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From *Poe* to *Roe*: A Bickelian View of the Abortion Decision—Its Timing and Principle

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I. INTRODUCTION

In 1961 the United States Supreme Court in *Poe v. Ullman*[1] refused to reach the merits of a suit brought by a couple, a housewife and a doctor under the Connecticut Declaratory Judgments Act to test the constitutionality of that state's anti-birth-control statutes.[2] Relying on the concept of desuetude,[3] the Court felt the plaintiffs had not demonstrated they were in immediate danger of prosecution and absent such a showing, the Court refrained from a decision on the merits.

In 1965 the Supreme Court in *Griswold v. Connecticut*[4] reached the constitutional merits of the Connecticut statutes challenged in *Poe*. Unlike the earlier case, this constitutional challenge was raised as a defense to a prosecution under the statutes. On the merits,

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1. 367 U.S. 497 (1961).
2. The statutes challenged provided:

> Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or both fined and imprisoned.

CONN. GEN. STAT. ANN. § 53-32 (1958), *repealed,* Pub. Act 828, § 214 (1969).

> Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.

CONN. GEN. STAT. ANN. § 54-196 (1958), *repealed,* Pub. Act 828, § 214 (1969).

3. Generally speaking, this is a concept by which statutes which have not been enforced for a long period of time become nullified or repealed by the fact of their continued disuse.
4. 381 U.S. 479 (1965).

the Court held that the statutes were an unconstitutional infringement on the right of privacy guaranteed by the United States Constitution.

In 1971 the Supreme Court in *United States v. Vuitch*[5] held that the District of Columbia statute which made abortions illegal "unless the same were done as necessary for the preservation of the mother's life or health"[6] was not unconstitutionally vague. The case was before the Court on an appeal by the government from the dismissal by a federal district court of an indictment against the defendant.

In 1973 the Supreme Court in *Roe v. Wade*,[7] an appeal from a grant of declaratory relief, held that a Texas statute prohibiting abortions unless "procured or attempted by medical advice for the purpose of saving the life of the mother"[8] was unconstitutionally overbroad. The Court held that the right of personal privacy is broad enough to encompass a woman's decision to terminate her pregnancy and that the state of Texas was unable to show a compelling interest in forbidding abortions during all stages of the pregnancy.

In the fall of 1961, shortly after the *Poe* decision, Alexander M. Bickel, a Yale professor, put forth an elaborate, sophisticated thesis in support of Supreme Court avoidance of constitutional adjudication on the merits.[9] The next year this thesis became the basis of a book entitled: *The Least Dangerous Branch, the Supreme Court at the Bar of Politics*.[10] The purpose of this article is to analyze the activity of the Supreme Court in the developing area of privacy in matters of procreation from the *Poe* decision to the *Roe* decision in terms of the thesis presented by Bickel in these works. Specifically, this article will examine Bickel's thesis in detail and the timing and rationale of the *Roe* decision from this Bickelian viewpoint.

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5. 402 U.S. 62 (1971).
6. D.C. CODE ANN. § 22-201 (1967). The statute in pertinent part provides:

> Whoever . . . produce[s] an abortion . . . on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned . . . .

7. 410 U.S. 113 (1973).
8. TEX. PENAL CODE art. 1196 (1961).
9. Bickel, *The Supreme Court, 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).
10. A. BICKEL, THE LEAST DANGEROUS BRANCH, THE SUPREME COURT AT THE BAR OF POLITICS (1962) [hereinafter cited as BICKEL].

II. BICKELIAN THESIS

In order to understand Bickel's thesis, it is essential to define exactly what he is attempting to justify. This is a difficult task since Bickel's discussion is often on several levels and the same statement often has meaning on several different levels. As one commentator, in reviewing his book, said, "I did not find this book easy reading."[11] Thus forewarned, as a general matter, Bickel attempts to justify and define the role of the Supreme Court in the American polity and governmental scheme. Initially, he attempts to defend the Court's exercise of the power of judicial review. Bickel feels that this power must be defended for several reasons. He acknowledges that the power of judicial review cannot be found in the Constitution, although this is not to say that it cannot be placed there.[12] He also realizes that when the Court invalidates a statute passed by an elected, representative body, its action is potentially "anti-majoritarian" or "democratically deviant." This results since the Court is thwarting the theoretical voice and will of the majority speaking through its elected representatives who are directly responsible to the public.[13]

Unable to accept the traditional basis for judicial review set forth by Chief Justice Marshall in *Marbury v. Madison*,[14] since the proofs at the same time "are not only frail, they are too strong; they prove too much"[15] and unable to answer fully all the arguments against judicial review, Bickel resorts to a truism to justify the device. The truism is that "many actions of government have two aspects: their immediate, necessarily intended, practical effects, and their perhaps unintended or unappreciated bearing on values we hold to have more general and permanent interest."[16] The question then arises who is to be the guardian of such values. Although legislatures and executives are directly elected and responsible to the majority, in reality most legislation is passed by pluralist groups or temporary majorities. This factor which makes them responsive to immediate needs is the very reason that they are not so well-fitted as the Supreme Court to be the guardian of the principles embodied in the Constitution.[17]

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11. Klonoski, Book Review, 42 ORE. L. REV. 83 (1962).
12. BICKEL, *supra* note 10, at 1.
13. *Id.* at 16-18.
14. 5 U.S. (1 Cranch) 137 (1803).
15. BICKEL, *supra* note 10, at 2. *See also* BICKEL, *supra* note 10, at 2-14.
16. *Id.* at 24.
17. BICKEL, *supra* note 10, at 27. Bickel sets forth several reasons why the Court is better suited to perform this task. The Court is isolated from the direct political pressures to which the legislatures are subject. Also the justices should have the leisure, the training and the

As guardians then of the country's long-range goals, the Court should only invalidate legislative actions when it has a principled basis for so doing. Consequently, Bickel would agree with Herbert Wechsler[18] to the extent that judicial review is the principled process of enunciating and applying certain enduring values to our society. Bickel would also agree with Marshall that a statute's repugnancy to the Constitution in most cases is not self-evident, but is rather an issue of policy that someone must decide.[19] Therefore a decision of invalidity is a value judgment that must be placed on a principled, long-range view of where society should be headed and on enduring values in society.

However, Bickel realizes, along with Professor Charles L. Black,[20] that the Court performs not only a checking function but also a legitimating one. That is, the Court in the exercise of judicial review not only invalidates legislation but also approves, or at least does not disapprove, statutes and thus adds its moral approval to the course of the legislative policy. This is a very important function to Bickel, since he feels that the Court holds a position of esteem in the country and that it serves a mystic function giving its imprimatur to legislative enactments. Indeed, "[t]he Court's high 'degree of credit' is a fact of life."[21]

Consequently, Bickel feels that "[t]he constitutional function of

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isolation to make scholarly studies into the ends of government. In addition, by the time a case regarding certain legislation gets before the Court, it is able to view the legislation in concrete situations whereas the legislature was able to view the problem only in the abstract and therefore is able to give a sober second thought to the legislation. Finally, the Court is viewed as a continuum with some measure of stability and thus the public is better able to see the Court in this role of guardian. *Id.* at 24-26, 31.

18. Herbert Wechsler, a professor of law at Columbia, in attempting to justify the exercise of judicial review, argues that the decisions in constitutional cases must rest on "neutral principles" which would apply to all similar situations and not merely to the case before the Court. *See* Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959). In that article Wechsler states:

> I put it to you that the main constituent of the judicial process is that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.

Id. at 15. *See also* BICKEL, *supra* note 10, at 49-65. For a definition of a "neutral principle," see note 23 *infra.*

19. BICKEL, *supra* note 10, at 3.
20. Charles L. Black, a professor of law at Yale, advanced his theory of judicial review in C. BLACK, THE PEOPLE AND THE COURT (1960). *See also* BICKEL, *supra* note 10, at 29.
21. BICKEL, *supra* note 10, at 130.

the Court is to define values and proclaim principles,"[22] whenever it makes a constitutional adjudication. However, a major problem arises since this function cannot be exercised with respect to relatively few matters while society is left to drift with respect to its other concerns. In addition, in some matters, such as integration, society requires both principle and expediency at the same time. Bickel therefore rejects Wechsler's idea of neutral principles[23] as a basis for every decision which the Court makes, since "it would require the Court to validate with overtones of principle most of what the political institutions do merely on grounds of expediency.[24] Bickel feels that some input (not necessarily a decision) is needed from the Court to aid the political branches in making expedient decisions before a principled decision with enduring effects is made by the Court.

At the core of Bickel's thesis is the fact that the Court is not always faced with the choice of invalidation or legitimization. Bickel says:

> The essentially important fact, so often missed, is that the Court wields a threefold power. It may strike down legislation as inconsistent with principle. It may validate, or, in Charles L. Black's better word, "legitimate" legislation as consistent with principle. *Or it may do neither.* It may do neither, and therein lies the secret of its ability to maintain itself in the tension between principle and expediency.[25]

Bickel feels that when the Court exercises the first two of these triune functions, it must do so on a principled basis. However, as for the exercise of the third power, Bickel notes that:

> When the Court, however, stays its hand, and makes clear that it is staying its hand and not legitimating, then the political processes are given relatively free play. Such a decision needs relatively little justification in terms of consistency with democratic theory. It needs more to be justified as compatible with the Court's role as defender of the faith, proclaimer and protector of the goals. But in withholding constitutional judgment, the Court does not necessarily forsake an educational function, nor does it abandon principle. It seeks merely to elicit the correct answers to certain prudential questions that, in such a society as Lincoln conceived, lie in the path of ultimate issues of principle. To this end, the Court has, over the years, developed an almost inexhaustible arsenal of techniques and devices. Most of them are quite properly

22. *Id.* at 68.
23. As interpreted by Bickel, a neutral principle is "an intellectually coherent statement of the reason for a result which in like cases will produce a like result, whether or not it is immediately agreeable or expedient." *Id.* at 59.
24. *Id.* at 69.
25. *Id.* (original emphasis).

> called techniques for eliciting answers, since so often they engage the Court in a Socratic colloquy with the other institutions of government and with society as a whole concerning the necessity for this or that measure, for this or that compromise. All the while, the issue of principle remains in abeyance and ripens. "The most important thing we do," said Brandeis, "is not doing." He had in mind all the techniques, of which he was a past master, for staying the Court's hand. They are the most important thing, because they make possible performance of the Court's grand function as proclaimer and protector of the goals. These are the techniques that allow leeway to expediency without abandoning principle. Therefore they make possible a principled government.[26]

As an example of this theory, Bickel discusses what he refers to as Plessy v. Ferguson's Error,[27] which was not that the Court refused to invalidate segregation but rather that the Court legitimated it. Bickel feels that if the question as to the constitutionality of segregation had been left undecided many of the problems present in the country and presented to the Court in *Brown v. Board of Education*[28] would not have appeared.

Another reason why the Supreme Court should stay its hand rather than make a constitutional adjudication at every opportunity is the prudential concerns with which the Court must contend. Although the Court is held in high esteem, it does not have any authority of its own to enforce its decisions. Having "neither force nor will,"[29] the effectiveness of the Court depends upon its continuing to be held in high esteem and the ability of its decisions to garner widespread acceptance. The Court cannot announce a principle, however true it may be, if the public will not accept it. This is but another facet of the fact that judicial review is democratically deviant.

Another quotation from his book helps to explain Bickel's thesis:

> The Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own; and—the short of it is—it labors under the obligation to succeed.
>
> In one sense, we have thus got no nearer to parsing the inexpressible. "These judges," Mr. Justice Frankfurter was reduced to

26. *Id.* at 70-71.
27. *Id.* at 197. This, of course is named after the famous case of Plessy v. Ferguson, 163 U.S. 537 (1896), in which the Supreme Court held the doctrine of "separate but equal" to be constitutional.
28. 347 U.S. 483 (1954).
29. This phrase is taken from the 78th Federalist Paper written by Alexander Hamilton entitled "The Judges as Guardians of the Constitution," in which Hamilton states:

> The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment . . . .

> telling the American Philosophical Society in 1954, ". . . must have something of the creative artist in them; they must have antennae registering feelings and judgment beyond logical, let alone quantitative, proof." But in another sense, the matter is far advanced once it is seen that the Court must pronounce only those principles which can gain "widespread acceptance," that it is at once shaper and prophet of the opinion that will prevail and endure. To be sure, there is still not much help in "quantitative proof"; it is still a question of "antennae." But we can be much clearer concerning ways to go about the task, to limit its challenge and make it manageable. The first wisdom, as I have tried to show, is that the moment of ultimate judgment need not come either suddenly or haphazardly. Its timing and circumstances can be controlled. On the way to it, both the Court and the country travel the paths of the many lesser doctrines, passive and constitutional, that I have sought to describe and assess. Over time, as a problem is lived with, the Court does not work in isolation to divine the answer that is right. It has the means to elicit partial answers and reactions from the other institutions, and to try tentative answers itself. When at last the Court decides that "judgment cannot be escaped—the judgment of this Court," the answer is likely to be a proposition "to which widespread acceptance may fairly be attributed," because in the course of a continuing colloquy with the political institutions and with society at large, the Court has shaped and reduced the question, and perhaps because it has rendered the answer familiar if not obvious. In these continuing colloquies, the profession—the practicing and teaching profession of the law—plays a major role; the law, as Bentham long ago remarked, is made, not by judge alone, but by judge and company. But in American society the colloquy goes well beyond the profession and reaches deeply into the places where public opinion is formed.
>
> I do not wish to maintain that this process is as deliberate, as well understood, or as well managed—by the judges, by the profession or by the public—as it might be. The modest effort of this book is to contribute to better understanding of it and to greater deliberation in its management. But my thesis is that such is in fact the process of judicial review carried on by the American Supreme Court.[30]

In order for the Court to carry on this colloquy with the political institutions and society at large, avoid constitutional adjudications and relieve the tension between expediency and principle, it has developed a number of "mediating techniques" of "not doing" based on technical legal concepts. Bickel christens these techniques the "passive virtues"—"passive" because no determination is made on a constitutional or principled basis and "virtues" because they have the advantage of advancing the colloquy. Several of the passive virtues discussed by Bickel in the context of specific cases include: case or controversy requirements; standing; justici-

30. BICKEL, *supra* note 10, at 239-40 (footnotes omitted).

ability; ripeness; political question; vagueness; desuetude; and mootness.[31]

To briefly summarize, Bickel sets out to define the role of the Supreme Court in the American polity and puts forth a call for a principled government with principled decisions designed to have enduring and lasting effects. Judicial review is to be justified only if it adds something to the process, which is principle. In addition, since there are demands on the system requiring immedate attention and the principled decisions of the Supreme Court need to gain widespread acceptance, the Court must be able to have some input into the system without making each decision a constitutional adjudication. As a result, the Court uses what Bickel calls the passive virtues to balance these complex problems. This, all too shortly, is the heart of Bickel's thesis. Whether it is a valid thesis, whether it works and what are its effects will now be examined in the light of the abortion controversy and the landmark case of *Roe v. Wade*.[32]

III. SUPREME COURT AND PRIVACY IN PROCREATION

There are very few things about the decision in *Roe v. Wade*[33] on which everyone in America can or would agree. On the first page of its opinion, the Court observed:

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.
>
> . . . .
>
> Our task, of course, is to resolve the issue by constitutional measurement free of emotion and of predilection.[34]

Clearly the Court was faced with a value judgment and Bickel would argue that this judgment would have to be placed on a principle that had been shaped and reduced through a colloquy with the political institutions and society at large. The Court in *Roe* held that the right of privacy included the decision to have an abortion, however, this right had to be balanced against the state's interest in protecting the health of the mother and the potential life of the fetus. As a result the Court divided the period of pregnancy into trimesters and held:

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31. *Id.* at 111-98.
32. 410 U.S. 113 (1973).
33. *Id.*
34. *Id.* at 116.

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[35]

An analysis of some developments in society and the case law which preceded *Roe* is necessary to determine whether the colloquy which Bickel envisions was effective, whether the controversy had been properly ripened, whether the decision in *Roe* was met with widespread acceptance and whether the principle announced is one that will prevail and endure.

The classic example that Bickel uses to describe his theory of avoidance of constitutional adjudications is *Poe v. Ullman*.[36] *Poe* was a consolidation of declaratory judgment actions brought by a Connecticut couple, a housewife and a Dr. Buxton to test the validity of a Connecticut statute[37] which forbade the dissemination of contraceptives and contraceptive information to everyone, including married couples. The statute in question had been passed in 1879 and except for two police court violations for vending machine sales and a prosecution in 1940 against two doctors and a nurse for aiding and abetting violation of the statute in the operation of a birth-control clinic, there were no recorded instances of prosecution.[38] The plaintiffs alleged the statute violated the fourteenth amendment by depriving them of life and property without due process of law. The complaints alleged that two of the plaintiffs who were married women needed medical devices for the protection of their health but that Dr. Buxton was deterred from giving such advice because the state attorney intended to prosecute any offense against the statute.

According to Bickel, there were two choices open to the Court: 1. it could have decided the controversy on the merits, however, this would have allowed the state's political institutions to evade their own responsibility to either enforce the statute or re-

35. *Id.* at 164-65.
36. 367 U.S. 497 (1961).
37. CONN. GEN. STAT. REV., § 53-32 (1958). *See* note 2 *supra.*
38. BICKEL, *supra* note 10, at 145-46.

peal it; or 2. it could, by judicial abstention, set in motion the process of political decision. The court in *Poe* refused to reach the merits of the case. Speaking through Justice Frankfurter, a four-man plurality felt that in the light of the history of nonenforcement, there was no immediacy of prosecution, which is an indispensable condition of constitutional adjudication. Justice Frankfurter said, "This Court cannot be umpire to debates concerning harmless, empty statutes. To find it necessary to pass on these statutes now, in order to protect appellants from the hazards of prosecution would be to close our eyes to reality."[39] The Court also noted that "the undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis."[40]

To Bickel this "undeviating policy of nullification" reflected the political deadlock in Connecticut and the political institutions had the responsibility to break this deadlock by making an initial decision. It is this decision which should be reviewed by the Supreme Court. Referring to the anti-majoritarian difficulty, Bickel notes, "[I]t is quite wrong for the Court to relieve them of this burden of self-government. However much judicial review may always—but uncertainly, inconclusively, and unavoidably—'dwarf the political capacity of the people,' it should surely not do so knowingly, demonstrably, avoidably."[41] Thus, Bickel applauds the result in *Poe*.

However, there were four dissenters to the abstention.[42] Both Justices Douglas[43] and Harlan,[44] foreshadowing the result in *Griswold,* expressed the opinion that the statute was an unconstitutional infringement on the appellants' rights.[45] In a concurring opinion, Justice Brennan noted,

> The true controversy in this case is over the opening of birth-control clinics on a large scale; it is that which the State has pre-

39. 367 U.S. at 508.
40. *Id.* at 502.
41. BICKEL, *supra* note 10, at 156.
42. The dissenters were Justices Black, Stewart, Douglas and Harlan.
43. 367 U.S. at 509-22.
44. *Id.* at 522-55.
45. In a separate dissent, Justice Stewart stated:
> Since the appeals are nonetheless dismissed, my dissent need go no further. However, in refraining from a discussion of the constitutional issues, I in no way imply that the ultimate result I would reach on the merits of these controversies would differ from the conclusions of my dissenting Brothers.

Id. at 555. The dissent of Justice Black merely states that he believed that the constitutional questions should be reached and decided. *Id.* at 509.

> vented in the past, not the use of contraceptives by isolated and individual married couples. It will be time enough to decide the constitutional questions urged upon us when, if ever, that real controversy flares up again.[46]

It did not take long for the controversy to flare up again and in 1965 Dr. Buxton was once again before the Supreme Court with a Mrs. Griswold, the director of a birth-control clinic, urging that the Connecticut statutes were unconstitutional.[47] However, this time the challenge was raised as a defense to a prosecution under the statutes. Unable in June of 1961 to achieve a decision on the merits in *Poe*, the appellants opened a birth-control clinic and operated it from November 1, 1961, to November 10, 1961, when it was closed by the state. On this appeal the Supreme Court reached the merits of the controversy, which it had avoided four years earlier, and held that the appellants had standing to raise the constitutional rights of their patients. Although they were unable to agree on the constitutional source of the right, seven justices found there was a right of privacy in the Constitution and that the Connecticut statutes were an infringement of this right.

Bickel had urged that the Court abstain from the merits until the political institutions had made the initial decision. However, in this instance the initial decision was made by the appellants in opening the clinics and the political agencies had responded by prosecutions. This does not necessarily mean that the colloquy had failed. Writing about the decision, one commentator noted:

> The decision in *Griswold v. Connecticut* answered one question, but perhaps only one. The Court held that the Connecticut statute forbidding the use of contraceptives unconstitutionally invaded the right of marital privacy. By 1965 the ruling on that narrow question was almost anticlimatic. Twice before, in 1943 and 1961, the same issue had been presented to the Court, but both cases had been dismissed for lack of standing or ripeness. When the Court finally decided the substantive issue, few remained to defend the statute. The Roman Catholic Church, for instance, which presumably had supported the retention of the Connecticut ban on the use of contraceptives, seemed reconciled to the invalidation of the statute in *Griswold*.[48]

Later in that same article, the author said:

> It is well known that the Catholic Church has long objected on moral grounds to the use of contraceptives. Indeed, in days past Catholic authorities in Massachusetts supported 'Vote God's Way' campaigns against repeal of the state's laws prohibiting the dissemination of birth control information. . . .

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46. *Id.* at 509.
47. Griswold v. Connecticut, 381 U.S. 479 (1965).
48. McKay, *The Right of Privacy: Emanations and Intimations*, 64 MICH. L. REV. 259, 261 (1965) (footnotes omitted).

> Gradually, however, Catholic support of these statutes weakened, although without any change in the moral prohibition applicable to members of that church. Indeed, the Catholic Conference on Civil Liberties presented an amicus curiae brief in *Griswold* supporting invalidation, on privacy grounds, of the Connecticut law.[49]

Thus, there is some support for the idea that by delaying the decision regarding the birth-control statutes, the Supreme Court was able to "buy some time" and gain widespread acceptance for the result in *Griswold*.

The fact that there was general satisfaction with the result, however, does not mean there was general agreement as to the soundness of the constitutional basis for the decision. Nor does it mean that those who applauded the result were in agreement as to the holding's future significance. In addition, there was no real colloquy as to the principle announced (except through the dissents of Harlan and Douglas in *Poe*) although the general pronouncement as to a right of privacy was probably widely accepted.

In 1969 the right of privacy announced in *Griswold* was expanded to include the right of a woman to choose to have an abortion. In *People v. Belous*,[50] the California Supreme Court reversed the conviction of a Dr. Belous for committing an abortion and conspiring to commit an abortion under the old California abortion statute.[51] This was the first case which had extended the *Griswold* rationale and overturned a state abortion statute. The court seemingly did not have any trouble in extending the *Griswold* privacy concept. In fact the court said, "The critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state."[52] However, in ruling the statute unconstitutional, the court did not place its emphasis on the right of privacy but on other grounds. Basically, the court found that the statutory exception

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49. *Id.* at 280.
50. 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).
51. The statute under which the doctor had been indicted provided:
> Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the State prison not less than two nor more than five years.

CAL. PENAL CODE § 274 (West 1955). The defendant had not actually performed an abortion, but had merely referred the woman to an unlicensed doctor who performed the abortion. In addition, the statute had been amended and liberalized after the abortion, but prior to the appeal. *See* note 57 *infra*.
52. 71 Cal. 2d at 964, 458 P.2d at 200, 80 Cal. Rptr. at 360.

to abortion, "unless the same is necessary to preserve her life,"[53] was not susceptible of a construction that did not violate legislative intent and at the same time be sufficiently certain to satisfy due process without improperly infringing on fundamental constitutional rights. The court felt that the vagueness was compounded since the decision whether an abortion fell within the statutory exception was delegated to the doctor who was to act at his peril, if his determination was contradicted by a jury. The court said, "The delegation of a decision making power to a directly involved individual violates the Fourteenth Amendment."[54]

In attempting to find a state interest to support the statute, the court referred to the medical protection afforded to the mother and the protection of the fetus. With respect to the former, the court noted that the statute was originally passed as a health measure but it was now medically safer to have an abortion in the first three months of the pregnancy than to carry the child to term. As for the latter, the court noted that all the rights accorded to a fetus depended either on live birth or reflected the interests of the parents.[55] Thus, the fetus itself was discounted as a person entitled to protection. The court also pointed out the number of illegal abortions being performed, mostly by unqualified persons, and the major health problems created thereby. Appeal was attempted to the Supreme Court; however, certiorari was denied.[56] Although the area of conflict was set out and basic battle-lines were drawn, the Supreme Court refused to become involved.

It is important to note that at the time of the *Belous* decision the California abortion statute under which the defendant was charged had been amended and liberalized.[57] The people of California,

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53. CAL. PENAL CODE § 274 (West 1955). *See* note 51 *supra.*
54. 71 Cal. 2d at 972-73, 458 P.2d at 206, 80 Cal. Rptr. at 366.
55. *Id.* at 968, 458 P.2d at 202, 80 Cal. Rptr. at 362.
56. 397 U.S. 915 (1970).
57. CAL. PENAL CODE § 274 (West 1970), provides:

> Every person who provides, supplies or administers to any woman, or procures any woman to take any medicine, drug or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, except as provided in the Therapeutic Abortion Act . . . of the Health and Safety Code, is punishable by imprisonment in the state prison not less than two nor more than five years.

The Therapeutic Abortion Act (HEALTH & SAFETY CODE §§ 25950-954) authorizes abortions "only" if the abortion takes place in an accredited hospital (§ 25951(a)); the abortion is approved by a hospital staff committee consisting of at least three licensed physicians and surgeons (§ 25951(b)); and there is "substantial risk that continuance of the pregnancy would gravely impair the physical or mental

speaking through their legislature, had decided that the former statutory scheme was too strict. Of even more importance is the fact that the statutory liberalization in California was not an isolated event. In 1962 the American Law Institute study on criminal law reform set forth proposals for abortion reform to be included in the Model Penal Code.[58] From the time of these proposals to the

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health of the mother" (§ 25951(c)(1)); the pregnancy resulted from rape or incest (§ 25951(c)(2)); or the woman is under 15 years of age (§ 25952(c)).

58. The MODEL PENAL CODE § 230.3 (1962) provides:

> (1) **Unjustified Abortion.** A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.
>
> (2) **Justifiable Abortion.** A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable. [Additional exceptions from the requirement of hospitalization may be incorporated here to take account of situations in sparsely settled areas where hospitals are not generally accessible.]
>
> (3) **Physicians' Certificates; Presumption from Non-Compliance.** No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any of the requirements of this Subsection gives rise to a presumption that the abortion was unjustified.
>
> (4) **Self-Abortion.** A woman whose pregnancy has continued beyond the twenty-sixth week commits a felony of the third degree if she purposely terminates her own pregnancy otherwise than by a live birth, or if she uses instruments, drugs or violence upon herself for that purpose. Except as justified under Subsection (2), a person who induces or knowingly aids a woman to use instruments, drugs or violence upon herself for the purpose of terminating her pregnancy otherwise than by a live birth commits a felony of the third degree whether or not the pregnancy has continued beyond the twenty-sixth week.
>
> (5) **Pretended Abortion.** A person commits a felony of the third degree if, representing that it is his purpose to perform an abortion, he does an act adapted to cause abortion in a pregnant woman although the woman is in fact not pregnant, or the actor does not believe she is. A person charged with unjustified abortion under Subsection (1) or an attempt to commit that offense may be convicted thereof upon proof

decision in *Roe*, fourteen states rewrote their statutes to conform basically to the A.L.I. proposals.[59] In addition, four other states passed even more liberalized statutes.[60]

The decision in *Belous* heralded the start of a number of suits in which the constitutionality of abortion statutes throughout the country were attacked.[61] A number of these challenges to restrictive abortion statutes were brought by doctors seeking declaratory judgments[62] and injunctive relief[63] against enforcement of

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of conduct prohibited by this Subsection.

(6) **Distribution of Abortifacients.** A person who sells, offers to sell, possesses with intent to sell, advertises, or displays for sale anything specially designed to terminate a pregnancy, or held out by the actor as useful for that purpose, commits a misdemeanor, unless:

(a) the sale, offer or display is to a physician or druggist or to an intermediary in a chain of distribution to physicians or druggists; or

(b) the sale is made upon prescription or order of a physician; or

(c) the possession is with intent to sell as authorized in paragraphs (a) and (b); or

(d) the advertising is addressed to persons named in paragraph (a) and confined to trade or professional channels not likely to reach the general public.

(7) **Section Inapplicable to Prevention of Pregnancy.** Nothing in this Section shall be deemed applicable to the prescription, administration or distribution of drugs or other substances for avoiding pregnancy, whether by preventing implantation of a fertilized ovum or by any other method that operates before, at or immediately after fertilization.

59. *See* ARK. STAT. ANN. §§ 41-303 to -310 (Supp. 1971); CAL. HEALTH & SAFETY CODE §§ 25950-955.5 (West Supp. 1973); COLO. REV. STAT. ANN. §§ 40-2-50 to -53 (Supp. 1967); DEL. CODE ANN. tit. 24, §§ 1790-93 (Supp. 1972); FLA. STAT. ANN. § 458.22 (Supp. 1972); GA. CODE ANN. §§ 26-1201 to -1203 (1972); KAN. STAT. ANN. § 21-3407 (Supp. 1972); MD. ANN. CODE art. 43, §§ 137-39 (Repl. 1971); MISS. CODE ANN. § 2223 (Supp. 1972); N.M. STAT. ANN. §§ 40A-5-1 to -5-3 (Repl. 1972); N.C. GEN. STAT. § 14-45.1 (Supp. 1971); ORE. REV. STAT. §§ 435.405-.495 (1971); S.C. CODE ANN. §§ 16-82 to -89 (Supp. 1971); VA. CODE ANN. §§ 18.1-62 to -62.3 (Supp. 1973).

60. *See* ALASKA STAT. § 11.15.060 (1970); HAWAII REV. LAWS § 453-16 (Supp. 1972); N.Y. PENAL CODE § 125.05 (McKinney Supp. 1973); WASH. REV. CODE §§ 9.02.060-.080 (Supp. 1972).

61. *See* notes 64 and 65 *infra*.

62. Declaratory judgments are brought under 28 U.S.C. § 2201 (1970) which provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

63. Actions for injunctive relief are brought under 28 U.S.C. § 2281

abortion statutes by state officials. Also other challenges arose in state courts as defenses to prosecutions. The legal arguments in these cases centered on the two basic arguments made in *Belous; i.e.,* vagueness and the interest of the state in protecting the fetus. A detailed analysis of each of these cases will not be attempted here, but it is important to note that the courts were split almost evenly on the issue; some held the statute invalid, at least in part, because of vagueness or overbreadth in the infringement of rights,[64] others upheld the state statutes.[65] The diversity of opinion can be easily demonstrated by a brief examination of some of these cases. In *Rosen v. Louisiana State Board of Medical Examiners*[66] and in *State v. Munson,*[67] each of the courts in upholding the statute held that the legislature was the proper body to determine the status and rights of a fetus and its determination was

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(1970) which provides:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

64. *See, e.g.,* Abele v. Markle, 342 F. Supp. 800 (D. Conn. 1972), *vacated,* 411 U.S. 940 (1973); Y.W.C.A. v. Kugler, 342 F. Supp. 1048 (D.N.J. 1972); Poe v. Menghini, 339 F. Supp. 986 (D. Kan. 1972); Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971); Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970), *modified and aff'd,* 411 U.S. 179 (1973); Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970), *modified and aff'd,* 411 U.S. 113 (1973); Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970), *appeal dismissed,* 400 U.S. 1 (1970); United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969), *rev'd,* 402 U.S. 62 (1971); People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied,* 397 U.S. 915 (1970); State v. Barquet, 262 So. 2d 431 (Fla. 1972).

65. *See, e.g.,* Crossen v. Attorney General, 344 F. Supp. 587 (E.D. Ky. 1972), *rev'd sub nom.,* Crossen v. Breckenride, 446 F.2d 833 (6th Cir.), *vacated,* 410 U.S. 950 (1973); Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971), *vacated and remanded,* 410 U.S. 950 (1973); Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970); Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970), *vacated and remanded,* 412 U.S. 902 (1973); Cheaney v. Indiana, — Ind. —, 285 N.E.2d 265 (1972), *cert. denied,* 93 S. Ct. 1516 (1973); Spears v. State, 257 So. 2d 876 (Miss. 1972); State v. Munson, — S.D. —, 201 N.W.2d 123 (1972), *vacated and remanded,* 410 U.S. 950 (1973).

66. 318 F. Supp. 1217 (E.D. La. 1970), *vacated and remanded,* 412 U.S. 902 (1973).

67. — S.D. —, 201 N.W.2d 123 (1972), *vacated and remanded,* 410 U.S. 950 (1973).

not to be overturned in the absence of compelling reasons; in *Steinberg v. Brown*,[68] the court held that the legislature had an affirmative duty under the fourteenth amendment to protect the fetus; in *United States v. Vuitch*,[69] the district court held that the District of Columbia abortion statute was unconstitutionally vague but that the Congress could require that all abortions be performed by qualified doctors; and in *Doe v. Scott*,[70] the court divided the period of pregnancy into trimesters assigning various rights to the woman and the state depending on the stage of the pregnancy.

An overwhelming number of these decisions were appealed to the Supreme Court by various means; however, with one exception the Supreme Court refused to hear any of these cases on the merits. It was obvious that the Court was staying its hand and allowing a colloquy to develop among the lower courts, legislatures and society in general. In addition to the case law and legislative activity, society in general was undergoing significant change. The phenomenon of women's liberation, including a proposed Equal Rights Amendment to the Constitution, was beginning to become a force in society. A new role in society for women in general was taking shape and one of the main goals of the movement was to liberalize abortion laws. The pros and cons of abortion were widely and openly discussed, the issues were being narrowed and the arguments were being made familiar. The one abortion case which the Court heard on the merits prior to the *Roe* case was *United States v. Vuitch*.[71] Why and how the Court chose this case as a vehicle to join in the colloquy presents an interesting look at Bickel's thesis.

Dr. Milan Vuitch was indicted for violation of the District of Columbia abortion statute which prohibited abortions "unless the same were done as necessary for the preservation of the mother's life or health."[72] Prior to trial, he moved to dismiss the indictments on the ground that the statute was unconstitutional. The United States District Court for the District of Columbia agreed and dismissed the indictments against him.[73] The court felt that earlier

68. 321 F. Supp. 741 (N.D. Ohio 1970).
69. 305 F. Supp. 1032 (D.D.C. 1969), *rev'd*, 402 U.S. 62 (1971).
70. 321 F. Supp. 1385 (N.D. Ill. 1971).
71. 402 U.S. 62 (1971).
72. D.C. CODE ANN. § 22-201 (1967). *See* note 6 *supra*.
73. 305 F. Supp. at 1036. The district court, however, refused to dismiss an indictment against a nurse's aid who also was indicted under the statute for an unrelated offense. *Id.* The court felt that the statutory requirement that any abortion be performed "under the direction of a competent licensed practitioner of medicine" was severable from the preservation-of-life-or-health standard and while the latter was unconstitutionally vague, the former represented a proper, separate legislative purpose. The court noted that the two-pronged

case law in the District of Columbia had established that once the prosecution had proven that a doctor had committed an abortion, the burden shifted to the doctor to justify his action.[74] In short, the doctor was presumed guilty unless he could prove his act fit within the statutory exception. The court felt that the doctor's professional, good faith judgment should not be subject to challenge and held that the statute was unconstitutionally vague for failing to give the certainty required by due process.[75] The ambiguities of the statute were particularly suspect since the statute greatly infringed on a significant constitutional right of an individual. In dismissing the indictments, the judge noted that a prompt appeal to the Supreme Court under section 3731 of Title 18 of the United States Code,[76] as then enacted, was highly desirable.[77] The government did appeal and on April 12, 1971, almost a year and a half after the district court decision, the Supreme Court reversed the lower court.[78] The Supreme Court held that the burden was on the prosecution to plead and prove the defendant's act was not within the statutory exception,[79] that the word "health" included mental as well as physical health,[80] that the statute was not vague and the delegation to doctors to determine the meaning of "health" was not improper since that type of judgment had to be made every day by doctors whenever surgery was required.[81]

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exception clearly showed Congressional concern with the medical factors involved in abortions. *Id.* at 1035.

74. *Id.* at 1034. The cases the court relied on were Peckham v. United States, 226 F.2d 34 (D.C. Cir. 1955), and Williams v. United States, 138 F.2d 81 (D.C. Cir. 1943).
75. 305 F. Supp. at 1034.
76. At that time, 18 U.S.C. § 3731 provided in pertinent part:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

Act of June 25, 1948, ch. 645, 62 Stat. 844, *as amended* Act of May 24, 1949, ch. 139, § 58, 63 Stat. 97.

77. 305 F. Supp. at 1036.
78. 402 U.S. 62 (1971).
79. *Id.* at 69-70.
80. *Id.* at 71-72.
81. *Id.* at 72. *Compare* People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), where the court held that the delegation to the doctor to ascertain if the case fit within the statutory exception was a violation of the fourteenth amendment. *See* note 54 and accompanying text *supra.*

Several aspects of the *Vuitch* decision deserve special attention. First, there was a serious question whether the Supreme Court had jurisdiction to hear the appeal.[82] Second, the appeal on the merits was specifically limited to the question of vagueness.[83] Third, the decision itself which upheld the statute. An analysis of the interaction of these three elements provides a fascinating study of the Bickelian thesis in operation.

As will be recalled, the lower court dismissed the indictments against the defendant and at the same time advised taking a direct appeal to the Supreme Court by means of section 3731 of Title 18 of the United States Code.[84] Subsequent to the filing of the appeal but prior to the decision, the statute was amended and direct appeals to the Supreme Court were eliminated.[85] Of direct interest in *Vuitch* was whether this statute prior to amendment allowed appeals from the District of Columbia. Five of the justices read the old statute broadly and held that "statutes" and laws passed by Congress included laws passed solely for the District of Columbia and consequently the Court had jurisdiction to hear the appeal. Four justices dissented and felt that the statute was not applicable and the proper procedure was to appeal to the Court of Appeals for the District of Columbia under another statute.[86] Thus, the criminal appeals statute was given a slightly expansive reading, or at least not the narrowest one possible, in order to hear this particu-

82. A decision whether jurisdiction existed was postponed until a hearing on the merits. United States v. Vuitch, 397 U.S. 1061 (1970). Later in an order on June 29, 1970, the Court requested the parties to brief and argue the following questions:

> 1. Does this Court have jurisdiction under 18 U.S.C. § 3731 to entertain a direct appeal from a decision of the United States District Court for the District of Columbia dismissing an indictment on the ground of the invalidity of the statute on which the indictment is founded, where the statute, although an act of Congress, applies only in the District of Columbia?
>
> 2. Could the District Court's decision in this case have been appealed to the Court of Appeals for the District of Columbia Circuit pursuant to D.C. Code § 23-105?
>
> 3. If the decision could have been appealed to the District of Columbia Circuit, should this Court, as a matter of sound judicial administration, abstain from accepting jurisdiction pursuant to 18 U.S.C. § 3731 because the case involves the validity of a statute the application of which is confined to the District of Columbia?

United States v. Vuitch, 399 U.S. 923 (1970).

83. 402 U.S. at 73.

84. *See* note 76 and accompanying text *supra.*

85. Omnibus Crime Control Act of 1970 § 14(a), 18 U.S.C. § 3731 (1970).

86. D.C. CODE ANN. § 23-105 (1967). The dissenters with respect to the jurisdictional question were Justices Harlan, Brennan, Marshall and Blackmun.

lar appeal, when it would have been very easy for the Court to exercise one of its passive virtues and avoid any adjudication on the merits.

At one level, Bickel would disapprove of the Court's assumption of jurisdiction, since these technicalities, such as the interpretation of this statute, are the devices to avoid constitutional adjudications rather than unnecessarily assume jurisdiction to decide controversial issues. Nevertheless, this assumption of jurisdiction must be viewed in the light of the other aspects of the case. There was really no chance of a long-range expansion of jurisdiction since the statute had already been amended. More importantly, since the indictment had been dismissed solely on the basis of vagueness, the Court could reach the merits of the abortion controversy without reaching a discussion of the right of privacy. Also the District of Columbia statute was one of only two restrictive abortion statutes with the word "health," so even if the statute were held to be unconstitutionally vague only two statutes would be affected.[87] The net result was that with the appeal limited to vagueness, the Court could join the colloquy on a limited basis.

But a question arises whether it was necessary for the Court to hear the case at all. Other than taking away one barrel of the two barrelled attack on abortion legislation, did this decision add anything to the colloquy? The decision upheld the validity of the statute but placed a heavy burden on the state to prove the abortion was not within the exception, placed a heavy presumption on the side of the doctor, and appeared to make a successful prosecution very difficult. On the other hand, doctors acting in good faith could be subject to the ordeal and expense of a prosecution. As Justice Douglas noted in dissent, since the abortion question was a highly emotional one, jurors might convict a doctor more on the basis of their own beliefs rather than the evidence.[88] It is also interesting that of the five justices who agreed that the Court had jurisdiction only three agreed that the statute was not vague.[89] Except for Justices Harlan and Blackmun who felt there was no jurisdiction to hear the merits, but who decided the case on the merits anyhow, the statute's constitutionality may have never been

87. ALA. CODE tit. 14 § 9 (1959) and D.C. CODE ANN. § 22-201 (1967). However, the A.L.I. Model Penal Code proposal also contained an exception allowing abortions to preserve the mental health of the mother. *See* note 58 *supra*. Thus, potentially a finding of vagueness would have had much wider implications.

88. 402 U.S. at 75.

89. The five Justices who held that there was jurisdiction to hear the case were Justices Black, Burger, White, Stewart and Douglas. Of this group, only Justices Black, Burger and White held that the statute was not vague.

determined.[90] The Court's decision in *Vuitch* to uphold the District of Columbia abortion statute when silence was a feasible alternative indicated to at least one commentator that the Supreme Court would be unlikely to overturn abortion statutes on a privacy argument thought to be based on a much shakier precedent.[91]

In addition to the abortion cases, the right of privacy articulated in *Griswold* also gave rise to a challenge to the Massachusetts contraceptive laws which made it an offense, *inter alia,* to distribute birth-control devices to unmarried persons. Although the Court eventually ruled this statute unconstitutional in 1972 in *Baird v. Eisenstadt,*[92] it based its decision on equal protection rather than the expanded right of privacy.[93] Besides failing to enlarge the scope of privacy in *Baird,* the Court had over the two terms prior to *Roe* been limiting the domestic privacy concept either explicitly or by implication, at least according to one commentator.[94] It is with this background that the Supreme Court was faced with an appeal from the district court of Texas challenging that state's abortion law.

IV. *ROE* DECISION

Jane Roe,[95] a single, pregnant woman, initiated a suit in March 1970 against a state district attorney seeking a declaratory judg-

90. Justice Stewart felt that if a doctor performed an abortion in good faith, he should be immune from prosecution. 402 U.S. at 97. Although there is no official indication of how Justices Marshall and Brennan, who dissented as to jurisdiction, would have held on the merits, one might assume they would have held the statute unconstitutional.

91. Sigworth, *Abortion Laws in the Federal Courts—The Supreme Court as Supreme Platonic Guardian,* 5 IND. LEGAL FORUM 130, 134 (1971).

92. 405 U.S. 438 (1972).

93. However, there was some expansion since the Court officially broke away from the sanctity of marriage basis in *Griswold* and held that privacy in matters of procreation was a personal right which belonged to an individual, whether married or single.

94. Sigworth, *supra* note 91, at 136-40. This commentator, whose article was based on the premise that all but the most permissive abortion laws were undesirable, concluded from a survey of recent Supreme Court decisions that the Court would not and should not be the body to repeal restrictive abortion laws. The commentaor concluded by saying:

> [B]oth sexes should think twice before entrusting the ordering of priorities of their intimate lives, not to a tradition which, though dying and riddled with injustice, has at times inspired love and beauty; and not to the democratic process, which at least offers the possibility that all can be heard; but finally to the limited perceptions, without precedent and without responsibility, of a "bevy of Platonic Guardians."

Id. at 142.

95. The name was a pseudonym.

ment that the Texas abortion statute was unconstitutional and an injunction restraining him from enforcing it. James Hubert Hallford, a licensed physician, was allowed to intervene in Roe's action. He alleged in his complaint that he had previously been arrested for violations of the statute and that two such prosecutions were currently pending against him. John and Mary Doe,[96] a married childless couple, with the wife not pregnant, filed a companion suit, alleging that if the wife became pregnant she would wish to have an abortion, and also sought declaratory and injunctive relief. The district court in Texas held that while Roe and Hallford had standing, the Does did not and that while abstention was warranted with respect to the injunctive relief,[97] it was not with respect to the declaratory judgment.[98] On the merits, the court held the statute was vague and overbroad and was an unconstitutional infringement on the plaintiffs' ninth amendment rights and it declared the statute void.[99] Appeal from the decision was made to the Supreme Court pursuant to section 1253 of Title 28 of the United States Code[100] and a protective appeal was also made to the Court of Appeals for the Fifth Circuit. At this time the Supreme Court, as always, had two choices; it could refuse to hear the case or it could hear the case on the merits presented squarely with the privacy issue and thus be compelled, at least according to Bickel, to give a principled decision.

It is evident from examining the jurisdictional posture of the case that there were several grounds by which the Court could have avoided a decision on the merits, if it had so desired. First, the appeals[101] were from the granting of a declaratory judgment and the denial of injunctive relief.[102] Earlier cases[103] held that

96. The names were pseudonyms.
97. Roe v. Wade, 314 F. Supp. 1217, 1224 (N.D. Tex. 1970).
98. *Id.* at 1220.
99. *Id.* at 1223.
100. Appeal was made pursuant to 28 U.S.C. § 1253 (1966) which provides:
> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.
101. The plaintiffs Roe and Doe and the intervenor Hallford appealed the denial of the injunction. The defendant district attorney purported to appeal under 28 U.S.C. § 1253 (1966) the court's grant of declaratory relief.
102. The Court noted, "It might have been preferable if the defendant, pursuant to our Rule 20, had presented to us a petition for certiorari before judgment in the Court of Appeals with respect to the granting of the plaintiff's prayer for declaratory relief." 410 U.S. at 123.
103. Gunn v. University Comm., 399 U.S. 383 (1970); Mitchell v. Donovan, 398 U.S. 427 (1970).

section 1253, the basis for the appeal, does not allow appeal to the Supreme Court from the granting or denial of declaratory relief alone. Thus, theoretically at least, the Court could have limited the appeal to whether the district court erred in abstaining from hearing the question of injunctive relief and never reached the merits of the case. Second, the Court held that Dr. Hallford and the Does did not have standing to challenge the statute.[104] Thus, the only party left was Roe, a single woman who was pregnant in May 1970 when the suit was instituted, but who obviously was not subject to that pregnancy at the time of the decision. After the decision in *Baird v. Eisenstadt*,[105] it no longer made any difference that Roe was not married, as the right of privacy in procreation had been extended to individuals, whether married or single. Furthermore, that she was no longer pregnant could have evoked application of the usual rule in federal cases that "an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated."[106] Nevertheless, the Court noted the long period of time the appellate process takes and the normal 266 day gestation period and concluded that "pregnancy provides a classic justification for a conclusion of nonmootness."[107] The Court refused to apply any of these technicalities to avoid the merits and allow the colloquy to continue and instead went to the merits.

According to Bickel, the decision of the Court on a constitutional adjudication must be based on an enduring principle, capable of widespread acceptance, which has been ripened through a colloquy with the political institutions and society at large. Does the decision in *Roe* meet these criteria?

Was the controversy ripe for adjudication and was the colloquy complete? On one level, the colloquy had been completed. All the information and arguments both for and against abortion legislation had been aired throughout society. Although no consensus was achieved, the public was as ready as it would ever be for a de-

104. 410 U.S. at 125-29. Dr. Hallford was unable to meet the requirements imposed by Younger v. Harris, 401 U.S. 37 (1971), and its companion cases, specifically Samuels v. Mackell, 401 U.S. 66 (1971). *Younger* held that absent a showing of harassment and bad faith, a defendant in a pending state criminal case cannot affirmatively challenge in federal court the statutes under which he is being prosecuted. Since Mrs. Doe was not alleged to be pregnant, the Court viewed the Does' position as speculative as far as being affected by the statute and the mere allegations of so indirect an injury was insufficient to present an actual case or controversy.

105. 405 U.S. 438 (1972). *See* note 92 and accompanying text *supra.*

106. 410 U.S. at 125.

107. *Id.* at 125.

cision by the Supreme Court. However, on another level the colloquy was not yet complete. Bickel warns that the Court should not "dwarf the political capacity of the people"[108] when it can avoid doing so. A great deal of legislative liberalization of abortion statutes had occurred in recent years.[109] In addition, voters in some states such as Michigan and North Dakota had recently voted against abortion reform.[110] Thus, the political forces were at work. Even the *Roe* division of pregnancy into trimesters had been discussed in some of the lower court decisions and specifically implemented in one of them.[111] It hardly seemed necessary for the Supreme Court to take an active role in the colloquy as it was proceeding actively throughout society. All of this effort was substantially modified by the *Roe* decision. Thus, it appears that the nature of the controversy was one particularly suited for resolution through the political processes.

Was the decision on a principled basis? There are several statements in *Roe* that could qualify as efforts to enunciate the applicable principles: 1. the right to choose to have an abortion is a fundamental right, however, it is not absolute and is subject to state regulation;[112] 2. the interests that a state has in regulating abortion are protection of the health of the mother and protection of the "potential life" of the fetus and these interests become compelling at different stages of the pregnancy;[113] 3. the fetus is not entitled to protection until it has "the capability of meaningful life outside the mother's womb."[114] The net result was that the period of pregnancy was divided into trimesters with various amounts of regulation allowed.

Are the principles announced in *Roe* likely to gather the widespread acceptance necessary for an enduring principle? It is well recognized that the abortion question was and still is highly charged with moral, ethical and emotional issues. It is unrealistic to expect that those who firmly believe the fetus is a person are likely to change their attitudes merely because the Court found the state was unable to prove that a fetus is a person. Those who were in favor of restrictive abortion legislation before the decision are, in fact, still attempting to effectuate their views.[115] However, there are also

108. BICKEL, *supra* note 10, at 156.
109. *See* notes 59 and 60 *supra*.
110. Noonan, *Raw Judicial Power*, NAT'L REVIEW, March 2, 1973, at 261.
111. Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971).
112. 410 U.S. at 154.
113. *Id.* at 162-64.
114. *Id.* at 163.
115. Noonan, *supra* note 110, at 264. Noonan suggests that there are two lines of attack which those opposed to the abortion decision could

many people in society who do not share these beliefs and who welcomed the Court's decision. Although the Court's decision must

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take. First, the Court could be expanded from nine to fifteen members. Second, the Constitution could be amended to provide protection for the unborn child. Noonan's proposed increase in the number of justices would have the effect of overruling *Roe*, a 7-2 decision, only if all six of the new justices would vote to overrule.

The Nebraska Legislature recently enacted a new statutory scheme regulating abortions in light of the *Roe* decision which provides protection for the "unborn child" as soon as it reaches viability. NEB. REV. STAT. § 28-4,143 *et. seq.* (Supp. 1973). The new statutory scheme is prefaced with a declaration of purpose which states:

> The Legislature hereby finds and declares:
>
> (1) That the following provisions were motivated by the legislative intrusion of the United States Supreme Court by virtue of its decision removing the protection afforded the unborn. Sections 28-4,143 to 28-4,164 are in no way to be construed as implementing, condoning, or approving abortions at any stage of unborn human development, but is rather an expression of the will of the people of the State of Nebraska and the members of the Legislature to provide protection for the life of the unborn child whenever possible until such protection can be afforded by an appropriate amendment to the the United States Constitution;
>
> (2) That the members of the Legislature expressly deplore the destruction of the unborn human lives which has and will occur in Nebraska as a consequence of the Supreme Court's decision on abortion;
>
> (3) That it is in the interest of the people of the State of Nebraska that every precaution be taken to insure the protection of every viable unborn child being aborted, and every precaution be taken to provide life-supportive procedures to insure the unborn child its continued life after its abortion;
>
> (4) That currently, in this state, there are grossly inadequate legal remedies to protect the life, health, and welfare of pregnant women and unborn human life; and
>
> (5) That it is in the interest of the people of the State of Nebraska to maintain accurate statistical data to aid in providing proper maternal health regulations.

NEB. REV. STAT. § 28-4,143 (Supp. 1973).

There also is currently a controversy regarding abortions being performed by some of the faculty at the University of Nebraska Medical Center. Pursuant to the standards set forth in *Roe* several of the faculty have performed abortions at the Medical Center. The Board of Regents of the University of Nebraska reacted to these developments by adopting several resolutions on June 23, 1973, regulating abortions at the Medical Center. One of these resolutions limited the number of abortions that could be performed there to fifteen a week. Another provided that if a full-time faculty member of the Obstetrical/Gynecological Department performs abortions outside of the University Hospital, his employment at the Medical Center was subject to termination. These resolutions have led to the recent filing of a suit in the United States District Court for the District of Nebraska by two faculty members who face dismissal. Orr v. Koefoot, Civil No. 73-L-286 (D. Neb., filed Nov. 7, 1973). In their complaint, the plaintiffs allege that the following comment was made by one of the

be able to garner widespread acceptance, according to Bickel, it is probably not essential that there be universal acceptance. If the overwhelming majority held a certain belief, it is likely that the change would be accomplished by means of legislative enactment.

Thus, it appears that the *Roe* decision was on a principled basis and was able to garner sufficient acceptance to satisfy these Bickelian requirements. However, in light of all the activity in society, Bickel might argue that the decision dwarfed the political capacity of the people and on this basis the Court should have avoided reaching the merits. In addition, there may be yet another prudential concern other than the need for widespread acceptance. The determination of a principle carries with it seeds for the future; in fact, Bickel requires that the principled basis must be able to prevail and endure. Consequently, the decision to announce a principle is one that must be made only after careful consideration of its effect. On this basis, the Court's decision in *Roe* is highly suspect.

The long-range goals embodied in the *Roe* principles are subject to several interpretations. Possibly the *Roe* principles carry the seeds of a movement toward population control. Perhaps future applications of the *Roe* principles may result in a lessening of the value of human life as it is now understood. The Court held that until the fetus was capable of meaningful life outside the mother's womb, the state could not prove it was a person entitled to constitutional protection. How then can the state protect a deformed baby or a terminally ill patient in a coma in the face of the argument that they are not capable of "meaningful life?" Of course, the *Roe* decision may be interpreted as providing a rampart against the increasing assault on the right of privacy and the right to lead one's life as he wishes in the face of electronic spying devices, computerization of every aspect of one's life and exploding urban centers. But if this were the "real" principle in the case, was *Roe* the proper case to employ to erect this rampart given the other facets of the case?

Ultimately, however, the real question arising from *Roe* is not whether the colloquy as to abortion was properly ended by the Court, but whether a new colloquy attempting to define life has

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Regents at their meetings: "The Medical Center is not a mecca for abortions. It's paid for by taxpayers . . . by individuals completely against abortion." Another Regent in proposing a complete prohibition of abortions at the Medical Center allegedly stated that he was personally opposed to abortions as were the people whom he represented. This controversy is merely another indication that many Americans continue to oppose the full implementation of *Roe* and still favor restrictive abortion procedures.

begun. One need not look too far into the future, with the transplants of vital organs, possibly even brain transplants, and the creation of "life" from test tubes to ponder whether these "creations" are "persons" entitled to constitutional protection. By its decision in *Roe,* the Court necessarily, according to Bickel, gave these challenges a constitutional basis which they may have never otherwise achieved and may have encouraged people to make arguments they would not have made without this constitutional basis. Consequently, Bickel would feel that the Supreme Court should have refrained in *Roe* from making a constitutional adjudication.