



University of Baltimore Law Forum

Volume 7
Number 2 January, 1977

Article 2

1-1977

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Recommended Citation

Tepel, S. Timmerman (1977) "The Fetus: Acorn or Oak Tree?," *University of Baltimore Law Forum*: Vol. 7 : No. 2 , Article 2.
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The FETUS: Acorn or Oak Tree?

by S. Timmerman Tepel

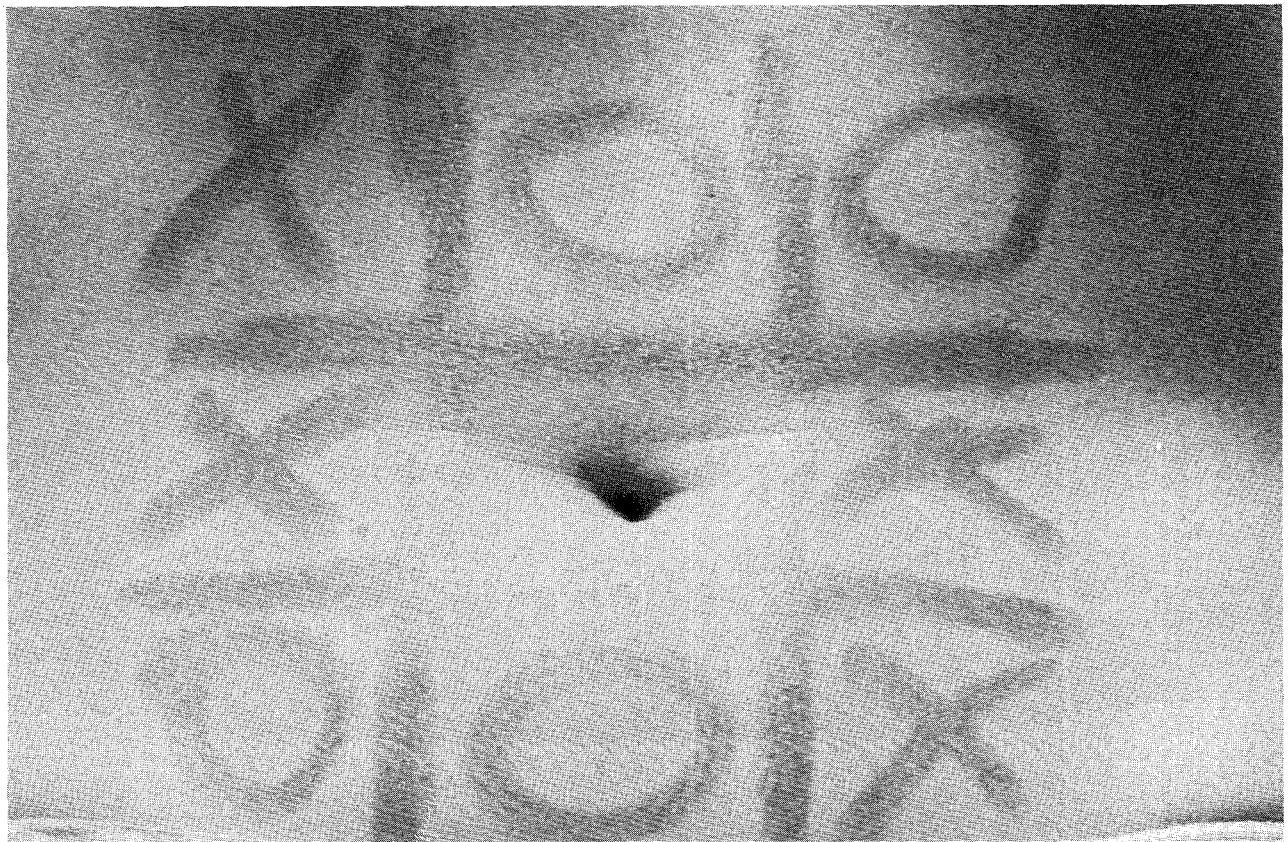


photo by Chris Michael

There is perhaps more controversy in 1976 about abortion than ever before. *Roe v. Wade*, 410 U.S. 113 (1973), spoke to certain issues and plainly decided to ignore others. *Doe v. Bolton*, 410 U.S. 179 (1973), (decided the same day as *Roe*), did nothing to clarify the ambiguous quality of *Roe*. Many people think there are many unanswered questions remaining from these decisions; furthermore, there is a large minority pushing for a constitutional amendment making all abortions illegal.

The Supreme Court in *Roe/Doe* neatly side-stepped a firm answer to the question: what is a fetus? Is a woman's

biology her destiny? Or, is a fetus an appendix easily removed when it causes trouble? Hundreds of years of productive thinking by our most brilliant philosophers hasn't really solved much; however, the time is fast approaching when definite answers will be necessary. Our ability to control our bodies mandates a clear definition of the fetus' status in the very near future.

I. Before *Roe v. Wade*

People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), was the first reported decision to declare an abortion statute unconstitutional. Refer-

ring to *Griswold v. Connecticut*, 381 U.S. 479 (1965), the California Supreme Court concluded that the right to choose whether to bear children was a woman's fundamental right based on the right of privacy or liberty in matters related to marriage and sex. This case was followed by a district court decision in *United States v. Vuitch*, 305 F. Supp. 1032 (D. D.C. 1969). *Vuitch* ruled that the phrase in the District of Columbia's abortion statute referring to the necessity of danger to the mother's life and health be eliminated. Then, in *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970), in Wisconsin, the district court declared the

statute unconstitutional in respect to an unquickened fetus; the court cited the right to privacy.

Next came the district court decisions of *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), and *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970), both cases holding parts of Texas' and Georgia's statutes unconstitutional.

[The *Doe*] decision [at the federal district court level, 319 F. Supp. 1048 (N.D. Ga. 1970), did] not stand for the fundamental right of a woman to choose whether to bear a child. The Court made it clear that it was unwilling to declare that such a right reposes unbounded in any one individual. Clearly, the decision to abort a formed embryo is not purely a private one affecting only husband and wife. The decision affects not only husband and wife, but also the state and the fetus as well. *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems*, 1972 U.I.L.L.F. 177, 187 (hereinafter cited as *Survey on Abortion*)

That state courts were not giving free rein to the concept of the right of privacy, alluded to in *Doe*, is even more apparent in *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217 (E.D. La. 1970). The *Rosen* decision emphasized the state's right to assign a value to fetal life. The court stated: "We do not recognize the asserted right of a woman to choose to destroy the embryo or fetus she carries as being so rooted in the traditions and collective conscience so as to be ranked as 'Fundamental'." *Id.* at 1232. Other cases, in the period prior to the Supreme Court's decisions in *Roe* and *Doe*, demonstrate a pattern of much disagreement and confusion among the states in their decisions about abortion.

As evidence of this confusion we find that—during the pre-*Roe* period—many states had abortion laws which were inconsistent with their feticide statutes. Concerning the effect of liberalized abortion laws on individual states' feticide statutes, "[i]t is inconsistent . . . to allow all abortions but to punish a third-party wrongdoer for an act which has the same end result—death of the fetus." *Survey on Abortion, supra* at 191-92. Two California decisions reflect this conflict: *Keeler v. Superior Court*, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal.

Rptr. 481 (1970), and *People v. Chavez*, 77 Cal. App. 2d 621, 176 P.2d 92 (1947). In *Keeler*, the district appeals court first held that a viable fetus is a human being for the purpose of California's homicide statutes. See generally *The Killing of a Viable Fetus Is Murder*, 30 MD. L. REV. 137 (1970). This decision was in line with *Chevez*, which held that a viable fetus in the act of being born was a human being. However, *Keeler* was overruled, the decision being based on the fact that there was no feticide statute, *per se*, in California, and therefore, there was no murder. "*Keeler* presents the paradoxical situation in which an unborn, 21-week child is protected from its own mother and her doctor but is not protected from a wrongdoer who maliciously takes its life." Knecht, *supra* at 193.

The controversy which eventually led up to the *Roe/Doe* decisions caused as much comment outside the courts as in. In 1972, Roger Wertheimer attempted to give definition to the various trends of thinking.

According to the liberal, the fetus should be disposable upon the mother's request until it is viable; thereafter, it may be destroyed only to save the mother's life. To an extreme liberal the fetus is always like an appendix, and may be destroyed upon demand anytime before its birth. A moderate view is that until viability the fetus should be disposable if it is the result of felonious intercourse, or if the mother's or child's physical or mental health would probably be gravely impaired. . . . For the extreme conservative, the fetus, once conceived, may not be destroyed for any reason short of saving the mother's life.

Since these definitions help not at all in coming to one conclusion about abortion, Mr. Wertheimer attempts—and sometimes succeeds—to demonstrate that all these separate groups are not so dissimilar as seems apparent at first glance. He pokes fun at them all, concluding that perhaps the only difference between birth and viability is the ". . . quite inessential one of geography."

Perhaps the remarks most indicative of Wertheimer's "conservative's" position came from Pope Paul in 1968.

In conformity with these landmarks in the human and Christian vision of marriage, we must once again declare that the direct interruption of the generative process already begun, and, above all, directly willed and procured abortion, even if for therapeutic reasons, are to be absolutely excluded as elicited means of regulating birth. POPE PAUL IV, ENCYCLICAL ON BIRTH CONTROL 178

Around the same time as the Pope's "Encyclical", feminists began to be vocal in their remarks in favor of Wertheimer's "appendix" theory. One aspect of abortion legislation particularly enraging to feminists was that, at the time of most statutes' enactment, most legislatures were comprised almost entirely of men. Many feminists believed that a man—and certainly not a body of men—had no right to tell a woman what she could or could not do to or with her own body. This has been described as the double irony: to be punished for being a woman under a law created in the absence of women's assent. See Comment, *Isolating the Male Bias Against Reform of Abortion Legislation* 10 SANTA CLARA LAWYER 301 (1970) (hereinafter cited as *Isolating the Male Bias*).

This is the background which brought us to the Supreme Court's *Roe/Doe* decisions. The argument for and against the fetus as person goes round and round. Perhaps the thrust of the problem is that logic is of no assistance; the determination of the fetus' status cannot be grounded wholly in logic. If we find ourselves taking a firm decision on the abortion issue, it's because we are looking at a fact situation in a certain way—not because the fact situation is that way. As Wertheimer so succinctly put it: ". . . there isn't much we can do with a fetus; either we let it out or we do it in."

II *Roe v. Wade* and *Doe v. Bolton*

Without *Griswold v. Connecticut, supra*, *Roe/Doe* could not have happened, or, certainly not with such ease. *Griswold* held a statute making the use of contraceptives a criminal offense an unconstitutional invasion of the right of privacy of married persons. The Court found that the Fourteenth Amendment concept of liberty protects those per-

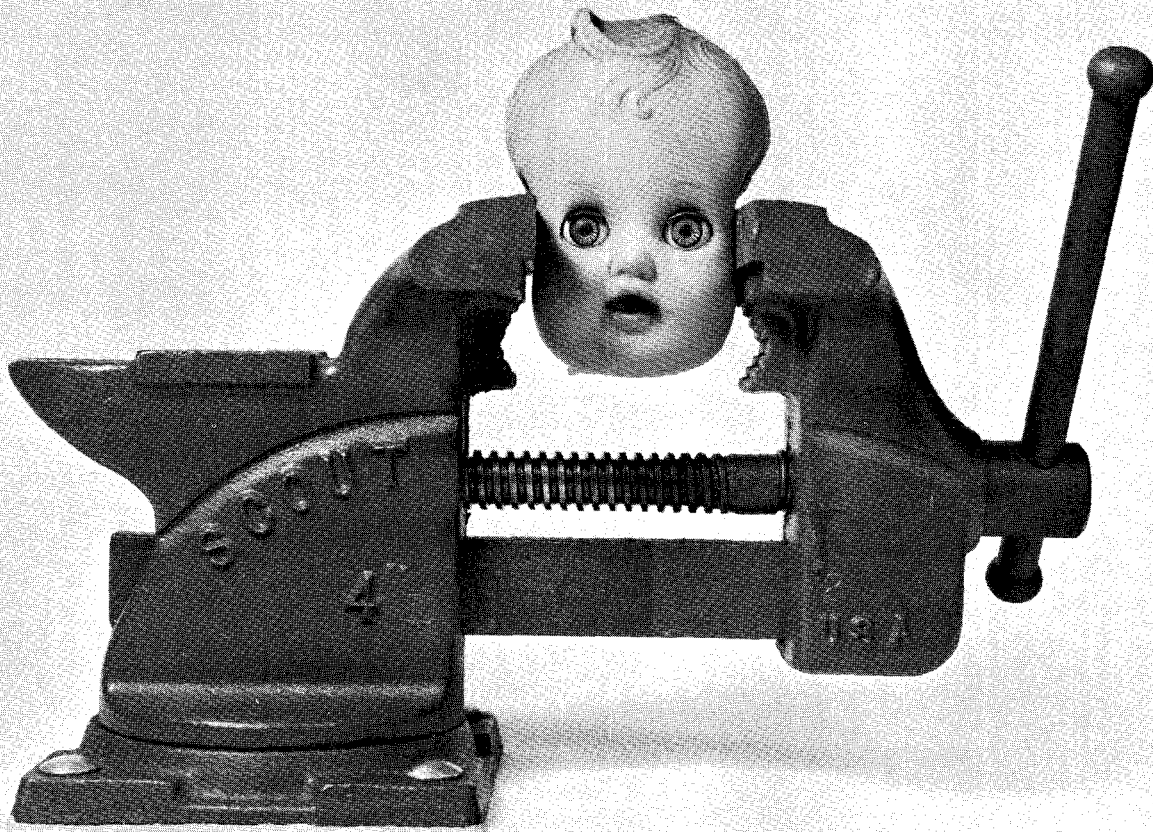


photo by Chris Michael

sonal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. This concept of the right to privacy set the stage for the *Roe/Doe* decisions.

In *Roe* the Court held that the Texas abortion statutes prohibiting abortion at any stage of pregnancy except to save the life of the mother were unconstitutional. Additionally, it held that during the first trimester of the pregnancy the state has no interest in the abortion decision; that at the end of the first trimester the state may regulate abortion procedure in ways reasonably related to maternal health; and that after viability the state may regulate and even proscribe abortion unless necessary for maternal life or health. One would think that this decision was flexible enough to please everyone; on the contrary, it pleased almost no one. Those who wished for an absolute right to abortion—trimesters and viability be damned—were disappointed. Those who hoped that abortion would be declared absolutely illegal were disappointed. And, in fact, as we

shall see further on, *Roe* did nothing to quell the controversy.

The Supreme Court in *Roe* made a thorough historical search of abortion law before reaching its decision. The major questions were whether the right to personal privacy includes an abortion decision and, inextricably related to that, whether the fetus is a “person” under the Constitution. The Court concluded that the right to privacy does include the right to have an abortion; but they held this right to be a qualified one. The Court stated that this right became limited when the fetus became “viable”.

[I]t is reasonable and appropriate for a State to decide that at some point in time another interest, that of the health of the mother or that of potential human life, becomes significantly involved. The woman’s privacy is no longer sole and any right of privacy she possesses must be measured accordingly. *Roe, supra* at 159.

The Court ducked the issue of determining when life begins, stating that viability usually occurs by the twenty-eighth

week, but might occur as early as the twenty-fourth week. *Id.* at 160. After surveying the common law history, the Court concluded that “. . . the unborn have never been recognized in the law as persons in the whole sense.” *Id.* at 162. Discussing the fetus in terms of “potential life”, the Court concluded that the State’s legitimate interest arises at viability, when the fetus has the capability of meaningful life outside its mother’s body. *Id.* at 163.

Mr. Justice Rehnquist, dissenting, stated that “[t]he decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.” *Id.* at 174. In some ways these remarks have evolved into the words of a prophet of doom; the Court’s division of the pregnancy into trimesters with the state’s interest beginning at “viability” has been the source of abortion controversy since 1973.

In *Doe*, decided the same day as *Roe*, the Supreme Court reiterated its position in *Roe* by declaring that a pregnant woman has no absolute constitutional right to abortion on demand. Further, the Court stated that the Georgia statute still permitting a physician to perform an abortion only after—using his best clinical judgment—he determined that the abortion was necessary was not unconstitutionally vague. “Physician’s best clinical judgment” was defined to include every factor relevant to his/her patient’s well-being. However, the Court did rule that the requirement of the Georgia statute that all abortions take place in an accredited hospital was not reasonably related to the statute’s purpose.

The Court further concluded that a statute could not require a hospital committee’s approval, nor could it require the concurrence of two other physicians. And finally, it held that a state abortion statute could not restrict abortions within that state to residents of that state. In *Roe*, the Court attacked the general issue of the legality of abortion; in *Doe*, it defined the limits of the individual state’s permissible involvement.

In respect to the “physician’s best judgment”, the Court stated that “. . . the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment.” *Doe, supra* at 192. The Court declared the hospital requirement invalid because it failed to exclude the first trimester; *Roe* had held that the state had no interest in an abortion decision during the first trimester. As to the Georgia statute’s requirement of two concurring doctors, the Court stated that “[i]f a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. . . . Required acquiescence by co-practitioners . . . unduly infringes on the physician’s right to practice.” *Id.* at 199.

Justice Douglas, in a concurring opinion, added that the Georgia statute’s medical supervision violated the pa-

tient’s right of privacy inherent in her choice of her own physician. This echoed his remarks in *Roe* concerning the right to privacy. “The right of privacy—the right to care for one’s health and person and to seek out a physician of one’s own choice protected by the Fourteenth Amendment—becomes only a matter of theory, not a reality, when a multiple-physician-approval system is mandated by the State.” *Id.* at 219.

Justice Douglas’ concurring opinion in *Roe/Doe* is perhaps the most interesting philosophically. In an attempt to synthesize the thinking of our time toward abortion, he related his remarks to the thoughts of many philosophers before him. He quotes from Mr. Justice Clark:

To say that life is present at conception is to give recognition to the potential, rather than the actual. The unfertilized egg has life, and if fertilized, it takes on human proportions. . . . The phenomenon of life takes time to develop, and until it is actually present, it cannot be destroyed. Its interruption prior to formation would hardly be homicide, and . . . society does not regard it as such. The rites of Baptism are not required when a miscarriage occurs. No prosecutor has ever returned a murder indictment charging the taking of the life of a fetus. This would not be the case if the fetus constituted human life. *Id.* at 217-18, quoting Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 *LOYOLA U.L. REV.* 1, 9-10 (1969)

Justice Douglas’ comments seem much a part of the mainstream of philosophers writing about abortion for the last fifteen hundred years.

One aspect of *Doe* of particular interest was that the Court held that physicians had standing to sue, and that they presented a justiciable controversy. In a brief *Amicus Curiae*, the American College of Obstetricians and Gynecologists, American Medical Women’s Association, American Psychiatric Association, New York Academy of Medicine, et. al. presented their case. Their brief discusses the differences between spontaneous and induced abortion: “The procedure of *induced* abortion differs from *spontaneous* not in the result, nor in the underlying reason for the abortion, but primarily in its being conscious and voli-

tional.” Brief for *Doe* as *Amicus Curiae* at 13, *Doe v. Bolton, supra*. The brief goes on to say that no law requires a patient to seek—or a physician to provide—treatment to prevent spontaneous abortion. *Id.* at 14. The physicians’ brief concludes: “The trouble with abortion statutes is that they reveal an understandable, but nonetheless substantial ignorance of how medicine is practiced. As much could be expected if physicians drafted statutes stipulating how attorneys should practice law. Attorneys would be required to do ‘justice’ to their clients, particularly physician-clients, and failure to do so would result in ten years’ imprisonment.” *Id.* at 56.

The physicians’ remarks seem quite similar to the feminist idea discussed earlier. *Isolating the Male Bias, supra*. There the author’s argument was that since women are the ones whose bodies contain the fetus, they are really the ones—and perhaps the only ones—to decide what to do with those fetuses. In the physicians’ brief, the doctors are arguing that, since they are the ones called upon to perform abortions, they—and perhaps only they—should determine the procedures under which those abortions are performed.

Certainly *Roe/Doe* created a violent upheaval in courts and legislatures all over the country. However, at first, it seemed that, at last, there was some firm ground to stand on when considering abortion. On the contrary, as the months have passed since those decisions in 1973, the ground gets mushier and mushier. Although solving some problems regarding abortion legislation, the decisions caused many more. Most importantly two “armed camps”, mostly women, began to be publicly vocal. Neither was pleased with *Roe/Doe*. On the one hand were the feminists who felt they’d been given a placebo: what they wanted was an absolute right to abortion; what they got was a “qualified right”. A right so qualified as to be hardly a right at all. On the other hand were the “Right to Lifers”. They wanted an absolute right for the fetus, i.e., the fetus as “person” from the moment of conception. What they too got was a “qualified right” for the fetus. And so the fight was on!

III. After *Roe* and *Doe*

A. The Courts

Aside from the dissatisfaction created in feminists and “right-to-lifers”, *Roe/Doe* did not bring an end to the abortion controversy in the courts. There were a number of unresolved questions remaining.

One problem arose when a layman, not a physician, challenged the Indiana statute as unconstitutional. *Cheaney v. Indiana*, 410 U.S. 991 (1973). There the Supreme Court denied certiorari for want of standing of the petitioner. His argument was that if state legislation required abortions to be performed by licensed doctors, it would make abortions available only to rich people. The Court concluded that there was no denial of equal protection. However, the dissenting opinion in *May v. State*, 254 Ark. 194, 492 S.W.2d 888 (1973), maintained that a statute limiting the grounds for abortion must be uncon-

stitutional as a unit, and that a layman had standing to challenge the statute as the statute did not differentiate between abortions performed by doctors and those performed by laymen.

In *People v. Bricker*, 389 Mich. 524, 208 N.W.2d 172 (1973), the court held that a statute prohibiting abortion unless necessary to preserve a woman’s life was valid in its application to laymen. However, in *State v. Hultgren*, 295 Minn. 299, 204 N.W.2d 197 (1973), the court found that since there was no distinction in the statute between laymen and physicians, the statute was unenforceable under *Roe* and *Doe*. The court did, however, comment that a statute specifically prohibiting abortions by laymen would be proper and desirable. In *State v. Strance*, 84 N.M. 670, 506 P.2d 1217 (1973), the court held the statute unconstitutional as applied to abortions performed by licensed physicians; however, they stated that the statute was

constitutional as applied to laymen.

Another issue that arose after *Roe/Doe* was the constitutionality of the phrase “necessary to preserve her life.” In *Nelson v. Planned Parenthood Center of Tucson, Inc.*, 19 Ariz. App. 142, 505 P.2d 580 (1973), the court held that there was no unconstitutional vagueness in that phrase. In respect to that phrase, the court in *Nelson* stated that having that restriction in the statute—“necessary to preserve her life”—did not unconstitutionally discriminate against poor women for the reason that wealthy women were presumably free to travel outside the state. The court also rejected the contention that the inclusion of that phrase in the statute constituted an establishment of religion and violated the plaintiffs’ religious liberty. The court stated that sanctity for life is not only based on religious concepts.

The abortion case of most significance in 1975, and perhaps 1976 as well, is the



Massachusetts case of *Commonwealth v. Edelin*, HUMAN PROD. & THE LAW REP. I-A-21, at 74-75. In *Edelin* the prosecution was not based on abortion; rather it was a manslaughter charge. Dr. Edelin, by hysterotomy, removed a fetus—while performing an abortion—from a woman; the fetus' age was estimated at from twenty to twenty-eight weeks. There was much conflicting testimony in the case, especially concerning whether the fetus was born alive or whether Dr. Edelin let the baby boy die by doing nothing. The Massachusetts statute concerning abortion had been found unconstitutional under *Roe/Doe*, and the legislature had not written a new one.

Judge McGuire, in his instructions to the jury, *Id.* at I-C-132, discussed the meaning of the word "person", stating that "... one of the essential elements of the crime of manslaughter ... is the death of a person." Directing the jury as to how the Constitution uses that word, Judge McGuire told them that "person" has "... applicability only postnatally. That means after birth. None of the definitions [in the Constitution] indicates with any assurance that it has any possible prenatal application." *Id.* Furthermore, Judge McGuire directed that: "A fetus is not a person, and not the subject of an indictment for manslaughter. In order for a person to exist, he or she must be born." *Id.* at 133. Despite these instructions, and the conflicting evidence, the jury found Kenneth Edelin guilty of manslaughter. The case is currently being considered by the Massachusetts Supreme Court, on appeal.

The *Edelin* decision set off fireworks. Calling the trial a "witchhunt", Edelin said that "a lot of things came together for the prosecution in my case. They got a black physician and they got a woman more than twenty weeks' pregnant and they got a fetus in the mortuary." It is clear from *Edelin* that the decisions reached in *Roe/Doe* did not end our problems with abortion. David M. Alpern stated in *Newsweek* magazine:

Indeed, the final legal verdict on Edelin may be less important than the philosophical discussions his case provides. The adversary system of the criminal courts is not the place to

define abortion, to define viability, or to define the moral issues of abortion,' says Dr. Kenneth J. Ryan ... chief of staff at the Boston Hospital for Women.

Interestingly, the legality of *Edelin* is not at issue; what has concerned people writing about the decision is the ethics/morality question. Modern science is complicating the situation daily; the various forms of mid to late term abortion, with the various accompanying risks of fetal survival, coupled with improvement in mechanical means of keeping prematurely "born" fetuses alive, raise issues of morality and ethics, not issues that can be decided by the courts.

As Margot Hentoff says: "What determines whether the *thing* will be treated as an aborted fetus or a premature infant is whether it is wanted or not—a rather odd way to make a determination of humanity." She believes that the "... real question abortion raises now and forever ... [is whether] ... killing for utilitarian principles [is] morally acceptable to humanists and where should it end?" She argues that taking the life of the fetus to preserve the freedom of the mother to be unburdened by a child is merely the "Ethics of Convenience". She likens abortions performed after the first trimester to infanticide: "... we have in modern western society rejected infanticide as a solution to social problems." Her final argument is that the burden should not be placed upon doctors like Edelin.

Perhaps doctors are the *least* equipped to make such judgments. Their training has educated them to go against their own early instincts—to cut into flesh, to inflict pain, to mutilate in order to cure. In a way, they are trained to be less susceptible to things than the rest of us. To doctors, if the law says an unborn child is only fetal tissue, it is fetal tissue. Tell them to maintain life in its most tortured form, and they maintain life.

The issues Ms. Hentoff raises are important ones. It seems that those to decide our stand on abortion need to be the people, not the courts. This is not to say that there are not narrow aspects of the abortion issue that should be left to the courts. There are a few.

One is the issue of consent, of which

there are two types recurring as a problem in the cases: minor's consent to abortion, and father's consent to abortion. In respect to the father, the cases are fairly consistent. There are, however, two types of paternal consent: that of the married father and that of the putative father. Since *Roe* declared a woman's "qualified right" to an abortion, where has that left that father if he wants the woman to bear the child? In *Coe v. Gersstein*, 376 F. Supp. 695 (S.D. Fla. 1974), *cert. denied*, 417 U.S. 279 (1974), the court found that the statutory requirement of spousal consent was unconstitutional. This decision supported the decision in *Jones v. Smith*, 278 So. 2d 339 (Fla. App. 1973), *cert. denied*, 415 U.S. 958 (1974). *Jones* "... apparently presented that court with a matter of first impression in the nation relative to paternal rights of adult unwed fathers in the abortion decision. The *Jones* court cited *Roe* and *Doe* in asserting that the essential and underlying factor in its own decision was the maternal right of privacy." G. Swan. *Abortion on Maternal Demand: Paternal Support Liability Implications*, 9 VAL. U.L. REV. 243, 253-54 (1975). In *Jones* a putative father was denied by the court any legal veto over an abortion; the court declared the right of privacy to be a personal one.

In *Planned Parenthood Ass'n v. Fitzpatrick*, 401 F. Supp. 554 (E.D. Pa. 1975), the court held invalid parts of a statute requiring consent of a spouse—or the consent of a parent of a minor—but they did not reach the issue of the consent of the putative father. In *Doe v. Doe*, 314 N.E.2d 128 (Mass. 1974), the court was presented with an estranged father who testified that he wanted custody of the child, to support it and arrange for its care. Despite this, the court held he had no veto.

In respect to *Doe v. Doe*, Ms. Lise Kenworthy remarks that one of the court's problems is that:

Courts have been reluctant to become involved in marital relations and protect one spouse from the act of the other. ... More specifically, assuming that the husband has an interest which is entitled to judicial protection, the prospect of ordering a woman not to procure an abortion involves seri-

ous enforcement problems and provokes the question of how one would punish a woman if she disobeyed the decree.

In this case the court reasoned that since the state could not regulate the abortion decision before the fetus becomes viable, then the state could not come to the aid of the husband with authority it did not possess. *Doe v. Doe*, *supra* at 132.

The Supreme Court finally reached the issue of consent—both spousal and parental—in *Planned Parenthood of Central Missouri v. Danforth*, 96 S. Ct. 2831 (1976). In *Planned Parenthood*, Justice Blackmun's opinion, expressing the Court's unanimous view, held that the spousal consent provision in a Missouri statute was unconstitutional. The reasoning was based on the fact that since the state could not regulate or proscribe abortions in the first trimester, then the state could not delegate to a spouse an authority it did not have itself. Unfortunately, the issue of the consent of the putative father was not before the court; however, it does seem likely that if the Supreme Court does not grant the privilege of consent to a spouse, then the consent privilege would not be granted to the unmarried father.

Doe v. Doe raised a question in respect to the father's liability for support. Judith Zernich suggests that "*Doe* has produced the anomalous situation of granting the woman's physician substantive rights superior to those of the father." Yet, if the woman chooses not to have the abortion, the father has the duty to support that child. The stand taken in *Doe* seems difficult; a father requesting custody and offering support is refused his right to make the mother bear his child, yet had she chosen to bear it, he would have had to support it. Ms. Zernich argues that "... if the father is willing to assume custody and support, and if the conception had been a desired one, perhaps requiring a full-term pregnancy is justified." She concludes by acknowledging that the obstacles in solving this problem are formidable, but not sufficiently formidable to totally ignore the father's rights. Elimination of paternal liability for child support may be logically and equitably necessary; or, alter-

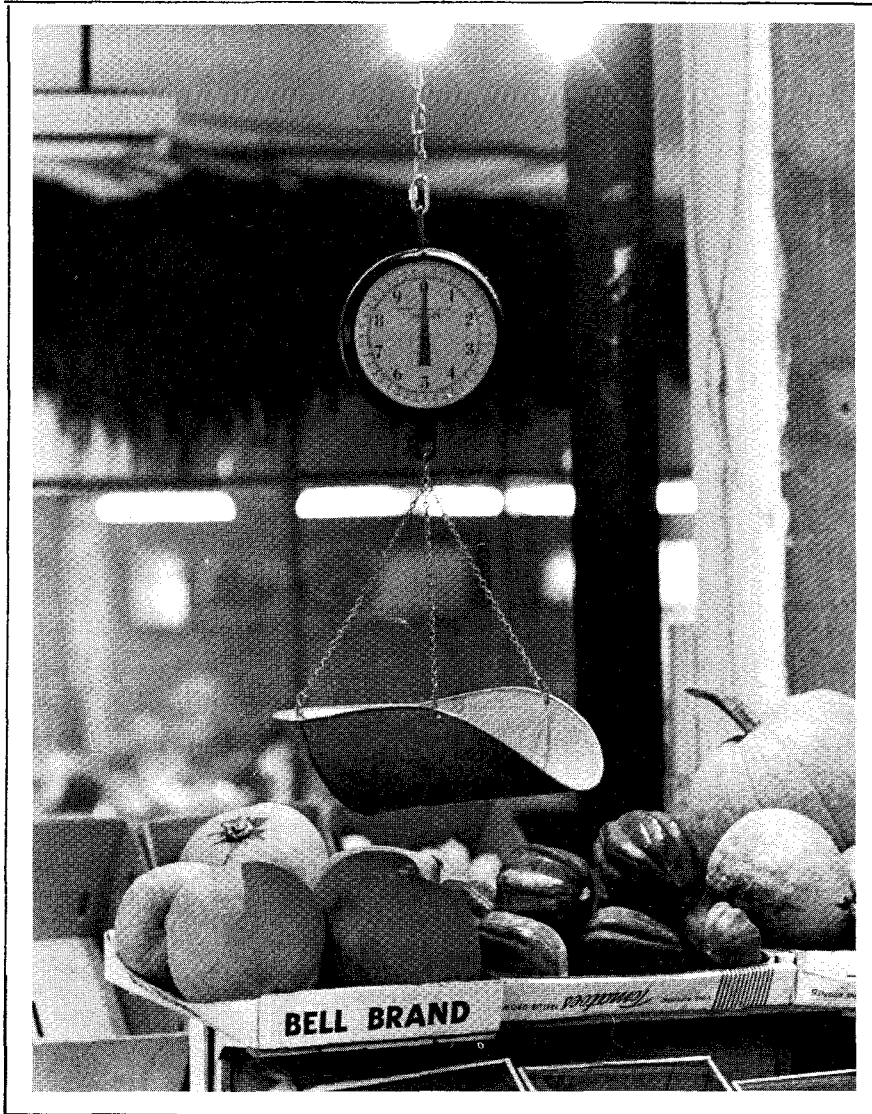


photo by John Woloszyn

natively, recognition of the paternal veto may be the answer. Swan, *supra* at 272.

A minor's right to an abortion without her parent's consent has frequently been a problem to the courts. Mr. Fred Hiatt would argue that since "... permission from a minor's parent is routinely accepted as informed consent ..." today (in respect to experimentation on the child as subject), the child ought to have the right to control the abortion decision. The courts since *Roe/Doe* mostly agree.

In *State v. Koome*, 84 Wash. 2d 901, 530 P.2d 260 (1975), the Washington Supreme Court invalidated that state's consent statute. The court found that the statute too broadly encumbered the unmarried woman's right to abortion, and that it discriminated between similarly situated groups of women. The lower court's decision turned on informed consent. The Florida court in

Coe v. Gerstein, *supra*, held that "... a pregnant woman under 18 years of age cannot, under the law, be distinguished from one over 18 years of age in reference to 'fundamental,' 'personal' constitutional rights." at 698. Most courts agree. "Data indicates that fear of parental reactions may drive the pregnant minor to run away from home, seek criminal abortion, attempt self-abortion, or even suicide. An absolute parental consent requirement would often result in denial or detrimental delay of needed medical care. Thus parental consent requirements are likely to be counterproductive. Furthermore, for reasons of health and social policy, it is not constructive to allow the imposition of compulsory pregnancy as punishment by parents. As the *Koome* court reasoned, "... parental prerogatives ... are not absolute and must yield to fundamental

rights of the child or important interests of the State. . . and the State's interest in restricting minors' access to abortions [is] inadequate to satisfy the requirements of due process under *Roe* and *Doe*." 530 P.2d at 264.

The Supreme Court agrees. The recently decided *Planned Parenthood of Central Missouri v. Danforth*, *supra*, held the statute's parental consent provision unconstitutional since the state did not have the constitutional authority to give a third party an absolute, possibly arbitrary, veto over the decision of the physician and his patient.

B. The People

Most of the post *Roe/Doe* furor is not taking place in the courts; more people with no real legal orientation are writing, thinking—and shouting—about abortion than ever before. Until recently, the practice of abortion was not taboo, only the mention of it. Now that the practice is neither taboo nor illegal, the mention of it is no longer taboo. Is the wish to be rid of "Eve's burden"—abortion—a needed instrument of social policy? Despite *Roe/Doe*, the people do not agree.

If we accept the underlying dictum of medical ethics as "Do no harm", is there a way out of the abortion dilemma by doing no harm? Or are we searching merely for a way to do the least harm—to the woman, to the father, to the parents of a minor, and to the fetus?

Do we look at the fetus' right to live as primary, or do we consider the effect of that life on others as primary? Anthony Smith, in *The Human Pedigree* suggests: "With the courts, and plaintiffs and defendants, and hard cash and publicity all involved, the fetus is joining the society of which it is a part earlier than ever before." The speculation is endless. What about fetal research? Since an aborted fetus prior to viability—at least—is not a "person," is that fetus then fair game for research? What about the future of our human race? Does man have an obligation to weed out, through genetic counseling, the imperfect fetuses? Smith states:

We lavish intense care upon our infants the moment they are born but have not expended thought upon the manner of their conception. There is a hidebound quality in our attitude that the genetic lottery of who mates with whom should be preserved at all costs. . . . If a third of our mental institution inmates are mongoloids, is it not strange that we do nothing to lessen that intake?

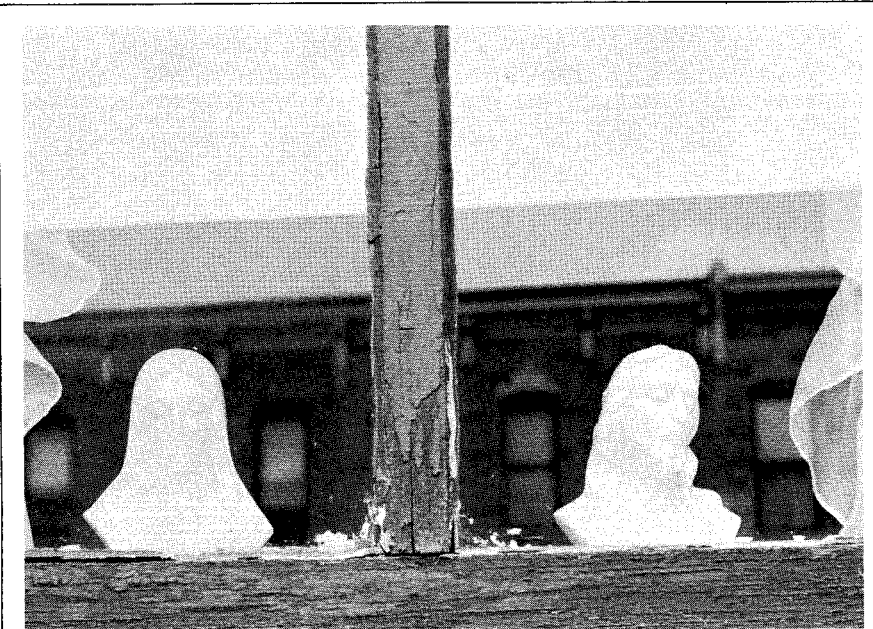
What about amniocentesis, a method by which a small amount of amniotic fluid is extracted in the twelfth to sixteenth week of pregnancy? This procedure is not new; it has been used for years to determine Rh factor incompatibility between mother and fetus. It may involve fetal puncture, or it may induce abortion and fetal malformation; it may

photo by June Chaplin

cause infection and bleeding to the mother. Do we follow Margot Hentoff's "Ethics of Convenience"? One doctor has said: "The final arbiter of what children should be born is the parents themselves. Only they know what is best for their marriage. I don't have any hesitation in cooperating with an abortion if both parents want only girls and the current pregnancy tests out by amniocentesis to be a boy." Mr. Richard Restak believes that doctors like this one see parents as consumers. Is the real point of the whole argument that a fetus is a part of a woman's body until it is born? "Anti-abortion laws give fetuses rights that living people don't enjoy. No human's right to life includes the use of another human being's body and life-support systems against that individual's will," says Jimmie Kimmey.

The *Edelin* decision has already slowed down fetal research. And yet research on fetuses has precipitated many benefits for our society. Fetal research cannot be divorced from the abortion issue because the fundamental question is the same: is the fetus human? Either the fetus is human or it's not. If the courts decree the pre-viable fetus non-human for abortions, then it should be non-human for research purposes. A number of states have adopted statutes which limit fetal research. In July of 1974, Public Law 93-348, Title II - Protection of Human Subjects of Biomedical and Behavioral Research, established a National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research.

In May of 1975 the Commission issued a comprehensive report on the use of the living fetus in biomedical research. It outlined the guidelines to be used in therapeutic research on fetuses, pregnant women, fetuses *in utero*, and in anticipation of abortion, as well as non-therapeutic research directed toward the nonviable fetus *ex utero*, the fetus during an abortion, and the possibly viable infant. A report was issued in August of 1975, "Protection of Human Subjects: Fetuses, Pregnant Women and In Vitro Fertilization." FED. REG. 33526. The report attempts to give clear definitions of every word a subject of the report; addi-



tionally, it discusses the concept of consent to research in great detail. What is especially interesting is the composition of the Commission. It is composed of eleven members: an obstetrician-gynecologist, an internist, a pediatrician, two physiological psychologists, two law professors, one practicing attorney, two ethicists (one a Catholic priest), and the president of a national black women's organization (a good cross-sectional representation of people well qualified to consider the subject with one exception: only one woman).

The fundamental source of our confusion about abortion is the Right to Life movement. There have always been Right to Lifers, I expect—Wertheimer's "conservatives". However, until the *Roe/Doe* decisions, no one paid much attention to them. Richard Steele of *Newsweek* calls abortion "1976's Sleeper Issue". The Right to Lifers even had their own candidate: an unknown housewife named Ellen McCormack, running on an anti-abortion ticket. There have been over thirty proposed amendments to the Constitution attempting to make abortion unconstitutional. They are of two types: "states' rights" amendments, and "affirmative" or Life-Protective amendments. An "affirmative" amendment would require recognition of the unborn as individuals; a "states' rights" amendment would give the states that option.

Those who argue that a fetus is human from the moment of conception argue that the premise on which the *Roe/Doe* decisions was decided is faulty; they contend that it is not evident from the Constitution that the word "person" excludes the unborn. They think that the burden is on those arguing exclusion, not on those arguing inclusion. One of the strongest pro-life arguments is made by Robert A. Destro: "[If] the 'compelling' point at which the state may exert its interests in the protection of the lives of the unborn is placed at viability, that point moves closer to the time of conception with each development in the treatment of prenatal and neonatal problems." The National Right To Life movement claims more than a million

active members; it is not the only pro-life group. They are making themselves heard; how effective their volume will be remains to be seen.

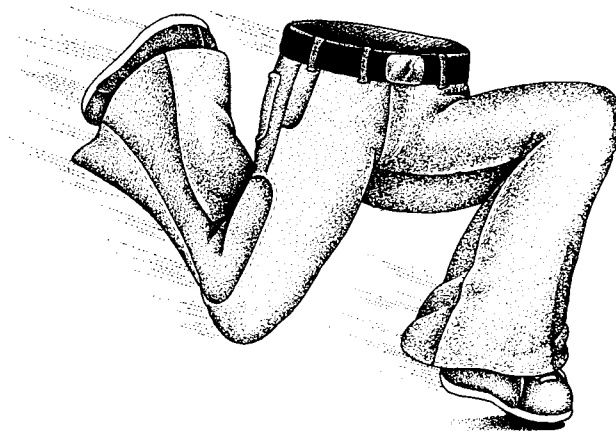
An easy solution to the multi-faceted issue of abortion is not likely, either now or in the near future. It will take time to reconcile Jan Leibman, of the National Organization for Women, when she says, "No woman should ever be forced to be her husband's brood mare. The woman is the one who carries the fetus and gives birth to it, so she should be the only one to decide whether to carry it to term" with Barry Goldwater when he says, "I don't want to see promiscuous

abortion. If a life is in danger, abortion is okay, but otherwise the Pill ought to be enough. If it isn't, they ought to learn to say no." Wertheimer sums up the argument by saying that each side's position is equally weak and equally strong:

The liberal asks, "What has a zygote got that is valuable?" and the conservative answers, "Nothing, but it's a human being, so it's wrong to abort it." Then the conservatives asks, "What does a fetus lack that an infant has that is so valuable?" and the liberal answers, "Nothing, but it's a fetus, not a human being, so it is all right to abort it."

And round and round we go.

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