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## The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal

James Bopp Jr.

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# The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal

James Bopp, Jr.\*  
Richard E. Coleson\*\*

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## I. INTRODUCTION

On January 22, 1973, the United States Supreme Court handed down its opinion in *Roe v. Wade*.<sup>1</sup> The seven-member majority seemed confident it had authoritatively resolved the volatile controversy over abortion. On December 14, 1987, the Court, by a vote split four to four, left standing an appellate court decision in yet another in the chain of cases spawned by *Roe*: *Hartigan v. Zbaraz*.<sup>2</sup> Only eight justices were on the Court, because the United States Senate had not yet consented to the appointment of one of President Reagan's nominees to replace retired Justice Powell. The continuing conflict in abortion jurisprudence results from continued adherence to the flawed analysis in *Roe v. Wade*.

This is a critique of *Roe v. Wade* and its progeny, based on the

1. 410 U.S. 113 (1973).

2. 108 S. Ct. 479 (1987)(per curiam), *affg* by an equally divided Court 763 F.2d 1532 (7th Cir. 1985). The unsettled nature of abortion jurisprudence may be seen in the table *Chronology 1980-1986* in E. RUBIN, ABORTION, POLITICS, AND THE COURTS: *ROE V. WADE AND ITS AFTERMATH* 193-204 (1987).

anomalous judicial treatment of the right of abortion. The anomaly will be demonstrated in two ways.

First, the tangent initiated by *Roe* will be examined. The degree of its departure from precedent and the Constitution will be shown. By following this tangent, subsequent abortion cases have diverged widely from the normal rules and principles of law. This divergence will be shown in the misuse of stare decisis in abortion cases, and in the extreme result achieved by the Court in the 1986 case, *Thornburgh v. American College of Obstetricians and Gynecologists*,<sup>3</sup> the most recent abortion case decided by the Court on the merits.

Second, areas of the law related to abortion—privacy rights, fetal rights, medical regulation, and procedural and adjudicatory issues—will be examined in the context of abortion cases. As will be seen, the normal rules in these areas are distorted when the case involves abortion. This abortion distortion factor is present throughout abortion case law.

The distortions consistently occur in the direction of making the abortion right more absolute. The special treatment for the abortion right violates the principles underlying the rule of law, the foundation stone of our constitutional system. Consequently, abortion jurisprudence should be reformed to conform it to the rest of the law. This requires the reversal of *Roe v. Wade*.<sup>4</sup>

## II. *Roe's* TANGENTIAL DEPARTURE FROM PRECEDENT

*Roe v. Wade* left the usual bounds of the law and set off on its own tangent. This section deals first with the abrupt angle of that tangent: *Roe's* radical departure from the norm, shown through a review of prior critiques,<sup>5</sup> and the abuse of stare decisis in subsequent abortion decisions. Second, this section examines *Thornburgh* to reveal the distance from the norm achieved in abortion jurisprudence by following the trajectory set by *Roe*. *Thornburgh* is the most recent word on abortion from the Court and the best example of the great rift achieved.

3. 476 U.S. 747 (1986).

4. Whether a Court holding comported with the Constitution might not be the only consideration of a justice in determining whether to reverse precedent. *See, e.g.*, N.Y. Times, Sept. 22, 1987, at A1, col. 3 (Judge Bork, in Senate confirmation hearings, mentioned he would consider several factors, including whether there was a basis for abortion rights in the Constitution.) This article does not deal with issues such as moral and ethical arguments, but only with considerations permitted by legal positivism, such as consistency and equal treatment of parties.

5. Detailed analysis of *Roe's* treatment of privacy rights, procedural rules, and other aspects of the law related to abortion jurisprudence will be dealt with in subsequent subsections. For treatment of privacy rights see *infra* section III-A. For treatment of procedural rules see *infra* section III-D.

## A. *Roe v. Wade*

As *Roe v. Wade* set the angle of departure from the rest of the law, it is appropriate to begin with a review of *Roe*—its facts, holding, and flaws.

### 1. *Facts*

In 1970, an unmarried, pregnant woman, using the pseudonym of Jane Roe, brought a class action in a federal district court in Texas.<sup>6</sup> She sought a declaratory judgment that the Texas abortion statute was unconstitutional and an injunction against its enforcement.<sup>7</sup> The Texas statute allowed abortion only “by medical advice for the purpose of saving the life of the mother.”<sup>8</sup> A majority of the states had similar statutes.<sup>9</sup>

### 2. *Holding*

Ultimately, the Supreme Court declared the statute a violation of the right of privacy “founded in the Fourteenth Amendment’s concept of personal liberty.”<sup>10</sup> However, the Court declared that the right of privacy was qualified by compelling state interests.<sup>11</sup> This balancing of the right of privacy against the state’s interests resulted in a trimester framework for legal analysis of state efforts to regulate abortion.

For the first trimester of pregnancy, no state interest was found to be “compelling.” Therefore, a woman was free to decide whether to have an abortion, so long as she did so in consultation with her physician.<sup>12</sup> This was so because, until approximately the end of the first three months, the first trimester, medical science had demonstrated that it was safer to have an abortion than to carry the fetus to term.<sup>13</sup> At the end of this period, the state’s interest in maternal health was considered to be compelling. Thus, from the beginning of the second trimester, the state could reasonably regulate abortion in order to promote maternal health.<sup>14</sup>

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6. *Roe*, 410 U.S. at 120. A physician, James Hallford, MD, intervened in the case, and a married couple, using the pseudonyms of John and Mary Doe, were also plaintiffs. The district court granted standing to Dr. Hallford but denied it to the Does. *Id.* at 120-29. The appeal was taken directly to the Supreme Court, which granted standing only to Jane Roe. *Id.*

7. *Roe*, 410 U.S. at 120.

8. *Id.* at 118.

9. *Id.*

10. *Id.* at 153.

11. *Id.* at 154.

12. *Id.* at 163.

13. *Id.* at 149, 163.

14. *Id.* at 163. Subsequent cases have allowed minimal health regulations in the first trimester.

At the point of viability, the Court held that the state's interest in "potential life" became compelling.<sup>15</sup> Thus, for roughly the last trimester of pregnancy, the state "may go so far as to proscribe abortion . . . except when it is necessary to preserve the life or health of the mother."<sup>16</sup> The fetus was held to have no rights of its own, because the Court decided it was not a "person," within the meaning of the fourteenth amendment.<sup>17</sup>

The Texas statute was declared unconstitutional for sweeping too broadly, by failing to distinguish among the stages of pregnancy and by allowing only the exception for preserving maternal life.<sup>18</sup> The abortion statutes of all of the states fell along with the Texas statute: *Roe* made them unenforceable.

### 3. Critiques

The radical departure of *Roe* from the norm was evident in its rejection by legal scholars. So much ink has been spilled in the debate over *Roe* that a comprehensive review of the literature is impossible here.<sup>19</sup> Rather, a sketch of early classics will be given to provide background for the analysis in this article. The excellent analysis of these early works has not been matched.

Some of these early critiques were philosophical in nature. For instance, Charles Rice, in *The Dred Scott Case of the Twentieth Century*,<sup>20</sup> placed *Roe* at the apex of modern positivist jurisprudence and then attacked the entire structure. Some of the more cogent critiques from a philosophical-jurisprudential perspective appeared in Catholic publications.<sup>21</sup> Nearly all early critiques of *Roe* featured prominent discussions of the personhood of the fetus. The philosophical literature, likewise, especially emphasized the personhood arguments. Another noteworthy aspect of this literature was the fear expressed that the abortion precedent, because of its loose language and lack of constitutional roots, would expand into a precedent for infanticide and euthanasia.<sup>22</sup> It is at least arguable that the casual judicial attitude toward

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ter as well. See *infra* notes 74-75 and accompanying text.

15. *Roe*, 410 U.S. at 163.

16. *Id.* at 163-64.

17. *Id.* at 158.

18. *Id.* at 164.

19. By 1985, "*Roe* ha[d] been the subject of more than 200 law review articles published since 1973." Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U. L. REV. 231, 237 n.39.

20. Rice, *The Dred Scott Case of the Twentieth Century*, 10 HOUS. L. REV. 1059 (1973).

21. Similarly, Catholic legal scholars of the 1930's were a force in the reaction to Legal Realism, of which *Roe* is clearly a product. See E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY* 159-78 (1973)(ch. 9).

22. See, e.g., Rice, *supra* note 20, at 1065-67 (discussing Kelsen's "pure" theory of law as

the rights of handicapped infants displayed in cases such as the Bloomington, Indiana, "Baby Doe" case is a function of *Roe*.<sup>23</sup>

Other early *Roe* criticisms were from a positivist perspective. Many were by supporters of abortion rights. John Hart Ely's *The Wages of Crying Wolf: A Comment on Roe v. Wade*<sup>24</sup> may be the most insightful discussion of *Roe*'s shortcomings as constitutional adjudication. After surveying its logical leaps and lapses, Ely concluded that *Roe* was a "Lochnering" opinion much more dangerous than the previous activist opinions of the Warren Court. *Roe*, he concluded, might be durable, but it was,

a very bad decision. Not because it [would] perceptibly weaken the Court . . . and not because it conflict[ed] with [his] idea of progress . . . It [was] bad because it [was] bad constitutional law, or rather because it [was] *not* constitutional law and [gave] almost no sense of an obligation to try to be.<sup>25</sup>

Archibald Cox agreed that *Roe* was a bad decision, but he seemed to disagree that *Roe* was durable.

My criticism of *Roe* . . . is that the Court failed to establish the legiti-

cited favorably in *Byrn v. New York City Health and Hosps. Corp.*, 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972).

23. See *In re The Treatment and Care of Infant Doe*, No. GU-8204-004A, slip op. at 2 (Monroe County Cir. Ct., Ind. Apr. 12, 1983), *Petition for Writ of Mandamus and Prohibition denied sub nom. State of Indiana ex rel Infant Doe v. Monroe Circuit Court*, No. 482S 140 (Ind. Apr. 14, 1983), *cert. denied, sub nom. Infant Doe v. Bloomington Hospital*, 104 S. Ct. 394 (1983), *reprinted in 2 ISSUES IN LAW & MED.* 77 (1986). The "slippery slope" is also discernible in the attitudes expressed in *American Academy of Pediatrics v. Heckler*, 561 F. Supp. 395 (D.D.C. 1983)(infanticide); *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976)(euthanasia); *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986)(suicide). See also "wrongful life cases:" *Turpin v. Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982)(California); *Harbeson v. Parke-Davis*, 98 Wash. 2d 460, 656 P.2d 483 (1983)(en banc)(Washington), *Procanic v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984)(New Jersey).

24. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

25. *Id.* at 947 (emphasis in original). Ely related a similar critique in *DEMOCRACY AND DISTRUST* (1980). Cf. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

Ely's argument that the court was not engaging in constitutional law in *Roe* is bolstered by recently released memoranda between members of the *Roe* majority written during consideration of *Roe*. The memoranda, found in papers of Justice Douglas and released by the Library of Congress, expressed concern that much of the opinion constituted "dicta" and questioned "the desirability of dicta being quite so inflexibility 'legislative.'" The memoranda reveal the author of *Roe* acknowledging that the opinion contained dictum and that the lines drawn were "arbitrary." Noticeably absent was discussion of the requirements of the Constitution; rather, the exchanges read like negotiations among members of a legislative conference committee seeking to hammer out compromise legislation. Woodward, *The Abortion Papers*, *The Washington Post*, Jan. 22, 1989, at D1, col. 1. The memoranda help put in context Justice White's charge that in *Roe* and *Doe v. Bolton*, 410 U.S. 179 (1973), the majority was engaged in an exercise of "law judicial power." *Id.* at 222 (White, J., dissenting).

macy of the decision by articulating a precept of sufficient abstractness to lift the ruling above the level of a political judgment . . . . The failure to confront the issue in principled terms leaves the opinion to read like a set of hospital rules and regulations, whose validity is good enough this week but will be destroyed with new statistics upon the medical risks of childbirth and abortion or new advances in providing for the separate existence of a foetus . . . . Constitutional rights ought not to be created . . . unless they can be stated in principles sufficiently absolute to give them roots throughout the community and continuity over . . . time . . . .<sup>26</sup>

As things now stand, it appears that Cox's vision of the future was more correct than the *Roe* Court's belief that the progressive forces of history indicated the decision it delivered.<sup>27</sup>

Alexander Bickel wrote a brief but telling analysis. *Roe* "may be a wise model statute," he wrote, but he expressed reservations about the Court's prohibition of "state regulation of the places where the abortion [was] . . . performed. The state regulates and licenses restaurants and pool halls and . . . God knows what else in order to protect the public; why may it not similarly regulate . . . abortion clinics, or doctors' offices . . . ?"<sup>28</sup> Ultimately, Bickel agreed with Ely: "One is left to ask why. The Court never said. It refused the discipline to which its function is properly subject."<sup>29</sup>

Richard Epstein also argued that "*Roe* . . . [was] symptomatic of the analytical poverty possible in constitutional litigation."<sup>30</sup> Epstein criticized *Roe*'s irrationality and the Supreme Court's activism, concluding that "we must criticize both Mr. Justice Blackmun in *Roe v. Wade* . . . and the entire method of constitutional interpretation that allows the Supreme Court . . . both to 'define' and to 'balance' interests on the major social and political issues of our time."<sup>31</sup> Epstein also criticized the Court's laxness in procedural issues—*Roe*'s standing and the mootness of her case. Recognizing the procedural laxness as both a symptom and a cause of the Court's generally slipshod activism, Epstein argued that *Roe*'s case was moot and that she should have been

26. A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 113-14 (1976).

27. See *Abortion*, *THE NEW REPUBLIC*, Feb. 10, 1973, at 9 ("[I]f the Court's guess concerning the probable and desirable direction of progress is wrong, it will nevertheless have been imposed on all 50 states, and imposed permanently, unless the Court itself should in future change its mind.").

28. A. BICKEL, *THE MORALITY OF CONSENT* 27 (1975).

29. *Id.* at 28.

30. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 184.

31. *Id.* at 185.



denied standing.<sup>32</sup> The presence of a doctor in the initial litigation showed "that the Court was mistaken when it held that the mootness requirement must be relaxed in the abortion cases because they present questions which [would] constantly arise yet be incapable of review."<sup>33</sup> He added, "The criminal trial of a doctor would provide him with every opportunity to challenge the abortion statute on its face."<sup>34</sup> These lapses on technical questions mark abortion jurisprudence to the present day.<sup>35</sup>

Philip Heymann and Douglas Barzelay, defenders of *Roe's* result, sought to rewrite the Court's opinion. They argued that "*Roe* was amply justified both by precedent and by those principles that have long guided the court in making the ever-delicate determination of when it must tell a state that it may not pursue certain measures . . . ."<sup>36</sup> However, the authors acknowledged that Justice Blackmun obscured the argument favoring a constitutional right to abortion.<sup>37</sup>

Donald Regan noted that the precedent on which Heymann and Barzelay depended was "a rag-tag lot."

Most of them either claim to be or are best understood as being primarily about something other than 'marriage, procreation, and child-rearing.' It is not clear that they add up to anything at all, especially when one remembers other cases in which colorable claims concerning marriage, procreation, or child rearing have received short shrift.<sup>38</sup>

Regan based his own support for abortion on the Good Samaritan doc-

32. *Id.* at 164-65.

33. *Id.* at 164.

34. *Id.*

35. See Brief for the United States Amicus Curiae at 2-6, 10-14, *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986)(No.84-495). These rules serve a useful purpose, just as substantive rules of law do. As will be discussed below, this recurrent heedlessness in the abortion context is another source of instability in abortion jurisprudence. See *infra* section III-D of this article for a further treatment of procedural and adjudicatory matters.

36. Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 765, 765 (1973).

37. *Id.* ("The language of the Court's opinion in *Roe* too often obscures the full strength of the . . . argument that underlies its decision."). Heymann and Barzelay's thesis stands or falls on their interpretation of the precedent cited in *Roe*. It is argued below that this interpretation is impressionistic and unjustifiable. Perhaps in recognition of the fact that no matter how loosely the privacy precedents are construed the abortion right does not follow. The authors argued for a more open-ended jurisprudence. Yet, even if their fundamental values approach is accepted, it is by no means clear that the abortion right is fundamental. The Supreme Court's skewed history in *Roe* certainly casts doubt on this. *Id.* at 777-83. See also Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974).

38. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1639 (1979)(citing *Sosna v. Iowa*, 419 U.S. 393 (1975)); *Dandridge v. Williams*, 397 U.S. 471 (1970); *Baker v. Owen*, 423 U.S. 907 (1975), *summarily aff'g* 395 F. Supp. 294 (M.D.N.C. 1975).

trine.<sup>39</sup> Applying an altered form of equal protection analysis,<sup>40</sup> he argued that the physical and psychological burdens imposed on the woman desiring an abortion were greater than those imposed on any other potential Samaritan.<sup>41</sup> This basis, he argued, "provide[d] a better justification than the Court's for the result in *Roe*."<sup>42</sup>

Laurence Tribe has adduced a similar argument in his latest attempt to rewrite *Roe*.<sup>43</sup> Tribe is the embodiment of the confusion created by *Roe*'s poor reasoning. He has developed and discarded several alternative justifications for *Roe* in the past thirteen years. In *Foreword: Toward a Model of Roles in the Due Process of Life and Law*,<sup>44</sup> he argued that, in this century, only religious groups have purported to decide when a human being with independent moral claims begins life. Since this is the central question of the abortion debate, it cannot be resolved without an unconstitutional entanglement of church and state, he argued.<sup>45</sup>

Tribe has since conceded that this argument is faulty.<sup>46</sup> Subsequent to the religious entanglement argument, Tribe argued that *Roe* could be justified based on a judicial right to intervene during a state of moral flux to help a new consensus evolve.<sup>47</sup>

Finally, Tribe has concluded that the fundamental issue in abortion jurisprudence is power.<sup>48</sup> This issue has been obscured by discussions of privacy and physicians' rights, he claimed.<sup>49</sup> According to this analysis, pregnancy, at least the unwanted variety, enslaves women. They are deprived of the equal protection of the laws. The Constitu-

39. Regan, *supra* note 38, at 1569.

40. *Id.*

41. *Id.* at 1572.

42. *Id.* at 1642. It is beyond the scope of this article to rebut all the alternatives offered in place of *Roe*. A systematic rebuttal of the asserted alternatives may be found in Bopp, *Will There be a Constitutional Right to Abortion after the Reconsideration of Roe v. Wade*, 15 J. CONTEMP. L. — (1989). It is, however, a sign of how low *Roe* has fallen in legal opinion that the Good Samaritan doctrine, with all its readily applicable exceptions, is considered a better foundation for an abortion right than *Roe*'s analysis. Cf. Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3, 40 n.114 (1981)(arguing that Regan violated goal of avoiding moral issues).

43. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 335-36 (1985).

44. 87 HARV. L. REV. 1 (1973).

45. *Id.* at 23-29.

46. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 928-29 (1978). See also McDaniel v. Paty, 435 U.S. 618 (1978).

47. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 293 (1975); Tribe, *Childhood, Suspect Classifications, and Conclusive Presumptions: Three Linked Riddles*, 39 LAW & CONTEMP. PROBS. 8 (Summer 1975).

48. Tribe, *supra* note 43, at 335-36.

49. *Id.* at 335.

tion, he argued, imposes affirmative duties to eradicate such inequality.<sup>50</sup> Tribe cited the thirteenth amendment's prohibition of involuntary servitude, from which he deduced certain inalienable rights which the government must uphold. One of these, he claimed, was a federally-funded abortion.<sup>51</sup>

Michael Perry is another writer who is pro-abortion but critical of *Roe*.<sup>52</sup> He attempted to defend its result by arguing that *Roe* was a ratification of conventional morality.<sup>53</sup> That, he argued, is part of the Court's function in policing legislation designed to regulate public morality.<sup>54</sup>

Thomas Grey argued that *Roe* was a ratification of "the stability-centered concerns of moderate conservative family and population policy."<sup>55</sup> In effect, this approach amounts to the ratification of the personal prejudices of the Court's majority. Grey saw the abortion and contraception cases (as well as *Stanley v. Georgia*,<sup>56</sup> an obscenity possession case) not as endorsing any liberty principles,<sup>57</sup> but as decisions "dedicated to the cause of social stability . . ."<sup>58</sup> He argued that these cases represented "two standard conservative views: that social stability is threatened by excessive population growth,<sup>59</sup> and that family stability

50. *Id.*

51. *Id.* at 335, 338.

52. Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976).

53. *Id.* at 733.

54. *Id.* at 694. It is arguable that the Court's assessment of conventional morality is wrong in the abortion cases, or was wrong in 1973. Is the function of the Court simply to ratify what it perceives (perhaps not impartially) to be widely held values, even if these values are not tied to the Constitution? *Id.* at 734. See Rice, *supra* note 20, at 1066. Certainly, the Legal Realists saw such ratification as the function of juridical science. See, e.g., Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975). But see *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984) (The fact of widely-held "racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother . . ."). It seems that law-making and adjudication involve something more than the reading of historical trends and the taking of informal opinion polls. Of course, *Roe* did not ratify the common consensus, even if it purported to do so. Justice Blackmun polled primarily the opinions of elite groups, such as the American Medical Association and the American Bar Association. These groups have their own biases. A majority of the voters in a majority of the states had voted otherwise through their legislatures.

55. Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83, 90 (Summer 1980).

56. 394 U.S. 557 (1969).

57. Grey, *supra* note 55, at 84 (contrary to allegations of contemporary disciples of John Stuart Mill).

58. *Id.* at 88.

59. Indeed, the ideological origins of the pro-abortion movement lay in the population control movement—a movement financed and propelled in large part by professionals and moderate to liberal Republican-types, not unlike some members of the Court. See generally NATHANSON, *ABORTING AMERICA* (1979) for the intellectual history of the pro-abortion movement. See also S.

is threatened by unwanted pregnancies, with their accompanying fragile marriages, single-parent families, irresponsible youthful parents, and abandoned or neglected children."<sup>60</sup>

Given the intellectual history of the pro-abortion movement, the background of key figures on the Court, and the language of *Roe*, Grey's version of the mental processes behind *Roe* may be the most accurate and honest explanation of that opinion. The great deference to and preoccupation with medical opinion evident in *Roe*,<sup>61</sup> *Planned Parenthood of Central Missouri v. Danforth*,<sup>62</sup> and *Akron v. Akron Center for Reproductive Health*<sup>63</sup> offer evidence that *Roe* reflects the prejudices of a few representatives of the professional classes. Justices Blackmun and Powell, the authors of those opinions, have strong ties to the medical community. Blackmun was formerly general counsel to the Mayo Clinic. Powell is from a family of obstetrician-gynecologists.

Grey's explanation of *Roe* has been avoided by others, despite its reinforcement of the common charge that *Roe* is judicial legislation, and despite its compatibility with the Legal Realism school. Perhaps this is because verification requires some judicial "psychoanalysis," or because it is impolite to suggest that Supreme Court justices are not objective.<sup>64</sup> Grey's analysis, nevertheless, has common-sense appeal, even if it is not scientifically verifiable.

Judge Ruth Bader Ginsburg in a 1985 essay continued the reanalysis of *Roe*.<sup>65</sup> She declared that "the Court ventured too far in the

KRASON, ABORTION: POLITICS, MORALITY AND THE CONSTITUTION (1984).

60. Grey, *supra* note 55, at 88. Grey went on to suggest that fornication and sodomy laws would one day be invalidated for similar reasons. "Thousands of couples are living together today outside of marriage. The fornication laws . . . stand in the way of providing a stable legal framework for . . . these unions." *Id.* at 97. "Similarly, the homosexual community is becoming an increasingly public sector of our society." *Id.* But see *Bowers v. Hardwick*, 476 U.S. 747 (1986)(declaring laws against sodomy constitutional).

61. *Roe*, 410 U.S. at 113.

62. 428 U.S. 52 (1976).

63. 462 U.S. 416 (1983).

64. See Dixon, *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B.Y.U. L. REV. 43, 85-87 (arguing that *Roe* resulted from the Court working out its own legislative compromise among competing groups).

65. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C.L. REV. 375 (1985). John Robertson has also sought to justify *Roe v. Wade* in a 1987 volume of the AMERICAN JOURNAL OF LAW & MEDICINE devoted to praising Justice Blackmun. However, while seeking to justify *Roe* he differs with *Roe's* reliance on the burdens of childrearing because those may be eliminated by adoption. Robertson, *Gestational Burdens and Fetal Status: Justifying Roe v. Wade*, 13 AM. J. L. & MED. 189, 193 (1987). His primary focus is on the personhood of the unborn, seeking by a discussion of the stages of human development to demonstrate that a fetus is not a person. *Id.* at 194-202. For present purposes, his conclusion is relevant: "*Roe v. Wade* has begun a dialogue . . . that needs refinement and further elaboration." *Id.* at 212. While praising Justice Blackmun and *Roe*, Robertson notes *Roe's* "limited analysis" contained "defects." *Id.*

change it ordered and presented an incomplete justification for its action."<sup>66</sup> In place of *Roe's* "medically approved autonomy idea," Ginsburg implies that she would have substituted a "constitutionally based sex-equality perspective."<sup>67</sup> She noted that *Roe's* "[h]eavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict."<sup>68</sup>

The Court's attempt to anchor the abortion right in the history of western civilization has also received numerous criticisms. A more detailed treatment of this aspect is found below in the discussion of privacy rights.

Two passages from the August 1979 *Michigan Law Review*, an issue wholly devoted to abortion jurisprudence, summarize the critiques well. In the first, Richard Morgan observed:

Rarely does the Supreme Court invite critical outrage as it did in *Roe* by offering so little explanation for a decision that requires so much. The stark inadequacy of the Court's attempt to justify its conclusions . . . suggests to some scholars that the Court, finding no justification at all in the Constitution, unabashedly usurped the legislative function.<sup>69</sup>

In the second passage, the editors of the law review, surveying the literature on *Roe*, concluded, "[T]he consensus among legal academics seems to be that, whatever one thinks of the holding, the opinion is unsatisfying."<sup>70</sup>

The great doubt about *Roe's* validity, and the wide disagreement among scholars on an acceptable substitute for Justice Blackmun's opinion, suggest that *Roe* cannot be satisfactorily modified and should be overruled.

## B. *Stare Decisis Abuse*

The deviation of abortion case law from the usual rules of law is also evident in the abuse of the doctrine of *stare decisis* in *Roe* and the subsequent abortion cases. The soundness of *Roe's* analysis and the doctrine of *stare decisis* have been invoked as the twin justifications of post-*Roe* decisions dealing with legislative attempts to regulate abortion.<sup>71</sup> Justice Powell stated this explicitly in *Akron*:

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66. Ginsburg, *supra* note 65, at 376.

67. *Id.* at 386.

68. *Id.* at 385-86.

69. Morgan, *Roe v. Wade and the Lesson of the Pre-Roe Case Law*, 77 MICH. L. REV. 1724, 1724 (1979).

70. *Editor's Preface*, 77 MICH. L. REV. (no number)(1979).

71. See *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 420 n.1 (1983).

There are especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v. Wade*. That case was considered with special care . . . . Since *Roe* was decided . . . the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy.<sup>72</sup>

This language may have signaled only a desire to adhere to the basic principle of *Roe*—that the privacy right includes a fundamental abortion right—and not the whole trimester framework.<sup>73</sup> The *Akron* Court may actually have been backing away from certain aspects of *Roe*, as *Akron* seemed to represent a modification of the *Roe* framework.<sup>74</sup> Yet, even where the Court seemed to back away from the language of *Roe*, it took pains to formally re-affirm the *Roe* trimester standard. That standard, claimed Justice Powell, “continues to provide a reasonable legal framework for limiting a State’s authority to regulate abortions.”<sup>75</sup>

This adherence to *Roe* on the dual and distinct grounds of inherent soundness and *stare decisis* is significant. *Roe*’s analysis is criticized even by those who accept the substantive result of that decision.<sup>76</sup> *Roe* is probably the most rewritten (by critics) opinion in Supreme Court history. Despite such general criticism, *Roe* endures. This indicates that it is the doctrine of *stare decisis*, not the intrinsic soundness of the opinion, that preserves *Roe*.<sup>77</sup> However, the analysis employed in *Roe*, and

72. *Id.*

73. Wardle has argued this. Wardle, *supra* note 19, at 251-52. However, Wardle acknowledged that the abortion privacy doctrine alone is sweeping in the regulations it prohibits, quite apart from the trimester scheme. *Id.* at 249.

74. See, e.g., Comment, *Abortion: From Roe to Akron, Changing Standards of Analysis*, 33 CATH. U.L. REV. 393 (1984). The author charged that the Court in *Akron* retreated from the “bright-line” trimester scheme in the name of physician discretion. In *Akron* the Court refined its trimester scheme in light of new standards established by the American College of Obstetricians and Gynecologists. *Akron*, 462 U.S. at 437. *But see* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 64 (1976) (“[I]t is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept . . .”). There seems to be some tension between the Supreme Court’s imposition of the trimester rule and its affinity for physician discretion. Compare *Akron*, 462 U.S. at 429-31 with *Akron*, 462 U.S. at 458 (O’Connor, J., dissenting) and Comment, *Abortion: From Roe to Akron, Changing Standards of Analysis, supra*, at 415-17 with Comment, *Toward Constitutional Abortion Control Legislation: The Pennsylvania Approach*, 87 DICK. L. REV. 373, 377 (1983).

75. *Akron*, 462 U.S. at 429 n.11.

76. See, e.g., Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973); L. TRIBE, *supra* note 46; Ely, *supra* note 24; Regan, *supra* note 38. See also Heymann & Barzelay, *supra* note 36.

77. In a recent poll of federal judges, only 33 percent thought *Roe* “was correctly decided, although an additional 31 percent said that despite their disagreement with the decision, they would not overturn it.” *The View from the Bench*, NAT’L L.J., Aug. 10, 1987, at S12.

developed in subsequent decisions, is fundamentally antithetical to the values that underlie the doctrine of stare decisis.<sup>78</sup>

### 1. *Traditional view of the doctrine of stare decisis*

The doctrine of stare decisis is essential to a system founded upon the rule of law. Justice Powell acknowledged this in *Akron*: “[T]he doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the *rule of law*.”<sup>79</sup>

The rule of law is one of the foundation stones of American society. The concept is crucial to the debate over *Roe*. A preliminary examination of political and jurisprudential theory<sup>80</sup> will demonstrate why this is so.

a. *The American rule of law.* The debate over the optimum system of governance has raged for millenia. Aristotle pointed out the weakness of a constitutional system incorporating the rule of law with an analogy:

The advocates of kingship maintain that the laws speak only in general terms, and cannot provide for circumstances; and that for any science to abide by written rules is absurd. In Egypt the physician is allowed to alter his treatment after the fourth day, but if sooner, he takes the risk. Hence it is clear that a government acting according to written laws is plainly not the best. Yet surely the ruler cannot dispense with the general principle which exists in law; and that is a better ruler which is free from passion than that in which it is innate.

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78. Abortion jurisprudence undermines the rule of law and stare decisis in many ways, as shown below. For example, *Akron* suggested that state legislators keep abreast of the latest medical standards and techniques. *Akron*, 462 U.S. at 431 (The state may not “depart from accepted medical practice.”). By so doing they may have some hope of constitutionally regulating abortion. *Id.* Yet, the *Akron* Court ignored the American College of Obstetricians and Gynecologists (ACOG) standards, on which it relied so heavily in evaluating maternal health interests, when it came to *Akron*’s informed consent provision. ACOG recommended that “sufficient time for reflection” be allowed a woman seeking an abortion, yet the Court struck down a codification of this notion. *Akron*, 462 U.S. at 473 (O’Connor, J., dissenting)(citing ACOG STANDARDS FOR OBSTETRIC-GYNECOLOGICAL SERVICES 54 (5th ed. 1982)). There is no guidance by the Court as to when a legislator should follow current medical opinion and when to ignore it.

79. *Akron*, 462 U.S. at 419-20 (emphasis added).

80. While juridical science is not identical to political science, it is a part of political science. This is an ancient notion given fresh impetus by Legal Realists, Critical Legal Studies (CLS) adherents, and others, who acknowledge the link between politics and judicial decision-making. Most modern theorists tend to subjectify politics and devalue political theory, while CLS seems to identify politics and judicial decision-making. However, it is impossible to gain a proper appreciation of abortion jurisprudence without placing it in its proper political context. The problems created by *Roe* are more than logical puzzles for lawyers and law professors. They are moral and political problems. Indeed, *Roe* has had an impact on American mores and has hastened the transformation of American politics.

Whereas the law is passionless, passion must always sway the heart of man. Yes, it may be replied, but then on the other hand an individual will be better able to deliberate in particular cases.<sup>81</sup>

This statement is emblematic of the argument against a constitution based on the rule of law: as it is folly for a physician to treat a patient according to fixed rules, so it is folly to tie the hands of rulers with fixed, pre-determined laws. Each situation is different. Discretion is required. There are too many contingencies for fixed rules to apply. It is noteworthy, however, that Aristotle concluded the above discussion with a comment that, where one feared for his safety at the hands of a physician, one "would be more inclined to seek treatment by the rules of a text-book."<sup>82</sup> The American revolutionaries had seen the "physician," the English monarch, in action and feared for their safety.

Rejecting the arguments for giving wide discretion to political authorities, our founding fathers set out to create a rule of law regime par excellence. The Declaration of Independence set forth the principle along with a catalogue of the abuses of royal prerogative. The new republic had practical experience with the evils of discretionary rule. The Constitution set forth a rule of law in its enumeration of powers and fundamental rights. This was reinforced by the Bill of Rights. These were safeguards against the types of abuses the framers of the Constitution observed in the mercurial legislatures of the day.<sup>83</sup> In the debate over rule of law versus rule of men, the prudent, practical judgment of American statesmen has usually been for the rule of law.

In our constitutional system, the rule of law means that the law, duly enacted by the representatives of the people, governs. No official may exercise power not granted to him or her by law. The rule of law operates on two levels, on the rulers and on the ruled.

Rules are imposed on rulers to guide them in their duties and to curb their discretion in likely areas of abuse. For example, the Constitution prohibits *ex post facto* laws.<sup>84</sup> Likewise, the first amendment guards an area of traditional abuse. There may be excellent reasons to retain the power of censorship in the hands of the ruler. However, the Constitution reflects the practical judgment that, despite its advantages, e.g., in national emergencies, censorship should not be allowed. It is safer to generally prohibit such censorship, with judicial oversight of

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81. ARISTOTLE, *POLITICS* 1286A, lines 10-22 (2 *THE COMPLETE WORKS OF ARISTOTLE* 2042 (Barnes ed. 1984)).

82. *Id.* at 1287a, lines 37-38 (2 *THE COMPLETE WORKS OF ARISTOTLE* at 2043).

83. *See, e.g.*, G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969); B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967).

84. U.S. CONST. art. I, § 9, cl.3.



any possible exceptions.<sup>85</sup>

The essence of self-government is a sharing of the activities of ruling and being ruled. Rulers are not above the law and are required to maintain the rule of law. Rulers must impose rules of conduct on "private" societal actors when the public good requires it. Such regulation is only tolerated where essential, due to the favored status of individual discretion in our individualistic society.

The most novel aspect of the framers' new scheme of politics was their preference for regulating private conduct through an invisible hand mechanism—many factions competing and cancelling each other out.<sup>86</sup> The federalist system envisioned a similar mechanism operating at the level of society's rulers—a system of ambition checking ambition.<sup>87</sup> This striving all takes place within a framework of constitutional rules, regulating the conduct of the rulers.

Such rules were intended to apply to the judiciary as well. As Judge Robert Bork has observed, "[T]he Court's power is legitimate only if it has, and can demonstrate in reasoned opinion that it has, a valid theory derived from the Constitution . . . ."<sup>88</sup> If the Court chooses rather to pretend it has a theory (or offers none at all), while imposing its own "predilections, the Court violates the postulates of the Madisonian model that alone justifies its power."<sup>89</sup> Furthermore, any theory which the Court employs must not only be neutrally applied but also neutrally defined and neutrally derived from the Constitution.<sup>90</sup> Otherwise judges are simply "imposing their values on the rest of us."<sup>91</sup>

In places the language of the Constitution is ambiguous. This allows for some modification of the rules in light of changing circumstances.<sup>92</sup> The Constitution also provides a formal amendment process

85. See, e.g., *New York Times v. United States*, 403 U.S. 713 (1971).

86. THE FEDERALIST No. 10 (J. Madison).

87. THE FEDERALIST No. 51 (A. Hamilton or J. Madison).

88. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971).

89. *Id.*

90. *Id.* at 7.

91. *Id.* Cf. Wolfe, *How the Constitution Was Taken Out of Constitutional Law*, 10 HARV. J.L. & PUB. POL'Y 596 (1987).

92. Some textual indeterminacy, however, is not a general warrant for the unbridled discretion of any branch, least of all the judiciary. As Ely has noted, even the wildest pre-*Roe* activism entailed some effort to trace the holding to some pre-existing constitutional rule. The *Roe* Court paid lip service to this requirement by citing some privacy precedents. Ely, *supra* note 24, at 947-49. Bork gives as an example of this type of modification the case of *Brown v. Board of Education*. Bork, *supra* note 88, at 14. As those who initiated the fourteenth amendment stated only the principle of racial equality as an objective, but were divergent as to the implications of this principle, the Court could only follow "the majestic and ambiguous formula: the equal protection of the laws." *Id.* The Court could not impose the missing "detailed code" which might allow equality in one case but not another, as some were advocating. *Id.* Thus, as Bork declared, "the no-state-

for more substantial changes. Beyond these, there is no authority for additions to or deletions from the Constitution.

However, the temptation is always strong for the Supreme Court to act to resolve apparently urgent societal dilemmas. Such an urgent need for intervention was felt by the Court in the early part of the twentieth century. State and federal governments had decided that laissez-faire economics was not working. Social welfare legislation was enacted to curb business discretion. The Supreme Court responded by striking down the legislation, in the name of freedom of contract (where state regulation was involved)<sup>93</sup> or by narrow construction of the commerce clause (where federal regulation was involved).<sup>94</sup>

The cases of this period are symbolized by *Lochner v. New York*.<sup>95</sup> In *Lochner*, the Court struck down state legislation limiting the hours that bakers could be required by their employers to work. The ten hours per day and sixty hours per week limitation was enacted, under the states' traditional police power, to protect the health of bakers. The tool employed by the Court to overthrow such legislation was substantive due process. The Court read its laissez-faire economic philosophy into the "liberty" of the fourteenth amendment, in order to find a fundamental right to contract unfettered by government regulation.<sup>96</sup>

This approach was strongly rejected by critics, by dissenting justices,<sup>97</sup> and, eventually, by the Court itself. In 1963, the Court noted the use of substantive due process in the past:

There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, outlawing "yellow dog" contracts, setting minimum wages for women, and fixing the weight of loaves of bread. This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time . . . . Mr. Justice Holmes said,

I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohi-

enforced-discrimination rule of *Brown* must overturn and replace the separate-but-equal doctrine of *Plessy v. Ferguson*." *Id.* at 15.

93. *See, e.g.*, *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); *Adair v. United States*, 208 U.S. 161 (1908); *Lochner v. New York*, 198 U.S. 45 (1905).

94. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *United States v. Butler*, 297 U.S. 1 (1936); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935).

95. 198 U.S. 45 (1905).

96. *Id.* at 53.

97. *See, e.g., id.* at 74-75 (Holmes, J., dissenting).

bition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.<sup>98</sup>

The Court then observed that the doctrine, "that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely, [had] been discarded."<sup>99</sup> The Court concluded, "We have returned to the original constitutional proposition that courts do not substitute their *social and economic* beliefs for the judgment of legislative bodies, who are elected to pass laws."<sup>100</sup>

It is noteworthy that this rejection of substantive due process was not limited to economic matters, as some have argued, but extended to "social" matters as well.<sup>101</sup> Further, the fact "that the 'right to abortion,' or noneconomic rights generally, accord more closely with 'this generation's idealization of America' than the 'rights' asserted in . . . *Lochner*," makes no difference, declared Ely.<sup>102</sup> "[T]hat attitude," he observed, "is *precisely* the point of the *Lochner* philosophy, which would grant unusual protection to those 'rights' that somehow *seem* most pressing, regardless of whether the Constitution suggests any special solicitude for them."<sup>103</sup>

The Court has often been accused of "Lochnering" in *Roe*.<sup>104</sup> However, the parallels are more numerous than they first appear. Both *Roe* and *Lochner* appear result-oriented, unjustified by the Constitution, and designed to protect a certain profession, rather than all interested parties.<sup>105</sup> The reasoning process behind both sets of cases is analogous. Both reflect the clear biases of the justices. Both dealt with issues that seemed especially pressing and important at the time (less so in a broader historical perspective), but were not mentioned by the framers.

The *Lochner* Court was clearly sympathetic to, and allied with, American business. It believed that sound policy dictated unfettered business. Business discretion could be trusted to bring about the best

98. *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963)(footnotes and citations omitted).

99. *Id.* at 730.

100. *Id.* (emphasis added). See also *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 533-37 (1949).

101. See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 484-86 (1961).

102. Ely, *supra* note 24, at 939 (footnotes omitted).

103. *Id.* (emphasis in original). Ely adds, "The Constitution has little to say about contract [footnote omitted], less about abortion, and those who would speculate about which the framers would have been more likely to protect may not be pleased with the answer." *Id.*

104. Ely, *supra* note 24, at 937-43; Epstein, *supra* note 30, at 168.

105. *Lochner*, 198 U.S. at 74-76 (Holmes, J., dissenting); Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812-21 (1935).

state of affairs. The Court was willing to strain to find constitutional support for this position. The justification for this faith was a belief in equal bargaining power and identity of interests between business and labor.<sup>106</sup> The *Lochner* model posited two free and equal adults—employer and employee—entering into a mutually beneficial agreement. By protecting the interests of the employer, the Court purported to protect the employee's interests.<sup>107</sup> Also bound up in the *Lochner* argument was the notion of an independent right to earn a living as one chooses.<sup>108</sup>

*Roe* contained dicta reminiscent of this latter notion.<sup>109</sup> The *Roe* Court was clearly sympathetic to the medical profession and believed in its sound exercise of discretion.<sup>110</sup> The *Roe* model of the doctor-patient relationship was predicated on an identity of interests between the physician and his patient. Because it was assumed that their interests exactly coincided with that of their patient, doctors have long been trusted to define their own standard of care. Both physician and patient benefitted from the patient's health. A physician's interest in more patients and payment of his fee would compel him to do justice. This positive view of the doctor-patient relationship is analogous to the *Lochner* Court's view of the employer-employee relationship. It was assumed that the physician would offer his best judgment and advice in assisting the woman to come to the best possible decision.<sup>111</sup>

Just as the *Lochner* Court believed that state regulations were disrupting its model system, the *Roe* Court believed that state regulation would disrupt the doctor-patient relationship. Doctors were to be left unfettered. This model of the doctor-patient relationship is unrealistic, especially in the abortion context, just as the *Lochner* Court's model of labor relations was unrealistic at the time.<sup>112</sup>

The states have responded to the breakdown of the "family physician" model of medical care just as they responded to perceived busi-

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106. See *Lochner*, 198 U.S. at 55, 57, 61.

107. *Id.*

108. *Id.* at 53.

109. *Roe*, 410 U.S. at 165-66. See also, *Doe v. Bolton*, 410 U.S. 179, 197 (1973).

110. *Roe*, 410 U.S. at 141-47, 156, 165-66; *Bolton*, 410 U.S. at 197; *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983). *Akron* relied heavily on the customs of the medical profession and placed great faith in the doctor-patient relationship. *Id.* at 437, 450-51. See also *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 61, 65 n.4, 73-75 (1976).

111. *Roe*, 410 U.S. at 165-66; *Bolton*, 410 U.S. at 195-200; *Colautti v. Franklin*, 439 U.S. 379, 387 (1979). See also Wood & Durham, *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B.Y.U. L. REV. 783, 785.

112. Wardle, *supra* note 19, at 244-45 n.72; Nathanson, *Deeper Into Abortion*, 291 N. ENG. J. MED. 1189 (1974); Zekman & Warrick, *The Abortion Lottery*, Chicago Sun-Times, Nov. 14, 1978, at 11-13.

ness abuses. Statutes designed to limit abuses by physicians, such as those at issue in *Thornburgh*, were, in this regard, similar to the state regulations of the *Lochner* era. Federal abortion funding restrictions and attempts to amend the Constitution to protect the unborn are analogous to New Deal reform attempts. Those attempts to reform or work around the Supreme Court opinions of the *Lochner* era were thwarted by the High Court.

Eventually, the Supreme Court recognized that the imposition of its economic philosophy on the country was inappropriate. It acknowledged that *stare decisis* was not a compelling argument for adhering to opinions that lacked the essentials of law. The Court recognized that the rule of law was consistent with the regulation of private actors.<sup>113</sup>

Hopefully, the Supreme Court will relearn the *Lochner* lesson, recognize the unconstitutionality of its holding in *Roe*, and overturn *Roe*. The rule of law in our Constitutional scheme requires such self-correction by the Court when the Court has transgressed the bounds of its lawful authority.

Abortion jurisprudence, then, may be seen as antithetical to the rule of law. It is so in several senses. First, it is based upon an unwarranted Constitutional theory. As shall be seen, the right to abortion may not be logically derived from substantive due process, even if such analysis were appropriate. The Court has never demonstrated the connection between the Constitution and the Court-created right to choose abortion. Thus, the Court has transgressed a fundamental principle of the rule of law—that all are bound by the law, even justices. They may not lawfully exercise power where it is unauthorized by the Constitution.

Second, abortion jurisprudence is antithetical to the rule of law because it grants an unwarranted degree of discretion to a powerful elite—physicians. By allowing this discretion, the Supreme Court has impeded a primary function of the rule of law—to ensure impartiality

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113. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937)(acknowledging the reality of uneven bargaining power); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)(permitting federal regulation of labor relations). It might be argued that these opinions were inconsistent with the rule of law, because they paved the way for a bureaucratic welfare state in which tremendous power is delegated to unelected executive personnel. Nevertheless, the doctrine of *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)(limiting standardless delegation of discretionary powers to the executive and to a private elite), still stands as a safeguard. Moreover, the history of administrative law reveals persistent impositions of rule-of-law constraints to limit the discretion of administrative agents. See, e.g., Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975). While our constitutional scheme might have been modified in light of changed circumstances, a distrust of unfettered discretion has remained constant. Today, however, three powerful groups seem to possess such discretion: the U.S. Supreme Court, the American College of Obstetricians and Gynecologists, and physicians who perform abortions.

among powerful social actors and that rulers and ruled act out of reason, principle, and the common good, rather than from passion and self-interest.

Third, abortion case law is antithetical to the rule of law because it undermines the ability of the state legislatures to enact generally applicable rules. This is an essential rule-of-law function. In the abortion context, the Court has mandated physician discretion, requiring case by case treatment of abortion. The Court has done this despite the fact that abortion patients generally are not given individualized treatment but are treated on a wholesale basis. The legal principle of treating like cases alike is violated. By so doing, the Court undermines a rule-of-law constraint on adjudication—the requirement of reasoned, principled decision-making. As will be demonstrated, the Court fails to treat abortion the same as other privacy rights, analogous medical procedures, and other legal issues involving the unborn.

Fourth, the rule of law also requires statutes, regulations, and judicial pronouncements to be susceptible to obedience. Yet, it is often difficult for state legislatures to determine just what regulation of abortion is permitted. A ready example is the Court's confusing pronouncements on post-viability regulations. Is the trimester scheme a "bright-line" framework, or does the physician have discretion to adjust these lines according to his own determination of viability?

Fifth, a corollary principle is the importance of stability in the law. Despite invocation of *Roe* as a polestar for creating and reviewing abortion regulation, abortion law has been marked by instability and uncertainty. As will be shown, the Supreme Court's pronouncements have been far from clear. As a result, it is difficult, if not impossible, to predict what the Court will do with any given regulation.

*b. Stare Decisis.* To allow obedience to and stability in the law, the rule-of-law doctrine of *stare decisis* has been developed. One of the essential aspects of the rule of law is that laws must be known in order to be followed. Thus, we have statute books. Where courts make law, the decisions of the courts are written and published. Where questions of law arise in subsequent cases, prior opinions are consulted for the controlling rules of law. Unless a prior decision is overruled as incorrect, the precedent is binding on subsequent cases. Judges are bound by the laws they have made before, unless they provide rationale for overturning them. They may not make *ad hoc* dispositions of cases.

If employed properly, the doctrine makes it possible to predict, with reasonable accuracy, what a court will decide in future cases which raise similar issues. As will be shown next, abortion jurisprudence undermines the rule of law by neglecting the proper application of the doctrine of *stare decisis* in abortion cases.

## 2. *Court neglect of stare decisis in abortion cases*

It is ironic that, while claiming to follow *Roe*, the Court has systematically gutted *Roe* to allow the current desired result. The doctrine of stare decisis presupposes a precedent with content to be followed. By emptying *Roe* of content, the Court's appeal to stare decisis is now an appeal only to the skeletal concept that a woman may have an abortion whenever she desires, for whatever reason.

The Court indicates this to be the core and substance of the precedent it follows. It has struck down any meaningful attempt to codify the restrictions allowed in *Roe* and abandoned key elements of the *Roe* formula when convenient. It is clear, then, that, while the Court raises the cry of stare decisis, it has not in fact followed its own precedent, except in the most skeletal fashion. Illustrations abound. Some are set forth below.

*a. Erosion of Roe's "bright line" trimester analysis.* In *Roe*, the Court adopted its famous trimester scheme.<sup>114</sup> In the first trimester, the state could impose little regulation. "[T]he abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."<sup>115</sup> In the second trimester, the state could regulate abortion to protect its compelling interest in maternal health.<sup>116</sup> Beginning with viability (roughly the third trimester), the state's interest in the fetus became compelling, and it could even proscribe abortion, with exceptions to protect the life or health of the mother.<sup>117</sup>

In *Gary-Northwest Indiana Women's Services v. Bowen*,<sup>118</sup> an Indiana District Court adhered to the precedent in *Roe*. At issue was a statute requiring hospitalization for second trimester abortions.<sup>119</sup> The plaintiffs argued that, since the D & E (dilation and evacuation) abortion techniques had improved since *Roe*, the hospitalization requirement was no longer rationally related to maternal health for at least the first half of the second trimester.<sup>120</sup> They argued that the second trimester should be split in half and clinic abortions allowed through eighteen weeks.<sup>121</sup>

The trial court rejected such argument, saying that "[t]o adopt the

114. *Roe*, 410 U.S. at 162-66.

115. *Id.* at 164.

116. *Id.*

117. *Id.* at 164-65.

118. 496 F. Supp. 894 (N.D. Ind. 1980) *aff'd sub. nom.* *Gary-Northwest Ind. Women's Servs. v. Orr*, 451 U.S. 934 (1981).

119. *Id.* at 896.

120. *Id.* at 897.

121. *Id.*

plaintiff's argument would require this Court to controvert the express language of *Roe*."<sup>122</sup> The court noted that *Roe* had specifically addressed the issue, and quoted *Roe*, emphasizing the relevant portions:

*Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital . . . .*<sup>123</sup>

The district court then continued:

The language is clear. A hospitalization requirement for second trimester abortions is constitutional. Indiana and many other states have relied on this interpretation of the language. This Court has "an obligation to follow the precedents of our highest Court." [Citation omitted.] This Court is bound by the language of *Roe*. This Court may not controvert specific rulings of the Supreme Court of the United States. The express language of *Roe* mandates that Indiana's second trimester hospitalization requirement be found by this Court to be constitutional.<sup>124</sup>

The district court went on to indicate that splitting the second trimester would require "some cutoff other than the end of the first trimester. The *Roe* language clearly demonstrates the intent of the Supreme Court to encourage, indeed force, states to use the end of the first trimester as a cutoff point for regulations designed to protect maternal health."<sup>125</sup> The court noted *Roe's* implied requirement that trimesters be treated as units and not broken up.<sup>126</sup>

The *Gary-Northwest* court also rejected the argument that "*Roe* allow[ed] regulation not of second trimester abortions, but only of abortions more dangerous than childbirth."<sup>127</sup> The court answered this argument:

The specific ultimate rulings in *Roe* with regard to the various stages of pregnancy were somewhat arbitrary judgments necessitated by a wide variety of factors. This Court must respect *Roe's* specific ultimate rulings. If this Court does not respect the specific ultimate rulings in *Roe*, those rulings will lose their usefulness. . . . [S]tates will be hard pressed to pursue their legitimate, compelling, interests in

122. *Id.* at 898.

123. *Id.* at 899 (emphasis in original); *Roe*, 410 U.S. at 163-64.

124. *Gary-Northwest*, 496 F. Supp. at 899.

125. *Id.*

126. *Id.* at 900.

127. *Id.*



protecting maternal health.<sup>128</sup>

The court noted that making the rule depend on whether childbirth was more dangerous than abortion would require a case by case determination of constitutionality, because the facts of each pregnancy differ.<sup>129</sup> Further, “[i]f the Supreme Court had intended the test . . . to be the safety of the abortion relative to childbirth, the Supreme Court would have so stated the test.”<sup>130</sup> It did not, the district court noted, but selected as the test the chronological stage of the pregnancy.<sup>131</sup>

Finally, the district court stated:

It would be impractical for the constitutionality of a second trimester regulation to depend on a factual question, such as whether the regulation in fact reduced maternal morbidity and mortality. [This] would require relitigation of the regulation’s constitutionality with each change in the availability of abortions, with each improvement in abortion technique, and with each publication of statistics showing that abortion skills had improved. Such an interpretation of *Roe* would result in repeated relitigation of the constitutionality of the same statute. It is the policy of the Supreme Court to avoid, if possible, the creation of rules of law which increase litigation.<sup>132</sup>

Therefore, the court held that, since it was reasonably related to promoting maternal health, the second trimester hospitalization requirement was constitutional.<sup>133</sup> “A contrary ruling would controvert *Roe*,” it concluded.<sup>134</sup>

The *Gary-Northwest* case gave a clear example of stare decisis in practice. As indicated in *Gary-Northwest*, many states relied on this interpretation of *Roe*.<sup>135</sup> The United States Supreme Court summarily affirmed the decision on appeal.<sup>136</sup> Not surprisingly, this was widely interpreted as indicating the Court’s continued approval of statutes requiring hospitalization for abortions after the first trimester.<sup>137</sup>

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 901.

133. *Id.* at 902.

134. *Id.*

135. *Id.* at 899.

136. *Gary-Northwest Ind. Women’s Servs. v. Orr*, 451 U.S. 934 (1981).

137. The view was not unanimous, however. *See, e.g.*, *Margaret S. v. Edwards*, 488 F. Supp. 181 (E.D. La. 1980)(*Margaret S. (I)*); *Margaret S. v. Treen*, 597 F. Supp. 636 (E.D. La. 1984)(*Margaret S. (II)*). *Margaret S. (II)* found *Gary-Northwest* not to be binding. Interestingly, one distinction it employed was that Indiana had a broader definition of “hospital” than did Louisiana, thereby making second and third trimester abortions “more readily accessible in Indiana.” *Margaret S. (II)*, 597 F. Supp. at 656. However, the court also cited the jurisdictional statement of

With this clear statement of *Roe*, the precedent seemed clear. A post-first trimester hospitalization requirement was constitutional. The city council of Akron, Ohio, codified this precedent.<sup>138</sup> However, the Supreme Court abandoned the doctrine of stare decisis in reviewing the regulation.

The doctrine of stare decisis required the Supreme Court merely to examine its own precedents and follow them. The district court in *Akron* did so,<sup>139</sup> and the court of appeals affirmed.<sup>140</sup> The Supreme Court reversed, because the American Public Health Association (APHA) and the American College of Obstetricians and Gynecologists (ACOG) had altered their positions.<sup>141</sup> At the time of *Roe*,<sup>142</sup> and when the Akron ordinance was enacted,<sup>143</sup> APHA and ACOG recommended hospitalization after the first trimester. By 1982, they did not.<sup>144</sup> The

*Gary-Northwest*, which set forth one of the three issues as, "[w]hether the district court abused its discretion in preliminarily upholding the second trimester hospital restriction, when the overwhelming majority of Indiana hospitals ban all abortion services, and there is no compelling health reason for mandatory hospitalization." *Id.* at 654 (capital letters removed). The distinction based on accessibility seems a rather weak one at best. More importantly, as *Margaret S. (II)* conceded, this issue "could possibly be characterized as substantive." *Id.* at 655 (other issues were definitely procedural). The *Margaret S. (II)* court argued, however, that, since only a preliminary injunction had been sought, this "was not tantamount to a decision on the merits on the constitutionality of a post-first trimester hospitalization requirement since it is clear that different standards apply in the granting of preliminary and permanent injunctions." *Id.* (citations omitted). While this assertion of different standards is correct, it is not dispositive. As *Margaret S. (II)* noted, one must show a "likelihood of success" (rather than "success") on the merits for a preliminary injunction. Thus, it is apparent that the Supreme Court did not believe that the district court abused its discretion in finding it likely that the state would prevail at a trial of its post-first trimester hospitalization requirement (even though one is not required to prove all one's case at a preliminary injunction hearing). *Id.*

It is unlikely that the Supreme Court would have summarily affirmed if it had believed that a second trimester hospitalization requirement was unconstitutional. The case was not entirely procedural, and the substantive aspect revolved around the sole issue of the hospitalization requirement. There was little doubt that the case would be widely perceived as placing the Court's endorsement on the hospitalization requirement. Indeed, this was the case with the *Akron* district and appellate courts. *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 426 (1983). If the Supreme Court did not intend to affirm a post-first trimester hospitalization requirement, it should have avoided the use of a summary affirmation, which certainly left such an impression. There is strong evidence that the Court still felt the hospitalization requirement was constitutional in 1981, because the American Public Health Association (APHA) and American College of Obstetricians and Gynecologists (ACOG), its authorities, had not yet agreed on a change. In 1981, APHA published its revised viewpoint, and ACOG's 1982 standards included its shift of opinion. *Id.* at 437. Thus, the shift in medical opinion was just then in progress and was not yet completed.

138. Akron, Ohio, CODIFIED ORDINANCES § 1870.03 (1978)(requiring that all abortions after the first trimester be performed in a hospital).

139. *Akron*, 462 U.S. at 426.

140. *Id.*

141. *Id.* at 435-37.

142. *Id.* at 435.

143. *Id.* at 431.

144. *Id.* at 437.

Court said the state (or its cities) may not “depart from accepted medical practice.”<sup>145</sup>

The state may no longer look to the precedent of the Court, but must now keep track of shifting medical opinions and follow them in order to legislate constitutionally. The “bright-line” trimester approach was abandoned.<sup>146</sup> The Court, by its “diligent research,”<sup>147</sup> decided that abortions in clinics were safe through the sixteenth week of pregnancy because of improvements in the D & E abortion technique.<sup>148</sup>

Therefore, the state may no longer treat the trimester as a unit but must fine-tune its legislation to the latest APHA and ACOG pronouncements. Of course, the Court’s latest guideline at sixteen weeks may not be safe for a legislator to follow, because ACOG now says eighteen weeks is the proper place to draw the line.<sup>149</sup> One is left not knowing whom to follow. In *Akron*, the Court followed medical organizations rather than its own pronouncements.<sup>150</sup>

145. *Id.* at 434 (citations omitted).

146. *See id.* at 455 (O’Connor, J., dissenting).

147. *Id.*

148. *Id.* at 436.

149. *Id.* at 437.

150. *Id.* The *Akron* Court attempted to find precedent for its holding in *Doe v. Bolton*, 410 U.S. 179 (1973). *See Akron*, 462 U.S. at 433. *Bolton* rejected a state requirement of hospitalization in accredited hospitals, for abortions in all three trimesters. *Bolton*, 410 U.S. 179, 194 (1973). However, the *Akron* Court rewrote the *Bolton* precedent in so doing. The *Bolton* Court held specifically the following: “We hold that the hospital requirement of the Georgia law, because it fails to exclude the first trimester of pregnancy, *see Roe*, . . . at 163, is also invalid.” *Id.* at 195. The *Akron* Court not only failed to clearly quote its holding in *Bolton*, but it relegated it to a passing comment at the end of a footnote. *Akron*, 462 U.S. at 434 n.19. The *Bolton* Court also cited the state’s failure to adduce enough evidence to support its hospital requirement for abortions in all trimesters. *Bolton*, 410 U.S. at 195. This the *Akron* Court presented as the primary reason for invalidation, rather than the first trimester infringement clearly indicated in the Court’s own statement of its holding. *Akron*, 462 U.S. at 433. In any event, the Supreme Court’s subsequent affirmation of *Gary-Northwest Ind. Women’s Servs. v. Bowen*, 496 F. Supp. 894 (N.D. Ind. 1980) *aff’d sub. nom. Gary-Northwest Ind. Women’s Servs. v. Orr*, 451 U.S. 934 (1981), which dealt with the issue of a second trimester hospitalization requirement, should have been dispositive of any question of the required level of proof. The *Gary-Northwest* district court opinion supported the hospitalization requirement on rationality grounds:

Clearly, it is reasonable for a state to conclude that a hospitalization requirement will promote health. It cannot be seriously disputed that medical risks accompany abortions. It is therefore eminently reasonable to require that abortion be performed in a hospital. Hospitalization may be the most obviously reasonable health-related regulation that there is. [Citation omitted.] That is probably why the Supreme Court of the United States expressly stated that hospitalization would be a regulation reasonably related to maternal health. Indiana’s determination that a hospitalization requirement would promote maternal health can be supported by reason.

*Gary-Northwest*, 496 F. Supp. at 902.

The Supreme Court affirmed *Gary-Northwest*, including the prominent statement by the District Court that the “ultimate test” was “whether the legislature acted reasonably in determining that the regulation would promote maternal health.” *Id.* Specifically rejected in *Gary-North-*

In a footnote, *Akron* referred to *Gary-Northwest*, noting that the court of appeals believed itself bound by this precedent.<sup>151</sup> The Supreme Court dismissed the case as not being binding.<sup>152</sup> It asserted this by reading into *Gary-Northwest* an alternative decisional basis: that the plaintiff did not prove the safety of second trimester abortions outside of hospitals.<sup>153</sup> However, the district court in *Gary-Northwest* held that “*even if* the plaintiffs could prove birth more dangerous than early second trimester D & E abortions,” that would not affect the constitutionality of the statutes.<sup>154</sup> As Justice O’Connor observed, the Court simply ignored this fact.<sup>155</sup>

Thus, the Supreme Court first held post-first trimester hospitalization requirements constitutional (in keeping with APHA and ACOG holdings) and then said they were not. This is a failure to observe the doctrine of stare decisis. Even if the Court really meant one must keep up with the latest rulings of medical panels, that also is a failure of stare decisis, for, in *Roe*, trimesters were set forth as units, and now the lines are being blurred. Surely stare decisis presupposes neutral principles “sufficiently absolute to give them roots throughout the community and continuity over significant periods of time.”<sup>156</sup> Finally, stare decisis surely requires adherence to decisions by the courts and not to the moving target of changing medical opinions.

The approach of the *Akron* majority to stare decisis wreaks havoc with the principles of the doctrine, especially consistency, susceptibility of obedience and amenability to generally applicable laws. How may a legislator predict what will be held constitutional under such a High Court approach? Of course, this emphasizes again the fallacy of the trimester approach, based as it is on the shifting sands of medical technology rather than on the bedrock of the Constitution.

Thus, stare decisis was abandoned in the same case (*Akron*) in which it was declared to be controlling. The Court in *Akron* followed what it wished in *Roe* and ignored what was inconvenient. In so doing, it distorted stare decisis and made the abortion right more absolute.

*b. Ignoring physician consultation requirements in abortion cases.* A second key concept of *Roe* was the requirement that the woman make the abortion decision “in consultation” with her physician,

*west* was the test of “whether the statute has the statistically demonstrable result of decreasing maternal morbidity or mortality for specific groups of abortions.” *Id.*

151. *Akron*, 462 U.S. at 433 n.18.

152. *Id.*

153. *See id.*

154. *Gary-Northwest*, 496 F. Supp. at 903 (emphasis added).

155. *Akron*, 462 U.S. at 455 n.3.

156. A. COX, *supra* note 26, at 114.

who must find "that, in his medical judgment, the pregnancy should be terminated."<sup>157</sup> The Court so held because the Court considered the abortion decision "inherently, and primarily, a medical decision."<sup>158</sup> The medical judgment of the physician was thus tied to the woman's freedom which the Court left in place during the first trimester. In an era when physicians, clinics, and corporate franchises make their living from abortion, this is not a very substantial check. However, the Court envisioned a traditional doctor-patient relationship and required consultation in *Roe*.<sup>159</sup>

In *Akron*, the Court restated the principle that a woman, during the first trimester, "must be permitted, *in consultation* with her physician, to decide to have an abortion and to effectuate that decision . . . ."<sup>160</sup> The Court added that informed consent requirements would be permissible if they leave "the precise nature and amount of this disclosure to the *physician's discretion and 'medical judgment.'*"<sup>161</sup> The Court even noted that "in *Roe* and subsequent cases we have 'stressed repeatedly the central role of the physician, both in *consulting* with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out.'"<sup>162</sup> However, the Court broke with its precedent and held that someone else could consult with the woman besides her physician (or any physician).<sup>163</sup> The Court noted that the "practice" at abortion clinics was not to have the physician consult with the patient and, therefore, held that requiring the physician to do so was unconstitutional.<sup>164</sup> The Court held that "it [was] unreasonable for a State to insist that only a physician [was] competent to provide the information and counseling relevant to informed consent."<sup>165</sup>

Again, the Court violated the doctrine of stare decisis. While purporting to follow *Roe*, it emptied *Roe* even further of content. Once more the "precedent" of medical practice ruled over the precedent of the Court.

*c. A pattern of stare decisis abuse.* Other illustrations show a dis-

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157. *Roe*, 410 U.S. at 163.

158. *Id.* at 166.

159. *See id.*

160. *Akron*, 462 U.S. at 429-30 (emphasis added).

161. *See id.* at 447 (emphasis added).

162. *Id.* at 447 (quoting *Colautti v. Franklin*, 439 U.S. 379, 387)(emphasis added).

163. *Id.* at 448.

164. *Id.* at 447-48.

165. *Id.* at 449. Interestingly, *Thornburgh v. American College of Obstetrics & Gynecologists*, 476 U.S. 747 (1986), still employed the physician consultation language. Along with abandoning the requirement of physician counseling went the concept that abortion was to be based on medical judgment. *Id.* at 762, 764.

turbing and consistent pattern of stare decisis abandonment. In *Planned Parenthood of Central Missouri v. Danforth*, recordkeeping was clearly allowed. However, in *Thornburgh v. American College of Obstetrics & Gynecologists*, the Court struck down comparable record-keeping requirements.<sup>166</sup>

In *Poelker v. Doe*, the Supreme Court noted that the personal motives of the ones promulgating the law are irrelevant.<sup>167</sup> In *Thornburgh*, the Court recited the history of Pennsylvania's attempts to pass constitutional abortion legislation "as if it were evidence of some sinister conspiracy."<sup>168</sup>

The Supreme Court approved of informed consent requirements in *Planned Parenthood Association v. Fitzpatrick*,<sup>169</sup> *Danforth*,<sup>170</sup> and *Guste v. Jackson*.<sup>171</sup> However, in *Thornburgh*, it struck down similar requirements which carefully steered clear of the hazards found in *Akron*.<sup>172</sup>

In *Planned Parenthood Association v. Ashcroft*, the Court held that parental consent may be required for certain minors before an abortion may be performed.<sup>173</sup> Though no court procedural rules had yet been promulgated, the Court said, "There is no reason to believe that Missouri will not expedite any appeal consistent with the mandate in our prior decisions."<sup>174</sup> In *Thornburgh*, a virtually identical statute under virtually identical circumstances was enjoined until procedural rules were adopted.<sup>175</sup>

Finally, as noted by Justice O'Connor, the Court has even changed some of its tests. For example, in *Akron*, it failed to apply the usual threshold inquiry for fundamental rights analysis of whether the right was "unduly burden[ed]."<sup>176</sup> Also, at one point, the *Akron* Court abandoned the usual "reasonable relationship" test for a newly created "vital state need" test.<sup>177</sup>

166. See *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Thornburgh v. American College of Obstetrics & Gynecologists*, 476 U.S. 762 (1986). This subject is further developed in *infra* section III-C-5.

167. *Poelker v. Doe*, 432 U.S. 519, 521 (1977). See also *City of Las Vegas v. Foley*, 747 F.2d 1294, 1298 (9th Cir. 1984)(rejecting the use of legislative motives).

168. *Thornburgh*, 476 U.S. at 751-52, 798 (White, J., dissenting).

169. 401 F. Supp. 554, 583 (E.D. Pa. 1975), *aff'd sub nom. Franklin v. Fitzpatrick*, 428 U.S. 901 (1976).

170. *Danforth*, 428 U.S. at 67.

171. 429 U.S. 399, 400 (1977)(per curiam).

172. A detailed discussion is found in the informed consent discussion *infra* section III-C-3.

173. *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490-93 (1983).

174. *Id.* at 491 n.16.

175. *Thornburgh*, 476 U.S. at 758 n.9.

176. *Akron*, 462 U.S. at 466.

177. *Id.* at 471 n.15.

*d. Consequences of stare decisis abuse.* The result of this vacillation is that abortion jurisprudence appears result-oriented. Stare decisis is adhered to when convenient and abandoned when not. Stability, predictability, and consistency—important purposes of stare decisis—are set aside, leaving legislators and the public puzzled as to what the law is on abortion.

Indications that the Court is playing politics in its abortion decisions compound this unpredictability. The abortion funding cases<sup>178</sup> and *H.L. v. Matheson*<sup>179</sup> might be interpreted as an effort to soften the political outrage at other decisions seeming to strengthen the protection of abortion. Given the Court's previous decisions, these latter holdings were not predictable. Indeed, they have been criticized as anomalous.<sup>180</sup>

Finally, abortion jurisprudence displays a cultural bias by the Supreme Court and a favoritism toward an elite group—physicians who perform abortions. Such bias is unseemly in a rule-of-law regime.

The rule of law has been discussed by many scholars. Different components have been stressed by different writers. Differing purposes have been set forth, such as securing democratic liberalism, securing maximum freedom, protecting property, or curbing irrational, arbitrary and corrupt rule.<sup>181</sup> The focus here is not to enter this debate but to observe that rule of law serves highly desirable ends. Among these are the securing of good government and the happiness of the citizenry.

In *Akron*, Justice Powell acknowledged that ours is a society "governed by the rule of law." He also noted that stare decisis is an important means to implementing such rule.<sup>182</sup> However, *Roe* and its progeny have been shown to be at war with the principles of the rule of law. The application of stare decisis to such precedent, thereby upholding the right to abortion, undermines the rule of law.

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178. See, e.g., *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980).  
179. 450 U.S. 398 (1981).

180. See, e.g., Tribe, *supra* note 43.

181. The literature is voluminous. See, e.g., J. LOCKE, *SECOND TREATISE OF GOVERNMENT*, chap. 7 (R. Cox. ed. 1982); F. HAYEK, *THE POLITICAL IDEAL OF THE RULE OF LAW*, Lecture III (1955); J. RAWLS, *A THEORY OF JUSTICE* 235-43 (1971); J. RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY*, chap. 11 (1979); R. UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* (1976); L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969). See also Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973); D. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* (1984). Of course, ARISTOTLE'S, *POLITICS*, and PLATO'S, *REPUBLIC*, *STATESMAN*, and *LAWS* remain the most insightful discussions. See also PLATO, *CRITO*.

182. *Akron*, 462 U.S. at 420.

*C. Thornburgh v. American College of Obstetricians and Gynecologists*

The wide divergence of abortion case law from the usual rules of law is also evident in the extreme result reached by the Court in *Thornburgh*.<sup>183</sup> This 1986 case demonstrates the problem states have in predicting and conforming to the Court's boundaries. As Justice O'Connor wrote in her dissent to *Akron*, the "bright lines" have become "blurred."<sup>184</sup>

The following discussion is an overview of *Thornburgh*. Certain elements of the decision will receive further treatment in the later discussion of the different aspects of abortion law.

1. *Background to Thornburgh: The statutes and the lower courts*

In *Thornburgh*, the constitutionality of the Pennsylvania Abortion Control Act was at issue. The challenged provisions included a requirement of a second physician in post-viability abortions to preserve the life of the fetus, if possible.<sup>185</sup> The Court of Appeals for the Third Circuit found this unconstitutional because it lacked an *explicit* emergency exception.<sup>186</sup>

Another Pennsylvania provision required use of the abortion technique most likely to preserve fetal life, unless it would cause significantly greater risk to the mother.<sup>187</sup> The Third Circuit found this unconstitutional by interpreting it to require an impermissible trade-off between maternal health and fetal rights.<sup>188</sup>

The Pennsylvania Act included an informed consent provision. It required physicians to make available state-prepared information concerning alternatives to abortion, available assistance for alternatives, and objective information regarding fetal characteristics and the possibility of fetal survival.<sup>189</sup> The physician was required to disclose (1) the possibility of unforeseeable psychological and physical risks of abortion,<sup>190</sup> (2) the availability of medical assistance benefits for prenatal care, childbirth, and neonatal care,<sup>191</sup> (3) the liability of the father for

183. *Thornburgh v. American College of Obstetrics & Gynecologists*, 476 U.S. 747 (1986).

184. *Akron*, 462 U.S. at 455 (O'Connor, J., dissenting).

185. 18 PA. CONS. STAT. § 3210(c)(1983).

186. *American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283, 300-01 (3d Cir. 1984) *aff'd* 476 U.S. 747 (1986). *But see* *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 485 n.8 (1983). *See also* Brief for the United States, *supra* note 35, at 5-6.

187. 18 PA. CONS. STAT. § 3210(b) (1983).

188. *Thornburgh*, 737 F.2d at 300. *See* *Colautti v. Franklin*, 439 U.S. 379, 400 (1979).

189. 18 PA. CONS. STAT. § 3205(a)(2)(iii) (1983).

190. *Id.* § 3205(a)(1)(ii).

191. *Id.* § 3205(a)(2)(i).



child support,<sup>192</sup> and (4) the probable gestational age of the fetus.<sup>193</sup> The court of appeals invalidated all of these provisions on the basis of *Akron*.<sup>194</sup>

Pennsylvania also included a parental consent provision which essentially codified the Supreme Court's holding in *Bellotti v. Baird (Bellotti (II))*.<sup>195</sup> The appeals court enjoined enforcement of this until the Pennsylvania Supreme Court promulgated implementing regulations.<sup>196</sup>

The Pennsylvania Act also required physicians to provide reports with a variety of data for statistical purposes.<sup>197</sup> Included was a report of the basis for the physician's determination that the fetus was not viable or "that the abortion [was] necessary to preserve maternal life or health."<sup>198</sup> The court of appeals invalidated these requirements because they were too extensive and complicated and, hence, were likely to increase the cost of an abortion and possibly have a chilling effect on physicians' willingness to perform abortions.<sup>199</sup>

Another Pennsylvania provision required health insurers to make available policies that excluded elective abortion coverage (except in the case of rape or incest). These policies would have been mandatorily priced less than policies with abortion coverage.<sup>200</sup> The appeals court invalidated this as an unjustified barrier to a woman's access to abortion.<sup>201</sup>

## 2. Reasoning of the Supreme Court

The Supreme Court's holding in *Thornburgh* had major procedural implications. The Court affirmed the appellate court's decision to go to the merits of the case, even though no final judgment had been

192. *Id.* § 3205(a)(2)(ii).

193. *Id.* § 3205(a)(1)(iv).

194. *Thornburgh*, 737 F.2d at 295-96. See *Akron*, 462 U.S. at 444-45. But see Brief for the United States, *supra* note 35, at 7-8.

195. 18 PA. CONS. STAT. § 3206 (1983). See *Bellotti v. Baird*, 443 U.S. 622 (1979)(*Bellotti (II)*).

196. *Thornburgh*, 737 F.2d at 297. But see Brief for the United States, *supra* note 35, at 4-5.

197. 18 PA. CONS. STAT. § 3214 (1983)(requiring information including the physician's name, location of facility, woman's age, race and marital status, type of abortion procedure, and any complications).

198. *Id.* § 3211.

199. *Thornburgh*, 737 F.2d at 301-02. But see Brief for the United States, *supra* note 35, at 9-10.

200. 18 PA. CONS. STAT. § 3215(e) (1983).

201. *Thornburgh*, 737 F.2d at 303. But see *Harris v. McRae*, 448 U.S. 297, 316-17 (1980); *Maier v. Roe*, 432 U.S. 464, 474 (1977).

rendered below.<sup>202</sup> The trial court had only denied a preliminary injunction from which this appeal was taken.<sup>203</sup>

The *Thornburgh* opinion also contained substantive rulings regarding informed consent, reporting requirements, and regulations designed to preserve the lives of viable, aborted fetuses. The Court invalidated almost every regulation Pennsylvania had passed, and it did so with a hostile, summary attitude.

The Supreme Court affirmed the appellate court's finding of unconstitutionality regarding the informed consent provisions, holding that they were designed to persuade women to withhold consent.<sup>204</sup> It added that the required giving of information "intrude[d] upon the discretion of the pregnant woman's physician," the two-week interval descriptions of fetal development was overinclusive, and requiring such disclosure was "contrary to accepted medical practice."<sup>205</sup> The Court likened the Pennsylvania statute to Akron's "parade of horrors" (which it had found unconstitutional) and declared it facially unconstitutional because it "cannot be saved by any facts that might be forthcoming at a subsequent hearing."<sup>206</sup> Finally, the Court refused to sever the defective portions, claiming the result would bear little resemblance to what the legislature intended.<sup>207</sup>

The Supreme Court also invalidated the provisions which required physician reports of the basis for a determination of nonviability or medical necessity (where abortions have been performed) and other information for statistical purposes.<sup>208</sup> These had been invalidated by the appellate court because of possible added expense and a chilling effect. The Supreme Court affirmed the appellate court, but on a different rationale. It found that "identification [was] the obvious purpose of these extreme reporting requirements."<sup>209</sup>

The Pennsylvania requirements of a second physician to care for the fetus at abortions after viability<sup>210</sup> and the use of the abortion method most likely to preserve fetal life, unless it would cause significantly greater risk to the mother,<sup>211</sup> were clear efforts to assert the State's compelling interest in the viable, unborn fetus which *Roe* de-

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202. *Thornburgh v. American College of Obstetrics & Gynecologists*, 476 U.S. 747 (1986).

203. *Id.*

204. *See id.* at 764.

205. *Id.* at 762.

206. *See id.* at 760-64.

207. *Id.* at 764-65.

208. *Id.* at 766.

209. *Id.* at 767.

210. 18 PA. CONS. STAT. § 3210(c) (1983).

211. *Id.* § 3210(b).

clared.<sup>212</sup> However, the Court affirmed the appellate court and struck down the latter provision as requiring an impermissible "trade-off" between maternal health and fetal rights,<sup>213</sup> and the former as having no emergency section.<sup>214</sup>

The Supreme Court also allowed a temporary injunction to stand against the enforcement of the parental consent provision. Although no defect in the provision itself was found, the statute was enjoined pending promulgation of procedural rules by the state courts to implement it.<sup>215</sup>

*Thornburgh* further demonstrates the Court's abandonment of stare decisis. *Roe* declared that states have compelling interests in maternal health, from the second trimester on, and in fetal life, after viability. Stare decisis would require continued recognition of those interests and sympathetic treatment of regulations seeking to implement them. The Court has not done this. Rather, the Court has struck down virtually every legislative attempt to assert these "compelling" interests. *Thornburgh* indicates the extremes to which the Court will go in avoiding its own precedent in *Roe*.

Chief Justice Burger's dissent in *Thornburgh* observed how these state interests had been ignored. First, he noted the state's compelling interest in maternal health which *Roe* established. He declared, "Yet today the Court astonishingly goes so far as to say that the State may not require that a woman contemplating an abortion be provided with accurate medical information concerning the risks inherent in the medical procedure . . . ." <sup>216</sup> Second, he pointed out the state's compelling interest in viable fetal life established by *Roe*. He then argued that the Court's willingness to strike down a second physician requirement (to care for viable aborted children) made the concerns of the Court in *Roe* "mere shallow rhetoric."<sup>217</sup> He added, "Undoubtedly the Pennsylvania Legislature added the . . . requirement on the mistaken assumption that this Court meant what it said in *Roe* concerning the 'compelling interest' of the states . . . ." <sup>218</sup>

*Thornburgh* is indicative of the problems *Roe* engenders. "The

212. *Roe*, 410 U.S. at 163.

213. *Thornburgh*, 476 U.S. at 768-69.

214. *Id.* at 770-71.

215. *Id.* at 758 n.9.

216. *Thornburgh*, 476 U.S. at 783 (Burger, C.J., dissenting). This subject is further developed in the informed consent discussion *infra* section III-C-3.

217. *Thornburgh*, 476 U.S. at 784 (Burger, C.J., dissenting). The Supreme Court struck down this statute because it lacked an emergency clause, though a construction allowing one was fairly possible. This is further developed in *infra* section III-D-3.

218. *Thornburgh*, 476 U.S. at 784 (Burger, C.J., dissenting).

soundness of our holdings must be tested by the decisions that purport to follow them," observed Chief Justice Burger, in his dissent in *Thornburgh*.<sup>219</sup> While *Roe* rejected abortion on demand,<sup>220</sup> *Thornburgh* indicated that virtually no meaningful state abortion regulation would survive—even a requirement that the choice be informed.<sup>221</sup> While *Roe* recognized a "compelling" state interest in viable fetal life,<sup>222</sup> *Thornburgh* indicated that any assertion of that interest would be met with hostility.<sup>223</sup> The *Thornburgh* majority was defensive, intransigent,<sup>224</sup> and so restrictive, even by *Roe* standards, that Chief Justice Burger, who concurred with the majority in *Roe*, dissented in *Thornburgh* and called for a reexamination of *Roe*.<sup>225</sup>

In sum, as Justice White observed, the majority viewed Pennsylvania's efforts to codify what the Court previously said was allowable regulation as "some sinister conspiracy"<sup>226</sup> and "change[d] the rules to invalidate what before would have seemed permissible."<sup>227</sup> In the process, as noted by Justice O'Connor, the Court trampled on accepted procedures and rules developed over years of judicial consideration,<sup>228</sup> creating a climate of instability, unpredictability, inconsistency, unworkability, and unfairness<sup>229</sup>—the antithesis of the values sought to be promoted by *stare decisis* and the rule of law.

Throughout the opinion, references were made to *Roe*. The majority saw *Roe* as controlling and reaffirmed its "general principles."<sup>230</sup> The dissenters saw *Roe* as the initial flaw leading to the hostile tone<sup>231</sup> and the unacceptable results of *Thornburgh*.<sup>232</sup>

This emphasis on *Roe* as the heart of the matter is significant.

219. *Id.* at 785.

220. *Roe*, 410 U.S. at 154-155. See also *Doe v. Bolton*, 410 U.S. 179, 208 (1973)(Burger, C.J., concurring)("Plainly, the Court today rejects any claim that the Constitution requires abortions on demand."); *Thornburgh*, 476 U.S. at 783-84 (Burger, C.J., dissenting).

221. *Thornburgh*, 476 U.S. at 783-84 (Burger, C.J., dissenting)("We have apparently already passed the point at which abortion is available merely on demand. If the statute at issue here is to be invalidated, the 'demand' will not even have to be the result of an informed choice.")

222. *Roe*, 410 U.S. at 163.

223. *Thornburgh*, 476 U.S. at 814 (White, J., dissenting). Especially noticeable in the opinion was the hostility toward the legislature for its "duplicitous," signalling a new focus on the state legislature's motives. Comment, *Thornburgh v. American College of Obstetricians: Return to Roe?*, 10 HARV. J.L. & PUB. POL'Y 711, 724 (1987).

224. *Thornburgh*, 476 U.S. 814 (White, J., dissenting).

225. *Id.* at 785.

226. *Id.* at 798 (White, J., dissenting).

227. *Id.* (White, J., dissenting).

228. *Id.* at 815 (O'Connor, J., dissenting).

229. *Id.* at 821, 826-27 (O'Connor, J., dissenting).

230. *Id.* at 759.

231. *Id.* at 788 (White, J., dissenting).

232. *E.g., id.* at 785 (Burger, C.J., dissenting).

Despite sixteen years and numerous decisions, *Roe* remains the center of the controversy.

Significantly, *Roe* was decided by seven justices with two dissenting.<sup>233</sup> *Akron* was decided by a six to three majority.<sup>234</sup> In *Thornburgh* the margin was narrowed to five to four, and, in *Hartigan*, the eight member Court divided evenly on the subject of abortion.<sup>235</sup>

Chief Justice Burger, in *Thornburgh*, declared that the Court had left its original consensus of no abortion on demand and, with it, had left him behind.<sup>236</sup> As shall be demonstrated in the detailed sections below, *Thornburgh* is an excellent illustration of why Chief Justice Burger's call for reexamination of *Roe* was appropriate.<sup>237</sup>

The most significant aspect of *Thornburgh* was that, in failing to overrule (or clarify) *Roe*, the Supreme Court failed to lead the courts and the nation from the moral and political storm in which they have trudged since the winter of 1973.<sup>238</sup> However, the *Thornburgh* case did

233. *Roe*, 410 U.S. 113, 115 (1973).

234. *Akron*, 462 U.S. at 418.

235. *Thornburgh*, 476 U.S. at 749; *Hartigan v. Zbaraz*, 108 S. Ct. 479 (1987).

236. *Thornburgh*, 476 U.S. at 782-83 (Burger, C.J., dissenting).

237. *Id.* at 785 (Burger, C.J., dissenting).

238. *Roe* truly has blown out the moral lights around us creating great confusion about the proper solutions to the problems an unwanted child conjures up: familial decay, sexual promiscuity, the plight of women and the poor and the collapse of community. The great change in American politics—the rise of conservatism and the search for new answers to the social conundrums spawned by bankrupt liberalism—if not itself a solution is at least evidence of problems that *Roe* has failed to resolve and to which it has, in fact, contributed. Certainly the currents of contemporary American politics gained impetus from the reaction to *Roe* and its consequences. As of 1985, approximately 17.5 million abortions have been performed since *Roe*. Henshaw, Forrest, & Van Vort, *Abortion Services in the United States, 1984 and 1985*, 19 FAM. PLAN. PERSPS. 64, table 1 (1987). Abortion is the most common operation performed in this country at about 1.5 million per year. F. JAFFE, B. LINDHEIM, & P. LEE, *ABORTION POLITICS: PRIVATE MORALITY AND PUBLIC POLICY* 7 (1981); Henshaw, Forrest, & Blaine, *Abortion Services in the United States, 1981 and 1982*, 16 FAM. PLAN. PERSPS. 119, 120 table 1 (1984). Approximately one-third of all pregnancies end by abortion, and, in many cities, abortions exceed live births. Henshaw, Forrest, Sullivan & Tietze, *Abortion in the United States, 1979 and 1980*, 14 FAM. PLAN. PERSPS. 5, 6 table 1 (1982). The problem of teen pregnancy is also an abortion problem; one-third of all abortions are performed on teenagers. Henshaw, Forrest, Sullivan, & Tietze, *Abortion in the United States, 1978-1979*, 13 FAM. PLAN. PERSPS. 6, 17 table 10, 18 table 11 (1981). The easy availability of abortion may be a cause of family and community decay. While this is not clear, it is clear that easy availability of abortion has reinforced broader social trends leading to this unfortunate state of affairs.

Moreover, this superficial solution (abortion) prevents families and society from confronting the personal and economic problems involved in unwanted pregnancies. Rather than offering compassion and resources to a woman confronted with the dilemma of childbirth or abortion, society has elected the easy solution. Perhaps abortion should not even be called an attempted solution. It is an attempt to annihilate the problem.

Widespread abortion has also acted to prevent new, committed family units from developing, by depriving numerous couples of an adoptable child. See Wardle, *supra* note 19, at 243 n.63. Other ill effects include women psychologically scarred from the abortion experience and a grow-

cast some light on the long road out of the national crisis created by *Roe*. It cast this light indirectly, by providing further evidence that "the seminal opinion of Justice Blackmun"<sup>239</sup> is not sufficiently principled to withstand either the test of time<sup>240</sup> or the test of reason.<sup>241</sup>

*Thornburgh* provided further evidence that any judge who takes *Roe* as a "polestar"<sup>242</sup> is assured of getting hopelessly lost in a jurisprudential jungle of ill-considered ideas. *Roe* is neither a measure nor a rule of action,<sup>243</sup> so perhaps the common argument that *Roe* is bad law is wrong. Perhaps it ought not to be considered law at all. In many respects, *Roe* does not possess those characteristics commonly thought essential to law, or it possesses them only minimally. *Roe* (and its progeny) lacks legal rationality. It claims legitimacy by historical correctness rather than by justice. Abortion jurisprudence after *Roe* is primarily a ratification of what is, not a prescription of what ought to be. It ratifies what certain doctors and patients do (and what certain "forward-looking" elites think) rather than discussing how they ought to act.

The doctrine of *stare decisis* sometimes commands us to obey even bad law.<sup>244</sup> Should it require us to adhere to *Roe*? In an unusual action, the United States Justice Department said no, as *amicus curiae* in *Thornburgh*, calling for the reversal of *Roe*. The government argued that "where a judicial formulation affecting the allocation of constitutional powers has proven 'unsound in principle and unworkable in practice,' where it 'leads to inconsistent results at the same time that it disserves principles of democratic self-governance' [the] Court has not hesitated to reconsider a prior decision."<sup>245</sup>

This article argues that *Roe* is such a case. *Roe's* analysis is fundamentally antithetical to the values that underlie the doctrine of *stare decisis*—the rule of law, logical consistency, practical workability, stability, predictability, and fairness. It is both paradoxical and counter-

ing callousness toward children and other "inconvenient" persons. *See id.* at 243 n.64.

239. American College of Obstetricians and Gynecologists v. *Thornburgh*, 737 F.2d 283, 291 (3d Cir. 1984) *rev'd*, 476 U.S. 747 (1986).

240. A. COX, *supra* note 26, at 114; *Akron*, 462 U.S. at 458 (O'Connor, J., dissenting).

241. *See, e.g.*, Ely, *supra* note 24; Rice, *supra* note 20.

242. *Thornburgh*, 737 F.2d at 290-91.

243. *See* T. AQUINAS, *SUMMA THEOLOGICA I-II*, Question 90, Art. 1 (giving this definition of law).

244. Hence we infer that sometimes and in certain cases laws should be changed; but when we look at the matter from another point of view, great caution would seem to be required. For the habit of lightly changing the laws is an evil, and when the advantage is small, some errors both of lawgivers and rulers had better be left; the citizen will not gain so much by making the change as he will lose by the habit of disobedience.

ARISTOTLE, *supra* note 81, at 2014, 1269a, lines 12-17.

245. Brief for the United States, *supra* note 35, at 21 (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985)).

productive to invoke *stare decisis* to perpetuate doctrines that undermine the achievement of the ends to which adherence to precedence is a means.

### III. THE LEGAL ANOMALIES OF *Roe* AND ITS PROGENY

The *Roe* decision and the subsequent abortion cases, which followed *Roe's* tangential departure from the rest of the law, contain numerous legal anomalies. Some of these have already been demonstrated in the discussions of the critiques of *Roe*, the misapplication of *stare decisis* in abortion law, and the extreme position taken by the Court in *Thornburgh*.

This section further demonstrates the divergent nature of abortion jurisprudence by comparing it with areas of the law relating to abortion. For example, the right to abortion is categorized by the Supreme Court as a privacy right. Yet, it is not treated the same as other privacy rights. Similar anomalies occur when abortion touches other areas of the law, such as fetal rights, medical regulations, and procedural and adjudicatory rules. Each of these areas will be discussed individually below to demonstrate the disparities.

As will be seen, the "abortion distortion effect" on the law is consistently making the right to abortion more absolute. This is ironic, as the Supreme Court in *Roe* made much of the fact that the right to abortion was not absolute. Justice Blackmun noted that Jane Roe and some amici claimed "that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses."<sup>246</sup> The Court disagreed, holding that the states had compelling interests in "safeguarding health, in maintaining medical standards, and in protecting potential life" at certain points in a woman's pregnancy.<sup>247</sup> The Court declared, "The privacy right involved, therefore, cannot be said to be absolute."<sup>248</sup>

However, John Hart Ely had more insight and foresight than the Court. He observed, in 1973, that the Supreme Court had granted the abortion right a "super-protected" status.<sup>249</sup> He characterized the protection given abortion as "far more stringent" than that accorded any other right, "so stringent that a desire to preserve the fetus's existence is

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246. *Roe*, 410 U.S. at 153.

247. *Id.* at 154.

248. *Id.* See also *Doe v. Bolton*, 410 U.S. 179, 208 (1973)(Burger, C.J., concurring)("I do not read the Court's holdings today as having the sweeping consequences attributed to them by the dissenting Justices . . . Plainly, the Court today rejects any claim that the Constitution requires abortion on demand.")

249. Ely, *supra* note 24, at 935.

unable to overcome it—a protection more stringent . . . than the present Court affords the freedom of the press explicitly guaranteed by the First Amendment.”<sup>250</sup>

Today, abortion enjoys even greater protection. It is more protected than any other privacy right. Less protection is provided the fetus in the abortion context than in any other context. Abortion is subject to less regulation than any other medical procedure. The abortionist-patient relationship is more sacrosanct than the doctor-patient relationship. The progeny of *Roe* have consistently rejected attempts by the states to assert their “compelling” interests, steadily making the abortion right more absolute. Today, abortion is available virtually on demand throughout the whole nine months of pregnancy. Apart from minor health regulations, the right to abortion has become absolute.

### A. *Privacy Rights*

The anomalies of abortion jurisprudence may be seen in a comparative study of the abortion privacy right and other privacy rights. The Court observed in *Roe*: “The Constitution does not explicitly mention any right of privacy.”<sup>251</sup> Yet, the Supreme Court has recognized a variety of rights subsumed under the general right of privacy. The privacy analysis in *Roe* culminated in the assertion that “the right of personal privacy includes the abortion decision.”<sup>252</sup> Therefore, the examination of abortion as a privacy right analogous to other privacy rights is an essential starting point to determine the permissible scope of state abortion regulation.<sup>253</sup>

#### 1. *Roe's privacy analysis*

In brief, *Roe's* privacy analysis consisted of citations to several cases covering a wide variety of subjects (from the fourth amendment bar to unwarranted search and seizure to the right to make a living as a German teacher), the conclusion that these cases constituted a constitutional right of privacy, the conclusion that the privacy right is broad enough to include abortion, an impressionistic discussion of the problems of unwanted pregnancy, an assertion that the abortion right is not absolute, and a make-weight argument based on prior state court

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250. *Id.*

251. *Roe*, 410 U.S. at 152.

252. *Id.* at 154.

253. See, e.g., *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 60-61 (1976).



abortion decisions.<sup>254</sup>

The cases cited by the Court did not clearly constitute a right of privacy. Two of the precedents cited were search and seizure cases,<sup>255</sup> two involved telephone taps,<sup>256</sup> one involved a court-ordered physical examination in a negligence action,<sup>257</sup> and one involved the possession of obscene matter in one's home.<sup>258</sup> Of this group, none was related to abortion.

The other cases, cited as precedents in *Roe*, were only slightly more related—in the sense that they were related to marriage, family, and procreation—to the issue of abortion. Two involved parental rights to direct rearing of their own children,<sup>259</sup> one involved a prohibition on children selling goods in public (with parental permission),<sup>260</sup> one involved state prohibition of interracial marriage,<sup>261</sup> one involved state sterilization of repeat felony offenders,<sup>262</sup> and two entailed the use and dispensing of contraceptives.<sup>263</sup>

Richard Epstein commented on the Court's effort to derive a constitutional right of privacy from these cases. He remarked, "It is difficult to see how the concept of privacy linked the cases cited by the Court, much less . . . explains the result in the abortion cases."<sup>264</sup> John Hart Ely echoed this opinion: "The Court has offered little assistance to one's understanding of what it is that makes [the privacy "precedents"] a unit."<sup>265</sup> He concluded, "Instead it has generally contented itself with lengthy and undifferentiated string [cites] . . . [You] can say a bunch of words, but a constitutional connection [should] require something more than this."<sup>266</sup>

To support its shaky precedential foundation, the Court sought to anchor its privacy right, including the right to abortion, in the Constitution. It mentioned various constitutional provisions alleged by others

254. *Roe*, 410 U.S. at 152-59. This latter argument demonstrated only that previous state court decisions were divided.

255. *Terry v. Ohio*, 392 U.S. 1 (1968), *Boyd v. United States*, 116 U.S. 616 (1886).

256. *Katz v. United States*, 389 U.S. 347 (1967), *Olmstead v. United States*, 277 U.S. 438 (1928).

257. *Union Pac. Ry. v. Botsford*, 141 U.S. 250 (1891).

258. *Stanley v. Georgia*, 394 U.S. 557 (1969).

259. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Meyer v. Nebraska*, 262 U.S. 390 (1923).

260. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

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

262. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

263. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

264. Epstein, *supra* note 30, at 170.

265. Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978).

266. *Id.*

to provide such an anchor. The Court selected substantive due process, “founded in the Fourteenth Amendment’s concept of personal liberty,” as the source of the Constitutional right of privacy.<sup>267</sup> As discussed earlier in this article, such analysis is highly suspect—as violative of the rule of law and the constitutional separation of powers—and had previously been rejected by the Court and legal scholars.<sup>268</sup>

However, the Court not only failed to show how the cases it cited added up to anything, but it also failed to show how a right of privacy, if indeed such a right existed, could include a right to abortion. It further failed to demonstrate, using its chosen form of analysis (substantive due process), how a right to abortion could be established from such analysis.

Rather, the Court simply declared that “[t]his right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>269</sup> No logical connection was given.

Instead, the Court switched immediately to policy arguments. The majority fretted that:

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable . . . to care for it. In other cases . . . [the] stigma of unwed motherhood may be involved.<sup>270</sup>

As Ely remarked of this reliance on policy argument, “all of this is true and ought to be taken very seriously. But it has nothing to do with privacy in the Bill of Rights sense or any other the Constitution suggests.”<sup>271</sup>

Next, the *Roe* Court rejected the argument that the abortion right ought to be absolute. In addition to noting compelling state interests in maternal health, medical standards, and fetal life, the Court observed that one does not have “an unlimited right to do with one’s body as one pleases . . . .”<sup>272</sup> Justice Blackmun cited *Jacobson v. Massachusetts*,<sup>273</sup> which allowed compulsory vaccination, and *Buck v. Bell*,<sup>274</sup> which allowed non-consensual sterilization of mental incompetents, and ob-

267. *Roe*, 410 U.S. at 153.

268. See *supra* section II-B-1-(a).

269. *Roe*, 410 U.S. at 153.

270. *Id.*

271. Ely, *supra* note 24, at 932.

272. *Roe*, 410 U.S. at 154.

273. 197 U.S. 11 (1905).

274. 274 U.S. 200 (1927).

served: "The Court has refused to recognize an unlimited right of this kind in the past."<sup>275</sup>

Finally, the Supreme Court cited the decisions of a number of lower federal and state courts.<sup>276</sup> This was inconclusive, and showed only that the courts were divided on the issue of abortion. It lent no credibility to the Court's discovery of a right to abortion.

Despite the cruciality of the privacy right, the *Roe* Court's privacy analysis was singularly slipshod—a methodological precedent to which the Court has adhered in *Roe's* progeny. The Court failed in *Roe*, and in the subsequent cases, to link abortion and other privacy rights in a precise or convincing manner. The sole connection between *Roe's* discussion of privacy rights and an abortion right was the bald assertion that the former was "broad enough to encompass" the latter.<sup>277</sup> The logical link was missing.

Although this point has been made repeatedly since *Roe*, the Court has been content to parrot its original conclusion. It has recently done so in an even more abbreviated form, substituting a few post-*Roe* privacy cases for some of the more questionable precedents cited in *Roe*.<sup>278</sup>

## 2. *Disparate treatment of privacy rights*

The Court's unwillingness or inability to restructure its privacy analysis has left it with some tortuous jurisprudential puzzles. For example, the central issue of *Bellotti v. Baird*<sup>279</sup> was how to choose between mutually exclusive privacy rights: the fundamental right of parents to raise their children according to their own lights<sup>280</sup> and the right of the child to have an abortion. The difficulty of the choice was enhanced by the Court's repeated claims that both rights were fundamental and fundamentally similar, and that the abortion privacy right sprang from the familial privacy right. As applied by the Court, the abortion rights of minor children supercede parental rights within the

275. *Roe*, 410 U.S. at 154.

276. *Id.* at 154-55.

277. *Id.* at 153.

278. "Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Thornburgh v. American College of Obstetrics & Gynecologists*, 476 U.S. 747, 772 (1986)(citing *Carey v. Population Servs. Int'l* (1977), *Moore v. East Cleveland* (1977); *Eisenstadt v. Baird* (1972); *Griswold v. Connecticut* (1965); *Pierce v. Society of Sisters* (1925); *Meyer v. Nebraska* (1923); *Whalen v. Roe* (1977)(citations omitted)). See also *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 426-27 (1983).

279. 443 U.S. 622 (1979)(*Bellotti (II)*).

280. See *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

family.<sup>281</sup>

This disparate treatment of the abortion right, as compared with other privacy rights, is typical. If abortion is a privacy right similar to other privacy rights, then it should be treated similarly to other privacy rights rather than being super-protected. Further comparison of judicial treatment of abortion with other privacy rights demonstrates the incongruity.

In *Roe*, the Court began its privacy discussion with a citation to *Union Pacific Railway v. Botsford*.<sup>282</sup> In *Botsford*, the Court held that "in a civil action for an injury to the person, the court [had no legal right or power to] . . . order the plaintiff, without his or her consent, to submit to a surgical examination as to the extent of the injury sued for."<sup>283</sup> The underlying rationale for the *Botsford* holding was that every individual has a right "to the possession and control of his own person."<sup>284</sup>

However, the *Botsford* Court acknowledged that an exception existed at common law which limits the precedential value of this case for a right to abortion. The exception was the "writ *de ventre inspiciendo*."<sup>285</sup> This writ authorized examination of a woman, without consent, to determine whether she was pregnant. It was issued when a woman was convicted of a capital crime "in order to guard against the taking of the life of an unborn child for the crime of the mother."<sup>286</sup> Professor John Gorby states that, though this case may indicate a common law right to privacy, "the common law not only acknowledged a right to life in the fetus but also recognized precedence of this right over the common law right of privacy."<sup>287</sup>

Of course, *Roe's* own citation of *Jacobson* and *Buck* indicates that the privacy right to control one's own person is not absolute. In fact, the Court suggested that the abortion right might be subject to more strictures than other privacy rights because fetal rights must be added to the traditional privacy paradigm.<sup>288</sup> However, the Court has not allowed more restrictions on abortion than other privacy rights but, in fact, has allowed fewer.

As Justice White observed in his *Thornburgh* dissent, the Court

281. *Bellotti (II)*, 443 U.S. at 622.

282. *Roe*, 410 U.S. at 152; *Union Pacific Ry. v. Botsford*, 141 U.S. 250 (1891).

283. 141 U.S. at 251.

284. *Id.*

285. *Id.* at 253.

286. *Id.*

287. Gorby, *The 'Right' to an Abortion, the Scope of Fourteenth Amendment 'Personhood,' and the Supreme Court's Birth Requirement*, 1979 S. ILL. U.L.J. 1, 19 & n.95.

288. *Roe*, 410 U.S. at 159.

has abandoned the application of the *Jacobson* principle to abortion.<sup>289</sup> He noted that *Jacobson* demonstrated that "a compelling state interest may justify the imposition of some physical danger upon the individual."<sup>290</sup> According to *Roe*, the state interest became compelling after viability.<sup>291</sup> Applying the *Jacobson* principle, a state ought to be able to legislate in the interest of protecting the fetus, even at the risk of some increase in danger to the woman.

The Pennsylvania legislature applied this principle in enacting a requirement that physicians use the abortion technique most likely to allow fetal survival, unless it would impose "significantly greater medical risk" to the mother.<sup>292</sup> The *Thornburgh* majority declared this unconstitutional.<sup>293</sup> Justice White noted that, according to the majority, the state's "compelling interest [could not] justify *any* regulation that impose[d] a quantifiable medical risk upon the pregnant woman."<sup>294</sup> He argued that this was a direct contradiction of *Roe's* holding that the state had a compelling interest so strong that it could "forbid *all* postviability abortions except when *necessary* to protect the life or health of the pregnant woman."<sup>295</sup> The implication of *Thornburgh* is that the privacy right at stake in *Jacobson* is now absolute (and *Jacobson* is overruled *sub silentio*), or the Court has abandoned its previous holding that abortion is limited, as are other privacy rights. Likewise, Chief Justice Burger argued that the Court had left its consensus against abortion on demand,<sup>296</sup> and *Roe's* recognition of "*another* important and legitimate interest . . . protecting the potentiality of human life."<sup>297</sup> As he noted, the concern of *Roe* "for the interests of the states" had been rendered "mere shallow rhetoric" by *Thornburgh*.<sup>298</sup>

In fact, the only part of the *Roe* privacy analysis that retained any certain validity after *Thornburgh* was the reference to *Buck*. The approval of sterilization for the mentally retarded and uneducated poor in *Buck*<sup>299</sup> parallels the fear in *Thornburgh* that informed consent re-

289. *Thornburgh v. American College of Obstetrics & Gynecologists*, 476 U.S. 747, 809 (1986)(White, J., dissenting).

290. *Id.* (White, J., dissenting).

291. *Roe*, 410 U.S. at 163.

292. *Thornburgh*, 476 U.S. at 768.

293. *Id.*

294. *Id.* at 808 (emphasis in original).

295. *Id.* at 809 (emphasis in original).

296. *Id.* at 782-83 (Burger, C.J., dissenting).

297. *Id.* See *Roe*, 410 U.S. at 162 (emphasis in original).

298. *Thornburgh*, 476 U.S. at 784 (Burger, C.J., dissenting).

299. A recent article demonstrated that Carrie Buck and her daughter were not "imbecile" or "feeble minded." Gould, *Carrie Buck's Daughter*, 2 CONST. COMM. 331 (1985).

quirements might *discourage* abortions.<sup>300</sup> Both promote the same theme: The Constitution greatly values unburdening society of the unwanted and undesirable. Today, the right to privacy seems to stand less for a right of individuals to a sphere of purely personal or intimate activity<sup>301</sup> than for the right to pursue nineteenth century theories of eugenics and social Darwinism.<sup>302</sup> In his *Thornburgh* dissent, Justice White observed that *Roe* “[was] not premised on the notion that abortion [was] itself desirable (. . . as a matter of . . . social policy).”<sup>303</sup> However, apart from *H.L. v. Matheson*,<sup>304</sup> *Harris v. McRae*,<sup>305</sup> and *Maher v. Roe*,<sup>306</sup> the Court’s subsequent abortion decisions have strongly suggested that, at least for some of the Court’s members, abortion holds extra-constitutional intrinsic value.<sup>307</sup> Indeed, Justice White went on to demonstrate that the Court had not adhered to *Roe*’s premise that abortion was permissible, but undesirable, by its overreaching to invalidate legislation that would have been allowable under the *Roe* rule.<sup>308</sup>

After citing *Botsford*, the *Roe* opinion moved to more contemporary cases, and found privacy rights in various constitutional provisions: the first, fourth, fifth, ninth, and fourteenth amendments, as well as the “penumbras of the Bill of Rights.”<sup>309</sup> Most of the rights cited there had clear roots in the common law and the text of the Constitution. Taken together they did not constitute a right broad enough to encompass the abortion decision. Unlike the abortion right, these other rights have remained limited and hedged with exceptions justifying state regulation.

For example, the *Roe* Court’s lone first amendment privacy case was *Stanley v. Georgia*.<sup>310</sup> *Stanley* stood for the proposition that possession of obscene material within one’s home was protected, even though the first amendment did not protect its distribution.<sup>311</sup> This argument, based on the traditional notion that a man’s house is his castle, was similar to arguments advanced by the Court in certain search and

300. *Thornburgh*, 476 U.S. at 763.

301. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

302. See *Ely*, *supra* note 24, at 947 n.139.

303. *Thornburgh*, 476 U.S. at 797 (White, J., dissenting).

304. 450 U.S. 398 (1981).

305. 448 U.S. 297 (1980).

306. 432 U.S. 464 (1977).

307. Cf. *Thornburgh*, 476 U.S. at 796-97 n.5 (White, J., dissenting).

308. *Id.* at 797-814 (White, J., dissenting). See also *id.* at 783 n.\* (Burger, C.J., dissenting).

309. *Roe*, 410 U.S. at 152.

310. 394 U.S. 557 (1969).

311. “Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one’s own home.” *Id.* at 565.

seizure cases<sup>312</sup> and in *Griswold v. Connecticut*.<sup>313</sup>

It is possible to read *Stanley* as a simple first amendment case with little or no implication for a right of privacy.<sup>314</sup> However, *Stanley* and other Supreme Court holdings do evince a fear of governmental intrusion into precincts traditionally considered private. Nevertheless, the right to pornography is very circumscribed.<sup>315</sup> Viewing of pornography outside the home, as well as the distribution of pornography, are subject to various regulations.<sup>316</sup>

The *Stanley* opinion is sometimes read as standing for a right to receive information.<sup>317</sup> However, just as compelling state interests may justify restrictions on the right to convey certain forms of information, they necessarily justify restrictions on the right to receive information. Zoning ordinances burden the rights of purveyors of pornographic films as well as their audience. Indeed, the right to receive information may be abridged altogether, given a strong enough interest. Child pornography may not be distributed even if it meets the *Miller v. California*<sup>318</sup> obscenity test.<sup>319</sup> School children have no right to deliver lewd speeches to their classmates, even if the remarks may be otherwise protected,<sup>320</sup> nor are their first amendment rights unrestricted in school newspapers.<sup>321</sup> Clearly, under the family privacy cases, parents may abridge the same interest in privacy at stake in *Stanley* by denying to their children the freedom to view pornography. Although the Supreme Court does not treat children as adults when it comes to first amendment rights, it very nearly does so when the right at stake is abortion.<sup>322</sup>

Under *Stanley*'s "right to receive information" language, a state could presumably protect this right for both minor and adult females regarding abortion information. If a state reasonably perceived a lack of information or information imbalance endangering this right, it should

312. See, e.g., *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (holding that a warrantless arrest of a "driving while intoxicated" suspect in his home violated the fourth amendment).

313. 381 U.S. 479 (1965).

314. See *Ely*, *supra* note 24, at 930 n.71; *Bowers v. Hardwick*, 478 U.S. 186, 195 (indicating that activity in one's bedroom is not automatically constitutionally protected).

315. See, e.g., *United States v. 12 200-ft. Reels of Super 8mm Film*, 413 U.S. 123, 126 (1973).

316. See *City of Renton v. Playtime Theaters*, 475 U.S. 41 (1986); *New York v. P. J. Video, Inc.*, 475 U.S. 868 (1986); *Young v. American Mini-Theaters*, 427 U.S. 50 (1976); *Miller v. California*, 413 U.S. 15 (1973). *Young* and *Renton* upheld the zoning of adult theaters.

317. See *Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982).

318. 413 U.S. 15 (1973).

319. *New York v. Ferber*, 458 U.S. 747 (1982).

320. *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

321. *Hazelwood School Dist. v. Kuhlmeier*, 479 U.S. 1053 (1988).

322. See *Danforth*, 428 U.S. at, 74; *Bellotti*, 443 U.S. at, 642-44.

be able to mandate the giving of certain information by a physician to his patient.<sup>323</sup> Of course, the state could not require the physician to mouth state slogans,<sup>324</sup> make speculations,<sup>325</sup> or relate matters of dubious veracity.<sup>326</sup>

Pennsylvania perceived that women (minors and adults) who sought abortions were not getting all the information they needed to make an informed choice. They were not being told enough about the maternal health implications of abortion, nor were they being fully informed of programs designed to effect the state's permissible interest in "potential life." In response, the state designed neutral, objective information to be made available to women who requested it. It was not to be forced on anyone. The legislation was accurately tailored to effect the woman's right to receive information. It did not force her or her physician to adhere to or mouth any official state views.

Yet, the Supreme Court held that *Roe* compelled the conclusion that this legislation placed an unconstitutional burden on the woman's privacy right.<sup>327</sup> It seems odd that a right flowing from *Stanley v. Georgia* would compel such a result, when *Stanley* was used to support the abortion right.

When *Roe* was decided, John Hart Ely observed that abortion was accorded more stringent protection than the first amendment right to freedom of the press, protection "so stringent that a desire to preserve the fetus's existence [was] unable to overcome it."<sup>328</sup> Ely cited *Branzburg v. Hayes*<sup>329</sup> to illustrate this point.

In *Branzburg*, the state's interest in protecting its citizens, through efficient criminal investigations, overrode the first amendment right of a journalist to withhold the identity of a source. In *Thornburgh*, by way of contrast, the Court refused to give any scope to the state's equally compelling interests in protecting "potential life," maternal health, and informed consent. Furthermore, when the abortion right actually clashed with the free speech rights of picketers, the outcome was predictable. In *Bering v. SHARE*, the Supreme Court of Washington, citing the need to protect the right to make a choice for abortion set forth in *Roe*, affirmed an injunction limiting the free speech of abortion pick-

323. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)(requiring certain information disclosure by attorneys).

324. *See Wooley v. Maynard*, 430 U.S. 705 (1977)(New Hampshire license plate slogan case).

325. *See Akron*, 462 U.S. at 444.

326. *Id.*

327. *Thornburgh*, 476 U.S. at 759.

328. Ely, *supra* note 24, at 935.

329. 408 U.S. 665 (1972).



eters, even including limits on words that could be used.<sup>330</sup> Even the foundational right of free speech, without which a democracy cannot maintain ordered liberty, was subordinated to the abortion right. Ely's assessment is as true today as it was sixteen years ago.

The other privacy rights, which the *Roe* Court cited along with *Stanley*, were subject to a wide variety of burdens and abridgements by various compelling state interests. The fourth and fifth amendment opinions illustrate this well. The Court cited *Terry v. Ohio*,<sup>331</sup> *Katz v. United States*,<sup>332</sup> *Boyd v. United States*,<sup>333</sup> and Justice Brandeis' dissent in *Olmstead v. United States*.<sup>334</sup>

Justice Brandeis' dissent is often noted for its description of "[t]he protection guaranteed by the [fourth and fifth] Amendments . . ." <sup>335</sup> These amendments, he believed, "protect[ed] Americans in their beliefs, their thoughts, their emotions and their sensations," conferring "as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."<sup>336</sup>

The accuracy of his statement is dubious, in light of the constitutional text and the views of the framers.<sup>337</sup> Men who love their privacy may love community as much or more. In fact, the very notion of civilization involves some necessary interference with individual privacy.<sup>338</sup> Moreover, this was a dissenting view of the law in 1928, and it is a dissenting view today.<sup>339</sup> The Court's fourth and fifth amendment privacy decisions make clear that there are limits to this sphere of personal autonomy. So it is with all of the other privacy rights as well, with the exceptions of *Roe* and its progeny. While the abortion privacy right has expanded since *Roe*, fourth and fifth amendment privacy rights have remained limited and, indeed, have been further restricted.<sup>340</sup>

330. 106 Wash. 2d 212, 721 P.2d 918 (1986), *cert. denied*, 107 S. Ct. 940 (1987).

331. 392 U.S. 1 (1968).

332. 389 U.S. 347 (1967).

333. 116 U.S. 616 (1886).

334. 277 U.S. 438, 471 (1928).

335. *Id.* at 478.

336. *Id.*

337. Even assuming the accuracy of Brandeis' legal argument, it is evident that his assertion about the universal love of privacy among civilized men is a rhetorical exaggeration, along the lines of his colleague's catchy dictum in *Buck v. Bell*, 274 U.S. 200, 207 (1927)(Holmes declared, "Three generations of imbeciles are enough.")

338. The current Governors of New York and Massachusetts support both a woman's right to have an abortion and the states' right to force drivers to wear seat belts. What do they value most? The right to be left alone? The right to life? The right to live in a civilized and safe community?

339. See *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986)(Blackmun, J., dissenting).

340. See *New York v. Class*, 475 U.S. 106, 122 (1986)(Brennan, J., concurring in part & dissenting in part).

*Boyd v. United States*,<sup>341</sup> cited in *Roe*,<sup>342</sup> prohibited "a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property . . ." <sup>343</sup> The case contained a long discussion of an English precedent, *Entick v. Carrington*.<sup>344</sup> According to the Court, the case laid down far-reaching principles, applying to "all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life."<sup>345</sup>

However, there was no indication that the *Boyd* Court thought its statement extended beyond the facts of the case. Further, *Boyd* had been repeatedly distinguished and limited, and much of the opinion had been dismissed as dicta.<sup>346</sup> In *United States v. Doe*,<sup>347</sup> Justice O'Connor noted that "[t]he notion that the Fifth Amendment protect[ed] the privacy of papers originat[ing] in *Boyd*" was overturned in *Fisher v. United States*<sup>348</sup> and that "[s]everal of *Boyd*'s express or implicit declarations [had] not stood the test of time."<sup>349</sup>

*Katz v. United States*,<sup>350</sup> also cited in *Roe*,<sup>351</sup> held that electronic surveillance of private phone calls by the government constituted a fourth amendment search and seizure. The Court also cited *Terry v. Ohio*,<sup>352</sup> which held constitutional a weapons search without probable cause, provided it proceeded from a reasonable inference and was properly limited to a search for weapons only.<sup>353</sup> The privacy right underlying these cases remains; that is, unreasonable searches are barred. However, the privacy right is not absolute; exceptions to this traditional form of privacy, outlined in these cases, have been created. It should also be noted that *Terry*, also holds that other state interests may justify abridging the right in certain circumstances.<sup>354</sup>

Examples of the exceptions include the holding by the Court that electronic surveillance might be undertaken, without warrant, where

341. 116 U.S. 616 (1886).

342. *Roe*, 410 U.S. at 152.

343. *Boyd*, 116 U.S. at 622.

344. 19 Howell's State Trials 1029 (1765) reprinted in MAY'S CONSTITUTIONAL HISTORY OF ENGLAND, Vol. 3, (American ed. Vol. 2) chap. 11 (1977).

345. *Boyd*, 116 U.S. at 630.

346. See, e.g., *Andresen v. Maryland*, 427 U.S. 463, 471 (1976); *Warden v. Hayden*, 387 U.S. 294, 301 (1967).

347. 465 U.S. 605 (1984).

348. 425 U.S. 391 (1976)(contents of business records ordinarily not privileged).

349. *Doe*, 465 U.S. at 618 (O'Connor, J., concurring)(quoting *Fisher*, 425 U.S. at 407).

350. 389 U.S. 347 (1967).

351. *Roe*, 410 U.S. at 152.

352. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

353. *Terry*, 392 U.S. at 30.

354. *Id.* at 29.

there was no reasonable expectation of privacy.<sup>355</sup> Also, the Court has held that “[t]he seizure of property in plain view involve[d] no invasion of privacy and [was] presumptively reasonable, assuming that there [was] probable cause to associate the property with criminal activity.”<sup>356</sup> No warrant is needed to search a car, including compartments not in plain view, when the car is legitimately stopped and there is probable cause to believe that contraband is concealed there.<sup>357</sup>

Minors’ privacy rights are also subject to special infringement in this context. No warrant is needed for searches by educators in schools. The searches need only satisfy a reasonableness requirement.<sup>358</sup> Finally, remedies for violations of these rights have been truncated—weakening the exclusionary rule.<sup>359</sup>

The point of this analysis is that the justifiable limitations on first, fourth, and fifth amendment privacy rights are numerous and significant. The limitations allowed on the abortion right are few and insignificant. The absolute right to be secure in one’s person and possessions may be abridged by getting a warrant. It may even be abridged without a warrant in certain circumstances.

Nevertheless, if the state has “probable cause” to believe that it could protect both potential life and maternal health by requiring two physicians to be present at postviability abortions, it might be prohibited from doing so.<sup>360</sup> This, and the striking down of most of the abortion regulations, seems inconsistent with the permissible limits on other rights as noted above.

Following the citations of these search and seizure cases, the *Roe* majority noted, citing *Griswold v. Connecticut*, that the privacy right had also been found in the ninth amendment and in the “penumbras”

355. *United States v. Knotts*, 460 U.S. 276 (1983). *See also* *United States v. Karo*, 468 U.S. 705 (1984); *United States v. White*, 401 U.S. 745 (1971).

356. *Payton v. New York*, 445 U.S. 573, 587 (1980). *See also* *Texas v. Brown*, 460 U.S. 730 (1983).

357. *See* *New York v. Class*, 475 U.S. 106 (1986); *United States v. Ross*, 665 F.2d 346 (5th Cir. 1982), *cert. denied*, 456 U.S. 919 (1982).

358. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

359. *See* *United States v. Leon*, 468 U.S. 897 (1984). *See also* *United States v. Janis*, 428 U.S. 433 (1976).

360. Such a provision was upheld in *Planned Parenthood Ass’n v. Ashcroft*, 462 U.S. 476 (1983), but the *Thornburgh* Court seemed to suggest that this ruling should be overturned, if it was not a dead letter already. The *Thornburgh* majority went out of its way to indicate that the *Ashcroft* ruling was “by a 5-4 vote, but not by a controlling single opinion . . .” *Thornburgh*, 476 U.S. at 770. The Court then proceeded to deliberately misread the Pennsylvania provision, obviously compatible with *Ashcroft*, so as to create a constitutional problem with it. *Id.* at 812 (White, J., dissenting). Thus, the *Thornburgh* discussion created more unpredictability, not in keeping with the principles underlying *stare decisis*. *See* discussion of statutory construction *infra* section III-D-3.

of the Bill of Rights.<sup>361</sup> *Griswold*, like the first, fourth, and fifth amendment cases above, can best be understood as protecting "the sacred precincts of the marital bedroom."<sup>362</sup>

The *Roe* decision also cited *Eisenstadt v. Baird*<sup>363</sup> as authority for its abortion right.<sup>364</sup> John Noonan, Jr., now judge on the Ninth Circuit Court of Appeals, has argued that *Eisenstadt* is *Roe's* only true precedent.<sup>365</sup> He observed this was because *Eisenstadt*, by extending a right formerly "based on the special position of the married" to individuals, married or not, "repudiated the legally privileged position of marriage."<sup>366</sup> By so doing, the Court "turned the liberty on its head," claimed Noonan.<sup>367</sup> He added that *Eisenstadt* was "decided after *Roe v. Wade* had been argued to the Court, so that its revolutionary rationale was probably invented with *Roe v. Wade* in view."<sup>368</sup>

If the right to abortion truly has its roots in marital privacy, one would expect that marriage and abortion would be treated similarly. However, in contrast to the virtually nonexistent restrictions allowed on abortion, there are many common restrictions on the right to marry. This is so even though another Supreme Court decision, cited by *Roe*,<sup>369</sup> found marriage to be a "fundamental" civil right of man.<sup>370</sup> Restrictions on marriage include licensing by the state, physical examinations, blood tests (including rubella tests), submission of personal data for recordkeeping, number of spouses (no polygamy or bigamy), waiting periods, residency requirements, and restrictions on who may be married due to age, prior marriage, insanity, sex (homosexual and transexual marriage may be barred), membership in the human race (no marriage to horses), blood relationship, or possession of certain ailments (including venereal diseases, impotence, drug addiction, alcoholism, epilepsy, and pulmonary tuberculosis).<sup>371</sup> For minors, parental consent is required with certain state-created exceptions, and, in one state, a court may order premarital counseling for minors, focusing on social, economic and personal aspects of marriage, in addition to gener-

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361. *Griswold*, 381 U.S. at 484-86; *Roe*, 410 U.S. at 152.

362. *Id.* at 485.

363. 405 U.S. 438 (1972).

364. *Roe*, 410 U.S. at 152-53.

365. J. NOONAN, A PRIVATE CHOICE, ABORTION IN AMERICA IN THE SEVENTIES 21 (1979).

366. *Id.*

367. *Id.*

368. *Id.*

369. *Roe*, 410 U.S. at 152.

370. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

371. See generally H. CLARK, CASES AND PROBLEMS ON DOMESTIC RELATIONS 130-54 (1980).

ally applicable three to five day waiting periods.<sup>372</sup> Regulation of marriage ceremonies and the persons performing ceremonies is also allowed.<sup>373</sup> The state imposes duties, including support obligations, and presumptions, such as that of paternity, based upon marital status.<sup>374</sup> Dissolution of the marital relationship is also controlled by the state and subject to its regulations.<sup>375</sup>

The contrast with permissible regulation of abortion is remarkable. For example, while states may require marriages to be licensed, *Bolton* declared that states could not require hospitals performing abortions to be licensed.<sup>376</sup> Although waiting periods of three to five days from the time of receiving the marriage license to the time of the ceremony are common, *Akron* held unconstitutional a twenty-four hour waiting period extending from the time a woman contacted an abortionist until the abortion was performed.<sup>377</sup> Despite residency requirements for marriage and divorce, *Bolton* rejected state residency requirements for abortion.<sup>378</sup> Ignoring the requirement of parental consent for minors to marry, *Danforth* struck down a state statute requiring parental consent for minors to obtain abortions.<sup>379</sup> While extensive record-keeping is permitted in marriage regulation, *Thornburgh* declared state recordkeeping regulations for abortion unconstitutional, even though confidentiality was guaranteed in the statute.<sup>380</sup> And, despite the medical examinations and tests required for marriage, *Akron* struck down a statute requiring a physician to tell a woman "[t]hat according to his best judgment . . . she is pregnant" before performing an abortion procedure on her.<sup>381</sup>

Of course, there are limits on restrictions a state may impose on the fundamental right of marriage.<sup>382</sup> However, this fundamental right

372. *Id.* at 93.

373. *Id.*

374. *Id.*

375. *Id.* at 185-238, 779-1110.

376. *Doe v. Bolton*, 410 U.S. 179, 194 (1973).

377. *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 451 (1983).

378. *Bolton*, 410 U.S. at 200.

379. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75 (1976).

380. *Thornburgh v. American College of Obstetrics & Gynecologists*, 476 U.S. 747, 766 (1986).

381. *Akron*, 462 U.S. at 423 n.5. *See also* *Women's Medical Center of Providence v. Roberts*, 530 F. Supp. 1136 (D.R.I. 1982)(holding unconstitutional a provision requiring that a woman be told whether she was pregnant and receive a copy of her pregnancy test prior to any abortion procedure).

382. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374 (1978). *Zablocki* struck down a Wisconsin statute requiring state permission to remarry for non-custodial parents required to make child support payments. Permission was predicated on proof that support obligations were current and that new obligations of the marriage would not jeopardize the pre-existing obligation of support.

of marriage has not been made absolute, as has the abortion right.

The *Roe* Court also cited the fundamental liberty of procreation, as seen in *Skinner v. Oklahoma*,<sup>383</sup> to support the right to abortion.<sup>384</sup> However, the Court's application of this right has not been absolute, as has been the application of the right to abortion. John Noonan observed the extinction of the liberty to procreate when it confronted the liberty to abort and argued the incongruity of such logic.<sup>385</sup>

Noonan employed a number of prior Court holdings in his argument. He noted that *Skinner* "had held that Oklahoma could not sterilize a recidivist chicken thief—the right to procreate was so fundamental that it could not be arbitrarily taken by the state."<sup>386</sup> This right, Noonan said, "could reasonably be argued . . . [to] include the protection of the child procreated throughout pregnancy."<sup>387</sup> Noonan continued his argument, stating that *Loving's* right to marry "could reasonably be argued . . . to include liberty to have children."<sup>388</sup> He observed that the Court had held that a divorced mother "could not constitutionally arrange for the adoption of a child in her custody without giving notice to the child's father."<sup>389</sup> From this it could be argued that a father should be entitled to a hearing before losing his child in the mother's womb.<sup>390</sup> The Court also held that an unwed father had special status in adoption proceedings simply because of his biological connection to the child.<sup>391</sup> "It could reasonably be argued," said Noonan, "that, if biology conferred rights, a father has as much interest in an unborn child of eight weeks as in an infant of eight months."<sup>392</sup> However, when the Court decided the issue of paternal rights versus abortion rights in *Danforth*, it was held that since the State itself lacked the power to veto abortion, "the State cannot delegate authority to any particular person, even the spouse, to prevent abortion . . . ."<sup>393</sup> The Court missed the whole point. The father's right was not derivative from the state, but was rooted in familial rights, from whence, purportedly, also sprang the right of abortion. The abortion right was found to be absolute, however, and overrode all other privacy rights.

383. 316 U.S. 535 (1942).

384. *Roe*, 410 U.S. at 152.

385. J. NOONAN, *supra* note 365, at 90-95.

386. *Id.* at 90.

387. *Id.* Otherwise, the right is a mere "liberty to fertilize an ovum . . . a good deal less than full freedom to procreate." *Id.*

388. *Id.* at 90.

389. *Id.* at 90-91 (citing *Armstrong v. Manzo*, 380 U.S. 545 (1965)).

390. *Id.*

391. *Stanley v. Illinois*, 405 U.S. 645 (1972).

392. J. NOONAN, *supra* note 365, at 91.

393. *Danforth*, 428 U.S. at 69.

It might be argued that abortion is fundamentally different from these more limited rights and was, therefore, properly given greater protection. However, this undercuts the *Roe* privacy analysis. If the difference was that fundamental, then the *Roe* Court was in error in adducing these other privacy rights as precedent for the abortion right. Moreover, the *Roe* Court acknowledged the differences between the rights it cited as precedent and the abortion right, but indicated that these differences (including the interests of the unborn fetus) cut in favor of limiting the abortion right, not removing most limitations, as the Court has subsequently done.<sup>394</sup>

It might be argued that the intrusion of the state into the abortion decision is greater than the intrusion involved in an unwarranted search and seizure. The felon, incarcerated on the basis of evidence seized without a warrant, may have great difficulty in seeing the distinction. So, also, might the subject of a "Terry" search.<sup>395</sup> Indeed, the Court has never articulated a principle to discriminate between various forms of governmental intrusion. It noted that *Terry* involved "a serious intrusion on the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."<sup>396</sup>

Of course, some women refused abortions experience hardship during pregnancy and childbirth. But abortion certainly involves a serious intrusion on the bodily integrity of the fetus, which is arguably greater than the hardships on its mother. Again, it seems that the presence of the fetus complicates the traditional privacy rights paradigm so as to justify greater state monitoring of the abortion right.

Taken as a whole, these cases constitute a discrete right of privacy in certain relationships (marital and familial) and in certain places (primarily the home). This right may be overridden, given a sufficiently important interest, and sufficient safeguards against abuse.<sup>397</sup> The *Roe* Court never articulated the rationale for extrapolating the abortion right from these cases. Nor has the Court subsequently provided a principled rationalization for its disparate treatment of abortion and the more traditional privacy rights.

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394. "The pregnant woman cannot be isolated in her privacy. She carries a . . . fetus . . . . The situation therefore is inherently different from marital intimacy . . . or procreation . . . ." *Roe*, 410 U.S. at 159. The Court concluded that a "woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly." *Id.*

395. *Terry v. Ohio*, 392 U.S. 1 (1968).

396. *Id.* at 17.

397. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

### 3. *Disparate substantive due process analysis*

The anomalous treatment of the abortion privacy right is also evident in the *Roe* Court's employment of its chosen constitutional analysis; substantive due process. Following a cite to *Griswold*, the Court cited *Meyer v. Nebraska*,<sup>398</sup> one of the few *Lochner*-era due process cases still recognized as good law.<sup>399</sup> However, the *Meyer* case held only that a statute forbidding the teaching of German to school children violated the due process clause of the fourteenth amendment by depriving Meyer of his liberty to engage in his occupation of teaching.<sup>400</sup> While, perhaps, lending support to the employment of substantive due process, *Meyer* cannot be precedent for an abortion right.

The *Griswold* case itself, with its revival of substantive due process, is at the core of the problem.<sup>401</sup> As Judge Bork has demonstrated, the Constitution protects the rights of majorities in some areas—by leaving certain decisions to majority vote—and the rights of minorities in other areas—by forbidding majority rule.<sup>402</sup> The role of the Supreme Court is to determine, by interpretation of the Constitution, whether a matter falls in the realm of majority or minority freedom.<sup>403</sup> “Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.”<sup>404</sup> Thus, the Court only has legitimate power to employ theories given in the Constitution, and the imposition of Court members' own value choices is unconstitutional.<sup>405</sup> Logically, then, the selection of certain values as “fundamental,” which are not constitutionally mandated, and extending constitutional protection to them, makes the Court a “perpetrator of limited *coups d'état*.”<sup>406</sup>

However, even if substantive due process is employed by the

398. 262 U.S. 390 (1923).

399. *Roe*, 410 U.S. at 152.

400. As a result of subsequent distortion worked by cases such as *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Roe*, many commentators have come to see *Meyer* as they see *Griswold v. Connecticut*, 381 U.S. 479 (1965): A case standing for the broad principle of “freedom of choice regarding an individual's personal life” or at least for the idea that the “right to private decision making regarding family matters [is] inherent in the concept of liberty.” J. NOWAK, R. ROTUNDA, & J. YOUNG, *CONSTITUTIONAL LAW*, 685 (3d ed. 1986). Some dicta in *Meyer* may suggest the latter reading, but a fair reading of *Meyer* makes it clear that the only problem considered in *Meyer* was whether Meyer had a right to teach and whether the right was violated. See *Meyer*, 262 U.S. at 298-99.

401. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

402. Bork, *supra* note 88, at 3.

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.* at 6.



Court, the abortion privacy right does not result from an application of the usual analysis. In effect, the Court employed an unconstitutional method of analysis, in violation of the usual rules of that analysis, to achieve the abortion privacy right.

The *Roe* Court's citation of *Palko v. Connecticut*<sup>407</sup> indicated a clear reliance on substantive due process. Substantive due process analysis first requires the finding of a fundamental right (to be weighed against the state interest in regulation). The Court noted the *Palko* test for "fundamental" rights: only those rights "implicit in the concept of ordered liberty" were "fundamental" and, thus, protected by the guarantee of personal privacy, rooted in the liberty concept of the fourteenth amendment.<sup>408</sup> This implied that "to abolish" the right to abortion would "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"<sup>409</sup> The *Palko* test served as a bridge between the Court's constitutional analysis and the lengthy historical survey that immediately preceded it—a survey apparently designed to show the fundamentality of abortion practice to liberal regimes.<sup>410</sup>

407. 302 U.S. 319 (1937).

408. *Roe*, 410 U.S. at 152 (citing *Palko*, 302 U.S. at 325).

409. *Palko*, 302 U.S. at 325 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

410. The Court never explicitly identified the purpose of its historical survey. However, the Court did express the belief that its history of abortion afforded insight into appellant's argument that abortion was a right guaranteed by the due process clause of the fourteenth amendment, the penumbras of the Bill of Rights, or the ninth amendment. *Roe*, 410 U.S. at 129. See Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. at 3 n.13. The prominence of the historical discussion and the constant straining to distinguish away or minimize evidence that the practice of abortion was disputed or condemned indicated that the Court meant this history to serve as a proof of fundamentality.

Furthermore, under its own precedent, cited in *Palko*, the Court had a duty to demonstrate that abortion practice was "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Palko*, 302 U.S. at 325 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)) or that the abortion right was "of the very essence of a scheme of ordered liberty." *Id.* As observed by Justice White, "a free, egalitarian, and democratic society does not presuppose any particular rule or set of rules with respect to abortion." *Thornburgh v. American College of Obstetrics & Gynecologists*, 476 U.S. 747, 793 (1986) (White, J., dissenting). This, he noted, is reinforced by "the fact that many men and women of good will and high commitment to constitutional government place themselves on both sides of the abortion controversy." *Id.* Thus, the Court had the obligation to demonstrate that abortion rights had roots in our traditions and collective conscience. The Court's own historical sketch in *Roe* refuted that argument. *Id.* The Court's failure to be more explicit about the purpose of its history has led to some confusion about the role of history in privacy jurisprudence as a whole. See *Bowers v. Hardwick*, 478 U.S. 186, 199 (Blackmun, J., dissenting); *infra* this section, the discussion of *Bowers*.

The *Roe* Court concluded from its historical research that about any regime of ordered liberty worth recognizing (excluding the American regime for over a century before *Roe*) had provided abortion rights, at least in the initial stages of pregnancy, which had historically been somewhat limited by concerns for fetal life (i.e., the "quickening" distinction) and maternal health. *Roe*, 410 U.S. at 139-42. Though the Court never explicitly linked the historical sketch to the rest of the

Interestingly, the *Roe* Court chose to rely on the older *Palko* language, as a test of fundamentality, rather than that of the more recent (1968) case of *Duncan v. Louisiana*.<sup>411</sup> In *Duncan*, the *Palko* question of whether the principle was "essential to a scheme of ordered liberty" was modified. The *Duncan* test was whether the principle was "necessary to an Anglo-American regime of ordered liberty."<sup>412</sup> The Court did not expressly extend *Duncan* to substantive due process until the 1977 case of *Moore v. City of East Cleveland*.<sup>413</sup> However, as John Hart Ely observed, *Palko* was of "questionable contemporary vitality" when *Roe* was decided.<sup>414</sup>

The *Palko* test is somewhat artificial<sup>415</sup> and difficult to apply. It requires the Court to imagine whether there would be a regime of ordered liberty if the particular right or procedure at issue did not exist. Of course, this almost always requires references to historical particulars, but the analysis is free-wheeling and not tied to the history of any particular liberal regime. The *Duncan* case limited this to Anglo-American practice and *Moore* further limited it to institutions "deeply rooted in *this Nation's* history and tradition."<sup>416</sup>

It should be noted that Justice Harlan's dissent in *Poe v. Ullman*<sup>417</sup> is often cited in the Court's discussions of the test of fundamentality. In *Poe*, Harlan wrote that the content of the due process clause of the fourteenth amendment consisted of "the balance which our Nation . . . has struck between . . . liberty and the demands of organized society."<sup>418</sup> It "is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke."<sup>419</sup> Read as a whole, Harlan's opinion seems to consider American history as dispositive.

Applying the Harlan or *Moore*<sup>420</sup> tests to abortion, the proper analysis would have required the Court to determine how abortion has traditionally been treated in *this* country, including deeply-rooted

opinion, it gave the strong impression that it felt it important that history and constitutional law be brought into close harmony. The Court's conclusions on history coincided rather conveniently with its constitutional conclusions.

411. 391 U.S. 145 (1968).

412. *Id.* at 149-50 n.14.

413. 431 U.S. 494, 503-04 n.12 (1977)(noting the "abstract formula" of *Palko*, and the more restrictive, historically based test of *Duncan*). The *Moore* Court followed *Duncan*. *Id.*

414. Ely, *supra* note 24, at 931 n.79.

415. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-2, at 773 (2d ed. 1988).

416. *Moore*, 431 U.S. at 503 (emphasis added).

417. 367 U.S. 497, 522 (1961).

418. *Id.* at 542.

419. *Id.*

420. The test of *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), cited in *Palko*, 302 U.S. at 325, gives the same result.

American traditions which represented a break from Old World traditions.<sup>421</sup> A test rooted in American history, while it may not totally prevent "judges from roaming at large in the constitutional field,"<sup>422</sup> would at least "impose[] limits on the judiciary that are more meaningful than any based on the abstract formula taken from *Palko* . . . ."<sup>423</sup> Under the Court's own tests, if faithfully followed, it is impossible to make a case for an abortion right.<sup>424</sup> *This* nation's history will not allow it. A survey of the history shows *Roe's* illegitimacy.<sup>425</sup>

As the *Roe* Court's own evidence showed, from the mid-nineteenth

421. See *Thornburgh*, 476 U.S. at 790-91 (White, J., dissenting).

422. *Griswold*, 381 U.S. at 502 (Harlan, J., concurring).

423. *Moore*, 431 U.S. at 503-04 n.12.

424. *Thornburgh*, 476 U.S. at 791-92 (White, J., dissenting).

425. *Id.* As argued by the United States, "[d]ue process analysis . . . must . . . seek a connection with the intentions of those who framed and ratified the constitutional text." Brief for the United States, *supra* note 35, at 25. However, "the period between 1860 and 1880 witnessed 'the most important burst of anti-abortion legislation in the nation's history.'" *Id.* (quoting J. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900* at 200 (1978)). Further, the laws were clearly aimed at protecting unborn life and not just maternal health. *Id.* at 26 (citing J. MOHR, *supra*, at 35-36). The United States' brief declared "that those who drafted and voted for the fourteenth amendment would have been surprised indeed to learn that they had put any part of such subjects beyond the pale of state legislative regulation." *Id.* at 26.

The historical context is very relevant to the interpretation of the due process clause in that it reveals the intent behind the clause. *Id.* This search for contemporaneous understanding has been conducted by the Court in establishment clause cases such as *Lynch v. Donnelly*, 465 U.S. 668 (1984). Similarly, the Court has employed historical analysis in eighth amendment evaluation of the death penalty, fifth amendment treatment of self-incrimination, and sixth amendment evaluation of trial by jury issues. Brief for the United States, *supra* note 35, at 26-27. In contrast to the straightforward use of history in these cases, argued the United States, the use of history in *Roe* is unclear and "it reaches a conclusion in direct variance with the historical facts recited." *Id.* at 27.

The United States, as amicus curiae, also noted the other ways history has been used. First, it has been "invoked . . . to take account of developments in society and the law." *Id.* Under this approach history has been used as a vector showing the proper application of the original understanding to undreamed of developments such as wire-tapping. The original intent is used "for developing values implied and inchoate at the point of origin." *Id.* However, the brief argued that whether the vector pointed to a right to travel or a right to attend criminal trials, "the Court has always taken pains to trace its point of origin back to specific constitutional provisions by a route either inferential or historical." *Id.* By contrast, *Roe* omitted these connections. *Id.* Indeed, the fourteenth amendment has been shown to have arisen during a period of "particular stringency" in abortion laws. *Id.* (emphasis in original). Thus, the "historical trajectory" did not support *Roe*. *Id.* at 28.

The inferential route, likewise, fails to support *Roe*. *Id.* The "germ of a theory" was missing from any constitutional passage to support a "general and fundamental right" to abortion. *Id.* Even such an "inferential extrapolation" must be "directly rooted in textually specified constitutional values." *Id.* *Griswold* included the notion of a connection "to what went before." *Id.* (quoting *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965)). By contrast, *Roe* was not "anchored in text, history, or precedent" but was "an abrupt departure from the Court's prior decisions." *Id.* at 28. All the cases purported to support a "privacy" right "were applications of accepted principles . . . ." *Id.* at 28-29. Therefore, *Roe* abandoned the normal use of history in constitutional analysis.

century forward, American statutory law began to break from the common law tradition in the abortion area.<sup>426</sup> The states enacted stringent prohibitions on abortion which remained in effect until the Court's ruling in *Roe*.<sup>427</sup> Even where the law was liberalized, it was much stricter than what the Court imposed in *Roe*.<sup>428</sup> Certainly, American abortion rights were not, in the language of *Duncan*, "fundamental in the context of the criminal processes maintained by the American States."<sup>429</sup>

Of course, even under the wider-ranging historical test of *Palko*, the case for the fundamentality of abortion fails. Virtually every aspect of the Court's recitation of history has been challenged, either for its factual accuracy or for the legitimacy of the inferences which the Court drew from its facts. The Court's view of history, as a whole, has been thoroughly refuted by a number of scholars.<sup>430</sup>

426. *Roe*, 410 U.S. at 139.

427. *Id.* at 140.

428. See *Doe v. Bolton*, 410 U.S. 179, 205 (1973)(citing MODEL PENAL CODE § 230.3 (proposed official draft, 1962)(reproduced as Appendix B)).

429. *Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14 (1968).

430. As one commentator has noted, "It was only by concentrating on . . . the outdated and biologically incorrect notions of when human life begins held by our ancestors [the concept of "quickenng"] that [the *Roe* Court] was led to assert that historically 'abortion was viewed with less disfavor than under most American statutes currently.'" D. Horan, *Roe v. Wade: It's Facts and Logic Cannot Stand* (no date)(unpublished manuscript on file at author's office). In addition, the Court relied on dated and skewed evidence of ancient attitudes on abortion. See S. KRASON, *ABORTION: POLITICS, MORALITY, AND THE CONSTITUTION* 120-48, 441-83 (1984); Arbagi, *Roe and the Hippocratic Oath*, in *ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS* 159 (D. Horan, E. Grant & P. Cunningham ed. 1987). The Court cited Book V of Plato's *Republic* as authority for the proposition that abortion was commended by the ancients. *Roe*, 410 U.S. at 131. An actual examination of the passage and its context makes it doubtful that Socrates was even speaking of abortion, let alone endorsing it, in the argument cited by Plato. See S. KRASON, *supra*, at 124-31. In fact, an examination of Aristotle's argument in Book VII of *THE LAWS* shows he opposed abortion for population control, gave the right, when exercised, to the state, not the woman, and opposed it from the point at which his scientific understanding indicated that life had begun (40 days for males, 90 days for females). S. KRASON, *supra* at 130.

The Supreme Court's discussion of historical Christian views and the common law suffered from similar defects. While a detailed critique of *Roe*'s historical material is beyond the scope of this article, much material is available on the subject. A survey of this literature is sufficient to indicate the overwhelming evidence against the *Roe* Court's view of abortion history. See generally Connery, *The Ancients and the Medievals on Abortion: The Consensus the Court Ignored*, in *ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS* at 123; J. CONNERY, *ABORTION: DEVELOPMENT OF THE ROMAN CATHOLIC PERSPECTIVE* (1977); S. KRASON & W. HOLLBERG, *THE LAW AND HISTORY OF ABORTION: THE SUPREME COURT REFUTED* (1984); Brown, *What the Supreme Court Didn't Know: Ancient and Early Christian Views on Abortion*, 1 *HUM. LIFE REV.* 5 (Spring 1975); Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 *FORDHAM L. REV.* 807 (1973); Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 *U. PITT. L. REV.* 359 (1979); Horan, Forsythe, & Grant, *Two Ships Passing in the Night: An Interpretivist Review of the White-Stevens Colloquy on Roe v. Wade*, 6 *ST. LOUIS U. PUB. L. REV.* 229 (1987); Noonan, *An Almost Absolute Value in History*, in *THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES* 1 (J.

Even taking the *Roe* history at face value, however, there is still considerable doubt that it established abortion as fundamental. Under *Palko*, if the Court could imagine a scheme of ordered liberty that did not include the abortion right, the right was not fundamental. The American system discussed in the Court's history presented just such a scheme. Ely concluded that the Court's survey "surely d[id] not seem to support the Court's position, unless a record of serious historical and contemporary dispute was somehow thought to generate a constitutional mandate."<sup>431</sup>

However, the invocation of *Palko* enabled the Court to multiply examples of permissible abortion: to roll the constitutionally relevant history all the way back to ancient Greece.<sup>432</sup> This maneuver provided a few more allegedly pro-abortion precedents for the Court and bolstered the impression that approval of abortion had roots deep in Western history. Moreover, the expansion of the relevant history enabled the *Roe* Court to portray the enactment of tough anti-abortion statutes, in effect in America for over a century before *Roe*, as freak developments in the history of ordered liberty.<sup>433</sup>

In sum, the *Roe* Court's substantive due process analysis, truncated as it was, was anomalous in comparison with the application of the analysis in other privacy cases. This may also be seen from the Court's treatment of another privacy claim: *Bowers v. Hardwick*.<sup>434</sup>

#### 4. *Roe v. Wade* contrasted with *Bowers v. Hardwick*

In *Bowers v. Hardwick*,<sup>435</sup> the Court, employing a history of Western attitudes toward sodomy, concluded that there was no fundamental right to commit sodomy under either the *Palko* or the *Moore* test.<sup>436</sup> Yet, the historical case for the fundamentality of abortion is no more convincing than the historical case for sodomy. The *Roe* majority

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Noonan ed. 1970).

431. Ely, *supra* note 24, at 925 n.42. See also Epstein, *supra* note 30, at 167; Thornburgh, 476 U.S. at 793 (White, J., dissenting).

432. It actually reached back to the Persian Empire, "where criminal abortions were severely punished." *Roe*, 410 U.S. at 130. But, since Persia was a "tyranny," its history was presumably irrelevant to any test concerned with "ordered liberty."

433. The Court adduced contemporary opinions of elite groups, such as the AMA and ABA, as further evidence that the American practice regarding abortion before the 1970's was on the wrong side of history. *Roe*, 410 U.S. at 141-47.

434. 478 U.S. 186 (1986).

435. *Id.*

436. *Id.* at 192. Cf. *The Supreme Court 1985 Term*, 100 HARV. L. REV. 4, 215 (1986) ("*Hardwick* indicates that rather than protecting an individual's freedom to make decisions fundamental to herself or himself, the right of privacy is limited to particular, traditional categories of private life.").

cited Plato's *REPUBLIC* as evidence of abortion's deep roots in our cultural traditions.<sup>437</sup> The *Bowers* majority apparently did not deem this sort of evidence as worthwhile.<sup>438</sup> Plato's dialogues contain numerous allusions to the practice of homosexual sodomy among the ancients.<sup>439</sup>

The *Roe* approach suggested that a shift of opinion, in favor of abortion, among selected elites and in a few states was constitutionally significant. The *Bowers* opinion saw little constitutional significance in the lack of enforcement of sodomy laws generally and repeal of such laws in many states.<sup>440</sup> These trends did not indicate a fundamental right. The comparison of the historical analysis employed in *Roe* with that used in *Bowers* indicates that, if the Texas abortion law challenged in *Roe* were subjected to the same analysis as the Georgia sodomy statute in *Bowers*, the abortion law would have been upheld. The *Bowers* analysis was more rigorous than that of *Roe*. The grasping at historical straws besmirching *Roe* was absent in *Bowers*. The *Bowers* history was certainly not complete, but it was not glaringly inaccurate. Nor did it have to be complete. It need only have shown that the practice was not rooted in the traditions of this nation nor essential to a scheme of ordered liberty.

The *Bowers* and *Roe* cases were inconsistent in other respects. As demonstrated above, traditional privacy precedents placed limited protection around places where privacy could reasonably be expected. This protection was provided where the interest of the government in intruding in those places, without proper safeguards, was outweighed by the potential of abuse inherent in the intrusion. The privacy right claimed by the plaintiff in *Bowers* fit much more easily into this line of cases (e.g., *Stanley*, *Katz*, and *Griswold*) than the privacy right claimed by Jane Roe.<sup>441</sup> All other things being equal, the right to privacy cannot logically justify unlimited access to abortion and, nevertheless, permit local police to selectively enforce long dormant sodomy statutes by entering into a private home.

Under privacy jurisprudence as it now stands, the government may not involve itself in the abortion decision in any meaningful way. Yet, it may completely abridge the decision to engage in certain consen-

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437. *Roe*, 410 U.S. at 131.

438. *Bowers*, 478 U.S. at 193-94 (no mention whatsoever of instances in ancient texts where the practice of homosexuality is condoned).

439. See PLATO, PHAEDRUS. Cf. Marzen, O'Dowd, Crone & Balch, *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1 (1985)(employing a *Roe* and *Bowers* type of historical analysis to find no constitutional right to suicide despite some approval of the practice in some parts of the ancient world).

440. *Bowers*, 478 U.S. at 193-94.

441. See *id.* at 195.

sual sexual encounters—encounters that directly affect the legitimate interests of other non-consenting parties to a much lesser extent than the abortion decision.

By any prudent measure, the state's interest in regulating abortion is at least as great as its interest in nabbing homosexuals in *flagrante delicto*. As the *Roe* Court noted, a responsible and responsive government must necessarily be permitted to regulate abortion for a variety of compelling reasons. Government has a legitimate interest in protecting potential life, in maintaining medical standards, and in preserving maternal health, including mental and physical well-being.

The social implications of the mass practice of abortion as an alternative form of birth control are grave. The government is necessarily desirous of minimizing these ill effects. On the other hand, the practical reasons for upholding the Georgia sodomy law seem no more compelling. True, upholding sodomy laws has a symbolic value. The health implications of sodomy practice are legitimate state concerns, but the Court gave these no overt consideration in the *Bowers* decision. Moreover, even if a sodomy right were declared a fundamental privacy right, the state would be free to show that these interests were compelling enough to justify abridgement of the right.

It might be argued that the inconsistency between *Bowers* and abortion jurisprudence is more apparent than real. Four of the five members of the *Bowers* majority were dissenting in *Thornburgh*; the four *Bowers* dissenters have consistently voted to reaffirm *Roe*. It appears that only Justice Powell's position as a supporter of both a broad privacy right in *Thornburgh* and a circumscribed privacy right in *Bowers* is inconsistent.<sup>442</sup>

However, the consistency of the dissenters in *Bowers* should not be readily presumed. It is interesting to note that the author of *Roe*, Justice Blackmun, who relied so extensively on history and the sanction of custom to justify that opinion, completely renounced the historical approach of *Bowers*.<sup>443</sup> He rejected the history of Anglo-American sodomy laws as irrelevant because of "[t]he theological nature of [their] origin."<sup>444</sup> Since much Anglo-American law has a theological origin, it appears that, for the *Bowers* dissenters, Anglo-American legal history is

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442. *Id.* at 197-98.

443. In this, Justice Blackmun was joined by Justices Brennan and Marshall, two original subscribers to *Roe*, as well as Justice Stevens, a latecomer to the pro-abortion majority, but a strong defender of *Roe*. Justice Blackmun asserted, "I cannot agree that either the length of time a majority has held its conviction or the passions with which it defends them can withdraw legislation from this Court's scrutiny." *Bowers*, 478 U.S. at 210.

444. *Id.* at 211-12 & n.6.

no guide to the determination of fundamental rights.<sup>445</sup>

Another *Bowers* dissenter, Justice Stevens, has argued forcefully for an historical approach and has "conscientiously, indeed passionately, sought to discern and apply the Framers' intent in construing a constitutional provision."<sup>446</sup> One of three cases where he forcefully argued for such an approach, *Press-Enterprise Co. v. Superior Court*,<sup>447</sup> was decided two weeks after the *Thornburgh* abortion case, in which Justice Stevens, in a concurring opinion, ridiculed such an approach by Justice White in the abortion context. Thus, Justice Stevens is a powerful advocate for interpretivism, except where it interferes with abortion or homosexual practice. It has been observed that this inconsistency boils down to a "whose-ox-is-gored" approach, which "is neither a principle of constitutional construction nor a principled manner of interpreting the Constitution."<sup>448</sup>

Apart from these apparently anomalous rejections of the worth of historical analysis, other inconsistencies are present. In *Bowers*, Justice Blackmun rejected theologically based law as a guide. However, in *Roe*, he approvingly cited ancient religious attitudes as well as canon law treatment of the unquickened fetus as evidence of an historical acceptance of abortion, at least in the early stages of pregnancy.<sup>449</sup> Moreover, the *Roe* opinion impliedly analogized from this history to the constitutional conclusion that the abortion right cannot be abridged at all in the first trimester.<sup>450</sup>

In the light of *Bowers*, one wonders anew about the purpose of Justice Blackmun's historical survey in *Roe*. Did he believe it was relevant? Was it simply an elaborate mystification disguised to cloak the real *policy* reasons for *Roe* and the lack of traditional constitutional analysis? There is some evidence for this.

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445. See H. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983).

446. Horan, Forsythe, & Grant, *supra* note 430, at 263.

447. 478 U.S. 1 (1986).

448. Horan, Forsythe, & Grant, *supra* note 430, at 267.

449. *Roe*, 410 U.S. at 133-34, 160-61.

450. Such "acceptance" of early abortion in the historical survey made the first trimester regulations seem normative. The Court failed to draw the logical conclusion from the quickening distinction that for centuries the unborn were protected from the earliest time when the science of the day indicated that human life existed. In the nineteenth century, when science discovered that life existed from conception, doctors led the way in persuading the legislatures to push abortion protection back to conception. This latter approach was consistent with the quickening distinction of the common law, as the *Roe* approach was not. The Court conveniently overlooked this powerful evidence that abortion laws were written to protect fetal life, and not just to protect maternal health. *Id.* Of course, the science of conception has not been altered. The underlying rationale of the abortion laws remains unchanged. However, the ruling members of the medical profession have altered their positions, apparently for reasons other than scientific facts.



First, the history in *Roe* does not prove what the Court suggests it proves. Second, the Court never explicitly says it is supposed to prove anything. Finally, in *Bowers*, Justice Blackmun claims that the principle linking abortion and other fundamental privacy rights is their centrality to the lives and importance to "the happiness of individuals."<sup>451</sup> In doing so, he implies that this factor is what makes these rights fundamental, not their importance in our history or collective conscience.

Of course, the test for fundamentality has never been, and cannot be, the Supreme Court's own estimate of a right's importance. The right to an education is as important as these other rights, perhaps more important. Yet the Court has never recognized it as fundamental.<sup>452</sup> Other important needs, such as the need for economic security, have never been recognized as fundamental.

Justice Blackmun's language in *Bowers* suggests that the most important part of the *Roe* Court's privacy analysis is the paragraph lamenting the problems of unwanted pregnancy. Yet, the Supreme Court could never have submitted an opinion grounded solely on this reasoning. It needed a legal analysis that included an historical justification of the fundamental status of abortion. Since the analysis the Court achieved was insufficient, the Court left the purposes of the various parts of its argument vague. As noted above, the opinion does not reason to a result as much as it evokes one. The upshot of this analysis is that *Roe* cannot stand without an historical argument of fundamentality and it cannot stand with one. The argument that *Roe*'s historical analysis was a result-oriented mystification seems compelled if we take Justice Blackmun's *Bowers* dissent seriously.

It is clear that the position of Justice Blackmun and the other three who joined him in the *Bowers* dissent is no more consistent with the analysis of *Roe* than the position of the *Bowers* majority. The *Bowers* opinion has compounded the problems of abortion jurisprudence. The *Thornburgh* opinion rendered the abortion right more incoherent, but *Bowers* expanded the analytical gulf between abortion jurisprudence and the privacy jurisprudence to which it is purportedly linked.

Even more disturbing is the confusion over the proper test for fundamentality evident in *Bowers*—confusion likely stemming in part from the vagueness of *Roe* on this point. Is the *Palko* test appropriate? Is *Moore*? Or is history irrelevant, as the *Bowers* dissenters suggest?

This confusion reminds us that the fundamentality of the abortion right has not been satisfactorily determined under any test. The argu-

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451. *Bowers*, 478 U.S. at 205 (Blackmun, J., dissenting).

452. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); cf. *Plyler v. Doe*, 457 U.S. 202 (1982).

ment put forward in *Roe* convinced none of the commentators. The analysis employed by the *Bowers* majority suggests that the abortion right could not have passed muster if Justice Powell had voted consistently with *Bowers*. Finally, no satisfactory alternative rationale for the fundamentality of abortion has ever been offered by its Supreme Court defenders (nor by other writers).

Indeed, a recent exhaustive analysis of abortion history and law demonstrated that an abortion right has never been "a liberty in American Law or tradition,"<sup>453</sup> let alone a fundamental liberty. The writers of that analysis added, "To the contrary, it is the protection of the life of the unborn child as a human being that is 'deeply rooted' in American Law. *Roe v. Wade* cannot be supported by any values that are protected by the Fourteenth Amendment."<sup>454</sup>

In light of this, the Court owes the country a re-evaluation of *Roe* with a plausible, reasoned justification and more principled guides to the regulation of the abortion right. Failing this, *Roe* should be overruled and the regulatory authority over abortion should revert to the states.

There is nothing in the *Roe* privacy analysis, or in the privacy jurisprudence as a whole, to justify continued adherence to *Roe*. The citation of cases in *Roe*, involving marriage, family, sex, and procreation, are insufficient to justify a fundamental right to abortion. The development of these rights has been so inconsistent with the development of the abortion right that a rethinking of the current approach to abortion jurisprudence is now needed.<sup>455</sup>

453. Horan, Forsythe, & Grant, *supra* note 430, at 311.

454. *Id.*

455. Perhaps the best illustration of the disparity between the traditionally cited privacy cases and abortion jurisprudence is found in the treatment of the family. As has already been noted, when the fundamental right of parents to direct the rearing of their children collided with the fundamental right of the child to have an abortion, the latter right prevailed.

In abortion contexts, the family has been painted in the bleakest possible terms to make the rejection of a parental consent or notice requirement seem reasonable. For example, in *Hodgson v. Minnesota*, 827 F.2d 1191 (8th Cir. 1987)(*reh'g granted, vacated*, 835 F.2d 1545, *rescinded* 835 F.2d 1546) the Eighth Circuit recently held that a state may not require notification (whenever possible) of both parents, prior to their child obtaining an abortion. The appellate court upheld the district court's findings that there was a large number of divorces in Minnesota, that many minors did not live with their parents, that many minors were from "dysfunctional families [and] 'live in fear of violence by family members,'" that notification would "only add to the magnitude of the problem of family violence," and that notifying a non-custodial parent could be harmful. *Id.* at 1198 (quoting *Hodgson v. Minnesota*, 648 F. Supp. 756, 768-69 (D. Minn. 1986)).

Ironically, this bleak view of the family is in stark contrast to the rosy picture painted of the physician-patient relationship. The Supreme Court consistently rejects evidence that some abortion-clinic doctors are greedy, unscrupulous, and unsafe. Instead, it consistently portrays the whole medical profession in an idealistic fashion.

A second stark contrast is the portrayal of the family in other contexts. In *Parham v. J. R.*,

## B. *Fetal Rights in Legal Contexts Other Than Abortion Law*

The anomalies of abortion jurisprudence may also be seen by a comparison of the rights of the unborn in abortion law with their rights in other legal contexts. Before reviewing fetal rights in these other contexts, here is a brief criticism of the legal status of fetal life which *Roe* perpetuated.

The Court referred to the legal status of fetal life in three contexts: (1) An inconclusive history of the legal treatment of the fetus,<sup>456</sup> (2) A discussion of personhood in the Constitution,<sup>457</sup> and (3) An analysis of the legitimate state interest in protecting "potential" life.<sup>458</sup> Subsequent Supreme Court opinions concerning the legal status of fetal life in any of the three contexts have not been rigorously principled. Nor have they adequately given effect to that legal interest especially given the extent to which fetal rights are protected in tort, property and criminal law.<sup>459</sup> Furthermore, despite having imposed national guidelines on abortion, the Court has brought no rationality to laws regulating treatment of the fetus. On the contrary, it has made a consistent and principled policy of protecting unborn life almost impossible. The Court has quite possibly aborted the nascent trend toward legal recognition of the dignity of unborn life. As Justice O'Connor has argued, the treatment accorded fetal life in abortion jurisprudence is illogical<sup>460</sup> since the state's interest in

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442 U.S. 584 (1979), the Court rejected a district court's holding that an adversarial, judicial-type hearing was required by due process for parental commitment of minor children to mental institutions. *Id.* at 607. The Court noted that such a hearing to challenge the parent's decision posed a danger of "significant intrusion into the parent-child relationship." *Id.* at 610. The Court added: "Pitting the parents and child as adversaries often will be at odds with the presumption that parents act in the best interests of their child." *Id.* This presumption seems non-existent in abortion cases.

Finally, the contrast is also observable in *Bowen v. American Hosp. Ass'n*, 476 U.S. 610 (1986), in which the Court repeatedly referred to decisions for nontreatment by parents of handicapped newborns. *Id.* at 631-39. The Court evinced no concern over the right of parents to make such nontreatment decisions. *Id.* at 636 n.22. The notion of leaving the matter in the parents' hands, without governmental intrusion, underlay the whole opinion.

Although such a "laissez-faire" approach is inappropriate in cases such as *Bloomington's Baby Doe*, because human life is at risk, the Court finds it appropriate. But, when parents might select a "nontreatment" of the pregnancy of their minor child, believing it to be in her best interest, the privacy right of parents to rear their own children is no longer compelling. Even notifying the parents may be taboo, because parents who may be trusted to have their children's best interests at heart when deciding that they should not receive neonatal surgery, or when committing them to a mental institution, suddenly lose their competency to determine best interest when the subject is abortion.

456. *Roe*, 410 U.S. at 159-62.

457. *Id.* at 156-59.

458. *Id.* at 154, 159, 165.

459. See *infra* section III-B-1, 2, & 3.

460. *Akron*, 462 U.S. at 459 (O'Connor, J., dissenting).

protecting life exists throughout pregnancy.<sup>461</sup>

Back, then, to a discussion of fetal rights in other legal contexts. Not only is abortion jurisprudence internally incoherent in regard to the protection of fetal life, it is inconsistent with related areas of law as well. In these related areas fetal rights are given greater protection. Some jurisdictions even recognize pre-conception torts as well as the more usual variety of prenatal harms and interests. Although criminal and tort protection of the fetus is inadequate,<sup>462</sup> the protection of "potential" life in the abortion context seems uninformed by the protection offered in these related areas.<sup>463</sup>

### I. *Fetal rights in tort law*

The law of torts has seen a dramatic change in the past ninety years. The rights of the unborn child have moved from a position of little legal protection to a position where even preconception wrongs are recompensible. As duties to the fetus increase, the foundation upon which *Roe* sits erodes, turning it into the exception rather than the rule in defining the personhood of the fetus.

The first American case which dealt with fetal injury was the celebrated opinion by then Judge Oliver Wendell Holmes, Jr. in *Dietrich v. Northampton*.<sup>464</sup> Holmes interpreted the Massachusetts wrongful death act to preclude recovery for the death of a four to five month old fetus.<sup>465</sup> He held that "the unborn child was a part of the mother at the time of injury" and that "any damage to [the fetus] which was not too remote to be recovered for at all was recoverable by her."<sup>466</sup> *Dietrich* was widely followed by other courts until 1946.<sup>467</sup> Holmes' approach was buttressed by concern with problems of proving causation, and fear that allowing recovery would lead to fictitious claims.<sup>468</sup>

461. *Id.* at 459, 460 (O'Connor, J., dissenting).

462. Parness, *Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life*, 22 HARV. J. ON LEGIS. 97 (1985).

463. *Roe* is sometimes read by lower court judges (and legislatures, too, no doubt) to preclude protection of fetal life, not just prior to viability but in a variety of criminal law contexts as well. For example, some courts have concluded that *Roe* makes feticide during the first three months of pregnancy unpunishable. Another struck down a statute requiring disposal of fetal remains "in a manner consistent with . . . other human remains" because, it reasoned, *Roe* does not permit the treatment of a fetus as a human being in any context. *Margaret S. v. Edwards*, 488 F. Supp. 181, 221 (E.D. La. 1980)(striking LA.REV.STAT.ANN. § 40:1299.35.14 (1977)).

464. 138 Mass. 14 (1884).

465. The fetus lived for "ten or fifteen minutes" after premature birth. *Dietrich*, 138 Mass. at 15. Nevertheless, the court referred to the newborn as an "unborn child." *Id.* at 17.

466. *Id.* at 17.

467. PROSSER AND KEETON ON THE LAW OF TORTS 367 (W. Keeton ed. 5th ed. 1984).

468. *Id. See, e.g., Magnolia Coca Cola Bottling Co. v. Jordan*, 124 Tex. 347, 78 S.W.2d 944 (1935).

*Dietrich* did not go uncriticized, however. In 1900, the Supreme Court of Illinois followed the reasoning of *Dietrich* in *Allaire v. St. Luke's Hospital*.<sup>469</sup> Justice Boggs issued a strong dissent, attacking the idea that the fetus was a part of the mother:

Medical science and skill and experience have demonstrated that at a period of gestation in advance of the period of parturition the foetus is capable of independent and separate life, and that though within the body of the mother it is not merely a part of her body, for her body may die in all of its parts and the child remain alive and capable of maintaining life when separated from the dead body of the mother.<sup>470</sup>

Though medical knowledge of the separateness of the fetus from the mother was recognized at the turn of the century, the tort-related legal rights of the unborn were slow in coming.

Recovery for prenatal injuries was finally allowed in 1946, in what William Prosser called "the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts."<sup>471</sup> In *Bonbrest v. Kotz*,<sup>472</sup> a federal court allowed the plaintiff infant to recover for injuries sustained when he was negligently taken, as a viable fetus, from his mother's womb by the defendant doctor.<sup>473</sup> The reasoning in *Bonbrest* (which closely followed that of Justice Boggs in his earlier dissent) stated:

As to the viable child being 'part' of its mother—this argument seems to me to be a contradiction in terms. True, it is in the womb, but it is capable now of extrauterine life—and while dependent for its continued development on sustenance derived from its peculiar relationship to its mother, it is not a 'part' of the mother in the sense of a constituent element—as that term is generally understood. Modern medicine is replete with cases of living children being taken from dead mothers. Indeed, apart from viability, a non-viable foetus is not part of its mother.<sup>474</sup>

As to the difficulty of proof of such claims, the court stated: "The law is presumed to keep pace with the sciences and medical science certainly has made progress since 1884. We are concerned here only with the right and not its implementation."<sup>475</sup>

Since *Bonbrest*, every state has recognized prenatal harm as a le-

469. 184 Ill. 359, 56 N.E. 638 (1900).

470. *Id.* at 370, 56 N.E. at 641.

471. W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* 336 (4th ed. 1971).

472. 65 F. Supp. 138 (D.D.C. 1946).

473. *Id.* at 143.

474. *Id.* at 140.

475. *Id.* at 143.

gitimate cause of action for a child subsequently born.<sup>476</sup> Compensation for prenatal injuries has also been allowed under the Federal Tort Claims Act in an action against the United States.<sup>477</sup> Some states limit recovery to post-viability injuries, but the clear trend is toward recovery for all prenatal harm.<sup>478</sup>

The justifications given for discarding the viability test vary. In *Smith v. Brennan*,<sup>479</sup> the New Jersey Supreme Court found that age is not the only determinant of viability, and, in borderline cases, there is no principled way to determine viability.<sup>480</sup> The court said:

We see no reason for denying recovery for a prenatal injury because it occurred before the infant was capable of separate existence. Whether viable or not at the time of the injury, the child sustains the same harm after birth and therefore, should be given the same opportunity for redress.<sup>481</sup>

A New York appellate court in *Kelly v. Gregory*<sup>482</sup> (the first court to reject the viability standard) focused on the issue of biological separability: "[L]egal separability should begin where there is biological separability."<sup>483</sup> Here, as in other related areas of the law, medical science empowered the engine for legal change. The court noted such knowledge, especially that dealing with fetal development, as a factor in helping to lead to this rule.<sup>484</sup>

The Supreme Court of Rhode Island has dropped the viability test in favor of a causation test: "With us the test will not be viability but causation, and our inquiry will be whether the damage sustained is traceable to the wrongful act of another."<sup>485</sup> This causation test seems more rational and logical than a viability test, which has been criticized

476. PROSSER AND KEETON, *supra* note 467, at 368.

477. *Sox v. United States*, 187 F. Supp. 465 (E.D.S.C. 1960). A cause of action for prenatal injuries under 42 U.S.C. § 1983 (1976) was recognized in *Douglas v. Town of Hartford*, 542 F. Supp. 1267 (D. Conn. 1982). The Court held that, for purposes of § 1983, a fetus was a "person" within the meaning of the statute. *Contra Harman v. Daniels*, 525 F. Supp. 798 (W.D. Va. 1981)(decided on virtually identical facts); *Poole v. Endsley*, 371 F. Supp. 1379 (N.D. Fla 1974), *aff'd in part*, 516 F.2d 898 (5th Cir. 1975); *McGarvey v. Magee-Womens Hosp.*, 340 F. Supp. 751 (W.D. Pa. 1972), *aff'd*, 474 F.2d 1339 (3d Cir. 1973). See generally Note, *Douglas v. Town of Hartford: The Fetus as Plaintiff Under Section 1983*, 35 ALA. L. REV. 397 (1984); Note, *The Fetus Under Section 1983: Still Struggling for Recognition*, 34 SYRACUSE L. REV. 1029 (1983).

478. PROSSER AND KEETON, *supra* note 467, at 368-69; Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349, 357 (1970).

479. 31 N.J. 353, 157 A.2d 497 (1960).

480. *Id.* at 367, 157 A.2d at 504.

481. *Id.*

482. 282 A.D. 542, 125 N.Y.S.2d 696 (1953).

483. *Id.* at 543, 125 N.Y.S.2d at 697.

484. *Id.* at 543-44, 125 N.Y.S.2d at 697-98.

485. *Sylvia v. Gobeille*, 101 R.I. 76, 79, 220 A.2d 222, 224 (1966).

as arbitrary and transient.<sup>486</sup> The disallowance of claims for injuries in the first trimester may well be the denial of the most meritorious and seriously harmful claims.<sup>487</sup> Though causation may be difficult to determine, most courts seem to realize that such difficulty should not be a bar to the action, but something to be handled in the courtroom. Recent medical advances make proof of medical causation increasingly reliable.<sup>488</sup>

## 2. *Fetal rights in wrongful death actions*

Under the language of most wrongful death statutes, recovery is only possible if the death was suffered by a "person."<sup>489</sup> Since wrongful death is a statutory right, the nature of the right depends on the provisions in the individual statutes. Most of the statutes are death acts which create a new cause of action for the death of a person "in favor of a representative and for the benefit of certain designated persons."<sup>490</sup> Other statutes are survival acts which preserve a cause of action for "damages resulting from the victim's death as well as damages accrued at the moment he died."<sup>491</sup> These survival acts allow suits to be

486. See, e.g., Morrison, *Torts Involving the Unborn—A Limited Cosmology*, 31 BAYLOR L. REV. 131, 141-44 (1979); Robertson, *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401, 1414-20.

487. Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579, 589 (1965).

488. PROSSER AND KEETON, *supra* note 467, at 369. In the parent-child relationship, there has been substantial limitation on tort liability. Generally, an unemancipated minor child is immune from tort liability for injury to his parents. See generally 67A C.J.S. *Parent & Child* (1978). § 128. In addition, an unemancipated minor child has no right of action against a parent for the tort of the parent. *Id.* at § 129; Annot., *Liability of Parent for Injury to Unemancipated Child Caused by Parent's Negligence—Modern Cases*, 6 A.L.R.4TH 1066 (1981) (hereinafter *Liability of Parent*). This intra-family immunity has been justified by the necessity for the protection of family peace and tranquility and by the concern that any change in the rule would interfere with the rights and obligations of parents with respect to the discipline, control, and care of their children. *Id.* at 1072. Some courts, however, have abrogated the intra-family tort immunity doctrine to allow a child to maintain an action against his parents for ordinary negligence, except where the alleged negligent act involves an exercise of parental authority over the child or where it involves an exercise of reasonable parental discretion with regard to the provision of food, clothing, housing, medical and dental care. *Id.* at 1113. See, e.g., *Plumley v. Klein*, 388 Mich. 1, 199 N.W.2d 169 (1972). In 1980, a Michigan court of appeals, in *Grodin v. Grodin*, indicated a woman would be liable to a child for taking medicine while pregnant which caused the child's teeth to be discolored. 102 Mich. App. 396, 301 N.W.2d 869. Whether the Michigan holding is followed or not, it is apparent that the unborn have strong and increasing rights in tort law. In the tort category of wrongful death actions the same trend may be seen. See *infra*.

489. Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 MO. L. REV. 639, 656 (1980).

490. PROSSER AND KEETON, *supra* note 467, at 946.

491. *Id.*

brought by the executor or administrator of the decedent's estate.<sup>492</sup> States have both wrongful death and survival provisions, usually encoded in the same statutes.<sup>493</sup>

Courts generally allow recovery under the wrongful death statutes where a viable unborn child is injured, born alive, and then dies.<sup>494</sup> This also seems to be the case for nonviable unborn children who are born alive and then die.<sup>495</sup> The Supreme Judicial Court of Massachusetts, in *Torigian v. Watertown News Co.*,<sup>496</sup> allowed recovery on behalf of an infant who died two and a half hours after birth as a result of injuries sustained in the fourth month of gestation. The court reasoned that there was no sound distinction between the viable and nonviable situations, and that the "vast majority" of cases allowed tort recovery to children who were injured when nonviable.<sup>497</sup> The child was held to be a "person" within the meaning of the Wrongful Death Act.<sup>498</sup> The Supreme Court of Alabama, in *Wolfe v. Isbell*,<sup>499</sup> granted an action to a nonviable child who was subsequently born alive and lived for fifty minutes. On the viability question, the court cited approvingly a Wisconsin Supreme Court holding:

[A] child is no more a part of its mother before it becomes viable than [sic] it is after viability, and . . . it would be more accurate to say that the fetus from conception lived within its mother rather than as a part of her.<sup>500</sup>

The court then reasoned:

It follows that the right to maintain an action for the wrongful death of an unborn child depends on the right of the particular child, if he had survived, to maintain an action for injuries sustained.<sup>501</sup>

A significant development in this area of tort law was the evolution of the right to maintain a wrongful death action where the injured child was stillborn. The first case to allow such an action, *Verkennes v.*

492. *Id.* at 947.

493. *Id.* at 950.

494. Kader, *supra* note 489, at 642; Note, *Tort Recovery for the Unborn*, 15 J. FAM. L. 276, 285 (1976-77); Note, *supra* note 478, at 358.

495. PROSSER AND KEETON, *supra* note 467, at 368-69 ("[W]hen actually faced with the issue for decision, most courts have allowed recovery, even . . . when the child was neither viable nor quick.").

496. 352 Mass. 446, 225 N.E.2d 926 (1967).

497. *Id.* at 448, 225 N.E.2d at 927.

498. *Id.*

499. 291 Ala. 327, 280 So. 2d 758 (1973).

500. *Id.* at 331, 280 So. 2d at 761 (citing *Puhl v. Milwaukee Auto Ins.*, 8 Wis. 2d 343, 99 N.W.2d 163 (1959)).

501. *Id.* at 330, 280 So. 2d at 761.



*Corniea*,<sup>502</sup> held that because the unborn were persons a wrongful death claim would be allowed.<sup>503</sup> Later courts have concurred, adding other justifications to this fundamental legal conclusion such as the biological independence of the fetus,<sup>504</sup> as well as the need to effect the remedial and policy purposes of the legislation.<sup>505</sup> An argument made by the Ohio Supreme Court demonstrates a typical attack on the logic of the born-alive rule:

Suppose . . . viable unborn twins suffered simultaneously the same prenatal injury of which one died before and the other after birth. Shall there be a cause of action for the death of the one and not for that of the other? Surely logic requires recognition of causes of action for the deaths of both, or for neither.<sup>506</sup>

In *Summerfield v. Superior Court*,<sup>507</sup> a 1985 case allowing recovery for a stillborn viable fetus, the Arizona Supreme Court noted a number of reasons for overturning its previous holding which disallowed such actions. The court cited the medical evidence of the separate existence of mother and fetus, as well as the strong legislative policy of protecting the unborn child, as evidenced in the criminal code and property law of the state.<sup>508</sup> The court also noted that the overwhelming majority of jurisdictions allowed a cause of action for the stillborn viable fetus.<sup>509</sup> In 1985, Pennsylvania also joined the ranks of jurisdictions allowing recovery for a stillborn, viable fetus,<sup>510</sup> as did South Dakota,<sup>511</sup> in 1986, and North Carolina, in 1987.<sup>512</sup>

Montana, in 1984,<sup>513</sup> and Texas, in 1987,<sup>514</sup> each disallowed a cause of action for wrongful death of a stillborn child. The Montana

502. 229 Minn. 365, 38 N.W.2d 838 (1949).

503. *Id.* at 366, 371, 38 N.W.2d at 839, 841.

504. Kader, *supra* note 489, at 646 & n.29. *E.g.*, O'Neill v. Morse, 385 Mich. 130, 135, 188 N.W.2d 785, 787 (1971). *Cf.* Williams v. Marion Rapid Transit, 152 Ohio St. 114, 124, 87 N.E.2d 334, 340 (1949)(holding contra to *Roe* that biological independence compels the conclusion that a fetus is a person).

505. *See* Eich v. Town of Gulf Shores, 293 Ala. 95, 99, 300 So. 2d 354, 356 (1974).

506. Stidam v. Ashmore, 109 Ohio App. 431, 434, 167 N.E.2d 106, 108 (1959).

507. 144 Ariz. 467, 698 P.2d 712 (1985)(en banc).

508. *Id.* at 476, 698 P.2d at 721.

509. *Id.* at 476 & n.5, 698 P.2d at 721-22 & n.5. *Cf.* Tebbutt v. Virostek, 65 N.Y.2d 931, 937-38 n.3, 483 N.E.2d 1142, 1147 n.3 (1985)(Jasen, J., dissenting)("The commentators on the subject of death actions for unborn children are virtually unanimous in favor . . .").

510. Amadio v. Levin, 509 Pa. 199, 501 A.2d 1085 (1985).

511. Farley v. Mount Marty Hosp., 387 N.W.2d 42 (S.D. 1986).

512. DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987); *see generally* Comment, *Wrong Without a Remedy—North Carolina and the Wrongful Death of a Stillborn*, 9 CAMPBELL L. REV. 93 (1986).

513. Kuhnke v. Fisher, 210 Mont. 114, 683 P.2d 916 (1984).

514. Witty v. American Gen. Capital Distribs., 727 S.W.2d 503 (Tex. 1987).

court held the legislature had occupied the field by defining a minor child as beginning at birth. Therefore, an unborn fetus could not be a minor child and could not fall within the statute.<sup>515</sup> The Montana Supreme Court noted, "That there is a field here in which the legislature should act [to allow such actions] is beyond question."<sup>516</sup>

The Texas decision declared the issue to be one of legislative intent and held that legislative silence on the matter indicated no intent to include stillborn children within the state wrongful death statute.<sup>517</sup> It also interpreted Texas precedent to require a born-alive rule.<sup>518</sup>

In a powerful, cogent dissent, three members of the Texas Supreme Court rejected the majority's rationale. The dissent declared that the precedent, on which the majority relied for a born-alive rule, was incorrectly interpreted.<sup>519</sup> In prior cases the court had "consistently accepted" its "responsibility to interpret statutes" to prevent inequity, even absent expressed legislative intent.<sup>520</sup> The dissent also noted there was no expressed legislative intent *excluding* fetuses from the statute,<sup>521</sup> and that there were several precedents, both in Texas law and general common law, for including the unborn within the wrongful death statute.<sup>522</sup>

The current number of jurisdictions allowing a cause of action for the wrongful death of a fetus is thirty-six, while those not recognizing such an action are eight.<sup>523</sup> *Roe* has influenced many of these decisions,

515. *Kuhnke*, 210 Mont. at 120, 683 P.2d at 919.

516. *Id.*

517. *Witty*, 727 S.W.2d at 505.

518. *Id.* at 505-06.

519. *Id.* at 507 (Kilgarin, J., dissenting). The debated precedent, *Yandell v. Delgado*, 471 S.W.2d 569 (Tex. 1971), dealt with the sole issue of "whether a fetus had to be viable at the time an injury was sustained in order for the injury to be actionable." *Witty*, 727 S.W.2d at 507 (Kilgarin, J., dissenting). "Furthermore, in *Yandell*, the fetus survived and the suit was brought for personal injuries, not wrongful death. The live birth issue in a wrongful death context could not have been before the *Yandell* court because there was no death involved." *Id.* at 507-08 (citation omitted). The majority cited *Yandell* as authority for a born-alive rule. *Id.* at 505-06.

520. *Witty*, 727 S.W.2d at 507, 511-12 (Kilgarin, J., dissenting). The dissent cited several such cases involving the Texas wrongful death statute. *Id.* at 507.

521. *Id.*

522. *Id.* at 508-11. A prior decision had reserved the very issue in this case. *Id.* at 510.

523. Thirty-six jurisdictions recognize a cause of action for the wrongful death of a stillborn child. *Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So. 2d 354 (1974); *Summerfield v. Superior Ct.*, 144 Ariz. 467, 698 P.2d 712 (1985)(en banc); *Hatala v. Markiewicz*, 26 Conn. Supp. 358, 224 A.2d 406 (1966); *Worgan v. Greggo & Ferrara, Inc.*, 50 Del. 258, 128 A.2d 557 (1956); *Greater Southeast Community Hosp. v. Williams*, 482 A.2d 394 (D.C. 1984); *Porter v. Lassiter*, 91 Ga. App. 712, 87 S.E.2d 100 (1955); *Volk v. Baldazo*, 103 Idaho 570, 651 P.2d 11 (1982); *Chrisafogeorgis v. Brandenburg*, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); *Britt v. Sears*, 150 Ind. App. 487, 277 N.E.2d 20 (1971); *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830 (Iowa 1983); *Hale v. Manon*, 189 Kan. 143, 368 P.2d 1 (1962); *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955); *Danos v. St. Pierre*, 402 So. 2d 633 (La. 1981); *State ex rel. Odham v. Sherman*, 234 Md. 179, 198 A.2d

often with confusing and contradictory results. First, courts have used *Roe* to support the argument that there should be no recovery because the fetus is not a person within the fourteenth amendment. Second, *Roe* has been cited for the proposition that viability is the point where the state interest becomes compelling and, therefore, the statute should apply only at viability. Finally, *Roe* has been cited as supporting the state interest in prenatal life, thereby supporting extension of the wrongful death action to cover the unborn.<sup>524</sup>

Actually, only one sentence and a footnote in *Roe* apply directly. Justice Blackmun wrote: "In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries."<sup>525</sup> The footnote referred to only two commentators: a note in NO-

71 (1964); *Mone v. Greyhound Lines*, 368 Mass. 354, 331 N.E.2d 916 (1975); *O'Neill v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971); *Verkennes v. Cornica*, 229 Minn. 365, 38 N.W.2d 838 (1949); *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954); *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. 1983)(en banc); *White v. Yup*, 85 Nev. 527, 458 P.2d 617 (1969); *Poliquin v. Macdonald*, 101 N.H. 104, 135 A.2d 249 (1957); *Salazar v. St. Vincent Hosp.*, 95 N.M. 150, 619 P.2d 826 (Ct. App. 1980); *DiDonato v. Wortman* 320 N.C. 423, 358 S.E.2d 489 (1987); *Hopkins v. McBane*, 359 N.W.2d 862 (N.D. 1984); *Werling v. Sandy*, 17 Ohio St. 3d 45, 476 N.E.2d 1053 (1985); *Evans v. Olson*, 550 P.2d 924 (Okla. 1976); *Libbee v. Permanente Clinic*, 268 Or. 258, 518 P.2d 636 (1974)(en banc); *Amadio v. Levin*, 509 Pa. 199, 501 A.2d 1085 (1985); *Presley v. Newport Hosp.*, 117 R.I. 177, 365 A.2d 748 (1976); *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964); *Farley v. Mount Marty Hosp.*, 387 N.W.2d 42 (S.D. 1986)(applying S.D. CODIFIED LAWS ANN. § 21-5-1 (1985 Supp.) which expressly includes a fetus); TENN. CODE ANN. § 20-5-106 (1980)(legislatively overruling *Hanby v. McDaniel*, 559 S.W.2d 774 (Tenn. 1977)); *Vaillancourt v. Medical Center Hosp.*, 139 Vt. 138, 425 A.2d 92 (1980); *Moen v. Hanson*, 85 Wash. 2d 597, 537 P.2d 266 (1975)(en banc); *Baldwin v. Butcher*, 155 W. Va. 431, 184 S.E.2d 428 (1971); *Kwaterski v. State Farm Mut. Auto Ins.*, 34 Wis. 2d 14, 148 N.W.2d 107 (1967).

Eight jurisdictions deny recovery for the wrongful death of a stillborn child. *Justus v. Atchison*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977)(en banc); *Hernandez v. Garwood*, 390 So. 2d 357 (Fla. 1980); *Kuhnke v. Fisher*, 210 Mont. 114, 683 P.2d 916 (1984); *Smith v. Columbus Community Hosp.*, 222 Neb. 776, 387 N.W.2d 490 (1986); *Graf v. Taggart*, 43 N.J. 303, 204 A.2d 140 (1964); *Tebbutt v. Virostek*, 65 N.Y.2d 931, 483 N.E.2d 1142 (1985)(citing with approval *Endresz v. Friedberg*, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969)); *Witty v. American Gen. Capital Distribs.*, 727 S.W.2d 503 (Tex. 1987); *Lawrence v. Craven Tire Co.*, 210 Va. 138, 169 S.E.2d 440 (1969).

The Supreme Court of Utah stated, in dictum, that "the death of a viable fetus should be considered as much a ground for damages as would a miscarriage." *Nelson v. Peterson*, 542 P.2d 1075, 1077 (Utah 1975). Though it cited a 1942 case stating there was no wrongful death cause of action for a fetus, since the issue was moot, it declined to reconsider the issue, saying, "Whether or not [death of a viable fetus] gives a different basis for recovery [from causing a miscarriage] can be determined when liability has been found in a proper case." *Id.* at 1077-78. A federal district court in the Virgin Islands has reportedly upheld a cause of action for wrongful death of a viable, unborn child. Recent Cases, LEX VITAE, Spring, 1987, at 2 (citing *Maynard v. Maynard*, (D.V.I. May, 1987)). The authors have been unable to obtain a copy of the opinion or locate it on any database.

524. Kader, *supra* note 489, at 652.

525. *Roe*, 410 U.S. at 162.

NOTRE DAME LAWYER and Prosser's treatise on torts.<sup>526</sup> The former did not oppose recovery for wrongful death but opposed abortion as inconsistent with the rights of the unborn, including the wrongful death action which it supported.<sup>527</sup> In fact, the NOTRE DAME LAWYER article declared:

The law of torts provides even more striking examples. Will the pregnant woman who is hit by a negligent driver while she is on her way to the hospital to have an abortion still have a cause of action for the wrongful death of her unborn child? If so, how is it possible for the law to say that a child can be wrongfully killed only hours before he can be rightfully killed? Absurd as it may seem, this is the present state of the law in some jurisdictions, and it does no good to say that the inconsistencies can be abated simply by refusing all recovery for prenatal injury or death because negligent death or injury to a child whose mother does not want an abortion clearly is a recognizable wrong for which there must be just compensation.

Is the unborn child any less a person when, instead of being killed by an automobile, he is killed by a doctor in the performance of an abortion? Seldom has the law been confronted by such an obvious contradiction.<sup>528</sup>

The other reference in the *Roe* footnote, to Prosser, was apparently in error as well.<sup>529</sup> Prosser simply stated the development of the law, and in no way opposed recovery.<sup>530</sup> Footnotes to Prosser's text did indicate some disagreement, but here even Prosser was in error. He implied that some articles opposed recovery for stillborns when they did not,<sup>531</sup> and he omitted several articles and the key material cited in *Verhennes v. Corniea* which favored recovery.<sup>532</sup> The Supreme Court also overlooked persuasive arguments and the clear trend of cases between 1971 (the date of Prosser's work) and 1973 (the date of *Roe*).<sup>533</sup>

Thus, *Roe's* discussion of wrongful death actions for unborn children was "largely inaccurate, and should not be relied upon as the correct view of the law at the time of *Roe v. Wade*."<sup>534</sup> Despite this fact and *Roe's* silence as to whether such actions for wrongful death were consistent with the abortion ruling, some cases have mentioned *Roe* in

526. *Id.* at 162 n.65.

527. Note, *supra* note 478.

528. *Id.* at 369.

529. Kader, *supra* note 489, at 653.

530. W. Prosser, *supra* note 471, at 338.

531. Kader, *supra* note 489, at 654-55.

532. 229 Minn. at 370, 38 N.W.2d at 841. Kader, *supra* note 489, at 654-55.

533. Kader, *supra* note 489, at 654-56. Four of the five cases decided in this period favored recognizing the cause of action. *Id.*

534. *Id.* at 653.

examining or re-examining the question of recovery for the wrongful death of a stillborn fetus. Interestingly, some have done so with no mention of *Roe*.

For those states denying recovery for the unborn in wrongful death actions, *Roe* has been seen as supportive authority. In *Justus v. Atchison*,<sup>535</sup> the California Supreme Court said it was "not so naive" as to believe the legislature could have entertained any idea of the fetus as a person when the wrongful death acts were passed in 1862 and 1872.<sup>536</sup> This was a clear reference to *Roe's* finding of no personhood for the fetus in the fourteenth amendment, which arose in the same time period.<sup>537</sup> Of such circular logic, Kader made the following observation:

There is a certain circularity in all of this, perhaps inevitable. *Roe v. Wade* relie[d] upon nineteenth century legislation for evidence that the fetus was not considered nor intended to be a "person" in the law, and modern prenatal death decisions in turn cite the conclusion of *Roe v. Wade* for the same proposition.<sup>538</sup>

535. 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977)(en banc).

536. *Id.* at 571, 565 P.2d at 132, 139 Cal. Rptr. at 101.

537. *Roe*, 410 U.S. at 158.

538. Kader, *supra* note 489, at 658. Ironically, it is precisely during this period that science was recognizing that fetuses were fully human from conception. As Victor Rosenblum has observed:

Only in the second quarter of the nineteenth century did biological research advance to the extent of understanding the actual mechanism of human reproduction and of what truly comprised the onset of gestational development. The nineteenth century saw a gradual but profoundly influential revolution in the scientific understanding of the beginning of individual mammalian life. Although sperm had been discovered in 1677, the mammalian egg was not identified until 1827. The cell was first recognized as the structural unit of organisms in 1839, and the egg and sperm were recognized as cells in the next two decades. These developments were brought to the attention of the American state legislatures and public by those professionals most familiar with their unfolding import—physicians. It was the new research findings which persuaded doctors that the old "quickening" distinction embodied in the common and some statutory law was unscientific and indefensible.

*The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 474 (statement of Victor Rosenblum, Professor of Law and Political Science, Northwestern Univ.); *see also*, Dellapenna, *supra* note 430, at 402-04. About 1857, the American Medical Association led a "physicians' crusade" to enact legislation to protect the unborn from conception. J. MOHR, *supra* note 425, at 147-70. The resulting legislation was designed primarily to protect the unborn and not, as Justice Blackmun claimed, solely to protect maternal health. *Id.*, *See Roe*, 410 U.S. at 151 & n.48. Contrary to Justice Blackmun's assertion, eleven state decisions explicitly affirmed protection of the unborn child as a purpose of their abortion statute (nineteenth century), and nine others implied the same. Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood," and the Supreme Court's Birth Requirement*, 1979 S. ILL. U.L.J. 1, 16-17. Furthermore, twenty-six of thirty-six had laws against abortion by the end of the Civil War, as did six of the ten territories by 1865. Dellapenna, *supra* note 430, at 429. This flatly contradicts Justice Blackmun's statement that such legislation did not become widespread until after the Civil War. *Roe*, 410 U.S. at 139.

The California Supreme Court also cited *Roe* as authority for the nonpersonhood of the unborn.<sup>539</sup> The court noted that any change must come from the legislature, which had occupied the field.<sup>540</sup> California appellate courts had rejected the cause of action before *Roe* was decided, so *Roe* was used to support pre-established California law.<sup>541</sup> The *Justus* opinion figured prominently in the recent rejection of a wrongful death action for the unborn in Texas.<sup>542</sup>

*Roe* also influenced the Florida Supreme Court in the 1980 case of *Hernandez v. Garwood*.<sup>543</sup> The court cited *Roe* as authority that a fetus was not a person and that equal protection of the fetus was not violated if it were excluded from the wrongful death act unless born alive.<sup>544</sup> There was no Florida rejection of the cause of action for stillborns before *Roe*. In 1977, the Florida Supreme Court first refused the cause of action in *Stern v. Miller*.<sup>545</sup> It noted that a change must be made by the legislature, since legislative intent was the issue.<sup>546</sup> However, the court noted that the weight of authority favored the cause of action, the reasons were "compelling," and the commentators "sp[oke] in one accord . . . and urge[d] recovery."<sup>547</sup> No reference to *Roe* was made in the *Stern* opinion, nor in a brief opinion affirming it in 1978.<sup>548</sup> However, the attitude shifted, as noted, in *Hernandez* with an explicit reliance on *Roe*.

Tennessee also denied a cause of action in wrongful death actions for the unborn. It had denied the action before *Roe* in 1958, stating that the fetus was not a person.<sup>549</sup> In 1977 in *Hamby v. McDaniel*, the court employed an extended quotation from *Roe* to support its position

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This material indicates that legislatures at the time of the adoption of the fourteenth amendment, the nineteenth century abortion laws, and the nineteenth century wrongful death statutes were not so naive as the California Supreme Court implied in its statement that it was "not so naive" as to believe the legislature could have entertained any idea of the fetus as a person when the wrongful death acts were passed in 1862 and 1872. Such legislatures could have included the unborn (from conception) in their understanding of the term "person." In fact this seems likely, since legislators were the specific targets of the national 'physicians' crusade.' Interestingly, Justice Blackmun was aware of this crusade, for he cited material from it, *Roe*, 410 U.S. at 141, but failed to apply its implications.

539. *Justus*, 19 Cal. 3d at 577, 565 P.2d at 130-31, 139 Cal. Rptr. at 105-06 (including the erroneous assertion that commentators generally opposed the cause of action for stillborn children).

540. *Id.* at 575, 565 P.2d at 129, 139 Cal. Rptr. at 104.

541. *Id.* at 581, 565 P.2d at 133, 139 Cal. Rptr. at 108.

542. *Witty v. American Gen. Capital Distribs.*, 727 S.W.2d 503, 505 (Tex. 1987).

543. 390 So. 2d 357 (Fla. 1980).

544. *Id.* at 359.

545. 348 So. 2d 303 (Fla. 1977).

546. *Id.* at 308.

547. *Id.* at 306.

548. *Duncan v. Flynn*, 358 So. 2d 178 (Fla. 1978).

549. *Hogan v. McDaniel*, 204 Tenn. 235, 319 S.W.2d 221 (1958).

against the rising tide to the contrary.<sup>550</sup> The legislature has since amended the Tennessee code to allow a wrongful death action for a viable fetus.<sup>551</sup>

The Utah Supreme Court reserved the issue of a wrongful death action for a stillborn in *Nelson v. Peterson*.<sup>552</sup> Certain dicta indicate a sympathy for such an action.<sup>553</sup> However, in *Nelson*, the court said that it was not prejudicial for a jury to hear of the illegitimacy of the deceased unborn child because it would help in calculating the mother's damages for mental anguish, since "many women undergo abortions in such a situation . . ."<sup>554</sup> Thus, *Roe's* influence was present although it should be noted that the first case holding there was no cause of action for an unborn child in Utah was decided before *Roe*.<sup>555</sup>

Nebraska,<sup>556</sup> New Jersey,<sup>557</sup> New York,<sup>558</sup> and Virginia<sup>559</sup> cases deciding wrongful death actions for unborn children made no mention of *Roe*. However, these cases were all decided before *Roe* or were based on prior cases that were. Montana only mentioned *Roe* in its discussion of California's rule, which it distinguished, and went on to say it was "beyond question" that the legislature should act to allow the cause of action.<sup>560</sup> Thus, in the cases denying recovery in wrongful death actions for the unborn, it is clear that *Roe* has had a negative effect on the growth of the law in certain states. Nevertheless, the trend continues to the present to reject the Supreme Court's holding in *Roe* that a fetus is not a person and allow a cause of action for the unborn. Ideally, "person" should mean the same in constitutional and statutory contexts. However, *Roe* is the exception to the rule, which was clear even in 1973, and any change ought to be in its holding, not in the tort law. *Roe* is increasingly out of step with this area of the law.

The Arizona Supreme Court stated the problem well in its 1985 rejection of the born-alive rule:

The theoretical underpinnings of the *Dietrich* rule have been eroded,

550. 559 S.W.2d 774, 777-78 (Tenn. 1977).

551. TENN. CODE ANN. § 20-5-106(b)(1980).

552. 542 P.2d 1075 (Utah 1975).

553. See *supra* note 523.

554. *Nelson*, 542 P.2d at 1077.

555. *Webb v. Snow*, 102 Utah 435, 132 P.2d 114 (1942).

556. *Smith v. Columbus Community Hosp.*, 222 Neb. 776, 387 N.W.2d 490 (1986); *Egbert v. Wenzl*, 199 Neb. 573, 573-74, 260 N.W.2d 480, 482 (1977) ("We express no opinion with respect to the existence of the fetus as a person in either the philosophical or scientific sense.")

557. *Graf v. Taggart*, 43 N.J. 303, 204 A.2d 140 (1964).

558. *Tebbutt v. Virostek*, 65 N.Y.2d 931, 483 N.E.2d 1142 (1985)(citing its rule in *Endresz v. Friedberg*, 24 N.Y.2d 478, 301 N.Y.S.2d 65, 248 N.E.2d 901 (1969)).

559. *Lawrence v. Craven Tire Co.*, 210 Va. 138, 169 S.E.2d 440 (1969).

560. *Kuhnke v. Fisher*, 210 Mont. 114, 120, 683 P.2d 916, 919 (1984).

and both it and *Gorman v. Budlong*, 23 R.I. 169, 49 A. 704 (1901), the other early case which gave support to the rule of non-recovery, have been overruled by the very courts which decided them . . . . The majority finds no logic in the premise that if the viable infant dies immediately before birth it is not a 'person' but if it dies immediately after birth it is a 'person.'

We take note, further, that the magic moment of 'birth' is no longer determined by nature. The advances of science have given the doctor, armed with drugs and scalpel, the power to determine just when 'birth' shall occur.<sup>561</sup>

*Roe* has also been cited as authority for allowing recovery in wrongful death actions for stillborn children because of the state's interest in potential life.<sup>562</sup> In *Eich v. Town of Gulf Shores*,<sup>563</sup> the Supreme Court of Alabama employed such an approach, as did the Oregon Supreme Court in *Libbee v. Permanente Clinic*.<sup>564</sup> The Oregon court noted that *Roe* held a fetus not to be a person under the fourteenth amendment, but decided the term meant something different under the Oregon Constitution.<sup>565</sup> Recently, the Ohio Supreme Court also cited *Roe* as supporting the protection of potential life and, therefore, recognizing a wrongful death action for the unborn was "entirely consistent with *Roe*."<sup>566</sup> The Supreme Court of Arizona also recognized a right of recovery for a stillborn child in 1985.<sup>567</sup> It argued that such an action "may further the policy of *Roe*" by protecting the woman's right to continue a pregnancy.<sup>568</sup> The Arizona court noted that, aside from protection of the right to continue one's pregnancy, *Roe* really was irrelevant in the wrongful death context, because voluntary termination of a pregnancy was quite distinguishable from termination "against the mother's will."<sup>569</sup>

*Roe* has also been influential in arguments for limiting recovery in wrongful death actions to the unborn who were viable. Georgia was the only pre-*Roe* state to allow recovery for a pre-viable, stillborn fetus, allowing recovery for an unborn, "quick" child.<sup>570</sup> In 1976, Rhode Island

561. *Summerfield v. Superior Ct.*, 144 Ariz. 467, 477, 698 P.2d 712, 722 (1985)(en banc). Also note the discussion of permissible judicial action in a developing area of the law created by statute. *Id.* at 472-73, 479, 689 P.2d at 717-18, 724.

562. *Roe*, 410 U.S. at 162.

563. 293 Ala. 95, 99, 300 So. 2d 354, 357 (1974).

564. 268 Or. 258, 267, 518 P.2d 636, 640 (1974).

565. *Id.*

566. *Werling v. Sandy*, 17 Ohio St. 3d 45, 49, 476 N.E.2d 1053, 1056 (1985).

567. *Summerfield v. Superior Ct.*, 144 Ariz. 467, 698 P.2d 712 (1985)(en banc).

568. *Id.* at 478, 698 P.2d at 723 (citing Kader, *supra* note 489).

569. *Id.* (emphasis in original).

570. *Porter v. Lassiter*, 91 Ga. App. 712, 87 S.E.2d 100 (1955).



abandoned any viability test in allowing recovery for stillborn infants, stating:

[V]iability is a concept bearing no relation to the attempts of the law to provide remedies for civil wrongs. If we profess allegiance to reason, it would be seditious to adopt so arbitrary and uncertain a concept as viability as a dividing line between those persons who shall enjoy the protection of our remedial laws and those who shall become, for most intents and purposes, nonentities. It seems that if live birth is to be characterized, as it so frequently has been, as an arbitrary line of demarcation, then viability, when enlisted to serve that same purpose is a veritable *non sequitur*.<sup>571</sup>

While the majority in the Rhode Island opinion never explicitly mentioned *Roe*, the harsh criticism of the viability test may betray a distaste for the Supreme Court's viability criterion. A concurring opinion does cite *Roe* as support for a viability dividing line.<sup>572</sup>

There is no logical reason why viability should be a criterion for recovery in a wrongful death action for a stillborn child. The viability requirement is no longer applied where the child is born alive. David Kader has stated: "[I]t is probably both desirable and inevitable that the viability requirement will likewise be abandoned to allow recovery by the beneficiary of a stillborn, notwithstanding any implications of *Roe v. Wade* to the contrary."<sup>573</sup> However, the implications of *Roe* show signs of stalling the progress predicted by Kader. In *Toth v. Goree*<sup>574</sup> a Michigan appeals court denied recovery for a three month old, nonviable fetus. The court said that any precedent "must be read in light of more recent developments in the case law. *Roe v. Wade* has had a considerable impact on the legal status of the fetus."<sup>575</sup> The court stated that there would be an inherent conflict if a person could be held liable under a wrongful death statute for the death of a child whom the mother could abort.<sup>576</sup> Of course, since the abortion right has developed to allow virtual abortion on demand throughout the pregnancy,<sup>577</sup> the Michigan court's reliance on the viability distinction may be misplaced. In 1975, it was still generally believed that states could effectively prohibit abortion after viability. Now it is apparent that a wrongful death

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571. *Presley v. Newport Hosp.*, 117 R.I. 177, 188, 365 A.2d 748, 753-54 (1976).

572. *Id.* at 192, 365 A.2d at 756 (Bevilacqua, C.J., concurring in part and dissenting in part).

573. Kader, *supra* note 489, at 660.

574. 65 Mich. App. 296, 237 N.W.2d 297 (1975).

575. *Id.* at 303, 237 N.W.2d at 301 (citation omitted).

576. *Id.*

577. *Thornburgh v. American College of Obstetrics & Gynecologists*, 476 U.S. 747 (1986)(Burger, C.J., dissenting).

action is inconsistent with the abortion right before and after viability.

The New Hampshire Supreme Court has also noted the inherent contradiction with *Roe*:

We remark in passing that it would be incongruous for a mother to have a federal constitutional right to deliberately destroy a nonviable fetus, *Roe v. Wade*, and at the same time for a third person to be subject to liability to the fetus for his unintended but merely negligent acts.<sup>578</sup>

In the most recent cases, *Roe's* viability emphasis is evident. The Pennsylvania Supreme Court, in *Amadio v. Levin*, said, "[t]he reasoning of the Court in *Roe* has been subject to widespread criticism and, at least as to the protectability of 'viable' unborn children, suffers from internal inconsistency."<sup>579</sup> Thus, the Pennsylvania court makes no mention of viability as a part of its rule. This probably indicates a rejection of a viability test.<sup>580</sup> The Ohio Supreme Court, in *Werling v. Sandy*,<sup>581</sup> specifically cited *Roe* as support for a viability standard, which it adopted.<sup>582</sup> The Arizona Supreme Court, in *Summerfield v. Superior Court*, claimed *Roe* was irrelevant but followed the majority in establishing a viability criterion.<sup>583</sup> The Supreme Court of North Dakota made no mention of *Roe* but followed the majority viability rule.<sup>584</sup>

Thus, it seems that the present trend is to require viability in a cause of action for wrongful death. *Roe* has certainly reinforced this trend. Interestingly, the viability line is seen as arbitrary by some courts who adopt it anyway because of the "weight of authority."<sup>585</sup> It makes little sense to abandon one arbitrary line for another, although moving to a viability criterion is a step in the right direction. *Roe's* illogical line drawing at viability will, unfortunately, have enduring effects in this area.

### 3. *Fetal rights in equity*

Equity is increasingly invoked to protect the rights of the unborn. It has taken on new dimensions with the recent development of fetal

578. *Wallace v. Wallace*, 120 N.H. 675, 679, 421 A.2d 134, 137 (1980) (citation omitted).

579. 509 Pa. 199, 225 n.5, 501 A.2d 1085, 1098 n.5 (1985) (Zappala, J., concurring).

580. Most likely this is the case. *Id.* at 207, 501 A.2d at 1089 ("[T]he recovery afforded the estate of a stillborn is no different than the recovery afforded the estate of a child [born alive].").

581. 17 Ohio St. 3d 45, 476 N.E.2d 1053 (1985).

582. *Id.* at 49, 476 N.E.2d at 1056.

583. *Summerfield v. Superior Court*, 144 Ariz. 467, 478, 698 P.2d 712, 723 (1985).

584. *Hopkins v. McBane*, 359 N.W.2d 862 (N.D. 1984).

585. *See, e.g., Summerfield*, 144 Ariz. at 477, 698 P.2d at 722 ("We acknowledge . . . that this, too, is an artificial line . . .").

surgery<sup>586</sup> and increased concern about preventing injury to the unborn child through the negligence of the mother.<sup>587</sup> While a fetus may not have a right to be born, under *Roe*, the right to be born with a sound mind and body has increasingly been recognized.<sup>588</sup>

A number of decisions have recently protected the unborn's right to life or health, even against maternal desire or convenience. These decisions are in marked contrast to the lack of protection for the fetus in abortion cases. Nowhere is the anomalous nature of the abortion right more visible.

Decisions which protect the unborn's right to life or health involve the right and obligation incidental to being a parent: the right and obligation to be the natural guardian of one's child.<sup>589</sup> This "private realm of family life" is protected from unwarranted state interference.<sup>590</sup> Family autonomy is not absolute, however,<sup>591</sup> and may be limited where "it appears that parental decisions will jeopardize the health or safety" of their children.<sup>592</sup> As a result, courts have acted to permit essential and necessary treatment of a child,<sup>593</sup> such as a blood transfusion<sup>594</sup> or vaccination,<sup>595</sup> despite parental refusal to consent to the treatment. Courts have ordered medical treatment over parental objections based on religious<sup>596</sup> and non-religious grounds.<sup>597</sup>

In some instances, pregnant women have refused medical treatment for themselves, which poses a serious risk to the life and health of their unborn children. While generally a person has a right to refuse medical care,<sup>598</sup> the state's interest in the welfare of children will justify compelling medical care when necessary to preserve the life of an un-

586. Lenow, *The Fetus as a Patient: Emerging Rights as a Person?*, 9 AM. J.L. & MED. 1 (1983).

587. Note, *A Maternal Duty to Protect Fetal Health?*, 58 IND. L.J. 531 (1983).

588. Mathieu, *Respecting Liberty and Preventing Harm: Limits of State Intervention on Prenatal Choice*, 8 HARV. J.L. & PUB. POL'Y 19 (1985).

589. *Richards v. Forrest*, 278 Mass. 547, 553, 180 N.E. 508, 511 (1932).

590. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

591. *Custody of a Minor*, 375 Mass. 733, 379 N.E.2d 1053 (1978).

592. *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

593. *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1962).

594. *Brooklyn Hosp. v. Torres*, 45 Misc. 2d 914, 258 N.Y.S.2d 621 (Sup. Ct. 1965).

595. *Mannis v. State*, 240 Ark. 42, 398 S.W.2d 206, cert. denied, 384 U.S. 972 (1966).

596. *Jehovah's Witnesses of Washington v. King County Hosp.*, 278 F. Supp. 488 (D.D.C. 1967), *aff'd*, 390 U.S. 598 (1968). See generally Annotation, *Power of Court or Other Public Agency to Order Medical Treatment over Parental Religious Objections for Child Whose Life is not Immediately Endangered*, 52 A.L.R.3d 1118.

597. *Custody of a Minor*, 375 Mass. 733, 379 N.E.2d 1053 (1978). See generally Annotation, *Power of Court or Other Public Agency to Order Medical Treatment for Child Over Parental Objections Not Based on Religious Grounds*, 97 A.L.R.3d 421.

598. See generally Annotation, *Patient's Right to Refuse Treatment Allegedly Necessary to Sustain Life*, 93 A.L.R. 3d 67.

born child.<sup>599</sup>

In two pre-*Roe* cases, *Hoener v. Bertinato*<sup>600</sup> and *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*,<sup>601</sup> a New Jersey juvenile court and the state's supreme court justified, under their *parens patriae* power, authorizing a hospital to give lifesaving blood transfusions to save the life of a child, even though the parents objected on religious grounds. In *Hoener*, the court authorized a blood transfusion to the child immediately after birth to correct an Rh factor problem that caused the death of the woman's previous child. It remained for the *Anderson* case to extend this principle to the child yet unborn.

In *Anderson*, the New Jersey Supreme Court decided whether a pregnant Jehovah's Witness could be compelled, against her religious beliefs, to take a blood transfusion. The court unanimously held that the thirty-two week old child was entitled to the law's protection and ordered the transfusions, stating:

In *State v. Perricone* we held that the State's concern for the welfare of an infant justified blood transfusions notwithstanding the objection of its parents who were also Jehovah's Witnesses, and in *Smith v. Brennan* we held that a child could sue for injuries negligently inflicted upon it prior to birth. We are satisfied that the unborn child is entitled to the law's protection and that an appropriate order should be made to insure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge at the time.<sup>602</sup>

This was the first case in which a court ordered procedures which invaded a mother's bodily integrity to benefit the unborn fetus.<sup>603</sup> The court determined that the child's right to live outweighed the woman's constitutionally protected right to practice her religion, as well as her right to refuse medical treatment and her right to bodily integrity. The court noted that the fact that the child and woman "are so intertwined and inseparable"<sup>604</sup> made the decision easier to make than if it were just an adult involved, underscoring the paramount status of the interest in protecting the child in the decision. Here the child was viable. *Roe* would have at least recognized the state's interest in the child's potentiality of life.

599. *In re Melideo*, 88 Misc. 2d 974, 390 N.Y.S.2d 523 (1976); *In re Yetter*, 62 Pa. D. & C.2d 619 (1973); *Hoener v. Bertinato*, 67 N.J. Super. 517, 171 A.2d 140 (Juv. Ct. 1961).

600. 67 N.J. Super. 517, 171 A.2d 140 (Juv. Ct. 1961).

601. 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964).

602. *Id.* at 423, 201 A.2d at 539 (citations omitted).

603. Lenow, *supra* note 586, at 21.

604. *Anderson*, 42 N.J. at 423, 201 A.2d at 538.

In *Jefferson v. Griffin Spalding County Hospital Authority*,<sup>605</sup> the Georgia Supreme Court approved more intrusive measures. A pregnant woman suffered from complete placenta previa (a condition where the placenta covers the opening of the birth canal). A ninety-nine percent chance of fetal fatality was predicted if a natural birth was attempted. The physicians also predicted a fifty percent chance that the mother would die with natural birth. Both had excellent chances of surviving a Caesarian section. The court upheld an order requiring the woman to submit to a sonogram, blood transfusions, and a Caesarian section should they be found necessary to sustain the life of the thirty-nine week old child, even though Mr. and Mrs. Jefferson opposed the operation on religious grounds. The order provided for custody of the unborn child to be granted to the state for the purpose of requiring surgery. The court stated that *Roe* indicated the state had a compelling interest in the life of the fetus after viability. Justice Hill concurring in the per curiam opinion, said:

[W]e weighed the right of the mother to practice her religion and to refuse surgery on herself, against her unborn child's right to live. We found in favor of her child's right to live.<sup>606</sup>

As it turned out, a subsequent ultrasound revealed that the placenta had shifted—a very rare occurrence—and the Caesarian was unnecessary.<sup>607</sup>

A recent survey indicated that courts in eleven states have ordered Caesarian deliveries to protect fetuses.<sup>608</sup> Only one of these cases was reported; most even elude the newspapers.<sup>609</sup> After surveying the cases, one author wrote, "In the cases of which I am aware, every judge but one who has ruled on an application for nonconsensual Cesarean delivery has granted the request."<sup>610</sup>

In November, 1987, the Court of Appeals for the District of Columbia continued this trend. In the case of *In re A.C.*, the court held that the interests of an unborn child and the state outweighed the right of a pregnant woman against bodily intrusion.<sup>611</sup> The mother was terminally ill, in extremis, lucid only at intervals, and with only hours to live; the fetus was twenty-six weeks old and experiencing oxygen depri-

605. 247 Ga. 86, 274 S.E.2d 457 (1981).

606. *Id.* at 90, 274 S.E.2d at 460.

607. Lenow, *supra* note 586, at 21 n.123.

608. Kolder, Gallagher & Parsons, *Court Ordered Obstetrical Interventions*, 316 *NEW ENG. J. MED.* 1192, 1194 (1987).

609. Rhoden, *Cesareans and Samaritans*, 15 *LAW, MED. & HEALTH CARE* 118 (1987).

610. *Id.* at 118 (footnote omitted).

611. 533 A.2d 611 (D.C. 1987), *vacated and reh'g en banc granted*, 539 A.2d 203 (D.C. 1988).

vation.<sup>612</sup> The court-ordered Caesarean delivery was performed—mother and child died soon after.<sup>613</sup>

In the 1983 case of *Taft v. Taft*,<sup>614</sup> the issue of court-ordered surgery to protect the fetus was raised before the Massachusetts Supreme Judicial Court. The woman was four months pregnant. Her husband sought a court order to force her to submit to a “purse string” operation, so her cervix would hold the pregnancy.<sup>615</sup> The woman wanted the child, but she refused to undergo the surgery for religious reasons. The lower court appointed a guardian ad litem for the unborn child and granted the husband authority to consent to the operation. On appeal, the Massachusetts Supreme Judicial Court reversed. It stated that “[no] case has been cited to us, nor have we found one, in which a court ordered a pregnant woman to submit to a surgical procedure in order to assist in carrying a child not then viable to term.”<sup>616</sup> The court reserved judgment on whether the state’s interest in the unborn was compelling enough to allow such overriding of the mother’s privacy and right to “free exercise” of religious beliefs.<sup>617</sup>

The *Taft* court, however, did not close the door to ordering surgical procedures to protect the unborn. The court specifically noted the sparse record regarding necessity “as a life saving procedure” or likelihood of success.<sup>618</sup> The court added that the state’s interest “might be sufficiently compelling” if the state’s interest were “established.”<sup>619</sup>

Significantly, the *Taft* decision involved a previable fetus. Interestingly, the court made no mention of *Roe*. However, the inference was clear that the viability point, which was significant in the original abortion cases, played no role in the consideration of imposed treatment on behalf of the unborn. Obviously, the viability criteria is arbitrary, meaningless, and contrary to reason. It was rightly not considered.

The prevention of disabilities is a strong state interest, with which many are sympathetic. Many of these disabilities are preventable by proper prenatal care.<sup>620</sup> This is a growing area in the establishment of fetal rights. In a 1980 case, *In Re Baby X*,<sup>621</sup> a newborn had demonstrated symptoms of narcotics withdrawal within a day of birth. The

612. *Id.*

613. *Id.*

614. 388 Mass. 331, 446 N.E.2d 395 (1983).

615. *Id.* at 332, 446 N.E.2d at 396.

616. *Id.* at 334 n.4, 446 N.E.2d at 397 n.4.

617. *Id.* at 334, 446 N.E.2d at 397.

618. *Id.* at 335, 446 N.E.2d at 397.

619. *Id.* at 334-35, 446 N.E.2d at 397.

620. Parness, *The Duty to Prevent Handicaps: Laws Promoting the Prevention of Handicaps to Newborns*, 5 W. NEW ENG. L. REV. 431 (1983).

621. 97 Mich. App. 111, 293 N.W.2d 736 (1980).

court held that evidence of the mother's prenatal drug use constituted abuse and neglect. The court took temporary custody of the child. However, since the same court had previously held a fetus not to be a person under the child custody statute, the state's equitable powers to protect the unborn are limited. In an unreported case,<sup>622</sup> a court enjoined a pregnant woman from using drugs and ordered a weekly urinalysis to protect the fetus.

It is unclear how far the states will go in ordering fetal surgery or medical procedures to protect the life of the unborn child. The court in *Jefferson* used a viability standard, as per *Roe*, but what happens when medical advances push back the stage of viability? And what effect will the trends and forces which have engineered the expansion of prenatal tort law have upon this area of the law? Will previable unborn children become the subject of court ordered fetal surgery against the wishes of a mother?

The growth of fetal treatment capabilities and litigation will force further consideration of the rights of the unborn. Surely, some criteria must be established. The early returns indicate that fetal rights are being recognized in the balance with the mother's rights. This is appropriate. Hopefully, the influence of *Roe* will not halt this growing trend. While women's rights must be placed in the balance, it is certainly equitable that unborn fetuses be allowed to develop without preventable handicaps and injuries.<sup>623</sup>

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622. Boston Globe, April 27, 1983, at 8, col. 1.

623. See *id.*; Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 DUQ. L. REV. 1 (1984); Note, *Informed Consent: An Unborn's Right*, 48 ALB. L. REV. 1102 (1984). Contra Johnson, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986). As indicated in the text above, a pregnant woman's duty to her unborn child includes the duty to provide life-saving medical care. The failure to provide medical care for a child can also carry criminal penalties. See generally Annotation, *Failure to Provide Medical Attention for Child as Criminal Neglect*, 12 A.L.R.2D 1047. Thus, a father could be guilty of a misdemeanor for failure to furnish medical attention to an unborn child, *People v. Sianes*, 134 Cal. App. 355, 25 P.2d 487 (1933), as long as it is shown that the child, as distinguished from the mother, is adversely and substantially affected by the lack of medical attention. *People v. Yates*, 114 Cal. App. Supp. 782, 298 P. 961 (1931).

In a number of different contexts, courts have ruled that the unborn is a member of the family and a dependent. A California court has held that an unborn child had a right to support from his or her father and ordered the father to fulfill his duty. *Kyne v. Kyne*, 38 Cal. App. 2d 122, 100 P.2d 806 (1940). Accord *People v. Yates*, 114 Cal. App. Supp. 782, 298 P. 961 (1931); *Metzger v. People*, 98 Colo. 133, 53 P.2d 1189 (1936). The primary duty of a parent to a child is to provide the child with support and protection. See generally, Annotation, *Propriety of Decree in Proceeding Between Divorced Parents to Determine Mother's Duty to Pay Support for Children In Custody of Father*, 98 A.L.R.3D 1146. In this regard, the duty to support may not be contracted away, even when the child is unborn. *Wilson v. Wilson*, 251 Ky. 522, 65 S.W.2d 694 (1933). The obligation of a parent to support his or her children may be enforced by an action at any time during the child's minority, see, e.g., *Strecker v. Wilkinson*, 220 Kan. 292, 552 P.2d 979 (1976), and may be brought on behalf of a child not yet born. See, e.g., *McCoy v. People ex rel.*

The significant point, however, is the strong protection given the

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[Minor] Child, 165 Colo. 407, 439 P.2d 347 (1968) (en banc). In addition, an order of support may be modified for the purpose of making allowance for the support of a child born since the filing of the original proceeding, even when the decree provided for the support of the child while unborn. See, e.g., *Schneider v. Schneider*, 188 Neb. 80, 195 N.W.2d 227 (1972).

Most states have made the nonsupport of a child a criminal offense. See generally 67A C.J.S. *Parent & Child* § 165. These statutes include an unborn child, who has been held to be a minor child within the meaning of a statute declaring willful nonsupport of a minor child to be an offense. *People v. Yates*, 114 Cal. App. Supp. 782, 298 P. 961 (1931). In this regard, the support is to be furnished through the mother. Where nothing at all in the way of food, clothing or shelter is furnished by the father to the expectant mother, a breach of duty to provide for the unborn child is shown. *Id.*

The Louisiana Supreme Court allowed an unborn child to bring an action to prove paternity, which would entitle the child to support and heirship. *Malek v. Yekani-Fard*, 422 So. 2d 1151 (La. 1982). Such decisions rest on the long recognized rights of the unborn in property and family law. Other related rights and obligations arise from the parent-child relationship as applied to unborn children. One substantial right is the presumption of legitimacy of birth. This presumption is "one of the strongest and most persuasive known to the law." *In re Findlay*, 253 N.Y. 1, 170 N.E. 471 (1930), and extends to a child conceived in wedlock but born after the termination of the marriage. See generally Annotation, *Presumption of Legitimacy of Child Born after Annulment, Divorce, or Separation*, 46 A.L.R.3d 158. As a result, a child conceived by artificial insemination of the wife during a valid marriage has been held to be a legitimate child, entitled to all the rights and privileges of a naturally conceived child of the same marriage. *In re Adoption of Anonymous*, 74 Misc. 2d 99, 345 N.Y.S.2d 430 (1973). Further, a surrogate mother, impregnated by artificial insemination with semen of a man not her husband, has been held unable to terminate her parental rights in the child and have custody of the child transferred to the biological father. *In re Baby Girl*, FAM. L. REP. 2348 (1983).

In *Alabama Farm Bureau Mutual Casualty Insurance v. Pigott*, 393 So. 2d 1379 (Ala. 1981), the Alabama Supreme Court held that the unborn grandson of the insured was a member of the family of the insured for the purpose of being covered by the uninsured motorist clause in the named insured's policy. See also *Peterson v. Nationwide Mut. Ins.*, 175 Ohio St. 551, 197 N.E.2d 194 (1964). In *Adams v. Weinberger*, 521 F.2d 656 (2d Cir. 1975), the Second Circuit Court of Appeals found that a posthumously born illegitimate child was entitled to his late father's social security survivor benefits. The test to qualify for the benefits was whether the support by the father for the unborn child was commensurate with the needs of the unborn child at the time of the father's death. See also *Wagner v. Finch*, 413 F.2d 267 (5th Cir. 1969); *Moreno v. Richardson*, 484 F.2d 899 (9th Cir. 1973). Also, in *S.L.W. v. Alaska Workmen's Compensation Board*, 490 P.2d 42 (Alaska 1971), a posthumously born child had the right of recovery for workmen's compensation death benefits, even though the father was unaware of the pregnancy at the time of his death. See also *Fontenot v. Annelida Acres, Inc.*, 302 So. 2d 690 (La. Ct. App. 1974).

In addition, for purposes of inheritance and trust laws, the unborn has long been recognized as a child with full rights as any born child. See 1 W. BLACKSTONE, COMMENTARIES \*130 ("An infant . . . in the mother's womb . . . is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born."). As a result, an unborn child can, among other things, inherit and own an estate, *Hall v. Hancock*, 32 Mass. (15 Pick.) 255 (1834); *Aubuchon v. Bender*, 44 Mo. 560 (1869), be a tenant-in-common with his brothers and sisters, *Deal v. Sexton*, 144 N.C. 157, 56 S.E. 691 (1907), or with his own mother, *Biggs v. McCarty*, 86 Ind. 352 (1882), be an actual income recipient prior to birth, *Industrial Trust Co. v. Wilson*, 61 R.I. 169, 200 A. 467 (1938), and take property by deed from an inheritance. *Mackie v. Mackie*, 230 N.C. 152, 52 S.E.2d 352 (1949). By 1941, a New York court, *In re Holthausen*, 175 Misc. 1022, 26 N.Y.S.2d 140 (1941), summed up the law concerning property rights of the unborn child as follows:



unborn. This is out of step with the inadequate protection of fetal rights in abortion law.

#### 4. *Fetal rights in criminal law*

"The criminal law historically has afforded the unborn child a substantial amount of protection," noted David Louisell in 1969.<sup>624</sup> The effect of *Roe* has been to strip away much of this protection. While the criminal law gave some of the unborn legal rights as "persons," *Roe's* declaration that they were not persons, for purposes of the fourteenth amendment, has spilled over into areas beyond abortion. Theoretically, the Court's holding for fourteenth amendment purposes has no bearing on personhood for homicide laws, but some state courts seem unable to grasp the distinction. Perhaps what is at work is the intuitive notion underlying *stare decisis*, that the law should be consistent. In other words, persons who have been "persons" under the criminal law should remain so or have no rights at all. Apparently, it is felt that the Court has taken such a radical step in stripping the unborn of their personhood in *Roe* that it cannot have meant to leave personhood in place for other purposes. Also, it is felt by some abortion advocates that the growth and maintenance of fetal rights in such an analogous area as homicide undercuts *Roe* and so must be inhibited.<sup>625</sup>

Such reasoning has brought about the astonishing result in the California cases regarding homicide of an unborn child. A murder indictment had been brought against a man for killing an unborn child. He had shoved his knee into his pregnant ex-wife's abdomen, saying, "I'm going to stomp it out of you." In 1970, the California Supreme Court reversed the murder indictment in *Keeler v. Superior Court*,<sup>626</sup> applying the born-alive rule.<sup>627</sup> Within the same year, the legislature

It has been the uniform and unvarying decision of all common-law courts in respect of estate matters for at least the past two hundred years that a child *en ventre sa mere* is 'born' and 'alive' for all purposes for his benefit.

*Id.* at 1024. 26 N.Y.S.2d at 143.

With regard to the disposition of an inheritance, a guardian ad litem may be appointed where the alleged father of the unborn had died and his estate was pending. *In re Thomas*, 118 Misc. 2d 456, 460 N.Y.S.2d 716 (1983). Similarly, with regard to the law of trusts, an unborn beneficiary cannot be bound by the consent of living beneficiaries, *In re Estate of Allen*, 35 Haw. 501 (1940), and a guardian ad litem can be appointed by the court to consent to a modification or revocation of the trust. *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559 (D.C. Cir. 1966). Thus, with few limitations, the unborn child is considered the child of his parents with the full rights of a born child and to which the parents owe substantial duties.

624. Louisell, *Abortion, the Practice of Medicine and the Due Process of Law*, 16 UCLA L. REV. 233, 238 (1969).

625. See, e.g., Johnson, *supra* note 623.

626. 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) (en banc).

627. The born-alive rule is an ancient relic from the fourteenth century, when proof

promptly redefined homicide to include the killing of a fetus.<sup>628</sup> In the 1976 case of *People v. Smith*,<sup>629</sup> the state appealed the dismissal of a homicide charge for a man who allegedly murdered a nonviable fetus. The appellate court held that *Roe* had removed the protection of a nonviable fetus:

The underlying rationale of [*Roe*], therefore, is that until viability is reached, human life in the legal sense has not come into existence. Implicit in [*Roe*] is the conclusion that as a matter of constitutional law the destruction of a non-viable fetus is not a taking of human life. It follows that such destruction cannot constitute murder or other form of homicide, whether committed by a mother, a father (as here), or a third person.<sup>630</sup>

The *Smith* court failed to distinguish between the fourteenth amendment context and the homicide context. Amazing as the result in *Smith* seems, the underlying notion that the legal treatment of the unborn ought to be consistent is sound. However, the only satisfactory way to make the law logically consistent is to give the unborn protection in all contexts. If the courts refuse such complete protection, then they ought to distinguish recognition of personhood for different contexts and at least provide protection to the unborn when abortion is not at issue. Under the clear influence of *Roe*, California chose the worst possible result—no protection at all.

A similar result was reached in Louisiana. In *State v. Gyles*,<sup>631</sup> the Louisiana Supreme Court held that the unborn were not included as "human beings" for the purposes of the homicide statute. The court noted that the legislature could amend the criminal code, in keeping with *Roe's* restrictions.<sup>632</sup> An amendment was adopted the next year, making the term "person" denote "a human being from the moment of fertilization and implantation."<sup>633</sup> Yet, the same court in *State v. Brown*,<sup>634</sup> where the defendant had beaten a woman and her unborn child to death, held the amendment did not expand homicide to include feticide. The court cited a need for greater clarity and less confusion than the word "person" reflects and a need to remain "within the lim-

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problems resulted from medical limitations in determining causation. *Commonwealth v. Cass*, 392 Mass. 799, 805, 467 N.E.2d 1324, 1328 (1984).

628. CAL. PENAL CODE § 187 (West 1988).

629. 59 Cal. App. 3d 751, 129 Cal. Rptr. 498 (1976).

630. *Id.* at 755, 129 Cal. Rptr. at 502.

631. 313 So. 2d 799 (La. 1975).

632. *Id.* at 802.

633. LA. REV. STAT. ANN. § 14:2(7) (West 1986).

634. 378 So. 2d 916 (La. 1979).

its fixed in *Roe v. Wade*.”<sup>635</sup>

These decisions were clearly misguided under a correct analysis of *Roe*. No privacy interests were involved on the part of the woman. The legislative intent was clear, and the state had strong interests in preventing assaults on unborn children, preventing their physical impairment and death, and protecting a woman's fundamental right of choosing to carry her child to term.<sup>636</sup>

The result of such decisions, in both California and Louisiana, has been noted by one commentator:

The irony of the *Keeler* decision is that, had the defendant's assault on the unborn child been somewhat less severe or even less accurate so that the child was born alive before she died from the injuries, the crime would clearly have been murder. [A footnote indicated that under the born-alive rule the child need only have lived a short time after birth to have established homicide.] It is therefore to the defendant's advantage to be sure that he has killed, rather than merely injured, the child in *utero*. One would have to search long and hard to find a better example of inverse justice at work.<sup>637</sup>

The *Keeler* case has had widespread influence. It is regularly quoted in cases following its result. For example, Minnesota, in 1985, denied a cause of action on behalf of a viable eight and a half month fetus under its vehicular homicide statute.<sup>638</sup> It cited *Keeler* twice.<sup>639</sup> Also in 1985, a New York court followed *Keeler's* lead, prominently citing "*Keller* [sic]."<sup>640</sup> In 1984, West Virginia held that the killing of a thirty-seven week fetus did not constitute homicide.<sup>641</sup> *Keeler* was given special mention.<sup>642</sup> Also in 1984, an appellate court in Florida cited *Keeler* and *Roe* in holding that the killing of a fetus did not constitute DWI manslaughter nor vehicular homicide.<sup>643</sup> This case was remarkable because, at the time of the automobile accident, the mother was in labor with a full-term viable fetus.<sup>644</sup> Further, the legislature had expressed its will in the criminal area by including willful feticide within the crime of manslaughter.<sup>645</sup> Arguing strict construction, the court refused to abandon the born-alive rule for the nonwillful crimes

635. *Id.* at 918.

636. *Maier v. Roe*, 432 U.S. 464, 472 n.7 (1977).

637. Note, *supra* note 478, at 367-68.

638. *State v. Soto*, 378 N.W.2d 625 (Minn. 1985).

639. *Id.* at 628 n.7, 630.

640. *People v. Joseph*, 130 Misc. 2d 377, 496 N.Y.S.2d 328 (Orange City Ct. 1985).

641. *State v. Wilson*, 332 S.E.2d 807 (W. Va. 1984).

642. *Id.* at 808 n.3.

643. *State v. McCall*, 458 So. 2d 875 (Fla. Dist. Ct. App. 1984).

644. *Id.* at 876.

645. *Id.* at 877.

charged.<sup>646</sup> In 1983, the Supreme Court of Kentucky decided that a fetus was not protected by the murder statute in the case of *Hollis v. Commonwealth*.<sup>647</sup> Hollis reportedly took his estranged wife from her parents' home to their barn.<sup>648</sup> She was twenty-eight to thirty weeks pregnant.<sup>649</sup> He "told her he did not want a baby, and then forced his hand up her vagina intending to destroy the child and deliver the fetus."<sup>650</sup> The court discussed *Roe* extensively, concluding, "It is fundamental that this Court has no authority to disagree with a decision of the United States Supreme Court interpreting the Federal Constitution."<sup>651</sup>

Another widely cited case which followed *Keeler* was the 1980 Michigan case of *People v. Guthrie*.<sup>652</sup> In 1983, Justice Ryan of the Michigan Supreme Court, dissenting in the vacating of leave to appeal the case, noted that the full-term infant in that case was "ready for birth," and was killed when the mother's vehicle was struck head-on by a pickup truck which had "crossed four lanes, including the center-line."<sup>653</sup> It was the "day before she was scheduled to enter the hospital for a Caesarean Section delivery."<sup>654</sup> The Michigan courts applied the born-alive rule despite earlier state court recognition of the unborn as within the state homicide statute. Instead of resorting to such precedent, the Michigan court relied on the outmoded common law born-alive rule.<sup>655</sup> Had the infant been scheduled for delivery a day earlier, and been riding home in an infant seat, it would have qualified for protection under the negligent homicide act. Such results, dependent on the vicissitudes of scheduling, are illogical. As dissenting Justice Ryan noted:

The 'rule' is generally understood to derive from the impossibility, 300 years ago, of determining whether and when a fetus was living and when and how it died, and the consequent necessity to preclude the fundamental inquiry whether a fetal death was a human death.

To hold as a matter of law in the waning years of the twentieth century that the question of the personhood or humanity of a viable

646. *Id.*

647. 652 S.W.2d 61 (Ky. 1983).

648. *Id.*

649. *Id.*

650. *Id.*

651. *Id.* at 63.

652. 97 Mich. App. 226, 293 N.W.2d 775 (1980), *appeal dismissed*, 417 Mich. 1006, 334 N.W.2d 616 (1983).

653. *People v. Guthrie*, 417 Mich. 1006, 334 N.W.2d 616 (1983) (Ryan, J., dissenting).

654. *Id.*

655. *Id.* at 1008-9, 334 N.W.2d at 618-19.

unborn child in the ninth month of gestation is governed by a common law rule of proof invented by the venerable but fallible Sir Edward Coke in the seventeenth century, to accommodate the medical and scientific impossibility of then proving the viability of a fetus, is disingenuous reasoning in the extreme.<sup>656</sup>

Medical testimony at the preliminary examination indicated that proof of life, viability, and cause of death were no longer the problems envisioned in the antiquated born-alive doctrine.<sup>657</sup>

In 1982, a New Mexico appellate court also followed *Keeler* in *State v. Willis*<sup>658</sup> by rejecting a vehicular homicide indictment for the killing of a fetus. In 1981, New Jersey reached the same conclusion in *State ex rel. A.W.S.*,<sup>659</sup> citing *Keeler* and *Guthrie*.

Another widely quoted case is *People v. Greer*, decided by the Illinois Supreme Court in 1980.<sup>660</sup> The court followed *Keeler* by holding it was not murder to kill an eight and a half month fetus by beating.<sup>661</sup>

In 1986, Connecticut decided that an unborn, viable fetus was not a "human being" within the meaning of the state murder statute, in *State v. Anonymous*.<sup>662</sup> *Keeler* was heavily relied upon in that decision.<sup>663</sup>

Thus, it is evident that *Roe* and *Keeler* have been very influential.<sup>664</sup> As discussed above, the reliance on *Roe* in this context is totally unfounded. *Keeler* presents a more persuasive precedent. It was decided, as were many of the subsequent cases, on the basis of stare decisis, strict construction, and the due process concern of giving adequate notice to defendants.

As this article argues, stare decisis serves important functions. However, when the rationale for a precedent is outmoded, such as it is for the born alive rule, common sense dictates that the precedent no longer be followed. This principle has been widely applied in the analogous areas of wrongful death statutes and tort law. It is widely ac-

656. *Id.* at 1007, 334 N.W.2d at 617 (citation omitted).

657. *Id.*

658. 98 N.M. 771, 652 P.2d 1222 (1982).

659. 182 N.J. Super. 278, 440 A.2d 1144 (App. Div. 1981).

660. 79 Ill. 2d 103, 402 N.E.2d 203 (1980).

661. *Id.*

662. 40 Conn. Supp. 498, 516 A.2d 156 (Conn. Super. Ct. 1986).

663. *Id.* at 500, 516 A.2d at 158-159. In 1987, in the case of *Meadows v. State*, 291 Ark. 105, 722 S.W.2d 584 (1987), the Supreme Court of Arkansas held that reckless killing of a viable fetus was not within the state manslaughter statute. Arkansas was unique in having an early feticide statute which had been expressly repealed. *Id.* at 587. From this, the court decided that legislative intent did not include the unborn within the manslaughter statute. *Id.*

664. Another case preceding *Roe* excluded fetuses from vehicular homicide statutes. *State v. Dickinson*, 28 Ohio St. 2d 65, 275 N.E.2d 599 (1971).

knowledge by the courts that medical science has progressed and the law should be "presumed to keep pace with the sciences."<sup>665</sup> There really is no serious issue here, since even courts which exclude the unborn from homicide statutes acknowledge the outdated rationale of the rule. For example, in *Guthrie*,<sup>666</sup> the court wrote:

This panel agrees that the "born alive" rule is outmoded, archaic and no longer serves a useful purpose. Modern medical practice has advanced to the point that, unlike the situation when the rule was first developed, the vast majority of viable fetuses will, in the absence of some unexpected event, be born alive and healthy. Further, medical technology can now accurately determine the stages of fetal development and viability. This being so, birth itself in terms of emergence from the mother's body should no longer be determinative. We further acknowledge that for purposes of actions in tort for wrongful death, recovery may be had even if a viable fetus was yet unborn.<sup>667</sup>

Thus, an application of stare decisis here is a brittle, mechanical application of the doctrine. Even worse, it works injustice. It is instructive to compare the rigid way that this precedent has been applied with the inflexible/flexible approach used in abortion jurisprudence. In the latter, the only inflexible point is that women may have abortions. Everything else is limply pliable. Here, while denying the validity of the rationale, the courts continue to apply the rule. Clearly, the unborn are deserving of more protection.<sup>668</sup> Even *Roe* indicated the compelling state interest in fetal life where women's privacy interests were not opposed.<sup>669</sup> Apparently, the explanation for this negative trend of feticide law lies somewhere beyond the realm of mere stare decisis. It lies largely in the negative influence of *Roe*.

The courts denying homicide actions for the unborn also cite the due process right of defendants to have notice of what constitutes unlawful conduct.<sup>670</sup> It is difficult to believe that a defendant who intentionally sought to "stomp" a baby out of the womb,<sup>671</sup> or tear it out vaginally,<sup>672</sup> or stab its mother in the abdomen when she was full-

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665. *Bonbrest v. Kotz*, 65 F. Supp. 138, 143 (1946).

666. 97 Mich. App. 226, 293 N.W.2d 775 (1980), *appeal dismissed*, 417 Mich. 1006, 334 N.W.2d 616 (1983).

667. *Id.* at 232, 293 N.W.2d at 778. This passage was quoted approvingly in New Jersey's rejection of homicide protection for the fetus as well, in 1981. *State ex rel. A.W.S.*, 182 N.J. Super. 278, 281, 440 A.2d 1144, 1146 (App. Div. 1981).

668. Parness, *supra* note 462.

669. *Roe*, 410 U.S. at 162.

670. *See, e.g.*, *State v. Horne*, 282 S.C. 444, 445, 319 S.E.2d 703, 704 (1984).

671. *Keeler*, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481.

672. *Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983).

term<sup>673</sup> would not believe he was acting criminally. The cases would give him notice that, if the child were born and lived only briefly, he would be liable for homicide. It seems incredible then to say that he had no notice. How was he to be certain the child would not survive to draw a breath? Or are we seeking to reward the lethally efficient, who make no mistakes? It may be somewhat of a legal fiction to imagine that a man in the act of stabbing his wife in her pregnant womb is counting on the rule that he is absolved of criminal liability if he succeeds in killing the child. At least, he should be on notice of the doctrine of transferred intent;<sup>674</sup> if he attacks the mother with malice and kills the unborn child unintentionally, he should be liable for having intended the act.<sup>675</sup>

Furthermore, with the rapid growth of fetal rights in tort law, especially wrongful death, it should come as no great surprise to an intentional killer of an unborn child if some state decides he has murdered a person. This is especially true in a state like Minnesota which has been active and well-known for advancing fetal rights in its much-publicized case, *Verkennes v. Corniea*,<sup>676</sup> where it recognized the unborn as persons.<sup>677</sup>

Finally, there is a simple solution to the concern with notice. While it works tragic injustice in an initial case, the employment of a holding with prospective effect only solves the dilemma easily. This solution was found satisfactory in *Commonwealth v. Cass*<sup>678</sup> and in *State v. Horne*.<sup>679</sup>

The remaining argument of the majority<sup>680</sup> is the doctrine of construing criminal statutes strictly. The purposes behind the rule are fairness<sup>681</sup> and avoidance of judicial usurpation of the legislative function.<sup>682</sup> In *Cass*, Massachusetts decided that fairness to the defendant (notice) was really the central issue of narrow construction and resolved it, as discussed above, by prospective application of its rule.<sup>683</sup> Of course, the principle of fairness is one that should be considered both as

673. *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984).

674. *Id.* at 446-47, 319 S.E.2d at 704.

675. *Id.*

676. 229 Minn. 365, 38 N.W.2d 838 (1949).

677. Unfortunately, Minnesota rejected this argument in *State v. Soto*, 378 N.W.2d 625 (Minn. 1985).

678. 392 Mass. 799, 467 N.E.2d 1324 (1984).

679. 282 S.C. 444, 319 S.E.2d 703 (1984).

680. The born-alive rule, in criminal cases, has been followed by 24 of the 26 jurisdictions which have considered it. *Soto*, 378 N.W.2d at 628 (including *Soto* in the sum).

681. *Cass*, 392 Mass. at 804, 467 N.E.2d at 1327.

682. *Soto*, 378 N.W. at 627-28.

683. *Cass*, 392 Mass. at 807-08, 467 N.E.2d at 1329.

it relates to the alleged criminal and to the victim. Clearly, the victim's rights have received short shrift in most courts.

The other foundation of the narrow construction rule involves the nature of the judicial function. The *Soto* court argued: "The rule of strict construction of criminal statutes is essential to guard against the creation of criminal offenses outside the contemplation of the legislature, under the guise of 'judicial construction.'"<sup>684</sup>

Two courts have stood against the trend denying fetal protection under homicide statutes and have discussed the rules of strict construction of criminal statutes. These will be examined to determine if their logic is compelling. Do they properly address the issue of common law development of criminal statutes? Of course, the nature of the statutes will affect the outcome in individual cases. However, general themes are transferable among the codes and cases.

In the 1984 case of *State v. Horne*,<sup>685</sup> South Carolina announced that a viable fetus would henceforth be a person for purposes of the homicide law. In its rationale, it first set forth a stare decisis argument based on consistency: "It would be grossly inconsistent for us to construe a viable fetus as a 'person' for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context."<sup>686</sup> Then the court noted prior changes made in the criminal law by the South Carolina Supreme Court itself:

This Court has the right and the duty to develop the common law of South Carolina to better serve an ever-changing society as a whole. In this regard, the criminal law has been the subject of change. The fact this particular issue has not been raised or ruled on before does not mean we are prevented from declaring the common law as it should be. Therefore, we hold an action for homicide may be maintained in the future when the state can prove beyond a reasonable doubt the fetus involved was viable . . . .<sup>687</sup>

The more famous case of *Commonwealth v. Cass*<sup>688</sup> was also decided in 1984, by the Supreme Judicial Court of Massachusetts. Massachusetts had the advantage of a prominent case, extending wrongful death rights to the unborn,<sup>689</sup> published a year before the vehicular homicide statute was passed. Thus, the court could reasonably argue that the legislature was presumed to be aware of state court develop-

684. *State v. Soto*, 378 N.W.2d 625, 628 (Minn. 1985).

685. 282 S.C. 444, 319 S.E.2d 703 (1984).

686. *Id.* at 445, 319 S.E.2d at 704.

687. *Id.* (citations omitted).

688. 392 Mass. 799, 467 N.E.2d 1324 (1984).

689. *Mone v. Greyhound Lines*, 368 Mass. 354, 331 N.E.2d 916 (1975).



ments, and so must have intended the definition of a "person" in *Mone* to apply to the new statute.<sup>690</sup>

Despite a similar sequence of case and statute, Minnesota recently rejected the *Cass* approach.<sup>691</sup> The court noted that the two courts which had rejected the born-alive rule were "common law" jurisdictions, while Minnesota was a "code state," i.e., the Minnesota legislature specifically abolished common law crimes.<sup>692</sup> The Minnesota court noted its authority to construe the law, but said a change of such magnitude in the criminal law was "within the province of the legislature."<sup>693</sup> This is the common argument of the majority, which follows *Keeler*.<sup>694</sup>

In analyzing this argument, it should be acknowledged at the outset that the general rule is correct. More judicial restraint is to be encouraged. It is troubling, however, when courts, including the United States Supreme Court, can "legislate" freely to strip the unborn of personhood, but suddenly cannot do so to grant it. In addition, the legislatures need to act clearly and unambiguously to protect the state interest in the unborn. However, where they have attempted to do so, as in California and Louisiana, the courts have offered a hostile reception.<sup>695</sup> Legislators must wonder if the effort will be effective. The kind of precision the courts apparently desire is time consuming, as the whole code must be overhauled. Minor adjustments have been rejected.<sup>696</sup> Of course, legislatures are busy with many other matters, as well, which may seem more pressing.

With this in mind, is there any way the courts can provide justice in this area? Surely, one who would intentionally beat a fetus to death must be deterred from such conduct. The answer lies in the nature of the born-alive rule itself. The born-alive rule is based on medical limitations and is rooted in the common law. The medical proof problems are largely gone. The question remains whether the legislatures intended to incorporate in their statutes the common law meaning of terms as a static concept or as a dynamic concept. Did the term "person" or "human being" in the statute mean whatever the common law would incorporate therein when applied, or what it meant at the time

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690. *Cass*, 392 Mass. at 801, 467 N.E.2d at 1326. The principle is the same as the presumption that the legislature adopted common law definitions extant at the time a statute was promulgated.

691. *State v. Soto*, 378 N.W.2d 625, 629-30 (Minn. 1985).

692. *Id.* at 630.

693. *Id.*

694. Minnesota, likewise, cites *Keeler* for this argument. *Id.*

695. See *supra* text accompanying notes 626-35.

696. *Id.*

passed, even if based on changed scientific facts?

The principle was established in *Bonbrest* that “[t]he law is presumed to keep pace with the sciences . . . .”<sup>697</sup> Every state has adopted that principle by allowing a tort action for prenatal harm.<sup>698</sup> If such a presumption is at work, then the legislative intent must be to adopt a dynamic concept of the common law. In other words, the definition under the presumption would be one based on current legal and scientific understanding, not that of hundreds of years past, which is no longer appropriate. Even “code states” use common law definitions of terms not defined in the code. These definitions should be allowed to develop with the common law, and not be frozen in time because a legislature chose to use them. Of course, the courts should not violate the clear intent of the legislature,<sup>699</sup> but where the legislature has not precluded reasonable development of the law, it should be allowed.

There is a clear distinction between the judicial actions in *Roe* and in *Cass*. In *Roe*, the Supreme Court was interpreting the Constitution, which historically has entailed an analysis of the intent of the framers of the original document or the drafters of its amendments. The Supreme Court had no other legitimate authority than to perform such analysis. It was not authorized to create law as a common law court. In *Cass*, the court was acting properly within the common law tradition. Thus, for a common law court, it is wholly appropriate to apply the principle of keeping pace with science. When courts in code states employ common law interpretations of terms left undefined by the legislature, that, too, is a proper function of the courts.

However, when the Supreme Court in *Roe*<sup>700</sup> and in *Akron*<sup>701</sup> declared that science is the controlling factor, over the intent of the framers or judicial precedent, it has usurped the role of the framers in the same way that a common law court would if going contrary to the express intent of a legislature in enacting a statute.

For example, if a legislature has defined death as the cessation of respiration or heart function, even if science has moved to a brain activity definition of death, the court may not legitimately adopt a brain death test against the will of the legislature. The legislature alone is authorized to make such policy decisions. However, if statutory law does not define death, but employs common law definitions, the judici-

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697. *Bonbrest*, 65 F. Supp. at 143.

698. PROSSER & KEETON, *supra* note 467, at 368.

699. This was done in California and Louisiana under the guise of strict construction. See *supra* text accompanying notes 626-35.

700. *Roe*, 410 U.S. at 149, 163.

701. *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 434 (1983) (legislatures may not “depart from accepted medical practice”).

ary may keep pace with science. Judge-made law—as the common law is—may legitimately be altered by judges. The Constitution, of course, is not judge-made law. It may not be altered by the Supreme Court—at least not under constitutional authority.

However, within legitimate authority to construe statutes and develop common law, courts retain a duty to so construe statutes to avoid inequity. Our judicial system is based on the common law tradition, which influences even “code states.” This tradition is a dynamic one, particularly suited to changing circumstances. Judicial “activism” within limits is a part of its genius. One hears cries of “judicial activism” by the dissent in *Cass*<sup>702</sup> and by the dissent in *Doe v. Bolton*.<sup>703</sup> The abortion cases, *Roe* and *Bolton*, were a dangerous sort of activism, clearly usurping the role of the legislatures, invalidating the legislative determinations of “a majority of the States reflecting, after all, the majority sentiment in those States,”<sup>704</sup> on the basis of a right nowhere mentioned in the Constitution, nor easily found among the shadows (“penumbras”) thereof.<sup>705</sup>

By contrast, decisions such as *Mone* and *Cass* were a positive sort of “activism.”<sup>706</sup> They represent the common law at work. In such situations, where the legislature has failed to act, injustice is being done, and precedents from collateral areas indicate a change is due, it is essential that the courts act. *Keeton* favorably argued for an expansion of such judicial involvement as legislatures are increasingly involved with other matters.<sup>707</sup>

[T]he continuing accumulation of precedents tends to narrow somewhat the area of interstitial creativity and to increase the need for candid breaks with precedent . . . . [I]t is never a satisfactory answer to an argument for judicial creativity that the need for change is one

702. *Commonwealth v. Cass*, 392 Mass. 799, 810, 467 N.E.2d 1324, 1330 (1984) (Wilkins, J., dissenting) (calling the majority opinion an “exercise of raw judicial power”).

703. *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., joined by Rehnquist, J. dissenting)(calling the majority opinion “an exercise of raw judicial power”).

704. *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting).

705. *Id.* at 152.

706. This assertion of good and bad forms of judicial “activism” is not inconsistent. An excellent concise discussion of the uses of the historical context of the due process clause in its interpretation is contained in the United States’ brief in *Thornburgh*. Brief for the United States, *supra* note 35, at 25-29. One of the uses of history set forth is “to take account of developments in society and the law.” *Id.* at 27. However, “the Court has always taken pains to trace its point of origin back to specific constitutional provisions by a route either influential or historical.” *Id.* In *Roe*, the “connections by either route were wholly missing.” *Id.* The brief continued, “The story traced by the Court does not show a steady and growing acceptance of a point of view until the practice in a few jurisdictions can be characterized as anomalous.” *Id.* The decisions in *Mone* and *Cass* are of this latter type, well supported by the “historical trajectory.” *Id.* at 28.

707. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 484 (1962).

that could be accomplished by statute. Where a need for reform is clear but no reforming statute has been enacted, courts must choose among the unsatisfactory precedent and other rules open to judicial adoption . . . .<sup>708</sup>

This flexibility has made the common law system immensely practical. Since legislators cannot foresee every possible situation when enacting a law, there remains need for judicial interpretation.

The Massachusetts Supreme Judicial Court comprehended the need and correctly asserted its right and duty, in such a situation, to interpret the statutory term dynamically, in light of changed circumstances. It is no coincidence that the court quoted Oliver Wendell Holmes, an earlier member of the same court, who dictated the rule of no rights for the unborn:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>709</sup>

Thus, Massachusetts has come full circle. Whether others will follow is unclear. What is clear is that the unborn have been stripped of protection and the courts and legislatures need to act to restore it.

The protection which was afforded the unborn before *Roe* was primarily provided by the state abortion statutes rather than homicide laws. When the United States Supreme Court in the 1973 *Roe* and *Bolton* decisions declared the abortion laws of Texas and Georgia unconstitutional, it removed the shield around the unborn.

The protection had been in place for some time. As early as the thirteenth century in England, the killing of a quickened<sup>710</sup> fetus was a homicide, according to a contemporary commentator, Henry de Bracton.<sup>711</sup> William Blackstone noted this view, along with the subsequent view of Edward Coke, that such an act was only a "heinous misdeme[a]nor."<sup>712</sup> In 1803, the Miscarriage of Women Act was promulgated in England, increasing the crime for willful killing of a fetus to a felony and pushing protection back to quickening.<sup>713</sup>

708. *Id.*

709. *Commonwealth v. Cass*, 392 Mass. 799, 805-06, 467 N.E.2d 1324, 1328 (1984) (quoting Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

710. The law has historically protected the unborn from the beginning of life, as understood by the science of the day. This protection was pushed back to conception with the discovery of cell development in the early nineteenth century. See *supra* note 538.

711. 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 341 (S. Thorne ed. 1968) (cited in *Roe*, 410 U.S. at 134 n.23).

712. 1 W. BLACKSTONE, COMMENTARIES 129-30.

713. LORD ELLENBOROUGH'S ACT, 1803, 43 Geo. 3, ch. 58, §§ 1-2.

The United States followed the English pattern.<sup>714</sup> In 1821, Connecticut prohibited causing the miscarriage of a quick child.<sup>715</sup> New York in 1828 extended the protection to those not yet quickened.<sup>716</sup> Most states followed suit with felony statutes protecting even the unquickened.<sup>717</sup> Even though penalties were increased over time, legislators were apparently affected by the born-alive rule, resulting in "a gross disparity in the protection of potential life and of continued life."<sup>718</sup> Still, criminal prosecution and penalties were generally available, especially for willful feticide, until the abortion statutes were declared unconstitutional by *Roe* and *Bolton*.<sup>719</sup> While *Roe* applied only to consensual abortions, it removed the abortion statutes leaving the unborn without protection. Although the states had already expressed their intent to protect the unborn from attack by the criminal abortion statutes, the courts have been generally unwilling to further this intent by applying the legislative intent when interpreting homicide statutes. Since the legislatures have been slow to act, the unborn may be killed willfully, without fear of criminal sanctions, in most jurisdictions.

Perhaps the best hope for fetal protection in the criminal area lies in comprehensive legislation to protect the unborn in non-abortion contexts. Three states are leading the way in this area. In 1987, North Dakota enacted such a comprehensive statute,<sup>720</sup> joining Minnesota<sup>721</sup> and Illinois.<sup>722</sup> In 1987, the Eleventh Circuit declared a Georgia feticide statute as constitutional and not conflicting with *Roe*. The criminal defendant, Smith, shot a pregnant woman and killed her unborn child.<sup>723</sup> He contended the feticide statute was unconstitutional "because there [was] no unlawful taking of human life, and because the statute contradicts . . . *Roe*."<sup>724</sup> The court declared the first contention "frivolous" and the second "without merit."<sup>725</sup> The fact that *Roe* declared a fetus not to be a "person" was "immaterial" where the state's interests did not conflict with a woman's right to abort.<sup>726</sup> In 1987, in

714. Parness, *supra* note 462, at 108.

715. See J. MOHR, *supra* note 425, at 21 (citing CONN. STAT. tit. 22, §§ 14, 16, at 152, 153 (1821)).

716. *Id.* at 26-27 (citing N.Y. REV. STAT. pt. IV, ch. I, tit. II, §§ 8, 9 at 550).

717. Parness, *supra* note 462, at 109.

718. *Id.*

719. *Id.* at 110.

720. N.D. CENT. CODE § 12.1-17.1 (Supp. 1987).

721. See, e.g., MINN. STAT. § 609.

722. See, e.g., ILL. REV. STAT., ch.36, § 9-1.1.

723. Smith v. Newsome, 815 F.2d 1386, 1388 (11th Cir. 1987).

724. *Id.*

725. *Id.*

726. *Id.* at 1388 & n.2.

the case of *State v. Wickstrom*,<sup>727</sup> the conviction of a man who beat and kicked a pregnant woman's abdomen, causing fetal death, was upheld under the state's criminal abortion law.<sup>728</sup> Such prosecutions may be possible elsewhere, but the need for comprehensive legislative action is clear.

We see then, that in the criminal setting, *Roe's* denial of personhood to the unborn violated the principles of *stare decisis* by creating instability, promoting logical inconsistency, and inhibiting predictability and fairness. It destroyed legal protection for unborn children from homicide and inhibited the growth of alternative protection. Such inhibition was not mandated by *Roe*—which recognized the state interest in potential life where the mother's privacy rights do not conflict—but it was inevitable, from the shoddy reasoning and inadequate protection of the unborn in *Roe*, that other courts would follow its lead.

### 5. *Laws relating to respect*

Recognition of the dignity of human life is important to create a climate where life is respected and, thus, not readily taken. Some states have passed laws promoting this dignity for the unborn. These laws are in keeping with *Roe's* recognition of the state interest in protecting "potential" life.<sup>729</sup> The laws take two forms. First, some statutes relate to the humane disposal of fetal remains. Second, other statutes proscribe fetal experimentation, except to preserve fetal life.

The first type of statute, requiring humane disposal of fetal remains, has been adopted by a number of states.<sup>730</sup> Such a statute was overturned for vagueness in *Akron*.<sup>731</sup> The *Akron* Court found that a "decent burial" might be intended, rather than prevention of "mindless dumping" as the City of Akron argued.<sup>732</sup> However, in *Akron*, the Court left open the possibility of clear legislation which did not burden the mother's right of privacy.<sup>733</sup>

In *Leigh v. Olson*,<sup>734</sup> a district court overturned a statute requiring the woman seeking abortion to select a method of disposal, even though

727. 405 N.W.2d 1 (Minn. App. 1987).

728. *Id.* at 10.

729. *Roe*, 410 U.S. at 162.

730. Parness, *supra* note 462, at 102 & n.12.

731. *Akron*, 462 U.S. at 451.

732. *Id.*

733. *Id.*

734. 497 F. Supp. 1340 (D.N.D. 1980). *Cf.* *Planned Parenthood Ass'n v. Cincinnati*, 822 F.2d 1390 (6th Cir. 1987); *Hodgson v. Minnesota*, 827 F.2d 1191 (8th Cir. 1987), *reh'g granted and opinion vacated*, 835 F.2d 1545 (8th Cir. 1987), *reinstated and (en banc) reh'g granted*, 835 F.2d 1546 (8th Cir. 1987), *reversed*, 853 F.2d 1452, *petition for cert. filed*, 57 U.S.L.W. 2105 (U.S. Feb 3, 1989).

one choice was to let someone else decide.<sup>735</sup> The court found this to be too great a burden on the privacy right. No financial cost need have been involved and the state had a legitimate interest in promoting respect for life, including an aborted fetus.<sup>736</sup> However, in the court's mind, the psychological burden proved too great. There is, however, substantial room here for the states to promote the dignity of the fetus.<sup>737</sup>

Fetal experimentation has been barred by some states, unless it would save fetal life.<sup>738</sup> According to one commentator, such statutes "suggest that in contemporary American society, the fetus is sometimes accorded the same dignity as a human being born alive."<sup>739</sup> Such protection reflects "significant sentiment" on the part of legislators that the unborn are entitled to respect.<sup>740</sup>

The fetal disposal and experimentation statutes reflect a respect for the unborn which is out of step with the approach taken in *Roe*. Thus, despite the dictates of *Roe*, the people through their elected representatives continue to express their belief in the essential humanity of the unborn.

## 6. Summary

The holding of *Roe* has been shown to be out of step with the rest of the law as it relates to the unborn. The long legal history of fetal rights has been one of significant and expanding scope. The development of medical technology has solved problems of providing proof which existed in former centuries. This has led to a dramatic turnaround in tort law. However, *Roe* has inhibited this growth in the area of criminal protection by stripping the fetus of personhood and the protection of the abortion laws. The inhibiting effect of *Roe* flies in the face of logic, medical technology and the consistency principles of stare decisis.

While *Roe* and its progeny offer little protection to the postviable fetus,<sup>741</sup> other areas of the law offer protection back to conception and even before. These protections in other areas are much stronger than the weak protection offered in *Roe*. Clearly *Roe* is out of step with the

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735. *Leigh*, 497 F. Supp. at 1351-52.

736. Parness, *supra* note 462, at 146.

737. *Id.*

738. *Id.* at 102 (giving examples in Louisiana, Illinois, and the report *National Comm'n for the Protection of Human Subjects of Biomedical and Behavioral Research, U.S. Dep't of Health, Educ. & Welfare, Report and Recommendations: Research on the Fetus* 61-62, 67, 74 (1975)).

739. Parness, *supra* note 462, at 102.

740. *Id.*

741. The "mother's health" exception has been interpreted very broadly.

long-established and developing fetal rights in the rest of the law. While *Roe* was wrong in its analysis of fetal rights in 1973, abortion jurisprudence deviates even further from the rest of the law since *Roe*.

### C. *Medical Regulations*

In his majority opinion in *Roe*, Justice Blackmun acknowledged that the abortion controversy raised philosophical, moral, religious, and medical questions.<sup>742</sup> The Court's ruling focused primarily on the medical aspect. The trimester scheme was based on medical concepts, definitions, determinations, and technological capabilities. A key player in the scheme was the attending physician. The woman was to make her decision in consultation with her doctor.<sup>743</sup> The doctor was given great leeway in exercising his virtually unassailable discretion.<sup>744</sup>

However, the medical criteria employed in the *Roe* trimester scheme were faulty and inadequate as a basis for a constitutional right. The unfettered discretion and deference afforded physicians in the abortion context is anomalous in light of the extensive regulation of medical practice. Also, the treatment of the informed consent doctrine in the abortion context is out of step with the current trend of the law and regresses to a widely-rejected model of the physician-patient relationship. Even reasonable recording and reporting requirements cannot withstand the Court's attack. These are the topics of this section.

#### 1. *Trimester medical criteria*

The Court in *Roe* decided that the state could not regulate abortion in the first trimester, as abortion was considered safer than continuing the pregnancy during that period.<sup>745</sup> In reaching this conclusion, Justice Blackmun referred to medical data from the appellant and amici briefs.<sup>746</sup> The studies cited supported the proposition that abortion was safer during this period.<sup>747</sup> However, a review of opposing amici briefs reveals contradictory data ignored by the Court.<sup>748</sup> The

742. *Roe*, 410 U.S. at 116-17.

743. *Id.* at 163.

744. *Doe v. Bolton*, 410 U.S. 179, 191 (1973).

745. *Roe*, 410 U.S. at 149, 163.

746. *Id.* at 149. The Court's trimester scheme should not be confused with the medical division of pregnancy into three three-month periods. See *Wolfe v. Schroering*, 388 F. Supp. 631, 635 (W.D. Ky. 1974), *aff'd*, 541 F.2d 523 (6th Cir. 1976); *Special Project, Survey of Abortion Law*, 1980 ARIZ. ST. L.J. 67, 139-42.

747. *Roe*, 410 U.S. at 149.

748. See Brief for Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology at 33-50, *Roe v. Wade*, 410 U.S. 113 (1973); Brief for Robert L. Sassone at 25-36, *Roe v. Wade*, 410 U.S. 113 (1973).



Court gave undue deference to certain segments of the medical community over others. Moreover, the asserted facts were in reality opinions of certain medical groups.

Even the Court's language in *Roe* indicated the uncertainty of the data. The Court stated initially, "Mortality rates for women undergoing early abortions, where the procedure is legal, *appear to be* as low as or lower than the rates for normal childbirth."<sup>749</sup> Later the Court referred back to this statement, concluding, "This is so because of the *now established medical fact*, referred to above at [prior quotation], that until the end of the first trimester mortality in abortion *may be* less than mortality in normal childbirth."<sup>750</sup> Subsequent articles and studies have supported the argument that the *Roe* Court's medical fact was really ill-founded medical opinion.<sup>751</sup> The *Roe* Court's extreme deference to such opinions, and to what were basically legislative facts, was unwarranted.<sup>752</sup> With this foundation removed, the first trimester rule is without a basis. Moreover, as medical technology changes, the relative safety of abortion and childbirth will remain a mobile guideline.

The *Roe* Court also relied on medical factors in drawing the line between the second and third trimesters, which was placed at viability. At viability, the state's interest in fetal life was to become compelling.<sup>753</sup> However, determining viability is a difficult task, leaving legis-

749. *Roe*, 410 U.S. at 149 (emphasis added).

750. *Id.* at 163 (emphasis added).

751. These analyses have further demonstrated that the opinions on which the Court relied were based on very questionable data. See Hilgers & O'Hare, *Abortion Related Maternal Mortality: An In-Depth Analysis*, in *NEW PERSPECTIVES ON HUMAN ABORTION* 69-91 (T. Hilgers, D. Horan & D. Mall eds. 1981) (application of more accurate formulas produced a finding that natural pregnancy is safer than legal abortion in both the first and second twenty weeks of pregnancy). See also Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CALIF. L. REV. 1250, 1295-03 (1975).

752. See generally Destro, *supra* note 751, at 1295-03. Such reliance on legislative facts is especially problematic in cases involving fundamental constitutional questions. Opinions on medical restrictions of abortion are particularly prone to predisposition. While adjudicative facts may be challenged at the trial level and are subject to the rules of evidence, legislative facts are usually presented at the level of flat assertions with little or no chance for rebuttal. Thus, the basic precept of the adversary system was neglected. See generally Miller & Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975).

The Court's heavy reliance on Cyril Means' article in *Roe* was particularly inappropriate in this respect. *Roe*, 410 U.S. at 135 n.26, 136, 140-41; Means, *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y. L. F. 335 (1971). Subsequent studies have soundly criticized the accuracy of much of the information contained in his article. See, e.g., Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807 (1973); Destro, *supra* note 751, at 1267-92; Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29 (1985).

753. *Roe*, 410 U.S. at 160.

latures with an almost insurmountable task in asserting their declared compelling interest in fetal life and doctors in the precarious position of having possible criminal penalties flow from an erroneous judgment of nonviability. The result has been more litigation, resulting in a wide berth being required of legislatures when legislating around the point of viability, and virtually unchallenged discretion being allowed physicians in making the determination of viability.<sup>754</sup> As with the line between the first and second trimesters, the viability line is a function of advances in medical technology.

In sum, while much of the medical data used in *Roe* was suspect at the time, medical technology has continued to alter the landscape, making the trimester scheme almost unrecognizable in its present form and on a certain "collision course with itself" in the future.<sup>755</sup> The resounding criticisms of the creation of a constitutional right, which will vary year-by-year, have already been given and need not be repeated.<sup>756</sup>

## 2. *Physician discretion*

The unchecked discretion granted to physicians in the abortion context is also inappropriate. Consistent with its view of abortion as primarily a medical matter, the Court has placed great emphasis on the physician-patient relationship. In *Roe*, for example, the woman in her first trimester was declared free, in consultation with her physician, to choose an abortion.<sup>757</sup> Later in the opinion, the Court reiterated the point 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."<sup>758</sup>

Subsequent opinions have shielded the physician from scrutiny. In *Bolton*, a scheme was invalidated which required review of the physician's decision by other physicians and a hospital committee.<sup>759</sup> The

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754. See *Danforth*, 428 U.S. at 63-65. *Danforth* stressed the flexibility of the *Roe* viability concept in upholding abortion legislation. *Id.* at 65. In *Colautti v. Franklin*, 439 U.S. 379 (1979) the Court struck down a state statute very similar to *Danforth's*. The fatal flaw was vagueness. *Id.* at 393. It is ironic that attempts to make the viability concept more definite have been struck down as too restrictive, while the formula, or very similar ones, used by the Court are inherently vague. The result is that little protection of the compelling state interest in fetal life is extant. The testimony in *Danforth* produced a wide range of definitions of viability. *Id.* at 396 n.15. See generally Note, *Current Technology Affecting Supreme Court Abortion Jurisprudence*, 27 N.Y.L. SCH. L. REV. 1221 (1982).

755. *Akron*, 462 U.S. at 458 (O'Connor, J., dissenting).

756. See *supra* section II-A-3 of this article.

757. *Roe*, 410 U.S. at 149, 163.

758. *Id.* at 166.

759. *Bolton*, 410 U.S. at 197-200.

physician-patient decision has also been shielded from familial veto,<sup>760</sup> regulation of the viability determination,<sup>761</sup> regulation of the informed consent dialogue,<sup>762</sup> regulation of the abortion method,<sup>763</sup> all but very limited recordkeeping,<sup>764</sup> and various standards of care imposed to protect fetal life.<sup>765</sup>

This extreme deference to the medical profession is also evident in the language of the Court's opinions, which evince a high degree of trust and faith in the medical profession. Of course, this view is not shared by many legislatures, which repeatedly attempt to regulate physicians' discretion in performing abortions. The Court, by contrast, refers "to the conscientious physician, particularly the obstetrician, whose professional activity is concerned with the physical and mental welfare, the woes, the emotions of his female patients."<sup>766</sup> The Court has expressed its belief that most physicians are "good" and that they will have sympathy and understanding for the pregnant patient.<sup>767</sup> Former Chief Justice Burger exhibited this sort of respect in his concurrence to *Bolton*. He said "that the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments."<sup>768</sup>

This is hopefully true. However, criminal statutes are not generally rejected by the Court on the basis that most people are law abiding. Furthermore, the picture painted by the Court is anachronistic. The Court portrays the physician as carefully consulting with the woman about possible medical and psychological harms, as well as long-range effects on her family and future.<sup>769</sup> Unfortunately, this is often unrealistic, as depicted in the award-winning series in the *Chicago Sun-Times*, *The Abortion Profiteers*.<sup>770</sup> More than fifty-five percent of the approximately one and a half million abortions performed annually are done in abortion clinics.<sup>771</sup> Many of these clinics operate at a high volume and doctors working there have an interest in the profits of the

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760. *Danforth*, 428 U.S. at 52, 67-75.

761. *Colautti v. Franklin*, 439 U.S. 379, 388-90 (1979).

762. *Akron*, 462 U.S. at 444-47; *Thornburgh*, 476 U.S. at 764.

763. *Danforth*, 428 U.S. at 75-79.

764. *Id.* at 79-81.

765. *See, e.g., id.* at 81-83.

766. *Bolton*, 410 U.S. at 196.

767. *Id.* at 197.

768. *Id.* at 208 (Burger, C.J., concurring).

769. *Roe*, 410 U.S. at 153.

770. *See infra* notes 1035-56 and accompanying text. *See also* Goldsmith, *Early Abortion in a Family Planning Clinic*, 6 *FAM. PLAN. PERSP.* 119 (1974).

771. Henshaw, Forrest & Blaine, *supra* note 238, at 120 table 1.

clinic.<sup>772</sup> Often the doctor does not even see the patient until she is on the operating table.<sup>773</sup> Justice Stewart took note of such practice in his concurrence in *Danforth*:

The counseling . . . occurs entirely on the day the abortion is to be performed . . . . It lasts for two hours and takes place in groups that include both minors and adults who are strangers to one another . . . . The physician takes no part in this counseling process . . . . Counseling is typically limited to a description of abortion procedures, possible complications, and birth control techniques . . . .<sup>774</sup>

Justice O'Connor, dissenting in *Akron*, called attention to the "fact that the record [in *Akron*] show[ed] that the [physician-patient] relationship [was] nonexistent."<sup>775</sup> She cited Judge Cornelia G. Kennedy, who declared "that the decision to terminate a pregnancy was made not by the woman in conjunction with her physician, but by the woman and the lay employees of the abortion clinic, the income of which is dependent upon the woman's choosing to have an abortion."<sup>776</sup>

With good reason, therefore, the states have endeavored to regulate perceived abuses and to assert their allegedly compelling interests. Under traditional rules, this ought to have been permitted.

*a. Substantive due process.* Indicative of the imprecision in abortion jurisprudence is the confusion over whose right is fundamental. While the abortion right seems to be the woman's, certain issues, such as informed consent requirements, have been decided on the basis of their effect on the physician.<sup>777</sup> This emphasis on the physician's freedom to practice medicine unfettered by the state is not consistent with traditional rules governing regulation of the medical profession.

Historically, the states have had the recognized authority under their police power to regulate the practice of medicine.<sup>778</sup> For a brief time, during the heyday of substantive due process, the Court recognized a right to practice medicine as guaranteed by the fourteenth amendment.<sup>779</sup>

772. See *infra* notes 1035-56 and accompanying text.

773. Wardle, *supra* note 19, at 245.

774. 428 U.S. at 91 n.2 (Stewart, J., concurring) (quoting Brief for the Appellants at 43-44, *Bellotti v. Baird*, 428 U.S. 132 (1976)(omissions by Stewart, J.)).

775. *Akron*, 462 U.S. at 773 (O'Connor, J., dissenting).

776. 651 F.2d at 1217 (Kennedy, J., concurring in part and dissenting in part).

777. *Thornburgh*, 476 U.S. at 763; *Akron*, 462 U.S. at 445; *Danforth*, 428 U.S. at 67 n.8; *Charles v. Daley*, 749 F.2d 452 (7th Cir. 1984), *appeal dismissed sub nom.* *Diamond v. Charles*, 106 S. Ct. 1697 (1986).

778. An excellent article, tracing the rights of physicians in relation to the doctrine of informed consent, is Jipping, *Informed Consent to Abortion: A Refinement*, 38 CASE W. RES. L. REV. 329, 351-56 (1988).

779. *Id.*; *Lochner*, 198 U.S. at 60. Cf. *Liggett Co. v. Baldridge*, 278 U.S. 105, 111, 115

As substantive due process was rejected, so too were such claims for the medical profession. In the same year that *Roe* was decided, the Court overruled *Liggett Co. v. Baldridge*,<sup>780</sup> a 1928 case which had upheld the property rights of pharmacists in their pharmacy business against state regulation.<sup>781</sup> The overruling Court declared that substantive due process rights in medical matters were ended, and that "states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific constitutional prohibition, or of some valid federal law . . ." <sup>782</sup> Subsequent cases have likewise rejected a substantive due process claim by the medical profession.<sup>783</sup> In response to claims of "unduly oppressive and unwarranted restrictions"<sup>784</sup> on the dental profession, one circuit court remarked that "[t]he courts have so often sustained identical legislative provisions"<sup>785</sup> that it was "surprised"<sup>786</sup> at the contention.

Thus, no longer is a right to practice medicine free from regulation recognized.<sup>787</sup> That the Supreme Court has revived such a notion in abortion jurisprudence is further evidence of the inconsistency between abortion and ordinary case law.

Since the Court has never explicitly held that physicians have a right to practice abortions free from state interference,<sup>788</sup> it should cease relying on such a concept. The current *sub silentio* recognition of the right in the abortion context is anomalous.<sup>789</sup> Thus, there is no constitutional basis for the extreme deference of the Court to the medical profession, and the unassailable discretion accorded abortion doctors is inappropriate.

*b. Police Power.* Outside of the detour into substantive due process in abortion case law, the right of the states to regulate the practice of medicine has been largely unquestioned. Of course, constitutional requirements must be observed, but the state's police power has

(1928).

780. 278 U.S. 105 (1928).

781. *North Dakota State Bd. v. Snyder's Drug Stores*, 414 U.S. 156 (1973).

782. *Id.* at 165 (quoting *Lincoln Union v. Northwestern Co.*, 335 U.S. 525, 536-37 (1949)).

783. *Jipping*, *supra* note 778, at 349-51 (citing *Semler v. Oregon Bd. of Dental Examiners*, 294 U.S. 608 (1935) and *Johnston v. Board of Dental Examiners*, 134 F.2d 9 (D.C. Cir. 1943) *cert. denied*, 319 U.S. 758).

784. *Johnston v. Board of Dental Examiners*, 134 F.2d 9, 10 (D.C. Cir. 1943).

785. *Id.* at 11.

786. *Id.*

787. *Jipping*, *supra* note 778, at 351.

788. *Id.* at 349.

789. Further confusion is caused by the failure of the Court to precisely define the right. Is it a right to an empty womb, a dead fetus, control of one's own body, control over certain decisions, an abortion, or merely a choice between abortion and birth? *Id.* at 339.

traditionally governed medical regulation.<sup>790</sup> Thus, the medical profession is subject to regulation to secure the people "against the consequences of ignorance and incapacity as well as of deception and fraud,"<sup>791</sup> especially in matters "which closely concern the public health."<sup>792</sup> In fact, declared the Court, "[t]here is perhaps no profession more properly open to [state] regulation than that which embraces the practitioners of medicine."<sup>793</sup>

Exercise of state police power has led to licensing requirements,<sup>794</sup> ongoing supervision,<sup>795</sup> revocation of licenses,<sup>796</sup> regulation of the commercial aspects of medical practice,<sup>797</sup> and defining the content of practice itself.<sup>798</sup> In areas analogous to abortion, such as sterilization and warning labeling of contraceptives, regulation has been commonplace. For example, many states have sterilization statutes incorporating requirements of age, written consent, and what information will constitute informed consent.<sup>799</sup> Parental consent may be required for minors to be sterilized,<sup>800</sup> a second physician may be required for consultation,<sup>801</sup> and spousal consent has been required.<sup>802</sup> Some states require a waiting period after written, informed consent is required.<sup>803</sup> This is in recognition of the permanent and generally irreversible nature of the procedure and the potential psychological sequelae. Similarly, an abortion is a permanent and irreversible termination of one's offspring, potentially fraught with similar ills. Surely a waiting period would be within the state power. However, even a twenty-four hour waiting period was struck down by the *Akron* Court.<sup>804</sup>

Ironically, the reasoning in *Akron* was that "[t]he decision

790. *Id.* at 351-52.

791. *Dent v. West Virginia*, 129 U.S. 114, 122 (1889).

792. *Watson v. Maryland*, 218 U.S. 173, 176 (1910).

793. *Id.*

794. *Jipping*, *supra* note 778, at 353.

795. *Id.* at 353-54.

796. *Id.*

797. *Id.* at 354-55.

798. *Id.* at 355-56.

799. COLO. REV. STAT. § 25-6-102(6) (1982); CONN. GEN. STAT. ANN. § 45-78q (West 1981); DEL. CODE ANN. tit. 16, § 5702 (Supp. 1988); GA. CODE ANN. § 31-20-2 (1985); KY REV. STAT. ANN. § 212.345 (Michie/Bobbs-Merrill 1983); ME. REV. STAT. ANN. tit. 34-B, § 7004 (1988); N.C. GEN. STAT. § 90-271 (1986); OR. REV. STAT. § 435.305 (1985); TENN. CODE ANN. § 68-34-108 (1986); UT. CODE ANN. § 64-10-3 (1987); VA. CODE ANN. § 54-325.9 (1982); W. VA. CODE ANN. § 16-11-1 (1985).

800. *See, e.g.*, COLO. REV. STAT. § 25-6-102(6) (1982).

801. GA. CODE ANN. § 31-20-2 (1985).

802. *Id.*

803. KY. REV. STAT. ANN. § 212.347 (Michie/Bobbs-Merrill 1983) (24 hrs.); VA. CODE ANN. § 54-325.9 (1982) (30 days for persons who are neither natural nor adoptive parents).

804. *Akron*, 462 U.S. at 450.

whether to proceed with an abortion is one as to which it is important to 'affor[d] the physician adequate discretion in the exercise of his medical judgment.'"<sup>805</sup> The Court added, "In accordance with the ethical standards of the profession, a physician will advise the patient to defer the abortion when he thinks this will be beneficial to her."<sup>806</sup>

*c. Nature of abortion.* One commentator has noted that, while abortion is a medical procedure in that a physician must perform it, it is not medically indicated in ninety-eight percent of abortion cases.<sup>807</sup> Thus, despite the fact that abortion is one of the most common surgical procedures today, in only a small fraction of cases is it indicated for physical or psychological health reasons.<sup>808</sup> It most correctly compares to elective surgery.<sup>809</sup> As noted by one writer, the result of this is that "the physician's special training and judgment are obviously less important in the abortion context than with most other medical procedures."<sup>810</sup>

The Court has recognized the generally non-medical reasons for abortion in its opinions. In *Bolton*, the Supreme Court gave the concept of health a very broad definition to include such items as family and work concerns—whatever related to "well-being."<sup>811</sup> Thus, in finding reasons for women to have abortions, the Court has given health the broadest possible interpretation. By contrast, when considering health in the context of the state's compelling interest in protecting the health of women considering or procuring abortions, the Court has adopted a very narrow view of health. This "dichotomous definition of 'health' lies at the heart of [the Supreme Court's] inappropriate review of informed consent statutes."<sup>812</sup>

Before proceeding to the topic of informed consent, it should be observed that the nature of abortion as predominantly an elective procedure, in the usual sense of the term, makes the extreme deference to the special diagnostic and treatment skills of physicians inappropriate. In the context of assembly line clinics, the physician is often a mere technician, not the noble healer depicted in the portrayals by the Supreme Court, in need of wide discretion to ply his profession. In any event, the great deference and discretion provided is inconsistent with the usual

805. *Id.* (quoting *Colautti v. Franklin*, 439 U.S. 379, 387 (1979)).

806. *Id.* Surely the Court's viewpoint ignores the prevalence of abortion clinics run with a profit motive.

807. Jipping, *supra* note 778, at 372.

808. *Id.* at 373.

809. *Id.*

810. *Id.* at 373-74.

811. *Bolton*, 410 U.S. at 192.

812. Jipping, *supra* note 778, at 374.

state police power in contexts other than abortion.

### 3. *Informed consent*

As noted in Section II-C of this article, Pennsylvania passed provisions requiring neutral information to be provided to women seeking abortions concerning such things as potential risks and the availability, if desired, of materials explaining alternatives to abortion and fetal characteristics at various stages. The appellate court in the case of *Thornburgh* invalidated all of these provisions on the basis of *Akron*.<sup>813</sup>

The Supreme Court likewise struck down the statutes, claiming they were designed to persuade women to withhold consent,<sup>814</sup> that they “intrude[d] upon the discretion of the pregnant woman’s physician,”<sup>815</sup> that the material depicting fetal development at two-week stages was overinclusive,<sup>816</sup> and that it was contrary to “accepted medical practice.”<sup>817</sup> The Court declared the provisions could not “be saved by any facts that might be forthcoming at a subsequent hearing.”<sup>818</sup>

In *Danforth*, the Supreme Court said a state may require informed, written consent to an abortion.<sup>819</sup> The opinion said the allowable information requirement consisted of “what would be done and its consequences.”<sup>820</sup> In *Akron*, the Court limited the state by saying it may not require the physician to deliver information designed to influence the woman’s choice.<sup>821</sup> The *Akron* Court went on to say that “the state legitimately may seek to ensure that [the decision] has been made ‘in light of all the attendant circumstances—psychological and emotional as well as physical—that might be relevant to the well-being of the patient.’”<sup>822</sup> The *Akron* Court also indicated that statutes describing the information to be disclosed in general terms would be permissible.<sup>823</sup>

The Pennsylvania statutes, at issue in *Thornburgh*, clearly fit within the permissible range allowed by the Supreme Court’s prior decisions. There was no speculation on when life begins, nor over the

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813. American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283, 295-96 (3d Cir. 1984) *rev’d* 476 U.S. 747 (1986); Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 444-45 (1983).

814. *Thornburgh*, 476 U.S. at 764.

815. *Id.* at 762.

816. *Id.*

817. *Id.*

818. *Id.* at 764. *Thornburgh* was on appeal from a granting of a preliminary injunction.

819. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 67 (1976).

820. *Id.*

821. Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 443-44 (1983).

822. *Id.* at 443 (quoting Colautti v. Franklin, 439 U.S. 379, 387, 394 (1979)).

823. *Id.* at 445, 447.



probable characteristics of a specific fetus, nor was abortion presented as a particularly dangerous surgery. These were the problems found objectionable in *Akron*.<sup>824</sup> The Pennsylvania regulations required the presentation of objective, verifiable, and relevant information. Specifically, Pennsylvania required that a woman be informed of who will perform the abortion.<sup>825</sup> This was a reasonable requirement. Another section required that a woman be advised "that there [might] be detrimental physical and psychological effects which were not accurately foreseeable."<sup>826</sup> This provision was carried forward from a prior statute, which was upheld against this same attack, by the Supreme Court, in *Franklin v. Fitzpatrick*.<sup>827</sup> The order in *Fitzpatrick* specifically cited *Danforth* as controlling. Pennsylvania also required that a woman be given "medically accurate" information about the risks of abortion and childbirth.<sup>828</sup> This seems a mere codification of what the Court specifically allowed in *Danforth* and *Akron*. A woman was also to be advised of the probable gestational age of her fetus.<sup>829</sup> This is non-judgmental, relevant information which is certainly not objectionable under the *Akron* test. Finally, information of assistance available for the childbirth option was to be offered to the woman.<sup>830</sup> Her receipt and reading of this material was purely optional and obviously relevant to her choice.<sup>831</sup>

As Justice White stated in his dissent, "One searches the majority's opinion in vain for a convincing reason why the apparently laudable policy of promoting informed consent becomes unconstitutional when the subject is abortion."<sup>832</sup> He rejected the majority reliance on *Akron* as controlling in striking down the provisions, because the provisions were fundamentally different.<sup>833</sup> The other three reasons the majority cited were equally unconvincing to Justice White.

First, the fact that the information might be irrelevant to some decisions was not controlling.<sup>834</sup> Legislators are allowed rational generalizations where there is no impingement on a fundamental right.<sup>835</sup> In this case, there was no infringement, because the woman's right to

824. *Id.* at 443-44.

825. 18 PA. CONS. STAT. ANN. § 3205(a)(1)(i) (Purdon 1983).

826. *Id.* § 3205(a)(1)(ii).

827. *Franklin v. Fitzpatrick*, 428 U.S. 901 (1976).

828. 18 PA. CONS. STAT. ANN. § 3205(a)(1)(iii) (1983).

829. *Id.* § 3205(a)(1)(iv).

830. *Id.* § 3205(a)(2)(i) & (ii).

831. *Id.* § 3205 (a)(2)(iii).

832. *Thornburgh*, 476 U.S. at 799 (White, J., dissenting).

833. *Id.* at 799-800 (White, J., dissenting).

834. *Id.* at 800 (White, J., dissenting).

835. *Id.* (White, J., dissenting)

choose was in no way affected.<sup>836</sup>

Second, the majority was concerned with anxiety and the possibility that the regulations might influence the woman.<sup>837</sup> As Justice White put it, "This is in fact their reason for existence, and . . . it is an entirely salutary reason."<sup>838</sup> The doctrine of informed consent requires that, if a woman would be influenced by information in making her decision, then she must have that information.<sup>839</sup> The purpose of *Roe* was "not maximizing the number of abortions, but maximizing choice."<sup>840</sup> Furthermore, Justice White adds, "[O]ur decisions in *Maher, Beal, and Harris v. McRae* all indicate that the State may encourage . . . childbirth . . . and the provision of accurate information regarding abortion and its alternatives is a reasonable and fair means of achieving that objective."<sup>841</sup>

Third, the majority said that the informed consent provisions intruded on the physician's discretion.<sup>842</sup> However, as Justice White pointed out that "the government is entitled not to trust members of a profession to police themselves . . ."<sup>843</sup> Further, the "regulation of the practice of medicine, like regulation of other professions and of economic affairs generally, was a matter peculiarly within the competence of legislatures, and . . . such regulation was subject to review only for rationality," argued Justice White.<sup>844</sup> Interestingly, the Court recently held that attorneys could be required to disclose more information than they were accustomed to or desirous of doing in advertising.<sup>845</sup> The normal rules were laid aside when it came to abortion and the medical profession.

The majority argued that the "anti-abortion character" of the regulations was evident, because the Commonwealth did not similarly require "disclosure of every possible peril" of other surgery.<sup>846</sup> However, were a legislature to do so, it would doubtless be upheld, especially where there were findings of abuse by the medical profession.<sup>847</sup> Evi-

836. *Id.* at 800-801 (White, J., dissenting).

837. *Id.* at 763.

838. *Id.* at 801 (White, J., dissenting).

839. *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064; Appleton, *Doctors, Patients and the Constitution: A Theoretical Analysis of the Physician's Role in Reproductive Decisions*, 63 WASH. U.L.Q. 183, 211 (1985).

840. *Thornburgh*, 476 U.S. at 801 (White, J., dissenting).

841. *Id.* at 801-802 (White, J., dissenting).

842. *Id.* at 764.

843. *Id.* at 803 (White, J., dissenting).

844. *Id.* at 802 (White, J., dissenting).

845. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

846. *Thornburgh*, 476 U.S. at 764.

847. The Commonwealth was prepared to give such testimony at the trial of *Thornburgh*. Brief for Appellants at 45-48, *Thornburgh*, 476 U.S. 747. See also Brief for Gans, Carlson &

dence of abuse existed and should have been considered by the Court. Only a super-protected right would cause the Court to say that no evidence could change its mind.<sup>848</sup>

Further evidence of the super-protected nature of the abortion right is the fact that the Court was willing to reject the whole modern trend of informed consent law to strike down the Pennsylvania regulations.<sup>849</sup> The Supreme Court followed the "physician paternalism" model of informed consent, which allows physicians great discretion to disclose or not to disclose, based on the physician's perceptions of the patient's needs.<sup>850</sup> This model is particularly suspect in situations where the physician has a strong monetary interest in a particular outcome, such as in an "abortion mill."<sup>851</sup> In 1972, the widely respected and followed case of *Canterbury v. Spence*<sup>852</sup> brought a newly emerging model into prominence. This new model featured patient autonomy, which is, ironically, an interest allegedly at stake in *Roe*. The "patient autonomy" model was summarized in the *Canterbury* opinion as follows:

[T]he patient's right of self-decision shapes the boundaries of the duty to reveal. That right can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. The scope of the physician's communications to the patient, then, must be measured by the patient's need, and that need is the information material to the decision. Thus the test for determining whether a particular peril must be divulged is its materiality to the patient's decision.<sup>853</sup>

The deep respect and deference to the medical profession, which the Supreme Court has repeatedly expressed,<sup>854</sup> is not reflected in the informed consent decisions of the states. Twenty-eight of the jurisdic-

Dewing, Amici Curiae, at 2-5, *Thornburgh*, 476 U.S. 747 (testimony of women who had abortions and experienced medical misconduct in communication of information).

848. *Thornburgh*, 476 U.S. at 764 ("These statutory defects cannot be saved by any facts that might be forthcoming at a subsequent hearing.").

849. Brief for Gans, Carlson & Dewing, Amici Curiae, *supra* note 847, at 18-21.

850. *Id.*

851. There is also evidence that the decision to withhold information may not always be grounded in practical experience:

Available evidence indicates that the physicians' decisions to withhold information are based on hearsay rather than on actual experience with the effects of full disclosure and that the physician's own emotional reluctance to confront the patient with stark diagnoses and risks often prevents disclosure.

Note, *Restructuring Informed Consent: Legal Therapy For the Doctor-Patient Relationship*, 79 YALE L.J. 1533, 1566 (1970).

852. 464 F.2d 772 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1972).

853. *Id.* at 786-87.

854. *See, e.g., Roe*, 410 U.S. 113, *Akron*, 462 U.S. 416.

tions that have confronted the issue have rejected the pure "physician paternalism" model adopted by the Court.<sup>855</sup> The clear trend is to require the physician to inform patients of the facts, so that the patients may make the choice of whether to have treatment rather than have the doctor decide for them.<sup>856</sup>

Pennsylvania had firmly adopted the "patient autonomy" model.<sup>857</sup> As many states have done, Pennsylvania even rejected a "therapeutic" exception, which would otherwise permit the physician to withhold certain information, if the physician thought the patient should not hear it.<sup>858</sup> This sound rejection of paternalism would seem especially appropriate in the "women's rights" area of abortion. The Court's imposition of its own paternalism and that of doctors' strikes a dissonant chord in this setting.<sup>859</sup>

Since the state has a legitimate interest in the "potential life" of the fetus,<sup>860</sup> since several decisions have allowed the state to encourage childbirth,<sup>861</sup> and since the abortion right is "a negative one," not to be encouraged for its own sake,<sup>862</sup> the Court's talk of informed consent *discouraging* women from abortions seems strange. If there is something in the nature of the truth about the matter that discourages women from having abortions, perhaps the right itself ought to be questioned. It is certainly not something about which one should decide without all the facts. A woman who is told that the life within her is simply a mass of cells has not been afforded the opportunity to make an informed decision about abortion.<sup>863</sup> The right to bear a child is at least as fundamental as the right to an abortion, according to *Maher v. Roe*.<sup>864</sup> Informed consent provisions, such as Pennsylvania promul-

855. Brief for Gans, Carlson & Dewing, Amici Curiae, *supra* note 846, at 20.

856. *Id.*

857. *Id.*

858. *Id.* at 26.

859. Because abortion involves the taking of a life, it is an emotionally troubling issue. However, this does not justify deception regarding the true nature of the decision. Such deception deprives a woman of the right to make a truly informed choice. Yet, the evidence indicates that women are often not told the basic facts. *Bellotti*, 499 F. Supp. at 219. In *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 489 n.12 (1983), Justice Powell cited *The Abortion Profiteers*, a Pulitzer Prize-winning newspaper series on the abuses and manipulation found in the medical profession practicing abortions. See *supra* notes 1035-56 and accompanying text.

860. *Roe*, 410 U.S. at 163.

861. *Thornburgh*, 476 U.S. at 801 (White, J., dissenting) ("Moreover, our decisions in *Maher*, *Beal*, and *Harris v. McRae* all indicate that the State may encourage women to make their choice in favor of childbirth . . .").

862. *Id.* at 797 (White, J., dissenting).

863. See, e.g., Brief for Gans, Carlson & Dewing, *supra* note 847, at 2-5 (where the unborn child was called "a mass of cells," the "product of conception," and other euphemisms avoiding its true nature).

864. 432 U.S. 464, 472 n.7 (1977).

gated, preserve the choice. Amazingly, the Court has rejected this core right established by *Roe*.

Chief Justice Burger, who was moved to leave the majority and to call for the reexamination of *Roe* by the extremity to which the Court has gone, put the matter well:

[T]oday the Court astonishingly goes so far as to say that the State may not even require that a woman contemplating an abortion be provided with accurate medical information concerning the risks inherent in the medical procedure which she is about to undergo . . . . *Can anyone doubt that the State could impose a similar requirement with respect to other medical procedures?* . . . .

. . . Can it possibly be that the Court is saying that the Constitution forbids the communication of such critical information to a woman? We have apparently already passed the point at which abortion is available merely on demand. If the statute at issue here is to be invalidated, the "demand" will not even have to be the result of an informed choice.<sup>865</sup>

Finally, because of the generally elective nature of abortion described earlier, the patient autonomy model is especially appropriate in the abortion context. The Court's heavy emphasis on the role of the physician "is misplaced since so much of what goes into and results from the abortion decision is non-medical in nature," observed Thomas Jipping in an article entitled *Informed Consent to Abortion: A Refinement*.<sup>866</sup> He continued, "[T]he Court's hostility to state measures designed to ensure informed consent to abortion is inappropriate" for several reasons, including the fact that "it looks at the physician's discretion rather than the woman's decision."<sup>867</sup>

Justice Stevens declared in *Danforth*, that "even doctors are not omniscient; specialists in performing abortions may incorrectly conclude that the immediate advantages of the procedure outweigh the disadvantages . . . ." He added, "In each individual case factors much more profound than a mere medical judgment may weigh heavily in the scales."<sup>868</sup>

The reasons why the patient autonomy model is especially appropriate in the abortion context may be briefly summarized. The nature of abortion supports the reasonable patient model of informed consent for at least two reasons. The factors that prompt women to consider the

865. *Thornburgh*, 476 U.S. at 783-84 (Burger, C.J., dissenting) (emphasis added).

866. Jipping, *supra* note 778, at 378.

867. *Id.*

868. *Danforth*, 428 U.S. at 104 (Stevens, J., dissenting).

abortion option are almost exclusively non-medical in nature<sup>869</sup> and, therefore, the physician's particular skill and exclusive knowledge are not implicated. Second, the abortion right itself, though not based on an absolute right of control over one's own body, nonetheless is a right of personal choice. Autonomy of decisionmaking is the most important facet of that right. This is the very basis of the reasonable patient model.<sup>870</sup>

The Supreme Court's rejection of the states' police power to regulate the practice of medicine, and the rejection of the patient autonomy model of informed consent, in an area where it is particularly appropriate, is truly out of step with the rest of the law. Even within abortion law, a glaring disparity may be seen between the concept of health employed to allow abortions and the same concept when considered in the context of giving informed consent. Such inconsistent treatment may also be seen in the Court's treatment of recordkeeping.

#### 4. *Records*

The *Thornburgh* case provided another example of the Supreme Court's invasion of the states' traditional police power to regulate the medical profession. As with the informed consent usurpation, the one involving recordkeeping was without warrant.

The Pennsylvania Act, at issue in *Thornburgh*, required physicians to provide reports with a variety of data for statistical purposes.<sup>871</sup> Required information included: physician's name, location of facility, woman's age, race and marital status, type of abortion procedure, and any complications.<sup>872</sup> Also included was a report of the basis for the physician's determination that the fetus was not viable "or that the abortion was necessary to preserve maternal health."<sup>873</sup> The court of appeals invalidated these requirements, because they were too extensive and complicated, and, hence, were likely to increase the cost of an abortion and possibly have a chilling effect on physicians' willingness to perform abortions.<sup>874</sup> The Supreme Court affirmed the appellate court, but on a different rationale. It found that "[i]dentification [was] the

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869. Torres & Forrest, *Why Do Women Have Abortions?*, 20 FAM. PLAN. PERSPECT. 169 (1988).

870. See Jipping, *supra* note 778, at 377-78.

871. 18 PA. CONS. STAT. ANN. § 3214 (Purdon 1983).

872. *Id.*

873. *Id.* § 3211.

874. American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283, 301-02 (3d Cir. 1984) *rev'd* 476 U.S. 747 (1986). *But see* Brief for the United States, *supra* note 35, at 9-10.

obvious purpose of these extreme reporting requirements.”<sup>875</sup>

There was nothing in the record to support such a finding.<sup>876</sup> In fact, the statute required the avoidance of identification by requiring that, although the reports were to be made available to researchers for public inspection, they were to be “made available . . . in a form which [would] not lead to the disclosure of the identity of any person filing a report.”<sup>877</sup> The district court had specifically “found that ‘the requirements of confidentiality . . . regarding the identity of both patient and physician prevent[ed] any invasion of privacy which could present a legally significant burden on the abortion decision.’”<sup>878</sup>

Rather than finding flaws in the district court’s conclusion, the Court merely substituted its own finding.<sup>879</sup> This was a clear violation of Federal Rule of Civil Procedure 52(a). Unless the trial court’s finding of fact is clearly erroneous, the reviewing court ought to defer to the trial court’s finding.<sup>880</sup> Even the Supreme Court ought to be bound by these rules.<sup>881</sup> To do otherwise is to introduce more inconsistency and unpredictability into the law.

The Court not only erred procedurally, by going to the merits and refusing to defer, but it erred substantively as well. As Justice White stated, it is “implausible that a particular patient could be identified . . . .”<sup>882</sup> The true purpose of the reporting was to ensure that physicians were not doing post-viability abortions except where medically indicated (as specifically allowed in *Roe*),<sup>883</sup> and to further its interests in maternal and fetal health by accurate record keeping.<sup>884</sup> Under the Court’s prior opinions, record keeping provisions were plainly constitutional. This was evident in *Danforth*<sup>885</sup> and *Planned Parenthood Association of Kansas City v. Ashcroft*.<sup>886</sup> The required information, at issue in *Thornburgh*, was of the type that doctors performing abortions would have readily available.<sup>887</sup> The material all fit on a single page

875. *Thornburgh*, 476 U.S. at 767.

876. *Id.* at 805 (White, J., dissenting).

877. 18 PA. CONS. STAT. ANN. § 3214(e)(2) (Purdon 1983).

878. *Thornburgh*, 476 U.S. 805 (White, J., dissenting) (quoting *Thornburgh*, 552 F. Supp. at 804).

879. *Thornburgh*, 476 U.S. at 805 (White, J., dissenting).

880. FED. R. CIV. P. 52(a).

881. *Thornburgh*, 476 U.S. at 805-06 (White, J., dissenting).

882. *Id.* at 806 (White, J., dissenting).

883. *Roe*, 410 U.S. at 165.

884. *Thornburgh*, 476 U.S. at 807-10 (White, J., dissenting); Brief for Bowes, M.D., and Schmidt, M.D., Amici Curiae, at 4, *Thornburgh v. American College of Obstetrics & Gynecologists*, 476 U.S. 747 (1986).

885. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 80-81 (1976).

886. 462 U.S. 476, 486-90 (1983) (plurality opinion) (pathology reports).

887. Brief for Bowes and Schmidt, *supra* note 884, at 14.

form,<sup>888</sup> and was a virtual adaptation of material used for reporting by the Centers for Disease Control.<sup>889</sup>

That the state may not further its compelling interests in fetal and maternal health by the use of standard demographic and medical categories in reports, where confidentiality is mandated<sup>890</sup> and cost would be minimal,<sup>891</sup> indicates again the extremes to which the Court is willing to go in "protecting" the abortion right.

In sum, as in every other area, the Court's treatment of the regulation of the medical profession by the states is anomalous. This special treatment confirms again the super-protected status of abortion.

#### D. *Procedural and Adjudicatory Issues*

The anomalies of abortion jurisprudence are also evident in the area of procedural and adjudicatory issues. The Supreme Court seems more eager to intervene in abortion cases than in other contexts.<sup>892</sup> Therefore, standard procedural rules and canons of adjudication are often treated differently in abortion cases. Epstein discussed this in his critique of *Roe*, focusing on the *Roe* Court's unorthodox handling of standing and mootness issues.<sup>893</sup> More recently, Justice O'Connor, in her *Akron* dissent, noted that the Court violated traditional principles of adjudication by reaching out to invalidate provisions of the Akron ordinance before they were construed by a state court.<sup>894</sup> In *Thornburgh*, Justice O'Connor devoted nearly her entire dissent to the majority's willingness to go to the merits before a trial was ever held or the facts developed.<sup>895</sup>

888. Brief for Appellants at 55a (addendum shows sample form).

889. Brief for Bowes and Schmidt, *supra* note 884, at 11.

890. 18 PA. CONS. STAT. ANN. § 3214(e)(2) (Purdon 1983).

891. Brief for Bowes and Schmidt, *supra* note 884, at 11. In *Ashcroft*, regulations producing an estimated increase in cost of \$19.40 per abortion were constitutionally permissible. *Ashcroft*, 462 U.S. 476, 490 (1983).

892. The Court seems especially eager to intervene in order to strike down restrictions on abortion. However, it can apply the procedural rules quite strictly and mechanically when not involved in eliminating restrictions. See, e.g., *Diamond v. Charles*, 476 U.S. 54 (1986). In *Diamond*, the Court held that an intervenor (physician) had no standing to appeal a case overturning abortion laws, where the state had not continued the appeal. While the decision seems reasonable, it stands in stark contrast to the flexible application of the rules when the Court needs to reach beyond the usual limits to consider a case to overturn abortion laws. This flexible approach is traceable throughout abortion jurisprudence and leaves one with the impression of result-orientation. See *infra* section III-D-3-(a).

893. Epstein, *supra* note 30, at 160-67.

894. *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 468-70 (1983) (O'Connor, J., dissenting).

895. *Thornburgh v. American College of Obstetrics & Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting).



Such looseness by the Supreme Court sets bad precedent for lower courts. As *amicus curiae* in *Thornburgh*, the United States noted that the lower courts have violated principles of sound adjudication in much the same manner as the Supreme Court.<sup>896</sup> For example, the courts commonly strain for unconstitutional interpretations of disputed statutes rather than seeking constitutional ones as required by the normal rule.<sup>897</sup>

This creates an impression that abortion jurisprudence is both result-oriented and policy-oriented. Moreover, it undermines procedural rules that serve a useful and important function.

### 1. *Standing in Roe*

The pattern for the approach of the abortion cases to procedural matters and principles of adjudication was set by *Roe*.<sup>898</sup> The *Roe* opinion discussed at length the standing of the parties and the question of mootness.<sup>899</sup> In the process, it deviated significantly from the norm.

The Court began by setting forth the standards and applying them to Jane Roe. As to standing, the Court asked whether Roe had "established that 'personal stake in the outcome of the controversy' that insure[d] that 'the dispute sought to be adjudicated [would] be presented in an adversary context and in a form historically viewed as capable of judicial resolution.'"<sup>900</sup>

In Justice Blackmun's majority opinion, the Court decided that there was "little dispute" that Roe's case, at the time of filing, "presented a case or controversy" and that as a "pregnant single woman thwarted by the Texas criminal abortion laws [she] had standing to challenge those statutes."<sup>901</sup> Justice Blackmun further noted that "[t]he 'logical nexus between the status asserted and the claim sought to be adjudicated' and the necessary degree of contentiousness [were] both present."<sup>902</sup>

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896. Brief for the United States, *supra* note 35, at 3.

897. *Id.* at 13-14.

898. *Roe*, 410 U.S. at 113.

899. *Id.* at 123-29.

900. *Roe*, 410 U.S. at 123 (citation omitted) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972); *Flast v. Cohen*, 392 U.S. 83, 101 (1968); *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

901. *Roe*, 410 U.S. at 124.

902. *Id.* (citations omitted) (quoting *Flast v. Cohen*, 392 U.S. 83, 102 (1968); *Golden v. Zwickler*, 394 U.S. 103 (1969)). A widely recounted story that Jane Roe was pregnant as a result of a gang rape has been recanted by Norma McCorvey, the woman using the Roe pseudonym, who now declares she was pregnant "through what [she] thought was love." USA Today, Sept. 9, 1987, at 4A. Similarly, a U.S. District Judge in Georgia recently ordered the records unsealed in *Doe v. Bolton*, 410 U.S. 179 (1973), revealing that a woman named Sandra Rae Bensing Cano was the Jane Doe in that case. Ms. Cano declares that she was used by Atlanta attorney Margie

The real question, according to the Court, was whether Roe's case was moot.<sup>903</sup> The normal rule for federal cases requires that "an actual controversy must exist at all stages of appellate or certiorari review, and not simply at the date the action is initiated," wrote Justice Blackmun.<sup>904</sup>

The Court easily bypassed the usual rule, however, by placing Roe's case within the exception for matters "'capable of repetition, yet evading review.'"<sup>905</sup> The *Roe* majority then concluded that Jane Roe had standing, a justiciable controversy, and no problem with mootness.<sup>906</sup>

Pitts Hames, who argued the case before the United States Supreme Court, for Ms. Hames' own purposes. Cano declared that she never wanted to abort her pregnancy at the time. In fact, she gave birth to a daughter and placed her for adoption. Ms. Cano's goal in getting the records unsealed was to aid her credibility as the true Jane Doe in order to further her efforts to halt legalized abortion. *Identity of Woman in Abortion Ruling Revealed*, San Francisco Banner, Jan. 6, 1989, at 4, col. 1-3.

903. *Roe*, 410 U.S. at 124-25.

904. *Id.* at 125.

905. *Id.* (quoting *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)).

906. *Id.* Epstein has challenged the Court's finding that Roe's case was not moot. "[T]o all appearances her case [was] one of classic mootness," he observed. Epstein, *supra* note 30, at 162. He argued that if, despite the ambiguity of the pleadings, Roe once had standing, it had been moot by the termination of her pregnancy. She was no longer pregnant by the time the Court heard her appeal. According to the Court, "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe*, 410 U.S. at 125 (citations omitted).

An exception to the mootness doctrine has been carved out by the Court. In *Southern Pacific Terminal Co.*, 219 U.S. at 515, the Court established an exception for events "capable of repetition, yet evading review." *Roe* applied this, without further analysis, to pregnancy. *Roe*, 410 U.S. at 125. Epstein argued that the earlier cases, on which the Court relied, had construed this exception to require a necessity element. Epstein, *supra* note 30, at 163. He claimed that only if "there was a danger that the Court could not deal with issues raised . . . if the present plaintiff were unable to proceed" would the Court utilize the exception. *Id.* at 163 & n.15.

There was no such danger in *Roe* as the issues could have been raised by a physician defending against criminal abortion charges, such as Dr. Hallford. *Id.* at 164. By the Court's prior decision, the physician might also raise *ius tertii*:

These doctors would not have interests in all respects identical with those of pregnant women, but since they too would seek to upset the statute on its face, it is hard to see what arguments would not be available to them that would be available to the women, particularly since the doctors could assert the rights of their patients in support of their own case.

*Id.* (citing *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965)).

Another available alternative was the *Does*. *Roe*, 410 U.S. at 127. The Court said they were unnecessary in view of the decision on Roe's standing and the identity of their interests. *Id.* However, the Court proceeded to analyze their standing anyway. The Court painted the *Does*' claim as speculative and resting on possible future events. *Id.* at 128.

It has been argued by Epstein that, under *United States v. SCRAP*, 412 U.S. 669 (1973), the *Does* might have been granted standing. Epstein pointed out a new test of standing that the Court had just developed in 1970. Epstein, *supra* note 30, at 166. This new test, developed in a decision about the Administrative Procedure Act, had two aspects: (1) The plaintiff must show an "injury in fact, economic or otherwise," and (2) "[T]he interest sought to be protected by the complaint

The *Roe* Court next turned to the standing of Dr. Hallford, a plaintiff-intervenor. The Court decided that, since he had already been indicted under the Texas abortion law, he must make his constitutional arguments in the state court.<sup>907</sup> The doctor sought to avoid the application of the abstention doctrine by distinguishing his present status from his status as a "potential future defendant" and assert only the latter.<sup>908</sup> The Court rejected the distinction and dismissed the doctor's appeal.<sup>909</sup>

The Court finally considered the Does, a childless married couple.<sup>910</sup> They asserted that their physician had warned the wife to avoid pregnancy for health reasons.<sup>911</sup> They argued that the Texas law inhibited normal marital relations for them because, were she to become pregnant, there would be no abortion readily available.<sup>912</sup> The Court rejected standing for the Does, because Mrs. Doe was not pregnant (and was childless), and any future possibility of harm or present marital unhappiness was either too speculative or too indirect.<sup>913</sup>

By the prior standards of the Court, Jane Roe ought not to have been granted standing. As Justice Rehnquist noted, there was nothing in the record to indicate that Roe was in her first trimester at any time "during the pendency of her lawsuit."<sup>914</sup> She conceivably could have

[was] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing Serv. v. Camp*, 397 U.S. 150, 152-53 (1970).

As to the first question, regarding damages and the remoteness problem, Epstein cited the case of *SCRAP*. Epstein, *supra* note 30, at 166; *SCRAP*, 412 U.S. at 669. As *SCRAP* was decided in the same year as *Roe*, it should provide an accurate contemporary indication of the Court's thinking as to remoteness. In *SCRAP*, the Court decided a group of students had standing, because an ICC rate increase for railroads hauling goods, which could include recyclable materials, might lead to increased preference for nonrecyclable containers, which could lead to an increase of litter, which could lead to clutter in the Washington parks, which would offend the sensibilities of these students. *SCRAP*, 412 U.S. at 669-70. In that case, the Court also noted that a "trifle" would be adequate for an "interest." *Id.* at 689 n.14. The Does arguably had a trifle of an interest. As to the second part of the test, the Does fell within "the class of persons whose interests [were] arguably regulated by the statute." Epstein, *supra* note 30, at 167. But, as now Justice Antonin Scalia argued in 1983, *SCRAP* itself was wrongly decided. Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 890-898 (1983).

It is generally accepted, however, that an exception to the mootness doctrine, for events "capable of repetition yet evading review," is necessary. Pregnancy is certainly such an event. The present problem is that the Court no longer examines the issue. It should at least explain the application of the doctrine to cases involving statutes which do not actually ban abortion, such as fetal disposal and parental notification (for minors) statutes. The doctrine may have no applicability in such contexts.

907. *Roe*, 410 U.S. at 125-26.

908. *Id.* at 126.

909. *Id.* at 127.

910. *Id.*

911. *Id.*

912. *Id.* at 128.

913. *Id.*

914. *Id.* at 171 (Rehnquist, J., dissenting).

been in her last trimester when the complaint was filed.<sup>915</sup> Under *Roe*, the state could proscribe abortion after viability, except for a pregnancy threatening the health or life of the mother, which was not alleged. Thus, Jane Roe may never have come within the constitutionally protected realm where she had a fundamental right to choose an abortion.

The Court used this "hypothetical lawsuit"<sup>916</sup> as "a fulcrum"<sup>917</sup> to strip any significant abortion restrictions from the first trimester.<sup>918</sup> By so doing, the Court played fast and loose with the standing rules. It also violated another important principle. As Justice Rehnquist noted, "the Court depart[ed] from the longstanding admonition that it should never 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"<sup>919</sup>

Richard Epstein has argued that "the 'concreteness' which compliance with the standing requirement is said to bring to a lawsuit" was contrary to the Court's sweeping intent for its pronouncement.<sup>920</sup> He noted the Court's view of "constitutional litigation as a means of settling the great conflicts of the social order."<sup>921</sup> With this "level of aspiration," he reasoned, "the 'concreteness' of a factual situation may well prove to be an embarrassment that can only work to limit the comprehensive sweep of the Court's pronouncements, for the details of a case could well reveal narrow grounds for a decision on the merits."<sup>922</sup> He concluded that the only way to tell that the standing requirement was met, was "because it [was] there."<sup>923</sup> That is hardly the sort of reasoning one is entitled to expect from the Supreme Court of the United States.

The impression left by the treatment of standing in *Roe* was that ends were more important than means. Careful craftsmanship was lacking in this area, as it was elsewhere in the opinion.

Unfortunately, this established a precedent of procedural laxity often followed by the lower courts and by the Supreme Court itself. The Fifth Circuit observed that "the Supreme Court has visibly relaxed its traditional standing principles in deciding abortion cases," and proceeded to employ the lowered standards itself.<sup>924</sup> Likewise, the Sixth

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915. *Id.* (Rehnquist, J., dissenting).

916. *Id.* at 172 (Rehnquist, J., dissenting).

917. *Id.* at 171 (Rehnquist, J., dissenting).

918. *Id.* at 171-72 (Rehnquist, J., dissenting).

919. *Id.* at 172 (Rehnquist, J., dissenting) (citations omitted).

920. Epstein, *supra* note 30, at 161.

921. *Id.*

922. *Id.*

923. *Id.* at 162.

924. *Margaret S. v. Edwards*, 794 F.2d 994, 997 (5th Cir. 1986).

Circuit cited the Supreme Court's laxity in procedural matters as authority for its own laxness in applying standing principles to abortion cases.<sup>925</sup> This use of precedent to justify procedural laxity and the violation of other procedural precedents is unique to abortion jurisprudence.

## 2. *A subsequent pattern*

The *Roe* approach to procedural matters was followed in many subsequent Supreme Court and lower court cases. A brief overview of some recent irregularities will indicate the pattern.<sup>926</sup>

In *Thornburgh*, the pervasive eagerness to strike down abortion regulations was clearly visible. Justice O'Connor criticized the Court's willingness to go to the merits on an appeal from a preliminary injunction.<sup>927</sup> She concluded: "If this case did not involve state regulation of abortion, it may be doubted that the Court would entertain, let alone adopt, such a departure from its precedents."<sup>928</sup> Of course, this irregularity originated with the Court of Appeals for the Third Circuit, indicating that the trend extends to the lower courts.<sup>929</sup>

In addition, *Thornburgh* violated the usual rule of construing statutes in a constitutional manner where possible. It seemed rather to place the worst possible construction on the statute. For example, the Pennsylvania statute required the attendance of a second physician at abortions after viability.<sup>930</sup> It contained no explicit exception for medical emergencies. A like provision in *Ashcroft* had no such explicit section either.<sup>931</sup> In *Ashcroft*, the Court inferred such an exception and upheld the statute.<sup>932</sup> The Third Circuit refused to do so in *Thornburgh*, despite an initial provision in the same section providing a "complete defense to any charge" under "*this section*," if "the abortion *was necessary to preserve maternal life or health*."<sup>933</sup> The Supreme Court affirmed the Court of Appeals.<sup>934</sup>

925. *Planned Parenthood Ass'n v. Cincinnati*, 822 F.2d 1390, 1396 & n.4 (6th Cir. 1987).

926. Of course, individual courts and cases may be exemplary in handling these matters. What is argued here is a pattern of greater laxity regarding abortion cases in the interest of striking down regulatory statutes.

927. *Thornburgh v. American College of Obstetrics & Gynecologists*, 476 U.S. 747, 815 (1986) (O'Connor, J., dissenting).

928. *Id.* at 826.

929. *American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283, 290 (3d Cir. 1984), *aff'd*, 476 U.S. 747 (1986).

930. 18 PA. CONS. STAT. ANN. § 3210(c) (Purdon 1983).

931. *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 485 & n.8 (1983).

932. *Id.*

933. 18 PA. CONS. STAT. ANN. § 3210(a) (Purdon 1983) (emphasis added).

934. *Thornburgh v. American College of Obstetrics & Gynecologists*, 476 U.S. 747, 771

The 1983 case of *Akron* contained a variety of irregularities. The Court noted the abstention doctrine but refused to follow it.<sup>935</sup> Rather, it chose to assume that the Ohio state judiciary would impose an unconstitutional construction on the parental notification ordinance for minors. As the dissent noted, this was inappropriate because it violated the independence of state courts.<sup>936</sup> In violating the abstention doctrine, the Court abandoned its more principled approach in *Bellotti v. Baird* (*Bellotti (I)*).<sup>937</sup> In *Bellotti (I)*, the Court held that the district court should have abstained from deciding the constitutionality of a parental notification statute until the state supreme court had construed it.<sup>938</sup>

The *Akron* Court also declined to follow the rule requiring constitutional construction of statutes where fairly possible. The Akron ordinance required physicians to "insure that the remains of the unborn child are disposed of in a humane and sanitary manner."<sup>939</sup> The Court of Appeals found the word "humane" impermissibly vague and declined to sever it.<sup>940</sup> The Supreme Court affirmed.<sup>941</sup> The city of Akron argued that its intent was merely to prevent dumping of fetuses on garbage piles. Such a construction clearly was possible from the terms of the statute and from *Planned Parenthood Association v. Fitzpatrick*,<sup>942</sup> where a humane disposal provision was upheld.<sup>943</sup>

The development of other examples below will further demonstrate the pattern. For example, the employment of such doctrines as vagueness to strike down abortion regulations is quite remarkable in its pervasiveness.

### 3. *General rules and special abortion rules*

As John Hart Ely proclaimed in 1973, the Supreme Court has granted the abortion right a "super-protected" status.<sup>944</sup> The following discussion demonstrates that "super-protected" status as it is evidenced in three areas: (1) standing, (2) constitutional adjudication, and (3) the judicial rush to judgment. In each section, the general rules will be compared with their usage in abortion jurisprudence.

(1986). Further examples of this pattern in *Thornburgh* will be found below.

935. *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 440-41 (1983).

936. *Id.* at 470 (O'Connor, J., dissenting).

937. *Bellotti v. Baird*, 443 U.S. 622 (1979).

938. *Id.* at 151.

939. *Akron*, 462 U.S. at 451.

940. *Id.*

941. *Id.*

942. 401 F. Supp. 554 (E.D. Pa. 1975), *summarily aff'd sub nom.* *Franklin v. Fitzpatrick*, 428 U.S. 901 (1976).

943. *Id.* at 573. Further discussion of this matter may be found in text below.

944. Ely, *supra* note 24, at 935.

a. *Standing*. As set forth in detail above, the *Roe* Court found standing for Jane Roe. She had not alleged that, at any time during the pendency of her lawsuit, she was within a period of her pregnancy which the state could not regulate by proscribing abortion (except for health reasons, which were not alleged). Nevertheless, the Court granted her standing. This violated the general rule that one must at some time during the legal proceeding come within the constitutionally protected realm in order to have standing.<sup>945</sup>

The standing of physicians to challenge laws restricting abortion has been automatic since *Doe v. Bolton*.<sup>946</sup> In *Bolton*, the district court had denied the physicians standing, relying primarily on *Poe v. Ullman*.<sup>947</sup> In *Poe*, only one prosecution had taken place since the passage of the challenged contraceptive regulation statute in 1897.<sup>948</sup> Enforcement of the more recent Georgia abortion statute at issue in *Bolton* had been more active.<sup>949</sup> Therefore, the *Bolton* Court held that the case was more like *Epperson v. Arkansas*,<sup>950</sup> where a school teacher was allowed to challenge an anti-evolution statute, though she was not yet criminally charged.<sup>951</sup>

More troubling was the Supreme Court's decision to allow physicians to assert the rights of their patients in abortion suits. The problems with this include a potential conflict of interest between the physician and his patient, and a violation of the usual rules for asserting *jus tertii* (the right of a third party). *Singleton v. Wulff*<sup>952</sup> decision demonstrated the problem clearly.

In *Singleton*, the Court allowed physicians to raise the rights of their patients in an action challenging Missouri's refusal to fund abortions not "medically indicated" under its Medicaid program.<sup>953</sup> A weak plurality was mustered with four justices favoring *jus tertii* standing

945. The Court in *Roe* allowed or disallowed standing for women based upon whether they were pregnant. Thus, Jane Roe had standing because of her pregnancy. *Roe*, 410 U.S. at 124. However, since the Does were not expectant parents, their claim was rejected as too speculative or too indirect. *Id.* at 127-28. This minimal requirement of pregnancy has been followed by the lower courts when considering the standing of women to challenge abortion regulations. See, e.g., *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123, 1128 (N.D. Ohio 1986) (denying standing to a minor female who did not allege her pregnancy in challenging a parental notification statute). For a good exposition of the standing rules, see *Haskell v. Washington Township*, 635 F. Supp. 550, 551-55 (S.D. Ohio 1986).

946. 410 U.S. 179 (1973).

947. *Id.* at 188; *Poe v. Ullman*, 367 U.S. 497 (1961).

948. *Bolton*, 410 U.S. at 188.

949. *Id.* at 188-89.

950. 393 U.S. 97 (1968).

951. *Bolton*, 410 U.S. at 189.

952. 428 U.S. 106 (1976).

953. *Id.* at 108.

and one concurring only because the physicians already had standing of their own (while questioning the logic of the other four).<sup>954</sup>

Justice Blackmun, writing the plurality opinion, noted the rule that "[f]ederal courts must hesitate before resolving a controversy . . . on the basis of the rights of third persons . . . ." <sup>955</sup> His first reason was that unnecessary adjudication of such rights should be avoided and the holders of the rights might not wish to assert them or might be able to enjoy them regardless of the litigation outcome.<sup>956</sup> His second reason was that the best defenders of *jus tertii* were usually the third parties themselves.<sup>957</sup> Third parties might have a preference for defending their own rights, as they would be bound by *stare decisis*.<sup>958</sup>

Justice Blackmun noted that from these two considerations came the general rule: "Ordinarily one may not claim standing in this Court to vindicate the constitutional rights of some third party."<sup>959</sup> However, noted Justice Blackmun, a general rule should not be applied when its underlying rationale is missing.<sup>960</sup> There are two elements the Court examines to determine if an exception should be made. First, the Court examines the relationship of the litigant and the third party to see if the latter's "right is inextricably bound up with the activity the litigant wishes to pursue."<sup>961</sup> Second, the Court determines whether "some genuine obstacle" exists to prevent the third party from asserting its own right.<sup>962</sup>

The first test, regarding the relationship of the parties, eliminates the possibility that *jus tertii* will not be affected by the result of the lawsuit.<sup>963</sup> It may also show that the litigant will be fully (or nearly) as effective a proponent of the third party's right as the third party would be.<sup>964</sup> As authority, the Court cited *Griswold v. Connecticut*,<sup>965</sup> where physicians were allowed to assert the privacy rights of married persons to receive advice on contraceptives. *Griswold* emphasizes the "confidential" relationship and the likelihood that the married couple's rights

954. *Id.* at 121-22 (Stevens, J., concurring).

955. *Id.* at 113.

956. *Id.* at 113-14 (citing *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring)).

957. *Singleton*, 428 U.S. at 114.

958. *Id.*

959. *Id.* (citing *McGowan v. Maryland*, 346 U.S. 249, 255 (1953), quoting *Barrows v. Jackson*, 366 U.S. 420, 429 (1961); *Flast v. Cohen*, 392 U.S. 83, 99 n.20 (1968)).

960. *Id.* at 114.

961. *Id.*

962. *Id.* at 116.

963. *Id.* at 115.

964. *Id.*

965. 381 U.S. 479 (1965).



would "be diluted or adversely affected" if not asserted in the suit.<sup>966</sup> The *Singleton* Court also cited *Eisenstadt v. Baird*,<sup>967</sup> which focused on the "advocate" relationship and the effect on the third party,<sup>968</sup> and *Barrows v. Jackson*,<sup>969</sup> which allowed a property owner to raise *ius tertii* in challenging a racially restrictive covenant. Justice Blackmun also observed that *Doe v. Bolton*,<sup>970</sup> which allowed physicians to assert the rights of their patients, would be controlling were *Bolton* not based on a criminal statute.<sup>971</sup> Applying this principle, Justice Blackmun argued that a physician was essential to a safe abortion and a poor woman could not obtain a physician unless the state paid for one.<sup>972</sup> Moreover, the abortion decision was to intimately involve the physician, under *Roe*.<sup>973</sup> Therefore, Justice Blackmun concluded, the physician was uniquely qualified to litigate the right of the patient to make the abortion decision.<sup>974</sup>

The second test is whether a genuine obstacle exists to the third party's own assertion of the right.<sup>975</sup> Such an obstacle suggests that the third party's absence from court is not an indication that his right is not truly at stake.<sup>976</sup> Justice Blackmun cited *NAACP v. Alabama*<sup>977</sup> as an example.<sup>978</sup> There the Court held that to require NAACP members to litigate their own rights would violate the right to anonymity for association members which was at issue in the case.<sup>979</sup> Justice Blackmun also cited *Eisenstadt*<sup>980</sup> and *Barrows*<sup>981</sup> as supporting this point.<sup>982</sup>

Applying this principle in *Singleton*, Justice Blackmun found two obstacles. First, a woman might be chilled from asserting her right by a desire to protect her privacy.<sup>983</sup> Second, a woman's claim suffered from "imminent mootness, at least in the technical sense."<sup>984</sup> Justice Blackmun acknowledged that these "obstacles" were not insurmountable, as

966. *Id.* at 481; *Singleton v. Wulff*, 428 U.S. 106, 115 (1976).

967. 405 U.S. 438, 445-46 (1972).

968. *Id.*; *Singleton*, 428 U.S. at 115.

969. 346 U.S. 249, 259 (1953), *Singleton*, 428 U.S. at 116.

970. 410 U.S. 179, 188-89 (1973).

971. *Singleton*, 428 U.S. at 115.

972. *Id.* at 117.

973. *Id.*; *Roe*, 410 U.S. at 153-56.

974. *Singleton*, 428 U.S. at 117.

975. *Id.* at 115-16.

976. *Id.* at 116.

977. 357 U.S. 449 (1958).

978. *Singleton*, 428 U.S. at 116.

979. *Id.*; *NAACP*, 357 U.S. at 459.

980. *Eisenstadt v. Baird*, 405 U.S. at 438, 446 (1972).

981. *Barrows v. Jackson*, 346 U.S. 249, 259 (1953).

982. *Singleton*, 428 U.S. at 116.

983. *Id.* at 117.

984. *Id.*

evidenced by the frequent use of pseudonyms, the *Roe* doctrine regarding events "capable of repetition yet evading review,"<sup>985</sup> and the employment of class actions.<sup>986</sup> Nevertheless, he decided that the physician could assert the rights of his patients.<sup>987</sup>

Justice Stevens was unconvinced by this logic but concurred, constituting a plurality to allow *jus tertii* assertion.<sup>988</sup> He did so because the doctors already had standing on their own.<sup>989</sup>

Four members of the *Singleton* Court forcefully rejected Justice Blackmun's argument. Justice Powell, author of the leading case on the matter, *Warth v. Seldin*,<sup>990</sup> wrote for the dissent. He argued that beyond the Article III question of power (present here) lay the prudential question of whose rights might be asserted.<sup>991</sup> The plurality, he noted, acknowledged the general *jus tertii* rule but purported to find an exception.<sup>992</sup> Justice Powell analyzed the plurality's precedents and rejected its result.<sup>993</sup>

In *Barrows*,<sup>994</sup> *NAACP*,<sup>995</sup> and *Eisenstadt*,<sup>996</sup> he observed, there was more than a "genuine obstacle," as the plurality had argued.<sup>997</sup> Rather, the facts of the cases indicated that assertion of *jus tertii* was appropriate when third party litigation was "in all practicable terms impossible."<sup>998</sup>

Moreover, Justice Powell argued, using the plurality's own "genuine obstacle" test did not result in proper assertion of the rights of a third party.<sup>999</sup> He pointed out the plurality's own confession that the obstacles were not insurmountable and, thus, were not significant enough to allow an exception to the general rule.<sup>1000</sup>

The *Singleton* plurality's primary reliance on the "confidential relationship" was also attacked by Justice Powell. He interpreted the

985. *Roe*, 410 U.S. at 124-25 (quoting *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 575 (1911)).

986. *Singleton*, 428 U.S. at 117.

987. *Id.* at 118.

988. *Id.* at 121-22.

989. *Id.*

990. 422 U.S. 490 (1975).

991. *Singleton*, 428 U.S. at 124 & n.3.

992. *Id.* at 125.

993. *Id.*

994. *Barrows v. Jackson*, 346 U.S. 249 (1953).

995. *NAACP v. Alabama*, 357 U.S. 449 (1958).

996. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

997. *Singleton*, 428 U.S. at 125-26.

998. *Id.* at 126. See Comment, *Singleton v. Wulff: Extension of the Right of Privacy Through Standing*, 55 DENVER L.J. 331, 339-42 (1978).

999. *Singleton*, 428 U.S. at 126.

1000. *Id.* at 126-27.

precedents cited by the plurality as only authorizing assertion of *jus tertii* where the state "directly interdicted the normal functioning of the physician-patient relationship by criminalizing certain procedures."<sup>1001</sup> Here, he argued, there was no direct interference, as neither patient nor doctor was forbidden to engage in abortions.<sup>1002</sup> Furthermore, the primary emphasis on the relationship in *Singleton* was in "marked contrast" to the subordinate position given the relationship in *Eisenstadt*.<sup>1003</sup> Justice Powell suggested this shift resulted "from the weakness of the argument that this litigation [was] necessary to protect third-party interests."<sup>1004</sup>

Rather than being logically related to *Barrows*,<sup>1005</sup> *Eisenstadt*,<sup>1006</sup> and *NAACP*,<sup>1007</sup> Justice Powell argued, the *Singleton* case was much closer to *Warth v. Seldin*.<sup>1008</sup> In *Warth*, taxpayers were not allowed to assert the rights of low-income persons partially because no obstacle prevented these persons from asserting their own rights.<sup>1009</sup>

The arguments of Justice Powell are the more persuasive. Under the plurality's "obstacle" test, one can find no "genuine obstacle." In fact, the Missouri medicaid statute provided a right to an administrative hearing for persons denied payment of claims.<sup>1010</sup> An adverse decision could be appealed.<sup>1011</sup> Thus, a ready mechanism existed for assertion of welfare recipients' claims.

Further, Justice Powell's approach of allowing the physician to assert his own rights, but not those of third parties, squares with *Moose Lodge No. 107 v. Irvis*.<sup>1012</sup> In *Irvis*, a guest of a lodge member was denied service. The guest was allowed to assert an equal protection claim regarding the lodge's treatment of guests. However, he was denied standing to attack the lodge's membership policies, because he had never applied for membership and could not assert *jus tertii*.<sup>1013</sup>

The *Bolton* decision, cited by the *Singleton* plurality as supporting a physician's right to assert *jus tertii*, did not use the causation test

1001. *Id.* at 128.

1002. *Id.* at 128-29.

1003. *Id.* at 127-28 n.5.

1004. *Id.*

1005. *Barrows v. Jackson*, 346 U.S. 249 (1953).

1006. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

1007. *NAACP v. Alabama*, 357 U.S. 449 (1958).

1008. 422 U.S. 490 (1975).

1009. *Id.* at 509-10; *Singleton*, 428 U.S. at 127 (citing for comparison *McGowan v. Maryland*, 366 U.S. 420, 430 (1961)).

1010. MO. REV. STAT. § 208.156 (Supp. 1975).

1011. *Id.* § 205.10(a)(5) (1973).

1012. 407 U.S. 163 (1972).

1013. *Id.* State action was found in the issuance of a liquor license.

established in the 1975 case of *Warth v. Seldin*.<sup>1014</sup> Had it been applied, as one commentator noted, the physicians would have had to establish "that a substantial probability existed that they would be prosecuted under the statute and that such harm would be alleviated if the doctors were successful in the suit."<sup>1015</sup> The causation test was ignored in the 1976 abortion cases of *Planned Parenthood of Central Missouri v. Danforth*<sup>1016</sup> and *Singleton v. Wulff*.<sup>1017</sup> The same commentator observed, "if the plaintiff's claims were subjected to the causation test, the plaintiffs should have been denied standing [in *Bolton*, *Danforth*, and *Singleton*]."<sup>1018</sup>

Another writer stated:

To obtain standing under this test the doctor would have to show that he had a pregnant patient who had asked for an abortion, that he had decided to perform the abortion, the patient was withholding consent or the doctor has tried to get the consent of a parent or spouse but has been unable to do so, and the only reason the patient has decided to forego the abortion is because of the statute. Additionally, the doctor must forego the abortion or risk the penalty. To meet the causation test the doctor will be required to show—as were the builders in *Warth*—that there is a 'specific project' involved which is 'currently precluded' by the statute.<sup>1019</sup>

Conversely, had the *jus tertii* rules used in the abortion context been applied, the builders in *Warth* would have been granted standing.<sup>1020</sup>

The arguments of dissenting Justice Powell in *Singleton*, with regard to the confidential nature of the physician-patient relationship, are also persuasive. Not only did the plurality incorrectly make the relationship the primary emphasis, but the precedents had not merged the physician and patient for constitutional purposes.<sup>1021</sup> The precedents clearly were distinguishable as they applied only in the criminal context and related to direct interference.<sup>1022</sup> The plurality argued that a less direct interference had been allowed as the basis for *jus tertii*

1014. 422 U.S. 490 (1975). *Bolton* set further bad precedent by allowing a plaintiff claiming no life or health threat to assert the rights of women with such threats. *Doe v. Bolton*, 410 U.S. 179, 222-23 (1973) (White, J., dissenting).

1015. Comment, *The Burger Court's Approach to Jus Tertii Standing*, 13 GONZ. L. REV. 961, 984 (1978).

1016. 428 U.S. 52 (1976).

1017. 428 U.S. 106 (1976).

1018. Comment, *supra* note 1015, at 985.

1019. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.00-3 (Supp. 1977) (quoting from *Warth v. Seldin*, 422 U.S. 490, 516 (1975)).

1020. Comment, *supra* note 1015, at 985; 3 K. DAVIS, *supra* note 1019, at § 22.00-4.

1021. *Singleton*, 428 U.S. at 128 (Powell, J., dissenting).

1022. *Id.* at 128-29.

standing in *Pierce v. Society of Sisters*.<sup>1023</sup> As Justice Powell noted, however, the issue of third-party standing was not addressed (or even mentioned) in that case.<sup>1024</sup> Moreover, the interference with private schooling “was as complete as if it had been proscribed,”<sup>1025</sup> as the statute at issue required the children to be in public school during school hours.<sup>1026</sup> The *Pierce* Court itself noted that “[t]he inevitable practical result” was the destruction of private schools.<sup>1027</sup>

Finally, the concept of “confidential relationship” is “analytically empty,” as Justice Powell asserted in *Singleton*.<sup>1028</sup> This would make the decision “difficult to cabin,” as there was little to distinguish the doctor from providers of other services.<sup>1029</sup> Justice Powell noted that this was especially so, “when one recognizes that, realistically, the ‘confidential’ relationship in a case of this kind often is set in an assembly-line type abortion clinic.”<sup>1030</sup> He saw little basis for *jus tertii* standing “based on nothing more substantial than a professional (or perhaps only an abortion-clinic) relationship and dimly perceived ‘obstacles’ to the rightholder’s own litigation.”<sup>1031</sup>

Thus, as Justice Powell observed, the Court violated a rule of self-governance by reaching unnecessarily to decide a difficult constitutional issue when “nothing more [was] at stake than remuneration for professional services.”<sup>1032</sup> In the process, the *Singleton* Court extended the right of privacy through an expanded view of standing.<sup>1033</sup>

The assembly-line abortion clinic raises another issue. Normally, one may only assert the rights of another where the interests of both coincide. Doctors have often been allowed to assert the rights of their patients because it was assumed the patients’ interest in getting well coincided with the doctors’ interest in promoting wellness. However, with the commercialization of abortion, questions have been raised as to whether a physician’s interest in financial gain coincides with his patient’s best interests. While the issue has been given short shrift by

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1023. 268 U.S. 510 (1925).

1024. *Singleton*, 428 U.S. at 129 n.6.

1025. *Id.*

1026. *Pierce*, 268 U.S. at 530.

1027. *Id.* at 534.

1028. *Singleton*, 428 U.S. at 130 n.7.

1029. *Id.* Any provider of services would now be able to claim standing for his customer’s rights, noted Justice Powell, “in an attack on a welfare statute that excludes from coverage his particular transaction.” *Id.* at 129-30.

1030. *Id.* at 130 n.7.

1031. *Id.*

1032. *Id.* at 129.

1033. Comment, *supra* note 998.

some courts,<sup>1034</sup> it is worth serious consideration.

In November, 1978, the *Chicago Sun-Times* began publication of a Pulitzer prize-winning series entitled "The Abortion Profiteers."<sup>1035</sup> It was a culmination of five months of investigation by the newspaper and the Better Government Association.<sup>1036</sup> Members of the investigation team had infiltrated six prominent abortion clinics.<sup>1037</sup> They had also investigated referral agencies and a laboratory that did work for the clinics.<sup>1038</sup> These six clinics accounted for more than half of the abortions in Illinois.<sup>1039</sup>

The reporters summarized their findings as follows:

- Dozens of abortion procedures performed on women who were not pregnant and others illegally performed on women more than 12 weeks pregnant.
- An alarming number of women who, because of unsterile conditions and haphazard clinic care, suffered debilitating cramps, massive infections and such severe internal damage that all their reproductive organs had to be removed.
- Incompetent and unqualified doctors, including moonlighting residents, medical apprentices and at least one physician who has lost his license in one state and faces revocation here.
- Doctors who callously perform abortions in an excruciating 2 minutes, when they should properly take 10 to 15 minutes, and doctors who don't even wait for pain-killing anesthetics to take effect.
- Referral services that, for a fee, send women to a disreputable Detroit abortionist, whose dog, to one couple's horror, accompanied the nurse into the operating room and lapped blood from the floor.
- Clinics that either fail to order critical postoperative pathology reports, ignore the results or mix up the specimens.
- Dangerously shoddy record keeping by aides who falsify records of patients' vital signs and who scramble or lose results of crucial lab tests.
- Counselors who are paid not to counsel but to sell abortions with sophisticated pitches and deceptive promises.<sup>1040</sup>

The reason for many of the problems was traced to greed. Since

1034. See *Wynn v. Scott*, 449 F. Supp. 1302, 1305 n.1 (N.D. Ill. 1978), *appeal dismissed sub nom. Carey v. Wynn*, 439 U.S. 8 (1978).

1035. The articles, by Zekman, Warrick, Koshner, McCahill, Warren, Sweet, Williams, Wheeler, and Hillman, extended from November 12 to December 6, 1978. Citations herein will be to a special reprint edition numbering forty-six pages. Hereinafter, it will be cited as *The Abortion Profiteers*.

1036. *The Abortion Profiteers*, *supra* note 1035, at 1.

1037. *Id.* at 2.

1038. *Id.*

1039. *Id.*

1040. *Id.* at 1-2.

they are paid by the number of abortions that they perform, doctors raced each other to see who could complete the most abortions.<sup>1041</sup> While safer clinics limited doctors to fifteen abortions per day,<sup>1042</sup> at the dangerous ones, individual doctors were chalking up forty per day.<sup>1043</sup> This speed was achieved at the expense of patient comfort, careful procedures, sterile environments, adequate counseling, and accurate record keeping.<sup>1044</sup>

Referral agencies received large fees for patients brought in while dispensing misleading information and providing pregnancy tests so haphazard that three samples of male urine were declared to show positive signs of pregnancy.<sup>1045</sup> A former worker on one of these hot lines declared, "Counseling? There was none. What we were doing there [was] selling abortions. We got no training except in what *not* to say. How not to use words like 'fetus' or 'kill' that might scare the customers away. Don't mention complications."<sup>1046</sup>

As noted in the series, "not all women who go to abortion clinics are sure they want abortions."<sup>1047</sup> Some have been "dragged" there by relatives or pressured by husbands or boyfriends.<sup>1048</sup> Recognizing this problem, the Illinois legislature required clinics to provide counseling.<sup>1049</sup> However, the investigation revealed that many of these counselors were taught to sell, not counsel.<sup>1050</sup> One administrator declared to an investigator who had infiltrated the staff, "We really have to sit on the phones back there and make appointments. Our fiscal year ends in September and we have to boost the figures. So go the extra mile."<sup>1051</sup>

One counselor said she was trained not to tell the patient the abortion would hurt, not to discuss the procedure or instruments in any detail, not to answer too many questions, and not to talk about birth control.<sup>1052</sup> The reason? All unnecessary corners had to be cut to maximize profits.<sup>1053</sup>

The investigation, therefore, revealed a conflict of interest between some doctors' greed and their patients' need. The deaths of twelve

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1041. *Id.* at 15.

1042. *Id.* at 35.

1043. *Id.* at 16.

1044. *Id.* at 18, 24-26.

1045. *Id.* at 21.

1046. *Id.* at 22 (emphasis in original).

1047. *Id.* at 33.

1048. *Id.*

1049. *Id.*

1050. *Id.*

1051. *Id.*

1052. *Id.*

1053. *Id.*

women<sup>1054</sup> and the maiming of others,<sup>1055</sup> unreported but discovered in the investigation, underscore this conflict. Doctors whose goal is to maximize personal profit by performing as many abortions as possible, and who encourage their staff "counselors" to sell abortions, are not appropriate parties to represent the rights of their patients.<sup>1056</sup>

Thus, the Court has distorted and expanded the usual standing rules to accommodate the abortion privacy right.<sup>1057</sup> This abortion distortion factor is also apparent in the Court's application of the rules of constitutional adjudication to abortion cases.

*b. Constitutional adjudication.* This subsection deals with three principles of constitutional adjudication. First is the principle that constitutional problems should be avoided in judicial decisions where possible. Special emphasis is placed upon the rule requiring construction of statutes which avoids their unconstitutionality where fairly possible. The second principle is the closely related one of construing statutes to uphold their constitutionality where a vagueness challenge is made. The third principle is the deference required of federal courts to lower courts, states, and legislatures, including the doctrine of abstention.

(1). *Avoiding constitutional issues.* The principle of avoiding constitutional issues was probably best summed up by Justice Brandeis in his famous concurrence to *Ashwander v. TVA*.<sup>1058</sup> Justice Brandeis listed seven rules which the Court had developed to avoid "passing upon a large part of all the constitutional questions pressed upon it for decision."<sup>1059</sup> Four of his rules were based on article III<sup>1060</sup> standing considerations. First, "[t]he Court [would] not pass upon the constitutionality of legislation in a friendly non-adversary, proceeding . . ."<sup>1061</sup> Second, "[t]he Court [would] not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'"<sup>1062</sup> Third, "[t]he Court

1054. *Id.* at 24. The deaths were the result of the abortions, but were unreported as such. *Id.*

1055. *Id.* at 16.

1056. The picture painted, in *Roe*, of a woman carefully weighing all the options, in consultation with her good-hearted family doctor, was unrealistic in the light of the way a majority of abortions were being performed in Illinois. The shift to clinics seems to be a national trend and not limited to Illinois. Interestingly, in *Charles v. Daley*, 749 F.2d 452, 462-63 (7th Cir. 1984), the Seventh Circuit decided the *Abortion Profiteers* series was irrelevant as evidence of the need to protect the state's interests in seeing that true informed consent was obtained.

1057. In 1987, a federal appellate court cited the *Singleton* rationale in giving a Planned Parenthood Clinic and its medical director standing to assert their patients' rights. *Planned Parenthood Ass'n of Cincinnati v. City of Cincinnati*, 822 F.2d at 1396 & n.4. It noted that this was a relaxation of the usual rules. *Id.*

1058. 297 U.S. 288, 346-48 (1936) (joined by Stone, Roberts, and Cardozo, J.).

1059. *Id.* at 346.

1060. U.S. CONST. art. III.

1061. *Ashwander*, 297 U.S. at 346.

1062. *Id.* (citations omitted).



[would] not pass upon the validity of a statute upon complaint of one who fail[ed] to show that he [was] injured by its operation."<sup>1063</sup> Fourth, "[t]he Court [would] not pass upon the constitutionality of a statute at the instance of one who [had] availed himself of its benefits."<sup>1064</sup>

Three of Justice Brandeis' rules were based on policy considerations developed by the Court itself. First, "[t]he Court [would] not 'formulate a rule of constitutional law broader than [was] required by the precise facts to which it [was] to be applied.'"<sup>1065</sup> Second, "[t]he Court [would] not pass upon a constitutional question although properly presented by the record, if there [was] also present some other ground upon which the case [might] be disposed of."<sup>1066</sup> If the Court could choose to decide a case on a constitutional ground or on a ground of statutory construction or general law, it should select the latter grounds.<sup>1067</sup> Third, "[w]hen the validity of an act of the Congress [was] drawn in question, and even if a serious doubt of constitutionality [was] raised, it [was] a cardinal principle that this Court [would] first ascertain whether a construction of the statute [was] fairly possible by which the question [might] be avoided."<sup>1068</sup>

These rules were quoted by the Court in *Rescue Army v. Municipal Court of Los Angeles*,<sup>1069</sup> where the Court added that the rules were employed to "avoid[] passing upon a large part of all the constitutional questions pressed upon it for decision . . . , notwithstanding conceded jurisdiction, until necessity compel[led] it in the performance of constitutional duty."<sup>1070</sup> "Like the case and controversy limitation itself and the policy against entertaining political questions," the Court declared, the avoidance principle "is one of the rules basic to the federal system and this Court's appropriate place within that structure."<sup>1071</sup>

This avoidance principle has been reflected in "numerous cases and over a long period."<sup>1072</sup> It has been repeated by the Supreme Court

1063. *Id.* at 347.

1064. *Id.* at 348.

1065. *Id.* at 347 (citations omitted).

1066. *Id.* at 347.

1067. *Id.*

1068. *Id.* at 348 (citations omitted). This principle applies to acts of state legislatures as well.

*See, e.g., Thornburgh*, 737 F.2d at 294.

1069. 331 U.S. 549 (1947).

1070. *Id.* at 569.

1071. *Id.* at 570.

1072. *Poe v. Ullman*, 367 U.S. 497, 503 (1961) (Frankfurter, J., plurality opinion). There has been controversy over particular applications of the principle, but not the principle itself. *See Mattiello v. Connecticut*, 4 Conn. Cir. Ct. 55, 225 A.2d 507, *appeal dismissed*, 395 U.S. 209 (1966); *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749, *vacated*, 350 U.S. 891 (1955) (per curiam); A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); Gunther, *The Subtle Vices of the "Passive Virtues" - A Comment on Principle and Expe-*

in cases involving state abortion laws.<sup>1073</sup> However, the avoidance principle has not been consistently employed in abortion jurisprudence. Most notable, of course, was the "hypothetical" case employed by the majority in *Roe*.<sup>1074</sup>

One of the avoidance rules often applicable in abortion jurisprudence has been the well-settled rule that federal courts should apply sympathetic constructions to state statutes in order to uphold their constitutionality.<sup>1075</sup>

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*diency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

1073. See, e.g., *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). The *Ashwander* avoidance principle was also recently cited with approval in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 117 (1984).

1074. See *supra* text accompanying notes 916-22.

1075. See, e.g., *Doe v. Bolton*, 410 U.S. 179, 191-92 (1973); *Thornburgh v. American College of Obstetrics & Gynecologists*, 476 U.S. 747, 294 (1986). Despite these common statements of the rule, one district court in *Henrie v. Derryberry*, 358 F. Supp. 719, 726 (N.D. Okla. 1973), and Justice Brennan, dissenting in *Broadrick v. Oklahoma*, 413 U.S. 601, 627 (1973), have used language seeming to indicate that a federal court may not "construe or narrow" a state enactment. Of course, in the same year, 1973, the Court in *Bolton* (with Justice Brennan joining the majority) "construed" (and used the term, "construed," itself) the word "necessary" to allow an abortion through a woman's "well-being" was at risk. In "well-being," the Court included "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." *Roe*, 410 U.S. at 191-92. The Court noted its earlier broad construction of "health" in *United States v. Vuitch*, 402 U.S. 62, 71-72 (1971), involving a District of Columbia statute, and approved the district court's adoption of such a construction of the Georgia statute. *Roe*, 410 U.S. at 191-92. Moreover, construction of state statutes is permissible even outside the scope of abortion jurisprudence. The misunderstanding seems to arise from a semantic conflict in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), *Gooding v. Wilson*, 405 U.S. 518 (1972), and *United States v. Thirty-seven (37) Photographs*, 402 U.S. 363 (1971). In *Thirty-seven (37) Photographs*, the Court affirmed the rule requiring constructions favoring constitutionality of statutes. *Thirty-seven (37) Photographs*, 402 U.S. at 368-69. It noted two prior cases where it had not done so, "the obstacle" being that the statutes at issue were state or city enactments. *Id.* The Court observed, for example, that one statute could be saved by a judicial construction which read time limits into the statute, but said "such construction had to be 'authoritative,' and we lack jurisdiction authoritatively to construe state legislation." *Id.* (citation omitted).

This statement of the rule was true as to authoritative construction, as a state court is not bound by a federal court's construction of a statute of that state. The real issue in this bit of dictum was not "authoritative" construction, however. A federal court may construe a statute so as to uphold its constitutionality and a state may later impose an unconstitutional construction in place of the federal one. The lack of authoritative constructive power does not void the rule requiring courts to find statutes constitutional where fairly possible. The real problem was stated by the Court when it said, in *Thirty-seven (37) Photographs*, that it had refused to "rewrite" the state and city enactments (e.g., by adding time limitations). *Id.* at 369. Thus, the use of the concept of construction, which the Court rejected here, included a *rewriting* of the statute which required state authority to do.

Justice Brennan, writing the Court's opinion a year later in *Gooding*, 405 U.S. 518, cited the *Thirty-seven (37) Photographs* rule in his comment that "[o]nly the Georgia courts can supply the requisite construction, since of course 'we lack jurisdiction authoritatively to construe state legislation.'" *Gooding*, 405 U.S. at 520. In the context of *Gooding*, the "requisite construction" referred to an authoritative one, as the state courts had already construed the elements of the statute without limiting them as required for constitutionality of the statute. *Id.* at 524-27. Thus, the federal

As with the rest of the avoidance principle, this rule has not been consistently applied in abortion cases.

In *Thornburgh*, this rule was violated by seeking to find an unconstitutional construction of a state statute rather than seeking to avoid one. As noted briefly above, the statute at issue required a second physician to care for the fetus in the case of abortions performed after viability.<sup>1076</sup> In *Ashcroft*, the Court had allowed a second-physician requirement, provided there was an emergency exception.<sup>1077</sup> Although the provision considered in *Ashcroft* contained no explicit emergency exception, one was construed from the phrase "provided that it does not pose an increased risk to the life or health of the woman."<sup>1078</sup>

The Pennsylvania statute at issue in *Thornburgh* provided "a complete defense to any charge brought against a physician for violating the requirements of this section that he had concluded in good faith, in his best medical judgment, . . . that the abortion was necessary to preserve maternal life or health."<sup>1079</sup> Clearly the failure to obtain a second physician was excusable where a mother's life or health was at risk. In fact, the statute's language in *Thornburgh* provided the Court with greater reason for such construction than did the statute in *Ashcroft*. Yet, the *Thornburgh* Court was unwilling to find a construction which avoided unconstitutionality. The Court struck down the statute.<sup>1080</sup>

In *Thornburgh*, the Pennsylvania statute also required the use of

court could not impose any construction on the statute.

The *Grayned* case clarified the scope of federal authority to construe state statutes. *Grayned*, 408 U.S. at 104. An anti-noise ordinance at issue had not been construed by the state courts which tried the case, but reference was made to similar statutes which had been recently construed and sustained. *Id.* at 109-10. The *Grayned* Court declared the rule:

In this situation, as Mr. Justice Frankfurter put it, we must "extrapolate its allowable meaning." Here, we are "relegated, . . . to the words of the ordinance itself," to the interpretations the court below has given to analogous statutes, and, perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it. "Extrapolation," of course, is a delicate task, for it is not within our power to construe and narrow state laws.

*Id.* at 110 (footnotes omitted) (citing *Thirty-seven (37) Photographs*, 402 U.S. at 369).

It may be seen, then, that some effort has been made to distinguish permissible interpretive functions of a federal court from impermissible ones and to assign the term "extrapolation" to the former. That this effort has been unsuccessful is evident from the use of the term "construction" for the interpretive function of a federal court in the abortion cases cited in this footnote and numerous other cases. As noted, however, there are more limits on a federal court than on a state court in construing state statutes.

1076. 18 PA. CONS. STAT. ANN. § 3210(c) (Purdon 1983).

1077. *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 482-86 (1983).

1078. *Id.* at 485 n.8.

1079. 18 PA. CONS. STAT. ANN. § 3210(a) (Purdon 1983).

1080. *Thornburgh v. American College of Obstetrics & Gynecologists*, 476 U.S. 747, 771 (1986).

the abortion method most likely to preserve the life of a postviable fetus unless that method posed "a significantly greater medical risk" to maternal life or health.<sup>1081</sup> "[P]otential psychological or emotional impact of the child's survival upon the mother" was not to be considered in determining the medical risk.<sup>1082</sup>

Arguably, a state could require some higher degree of maternal risk after viability than before, because the broad health definition of *Bolton*<sup>1083</sup> applies only to early pregnancy.<sup>1084</sup> But, even rejecting this notion, the *Thornburgh* Court was offered two other plausible constructions.

First, the state argued for a construction of the phrase "significantly greater" risk to mean "meaningfully increased" risk.<sup>1085</sup> Thus, in keeping with *Colautti v. Franklin*,<sup>1086</sup> no trade-off would be required between a mother's health and fetal survival.<sup>1087</sup> The district court had employed the "meaningfully increased" construction and upheld the statute, recognizing its "oblig[ation] to give the statute [a] reasonable interpretation which avoids the danger of constitutional invalidity."<sup>1088</sup> That Court supported its construction by a dictionary definition of the relevant terms.<sup>1089</sup> The Court of Appeals rejected this interpretation, holding that the statute was "not susceptible to a construction that does not require the mother to bear an increased medical risk in order to save her viable fetus."<sup>1090</sup> The Supreme Court agreed.<sup>1091</sup>

A second construction would also have avoided a claim that increased medical risks were imposed on the mother:

Section 3210(b) could reasonably be construed to mandate that the physician may not base his decision to use an abortion procedure other than the procedure most likely to result in a live birth *solely* on the possibility of psychological or emotional harm to the woman if her

1081. 18 PA CONS. STAT. ANN. § 3210(b) (Purdon 1983).

1082. *Id.*

1083. *Roe*, 410 U.S. at 192. See *supra* note 1075 for the definition.

1084. Brief for the National Right to Life Committee, Amicus Curiae, at 12-22; *Thornburgh v. American College of Obstetrics & Gynecologists*, 476 U.S. 747 (1986) (No. 84-495). See also *Thornburgh*, 476 U.S. at 807-08 (White, J., dissenting).

1085. *Thornburgh*, 476 U.S. at 769.

1086. 439 U.S. 379, 400 (E.D. Pa. 1979).

1087. *But see Thornburgh*, 476 U.S. at 807 (White, J., dissenting) ("*Colautti* held no such thing.").

1088. *Thornburgh*, 552 F. Supp. 791, 807 (E.D. Pa. 1982).

1089. *Id.*

1090. *The American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283, 300 (3d Cir. 1984) *rev'd* 476 U.S. 747 (1986).

1091. *Thornburgh*, 476 U.S. at 769.

child is delivered alive rather than dead.<sup>1092</sup>

However, neither the appellate court nor the Supreme Court considered abstaining to determine if the state courts might adopt a constitutional construction. Nor did the two courts adopt a constitutional construction. Instead they resorted to "linguistic nit-picking" to strike down the provision.<sup>1093</sup>

One further item in *Thornburgh* is relevant here. Pennsylvania had promulgated its abortion regulations based in part on its finding that many women were undergoing abortions "without full knowledge of the development of the unborn child or of alternatives to abortion."<sup>1094</sup> To remedy this defect in the informed consent process, a provision was enacted to give some structure to the physician-patient dialogue. The Supreme Court followed the appellate court in finding that provision, Section 3205, unconstitutional.<sup>1095</sup>

A cross-reference tied Section 3205 to Section 3208, which provided for printed information to be prepared by the state. This material was to list agencies providing resources to women desiring to carry their unborn children to term (and to assist thereafter with adoption or child support). The material also provided "anatomical and physiological characteristics" of an unborn child at two week intervals. The appellate court had found no flaw with Section 3208, but held it was "inextricably intertwined" with Section 3205, and so was not severable. This was erroneous, as a mere cross-reference does not make for inextricable intertwining.

Moreover, the Supreme Court had held that a state may "make a value judgment favoring childbirth over abortion, and . . . [may] implement that judgment by the allocation of public funds."<sup>1096</sup> In implementing its value judgment, the state should be able to print any material it desires. Striking down Section 3208 seems little more than an

1092. Brief for the National Right to Life Committee, Amicus Curiae, at 9 n.1, *Thornburgh v. American College of Obstetrics & Gynecologists*, 476 U.S. 747 (1986)(No. 84-495).

1093. *Thornburgh*, 476 U.S. at 807 (White, J., dissenting).

The term 'significant' in this context, however, is most naturally read as synonymous with the terms 'meaningful,' 'cognizable,' 'appreciable,' or 'non-negligible.' That is, the statute requires only that the risk be a real and identifiable one. Surely, if the State's interest in preserving the life of a viable fetus is, as *Roe* purported to recognize, a compelling one, the State is at the very least entitled to demand that that interest not be subordinated to a purported maternal health risk that is in fact wholly insubstantial. The statute, on its face, demands no more than this of a doctor performing an abortion of a viable fetus.

*Id.*

1094. 18 PA. CONS. STAT. ANN. § 3202(b)(1)(Purdon 1983).

1095. *Thornburgh*, 476 U.S. at 764.

1096. *Maier v. Roe*, 432 U.S. 464, 474 (1977).

attempt to censor material of which the courts disapproved. For purposes of this discussion, however, it is clear that the appellate court in *Thornburgh* construed these statutes to create constitutional problems and not to remove them.

The Supreme Court also held Section 3208 to be unconstitutional, treating it as a unit with Section 3205, though not alluding to the "inextricably intertwined" language.<sup>1097</sup> It did not even consider the possibility of severing one of the two sections, and, when it refused to sever provisions within Section 3205, it rested its refusal partially on the absence of a broad severability clause in the Pennsylvania Abortion Control Act.<sup>1098</sup> That the Court failed to find a severability clause is astonishing, because the Brief for Appellants mentioned the relevant severance clause twice,<sup>1099</sup> and it was also argued in connection with these sections in the United States' brief.<sup>1100</sup>

Such eagerness to strike down abortion legislation does not square with the *Ashwander* principles. Justice White, dissenting in *Thornburgh*, summed up the matter well in his comment on the majority's refusal to find an emergency exception in the two-physician requirement for postviability abortions:

The Court's rejection of a perfectly plausible reading of the statute flies in the face of the principle—which until today I had thought applicable to abortion statutes as well as to other legislative enactments—that '[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality.' *Planned Parenthood Ass'n v. Ashcroft* [citation omitted]. The Court's reading is obviously based on an entirely different principle: that in cases involving abortion, a permissible reading of a statute is to be avoided at all costs.<sup>1101</sup>

In *Danforth*,<sup>1102</sup> the Court was presented with a construction problem involving a statute designed to protect the lives of aborted fetuses. The statute provided:

Section 6. (1) No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person

1097. *Thornburgh*, 476 U.S. at 762.

1098. *Id.* at 765.

1099. Brief for Appellants at 74, 45a, *Thornburgh v. American College of Obstetrics & Gynecologists*, 476 U.S. 747 (1986) (No. 84-495). The clause is found in Act No. 1982-138, § 5, 1982 Pa. Legis. Serv. 750, 794 (Purdon).

1100. Brief for the United States, *supra* note 35, at 7.

1101. *Thornburgh*, 476 U.S. at 812 (White, J., dissenting).

1102. *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52 (1976).

assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter . . . . Further, such physician or other person shall be liable in an action for damages . . .

<sup>1103</sup>

The challenge to this provision was based on overbreadth. Appellants argued that “the statute on its face effectively preclude[d] abortion and was meant to do just that.”<sup>1104</sup> The district court held it to be “unconstitutionally overbroad because it failed to exclude from its reach the stage of pregnancy prior to viability.”<sup>1105</sup>

Under the usual rules, the Court had an obligation to find a constitutional construction for the statute whenever possible. It began its task but aborted it too early. The Court considered the construction offered by the state of Missouri’s Attorney General: “the first sentence of § 6(1) establishes only the general standard of care that applies to the person who performs the abortion, and . . . the second sentence describes the circumstances when that standard of care applies, namely, when a live child results from the procedure.”<sup>1106</sup>

The *Danforth* Court was “unable to accept the appellee’s sophisticated interpretation of the statute.”<sup>1107</sup> The Court declared that section 6(1) required the special standard of care on behalf of a *fetus*; and it did so without specifying that it applied only after viability.<sup>1108</sup> Thus, the Court held, “it impermissibly require[d] the physician to preserve the life and health of the fetus, whatever the state of pregnancy.”<sup>1109</sup> The Court decided that the second sentence referring to *child* simply did not modify the first sentence, but held them unseverable for being “inextricably bound together.”<sup>1110</sup>

1103. *Id.* at 85-86.

1104. *Id.* at 82.

1105. *Id.* (citing *Planned Parenthood v. Danforth*, 392 F. Supp. 1362, 1371 (E.D. Mo. 1975)). This ready application of the overbreadth doctrine to abortion is remarkable in itself, because the common perception is that a facial overbreadth challenge will be applied only in free expression cases. In a recent case, the Court declared, “[W]e have not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment.” *United States v. Salerno*, 107 S. Ct. 2095, 2100 (1987) (citing *Schall v. Martin*, 467 U.S. 253, 269 n.18 (1984)). Yet, the Court applied the doctrine in *Roe*, 410 U.S. at 164, and in *Danforth* as noted in the text accompanying this article, and this practice has been followed in numerous lower court cases. Thus, either the abortion right has been raised to the level of the right of free expression, which has traditionally been the most protected of rights, or the Court’s analysis is inconsistent. The Court has never directly confronted the issue of whether abortion truly should be exalted to the level of free expression.

1106. *Danforth*, 428 U.S. at 82.

1107. *Id.* at 83.

1108. *Id.*

1109. *Id.*

1110. *Id.*

That a reasonable constitutional construction was available and had been set before the Court is evidenced by Justice White's dissenting opinion. He noted that the standard of care required was only "'that degree of professional skill . . . to preserve the . . . fetus,' which would be required if the mother wanted a live child."<sup>1111</sup> "Plainly, if the pregnancy is to be terminated at a time when there is no chance of life outside the womb, a physician would not be required to exercise any care or skill to preserve the life of the fetus . . . ."<sup>1112</sup> Thus, the statute could easily have been construed to apply only to the time when the fetus was viable.

"Incredibly," Justice White remarked, "the Court reads the statute . . . to require 'the physician to preserve the life and health of the fetus, whatever the stage of pregnancy,' . . . thereby attributing to the Missouri Legislature the strange intention of passing a statute with absolutely no chance of surviving constitutional challenge under *Roe* . . . ."<sup>1113</sup>

Finally, as severability is "*entirely* a question of the intent of the state legislature,"<sup>1114</sup> and Missouri clearly intended to protect live babies resulting from abortions,<sup>1115</sup> the Court had an obligation to honor that intent and sever the passage if the Court could find no constitutional construction of it. Due to the violation of the usual rules, one is left with the feeling that the majority did not like the protection provided by the statute and found an unconstitutional construction of it as a means to an end.<sup>1116</sup>

It is perhaps indicative of the Court's predisposition in *Danforth* that it failed to mention its obligation to employ a constitutional construction of the statute, if possible.

(2). *Avoiding Vagueness.* The rule requiring construction of a statute to avoid its unconstitutionality covers construction of statutes to avoid a finding of unconstitutional vagueness, as well. The courts have been especially active in construing abortion laws in light of the vagueness doctrine. The principle underlying the doctrine was explained by the Supreme Court in 1972 in *Grayned v. City of Rockford*:

1111. *Id.* at 99.

1112. *Id.* at 99-100.

1113. *Id.* at 100.

1114. *Id.*

1115. *Id.* at 101 (citing the Missouri Attorney General's argument that the *only* intent of § 6(1) was to require medical support for live babies resulting from abortions).

1116. Compare the debate in *Thornburgh* over whether a mother is entitled only to an empty womb or to a dead fetus as well. *Thornburgh*, 476 U.S. at 784 (Burger, C.J., dissenting) ("[18 PA CONS. STAT. ANN. § 3210(c) (Purdon 1983)] simply states that a viable fetus is to be cared for, not destroyed").



It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.<sup>1117</sup>

The Supreme Court, in *Colautti v. Franklin*,<sup>1118</sup> set forth a vagueness test in an abortion case:

It is settled that, as a matter of due process, a criminal statute that 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute,' or is so indefinite that 'it encourages arbitrary and erratic arrests and convictions,' is void for vagueness. This appears to be especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights.<sup>1119</sup>

In light of the pervasive use of the vagueness doctrine to strike down abortion regulations, a more detailed exposition of the rule is appropriate. The Court observed, in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* that the level of vagueness tolerated varied with the nature of the statute at issue.<sup>1120</sup> Economic regulation receives less scrutiny due to its narrow subject matter, the economic motivation for business to consult legislation before acting, and the availability of clarification by personal inquiry or administrative ruling.<sup>1121</sup> Where criminal penalties are imposed, the scrutiny is stricter.<sup>1122</sup> However, a scienter requirement may mitigate a certain amount of vagueness, especially where the principle of adequate notice regarding proscribed conduct is involved.<sup>1123</sup> Finally, where a law "threatens to inhibit the exercise of constitutionally protected rights," more clarity is required.<sup>1124</sup> Prior to the abortion cases, however, this higher level of scrutiny was only applied to cases involving restrictions of free speech or association. Indeed, these are the examples cited by

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1117. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

1118. 439 U.S. 379.

1119. *Id.* at 390-91 (citations omitted).

1120. 455 U.S. 489, 498 (1982).

1121. *Id.*

1122. *Id.* at 498-99.

1123. *Id.* at 499.

1124. *Id.*

*Hoffman Estates*<sup>1126</sup> and *Colautti*.<sup>1126</sup>

The vagueness doctrine, which underscores the desire for notice of proscribed conduct and adequate guidelines for law enforcement, has its limits. First, as noted previously, courts have a duty to give a statute a construction which favors the constitutionality of the statute, where fairly possible.<sup>1127</sup> Second, that there may be difficulty with marginal cases does not cause unconstitutional vagueness.<sup>1128</sup> Third, where one's "conduct falls squarely within the 'hard core' of the statute's proscriptions," a facial vagueness challenge will not be allowed.<sup>1129</sup> Fourth, where technical terms or terms with special meaning are employed (e.g., common law terms), or where the terminology is commonly grasped in the context, a fatal ambiguity will not be found.<sup>1130</sup> Fifth, scienter, as noted before, will ameliorate ambiguity. Sixth, the vagueness doctrine does not require "unattainable feats of statutory clarity."<sup>1131</sup>

1125. *Id.*

1126. 439 U.S. at 391. Free expression has traditionally received greater protection both from the vagueness doctrine and from the related overbreadth doctrine. *See, e.g., Grayned*, 408 U.S. at 109 (giving heightened scrutiny in context of first amendment constitutional rights only), 114-15 (overbreadth); *Broadrick v. Oklahoma*, 413 U.S. 601, 612-13 (1973)(overbreadth).

1127. Any limiting construction given by a state court or enforcement agency must be considered. *Kolender v. Lawson*, 461 U.S. 352, 355 (1983).

1128. *United States v. Harriss*, 347 U.S. 612, 618 (1954). While many of the discussions of the vagueness rule, such as that in *Harriss*, focus on the due process clause of the fifth amendment, the Court has applied the principles equally to the fourteenth amendment. This may be seen in the common citation of vagueness analysis precedents dealing with federal statutes in cases involving state laws. *See, e.g., Grayned*, 408 U.S. at 108 n.3.

1129. *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973).

1130. *United States v. Maude*, 481 F.2d 1062, 1068 (D.C. Cir. 1973).

1131. *Id.* The Supreme Court, in *United States v. Petrillo*, 332 U.S. 1 (1947), set forth the requirements of due process in its discussion of a statute which made it unlawful to coerce a broadcaster to employ more employees than needed to perform actual services. The Court stated:

Clearer and more precise language might have been framed by Congress to express what it meant by 'number of employees needed.' But none occurs to us, nor has any better language been suggested, effectively to carry out what appears to have been the Congressional purpose. The argument really seems to be that it is impossible for a jury or court ever to determine how many employees a business needs, and that, therefore, no statutory language could meet the problem Congress had in mind. If this argument should be accepted, the result would be that no legislature could make it an offense for a person to compel another to hire employees, no matter how unnecessary they were, and however desirable a legislature might consider suppression of the practice to be.

The Constitution presents no such insuperable obstacle to legislation. We think that the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. It would strain the requirement for certainty in criminal law stan-

The *Broadrick* Court put this last matter in perspective by stating that “[w]ords inevitably contain germs of uncertainty.”<sup>1132</sup> It continued:

[T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.<sup>1133</sup>

Thus, as the cases show, absolute precision in legislative drafting is not required. It is enough if “citizens who desire to obey the statute will have no difficulty in understanding it.”<sup>1134</sup>

As this rather detailed analysis of the vagueness rule shows, there is more to the rule than *Colautti* admitted. It is symptomatic of abortion jurisprudence that the ameliorating principles are largely ignored. These should be kept in mind as the application of the vagueness doctrine is observed.<sup>1135</sup>

One of the most commonly cited cases setting forth the rule against vagueness is *United States v. Harriss*.<sup>1136</sup> *Harriss* was cited by *Colautti* for the vagueness rule.<sup>1137</sup> The proper analysis of a vagueness claim was illustrated by the *Harriss* Court when it set out the vagueness rule<sup>1138</sup> and immediately followed it with a paragraph containing

dards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees. The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more.

*Id.* at 7-8 (citations omitted).

1132. 413 U.S. at 608.

1133. *Id.* (quoting *United States Civil Service Comm'n. v. Letter Carriers*, 413 U.S. 548, 578-79 (1973)).

1134. *Colten v. Kentucky*, 407 U.S. 104, 110 (1972) (quoting *Colten v. Commonwealth*, 467 S.W.2d 374, 378 (Ky. 1971)).

1135. An excellent explication and application of the vagueness rule is found in the concurring opinion of Judge Williams in *Margaret S. v. Edwards*, 794 F.2d 994, 999-1002 (5th Cir. 1986) (rejecting the majority's finding of unconstitutional vagueness in a fetal experimentation statute).

1136. 347 U.S. 612 (1954).

1137. *Colautti v. Franklin*, 439 U.S. 379, 390 (1979).

1138. The rule, as stated in *Harriss*, is:

The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

two of the limitations on the expansion of the rule. It stated:

On the other hand, if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction. This was the course adopted in *Screws v. United States*, upholding the definiteness of the Civil Rights Act.<sup>1139</sup>

The *Harriss* Court proceeded to uphold the statute at issue, even though it involved restrictions on highly protected free expression, an area in which stricter scrutiny is applied.<sup>1140</sup>

The vagueness analysis, as set forth in *Harriss*, may be summarized as a two-step process. First, evaluate the statute in light of common understanding, technical use of terms, scienter requirements, applicability of its "hard core" to the plaintiff, and so on, to determine whether vagueness exists. Second, determine whether a construction is fairly possible which favors constitutionality and, if one exists, employ it.

One indicator of a court's predisposition toward finding an abortion statute impermissibly vague is whether the court mentions the second prong of the *Harriss* analysis in setting out the rule. In the discussion of the following cases, the presence or absence of the second part of the *Harriss* analysis should be observed.

Before *Roe*, the Supreme Court decided the abortion case of *United States v. Vuitch*.<sup>1141</sup> That opinion was noteworthy for a clear explication of the constitutional construction principle: "statutes should be construed whenever possible so as to uphold their constitutionality."<sup>1142</sup> Applying this principle, the Court construed a "health" exception to an abortion prohibition broadly to include mental health and, thus, eliminated any ambiguity.<sup>1143</sup>

This recognition of the rule and its appropriate application was also evident in *Doe v. Bolton*.<sup>1144</sup> In *Bolton*, a Georgia statute was challenged on vagueness grounds because it forbade a physician to perform an abortion except when it was "based upon his best clinical judg-

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*Harriss*, 347 U.S. at 617.

1139. *Id.* at 618 (citations omitted).

1140. *Id.*

1141. 402 U.S. 62 (1971).

1142. *Id.* at 70.

1143. *Id.* at 71-72.

1144. 410 U.S. 179 (1973).

ment that an abortion [was] necessary."<sup>1145</sup> The term "necessary" was attacked as being standardless. The Court said, "The vagueness argument is set aside by the decision in *United States v. Vuitch*."<sup>1146</sup> The doctor was to consider all circumstances in deciding necessity, and, the Court observed, such "necessity" of surgery "is a judgment that physicians are obviously called upon to make routinely."<sup>1147</sup> The Court also noted that this "room" for a physician to make his "best medical judgment" operated to the benefit of the pregnant woman.<sup>1148</sup>

This clear statement of the rule in *Vuitch* and its positive application in that case and in *Bolton* are in marked contrast to subsequent constructions of abortion statutes by the Supreme Court. Perhaps this is explainable by the fact that both of those cases had the effect of expanding the abortion rights of women. Subsequent constructions of statutes where vagueness was found were often employed to strike abortion regulation by finding statutes to be unconstitutional.<sup>1149</sup>

In *Colautti*, the Court was confronted with two vagueness challenges. They were focused on Section 5(a) of the Pennsylvania Abortion Control Act:

(a) Every person who performs or induces an abortion shall prior thereto have made a determination based on his experience, judgment or professional competence that the fetus is not viable, and if the determination is that *the fetus is viable or if there is sufficient reason to believe that the fetus may be viable*, shall exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted and *the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother*.<sup>1150</sup>

The first challenged phrase, "the fetus is viable or if there is sufficient reason to believe that the fetus may be viable," was challenged as unconstitutionally vague "because it fail[ed] to inform the physician when his duty to the fetus ar[ose], and because it d[id] not make the physician's good-faith determination of viability conclusive."<sup>1151</sup>

1145. GA. CODE ANN. § 26-1202(a) (1968).

1146. *Bolton*, 410 U.S. at 191 (citation omitted).

1147. *Id.* at 192.

1148. *Id.*

1149. See *infra* text accompanying notes 1150-58 (discussing confirmation of this distinction in *Colautti*).

1150. PA. STAT. ANN. tit. 35, § 6605(a) (Purdon 1977) (challenged portions emphasized).

1151. *Colautti v. Franklin*, 439 U.S. 379, 389 (1979).

The Supreme Court agreed that this portion was ambiguous, that this ambiguity was "aggravated by the absence of a scienter requirement with respect to the finding of viability," and, therefore, that "the viability-determination requirement of [section] 5(a)" was "void for vagueness."<sup>1152</sup>

The first step in a proper vagueness analysis is to determine if ambiguity exists. The Court did this, citing *Harriss*<sup>1153</sup> for the rule against overly vague criminal statutes.<sup>1154</sup>

The second step is to determine if a construction can fairly be found which resolves the ambiguity. However, the Court neither cited this rule—although *Harris* had just been cited for its vagueness principle—nor made any effort to find a saving construction.

The *Colautti* Court virtually conceded that a different construction rule existed where abortion rights were being expanded than where they were being restricted. The Court noted the *Vuitch* and *Bolton* constructions favoring constitutionality, but distinguished them on the ground that they "afford[ed] broad discretion to the physician," unlike the statute at issue in *Colautti*.<sup>1155</sup>

Moreover, the *Colautti* Court found the vagueness at issue to be compounded by the lack of a scienter requirement.<sup>1156</sup> A construction recognizing a scienter requirement was possible in *Colautti* because, as the Court noted, "the Pennsylvania law of criminal homicide, made applicable to the physician by section 5(d), conditions guilt upon a finding of scienter."<sup>1157</sup> The relevant provision was distinguished, however, as applying only to "caus[ing] the death of another human being."<sup>1158</sup> The Court refused to include within the definition of "caus[ing] the death of another human being" a physician's negligent failure to ascertain the existence of a viable fetus which caused that fetus' death.<sup>1159</sup>

In *Akron v. Akron Center for Reproductive Health*, as briefly noted earlier, the Supreme Court struck down a regulation requiring "humane and sanitary" disposal of fetal remains.<sup>1160</sup> The city of Akron contended that the statute was merely "to preclude the mindless dumping of aborted fetuses onto garbage piles."<sup>1161</sup> In *Planned Parenthood*

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1152. *Id.* at 390.

1153. *United States v. Harriss*, 347 U.S. 612, 617 (1954).

1154. *Colautti*, 439 U.S. at 390 (noting also the higher standard where the ambiguity inhibited exercise of constitutionally protected rights).

1155. *Id.* at 394.

1156. *Id.*

1157. *Id.*

1158. PA. STAT. ANN. tit. 18, § 2501 (Purdon 1973).

1159. 439 U.S. at 394-95.

1160. 462 U.S. at 451-52.

1161. *Id.* (quoting *Planned Parenthood Ass'n v. Fitzpatrick*, 401 F. Supp. 554, 573 (E.D.

*Association v. Fitzpatrick*,<sup>1162</sup> a district court had upheld the term "humane" against a vagueness attack.<sup>1163</sup> That statute required the Pennsylvania Department of Health to "make regulations to provide for the humane disposition of dead fetuses."<sup>1164</sup> The district court noted that the parties agreed that incineration would be appropriate and that the Commonwealth was only protecting the public health by precluding "the mindless dumping of aborted fetuses on to garbage piles."<sup>1165</sup> The court noted that, if "humane" were construed to require "expensive burial," it "may very well invade the privacy of the pregnant woman and burden her decision concerning an abortion."<sup>1166</sup> This opinion was summarily affirmed by the Supreme Court in 1976.<sup>1167</sup>

With this body of law available to it, the City Council of Akron passed Ordinance No. 160-1978, "Regulation of Abortion."<sup>1168</sup> The ordinance contained a clear severability clause<sup>1169</sup> and the requirement that "[a]ny physician who shall perform or induce an abortion . . . shall insure that the remains . . . are disposed of in a humane and sanitary manner."<sup>1170</sup> This ordinance was enforced by misdemeanor penalties.<sup>1171</sup>

While the imposition of such penalties heightens the level of scrutiny, the general rules described above still do not require impossible standards. By comparison, the Supreme Court has upheld criminal or quasi-criminal statutes against vagueness challenges to such terms as "crime involving moral turpitude,"<sup>1172</sup> "restraint of trade,"<sup>1173</sup> "any offensive, derisive or annoying word,"<sup>1174</sup> "connected with or related to the national defense,"<sup>1175</sup> "fair and open competition,"<sup>1176</sup> and other similar phrases.<sup>1177</sup> If such phrases may be construed, despite criminal penalties, to be sufficiently clear for constitutional purposes, then the

Pa. 1975), *aff'd mem. sub nom.* Franklin v. Fitzpatrick, 428 U.S. 901 (1976).

1162. 401 F. Supp. 554 (E.D. Pa. 1975).

1163. *Id.* at 572-73.

1164. *Id.* at 572.

1165. *Id.* at 573.

1166. *Id.*

1167. 428 U.S. 901.

1168. *Akron*, 462 U.S. at 421.

1169. The clause provided that "should any provision . . . be construed . . . unconstitutional . . . such unconstitutionality . . . shall not extend to any other provision . . ." AKRON ORDINANCE No. 160-1978 § 1870.19.

1170. *Id.* § 1870.16.

1171. *Id.* § 1870.18.

1172. *Jordan v. DeGeorge*, 341 U.S. 223, 231 n.15 (1951).

1173. *Nash v. United States*, 229 U.S. 373 (1913).

1174. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

1175. *Gorin v. United States*, 312 U.S. 19 (1941).

1176. *Old Dearborn Co. v. Seagram Corp.*, 299 U.S. 183 (1936).

1177. *See Jordan v. DeGeorge*, 341 U.S. 223, 231 n.15 (1951).

phrase "humane and sanitary" would seem to be a candidate for similar construction.

As noted by the United States, as amicus curiae, "[t]he phrase 'humane and sanitary' appears in countless laws regulating health and safety. Congress has even mandated the 'humane . . . disposal of excess wild free-roaming horses and burros.' As a familiar regulatory formula, the phrase 'humane and sanitary' resembles the phrase 'informed consent,' which the Court in *Danforth* held not to be vague."<sup>1178</sup>

Justice O'Connor, dissenting in *Akron*, agreed:

In light of the fact that the city of Akron indicates no intent to require that physicians provide 'decent burials' for fetuses, and that 'humane' is no more vague than the term 'sanitary,' the vagueness of which Akron Center does not question, I cannot conclude that the statute is void for vagueness.<sup>1179</sup>

The fact was ignored by the Court that there was already precedent in *Fitzpatrick* for not construing "humane" to require a "decent burial". The fact that the ordinance was passed after *Fitzpatrick*, and presumably in its light, was ignored. The fact that the city of Akron argued for the construction of *Fitzpatrick* as the intent of the city council was ignored. The fact that, even without this precedent, a saving construction, excluding a "decent burial," was possible was ignored. The fact that severance of the term "humane" was available, leaving the undisputed term "sanitary," was ignored. Rather, the Court elected to speculate that a "decent burial" was being required and threw out the usual rules of construction along with the ordinance. Nowhere did the Supreme Court note its duty to apply a constitutional construction.

The hostility of the Supreme Court to abortion regulations and the employment of the vagueness doctrine to strike them down is also reflected in lower court opinions. Again, express recognition of the duty to employ a constitutional construction serves as a predictor of the court's intent to strike the statutes.

The hostile approach was evident in the Seventh Circuit opinion in *Charles v. Daley*.<sup>1180</sup> The appellate court held unconstitutionally vague a 1983 Illinois statute which required a certain standard of care of a "physician or person assisting in . . . a pregnancy termination" performed after the fetus is "known to be viable."<sup>1181</sup> This was held

1178. Brief for the United States, *supra* note 35, at 20 (citations omitted).

1179. *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 475 (1983)(O'Connor, J., dissenting).

1180. 749 F.2d 452 (7th Cir. 1984), *appeal dismissed sub nom.* *Diamond v. Charles*, 476 U.S. 54 (1986).

1181. *Daley*, 749 F.2d at 455; ILL. REV. STAT. ch.38, para. 81-26 (1983).



vague on the ground that the statute did "not specify . . . which party, physician or assistant, must make the viability determination."<sup>1182</sup> A 1983 amendment defined "viability" to be dependent on "the medical judgment and determination of the attending physician."<sup>1183</sup> A 1984 amendment of the specific section at issue made it explicit that the attending physician's determination controlled.<sup>1184</sup> This made the legislature's intent clear.

However, even under the unamended 1983 version,<sup>1185</sup> it was clear that the legislature intended that the attending physician should make the determination. Furthermore, such a constitutional construction was plainly permitted under the amended 1983 version due to the definition of viability, which made the attending physician's decision controlling. Under the usual rules, where such a constitutional construction is plainly permitted, the federal court is obligated to give a statute such a construction. Instead, the court elected to violate the well-settled rule, to which it made no reference.

Numerous other examples exist of the federal courts' hostile construction of state abortion statutes.<sup>1186</sup> The 1987 case of *Planned*

1182. *Daley*, 749 F.2d at 459.

1183. *Id.* at 455.

1184. H.R. 1399, 1984 Ill.

1185. This version was declared constitutional by the district court. *Charles v. Carey*, 579 F. Supp. 464, 466, 469 (N.D. Ill. 1983).

1186. In 1986, an Ohio district court in *Haskell v. Washington Township* found a zoning resolution impermissibly vague. 635 F. Supp. 550 (S.D. Ohio 1986). The problem was that the resolution failed to define "abortion clinic." *Id.* at 561. Since a number of conceivable arrangements could be classified as abortion clinics, it was held that no sufficient warning was given by the statute to persons attempting to comply with it. *Id.* at 562. The court noted that when "persons affected . . . are a select group with specialized understanding of the subject being regulated the degree of definiteness required to satisfy due process concerns is measured by the common understanding and commercial knowledge of the group." *Id.* at 561 (quoting *Fleming v. United States Dep't of Agric.*, 713 F.2d 179, 184 (6th Cir. 1983)). Even specialized knowledge, however, would not enable a doctor to know whether a general practice facility equipped to do abortions would be considered the same as a facility that performed abortions exclusively and advertised itself as an abortion clinic, said the court. *Id.* at 562. With misdemeanor penalties attached, such vagueness proved fatal in the view of this court. *Id.* at 561.

However, the standards set out by the Supreme Court require a more sympathetic approach. In *United States v. Petrillo*, 332 U.S. 1, 7 (1947), the Court declared, "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense." Certainly anyone who operated a facility solely to perform abortions would know the facility was an abortion clinic. Many clinics of this type exist and account for a large proportion of abortions performed. *The Abortion Profiteers*, *supra* note 1034, at 2. While it is preferable for legislative bodies to precisely define terms used, the Supreme Court has determined that the Constitution only requires the warning of the proscribed conduct to be sufficiently definite "when measured by common understanding and practices." *Petrillo*, 332 U.S. at 8. "Common understanding" would certainly include clinics devoted exclusively or principally to the performance of abortions within the concept of "abortion clinic." *The Haskell* court's approach violates the princi-

*Parenthood Association of Cincinnati v. City of Cincinnati* demon-

ple, recently given fresh impetus in *United States v. Salerno*, 107 S. Ct. 2095, 2100 (1987), that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."

The Northern District of Ohio was exemplary in its handling of vagueness issues in the 1986 case, *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986). The plaintiffs had argued that a statute providing that "[n]o person shall knowingly perform or induce an abortion upon a woman who is . . . unmarried, under eighteen years of age, and unemancipated" without meeting statutory requirements was vague. *Id.* at 1133; OHIO REV. CODE ANN. § 2919.12 (B)(1)(a)(Page Supp. 1985). They contended it was unclear whether "knowingly" applied to the performance of the abortion or the physician's determination of the woman's status. *Rosen*, 633 F. Supp. at 1133. The court noted an affirmative defense section which protected physicians from strict liability where misrepresentation of status had occurred and found the scienter element to apply to both clauses. *Id.* at 1134. The same court rejected vagueness challenges to the terms "reasonable efforts" and "reasonable cause to believe," observing that "[b]y insisting on definitions of commonly understood words, plaintiffs only confuse their meanings." *Id.* Such terms "must be interpreted in the context of the conduct they modify, as they are in other legal settings," and "[t]he scienter element in the criminal offense ameliorates any slight uncertainty in these words." *Id.* (citing *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 492 n.18 (1983); *Colautti v. Franklin*, 439 U.S. 379, 395 (1979)).

The decision of the Eastern District of Louisiana in the 1984 case, *Margaret S. v. Treen*, 597 F. Supp. 636 (E.D. La. 1984)(*Margaret S. (II)*), achieved mixed results. First, the court held a provision void for vagueness which required a physician to advise a woman "[o]f the anatomical and physiological development of the particular unborn child at the time the abortion is to be performed or induced, according to the best medical judgment of the attending physician." LA. REV. STAT. ANN. § 40:1299.35.6(B)(3)(West Supp. 1981). It is noteworthy that, after initially quoting the statute footnote, *Margaret S. (II)*, 597 F. Supp. at 657 n.15, the court ignored the phrase "according to the best medical judgment of the attending physician" throughout the rest of its discussion. *Id.* at 661-64. In fact, in its discussion, the court restated the provision as requiring that the woman be informed of the "'anatomical and physiological development of the unborn child at the time the abortion is to be performed.'" *Id.* at 661. This restatement completely ignored the "best medical judgment" clause of the provision. *Id.*

Building on this misrepresented base, the *Margaret S. (II)* court noted the plaintiffs' arguments that the statute was impermissibly vague in that "it is impossible for a physician to determine with accuracy the precise gestational age of a fetus," and that, therefore, the "physician would be required to describe a range of fetal development of several weeks." *Id.* They further argued that the statute was vague, because it did not specify "the amount of information a physician must impart." *Id.* The court agreed that, since a physician could not "determine fetal age precisely," it would be impossible to comply with the statute. *Id.* at 663 (citing with approval its prior case construing the predecessor to this statute). This conclusion completely ignored a whole clause of the statute, which only required the physician's "best medical judgment" on the matter.

Such "rewriting" of the statute in order to invalidate it is inexcusable. If the statute is read properly, compliance is rather simple, and no "range" of fetal development need be given. Further, "best medical judgment" was never challenged as itself vague. In fact, the concept is commonly used without challenge. *See, e.g., Doe v. Bolton*, 410 U.S. 179, 191-92 (1973)(upholding against a vagueness attack the requirement that a physician determine that an abortion is "necessary" based on his "best clinical judgment"); *Colautti v. Franklin*, 439 U.S. at 379, 396-97 (1979).

The court also agreed with plaintiffs that a doctor would have difficulty knowing how much detail was required in describing fetal development. *Margaret S. (II)*, 597 F. Supp. at 663 (citing with approval its prior case construing the predecessor to this statute). However, this provision is no more vague than Section 40:1299.35.6(B)(5), which the court upheld. Section (B)(5) required

the patient to be informed of "the type of method or technique which will be utilized in the abortion, the means of effectuating the method or technique, and the medical risks and consequences of the method or technique to be utilized." There was no prescribed level of detail in that provision, either. However, the court noted that *Danforth* set forth the informed consent requirements "as the giving of information to the patient as to just what would be done and as to its consequences." 597 F. Supp. at 665 (quoting *Danforth*, 428 U.S. at 67 n.8). The district court held that, under the *Danforth* standard, Section 40:1299.35.6(B)(5) was constitutional, 597 F. Supp. at 665 (citing *Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d at 1019), observing that "[t]he statute requires the woman to be informed of the nature of the abortion procedure and the risks associated with it, directives which were specifically approved in *Danforth*." 597 F. Supp. at 665 (citing in accord *Bellotti*, 641 F.2d at 1019; *Hodgson v. Lawson*, 542 F.2d 1350 (8th Cir. 1976); *Ashcroft*, 462 U.S. 476). Ironically, this was no more specific a directive than that which the district court had just overturned, but it was upheld because in *Danforth*, in 1976, the Supreme Court had applied the normal construction rules and had already approved more vague language than this district court would allow.

The district court in *Margaret S. (II)* did uphold a provision allowing for emergency exceptions to the statute's restrictions. LA. REV. STAT. ANN. § 40:1299.35.12 (West Supp. 1981). Plaintiffs contended that adequate notice was not provided as to the required conduct, *Margaret S. (II)*, 597 F. Supp. at 667, as the statute required "physicians to determine what constitutes an 'immediate threat and grave risk to life or permanent physical health.'" *Id.* The court rejected this notion, because "physicians make determinations of the existence of medical emergencies that threaten a patient's physical health on a regular basis." *Id.* Surely doctors involved in caring for pregnant women make determinations regarding the stage of their pregnancy on a regular basis. The logic rejecting a vagueness challenge to this latter provision requires also a rejection of the vagueness challenge to the "informed consent" provision, providing for information regarding fetal development. This is especially so where only "best medical judgment" is required. Thus, these holdings on vagueness are inconsistent.

The 1982 case of *Women's Medical Center of Providence v. Roberts*, 530 F. Supp. 1136 (D.R.I. 1982), provides a further example of the amnesia of the courts when an abortion statute is to be construed. Reading *Roberts*, one would never know that the Supreme Court had established a duty to give statutes a constitutional construction where possible. The well-settled rule was conveniently forgotten. While *Roberts* noted the rule against unconstitutional vagueness, it was silent about any obligation on its part to avoid vagueness by giving a constitutional construction to the statutes under review. *Id.* at 1145.

The amnesia was evident in the *Roberts* application of the vagueness doctrine. The court first found the term "abortion" vague, noting that it had not been defined and could mean "both doctor-induced and spontaneous fetal loss." *Id.* Also, "a physician can be said to 'perform' an 'abortion' both when he initiates the termination of a pregnancy and when he performs an operation to complete an otherwise incomplete, spontaneous miscarriage." *Id.* While a precise definition would be ideal, as discussed above, the Supreme Court does not require so much. The "common understanding" test would quickly resolve the options the court listed. Clearly, the statute at issue referred to doctor-induced terminations of pregnancies. Where such a constitutional construction was permissible, the court ought to have resolved the vagueness issue with such a construction.

The *Roberts* court decided that nearly the entire statute must fall due to this ambiguity. *Id.* However, it proceeded to find other ambiguities. The statute at issue required disclosure to the pregnant woman of "all medical risks, both physical and psychological, associated with the particular abortion procedure to be employed, consistent with good medical practice." R.I. GEN. LAWS § 23-4.7-2(3)(1956). In its discussion of vagueness, the court ignored the phrase "consistent with good medical practice" and decided that the provision was too vague, because "new risks associated with undergoing an abortion are constantly being discovered." *Roberts*, 530 F. Supp. at 1145. With the neglected phrase included, the statute is no more vague than "informed consent," which the Supreme Court in *Danforth* held not to be vague by properly giving the term a constitutional construction. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67 n.8 (1976).

The *Roberts* court then turned to the portion of the Rhode Island statute which required a

strates that the trend continues unabated.<sup>1187</sup>

The ordinance at issue in the *Cincinnati* case required hospitals,

woman to be advised, "consistent with good medical practice," of "all medical risks, both physical and psychological, to herself and the fetus," if she carried the fetus to term. R.I. GEN. LAWS § 23-4.7-2(5)(1956). Ignoring again its duty to constitutionally construe state statutes, the court decided the concept of "psychological risks to the fetus" was unconstitutionally vague as a "meaningless" term. *Roberts*, 530 F. Supp. at 1145. This jocular approach ("Doctors simply would not know what to say to a patient" *Id.*) is inappropriate. If no psychological risks to the fetus from its birth were apparent to the doctor, none need be communicated to the patient. If the concept was impossible for the court to live with, it should have applied the permissible construction that psychological risk applied only to the woman and not the fetus. The state legislature was obviously attempting to include all sorts of potential harm to all parties involved within its provision. A sympathetic approach, not a hostile one, was required by the established rules of constitutional construction. This doctrine was violated by a demand for precision not required by the Constitution.

The *Roberts* court also considered the requirement that a woman be told whether she is pregnant and that a copy of her pregnancy test be made available to her before an abortion is performed. R. I. GEN. LAWS § 23-4.7-2(1)(1956). The court discussed blood, urine, and physical examination tests, and how for the latter a physician could arguably "comply with the statute by making available a copy of his report to the patient." *Roberts*, 530 F. Supp. at 1149. Rather than construing the statute in precisely that manner to remove any possible ambiguity, the court backed away from a constitutional construction and found the provision void for vagueness. *Id.*

That the *Roberts* court was capable of sympathetic construction was evident in its treatment of the requirement of disclosure regarding "the nature of an abortion." R.I. GEN. LAWS § 23-4.7-2(2)(1956). The court interpreted this to mean "an explanation of the *medical* nature of an abortion" and not "a philosophical or moral discussion," thus upholding the provision. *Roberts*, 530 F. Supp. at 1149 (emphasis in original). The court cited *Danforth*, 428 U.S. at 67 n.8, as controlling with its construction of "informed consent" as "the giving of information to the patient as to just what would be done . . ." *Id.*; *Roberts*, 530 F. Supp. at 1149. Once again, the contrast between the constitutional requirement and the near-impossible precision required by the lower courts (and recent Supreme Court cases) in abortion cases is remarkable.

The construction employed by the *Roberts* court, when it did consider the "consistent with good medical practice" clause, is instructive. The court was faced with two possible constructions of § 23-4.7-2(3) and (5): (1) that all risks must be disclosed (regarding abortion or carrying the fetus to term), or (2) that all risks "consistent with good medical practice" must be disclosed. The court stated that, since no construction of the statute had been made, and since this was a criminal statute, it could "only conclude that doctors will be forced to disclose *all* possible complications . . ." *Roberts* 530 F. Supp. at 1151 (emphasis in original). The conclusion does not, of course, follow from the stated premise. The duty to employ constitutional construction applies in criminal cases, as seen in the Supreme Court cases above. The absence of a prior construction in no way requires one to elect a construction which will render the statute unconstitutional. Rather, one is required to select the construction which will preserve the constitutionality of the statute, where fairly possible. A saving construction was possible here, as the phrase "consistent with good medical practice" clearly qualified the phrase "all medical risks." Further case-by-case analysis is beyond the scope of this article. However, analysis of the following cases in light of the principles set forth in the text is illuminating. *Cf. Thornburgh v. Amer. College of Obstetricians & Gynecologists*, 737 F.2d 283 (3d Cir. 1984); *Eubanks v. Brown*, 604 F. Supp. 141 (W.D. Ky. 1984); *Schulte v. Douglas*, 567 F. Supp. 522 (D. Neb. 1981); *Leigh v. Olson*, 497 F. Supp. 1340 (D.N.D. 1980); *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 483 F. Supp. 679 (W.D. Mo. 1980); *Mobile Women's Med. Clinic v. Board of Comm'rs*, 426 F. Supp. 331 (S.D. Ala. 1977); *Rodos v. Michaelson*, 396 F. Supp. 768 (D.R.I. 1975); *Montalvo v. Colon*, 377 F. Supp. 1332 (D.P.R. 1974); *Henrie v. Derryberry*, 358 F. Supp. 719 (N.D. Okla. 1973); *Friendship Med. Center v. Chicago Bd. of Health*, 367 F. Supp. 594 (N.D. Ill. 1973).

1187. 822 F.2d 1390 (6th Cir. 1987).

clinics, and laboratories to dispose of aborted fetuses by interment, deposit in a vault or tomb, cremation, or otherwise as "approved by the Commission of Health."<sup>1188</sup> Any of the medical facilities which dispose of fetuses was required to first obtain a permit from the commissioner, who was to determine that the proposed "facilities, methods, and capabilities" were suitable for "sanitary" disposal, "consistent with public health and safety."<sup>1189</sup>

The federal district court decided that the ordinance was impermissibly vague.<sup>1190</sup> No vagueness was found with interment, entombment, or cremation, but the phrase "otherwise disposed of in a manner approved by the Commissioner of Health" was found to be vague, especially as the Commissioner planned to issue no regulations under the ordinance.<sup>1191</sup>

The Sixth Circuit, in reviewing the case, noted the permitted use of "humane" in *Planned Parenthood Ass'n v. Fitzpatrick*,<sup>1192</sup> where the term was to guide the rule-maker, and the rejection of "humane" in *Akron*,<sup>1193</sup> where the term was to guide the physician. The *Cincinnati* appellate court noted *Akron's* closing acknowledgement that the city could "enact more carefully drawn regulations that further its legitimate interests in proper disposal of fetal remains."<sup>1194</sup> The *Harriss* rule requiring "fair notice"<sup>1195</sup> was given, but the companion rule requiring constitutional construction was ignored.<sup>1196</sup>

The city of Cincinnati argued that the listing of specific methods of fetal disposal avoided unconstitutional vagueness.<sup>1197</sup> The court of appeals decision acknowledged that the listed methods were not vague,<sup>1198</sup> as did a concurring opinion.<sup>1199</sup> However, it insisted that the

1188. *Id.* at 1392 (citing CINCINNATI, OHIO, MUNICIPAL CODE § 749-1).

1189. *Id.*

1190. *Planned Parenthood Ass'n of Cincinnati v. City of Cincinnati*, 635 F. Supp. 469 (S.D. Ohio 1986).

1191. *Id.* at 471.

1192. 401 F. Supp. 554, 573 (E.D. Pa. 1975).

1193. *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).

1194. *Cincinnati*, 822 F.2d at 1397 (quoting *Akron*, 462 U.S. at 452 n.45).

1195. *United States v. Harriss*, 347 U.S. at 617 (1954).

1196. *Cincinnati*, 822 F.2d at 1399.

1197. *Id.*

1198. *Id.*

1199. *Id.* at 1400, (Merrit, J., concurring). The concurrence stated, in a cryptic passage, that "the vagueness of the ordinance is not cured by its more specific language," because "the specific means of disposal prescribed by the ordinance constitute an impermissible burden on a woman's . . . right to an abortion." *Id.* Of course, the presence or absence of a burden does nothing to create or remove vagueness, so the concurring opinion's argument must be that the burden makes the ordinance unconstitutional whether or not the vagueness is cured. Possibly, a heightened scrutiny was being argued, but heightened scrutiny does not make vagueness itself. The concurrence expresses no disagreement with the fact that the three explicit modes of disposal are not vague. *Id.*

granting of authority to the commissioner to specify other methods made the statute unconstitutionally vague.<sup>1200</sup>

Analysis of this claim shows its flaws. First, if the commissioner promulgated regulations, those would have to be challenged after passage and not in a facial challenge. So it was in *Fitzpatrick*, which found the Pennsylvania statute not unconstitutional on its face.<sup>1201</sup> Furthermore, if the state can employ the term "humane," as was done in *Fitzpatrick*,<sup>1202</sup> to guide the rule maker, then certainly "sanitary" and "consistent with public health and safety" may be so used. These were not challenged, nor could they be under *Akron*.<sup>1203</sup> The Supreme Court had declared little more than a month before this case was decided that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."<sup>1204</sup> Because the Cincinnati ordinance was valid as against anyone who disposed of fetuses in any manner without obtaining a prior permit from the commissioner, it easily passes the hurdle of facial ambiguity.

Second, if the commissioner enacted no regulations setting forth other methods of disposal, then only interment, entombment, and cremation remain. These had not been challenged for vagueness (nor could they reasonably be), but, rather, their sufficient clarity had been conceded. Any medical facility administrator neither employing one of these disposal methods, nor having obtained permission for an alternative method, would be on notice that he or she had violated the ordinance. Moreover, before one could even employ one of the specified methods of disposal, a review of one's methods and facilities is required and a permit must be granted indicating approval. Where one has "access to [an administrative authority] for a ruling to clarify the issue" of statutory compliance, a vagueness challenge is even more difficult to sustain.<sup>1205</sup> As the dissent in the *Cincinnati* case observed, "[i]f for some reason the plaintiffs . . . cannot tell whether the particular disposal method used by their laboratory . . . is a method explicitly approved by the ordinance . . . [or] approved by the Commissioner of Health . . . all they have to do is ask the Commissioner of Health."<sup>1206</sup> Likewise, if they feel their method is sanitary and not dangerous to the public

1200. *Id.* at 1399.

1201. 401 F. Supp. at 572-73.

1202. *Id.* at 572.

1203. *Akron*, 462 U.S. at 452 n.45.

1204. *United States v. Salerno*, 107 S. Ct. 2095, 2100 (1987).

1205. *Cincinnati*, 822 F.2d at 1403 n.3 (Nelson, J., dissenting)(quoting *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 49 (1966)).

1206. *Id.* at 1403.

health or safety, they may simply seek approval.<sup>1207</sup>

Whatever other complaints Planned Parenthood may have had against the Cincinnati ordinance, the ordinance was not vague under the application of the normal rules of vagueness. The impression is left that vagueness was a convenient means to the end of striking down the fetal disposal ordinance.<sup>1208</sup>

(3). *Deference.* In a federal system, incorporating a separation of powers among co-equal branches, federal and state governments, and trial and appellate courts, it is necessary that all parties practice mutual respect, appropriate deference, and a commitment to remaining within allotted boundaries. If not, major disruptions in the carefully balanced system occur, usually accompanied by injustices which the checks and balances were designed to limit. The overarching principles of respect and restraint have been expressed in such doctrines as abstention and deference and in such terms as comity and federalism. Without respect and restraint, however, the doctrines are easily devoured by exceptions. Abortion is the exception which swallows all rules.

The undisguised hostility of the Court in *Thornburgh* toward Pennsylvania's efforts to assert its compelling interests revealed a failure of requisite respect.<sup>1209</sup> In dissent, Justice White, joined by now Chief Justice Rehnquist, explicitly addressed the lack of deference:

The majority's opinion evinces no deference toward the State's legitimate policy. Rather, the majority makes it clear from the outset that it simply disapproves of any attempt by Pennsylvania to legislate in this area. The history of the state legislature's decade-long effort to pass a constitutional abortion statute is recounted as if it were evidence of some sinister conspiracy.<sup>1210</sup>

He added that the real problem was the Court's "changing [of] the rules to invalidate what before would have seemed permissible."<sup>1211</sup>

The disrespect of the Court was also evident in *Thornburgh* and other cases, as discussed earlier, in the seeking of unconstitutional constructions rather than constitutional ones.

*Roe* was the consummate example of the refusal of the Court to remain within its constitutionally assigned boundaries. The lesser trespasses have flowed rather easily from this initial transgression.

A growing hostility seems evident in the recent opinions in *Akron*

1207. *Id.* If approval is not granted, that is, of course, not a vagueness issue.

1208. Of course, given the court's approach, it is not surprising that it did not see fit to sever the offending provision. *Id.* at 1399.

1209. *Thornburgh*, 476 U.S. at 751-54, 759.

1210. *Id.* at 798 (White, J., dissenting).

1211. *Id.* (White, J., dissenting).

and *Thornburgh*. Indeed, *Akron* has been viewed by many as a turning point in the hostility of the Court toward abortion restrictions.<sup>1212</sup> Of course, anomalies have been present throughout modern abortion case law, but some examples will demonstrate that, excluding *Roe* itself from consideration, things are getting worse.

In *Bellotti v. Baird (I)*,<sup>1213</sup> the Supreme Court held that a district court should have abstained from deciding the constitutionality of a parental consent statute.<sup>1214</sup> The Court noted that, under what is commonly known as the *Pullman* abstention doctrine,<sup>1215</sup> it is appropriate to abstain "where an unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.'"<sup>1216</sup>

The *Bellotti (I)* Court refused to accept the assertion that the state supreme court would inevitably decide the statute in an unconstitutional manner.<sup>1217</sup> It noted that the presence of a state supreme court procedure for certification helped the analysis, although it was not mandatory.<sup>1218</sup> Also, where the issue was one of the "relative burden" on the abortion right rather than "total denial of access," it became easier equitably to consider abstention.<sup>1219</sup> Finally, the Court observed that abstention could always be raised by a court *sua sponte*.<sup>1220</sup>

By contrast, *Akron* failed to follow the principled approach of *Bellotti (I)*. In *Akron*, the Court quoted the abstention rule<sup>1221</sup> but refused to apply it, although both the statutes at issue in *Bellotti (I)* and *Akron* involved the applicability of parental consent statutes to mature minors. Justice O'Connor, in dissent, argued for the usual application of the abstention doctrine.<sup>1222</sup> She observed:

In light of the Court's complete lack of knowledge about how the Akron ordinance will operate, and how the Akron ordinance and the State Juvenile Court statute interact, our 'scrupulous regard for the rightful independence of state governments' counsels against 'unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of

1212. Brief for the United States, *supra* note 35, at 16.

1213. 428 U.S. 132 (1976).

1214. *Id.* at 151.

1215. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

1216. *Bellotti (I)*, 428 U.S. at 147 (quoting *Harrison v. NAACP*, 360 U.S. 167, 177 (1959)).

1217. *Id.* at 147-48.

1218. *Id.* at 151.

1219. *Id.*

1220. *Id.* at 143 n.10.

1221. 462 U.S. at 440.

1222. *Id.* at 469.



our federal system.<sup>1223</sup>

The *Akron* Court found distinguishing features between the laws at issue to explain the disparate treatment.<sup>1224</sup> At heart, however, the real problem seemed to be the familiar approach of seeking unfavorable constructions of statutes, where abortion regulation was involved, rather than favorable ones.<sup>1225</sup>

In *Thornburgh*, the Court declared that a federal court need not abstain from addressing the constitutional issue, "pending state-court reviews," if "the unconstitutionality of the particular state action under challenge is clear."<sup>1226</sup> However, the unconstitutionality of the Pennsylvania statute was not clear, as the dissenters demonstrated by employing the usual adjudicatory principles.<sup>1227</sup>

The federal courts have also been reluctant to sever offending portions of statutes, preferring instead to strike down the whole statute. This approach is usually hostile to the wishes of the legislatures, which would generally prefer truncated regulation of abortion to none. A prime example was the refusal of the *Akron* Court to sever the term "humane" from the unchallenged term "sanitary" in Akron's fetal disposal ordinance.<sup>1228</sup> Clearly, Akron would have preferred a "sanitary" fetal disposal ordinance to none at all. The hostility of lower federal courts to severance in abortion contexts often mirrors that of the Supreme Court.<sup>1229</sup>

1223. *Id.* at 470 (citations omitted).

1224. *Id.* at 441.

1225. The *Akron* majority declared that "we do not think the . . . ordinance . . . is reasonably susceptible of being construed to create an 'opportunity for case-by-case evaluations of the maturity of pregnant minors.'" *Id.* (quoting *Bellotti (II)*, 443 U.S. at 643 n.23).

1226. *Thornburgh*, 476 U.S. at 756.

1227. *Id.* at 782-883 (Burger C.J., White, Rehnquist & O'Connor, J.J., dissenting). As many constitutional constructions of the Pennsylvania statutes were possible, and as the thrust of Pennsylvania's enactments was informed consent, protection of the fetus, and reporting, questions of "relative burden," rather than "total denial of access" under *Bellotti (I)* abstention, was proper. *Bellotti (I)*, 428 U.S. at 151.

In the federal courts, abstention has received disparate treatment in the abortion context. *See, e.g., Ashcroft*, 462 U.S. at 493 n.21 (rejecting abstention); *Indiana Planned Parenthood Affiliates v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983)(rejecting abstention); *Scheinberg v. Smith*, 659 F.2d 476, 480 (5th Cir. 1981)(rejecting abstention); *Zbaraz v. Hartigan*, 584 F. Supp. 1452, 1457-58 (N.D. Ill. 1984)(rejecting abstention); *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 483 F. Supp. 679, 693-94 n.24 (W.D. Mo. 1980)(rejecting abstention); *Wynn v. Scott*, 449 F. Supp. 1302, 1311-14 (N.D. Ill. 1978)(rejecting abstention); *Mobile Women's Med. Clinic v. Board of Comm'rs*, 426 F. Supp. 331, 335 (S.D. Ala. 1977)(rejecting abstention); *Rodos v. Michaelson*, 396 F. Supp. 768, 775-76 (D.R.I. 1975)(rejecting abstention); *Montalvo v. Colon*, 377 F. Supp. 1332, 1335 (D.P.R. 1974)(rejecting abstention); *Henrie v. Derryberry*, 358 F. Supp. 719, 726 (N.D. Okla. 1973)(abstaining).

1228. 462 U.S. at 451-52.

1229. *See, e.g., Scheinberg v. Smith*, 659 F.2d 476, 481-82 (5th Cir. 1981)(rejecting severance); *Zbaraz v. Hartigan*, 584 F. Supp. 1452, 1464 (N.D. Ill. 1984)(rejecting severance);

The Supreme Court has also been willing to substitute its own findings for that of a lower court. In *Thornburgh*, the majority struck down the Pennsylvania abortion reporting requirements on the basis that "[i]dentification [was] the obvious purpose of th[o]se extreme reporting requirements."<sup>1230</sup> Justice White observed the divergence from the usual rule:

Where these 'findings' come from is mysterious, to say the least. The Court of Appeals did not make any such findings . . . and the District Court expressly found that 'the requirements of confidentiality . . . prevent any invasion of privacy which could present a legally significant burden on the abortion decision.' Rather than pointing to anything in the record that demonstrates that the District Court's conclusion is erroneous, the majority resorts to the handy, but mistaken, solution of substituting its own view of the facts and strikes down the statute.<sup>1231</sup>

Justice White continued, stating that "the majority's action . . . [was] procedurally and substantively indefensible."<sup>1232</sup> It was procedurally wrong for going to the merits, as will be discussed later, and for "reflect[ing] a complete disregard for the principle embodied in Rule 52(a), that an appellate court must defer to a trial court's findings of facts unless those findings are clearly erroneous."<sup>1233</sup> The rule is applicable to findings in a preliminary injunction action and applies to the Supreme Court in equal measure as other federal courts.<sup>1234</sup>

In *Danforth*, the Court made a finding without any basis in the evidence when it found that prostaglandin abortions were unavailable in Missouri.<sup>1235</sup> The Missouri legislature had determined that prostaglandin abortions were far safer than the saline amniocentesis method.<sup>1236</sup> The district court cited findings based on scientific testimony that the saline method could cause severe complications.<sup>1237</sup> In fact, the Chief of Obstetrics at Yale University, in testimony before the district court, strongly "suggested physicians should be liable for malpractice if they chose saline over prostaglandin after having been given

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Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft, 483 F. Supp. 679, 699 (W.D. Mo. 1980)(employing severance); Wynn v. Scott, 449 F. Supp. 1302, 1314-15 (N.D. Ill. 1978)(employing severance); Rodos v. Michaelson, 396 F. Supp. 768, 775 (D.R.I. 1975)(rejecting severance).

1230. *Thornburgh*, 476 U.S. at 767 (White, J., dissenting).

1231. *Id.* at 805 (White, J., dissenting)(citation omitted).

1232. *Id.* (White, J., dissenting).

1233. *Id.* (White, J., dissenting).

1234. *Id.* (White, J., dissenting).

1235. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 79 (1976).

1236. 392 F. Supp. 1362, 1373-74 (E.D. Mo. 1975).

1237. *Id.* at 1372-73.

all the facts on both methods.”<sup>1238</sup> Other methods were also available besides prostaglandin which were also safer than the saline method.<sup>1239</sup> Thus, the district court found the legislative ban on saline abortions a legitimate regulation advancing the state’s interest in maternal health.<sup>1240</sup>

The *Danforth* Court reversed the district court on the basis of the unavailability of prostaglandin in Missouri.<sup>1241</sup> As a careful study of the evidence by the dissent noted, this ruling was not based on any facts.<sup>1242</sup> Justice White stated, “[t]here is simply no evidence in the record that prostaglandin was or is unavailable at any time relevant to this case.”<sup>1243</sup> He advocated the normative rule, that the Court could not strike down a state statute without evidence and that the state did not bear the burden of establishing the constitutionality of one of its laws.<sup>1244</sup> Justice White concluded with a comment on the majority’s violation of the rules: “I am not yet prepared to accept the notion that normal rules of law, procedure, and constitutional adjudication suddenly become irrelevant solely because a case touches on the subject of abortion.”<sup>1245</sup>

Another *Thornburgh* example further illustrates the diminishing deference of the Court. The *Thornburgh* Court allowed a temporary injunction to stand against the enforcement of the parental consent statute at issue.<sup>1246</sup> The district court had issued the injunction pending promulgation of court rules for implementation.<sup>1247</sup> These rules were issued while the case was before the Supreme Court, leading the district court to declare itself without jurisdiction.<sup>1248</sup> The Supreme Court sent the matter back to the lower court because “this development should be considered by the District Court in the first instance.”<sup>1249</sup>

Two problems appear upon examination of this action of the Court. First, in *Ashcroft*, an identical situation was treated differently when a parental consent provision virtually identical to Pennsylvania’s had been held constitutional, despite the fact that no procedural rules

1238. *Id.* at 1373.

1239. *Id.*

1240. *Id.* at 1374.

1241. *Danforth*, 428 U.S. at 77-79 & n.12.

1242. *Id.* at 98 (White, J., dissenting).

1243. *Id.* (White, J., dissenting).

1244. *Id.* (White, J., dissenting).

1245. *Id.* (White, J., dissenting).

1246. *Thornburgh*, 476 U.S. at 758 n.9.

1247. *Id.*

1248. *Id.*

1249. *Id.*

had yet been established.<sup>1250</sup> The Court said, "There is no reason to believe that [the state] will not expedite any appeal consistent with the mandate in our prior opinions."<sup>1251</sup> In *Thornburgh*, the statute was found constitutional,<sup>1252</sup> but the same presumption that "the State [would] provide for the expedited procedures called for by the statute" was not extended to Pennsylvania;<sup>1253</sup> thus, the Court enjoined the statute.

Justice O'Connor observed another incongruity between the two cases:

I add only that the Court's explanation for its refusal to follow *Ashcroft*—that the new rules 'should be considered by the District Court in the first instance'—does not square with its insistence on resolving the rest of this case without giving the District Court an opportunity to do so.<sup>1254</sup>

This latter theme will be taken up later.

Finally, the hostility of the *Thornburgh* Court was evident in its impugning of state legislative motives. The Court treated Pennsylvania's assertion of its compelling state interests as a "sinister conspiracy."<sup>1255</sup> Rather than examining the statute on its face, the Court purported to go behind the scenes and determine the true intent of the legislators. It termed the informed consent provisions "poorly disguised elements of discouragement for the abortion decision" and declared that the lack of similar disclosure requirements for other medical procedures "reveal[ed] the anti-abortion character of the statute and its real purpose."<sup>1256</sup>

This inappropriate concern with legislative motives is present in the lower federal courts as well. For example, the Third Circuit opinion in *Thornburgh* was even more excoriating than the Supreme Court's. The appellate court declared the debate on the legislation "scant,"<sup>1257</sup> the bills to which it was attached "unrelated,"<sup>1258</sup> and the

1250. *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 491 n.16 (1983).

1251. *Id.* See also *Roe* 410 U.S. at 166 (declining to enjoin state enforcement of the state abortion statute).

1252. *Thornburgh*, 737 F.2d at 297.

1253. *Thornburgh*, 476 U.S. at 833 (O'Connor, J., dissenting).

1254. *Id.* (O'Connor, J., dissenting)(citation omitted).

1255. "The history of the state legislature's decade-long effort to pass a constitutional abortion statute is recounted as if it were evidence of some sinister conspiracy." *Thornburgh*, 476 U.S. at 798 (White, J., dissenting). "Appellants claim that the statutory provisions before us today further legitimate compelling interests . . . . Close analysis . . . shows . . . an effort to deter a woman from making a decision that . . . is hers to make." *Id.* at 759.

1256. *Thornburgh*, 476 U.S. at 763-64.

1257. *Thornburgh*, 737 F.2d 283, 288 (3rd. Cir. 1984).

1258. *Id.* at 288-89.

whole enactment motivated by "a pervasive invalid intent."<sup>1259</sup> It did note that it could not invalidate the whole regulatory scheme simply by finding an invalid intent, but must "instead review the various provisions . . . independently, and on their own merit."<sup>1260</sup>

That the *Thornburgh* appellate court did not invalidate the whole act at once made little difference, for the hostility to the perceived invalid legislative intent permeated the whole of the opinion, resulting in virtually the whole act being struck down anyway. The step-by-step treatment of the various provisions of the statute seemed a mere mechanical procedure to accomplish a foregone conclusion. The court had already decided and declared that the legislature's motives were inappropriate. It even quoted a newspaper article, which revealed that one of the co-sponsors was pro-life in his viewpoint on abortion.<sup>1261</sup>

This focus on the legislators' motives was declared inappropriate by the Supreme Court in *United States v. O'Brien*.<sup>1262</sup> The *O'Brien* opinion declared it "a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."<sup>1263</sup> The Court continued: "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."<sup>1264</sup>

Furthermore, the notion that legislators may not have opinions in opposition to abortion, and express them, is erroneous. The Supreme Court has declared that both municipalities and states may express "a preference for normal childbirth" over abortion.<sup>1265</sup> Not only may the state have a preference, it may also further its preference by expenditure of public funds.<sup>1266</sup> The first amendment applies to pro-life legislators equally with other members of society, giving them a right to free expression on the subject of abortion.

Much of the confusion in this area has arisen from a misinterpretation by federal courts of a passage in *Roe*. Justice Blackmun wrote in *Roe*, "[W]e do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."<sup>1267</sup>

1259. *Id.* at 292.

1260. *Id.*

1261. *Id.* at 288.

1262. 391 U.S. 367 (1968).

1263. *Id.* at 383.

1264. *Id.* at 384. See also *Akron*, 479 F. Supp. at 1194 (rejecting a "legislative motive" test in an establishment clause challenge to an abortion statute).

1265. *Poelker v. Doe*, 432 U.S. 519, 521 (1977)(per curiam); *Harris v. McRae*, 448 U.S. at 325.

1266. *Maher v. Roe*, 432 U.S. 464 (1977).

1267. *Roe*, 410 U.S. at 162.

The Court did not say that the state could not adopt a view of when life begins. It merely declared that, in doing so, the state could not implement its view by depriving women of the right to abortion. The Court made it clear that states could adopt viewpoints on abortion, as already noted, in *Maher*.<sup>1268</sup> In fact, *Roe* explicitly left open the question of when life begins, and has not addressed it again. Justice Blackmun stated, "we need not resolve the difficult question of when life begins."<sup>1269</sup> The matter of when individual human life begins is a scientific fact for the Court to recognize, not a legal question for it to decide.

In *Akron*, however, Justice Powell, writing for the majority, declared a provision which said "that 'the unborn child is a human life from the moment of conception,'" was "inconsistent with the Court's holding in *Roe v. Wade* that a State may not adopt one theory of when life begins to justify its regulation of abortions."<sup>1270</sup> *Roe* said no such thing, but the majority said it had and the lower courts listened.

In *Charles v. Carey*,<sup>1271</sup> a district court, relying on the *Akron* statement, struck down a statute referring to a fetus as a "human being" and went so far as to question the propriety "of the term 'death' in conjunction with the term 'fetal.'"<sup>1272</sup> The appellate court declared the term "fetal death" to be unconstitutional as well.<sup>1273</sup>

Another district court, in *Eubanks v. Brown*,<sup>1274</sup> struck down as unconstitutional a statute defining a "'fetus' as 'a human being from fertilization until birth.'"<sup>1275</sup> The term "human being" was defined "as 'any member of the species homo sapiens from fertilization until death.'"<sup>1276</sup> These definitions were "unconstitutional because they incorporate[d] into the law a definition of life as beginning at fertilization, a theory which the Supreme Court ha[d] not adopted, and which the Supreme Court ha[d] held may not be used by a state in a statute to justify its regulation of abortion."<sup>1277</sup> Likewise, in *Poe v. Gerstein*, an appellate court concluded that since, under *Roe*, a fetus was not a person, it could not be called a "child."<sup>1278</sup>

1268. *Maher*, 432 U.S. 464.

1269. *Roe*, 410 U.S. at 159. Of course, by requiring permissive abortion laws, the Court implicitly decided the issue of when life begins.

1270. *Akron*, 462 U.S. at 444.

1271. 579 F. Supp. 377 (N.D. Ill. 1983).

1272. *Id.* at 379-80.

1273. *Charles v. Daley*, 749 F.2d 452 (7th Cir. 1984).

1274. 604 F. Supp. 141 (W.D. Ky. 1984).

1275. *Id.* at 144.

1276. *Id.*

1277. *Id.*

1278. 517 F.2d 787, 796 (5th Cir. 1975), *aff'd sub nom. mem.* *Gerstein v. Coe*, 428 U.S.

It should be noted that simple use of the term "unborn child" in a constitutional definition of viability was allowed in *Danforth*, without comment by the Court.<sup>1279</sup> Moreover, there is an incongruous circularity to the Supreme Court's reasoning. In *Roe*, the Court surveyed state law treatment of the unborn and concluded: "In short, the unborn have never been recognized in the law as persons in the whole sense."<sup>1280</sup> If the fetus is not a person, because it is not treated as such in the law, does it follow that the fetus may not be treated as a person in the law, because the fetus is not treated as a person in the law?

A state ought to be able to declare its belief that a fetus is a person, a child, or a human being from conception. If the Constitution requires a free abortion choice for women, the state would be unable to implement its view by banning abortions. That is all that *Roe* declared. The notion that the Supreme Court is the censor of the words and findings of state legislators is unsound.

In a recent Sixth Circuit case, *Planned Parenthood Ass'n of Cincinnati v. Cincinnati*, the dissenting opinion addressed the free expression rights of lawmakers:

[T]he right to criticize the current orthodoxies—whether constitutionalized or not—is explicitly protected by the same constitution that has been held implicitly to prohibit state and local governments from making it a crime to procure a first trimester abortion. For the Cincinnati City Council to adopt a resolution expressing open disapproval of *Roe v. Wade* and petitioning for a return of the Constitution to the *status quo ante* 1973 would probably anger many of the plaintiff clients even more than they were angered by adoption of the fetal disposal ordinance actually passed—but that would hardly make such a resolution unconstitutional.<sup>1281</sup>

Of course, this is so, as even a fair reading of *Roe* admits. It is typical of abortion jurisprudence that such basic notions as first amendment rights get lost in the flurry to overturn statutes regulating abortion, even first amendment rights in the most sacred realm of political debate.

Justice O'Connor, in *Akron*, stressed a point which capsulizes this discussion well. She wrote:

[W]e must keep in mind that when we are concerned with extremely sensitive issues, such as the one involved here, 'the appropriate forum for their resolution in a democracy is the legislature. We should not

901 (1976).

1279. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 63 (1976).

1280. *Roe*, 410 U.S. at 162.

1281. 822 F.2d 1390, 1405 (6th Cir. 1987)(Nelson, J., dissenting).

forget that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." This does not mean that . . . we defer to the judgments made by state legislatures. 'The point is, rather, that when we face a complex problem . . . we do well to pay careful attention to how the other branches of Government have addressed the same problem.'<sup>1282</sup>

*c. Rush to judgment.* Further evidence of the growing hostility of the Court toward abortion restrictions was evident in *Thornburgh*, where the Court rushed to judgment on the merits from the appeal of a grant of a preliminary injunction.

Four months after Pennsylvania passed its regulations in 1982, but shortly before the statute was to go into effect, the plaintiff abortion providers filed a two-volume compendium of forty affidavits.<sup>1283</sup> These later became the basis of a court-ordered stipulation.<sup>1284</sup> The state was forbidden to contest plaintiffs' facts unless they were able to offer evidence at the hearing for a preliminary injunction.<sup>1285</sup> Because of the limited time for preparation, no testimony was offered at the hearing.<sup>1286</sup>

No major injustice was imposed, however, because the parties were assured the stipulation would be used solely for purposes of the hearing.<sup>1287</sup> The district court denied nearly the whole requested injunction.<sup>1288</sup> Two days later, the appellate court enjoined the entire Act pending appeal.<sup>1289</sup> The appeals were argued, then reargued following the Supreme Court's decision in *Akron* and its companion cases.<sup>1290</sup> Then the appellate court went to the merits, holding the Act largely unconstitutional.<sup>1291</sup>

The Supreme Court rejected the argument that the appellate court had erred in going to the merits rather than limiting its scope of review

1282. *Akron*, 462 U.S. at 465 (O'Connor, J., dissenting)(citation omitted).

1283. The motion for preliminary injunction was filed on October 29, 1983, four months after the Act was passed. The Act was to take effect on December 8. The plaintiffs collected extensive affidavits during this time. At a meeting with counsel on November 18, the district court ordered the parties to submit a stipulation of uncontested facts by November 30. However, no contesting of facts was allowed unless evidence was presented at the hearing on December 2. As a result, the "unusually complete" (as Justice Blackmun called it) record was lopsided heavily in favor of plaintiffs. Brief for Appellant at 35-49.

1284. *Id.* at 35-49.

1285. *Id.*

1286. *Id.*

1287. *Id.*

1288. *Id.* at 7-8.

1289. *Id.*

1290. *Id.* at 8.

1291. *Id.*



to whether the district court had abused its discretion.<sup>1292</sup> The Court admitted that such a standard of review is normally appropriate.<sup>1293</sup> It then cited two cases of dubious applicability as creating an exception.<sup>1294</sup>

*Thornburgh's* end result was to work a great injustice on the state of Pennsylvania, since under *University of Texas v. Cumenish* such use would not have been made of its stipulations and the State had received no notice that it was being subjected to expedited proceedings.<sup>1295</sup> Further, the new rule created by the Court will leave parties uncertain whether a final ruling on the merits will result from a preliminary injunction motion.<sup>1296</sup> The likely result will be that preliminary injunction hearings will become full-scale trials.<sup>1297</sup>

Justice O'Connor iterated the thesis of the present article well. She observed, "If this case did not involve state regulation of abortion, it may be doubted that the Court would entertain, let alone adopt, such a departure from its precedents."<sup>1298</sup>

By contrast, in the earlier case of *Singleton*, the Court unanimously held that the appellate court had erred in going to the merits of the case, as the state had not had adequate opportunity to present evidence or arguments in defense of the abortion regulations.<sup>1299</sup> This was ignored in *Thornburgh*.<sup>1300</sup> The *Singleton* Court stated the general rule "that a federal appellate court does not consider an issue not passed upon below."<sup>1301</sup> It continued with a commentary which the *Thornburgh* Court ought to have reread:

In *Hormel v. Helvering*, the Court explained that this is 'essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.' We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the

1292. *Thornburgh*, 476 U.S. at 757.

1293. *Id.* at 755.

1294. *Id.* at 819-226 (O'Connor, J., dissenting).

1295. *Id.* at 816-817.

1296. *Id.* at 826 (O'Connor, J., dissenting).

1297. *Id.*

1298. *Id.*

1299. *Singleton v. Wulff*, 428 U.S. 106, 119 (1976).

1300. *See, e.g., Thornburgh*, 476 U.S. at 752-754, 755-57.

1301. *Singleton*, 428 U.S. at 120.

statute.<sup>1302</sup>

These inconsistencies within abortion jurisprudence create a climate of unpredictability in the courts. As in *Thornburgh*, one may be surprised by a decision on the merits before having opportunity to present one's case. Cases such as *Singleton*, while correctly decided on the issue of going to the merits, give one no notice of when and where abortion jurisprudence will go astray from the usual rules. A comparison of *Singleton* and *Thornburgh* indicates a failure of the principle of stare decisis as well as a violation of the rules of self-governance. Under the rules of *Singleton*, *Thornburgh* should have been remanded for a trial on the merits. The hostile tone of *Thornburgh* and its radical result seem indicative of the increasingly defensive mood of the *Roe* majority because of the general scholarly rejection of its handiwork in *Roe*, the skillful assaults of Court dissenters on *Roe*, and, perhaps, the loss of yet another member of the pro-*Roe* majority (with the call of Chief Justice Burger for reconsideration of *Roe*).<sup>1303</sup>

#### 4. Value of rules

The value of the normal rules of procedure and adjudication seems so obvious as to need no recital. However, since the rules have suffered so much violation in abortion jurisprudence, a reminder seems appropriate. As Justice O'Connor observed in *Thornburgh*, "no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion."<sup>1304</sup> The Court's action in *Thornburgh*, she declared, was "in contravention of settled principles of constitutional adjudication and procedural fairness."<sup>1305</sup>

These "settled principles" assure predictability, stability, and consistent results— notions related to the goals of stare decisis. They also allow a normal and detailed development of constitutional law after time for reflection and step-by-step development. Further, obedience to the normal principles lends legitimacy to the Court's decisions, avoids the appearance of result orientation, and maintains the appearance of neutrality.

Transgressions into the realm of the legislature are problematic because the Court is ill-equipped to do legislative work. Its decisions carve social policy into the granite of constitutionality, which should

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1302. *Id.* (citation omitted).

1303. *Thornburgh*, 476 U.S. at 785 (Burger, C.J., dissenting).

1304. 476 U.S. at 814 (O'Connor, J., dissenting).

1305. *Id.* at 815 (O'Connor, J., dissenting).

more properly be written in sand as experiments which may be easily erased if unworkable or unjust upon reflection. Legislatures, by contrast, can write, alter, and erase social experiments as the seasons of social change pass by.

In *Rescue Army v. Municipal Court*,<sup>1306</sup> the Court summed up the special virtue of the rule requiring avoidance of constitutional issues where possible. Such a policy is not "merely procedural," but is "one of substance, grounded in considerations which transcend all such particular limitations."<sup>1307</sup>

That policy, declared the *Rescue Army* Court, had its roots in the particular role of judicial review in our governmental scheme and included considerations of the "comparative finality" of its decisions, respect for "other repositories of constitutional power," the necessity of each part of government "to keep within its power, including the courts," and "the inherent limitations of the judicial process, arising especially from its largely negative character."<sup>1308</sup> For those concerned with private rights under such a system, the Court noted:

On the other hand it is not altogether speculative that a contrary policy, of accelerated decision, might do equal or greater harm for the security of private rights, without attaining any of the benefits of tolerance and harmony for the functioning of the various authorities in our scheme. For premature and relatively abstract decisions, which such a policy would be most likely to promote, have their part too in rendering rights uncertain and insecure.<sup>1309</sup>

However, the Court noted, in *Rescue Army*, the choice had long since been made, and wisely so, for the rule of restraint not only maintains the Court in its proper place but preserves individual rights as well.<sup>1310</sup>

These rules, then, are not a mere product of "the fussiness of judges," but are designed to prevent the courts from becoming "roving commissions assigned to pass judgment on the validity of the Nation's laws."<sup>1311</sup> The health of the national government and the ultimate protection of individual rights rests in great measure on observance of these rules of respect and restraint. They ought to be observed even in the realm of abortion jurisprudence.

1306. 331 U.S. 549 (1947).

1307. *Id.* at 570.

1308. *Id.* at 571.

1309. *Id.* at 572.

1310. *Id.*

1311. *Singleton*, 428 U.S. at 131 (Powell, J., dissenting)(quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973)).

IV. THE CORRECTION: A CALL FOR *Roe v. Wade*'s REVERSAL

Abortion jurisprudence is not only incoherent internally, it is incongruously related to the precedents in which it is purportedly rooted, to the medical procedures to which it is allegedly related, and to the state interests by which it is supposedly delimited. The unprincipled rhetoric of *Roe* and its progeny have yielded a body of judicially-crafted policies inconsistent with the canons of sound jurisprudence on which a liberal democracy depends.

The tangent set by *Roe*'s unconstitutional departure from the norm has led abortion jurisprudence far from the path of the rest of the law. A correction in the angle of the trajectory is required. The most direct and constitutionally defensible correction is the reversal of *Roe*.

Lynn Wardle has listed several reasons why the principle of stare decisis is no obstacle to reconsidering *Roe v. Wade*.<sup>1312</sup> First, he noted<sup>1313</sup> Justice Powell's declaration of a Court duty to "reexamine a precedent where its reasoning or understanding of the Constitution is fairly called into question. And if the precedent or its rationale is of doubtful validity, then it should not stand."<sup>1314</sup> *Roe* has been relentlessly criticized, subjected to continuing efforts to rewrite its rationale, and rejected by the co-equal administrative and legislative branches of government.<sup>1315</sup> Clearly the Court has a duty to reexamine *Roe*.

Second, underlying the doctrine of stare decisis is the principle of consistency, which should require the Court to bring the abortion privacy doctrine into harmony with the rights of the unborn in other contexts.<sup>1316</sup> In 1983, Justice Brennan remarked that "the same respect for the rule of law that requires us to seek consistency over time also requires us, if with somewhat more caution and deliberation, to seek consistency in the interpretation of an area of law at any given time."<sup>1317</sup> As has been demonstrated, *Roe* and its progeny are anomalous across the legal landscape and especially in the highly relevant area of fetal rights. A startling inconsistency occurs when an unborn child in one hospital room is being aborted, while in the room next door another is being medically treated, with full legal protection, simply because one mother prefers to abort her offspring and the other does not.<sup>1318</sup> Rights dependent on the preferences of another are inconsistent with the usual

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1312. Wardle, *supra* note 19, at 251-57.

1313. *Id.* at 252.

1314. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627-28 (1974)(Powell, J., concurring).

1315. Wardle, *supra* note 19, at 252.

1316. *Id.*

1317. *Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 391 (1983).

1318. Wardle, *supra* note 19, at 254.

concept of rights.<sup>1319</sup> "That the attempt of a distressed woman to kill her child shortly after birth is deemed a repugnant criminal act of child abuse or attempted homicide while the attempt of the same woman to kill the same child shortly before birth is deemed a fundamental constitutional liberty is an arbitrary discrepancy too large to ignore," observes Wardle.<sup>1320</sup>

Third, a reexamination of cases which "marked a significant departure" from precedent is recognized by the Court as especially appropriate.<sup>1321</sup> As shown above, continuous protection of the unborn, by legal restriction of abortion, had been in place from the inception of the United States and for centuries before. The unprecedented scholarly outcry over *Roe* is further evidence of the abruptness of the departure of *Roe* from what had gone before.

Fourth, abortion jurisprudence has "deviated substantially from reasonable and workable methods of constitutional analysis," and has, instead, resorted to a rigid formalistic reliance on *stare decisis* (while, at the same time, gutting *Roe* of content).<sup>1322</sup> Justice O'Connor observed, in her *Akron* dissent, that "[t]he Court's analysis . . . is inconsistent both with the methods of analysis employed in previous cases dealing with abortion, and with the Court's approach to fundamental rights in other areas."<sup>1323</sup> Lower courts have followed this "regressive formalism," reaching extreme results.<sup>1324</sup> "When the underlying principles are so unworkable that rigid application of *stare decisis* results, it is time to reconsider the precedent," argues Wardle.<sup>1325</sup>

Fifth,<sup>1326</sup> "[s]tare decisis has a more limited application when the precedent rests on constitutional grounds, because 'correction through legislative action is practically impossible.'"<sup>1327</sup> The ultimate task of the Supreme Court in adjudicating claims of constitutional right is to interpret and apply the Constitution. If a line of cases, upon more mature reflection, appears unconstitutional, then the cases must be overruled. *Stare decisis* is less binding in constitutional adjudication precisely because the Justices' first loyalty must be to the Constitution and not to

1319. *Id.*

1320. *Id.*

1321. *Id.* at 255 (citing *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627 (1974)(Powell, J., concurring), *Monnell v. Department of Social Servs.*, 436 U.S. 658, 695 (1978), and *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 273 (1980)(Stevens, J., plurality opinion)).

1322. *Id.* at 256.

1323. *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 452-53 (1983)(O'Connor, J., dissenting).

1324. Wardle, *supra* note 19, at 257.

1325. *Id.*

1326. *Id.*

1327. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272-73 & n.18 (1980).

their prior pronouncements. Of course, where cases such as *Roe* have not been overruled, then such precedent should be followed, including implementation of the state interests declared to be compelling. This has not been done, making the abortion right even more anomalous, absolute, and unconstitutional. The case for overturning *Roe* is more powerful now than when *Roe* was conceived in 1973.<sup>1328</sup>

Justice Brandeis said that the Court had "often" overruled its prior decisions involving constitutional interpretation.<sup>1329</sup> In fact, the Court has expressly overruled its precedent over one hundred times,<sup>1330</sup> and it has done so *sub silentio* numerous other times.<sup>1331</sup> One commentator has observed:

The practice of overruling error has been defended by the conservative nineteenth century Chief Justice Roger Brooke Tanney and championed by the liberal twentieth century Justice William O. Douglas. The necessity of jettisoning past mistakes is a belief that belongs to the ideology of no party and no faction and is as much an institution accepted by the whole Court as judicial review itself.<sup>1332</sup>

Cases have been overruled after a history of one hundred and four years<sup>1333</sup> and, on rehearing, granted to the same parties within one year.<sup>1334</sup>

However, some voices may be heard proclaiming that abortion law is such a settled part of the legal landscape that reversal is unwarranted. Some decry the possible reversal of *Roe* by a new Court constituency as a politicizing of the Supreme Court. One commentator remarked, "The fate of the abortion right is . . . riding on whether or not the *Roe* supporters remain on the bench through President Reagan's term, and if they do remain, on who the next president is and who he nominates to the Supreme Court."<sup>1335</sup>

1328. See generally Wardle, *supra* note 19 (setting forth the many reasons why the Court is better equipped to handle the abortion issue now than it was in 1973 and why the constitutional imperative is even more pressing).

1329. *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 407 (Brandeis, J., dissenting).

1330. Pfeifer, *Abandoning Error: Self-Correction by the Supreme Court*, in *ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS* 5 (D. Horan, E. Grant & P. Cunningham eds. 1987).

1331. See, e.g., *supra* text accompanying notes 135-56 (discussing the implicit overruling of *Gary-Northwest*).

1332. Pfeifer, *supra* note 1330, at 7.

1333. *Edwards v. California*, 314 U.S. 160 (1941), *overruling* *City of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837).

1334. *Jones v. Opelika*, 319 U.S. 103 (1943), *overruling* *Jones v. Opelika*, 316 U.S. 584 (1942).

1335. Comment, *Thornburgh v. American College of Obstetricians: Return to Roe?*, 10 HARV. J.L. & PUB. POL'Y 711, 727 (1987).

Such a view implies that constitutional law is merely a matter of the current political views of five justices. Such a notion, of course, is to be rejected. Rather, Justices have a duty to put away their personal philosophies and interpret the Constitution by means of neutral principles. That this is easier at some times than others is no reason to abandon the pattern and goal.

However, where past Court constituencies have politicized the process, it is not politicizing it further to reject such unconstitutional activities and return to the letter and spirit of the Constitution. Refusal to do so would be to abandon the Court's ultimate loyalty to the Constitution.

Had the Court in the past allowed itself to be bound by unconstitutional precedent merely because it was entrenched and reversal might be disruptive, this nation would yet be shackled to *Plessy v. Ferguson*<sup>1336</sup> and *Lochner v. New York*.<sup>1337</sup>

As recently as 1985, Justice Blackmun, author of *Roe*, declared that "when it has become apparent that a prior decision has departed from a proper understanding" of the Constitution, the prior decision must be overruled.<sup>1338</sup>

A Supreme Court refusal to overrule *Roe v. Wade* merely because it is claimed to be entrenched would be the ultimate illustration of the super-protected nature of the abortion right. It would also be a sacrifice of the Constitution on the altars of political expediency and personal ideology.

Typical of the political approach is Laurence Tribe's book, *God Save This Honorable Court*.<sup>1339</sup> In his book, Tribe warns of the "constitutional storm" from which the Court must be preserved.<sup>1340</sup> Upon close examination, however, it becomes clear that the storm he fears is the appointment of justices who will adhere closely to the Constitution.<sup>1341</sup> It seems obvious that, given the Court's duty of loyalty to the Constitution, any proposed justice who did not adhere closely to the Constitution ought to be rejected. That such faithfulness is viewed as a vice demonstrates the flawed analysis of Professor Tribe.

Moreover, Tribe's solution to what he views as politicization of the Court is itself politicization of the Court. He advocates the active examination of judicial nominees on the basis of their political views relating to certain of his favorite doctrines, especially the abortion pri-

1336. 163 U.S. 537 (1896)(separate but equal doctrine).

1337. 198 U.S. 45 (1905)(economic substantive due process).

1338. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985).

1339. L. TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985).

1340. *Id.* at xix.

1341. *Id.* at 41.

vacy right.<sup>1342</sup> Those failing his litmus test should be rejected.

Surely an appeal to neutral principles of constitutional adjudication is in order at this point in history. If certain doctrines are jeopardized by such an approach, there ought to be no cry of politicization. To remedy past political transgressions of the Court is not a politicized act but an exercise of loyalty to the Constitution and a fulfillment of the judicial mission. Thus, there is no principled reason not to overturn *Roe v. Wade*.

## V. CONCLUSION

In 1973, the Supreme Court, in *Roe v. Wade*, set out on an abrupt angle away from the rest of the law. The decision was firmly rejected by the legal community. The criticism continues regarding the failure of the Court to anchor the abortion privacy right in the Constitution.

As the Supreme Court and the lower courts have followed the trajectory set by *Roe*, abortion jurisprudence has strayed further away from the normal rules of law and has made the abortion privacy right a super-protected right. The anomalous treatment of the abortion right is evident in its special judicial protection, as compared with the usual treatment of cases involving other privacy rights, fetal rights in other contexts, other permitted medical regulation by the states, procedural and adjudicatory rules, and the employment of stare decisis. As the Court has repeatedly rebuffed efforts by the legislatures to protect the compelling state interests declared in *Roe*, the right to abortion has become nearly absolute.

These anomalies undermine the principles of stare decisis, on which the Court has relied to uphold the abortion privacy right since *Roe*, and the rule-of-law foundation upon which the Constitution rests. *Roe* itself was an unconstitutional usurpation of power not granted to the Court by the Constitution. Continued adherence to *Roe* violates the Supreme Court's duty to uphold the Constitution.

The only principled remedy is to overrule *Roe v. Wade*. By so doing, the Court may return the matter to the political forum, where it properly belongs under the Constitution of the United States.

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1342. *Id.* at xviii.