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RECENT DEVELOPMENTS IN THE ABORTION AREA

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I. INTRODUCTION

- A. It is a pleasure, up to a point, to be invited to speak to the Diocesan Attorneys' meeting once again.
 - 1. While this meeting is not, as Marsilius of Padua once said of a general council of the Church, "the gathered intelligence of Christendom,"¹ nevertheless it is certainly the "gathered intelligence" of Catholic lawyers throughout the country.
- B. The subject assigned to me could have been presented by men more competent and experienced than myself.
 - 1. Dennis Horan, Professors Noonan, Byrn, and Witherspoon, for example.
 - 2. My own litigation experience and my recent function as general counsel to the National Committee for a Human Life Amendment, Inc.
 - 3. I have attempted to keep reasonably conversant. Perhaps, in the words of Father John Courtney Murray to a young Jesuit, Charles Whelan: "It isn't that I understand it, but now I misunderstand it less."

II. GENERAL REMARKS AND OBSERVATIONS

- A. The general topic assigned to me.
- B. I have subdivided it into four parts.
 - 1. The recent abortion cases following in the wake of *Roe* and *Doe*— as far as Catholic moral principles are concerned, it was truly a "wake."
 - 2. The conscience clause issue, especially as it affects denominational or religious-related hospitals.
 - 3. The contraction, thank God, of the state or governmental action theory.

¹ W. DURANT, *THE RENAISSANCE* 363 (1953).

4. Very briefly, some comments on pending proposals for a human life amendment to the Constitution.

III. RECENT ABORTION CASES

- A. These I have divided into several categories including spousal or parental consent, state regulation of conditions and facilities, the viability issue, and the issue of whether the taxpayers must pay for abortions under Medicaid—obviously not under Medicare.
- B. Perhaps at this point it might be fruitful to summarize the essence of the holdings of the Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973).
 1. In *Roe v. Wade*, the Supreme Court held that the fourteenth amendment “right of personal privacy includes” a woman’s decision to abort and that the word “person” as used in the fourteenth amendment does not include the unborn. As a consequence, said the Court:

A state criminal abortion statute of the current Texas type, that excepts from criminality only a *life-saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

 - (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.
 - (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
 - (c) For the stage subsequent to viability, the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.²
 2. Discussion of this language, including the Court’s specific reference that the considerations of health embrace physical, emotional, psychological, familial, the woman’s age, distress for life and future, the unwanted child, unwanted

² 410 U.S. at 164-65.

motherhood, etc. In other words, the word "health" as used by the Supreme Court in *Roe v. Wade, supra*, means abortion on demand or request.

3. The Supreme Court overturned an ALI-type of statute in the Georgia *Doe v. Bolton* case.
4. In short, the Supreme Court's decisions have removed all but the most minimal constraints or protections for the unborn and, as Dennis Horan has pointed out, leave a constitutional amendment as the only avenue through which to correct the situation if, dear Lord, it is to be corrected.
5. A passing comment on Professor Witherspoon's thirteenth (antislavery) amendment argument, *i.e.*, the concept of a "human being" embodied implicitly in the thirteenth amendment.
 - a. Express my doubts as to its validity—what is constitutionally guaranteed under the Supreme Court's interpretation of the fourteenth amendment cannot be constitutionally precluded by the thirteenth amendment. The only hope is to revise the fourteenth amendment by adding an amendment which repeals pro tanto the gross gloss which the Supreme Court has put on it by its decisions in *Roe* and *Doe*.

C. SPOUSAL CONSENT

1. In the cases decided since *Roe* and *Doe*, the courts have consistently upheld a woman's right to abort without obtaining the consent of, or without the interference of, prospective fathers. *Doe v. Doe*, 314 N.E.2d 128 (Mass. 1974); *Jones v. Smith*, 278 So.2d 339 (Fla. Ct. App. 1973), *cert. denied*, 415 U.S. 958 (1974). The basic reason for these decisions disallowing the requirement of spousal consent is that if the state itself cannot prohibit abortion within the perimeters set forth in the Supreme Court decisions, *supra*, the state cannot assign that power to husbands or boyfriends. *Coe v. Gerstein*, 376 F. Supp. 695, 697 (S.D. Fla. 1973), *cert. denied*, 417 U.S. 279 (1974).
2. In a 1974 case, for example, the highest court in Massachusetts refused a husband's attempt to enjoin his wife from having an abortion and declared that a husband cannot interfere with his wife's decision to abort "at least before the fetus is viable and in the absence of any danger to natural life or health." *Doe v. Doe*, 314 N.E.2d at 132.

D. PARENTAL CONSENT CASES

1. Here, the score is no better. Almost without exception the courts have found parental consent requirements unconstitutional even in cases of females below the legal age of majority. In this context courts have not considered abortion equivalent to other surgical procedures where parental consent may be required. *Murray v. Vandevander*, 522 P.2d 302 (Okla. Ct. App. 1974); *In re P.J.*, 12 Crim. L. Rep. 2549 (D.C. Super. Ct. 1973); *Doe v. Ramptan*, 366 F. Supp. 189 (D. Utah), *vacated on other grounds*, 410 U.S. 950 (1973). See the recent case of *State v. A. Frans Koome*, 84 Wash. 2d 901, 530 P.2d 260 (1975) (en banc) in which the Supreme Court of the State of Washington, in a 5 to 4 ruling, held that the parental consent provisions of the State's 1970 abortion law were unconstitutional. The dissenting opinion in the *Koome* case concluded that the State's interest "in the quality of the minor's abortion decision as well as in the mental health of a pregnant minor is of a compelling nature from the time of conception"
2. All that can be said is that perhaps the Supreme Court's decision in *Roe* and *Doe* may leave open the possibility that a putative father or a parent may have some interest in approving the abortion decision of wife or daughter *at or after viability* but before that time it is extremely doubtful that any court can be induced to depart from the rather broad reading that federal and state courts thus far have afforded the Supreme Court's decision and rationale in the *Roe* and *Doe* cases, *supra*.

E. STATE REGULATION OF CONDITIONS AND FACILITIES

1. Since *Roe* and *Doe* were decided, a number of states, including Indiana and Illinois, have revised their abortion statutes in an attempt to somewhat, at least, make access to abortion less than free and easy.
2. Recall that the Supreme Court apparently recognized some power on the part of states to protect *viable* unborn children although, because of the Court's wide definition of health, not much scope is afforded for the protection of such children.
3. In *Hodgson v. Anderson*, 378 F. Supp. 1008 (D. Minn.), *appeal dismissed* 420 U.S. 903 (1974), a three-judge federal court invalidated the recently enacted antiabortion statute of Minnesota which prohibited an abortion when the fetus is potentially viable unless the attending physician certified

in writing that in his best medical judgment abortion was necessary to preserve the life or health of the pregnant woman. The statute also contained a provision requiring medical attention for a live born child which was aborted but born in the state of potential viability. Incredibly, the court found that a state could not constitutionally protect the life of a live born child resulting from an abortion occurring at or after 20 weeks. Insensitively, the three-judge court said:

[T]he statute as worded would take away from the physician his right to determine, in the exercise of his professional medical judgment under the technology and medical knowledge available to the profession, when a fetus is viable.³

4. Fortunately, the jury in the *Edelin* case in Massachusetts refused to treat manslaughter as "the exercise of . . . professional medical judgment."
5. Dennis Horan's testimony before the Senate Subcommittee on Constitutional Amendments on April 11, 1975 refers in Appendix B thereof to cases of live births following abortion. One such child survived and was adopted. This situation could become more common as the science of fetology progresses.
6. The wrongful death cases which have permitted suit in behalf of a fetus whose death was caused by the negligence of a third party. See, e.g., *Chrisafogeorgis v. Brandenburg*, 55 Ill. 2d 368, 304 N.E.2d 88 (1973). However, cases of this kind were called to the court's attention and argued *in extenso* in the amicus curiae brief which we submitted in the *Roe* and *Doe* cases. In short, the mother is to be preferred, the stranger isn't, even though the former is a party to an intentional killing while the latter has only been negligent.

F. ABORTIONS UNDER PUBLIC ASSISTANCE PROGRAMS

1. In this area the cases seem to hold that when a wide range of medical services is made available to indigent people from public funds, abortion cannot be ruled out as one kind of medical service. *Doe v. Rose*, 499 F.2d 1112 (10th Cir. 1974); *Klein v. Nassau County Medical Center*, 347 F. Supp. 496 (E.D.N.Y. 1973), *vacated*, 412 U.S. 925 (1973) (mem.).
2. The defeat of the Bartlett Amendment to the Department of Health, Education, and Welfare Appropriation Bill also

³ 378 F. Supp. at 1017.

means that recipients of public assistance can continue to obtain abortions under Medicaid.

3. The equal protection argument is misused in this area. Still, the states try to do their best. Arizona, for example, has proscribed the use of certain public property for the payment of medical assistance benefits for the performance of abortions except to save the life of the mother. This statute is now under challenge in *Roe v. Harrison Board of Regents*, No. 149243 (Ariz. Super. Ct. 1975).
4. As Professor Witherspoon has observed, courts which strike down these attempts to restrict the use of public money for private abortions fail to distinguish the difference between a regulatory statute enforced by criminal sanctions, such as the statutes involved in the *Roe* and *Doe* cases, and rules and regulations which deal with the use of public funds and public property.

IV. HOSPITALS AND ABORTIONS

- A. Up until now, the federal courts have held that public hospitals may not refuse the performance of elective abortions, even when overcrowded facilities and staff unwillingness have been assigned as the reasons for nonperformance. *Doe v. Hale Hospital*, 500 F.2d 144 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975); *Nyberg v. City of Virginia*, 495 F.2d 1342 (8th Cir. 1974); *McGarvey v. Magee-Womens Hospital*, 340 F. Supp. 751 (W.D. Pa. 1972), *aff'd* 474 F.2d 1339 (3d Cir. 1973).
- B. Suits against private hospitals have been unsuccessful even in the face of the so-called "state action" theory. *Doe v. Bellin Memorial Hospital*, 479 F.2d 756 (7th Cir. 1973).
- C. The same is true in the case of denominational hospitals. *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (10th Cir. 1974).
 1. The conscience clause aspect of the matter.
 2. Justice Blackmun's dicta concerning the protections afforded to religious-related hospitals.
- D. Our argument in the *Holy Cross Hospital* case.
 1. The conscience clause is not necessary; we stand on the free exercise of religion clause.
 2. The conscience clause statutes illustrate the high place that society assigns to the free exercise of religion.
 3. Repudiate the tenuous argument that a religious corpora-

tion owned and operated by its religious members cannot have a "conscience."

- E. The contraction of the "state action" attack as manifested in recent decisions, especially the Supreme Court's decision in the *Jackson* case. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

- 1. Lucas' reaction to *Jackson* in the *Holy Cross* case.

V. PROPOSED CONSTITUTIONAL AMENDMENTS

- A. The difficulty in securing their passage.
- B. The difference of opinion concerning a states' rights amendment.
- C. An allusion to Professor Noonan's constitutional proposal which I think makes a great deal of sense and would have as good a chance as any other type to get through the Congress and to the states for ratification.
- D. A caution about opposing the Equal Rights Amendment on any theory, not justified by the legislative history of the ERA, that its passage would somehow affect abortion laws or a subsequently enacted Human Life Amendment.

VI. CONCLUSION

- A. The future is bleak so far as halting the flow of abortions that is now occurring.
- B. The Catholic and other religious-related hospitals seem secure—conscience clause or no conscience clause.
- C. The nonreligious *private* hospitals are less secure but if the conscience clause holds up, they will be all right.
- D. It is only, however, a constitutional amendment that could effectively turn the tide.
 - 1. Chance for its passage, as I have said, is not sanguine.
 - 2. Therefore, I think a Noonan type of states' rights amendment represents the best outside chance.