹⁵¹ American Medical News, Feb. 12, 1973, at 3, col. 1.

¹⁵² 93 S. Ct. at 733.

¹⁵³ See American Medical News, Feb. 12, 1973, at 3, col. 1.

¹⁵⁴ *Id.*

¹⁵⁵ American Medical News, Mar. 12, 1973, at 2, col. 1. Military hospitals will also be feeling the impact of the decision. Medical personnel have anticipated a marked increase in requests for abortions in naval medical facilities. The Navy intends to be guided by state law for hospitals based in the United States. However, in overseas areas, they will continue to delegate decision making authority to area commanders, who, in the past, have made their own decisions on a nation by nation basis. American Medical News, Feb. 19, 1973, at 2, col. 1.

compromise where an isolated rural area is serviced solely by a Catholic medical facility.

The legislative arena has also voiced response. A constitutional amendment has been proposed by Representative Hogan of Maryland which would seek to limit abortions, perhaps by requiring a *judicial* review before any abortion could be performed.¹⁵⁶ Other legislation to mitigate the effect of the Supreme Court decision has been introduced. Under an "abortion option" bill proposed by Representative Margaret Heckler of Massachusetts, employees of hospitals which maintain abortion facilities could refuse to participate in abortions for reasons of religious belief or conscience.¹⁵⁷ Representative Heckler has stated her position as follows:

The federal government should never be a party to forcing hospital personnel to perform tasks they find morally abhorrent and repugnant Conscientious objection to the taking of unborn life deserves as much consideration and respect as does conscientious objection to warfare.¹⁵⁸

CONCLUSION

Wade and *Bolton* are open to criticism on many grounds. Of course, those who find abortion unacceptable for religious or ethical reasons will contest the result of the decision strongly. No moral evaluation of the decision has been attempted here. On legal grounds, the decision is seemingly erroneous in two areas. In its application of the compelling interest test to the realm of substantive due process, the Court has strayed from long established principles of constitutional law. The concept of equal protection has no relevance to a law which does not discriminate against a particular class of *persons*. And the rational basis test is of little value when an alleged fundamental liberty is being frustrated. But the Court's justification for the transition is not found in the opinion.

The Court's analysis of the Constitution in its vain search for a reference to fetal life was unconvincing. The omission of a direct reference to the unborn in the Constitution seems to be a tenuous basis for the assertion that a fetus is not protected by any constitutional guarantee. If this is so, how could a state statute satisfy the compelling interest test in purporting to protect the fetus at the stage of viability? Admittedly, however, a statement that the abortion decision is predominantly a moral one is difficult to express in legal terms.

¹⁵⁶ American Medical News, Feb. 12, 1973, at 3, col. 1. In part, the proposed amendment states: "neither the United States nor any state shall deprive any human being, from the moment of conception, of life without due process of law; nor shall the United States nor any state deny to any human being from the moment of conception, with its jurisdiction, the equal protection of the laws." *Id.*

¹⁵⁷ American Medical News, Mar. 12, 1973, at 15, col. 1.

¹⁵⁸ *Id.*

It is inevitable that in the future, the Court will be called upon to answer questions similar to those posed here, possibly with respect to suicide and euthanasia. While it is difficult to say that the holdings of *Wade* and *Bolton* could offer meaningful insight into those ultimate decisions, legislative proscription of suicide and euthanasia may also fail to withstand the scrutiny of the new compelling interest test propounded in *Wade* and *Bolton*.

Suicide and euthanasia present a clear issue concerning the lives of constitutionally recognized individuals. In the abortion issue no constitutional protection was afforded to the fetus in the stage prior to viability. But if the right of privacy and the right to control one's body extends as far as to allow the termination of a non-viable fetus, in a tripartite conflict among mother, state and fetus, the right to terminate one's own life may be found to exist when only two conflicting interests appear. Does the state have a compelling interest in protecting the life of an individual who, asserting his right of privacy, seeks to waive his constitutional protection? This would seem to be a logical question to ask in light of the abortion decision.

The concept of wrongful death recoveries for the unborn has been placed in a precarious position. In *Wade*, the Court touched only lightly on this facet of the law. It would seem that if a mother can intentionally terminate fetal development where her life or health is not necessarily in danger, it does not seem entirely consistent to hold liable in tort a third party who may only have caused fetal injury through negligence. The Court's explanation that a wrongful death recovery exists mainly to assuage aggrieved parents would prove unsatisfactory in a situation where an abortion is performed against a father's wishes. Would the father then have a tort claim against the mother?

The weaknesses of *Wade* and *Bolton* may very well prevent them from providing forceful precedent in related areas. However, on the issue of abortion the legal question is apparently settled. A woman and her physician may complete the decision to obtain a first-trimester abortion free from almost all state control. State legislatures will be compelled to restructure their abortion statutes to conform to the Court's stated guidelines. In effect, the Court is removing legislated standards of morality from abortion law.

Undoubtedly, abortion clinics will emerge on a nation-wide scope since first-trimester abortions need not require hospitalization. As a result, there may prove to be an over-concentration of medical specialists in areas such as New York City and a dearth of qualified personnel in the nation at large. It is possible that the established safety record of the abortion procedure may suffer. With increased abortion facilities, the birth rate may also decline and the nation may see its population figures stabilize.

But this is mere speculation about future events. What is certain today is that the dilemma of choosing between abortion and childbirth must now be resolved by application of personal, rather than public, religious and ethical values.