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Prenatal Caretaking: Limits of State Intervention

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PRENATAL CARETAKING: LIMITS OF STATE INTERVENTION WITH AND WITHOUT *ROE**

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I. INTRODUCTION

Chaos and tension are developing in the area of maternal and fetal rights. Substantial confusion emanates from the Supreme Court's land-

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mark abortion decision in *Roe v. Wade*.[1] In resolving conflicts between the woman and fetus, outside of abortion, *Roe's* relevance is obscure. For example, an apparent conflict exists between acknowledging a woman's right of privacy under *Roe* and simultaneously imposing a duty on her under tort law to protect the fetus. How can a pregnant woman be treated as an ordinary tortfeasor for harming the fetus she could have aborted? Can a state regulate a woman's behavior to protect her fetus? Must a pregnant woman undergo surgery for the benefit of the fetus? How does *Roe* affect the answers to these questions?

Adding to the confusion in this area are doubts and concerns about the continuing validity of *Roe*.[2] Recent abortion clinic bombings,[3] as well as heated debates between anti-abortionists and pro-choice interest groups,[4] have focused national attention on the abortion controversy. Members of the Supreme Court acknowledge that recent advances in neonatal medicine, enabling many premature babies to survive beyond previous expectations, challenge the continuing validity of *Roe*.[5] Is *Roe* about to be, or should it be overruled? Would overruling *Roe* obviate the confusion surrounding conflicts in this area?

The confusion in this area can be resolved. Section II of this article analyzes the effect of *Roe* on the pregnant woman-fetus relationship and suggests that by focusing on *Roe* and the woman's right to get an abortion, the Supreme Court ignored other relevant principles. For example, the present emphasis on abortion distracts from questions about the state's interest in protecting the fetus and the scope of the

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

2. *See infra* § IV.

3. *See, e.g., Abortion Clinics Report Anxieties*, N.Y. Times, Jan. 20, 1985, § 1, at 24, col. 1 (nationwide anxiety within abortion clinics over bombings and continuing threats of violence); *Bombing Case Offers a Stark Look at Abortion Conflicts*, N.Y. Times, Jan. 18, 1985, at A12, col. 1 (account of abortion clinic bombing and fanatic fervor of alleged perpetrators in Pensacola, Florida).

4. *See, e.g., Cuomo Opposes Cardinal on Abortion*, N.Y. Times, Feb. 17, 1986, at B2, col. 4 (ongoing debate on abortion between New York's Governor Mario Cuomo and New York's Cardinal O'Connor); *Troublesome Abortion Issue: Theological Roots are Spread Wide and Deep*, N.Y. Times, Sept. 8, 1984, at A8, col. 1 (discussion of ongoing debates on abortion within Catholic, Protestant, and Jewish communities).

5. *See, e.g.*, City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting). Justice O'Connor suggested that medical technology is moving viability back into the second trimester, while simultaneously moving forward into the second trimester the point at which the state can regulate to protect maternal health. *Id.* at 456-57. She suggested that because of this phenomenon, *Roe* is on a collision course with itself. *Id.* at 458. *But see infra* notes 152-54 and accompanying text (discussion of advances made in moving the age of viability earlier in the pregnancy).

woman's right of privacy outside of abortion. The present focus on abortion also undermines the significance of the woman's role as mother of the fetus in making decisions affecting the fetus' well-being. Established principles in these areas provide some guidance in resolving maternal-fetal-state conflicts. Most important, these questions need to be answered if the gaps left by *Roe* are to be closed.

Section III examines conflict resolution among the woman, fetus, and state assuming *Roe* were overruled. It explores three rationales the Supreme Court might use as a basis for overruling *Roe*. Section III also demonstrates that overruling *Roe* will not obviate the confusion and tension in this area because *Roe* ineffectively resolves conflicts among the woman, fetus, and state outside of abortion. However, by understanding the limitations of *Roe* and identifying the sources of confusion in this area, courts and legislators can focus their efforts upon establishing guidelines for resolving conflicts involving the fetus that arise during the pregnancy.

Finally, section IV explores the possibility that *Roe* will be overruled. The question is particularly timely in light of recent changes in Court personnel.[6] The discussion focuses on why the Court might reconsider *Roe*, the role of stare decisis[7] in judicial decisionmaking, and the possible ways the Court might justify a decision to depart from precedent. Section V concludes that overruling *Roe* may not be as imminent as some suspect, and that justifiable reasons for not overruling it abound.

II. State Intervention in the Woman's Pregnancy Under *Roe*

A. *The* Roe *Paradigm*

At issue in *Roe* was the validity of a state criminal law that pro-

6. *See Burger Retiring, Rehnquist Named Chief; Scalia, Appeals Judge, Chosen For Court*, N.Y. Times, June 18, 1986, at A1, col. 4. *See also infra*, Author's Addendum (discussing potential impact of Justice Powell's retirement and the nomination of Judge Bork as Powell's successor).

7. "Without the slightest fanfare, the principle of *stare decisis* makes its appearance in constitutional law; Supreme Court decisions interpreting the Constitution are to be authoritative, are to be precedents that must be taken account of when a once-interpreted constitutional clause comes before the Court again." Jones, *Dyson Distinguished Lecture: Precedent and Policy in Constitutional Law*, 4 Pace L. Rev. 11, 16 (1983). *See generally*, Catlett, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should be Applied*, 21 Wash. L. Rev. 158 (1946); Note, *The Power that Shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U.L. Rev. 345 (1986).

hibited abortions except to save the mother's life or health.[8] The *Roe* Court invalidated the statute and established a trimester formula for analyzing the constitutionality of various state laws regulating abortion. Under *Roe*, a woman has a fundamental right to obtain an abortion without state interference during the first trimester, or first three months of pregnancy.[9] The Court recognized, however, that the state's interest in protecting maternal health is sufficiently compelling during the second trimester to justify reasonable state regulations designed to further that interest.[10] Finally, at the point of viability, or at the third trimester, the Court held that the state's interest in preserving and protecting the potential life of the fetus outweighs the woman's right of privacy.[11] During the third trimester, therefore, the state constitutionally can proscribe abortions except when necessary to preserve the life and health of the mother.[12]

The trimester framework, intended as a functional approach to abortion regulation analysis, has not been the forerunner of clarity and certainty.[13] The number of abortion cases heard by the Court since *Roe* evidences the continuing struggle to understand *Roe*. Therefore, it is not surprising that when a non-abortion issue arises during the pregnancy, the relevance of *Roe* is obscure.

Confusion generated by *Roe*, outside of the abortion context, can be attributed to the Court's holding that the fetus is not a person

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8. 410 U.S. at 117 n.1. Relevant parts of the statute read as follows:

> If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use toward her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.
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> . . . .
>
> Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

Id. (quoting TEX. PENAL CODE ANN. §§ 1191, 1196 (Vernon) (former penal code repealed 1973)).

9. *Id.* at 163.

10. *Id.*

11. *See id.* at 163-64.

12. *Id.*

13. *See generally* Rhoden, *Trimesters and Technology: Revamping* Roe v. Wade, 95 YALE L.J. 639 (1986).

under the Constitution.[14] Although the Court declared itself incapable of deciding when life begins,[15] its decision to allow state protection of the viable fetus' potential life essentially contradicted that declaration. Except for limited circumstances, the viable fetus is protected from being aborted. This protection arises, as a matter of constitutional law, because the viable fetus is a life capable of existing outside of the woman's womb.[16]

On the other hand, states, as independent sovereigns, are not restricted by *Roe* from establishing fetal protection laws. In fact, the fetus has enjoyed legal protection under property[17] and criminal[18] laws

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14. 410 U.S. at 158.

15. *Id.* at 159.

16. *See infra* note 154.

17. Following English common law, an unborn child could be named as an heir from the moment of conception. 1 W. BLACKSTONE, COMMENTARIES *130 (infant *in ventre sa mere*, in the mother's womb, is capable of being named heir to an estate); *see also* Hall v. Hancock, 32 Mass. (15 Pick.) 255 (1834), *reprinted in* 26 Am. Decisions 598 (1834) (in general, child is considered to be *in esse* from the time of its conception). While *in utero*, however, a designated heir was not recognized legally as a person. Any inheritance rights it had were contingent upon its live birth. If it died before that event, its inchoate interests either reverted to the grantor or passed to another heir. 2 W. BLACKSTONE, COMMENTARIES *513; *see, e.g.*, Marsellis v. Thalhimer, 2 Paige Ch. 35, *reprinted in* 21 Am. Decisions 66 (N.Y. Ch. 1830) (inchoate interests of child born dead go to collateral heirs of deceased father of the child, not to child's mother in child's interest). The legal status of the fetus in property law generally remains the same today. *See, e.g.*, *In re* Holthausen's Will, 175 Misc. 1022, 1024, 24 N.Y.S.2d 140, 145 (Sur. Ct. 1941) ("It has been the uniform and unvarying decision of all common law courts in respect of estate matters for at least the past two hundred years that a child *en ventre sa mere* is 'born' and 'alive' for all purposes for his benefit."); Ebbs v. Smith, 59 Ohio Misc. 133, 137, 394 N.E.2d 1034, 1037 (1979) (beneficiaries of will include child *in ventre sa mere* who takes full share upon birth); UNIFORM PROBATE CODE § 2-108 (1983). *But see* Louisell, *Abortion, the Practice of Medicine and the Due Process of Law*, 16 UCLA L. REV. 233, 237 (1969) (suggesting that unborn should have vested property rights although never born). *See generally* C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY (1962).

18. The status of the fetus in criminal law has varied more than has its status in property law. Earliest reports indicate that at common law the killing of a fetus was not homicide unless the fetus was born alive and died as a result of injuries inflicted upon it while *in utero*. *See* Note, *Taking* Roe *to the Limits: Treating Viable Feticide as Murder*, 17 IND. L. REV. 1119, 1122 (1984) (citing E. COKE, INSTITUTES III *50 (1817)). The necessity that the child be born alive was judicially imposed because of the difficulties in proving causation. *See, e.g.*, Sim's Case, 75 Eng. Rep. 1075 (Q.B. n.d.) (it cannot be determined if a child born dead was living at the time of the battery yet, "when it is born living and the wounds appeare in his body, and then he dye, the batteror shal be arraigned of murder") (note: although the exact date of this case could not be determined, it is a seventeenth century case). For a discussion of the born alive rule, see Note, *supra*.

Early common law also distinguished the "quickened" from the "pre-quickened" fetus. A fetus is quickened when the mother can feel it move inside the womb, which usually occurs at

for centuries. Prior to *Roe*, jurisdictions also began to allow suits against tortfeasors who caused fetal injury.[19] Following the pre-*Roe*

16-20 weeks gestation. *See* J. PRITCHARD, P. MACDONALD & N. GANT, WILLIAMS OBSTETRICS 218 (17th ed. 1985). Destruction of a quickened fetus, although not homicide, probably was a crime. Abortion of a woman "quick with childe" is "a great misprision, and no murder." *Roe*, 410 U.S. at 134-35 (quoting E. COKE, INSTITUTES III *50). However, whether early common law also criminalized the destruction of a pre-quickened fetus is less certain. *See Roe*, 410 U.S. at 132; *see also*, Quay, *Justifiable Abortion — Medical and Legal Foundations*, 49 GEO. L.J. 395, 432 (1961) (destruction of pre-quickened fetus was not criminalized because until the fetus was "infused with a soul," or "animated," it was still part of the mother). *See generally* Parness, *Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life*, 22 HARV. J. ON LEGIS. 97 (1985).

In American jurisprudence, the killing of a fetus generally was not criminalized until anti-abortion legislation became popular in the early to mid-1800s. Connecticut passed the first anti-abortion statute in 1821. Quay, *supra*, at 435 (citing CONN. STAT. tit. 22 §§ 14, 16 (1821)). By the Civil War, almost all jurisdictions had outlawed abortion. *See Roe*, 410 U.S. at 113, 175-76 n.1 (Rehnquist, J., dissenting). Following the common law, originally it was a greater offense to cause the destruction of a quickened than a pre-quickened fetus. However, in the mid-1800s the quickening distinction disappeared from all of the statutes. *Id.* at 139; Quay, *supra*, at 435-38. For example, the first anti-abortion statute in this country punished with life imprisonment, the abortion or the attempted abortion by poison of a quickened fetus. *Id.* app. I at 453 (quoting CONN. STAT. tit. 22 §§ 14, 16 (1821)). By 1830, the statute had been extended to include the abortion of a quickened fetus by means other than drugs, but the penalty was reduced to seven to ten years in prison. *Id.* app. I at 453-54 (quoting CONN. LAWS ch. 1 § 16 (1830)). In 1860, the statute was further amended to include the abortion of a pre-quickened fetus. The penalty was reduced to one to five years in prison and the statute exempted abortions to save the life of the woman. *Id.* app. I at 454 (quoting CONN. PUB. ACTS ch. LXXI §§ 1, 2 (1860)). *See generally* Quay, *supra*, at 447 (compilation of the abortion statutes of all the states from the 1800s).

Since *Roe*, no statutory consensus on feticide has yet emerged. Some statutes require that the fetus be quick when the criminal act takes place in order to constitute homicide. *See, e.g.*, FLA. STAT. § 782.09 (1985) (willful killing of an unborn quick child by any injury to the mother is manslaughter); MICH. COMP. LAWS ANN. § 750.322 (West 1986) (the willful killing of an unborn quick child is manslaughter). In contrast, New York requires that the fetus be viable (24 weeks gestation) at the time of the criminal act to constitute homicide. N.Y. PENAL LAW § 125.00 (McKinney 1975). Other states do not require either quickening or viability. *See, e.g.*, CAL. PENAL CODE § 187 (West 1986) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."); S.D. CODIFIED LAWS ANN. § 22-17-6 (1986) (intentional killing of a human fetus by an unauthorized injury to the mother is a felony). Finally, feticide is not criminalized at all in some states. *See, e.g.*, ALA. CODE § 13A-6-1 (1986); ALASKA STAT. § 11.41.140 (1983); COLO. REV. STAT. § 18-3-101 (1986) (homicide statutes defining person as a human being who had been born and was alive at the time of the criminal act); KY. REV. STAT. § 507.010 (Baldwin 1984) (fetus not a person). Of course, *Roe* protects the physician and the woman from criminal liability for aborting the pre-viable fetus, or the viable fetus if an abortion is necessary to save the life or health of the mother. *See* 410 U.S. at 113.

19. W. PROSSER & W. KEETON, THE LAW OF TORTS 368 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 69 (1982).

development, such suits typically fall into three categories: the mother's tort suit, which compensates her for her injuries;[20] wrongful death actions, which compensate parents for the loss of their stillborn child;[21] and the prenatal tort action, which compensates the after born

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20. When a pregnant woman sues for tortious injury, her damages are measured by the harm she suffers, which may include harm done to the fetus. Generally, if the fetus is destroyed prior to viability, it is viewed as an extension of the mother, and her damages are assessed accordingly. *See* Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 17 (1884). In a minority of jurisdictions, the mother's tort action also includes damages for the destruction of a viable fetus. *See, e.g.*, Volk v. Baldazo, 103 Idaho 570, 651 P.2d 11 (1982); Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969); Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964). Allowing the mother to recover for the loss of the fetus furthers the policy goals of compensation and deterrence; a separate action by the fetus is unnecessary.

21. *See generally* Beal, *"Can I Sue Mommy?" An Analysis of a Woman's Tort Liability for Prenatal Injuries to Her Child Born Alive*, 21 SAN DIEGO L. REV. 325, 332 nn.43 & 44 (1984) (citing authorities prior to *Roe* that allowed wrongful death suits for prenatal injuries); *see also* Robertson, *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401 (providing history of "born alive" rule and viability requirements for wrongful death actions stemming from prenatal injuries). Today, in most jurisdictions, if the fetus is viable when the injury occurs, or survives to viability and is stillborn as a result of the tortfeasor's conduct, a wrongful death action lies. W. PROSSER & W. KEETON, *supra* note 19, at 370. A minority of jurisdictions allow wrongful death actions stemming from fetal injury only if the child is born alive. *See, e.g.*, Justus v. Atchison, 19 Cal. 3d 564, 580, 565 P.2d 122, 133, 139 Cal. Rptr. 97, 107 (1977) (fetus not a person and cannot maintain wrongful death action if stillborn); Hernandez v. Garwood, 390 So. 2d 357, 359 (Fla. 1980) (no action under wrongful death statute for death of viable fetus stillborn); Dunn v. Rose Way, Inc., 333 N.W.2d 830, 833 (Iowa 1983); Group Health Assoc., Inc. v. Blumenthal, 295 Md. 104, 116-19, 453 A.2d 1198, 1207 (1983) (child must be born alive to recover under wrongful death statute); Kuhnke v. Fisher, 683 P.2d 916, 919 (Mont. 1984) (unborn or stillborn fetus does not qualify under wrongful death statute); Raymond v. Bartsch, 84 A.D.2d 60, 62, 447 N.Y.S.2d 32, 34 (App. Div. 1981) (reaffirming earlier decisions not allowing recovery under wrongful death statute for death of a nine month old fetus stillborn). Similar to the mother's tort action, the wrongful death action is intended to compensate the parents, who are also victims. Because the wrongful death action recognizes the independent legal existence of the stillborn child, damage awards augment those received by the mother in her tort action. Generally, the defendant in a wrongful death action is liable for the parents' pecuniary loss, W. PROSSER & W. KEETON, *supra* note 19, at 949; RESTATEMENT (SECOND) OF TORTS 925 (1982), and may be liable for the parents' loss of society or companionship with the child. *See, e.g.*, White v. Yup, 85 Nev. 527, 533, 458 P.2d 617, 623 (1969) (wrongful death statute allows recovery for non-pecuniary loss such as loss of society); Sanchez v. Schindler, 651 S.W.2d 249, 253 (Tex. 1983) (court expanded recovery under the wrongful death statute to include loss of society and mental anguish); Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 15, 148 N.W.2d 107, 108 (1967) (recovery for loss of society and companionship in wrongful death action allowed).

Finally, some jurisdictions allow the parents to recover punitive damages. Alabama is the only state with a strictly penal wrongful death statute. ALA. CODE § 6-5-410 (1985). *See also,*

child for injuries inflicted on the child during its fetal development.[22]

State fetal protection laws, such as those mentioned above, survive constitutional analysis under *Roe* because they do not unreasonably burden a woman's abortion decision. But the analysis of fetal rights since *Roe* has not been this straightforward.[23] Rather than limit *Roe*

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e.g., Eich v. Town of Gulf Shores, 293 Ala. 95, 98, 300 So. 2d 354, 356 (1974) (wrongful death statute requires recovery for punitive damages only, based on the culpability of the defendant and the enormity of the harm). Other statutes allow punitive damages in addition to compensatory damages. *See, e.g.*, KY. REV. STAT. ANN. § 411.50 (Baldwin 1985) (in action by the surviving spouse or child of a person killed with a deadly weapon, "vindictive" damages recoverable); N.C. GEN. STAT. § 28a-18-2 (1984) (punitives damages allowed). *See generally* S. SPEISER, RECOVERY FOR WRONGFUL DEATH (2d ed. 1975 & Supp. 1985) (compilation of wrongful death statutes state by state). For an excellent recent discussion of the development of wrongful death actions, see Steinglass, *Wrongful Death Actions and Section 1983*, 60 IND. L.J. 559 (1985).

22. Most jurisdictions allow such actions regardless of whether the injury occurred prior to viability. *See, e.g.*, Day v. Nationwide Mut. Ins. Co., 328 So. 2d 560, 562 (Fla. 2d D.C.A. 1976) (child injured during sixth week of pregnancy); Womack v. Buchhorn, 384 Mich. 718, 725, 187 N.W.2d 218, 222 (1971) (child injured during fourth month of pregnancy). *See generally* W. PROSSER & W. KEETON, *supra* note 19, at 368. Other courts have expressly rejected the viability distinction. *See* Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 505, 93 S.E.2d 727, 728 (1956); Bennett v. Hymers, 101 N.H. 483, 485, 147 A.2d 108, 110 (1958); Smith v. Brennan, 31 N.J. 353, 367, 157 A.2d 497, 504 (1960); Kelly v. Gregory, 282 A.D. 542, 543, 125 N.Y.S.2d 696, 697 (App. Div. 1953); Sinkler v. Kneale, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960); Sylvia v. Gobeille, 101 R.I. 76, 78, 220 A.2d. 222, 224 (1966). Several courts have failed to make a viability distinction when considering prenatal tort actions. *See* Rodriguez v. Patti, 415 Ill. 496, 114 N.E.2d 721 (1953); White v. Yup, 85 Nev. 527, 534, 458 P.2d 617, 621 (1969); Seattle-First Nat'l Bank v. Rankin, 59 Wash. 2d 288, 291, 367 P.2d 835, 838 (1962).

Recovery for prenatal injuries has been permitted in an action against the United States under the Federal Tort Claims Act, 28 U.S.C. § 1346 (1970). Sox v. United States, 187 F. Supp. 465, 469 (E.D.S.C. 1960) (without making a viability distinction, court held that damages may be obtained by child who was born alive after prenatal injuries were sustained when an army truck injured the child's mother). Other jurisdictions retain the pre- and post-viability distinction. *See, e.g.*, Volk v. Baldazo, 103 Idaho 570, 572, 651 P.2d 11, 13 (1982) (prenatal tort action allowed if injury occurred after viability and child born alive); *accord* Tursi v. New England Windsor Co., 19 Conn. Supp. 242, 248, 111 A.2d 14, 17 (1955); Steggall v. Morris, 363 Mo. 1224, 1229, 258 S.W.2d 577, 581 (1953); Woods v. Lancet, 303 N.Y. 349, 357, 102 N.E.2d 691, 695 (1951); Williams v. Marion Rapid Transit Inc., 152 Ohio St. 114, 129, 87 N.E.2d 334, 340 (1949); Mallison v. Pomeroy, 205 Or. 690, 697, 291 P.2d 225, 228 (1955); Shousha v. Matthews Drivurself Serv., Inc., 210 Tenn. 384, 395, 358 S.W.2d 471, 476 (1962). *See generally* Annotation, *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222 (1971); W. PROSSER & W. KEETON, *supra* note 19, at § 55. Similar to wrongful death actions, in most jurisdictions prenatal tort actions are premised upon the belief that the fetus is a separate entity entitled to legal protection.

23. Literature in this area evidences the growing concern with defining the rights of the fetus since *Roe*. *See* Kader, *The Law of Tortious Prenatal Death Since* Roe v. Wade, 45 MO. L. REV. 639 (1980); King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647 (1977); Louisell, *supra* note 17; Morrison, *Torts Involving*

to abortion regulation analysis, many courts and legislators have relied upon *Roe* to justify decisions and laws that regulate the woman's pregnancy outside of abortion. For example, some states have attempted to protect the fetus by bringing it within the reach of child abuse and neglect laws.[24] Given that the viable fetus' interest in life outweighs the woman's right of privacy, the predominant suggestion is that states possess broad regulatory power over the fetus. States have attempted to exercise that power to protect the fetus, not just from abortion, but from any harm.[25] In short, states have attempted to regulate a

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the Unborn — A Limited Cosmology, 31 BAYLOR L. REV. 131 (1979); Parness, *supra* note 18; Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979); Robertson, *supra* note 21, at 1404-13.

Courts also are confused. For example, the Supreme Court of New Hampshire, in dicta, stated that allowing a wrongful death action against a third-party tortfeasor who negligently caused the destruction of a pre-viable fetus would be inconsistent with *Roe*. Wallace v. Wallace, 120 N.H. 675, 679, 421 A.2d 134, 137 (1980) (dicta). Other courts allow prenatal tort actions without mentioning *Roe*. *See, e.g.*, Simon v. Mullin, 34 Conn. Supp. 139, 380 A.2d 1353 (Conn. Super. Ct. 1977); Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 367 N.E.2d 1250 (1977); Shack v. Holland, 89 Misc. 2d 78, 389 N.Y.S.2d 988 (N.Y. Sup. Ct. 1976); Labree v. Major, 111 R.I. 657, 306 A.2d 808 (1973). Moreover, since *Roe*, a growing number of jurisdictions have allowed the child's prenatal tort suit against the mother even prior to viability. *See, e.g.*, Stallman v. Youngquist, 129 Ill. App. 3d 859, 865, 473 N.E.2d 400, 404 (1984) (prenatal tort action upheld against mother for injuries sustained by 5½ month old fetus as a result of mother's negligent driving); Grodin v. Grodin, 102 Mich. App. 396, 398, 301 N.W.2d 869, 870 (1981) (court held mother would be liable for unreasonable use of tetracycline during pregnancy, which caused discoloring of son's teeth). *See generally* Beal, *supra* note 21, at 357 (listing 30 jurisdictions that would allow prenatal tort actions against the mother). Allowing suits against the mother is not necessarily inconsistent with *Roe*. *See infra* notes 34 & 35 and accompanying text.

Courts and legislatures also seem to be increasingly more concerned and confused about the limits of state power under *Roe* to protect the fetus under child abuse and neglect laws. *See infra* notes 24 & 25 and accompanying text.

24. *See, e.g.*, CAL. PENAL CODE § 270 (West Supp. 1986); N.J. STAT. ANN. § 30:4C-11 (West 1981); *see also In re* Baby X, 97 Mich. App. 111, 116, 293 N.W.2d 736, 739 (1980) (newborn suffering from narcotics withdrawal symptoms due to prenatal maternal drug addiction is neglected and within jurisdiction of probate court); *In re* Smith, 128 Misc. 2d 976, 980, 492 N.Y.2d 331, 334 (N.Y. Fam. Ct. 1985) ("person" under Family Court Act includes unborn child who is neglected as a result of mother's conduct); *In re* Ruiz, 27 Ohio Misc. 2d 31, 500 N.E.2d 935, 939 (Ct. C.P. 1986) (mother's use of heroin close to baby's birth "created substantial risk to the health of the child" and constituted child abuse). *But see Case Against Woman in Baby Death Thrown Out*, N.Y. Times, Feb. 27, 1987, at Y5, col. 3 (statute governing criminal liability for failure to pay child support does not extend protection to child born brain-damaged as result of mother's prenatal conduct). *See generally* Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 DUQ. L. REV. 1 (1984).

25. In addition to child abuse and neglect statutes, *see supra* note 24, the state's interest in protecting the fetus from harm is evident in recent efforts to keep pregnant women out of

woman's pregnancy in order to protect the fetus' quality of life after birth.

States that adopt the view that *Roe* allows them to regulate the pregnancy beyond abortion add to the confusion over the limits of state intervention in prenatal caretaking. A careful evaluation of *Roe* and its progeny reveals that the Court has not addressed the quality-of-life issue. Moreover, if one assumes that quality of life becomes a relevant consideration in state regulation of the woman-fetus relationship, one must also conclude that abortion should remain an option, at least if the quality of life for the after born child would fall below an acceptable standard. This view suggests, therefore, that in some instances *Roe*'s trimester scheme should be relaxed. Finally, if the viable fetus is to be treated as if it were an infant, general principles governing the parent-child relationship also would be appropriately applied to maternal-fetal conflict resolution. These controversial points raise difficult issues that are explored more fully below.

B. Roe *and Quality of Life Principles*

1. Assumption: Quality of Life Is Not a State Interest

The primary task of the *Roe* Court was to establish a framework that would balance the interests of the various parties in an abortion decision. The Court expended little energy in describing the state's interest in the developing fetus. Quite simply, the Court held that the state is interested in protecting the potential life of the fetus.[26] Weighing the state's interest within the trimester formula, the Court held that the state's interest did not become compelling until viability.[27] The *Roe* Court defined viability as the point at which the fetus "has the capability of meaningful life outside the mother's womb."[28] While "meaningful" may connote "qualitatively good," it is likely the Court meant a viable fetus is a fetus capable of survival outside of the womb.[29] Given the tenor of the *Roe* opinion, concerned simply with determining if and when the fetus could be destroyed, it is difficult to ascribe to the *Roe* opinion a state interest in the fetus' quality of life.

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certain hazardous working environments. *See infra* note 46 and accompanying text. *See generally* Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986); Timko, *Exploring the Limits of Legal Duty: A Union's Responsibilities with Respect to Fetal Protection Policies*, 23 HARV. J. ON LEGIS. 159 (1986).

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

27. *Id.*

28. *Id.*

29. *See id.*; *see, e.g.*, King, *supra* note 23, at 1656. As Professor King stated:

However, the state has expressed interests in the fetus outside of those mentioned in *Roe*. The fetus is protected under property, criminal, and tort laws, all of which reflect state involvement in fetal protection. Such state laws are legitimate under *Roe*, however, only if they do not impose an unreasonable burden on the woman's right of privacy. Moreover, even assuming the *Roe* Court implicitly held that quality of fetal life is not a legitimate state interest in abortion regulation analysis, property and criminal fetal protection laws would remain valid. Vesting the fetus with contingent property rights is irrelevant to the woman's right of privacy. Similarly, holding a defendant, other than the pregnant woman prior to viability, criminally responsible for destroying the fetus protects the state's interest in the fetus' potential life. Furthermore, imposition of criminal liability is consistent with the view that life, regardless of its quality, is better than being destroyed.

Less clear under the assumption that impaired life is better than no life, is whether the state could attempt to protect the fetus from harm by allowing actions against tortfeasors who cause it injury. By allowing prenatal tort actions, the state is imposing a subtle form of deterrence on the tortfeasor's conduct, which suggests that the state has an interest in protecting the fetus from mere harm. Under the assumption that *Roe* limits the state's interest to protecting fetal life and disregards any state interest in the quality of the after born child's life, recognition of prenatal tort actions appears inconsistent.

However, even under the narrow view that quality of life is not a state interest, the state may legitimately allow prenatal tort actions to deter tortious conduct that could possibly destroy the fetus. Moreover, protecting the fetus from possible destruction as a result of tortious conduct is only one among many interests the state has in allowing a suit against a defendant who injures a fetus. For example, when harm is inflicted by a third party, the state also has an interest both in protecting the woman's body from injury, and in protecting her interest in the developing fetus.[30] The state wants to insure that the woman's injuries are compensated by the tortfeasor so she need not resort to state aid.[31]

> It is far more likely that the Court meant the word "meaningful" to exclude only the class of fetuses that lack the minimal integrative physiological equipment and therefore could not survive for a significant period of time — more than a few minutes — if separated from their mothers by existing medical techniques.

Id. (footnote omitted).

30. *See supra* note 20.

31. *See infra* note 36.

Most important, when the woman is not the tortfeasor, *Roe* has no relevance at all; her right of privacy is not implicated. Whether she has an option to abort the fetus has nothing to do with the negligent injury of her fetus by a third person. At most, if she seeks an abortion after the alleged tortious fetal injury, the question should be one of damages suffered by her and the amount of compensation owed to her under her own tort action.[32] Finally, the defendant should not be allowed to successfully assert the defense that the woman had a duty to mitigate damages by aborting a pre-viable fetus. Indeed, if the defendant's conduct results in loss of the fetus, the woman's damages may be greater.[33] Moreover, under *Roe* and the assumption that quality of life is irrelevant, after viability the state may prohibit the woman from choosing abortion, unless an abortion would be necessary to save her life or health.

Nor should the woman, as tortfeasor, necessarily be immune from the child's prenatal tort action.[34] When the woman harms the fetus,

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32. *See supra* note 20.

33. *See supra* notes 20 & 21.

34. Historically, the parent was immune from being sued by the child. *See* Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905). The parent-child tort immunity doctrine reflected society's fears that allowing such actions would create family discord and undermine parental decisionmaking and authority to discipline the child. *See generally* H. CLARK, THE LAW OF DOMESTIC RELATIONS § 9.2 (1968); Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 32 DEF. L.J. 213, 226-27 (1983) (assailing argument that immunity fosters domestic tranquility and parental authority). Society also feared that suits between the parent and child might enable the parent to benefit from the wrong, for example, if the parent survived the child and inherited the child's estate. *See, e.g.*, Roller v. Roller, 37 Wash. 242, 245, 79 P. 788, 789 (1905). Also common were fears that if the child recovered a judgment from the parent, family resources would be depleted to the detriment of all family members. *See, e.g.*, Hastings v. Hastings, 33 N.J. 247, 257, 163 A.2d 147, 150 (1960) (suit by child against uninsured father could seriously disrupt family's finances). Finally, the parent-child immunity doctrine was intended to prevent fraudulent claims. *See, e.g., id.* at 252, 163 A.2d at 150 ("The risk of collusion is indeed a very great and human one, when the insured's own flesh and blood and the family pocketbook are concerned."). *But see* Emery v. Emery, 45 Cal. 2d 421, 431, 289 P.2d 218, 224 (1955) (child's interest in recovering for tortious injury sufficient to outweigh danger of fraud or collusion).

As courts and legislators were persuaded that these fears are largely unfounded, the doctrine began to erode. *See generally*, Hollister, *supra*; Comment, *Child v. Parent: Erosion of the Immunity Rule*, 19 HASTINGS L.J. 201 (1967-68). Thus, while some jurisdictions have abrogated the doctrine, others limit it and, in particular, continue to immunize from tort liability parents who act reasonably in disciplining and supervising their children. *See* Hollister, *supra* (1983 survey of states' immunity rules); *see also* Special Project, *Legal Rights and Issues Surrounding*

the state continues to be interested in assuring that the after born child receives compensation for its injuries.[35] The state's foremost interest is in having the mother pay damages to the child for the consequences of her actions. If she refuses to provide adequate compensation and care for the child she injured during its fetal development, the child should have a cause of action against her in order to protect the state's monetary interest.[36]

Thus far, it appears that *Roe* has little bearing on state intervention in the woman-fetus relationship outside of abortion regulation. But an assumption that the state has no interest in the healthy development of the fetus can have significant ramifications. It leaves largely unfettered the woman's right of privacy — her right to make independent decisions affecting her pregnancy outside of the abortion context. For

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Conception, Pregnancy, and Birth, 39 VAND. L. REV. 597, 828-30 (1986) (discussion of recent cases establishing community standards of reasonable parental conduct) [hereinafter Special Project].

Rules governing parent-child tort immunity should not vary because the child's injury occurred during fetal development. *See generally* Special Project, *supra*. The possibility of intrafamilial conflict as a result of a child's prenatal tort suit against its mother will be the same as in any other suit by the child against the parent. Just as possible family discord is insufficient reason to disallow the child's suit in other situations, it also should be insufficient reason to disallow the prenatal tort action against the mother. Moreover, fear of undermining parental authority by allowing the child's suit is largely misplaced when the child's action is one for prenatal injuries. At the time of the injury, it is unlikely that the mother's conduct, whether intentional or negligent, had anything to do with her role as a disciplinarian. In contrast, the mother's choices to smoke, or drink, or skydive — activities that may harm the fetus — have a lot to do with her parental discretion to oversee the fetus' development. By acknowledging prenatal tort actions against the mother, society would not be attempting to make pregnant women martyrs or prisoners in their own bodies. A pregnant woman would simply be held to a reasonable standard of care toward her fetus. A pregnant woman whose conduct evidences an unreasonable disregard for the fetus' and after born child's welfare should not be immunized from liability for the harm she causes. Clearly, however, allowing the mother to shield herself from liability for prenatal injuries she unreasonably causes cannot be justified either on the rationale that immunity is necessary to preserve family harmony or on the rationale of protecting parental authority.

35. *See, e.g.*, Stallman v. Youngquist, 129 Ill. App. 3d 859, 865, 473 N.E.2d 400, 404 (1984) (child has right to be compensated for injuries suffered during fetal development as a result of mother's negligence); Grodin v. Grodin, 102 Mich. App. 396, 399-400, 301 N.W.2d 869, 870 (1981) (regardless of identity of tortfeasor, child should be able to recover for injuries inflicted during fetal development).

36. Similarly, Professor Robertson suggests that the child who is born damaged as a result of being conceived through certain new reproductive technologies should be able to hold its parents financially responsible for its injuries so that the burden of rearing the child does not fall on others. *See* Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 992-93 (1986).

example, the state could not prohibit a pregnant woman from drinking alcohol to ensure that the fetus was not born with fetal alcohol syndrome.[37] If the fetus is not aborted in violation of *Roe*, then the assumption that the state is not interested in the fetus' quality of life after birth frees the woman to disregard the fetus' health.[38]

In short, even assuming that abortion is the worst fate for the fetus, and that the woman's right of privacy under *Roe* cannot be restricted to protect the fetus from mere harm, the state still can give the fetus some legal recognition. For participants in the abortion debate and the debate over the state's power to intervene in prenatal caretaking, however, it is critical to understand and emphasize that *Roe* does not raise the quality-of-life issue. *Roe* addresses only the proper role of the state in abortion regulation. Reliance upon *Roe* outside of that context leads not only to confusion, but may result in dangerous presumptions about state power to regulate the relationship between the woman and her fetus.

2. Assumption: Quality of Life Is a State Interest

Roe's failure to address the state's interest in the fetus' quality of life after birth does not necessarily mean that the state has no interest

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37. Children who are born with physical or mental abnormalities as a result of their mothers' excessive drinking during their pregnancies may suffer from fetal alcohol syndrome. Children afflicted with the syndrome may evidence growth deficiency, eye and ear irregularities, and heart defects. These children can also have intellectual handicaps, ranging from severe to mild mental retardation. *See* Little & Streissguth, *Effects of Alcohol on the Fetus: Impact and Prevention*, 125 CAN. MED. A.J. 159 (1981).

38. Even under an assumption that the state has an interest in healthy fetal development, *see infra* § II.B.2., the state's ability to enforce any regulations upon the pregnant woman prior to fetal viability would be so limited as to be useless as a practical matter. A woman could opt out of the scope of any regulations to protect the fetus by terminating the pregnancy through abortion. In fact, by attempting to force the woman to forego her drinking, smoking, or other potentially harmful activity, the state actually may be encouraging her to exercise her abortion option. *See* Johnsen, *The Creation of Fetal Rights with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 612 n.56 (1986); Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 447 n.129 (1983). A similar concern arises in property law where a woman can avoid sharing an inheritance with her unborn child by aborting the fetus. Authors Parness and Pritchard suggest that elimination of the "born-alive" rule in property law would reduce the woman's incentive to abort and, in turn, augment the state's interest in protecting potential life. Parness & Pritchard, *To Be Or Not To Be: Protecting the Unborn's Potential of Life*, 51 CINN. L. REV. 257, 265 (1982). Most jurisdictions, however, continue to follow the "born-alive" rule for estate distribution purposes. *See* W. PROSSER & W. KEETON, *supra* note 19, at 367-68. In tort law, policy reasons for allowing prenatal tort actions against the mother may outweigh the risk that she will abort to avoid such liability. *See supra* notes 22, 30-35 and accompanying text.

in protecting the fetus' healthy development. Fetal protection laws such as those in existence even prior to *Roe* indicate that the state probably is interested in protecting the fetus from harm for the purpose of enhancing the chances for a high quality of life after birth. Recent efforts in some states to provide medical and financial assistance to pregnant women,[39] as well as efforts to exert control over a pregnant woman who jeopardizes her fetus,[40] highlight the growing state interest in healthy fetal development. Proponents of the view that the state has a legitimate interest in the fetus' quality of life after birth would argue, probably correctly, that *Roe* does not set the outer limits on state power to interfere in the woman's pregnancy.

Having made this general assertion, proponents of the quality-of-life view may very well fall into two groups, which are not mutually exclusive. Group one would consist of those people who believe that *Roe*'s holding is too narrow to resolve non-abortion pregnancy-related conflicts. Group one members would assert that under *Roe*, states

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39. For example, under Florida's Handicap Prevention Act of 1986, Florida provides comprehensive prenatal care to high-risk pregnant women to minimize the possibility of handicapped children. FLA. STAT. §§ 411.101-.108 (1986). In New York, the Commissioner of the Department of Social Services promulgated a rule, based on aid to dependent children benefits, which allows a woman at least four months pregnant to receive benefits for the unborn child. N.Y. ADMIN. CODE tit. 18 § 369.1 (1984). The federal government also provides assistance to states to improve the quality of prenatal care. *See, e.g.*, Maternal and Child Health Service's Block Grant Program, 42 U.S.C. §§ 701-709 (1985) (government funding to provide access to quality maternal and child health services to low income mothers and children to reduce infant mortality and the incidence of preventable diseases); Special Supplemental Food Program, 42 U.S.C. § 1786 (1986) (provides supplemental foods and nutrition education to pregnant women, infants and young children from low income families).

40. *See, e.g., State Takes Custody of Baby Addicted to Cocaine*, Gainesville Sun, Aug. 30, 1986, at 2C, col. 2 (infant born addicted to cocaine made ward of state until mother agreed to rehabilitation program). Some lower courts have intervened in women's pregnancies for the sake of protecting the fetus, but such decisions have been overturned on appeal. For example, a California juvenile court detained a pregnant woman for two months for psychiatric treatment under the court's dependency jurisdiction. The woman's petition for habeas corpus relief was granted, however, because "person" in the juvenile code was held not to include the unborn fetus. *In re* Steven S., 178 Cal. Rptr. 525, 528, 126 Cal. App. 3d 23, 29-30 (Ct. App. 1981). Similarly, a family court judge in Massachusetts ordered a pregnant woman sutured so that her cervix would hold her fetus. On appeal, the court held that coercing the woman to undergo the operation did not satisfy a compelling state interest and unconstitutionally interfered with the woman's right of privacy. Taft v. Taft, 388 Mass. 331, 333-34, 446 N.E.2d 395, 397 (1983). *But see* Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 89, 274 S.E.2d 457, 460 (1981) (Georgia Supreme Court upheld order that woman undergo caesarean section if necessary at delivery). *See generally* Bross, *Court-Ordered Intervention on Behalf of Unborn Children*, 7 CHILDREN'S LEGAL RTS. J., Spring 1986, at 15.

would have to respect the woman's right to choose abortion, but that states also would be allowed to take a greater interest in prenatal caretaking. Group two members might agree with those in group one, but also would assert that *Roe*'s holding is too broad. If quality of life is truly a legitimate state interest in fetal development, group two would argue that third-trimester eugenic abortions should be permissible.[41]

a. Group One's Position

Proponents of the group one quality-of-life view support their position with several arguments. First, they argue that *Roe* recognizes the state's interest in the quality of life of the after born child. This argument is premised upon *Roe*'s ambiguous holding that the viable fetus, though not a person under the Constitution, can be treated as one.[42] Advancing this argument,[43] the balance of interests struck in *Roe* would be of limited utility in defining the limits of state intervention to protect the fetus-person from mere harm. For one thing, the trimester scheme would be useless in determining the validity of regulations aimed at protecting fetal health. The state's interest in protecting the quality of the fetus' life would begin, and arguably would be compelling, even before conception. The state would have an interest in overseeing the conduct of all women capable of child-bearing. At a minimum, the state's interest would be legitimate once the pregnancy becomes known to the woman. Thus, while this view leaves intact abortion regulation analysis under *Roe*, the scope of the woman's right of privacy outside of *Roe* could be sufficiently curtailed to accommodate the state's interest in assuring that the fetus has a chance for a healthy life after birth.[44]

A second argument group one advocates is that a woman who elects to carry a fetus to term waives any right of privacy she might have in the pregnancy in general.[45] Labor laws preventing pregnant

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41. Even the Georgia statute challenged in Doe v. Bolton, 410 U.S. 179 (1973), companion case to *Roe*, permitted abortions when the fetus might be born with severe disabilities. *Id.* at 183. The Georgia statute was patterned after the American Law Institute MODEL PENAL CODE, § 230.3 (Proposed Official Draft 1962), *reprinted in* 410 U.S. at 205 app. B. *See infra* note 54 and accompanying text.

42. *See supra* text at notes 14-16.

43. The argument that the viable fetus, although not a person, is entitled to constitutional protection is also the basis for an argument that *Roe* should be overruled. *See infra* § III.A.2.

44. Sharp curtailment of the pregnant woman's right of privacy may encourage her to abort the fetus to protect her autonomy. *See supra* note 38 and accompanying text.

45. *See* Robertson, *supra* note 38, at 437-38.

women from working in hazardous work environments,[46] and prohibition laws for pregnant women,[47] to list two examples, would appear to be valid under this view. At its broadest reach, this argument suggests that whenever a woman harms a fetus she then carries to term, the state would be able to hold her responsible, either civilly or criminally, for the consequences of her actions. In addition to compensating the child victim, civil and criminal sanctions would serve to deter the woman from acting in ways injurious to the fetus. Whatever the scope of her right of privacy in the pregnancy in general, this argument suggests that she waived it when she elected to forego an abortion.

However meritorious these arguments may be,[48] their open-endedness limits their utility in resolving conflicts between the woman and

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46. Although the Pregnancy Discrimination Act of Title VII of the Civil Rights Act of 1964, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)), prohibits discrimination on the basis of sex, whether removal of a pregnant woman from a hazardous workplace would violate that provision is an open question. *See generally* Becker, *supra* note 25; Devereux, *Equal Employment Opportunity Under Title VII and the Exclusion of Fertile Women from the Toxic Workplace*, 12 LAW, MED. & HEALTH CARE 164 (1984); Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 GEO. L.J. 641 (1981). Generally, legislation in this area is offensive, not simply because of the right of privacy issue, but also because it functions to keep women in lower paying jobs. Only if employers arranged for pregnant workers to assume safe positions at comparable pay during their pregnancies would the question of the scope of the woman's right of privacy with respect to fetal rights be the central focus in litigation challenging this employment practice. Until then the more immediate issues of sex discrimination and equal protection for women will continue to receive the most attention. For a recent and creative discussion of the issues, see Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986).

47. *See supra* notes 37, 38 & 40 and accompanying text.

48. Many commentators find little or no merit to the arguments that the pregnant woman's privacy rights must succumb to any state interest in the quality of the fetus' life after birth, or that the woman waives her rights by not getting an abortion. *See* Beal, *supra* note 21, at 366-70; Johnsen, *supra* note 38, at 605-09. Those who believe that a woman has a right to autonomy during the pregnancy buttress their position by invoking principles of equal protection. They suggest that because only women can become pregnant, it would be unconstitutional sex discrimination to restrict the pregnant woman's freedom because she is pregnant. *See* Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985); Johnsen, *supra* note 38, at 620-24; Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1008-11 (1984); Regan, *supra* note 23, at 1618-45 (1979). *But see* Geduldig v. Aiello, 417 U.S. 484 (1974). The *Geduldig* Court held that the California disability insurance system, which provided for private employees temporarily disabled by an injury or an illness and covered by worker's compensation, did not violate the equal protection clause by excluding the risk of disability from a normal pregnancy. *Id.* at 497. The equal protection clause does not require a totally comprehensive program that would be considerably more costly to the state.

the fetus. For example, it is plausible to suggest that the state may curtail a woman's right of privacy under the quality-of-life view because *Roe* implicitly says so, or because the woman unwittingly says so by not getting an abortion. The critical questions remain: How much can the state curtail her privacy right? To what extent does a woman waive her right of privacy by choosing to carry the fetus to term? It is one thing for a state to hold a woman accountable for the harm she causes to her baby who is born with fetal alcohol syndrome. It is quite another matter to restrict that woman's freedom to drink during her pregnancy. Answers to these constitutional questions are not lurking in *Roe* and its progeny.

The strongest argument group one can make is to persuade the community to acknowledge that the state has an interest in assuring healthy fetal development, and to convince courts and legislators to separate general pregnancy health care decisionmaking from abortion regulation analysis.[49] This argument does not try to divine a state interest in healthy fetal development from *Roe* and its progeny.[50] Nor does it skirt the underlying question about the state's interest in healthy fetal development by implementing a broad waiver theory

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Id. at 495. The state has a legitimate interest in maintaining the self-supporting nature of the insurance program and in keeping the cost to participating employees low. *Id.* at 496. These state interests provide an objective and non-discriminatory basis for the state's decision to exclude a particular group. *Id.*

49. *See* Mathieu, *Respecting Liberty and Preventing Harm: Limits of State Intervention in Prenatal Choice*, 8 HARV. J.L. & PUB. POL'Y 19 (1985). Dr. Mathieu suggests that the right to an abortion is independent of the pregnant woman's responsibilities to her future child. "It is *not* true that the right to have an abortion implies the right to refuse to provide medical treatment to the fetus. It is also not true that an obligation to undergo this treatment would imply an obligation to forego an abortion." *Id.* at 32 (emphasis in original); *see also In re* Ruiz, 27 Ohio Misc. 2d 31, 500 N.E.2d 935 (Ct. App. 1986) (woman's right to abortion pre-viability is protected, but post-viability, the fetus should be considered a child for purposes of child abuse and neglect statute and mother can be held responsible for abusing the fetus).

50. Ironically, the same line of cases is used both to broaden and to restrict the woman's right of privacy. The nebulous nature of *Roe* is at least partially responsible for the uncertainty in this area. In upholding the woman's right to choose abortion, the *Roe* Court relied upon a line of cases that upheld such rights as the right to marry, Loving v. Virginia, 388 U.S. 1 (1967); the right to procreate, Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942); the right to use contraceptives, Eisenstadt v. Baird, 405 U.S. 438 (1972); and the right to privacy in family relationships, Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of the Sisters, 168 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *Roe*, 410 U.S. at 152-53.

At one extreme are those who suggest that this line of cases does not even support *Roe*'s holding that the right of privacy includes the right to choose abortion. *See* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); Epstein, *Substantive Due*

under *Roe*. Rather, group one asserts that distinguishing prenatal care decisions from abortion regulation makes apparent the need to strike a balance between the rights of the woman and the fetus outside of abortion, and the state's interest in the fetus outside of abortion. Thus, in determining the validity of various state laws affecting the pregnancy outside of abortion, the question is not whether such laws violate *Roe*, but whether they violate the woman's right of privacy.[51] Asking this question should help to clarify the ensuing analysis. Some regulations will unconstitutionally encroach on the woman's right of privacy; for example, prohibiting pregnant women from drinking *any* alcohol in the absence of medical data indicating that a total prohibition is necessary to protect fetal health. In contrast, this argument may also permit criminal or civil sanctions upon a woman whose child is born with fetal alcohol syndrome.[52]

b. Group Two's Position

Members of group two believe the state has an interest in the fetus' quality of life, but concede that in some cases a life may be of

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Process by Any Other Name: The Abortion Cases, 1973 SUP. CT. REV. 159; Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1863-70 (1985). Others conclude that the right of privacy to choose abortion under *Roe* does not preclude the state from protecting the fetus from mere harm. *See* King, *supra* note 23, at 1663-64 (state can balance woman's right of privacy with degree of intrusiveness of state regulation aimed at protecting fetus from mere harm); Mathieu, *supra* note 49, at 34-39; Parness & Pritchard, *supra* note 38, at 298; Robertson, *supra* note 38, at 437-50; Note, *Constitutional Limitations on State Intervention in Prenatal Care*, 67 VA. L. REV. 1053, 1057-61 (1981). *But see* Myers, *supra* note 24 (state intervention unlikely unless great harm or death is imminent). Finally, some commentators interpret this line of cases to fortify the woman's right to autonomy to make all critical decisions during her pregnancy. *See, e.g.*, Nelson, Buggy, & Weil, *Forced Medical Treatment of Pregnant Women: "Compelling Each to Live as Seems Good to the Rest,"* 37 HASTINGS L.J. 703, 749-62 (1986) (suggesting that the pregnant woman's right of privacy under *Roe* and its progeny supersedes any interest the fetus might have in certain medical procedures).

51. When the woman assumes parental status, her right of privacy to oversee the child's development is not unlimited. Thus constitutional doctrine in the parent-child relationship also must be considered. *See infra* § II.C.

52. *See infra* § II.C. Professor Robertson suggests that a state could easily prohibit a pregnant woman's activities, like drinking or using drugs, that might harm a viable fetus. State laws prohibiting such harmful activity would be constitutional, he continues, because a woman has no fundamental right to use such substances. A state, therefore, would not need to show a compelling state interest to restrict the use of alcohol or drugs by a pregnant woman. Robertson, *supra* note 38, at 442-43. *See generally* Parness, *The Duty to Prevent Handicaps: Laws Promoting the Prevention of Handicaps to Newborns*, 5 W. NEW ENG. L. REV. 431 (1983) (suggesting that laws should protect the fetus from abusive acts by parents and that cease and desist orders could be placed on parents to stop abuse). Fetal protection laws that

such poor quality that it is not worth living.[53] Group two takes exception to *Roe*'s proscription of third trimester abortions when the woman's life is not jeopardized. Group two contends that abortion should be available to a woman who becomes aware of certain defects in her fetus during the third trimester.[54]

Group two members carry a higher burden of persuasion; like pro-choice advocates in the abortion debate, they must overcome general religious and moral beliefs in our society that life is to be preserved at any cost. Moreover, the philosophy that death is preferable to living a life of a certain quality has not received explicit Supreme Court sanction. Decisions by the Court in at least two other areas, however, evidence a growing tendency to accept the belief that dying is not always worse than living. For example, implicit in the Court's holding that the death penalty is not cruel and unusual punishment,[55] is an assumption that some forms of punishment are more cruel and unusual than death.[56] The Supreme Court has acknowledged that death may

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would pass constitutional scrutiny may nevertheless be sufficiently onerous to an individual woman and encourage her to abort. *See supra* note 38. Policy reasons, therefore, may cause the state to forego imposition of valid restrictions upon pregnant women.

53. Professor Goldstein uses the term "not a life worth living" in an attempt to circumscribe state power over private health care decisions involving the parent and child. Because quality of life is a subjective determination, he suggests that death should be an option for a patient when (1) no proven medical procedure exists, or (2) parents receive conflicting medical advice about which treatment procedure to follow, or (3) nonexperimental treatment will probably not enable the child to pursue either a life worth living or a life of relatively normal healthy growth toward adulthood. Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 653 (1977); *see also* Rhoden, *Treatment Dilemmas for Imperiled Newborns: Why Quality of Life Counts*, 58 S. CAL. L. REV. 1283 (1985) (discussing quality of life decisions and proposing guidelines based on the child's potential for human interaction); Robertson, *supra* note 36, at 988 (suggesting that it might wrong a child to allow birth to occur if the child's life will be filled with pain or suffering).

54. *See supra* note 41. *See generally* Note, *Genetic Screening, Eugenic Abortion, and* Roe v. Wade: *How Viable is* Roe's *Viability Standard?*, 50 BROOKLYN L. REV. 113 (1983) (suggesting that the state's interests are never compelling enough to prevent the abortion of a severely defective fetus).

55. Gregg v. Georgia, 428 U.S. 153, 173 (1976). *Gregg* is the first case the Court heard on the death penalty after it struck down the use of the death penalty in Furman v. Georgia, 408 U.S. 238 (1972). The *Gregg* Court held that the reformulated Georgia statute imposing the death penalty did not violate the eighth amendment. 428 U.S. at 173. The majority articulated a two-pronged inquiry to determine if a certain form of punishment was "excessive" and therefore violated the eighth amendment. First, the punishment cannot involve unnecessary infliction of punishment. Second, the punishment must be in proportion to the severity of the crime. *Id.* The Court concluded that the death penalty as applied in *Gregg* was not "unconstitutionally severe" and was not "invariably disproportionate to the crime." *Id.* at 187.

56. Only Justices Marshall and Brennan, dissenting in *Gregg*, found that the death penalty

not be the most intolerable fate of a criminal defendant.

More directly on point is the Court's recent decision in *Bowen v. American Hospital Association*[57] that struck down the Baby Doe regulations.[58] In *Bowen*, the Court analyzed the validity of federal regulations that made it unlawful to refuse to treat certain defective newborns, solely on the basis of their handicaps, if they were otherwise qualified to receive medical treatment.[59] Absent parental consent for the treatment, the newborn would not be "otherwise qualified" within the meaning of the regulations.[60] The Court struck down the regulations, inter alia, because decisions not to treat are usually a matter of parental discretion. If the parents' choice is professionally acceptable, then it controls.[61] According to the *Bowen* decision, a professionally accepted choice could be not to treat, even if death of the newborn results.[62]

Support can be found among state courts and legislatures for the philosophy that quality of life is a legitimate state interest.[63] Wrongful birth claims are premised on the theory that if the parents had known about certain defects in the fetus, then the fetus would have been aborted.[64] Similarly, "Natural Death Acts," which allow patients to

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was cruel and unusual punishment. *Id.* at 231 (Marshall, J., dissenting), *id.* at 241 (Brennan, J., dissenting).

57. 106 S. Ct. 2101 (1986).

58. Much has been written on Baby Jane Doe and the federal regulations governing treatment of handicapped newborns. For a recent and insightful examination of some of the issues, see *Symposium: Issues in Procreational Autonomy*, 37 HASTINGS L.J. 697 (1986).

59. *Bowen*, 106 S. Ct. at 2105-07.

60. *Id.* at 2114.

61. *Id.* at 2113 n.13 (quoting REPORT OF THE PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH 212-14 (1983)); *see also*, Lenow, *The Fetus as a Patient: Emerging Rights as a Person?*, 9 AM. J. L. & MED. 1, 26-27 (1983) (parents' right to choose course of treatment should be respected unless it clearly is not in child's best interest).

62. 106 S. Ct. at 2106 n.4.

63. A recent case that received national attention is Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (Ct. App. 1986). In *Bouvia*, a 28-year old competent quadriplegic who suffered from cerebral palsy since birth wished not to be fed through a nasogastric tube, the only method of feeding her. Withdrawal of the tube presented a life-threatening situation for the patient. Nevertheless, the court held that her right to refuse such treatment was a fundamental right protected by both the California and the United States Constitutions. 179 Cal. App. 3d at 1138, 225 Cal. Rptr. at 301; *see also*, *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1975) (father of comatose woman allowed to assert her right to refuse lifesaving treatment), *cert. denied*, 429 U.S. 922 (1976). *See generally* Smith, *Legal Recognition of Neocortical Death*, 71 CORNELL L. REV. 850 (1986).

64. Most jurisdictions that have confronted the question whether wrongful birth actions should be recognized have allowed parents to recover for the harm they suffer if the child is

refuse life-saving medical treatment, support the position that in some circumstances death may be better than life.[65] Assuming an acceptable procedure for implementing such decisions,[66] proponents of the group two quality-of-life view would argue that the philosophy should be equally applicable to the unborn child, regardless of its stage of fetal development.

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born less than healthy. *See, e.g.*, Berman v. Allan, 80 N.J. 421, 432, 404 A.2d 8, 15 (1979); Becker v. Schwartz, 46 N.Y.2d 401, 413, 386 N.E.2d 807, 813, 413 N.Y.S.2d 895, 901 (1978); Jacobs v. Theimer, 519 S.W.2d 846, 850 (Tex. 1975); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 776, 233 N.W.2d 372, 377 (1975) (cases allowing parents to sue for birth of defective child they would have aborted but for the physician's negligence). *See generally* Beal, *supra* note 21; Comment, *Wrongful Life and Wrongful Birth Causes of Action-Suggestions for a Consistent Analysis*, 63 MARQ. L. REV. 611 (1980). In contrast, most jurisdictions refuse to acknowledge wrongful life claims brought by children who would not have been born absent the physician's negligence. *See, e.g.*, Gleitman v. Cosgrove, 49 N.J. 22, 25, 227 A.2d 689, 692 (1976) ("This Court cannot weigh the value of life with impairments against the nonexistence of life itself."); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 773, 233 N.W.2d 372, 376 (1975) (inability to measure damages under wrongful life claim compels its disallowance). *But see* Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 829, 165 Cal. Rptr. 477, 488 (1980) (court upheld wrongful life claim because "reality of the 'wrongful-life' concept is that such a plaintiff both exists and suffers, due to the negligence of others"); Robertson, *supra* note 36, at 988 ("If the damage that is inextricably linked to conception or birth is so severe, so fraught with pain and suffering, that the child might find death preferable, then it might wrong the child to allow birth to occur at all."). *See generally* W. PROSSER & W. KEETON, *supra* note 19, at 370-71.

65. California became the first state to pass a Natural Death Act. The Act allows a terminally ill adult to give the doctor a directive to withhold or withdraw life-sustaining medical care. It includes carefully articulated definitions of the kind of patient covered by the Act and the requirements for filing the directive. A specifically worded directive is also included. CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West 1986). Other states have adopted similar legislation. *See, e.g.*, ARK. STAT. ANN. § 82-3801-04 (1981); IDAHO CODE §§ 39-4501 to -4508 (1985); NEV. REV. STAT. §§ 449.540-.690 (1983). *See generally*, Comment, *The Right to Die — A Current Look*, 30 LOY. L. REV. 139 (1984); Comment, *A Proposed Amendment to the California Natural Death Act to Assume the Statutory Right to Control Life Sustaining Treatment Decisions*, 17 U.S.F. L. REV. 579 (1983).

66. Deciding the "right" course of treatment is especially difficult when the patient, for whatever reasons, cannot express his or her views. By necessity, the next of kin or a legal representative must actually make the decision. In the case of minors, generally the parents decide. Their choice of treatment, moreover, is usually respected if it comports with the medical advice given to them. *See supra* notes 57-62 & 65 and accompanying text.

One of the most objectionable aspects of injecting a quality-of-life factor into health care decisionmaking is that it makes the decision subjective and opens up the possibility for abuse. However, medical professionals do not have unlimited discretion in suggesting alternative courses of treatment. Their options are limited by the particular case and by ethical and professional standards. On March 15, 1986, The Council on Ethical and Judicial Affairs of the American Medical Association adopted the position that when the physician's commitments to relieve suffering and sustain life conflict, the choices of the family or legal representative should prevail. *See* Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1141, 225 Cal. Rptr. 297, 303 (Ct. App.

Treating the viable fetus as a person, even though not a constitutional person under *Roe*, provides the basis for group two's argument, just as it did for group one. The argument essentially claims that *Roe* made the state the decisionmaker in choosing between abortion and continuing the pregnancy during the last trimester when the woman's life is not jeopardized. Even if quality of life considerations were knowingly factored into the decision, the choice between the potential life or death of the fetus remains. Significantly, however, the analysis could shift the decisionmaking authority. Because *Roe* implies that the viable fetus is worth treating as a person, it is appropriate to draw upon principles governing similar life and death decisions with an after born child. Generally, in such critical situations, the parents, not the state, are the primary decisionmakers for the child.[67] Therefore, the critical question becomes whether the state should continue to be the decisionmaker or whether the decision should reside with the woman. As discussed below, the woman, as mother, generally would be the decisionmaker with respect to the abortion decision.

The discussion thus far has demonstrated the futility of relying upon *Roe* to resolve all conflicts between the pregnant woman and the fetus. The question whether a state can permissibly intervene in a woman's pregnancy for the purpose of enhancing the after born child's quality of life raises difficult issues about the scope of the woman's right of privacy. While it seems perfectly reasonable to suppose that the state has an interest in protecting fetal development for the purpose of enhancing the quality of the after born child's life, abortion must remain an option once quality of life becomes a relevant consideration. Moreover, the woman generally should retain decisionmaking authority over the abortion decision throughout the pregnancy. The extent to which her authority would be limited during the third trimester should be determined, not by principles governing abortion regulation, but rather by principles governing the parent-child relationship.

C. Roe *and Parental Decisionmaking Authority*

Abortion regulation analysis essentially ignores the woman's maternal bond with the fetus. The *Roe* Court described the role of the pregnant woman in the abortion decision as that of an independent

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1986); *see also* Rhoden, *supra* note 53, at 1342-43; Shapiro & Barthel, *Infant Care Review Committees: An Effective Approach to the Baby Doe Dilemma?*, 37 HASTINGS L.J. 827 (1986) (articles suggesting use of ethics committees to review difficult cases).

67. *See supra* notes 57-62 and accompanying text.

woman whose right of privacy, at least prior to viability, entitles her to choose whether or not to become a mother. However, for purposes of non-abortion decisionmaking or post-viability abortion decisionmaking, choices become more complicated. At what point in the pregnancy is a woman not only an individual, but also the mother of the fetus she is carrying? This question, unanswered by *Roe*, is important because the state may be able to impose on the fetus' mother responsibilities that would otherwise infringe upon her independence.[68] Yet, as mother of the fetus, the pregnant woman may at the same time assume a position of authority over the state with respect to certain decisions affecting the fetus' development.

Principles governing the mother-child relationship,[69] therefore, may

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68. By assuming the role of the fetus' mother, arguably the woman waives some of her privacy rights outside of abortion, thereby weakening any contention that certain state regulations are an unreasonable burden upon her. Even if the state's imposition of duties and obligations upon the mother can be supported by a waiver theory, foregoing rights for the sake of the fetus by assuming parental status should be distinguished from a general waiver of the right to get an abortion under *Roe*. *Roe* does not provide principles governing the mother's relationship to the fetus that is not aborted. *See supra* notes 45-52 and accompanying text. Moreover, a simple application of a waiver theory fails to consider the amount of constitutional protection the woman might be entitled to as mother of the fetus if such principles were applied to the mother-fetus relationship. *See infra* notes 71-74 and accompanying text.

69. This article focuses upon the mother and the fetus. A legitimate question arises, however, about the father's rights in prenatal care decisionmaking. In *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), the Court reviewed the validity of a statute that required a woman's husband's consent before she could obtain an abortion. Plaintiffs-appellants argued that a spousal consent requirement was designed to give the woman's husband ultimate veto power over her abortion decision, whether or not he was the father of the fetus. *Id.* at 68-69. The Court noted that the questions of spousal consent, as well as consent by the father or the parents of the unmarried minor, were left open in *Roe* and *Doe*. *Id.* at 69. The *Danforth* Court struck down the spousal consent requirement. *Id.* The Court noted the importance of the abortion decision to the husband and described the importance of the marital relationship. *Id.* 69-72. Throughout its discussion of the invalidity of the spousal consent requirement, the Court used general language, only once suggesting its decision extended beyond the spouse to other persons: "[T]he State cannot delegate authority to *any particular person*, even the spouse, to prevent abortion during [the first trimester]." (emphasis added). *Id.* at 69. It is unclear whether the Court intended to include within the phrase, "any particular person," the father of the fetus. However, the Court subsequently addressed the scope of parents' rights to veto or participate in their minor daughter's abortion decision, notwithstanding the general language in *Danforth*. *Id.* at 72-75. Moreover, the *Danforth* Court itself left open the question whether a parental consent requirement for immature minors would be constitutional. *Id.* at 75. This question remained unanswered until *Bellotti v. Baird*, 443 U.S. 622 (1979). Given the uncertainty surrounding parental rights after *Danforth*, the one general phrase in *Danforth* cannot be presumed to have settled the question of the father's rights in the woman's abortion decision.

Subsequent Supreme Court cases have not addressed the scope of the father's right to participate in the abortion decision, or of the husband's/father's rights in the pregnancy in

be relevant to the woman/mother-fetus relationship.[70] State power to intervene in the mother-child relationship following birth is constitutionally limited[71] and can take one of two forms. Relying upon its police power, the state can regulate the mother's or the child's conduct to protect and promote the public's welfare.[72] State intervention into the mother-child relationship also is permissible under the state's parens patriae power.[73] Intervention based upon the parens patriae doc-

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general. If the woman's right of privacy is more important than the state's or the husband's interests in the abortion decision, presumably it also would override the father's. Although the Court has upheld the father's fundamental right to enjoy his relationship with his children, *see, e.g.*, Stanley v. Illinois, 405 U.S. 645, 650-51 (1972) (father's liberty interest in relationship with his children born out of wedlock entitled to due process protection), recent decisions indicate a trend to place less importance on the biological bond, and more significance on the psychological ties between the parent and child. *Compare* Smith v. Organization of Foster Families, 431 U.S. 816, 846-47 (1977) ("Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated when the proposed removal from the foster family is to return the child to his natural parents.") *with* Lehr v. Robinson, 463 U.S. 248, 248 (1983) (unwed father must demonstrate "a full commitment to the responsibilities of parenthood" before he has right under due process to veto adoption) *and* Caban v. Mohammed, 441 U.S. 380, 392-93 (1979) (unwed father who has "come forward to participate in the rearing of his child" is given right to veto adoption). For an excellent analysis of this line of cases, see Note, Lehr v. Robertson: *Procedural Due Process and Putative Fathers' Rights*, 33 DEPAUL L. REV. 393 (1984).

The Court's de-emphasis on the biological relationship, coupled with the weight of the woman's right of privacy under *Roe*, diminishes the father's chances of having protectable rights in the pregnancy. Thus, in disputes between the mother and father in which the state has no real interest, the woman's decision, as a practical matter, would always control. See *infra* note 87 and accompanying text for a discussion of how overruling *Roe* might affect this analysis.

70. Professor Tribe suggests that *Roe* itself can be justified upon principles of role-allocation between the mother and state. *See* Tribe, *Foreward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 10-50 (1973).

71. The Supreme Court has repeatedly acknowledged the right of the parent to oversee the child's upbringing. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("the custody, care and nurture of the child reside first in the parents"); Pierce v. Society of the Sisters, 168 U.S. 510, 535 (1925) (parents "have the right, coupled with the high duty" to care for the child). *See generally* Rush, *The Warren and Burger Courts on State, Parent, and Child Conflict Resolution: A Comparative Analysis and Proposed Methodology*, 36 HASTINGS L.J. 461 (1985).

72. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (child labor laws proper exercise of state's police power); Meyer v. Nebraska, 262 U.S. 390, 394 (1923) (compulsory education laws proper exercise of state's police power); Jacobson v. Massachusetts, 197 U.S. 11, 24-25 (1905) (state law requiring vaccination against smallpox upheld under state's police power); *see also infra* note 74 (discussion of parens patriae doctrine). *But see* Erznoznik v. City of Jacksonville, 422 U.S. 205, 214-15 (1975) (state's police power insufficient to proscribe drive-in movie theatre's exhibition of films depicting nudity when films are viewable from public streets).

73. The doctrine of parens patriae originated in England and derives from the King's royal prerogative as guardian of infants, lunatics and others with legal disabilities. 3 W. BLACKSTONE,

trine is justified when the state needs to assume the role of substitute parent because of parental unfitness.[74]

Roe's trimester scheme for abortion regulation analysis arguably fits the constitutional paradigm for allocating decisionmaking authority between the state and the parent with respect to the child. For example, *Roe* suggests that the woman does not assume the status of mother prior to viability. The woman is therefore free to treat the fetus with any degree of care. The state's police or parens patriae powers would not provide justification for intervening into her life to protect the fetus. However, post-viability, *Roe* arguably imposes maternal status on the woman and a decision to abort a viable fetus causes the state to be alarmed. Under its police power, state interest in preserving life would justify usurpation of the mother's abortion decision. Alternatively, the argument could conclude that any mother who would destroy her viable fetus is unfit and, therefore, state intervention under the parens patriae doctrine would be justified.

This analysis, although accurately applied to *Roe*, suffers from some of the same deficiencies apparent in the *Roe* decision. First, it is based upon the premise that the state has an interest only in the fetus' potential life, and not its quality of life after birth. Second, it concludes that the woman loses her right of privacy to abort the fetus after viability. But a woman may intend to carry her pregnancy to term, and not exercise her right to have an abortion under *Roe*. If so, when in her pregnancy does her maternal bond with the fetus make her the mother for decisionmaking purposes? Would her authority as mother be broader or narrower than her right as an independent woman to make non-abortion decisions with respect to her pregnancy? Third, how are such factors as the mother's love, affection, and concern for the fetus' welfare to be measured against the state's interest in the fetus' potential life? Finally — that recurring question at the heart of the controversy — does the state have an interest in protecting the fetus from mere harm to ensure its chances for a healthy life after

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COMMENTARIES *47. *See generally* Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978).

74. In American jurisprudence, parens patriae traditionally has been limited to cases in which the parent has failed, either through abuse or neglect, to care for the child. *See, e.g.*, Schall v. Martin, 106 S. Ct. 2403, 2410 (1984) ("if parental control falters, the State must play its part as parens patriae"); Santosky v. Kramer, 455 U.S. 745, 767 n.17 (1982) ("Any *parens patriae* interest in terminating the natural parents' rights arises only at the dispositional phase, after the parents have been found unfit"); Wisconsin v. Yoder, 406 U.S. 205, 232-34 (1972) (unless parents' decisions to withdraw children from school "jeopardize[d] [the children's] health or safety," state's reliance on parens patriae power is misplaced).

birth? If so, how is that interest to be measured against the mother's when the state and the mother disagree on matters of prenatal care?

Assuming that both the woman, as mother, and the state have legitimate interests in the healthy development of the fetus, the allocation of decisionmaking power between them is much more complex than a simple application of those principles to *Roe* might suggest. Consider when it would be appropriate, under the assumption that quality of life matters, for the state to invoke its police power to regulate the pregnancy. With or without *Roe*, the state's interest in protecting the fetus from mere harm should not automatically vest decisionmaking authority in the state. If *Roe*'s holding that the fetus is not a constitutional person means the fetus is not entitled to any protection with respect to non-abortion pregnancy decisions, then the state's police power over the fetus would be less than it is over a child, a constitutional person.[75] Accordingly, the woman's discretion to regulate her pregnancy would be broader than her discretion to direct the upbringing of her child after birth.[76]

But the Court's treatment of the constitutional status of the fetus is ambiguous, and the discussion thus far has not been constrained to interpret that part of *Roe* as forbidding state intervention in other pregnancy decisions. In fact, the state probably does have an interest in fetal protection laws. To provide a thorough analysis, assume that the state's interest in the fetus' development is just as strong as its interest in the child's welfare. If the state's interest can be elevated to this degree, then the woman's interest, as mother, deserves as much consideration. When a conflict arises between the state and the mother, the state must be able to justify as reasonable any regulation aimed at protecting the fetus from harm. To pass constitutional scrutiny, general welfare legislation governing fetal protection should factor in the mother's interest, but must also overcome whatever

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75. The Burger Court, however, made clear that children are not entitled to the same constitutional protections as adults. *See generally* Rush, *supra* note 71, at 470-72.

76. One could argue the opposite, taking the position that the pregnant woman is not a mother until birth of the fetus, and that therefore, the constitutional principles protecting her from unreasonable state interference do not apply during the pregnancy. Even accepting this as true, the woman's right of privacy provides strong protection from state interference with her autonomy, at least prior to viability. Moreover, although the degree to which her privacy rights actually protect her autonomy in non-abortion regulation analysis is an open question, the assumption that she is concerned with the fetus' healthy development should fortify any rights she has with respect to making independent decisions affecting the fetus. The fact that the state has a similar interest should not automatically mean that it, and not the woman, should be the primary decisionmaker.

privacy rights the mother retains as an individual under the Constitution. A state regulation that all pregnant women must drink three glasses of milk daily might be reasonable, assuming the consumption of milk was medically necessary to healthy fetal development and all women had the means to obtain the milk. On the other hand, a state regulation that a pregnant woman see a physician every three weeks may be unreasonable, assuming the medical benefits were relatively minimal.

Similarly, invocation of the state's parens patriae power under the quality-of-life view must also be justifiable. During the pregnancy, the woman may place the fetus at risk. For example, the woman may consume alcohol in such quantity that the after born child suffers from fetal alcohol syndrome. No one would disagree that a woman who abuses her child to that extent is an unfit mother. Removing the child from the mother after birth, then, would be justifiable. But could the state intervene prior to birth and attempt to detoxify the mother for the sake of the fetus?

As a practical matter, *Roe* protects the woman's right to abuse the fetus, or at least the pre-viable fetus she intends to abort. Short of asking a woman her intentions, which could always change, the only evidence that she intends to become a mother is for her not to get an abortion. Once the abortion option is lost to the woman under *Roe*, the state's power under the quality-of-life view arguably would enable it to intervene in the pregnancy when the fetus is being abused, based upon the woman's unfitness to be a mother.[77]

Application of mother-child principles to the viable fetus, however, also demonstrates the overbreadth of *Roe*. The woman/mother who has not aborted the fetus and discovers during the third trimester that the fetus will be born with certain defects should have an option to abort it. Not even the Baby Doe regulations struck down in *Bowen* attempted to override the parents' decision not to treat some newborns.[78] The pregnant woman/mother, absent unfitness, should be given as much authority over her fetus.

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77. *See supra* notes 23, 24 & 40 and accompanying text; *see also* Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. LEGAL MED. 63 (1984). Dr. Shaw writes: "A woman's right to abuse her own body and threaten her own health should not extend to the body of her fetus. In addition to criminal sanctions, punitive damages for these intentional torts should be vigorously pursued by the child's next friend." *Id.* at 104. Dr. Shaw includes alcohol and drug abuse within conduct that should be deterred. *Id.*; *see also* Note, *Recovery for Prenatal Injuries: The Right of a Child Against Its Mother*, 10 SUFFOLK U.L. REV. 582, 607 (1976) (woman should be liable for injuries inflicted upon fetus as result of her "gross negligence").

Thus, the validity of fetal protection laws assuming that quality of life matters will depend upon establishing a framework for analyzing the competing interests between the state and the woman/mother. While mother-child principles seem relevant and would be helpful in resolving conflicts between the state and the mother over fetal development, as of today, the Court has not attempted to fill the void left by *Roe* by applying those principles to general pregnancy regulation.

III. LIMITS OF STATE INTERVENTION WITHOUT *ROE*

In overruling *Roe*, the Supreme Court might choose among three possible rationales to justify its decision. Bestowing constitutional personhood on the fetus is one alternative. Second, the Court might hold that the woman's right of privacy does not protect her independent decisionmaking authority over questions relating to her pregnancy. Third, the Court could hold that the right of privacy does not protect the woman's right to choose abortion. An exploration of the relationship among the three rationales highlights the consequences of choosing one over the others.

A. *The Fetus as Person*

Several constitutional amendments have been proposed that would make the fetus a person.[79] Although they have failed to pass, the Court nevertheless could decide that the fetus, like other persons, is protected by the fourteenth amendment. Implicit within this holding

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78. *See supra* notes 57-62 and accompanying text. *But see* Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 274 S.E.2d 457 (1981) (mother of viable fetus forced to undergo caesarean section to save the fetus despite objections that such intervention violated her rights of privacy and religious freedom). *See generally* Annas, *Forced Caesareans: The Most Unkindest Cut of All*, 12 HASTINGS CENTER REP., June 1982, at 16; Nelson, Buggy, & Weil, *supra* note 50.

79. For example, the Human Life Amendment, known also as the Garn-Obserstar Amendment, provided in part: "Section 2. No unborn person shall be deprived of life by any person: Provided, however, that nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother." S.J. Res. 17, H.R.J. Res. 62, 97th Cong., 1st Sess. (1981). *See generally*, Westfall, *Beyond Abortion: The Potential Reach of a Human Life Amendment*, 8 AM. J.L. & MED. 97, 97-102 (1982). The most recent attempts by Congress to overrule *Roe* have been amendments to the Civil Rights Act proposing to protect the lives of unborn human beings. Several Senate bills introduced in early 1985 were sent to the Judiciary Committee. S. 46, S. 504, S. 522, 99th Cong., lst Sess. (1985). The House bills, proposing to enact the "Preborn Children's Civil Rights Act of 1985," were also introduced in early 1985 and have been sent to the Committee. H.R. 555, H.R. 2287, 99th Cong., 1st Sess. (1985).

is the decision that the right of privacy to choose abortion does not exist.[80] As a "person," the fetus would be entitled to be treated in the same manner as all other persons. With the possible exception of eugenic abortions, an abortion would be permissible only when necessary to save the life of someone else; that is, when it constituted justifiable homicide.[81]

By ascribing constitutional status to the fetus, the Court would also be adopting, at least implicitly, the quality-of-life view. Thus, the fetus would be within the reach of the state's police power along with born persons. The state's power to regulate the pregnant woman's conduct for the sake of protecting the fetus might be quite broad under this view.[82] If children were allowed to sue their parents for negligence, then the after born child's right to be treated equally would allow it to bring a prenatal tort action for injuries it sustained while *in utero* that were caused by the mother's negligence. Under its police power, the state could prohibit the pregnant woman from working in certain hazardous workplaces without fear of infringing upon her right of privacy.[83] States might even have to enforce, through their criminal laws, the fetus' right to be free of another person's, including the mother's, wanton and willful disregard for its safety.[84] In fact, the state's power to protect the fetus might be even broader than its power to protect adults, just as it is with minors.[85]

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80. Overruling *Roe* because the right of privacy does not extend to the abortion decision, however, has different ramifications from a holding that the fetus is a person. *See infra* § III, B.

81. *See* Regan, *supra* note 23, at 1611-18.

82. *See* Chemerinsky, *Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy*, 31 BUFFALO L. REV. 107, 111-14 (1982).

83. Equal protection principles might protect the woman to a limited degree from losing pay or seniority. *See supra* notes 25 & 46.

84. *See, e.g.*, Chemerinsky, *supra* note 82, at 113 (suggesting that abortion would have to be punished as homicide to withstand challenges that a lesser penalty denied the fetus of equal protection). At least one state already criminalizes the reckless destruction of a viable fetus by the mother. *See* Commonwealth v. Cass, 392 Mass. 799, 467 N.E. 2d 1324 (1984) (mother charged with vehicular homicide when her reckless driving caused fetus' death); *see also Dead Baby's Mother Faces Criminal Charge on Acts in Pregnancy*, N.Y. Times, Oct. 9, 1986, at A22, col. 1 (mother arrested and charged with failure to provide necessary medical care to fetus who died as a result of her omission). *But see Case Against Woman in Baby Death Thrown Out*, N.Y. Times, Feb. 27, 1987, at Y5, col. 3 (statute governing criminal liability for failure to pay child support inappropriate means to hold mother criminally liable for child born brain-damaged as result of mother's prenatal drug abuse). Holding the mother criminally responsible when her conduct causes the viable fetus to die is consistent with treating the pregnant woman as the fetus' mother. *See infra* notes 86 & 87 and accompanying text.

85. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 756 (1982) ("States are entitled to greater leeway in the regulation of pornographic depictions of children."); Bellotti v. Baird, 443 U.S.

The implicit assumption that the state has an interest in the fetus-person's quality of life would not necessarily support a prohibition on all abortions. If the right of privacy entitled anyone to choose death over a life not worth living, an increasingly accepted possibility,[86] then presumably this option would have to be available to all persons, including the fetus-person. Unfortunately, holding that the fetus is a person under the Constitution does not directly answer the question of whether impaired life is better than no life at all.

Finally, if *Roe* is overruled because the fetus is a person who deserves constitutional protection, then the woman also becomes the fetus' mother who, in turn, has the constitutional right in that role to oversee the fetus' development.[87] As guardian of all persons who are unable to help themselves, however, the state would be justified

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622, 635-37 (1978) (parental control over child subject to state regulations that serve public interest). *See generally* Rush, *supra* note 71.

86. *See supra* notes 57-62 & 66 and accompanying text.

87. *See supra* notes 70-74 and accompanying text. The man who impregnates the woman (and declares paternity) also immediately becomes the father of the fetus once the fetus becomes a person under the Constitution. Questions regarding the scope of his right to participate in decisions that affect the fetus' development would need to be addressed also. *See supra* note 69. Analogizing from recent Supreme Court decisions involving born children, the amount of due process the father of the fetus would be entitled to would depend upon his involvement with the fetus. Establishing a relationship with an unborn child is difficult. Being married to the mother is one possible way of demonstrating a commitment to the child. Of course, at common law, the husband of the mother was presumed to be the father of the child, and most states have codified this presumption. H. CLARK, *supra* note 34, at 156. Whether this presumption, especially if it is irrebuttable, remains valid after the abortion cases is an open question. *See* W. WEYRAUCH & S. KATZ, AMERICAN FAMILY LAW IN TRANSITION 252 (1983). The father might also contribute financially or emotionally to the mother's care during the term of the pregnancy. At the other extreme, the father who takes no interest in the pregnancy at all will have little justification for arguing that his right to make decisions on behalf of the fetus should be respected.

Two recent stories illustrate how an analysis of the father's rights might proceed if the fetus were a constitutional person. In both stories, the pregnant women were comatose and not married to the fathers of the fetuses. *See Brain-Dead Woman Gives Birth*, Washington Post, July 31, 1986, at A16, col. 2; *Baby Is Weak After Birth to Brain-Dead Woman*, N.Y. Times, Aug. 16, 1986, at 6Y, col. 5. However, in one case, the father, Mr. Poole, was engaged to the mother. Washington Post, July 31, 1986, at A16, col. 2. In the other case, the mother was married to another man, Mr. Piazzi. Mr. Piazzi did not contest the paternity of the child by its alleged father, Mr. Hadden. N.Y. Times, Aug. 16, 1986, at 6Y, col. 5.

Mr. Poole and Mr. Hadden each wanted the mother of his child continued on life support systems until the fetus could survive outside of her womb. The mother's parents resisted Mr. Poole's request. Gainesville Sun, July 31, 1986, at 4A. Mr. Piazzi, the mother's husband, resisted Mr. Hadden's request. N.Y. Times, Aug. 16, 1986, at 6Y, col. 5. Both fathers' requests were honored, but the principles that justified the decisions are difficult to discern.

under its parens patriae power in superseding any decisions by the mother that were abusive or neglectful of her fetus-child.[88]

B. *No Right of Privacy in the Pregnancy*

A second rationale the Court might adopt in overruling *Roe* is that the woman's right of privacy does not extend to pregnancy. This rationale gives tremendous latitude to the state in regulating both abortion and pregnancy. States would be free to exercise sovereign

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When a patient is unable to make health care decisions, someone must assume the role of decisionmaker. Generally, the substitute decisionmaker is limited to choosing the course of treatment that the patient would have chosen. *See, e.g., In re* Quinlan, 70 N.J. 10, 38-39, 355 A.2d 647, 662-63 (father allowed to request withdrawal of life support system because daughter would have chosen that), *cert. denied*, 429 U.S. 922 (1976). For an excellent discussion of the development of the substitute judgment theory, see Comment, *Withholding Treatment From Seriously Ill and Handicapped Infants: Who Should Make the Decision and How? — An Analysis of the Government's Response*, 33 DEPAUL L. REV. 495, 524-31 (1984).

Because the fetus at present is not a person under the Constitution, the father's rights with respect to the fetus of a comatose mother are not clearly protected. Under present law, therefore, once the mother in each case became unable to make medical decisions for her fetus, a substitute decisionmaker, ususally the next of kin, should have been appointed. Even though Mr. Poole was engaged to the mother, her parents were her next of kin. Similarly, Mr. Piazzi, the mother's husband in the second case, was her next of kin and should have been the substitute decisionmaker. As substitute decisionmakers, the parents and Mr. Piazzi, respectively, would arguably have been limited to choosing a course of treatment that their daughter and wife, respectively, would have chosen had each of them been competent to do so.

If the fetus were a person and the father's rights were constitutionally protected, then the father's decisionmaking role might have obviated the need to invoke the substituted judgment doctrine. For example, Mr. Poole, as the fiance of the mother, had an emotional, and perhaps financial, attachment to the woman and the child she was carrying. Washington Post, July 31, 1986, at A16, col. 2; Gainesville Sun, July 31, 1986, at 4A. Under this view, because he had established a bond with the fetus-child, he arguably would have had an independent interest in the decision. His choice, therefore, should have governed over that of the comatose woman's parents. Only if his choice reflected parental unfitness would the state have needed to look to a substitute decisionmaker. *See supra* note 74.

The case involving Mr. Piazzi and Mr. Hadden is more difficult. At common law, Mr. Piazzi, as the husband, would be presumed to be the father of the child born during the marriage. H. CLARK, *supra* note 34, at 156. If the biological father, Mr. Hadden, had declared paternity, however, and had taken an active role in the woman's pregnancy, then he may have preserved his rights. Mr. Piazzi, in fact, did not contest Mr. Hadden's paternity. N.Y. Times, Aug. 16, 1986, at 6Y, col. 5.

What probably happened in these two stories is that the state allowed each woman to remain on the life-support system because of the state's interest in protecting the fetus' potential life. It was probably less significant who argued for continuing the life-support system than that it was, in fact, continued. But that kind of reasoning sets a dangerous precedent; it ignores the fundamental question of who the decisionmaker should be in critical health care situations.

88. *See supra* notes 73 & 74 and accompanying text.

discretion in allowing or disallowing abortion. The Court would be saying, as a matter of constitutional law, that the woman has no right of privacy in her pregnancy. Regulations designed to promote the fetus' health would not infringe upon the woman's right of privacy. For example, the state could allow prenatal tort actions, even against the woman. Right of privacy concerns would not prevent employers from prohibiting the pregnant woman from working in hazardous environments,[89] but the state would not be constitutionally compelled to protect the fetus, even if the state protected persons from similar types of risks and harms. As long as the fetus is not a person, it could not demand equal treatment. The state might even have an interest in compelling abortion to prevent the birth of a defective child.[90]

A decision holding that the woman has no right of privacy in her pregnancy also would weaken any arguments that the woman, as mother, has the constitutional right to make decisions relating to her pregnancy. Such a broad holding would suggest that the state constitutionally could refuse to recognize the pregnant woman as an independent decisionmaker, either as an individual asserting her own rights or as a potential mother asserting her parental rights. This rationale, therefore, has the potential to be even more formidable and burdensome on women than the alternative holding that the fetus is a person under the fourteenth amendment.

C. *No Right to Choose Abortion*

The Court might take the narrowest route and decide to overrule *Roe* by asserting the right of privacy does not extend to the abortion decision. However, this rationale would leave open the question of the scope of the woman's right of privacy in other pregnancy-related decisions. Significantly, this does not mean that the fetus is a person under the Constitution. Similar to the second rationale, this view leaves much of the authority to regulate abortion to the state.

Unlike the second alternative, the third basis for overruling *Roe* preserves some zone of privacy, limiting the state's ability to regulate the pregnancy outside of abortion. Unless the Court gave explicit guidelines about the scope of the woman's right, however, the omissions would spawn tremendous litigation about the state's power to intervene in the pregnancy to protect the fetus outside of abortion.

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89. Whether fetal protection regulations would survive equal protection analysis is a different question. *See supra* notes 25, 46 & 83.

90. *See* Chemerinsky, *supra* note 82, at 117.

Thus, the situation would not differ from the present one. For example, prenatal tort actions would appear to be permissible when the injury is due to the pregnant woman's negligence. The state's subtle form of regulating to protect the fetus' quality of life would not implicate the woman's right of privacy. Whether the state, for example, could go so far as to keep the pregnant woman out of a hazardous work environment would be an open question, but the woman's right to autonomy under this view arguably would be broader than under either of the other rationales.

In addition to maintaining some protection under the right of privacy doctrine to make decisions affecting her pregnancy, this rationale also leaves room for the woman to argue for decisionmaking authority over the fetus as its mother. Her argument would resemble the one that can be made on behalf of the viable fetus under *Roe*.[91] Absent unfitness, the mother would be the primary decisionmaker for all non-abortion pregnancy-related questions. In assuming the role as mother, of course, the pregnant woman also assumes an interest in the fetus' quality of life. Unless the Court ruled on the quality-of-life issue and upheld the state's interest in protecting the fetus from harm, however, the limits of the mother's right to make decisions on that basis would be undefined. Would a eugenic abortion be in the fetus' best interest?

Of the three possible rationales for overruling *Roe*, the Court most likely would base a decision to overrule *Roe* on the third: the right of privacy does not extend to the abortion decision. Not only is the third alternative the narrowest, it is the one advocated by Chief Justice Rehnquist and Justice White, the dissenters in *Roe*.[92] The third rationale places abortion regulation within the state's sovereignty.[93] Although the second rationale, that the right of privacy does not extend to the pregnancy, also places abortion regulation with the state, that rationale would call into question the validity of many other right of privacy cases related to pregnancy, such as the use of contraceptives and childrearing in general.[94] The Court is probably not

91. *See supra* § II.C.

92. *See infra* notes 159-63 and accompanying text.

93. Justices Rehnquist and White took the view in their dissents in *Roe* and *Doe* that abortion should be left to the states. *Roe*, 410 U.S. at 177 (Rehnquist, J., dissenting); *Doe*, 410 U.S. at 222 (White, J., dissenting). They have adhered to this view, and have persuaded at least Justice O'Connor and former Chief Justice Burger to join them. Thornburgh v. American College of Obstetricians & Gynecologists, 106 S. Ct. 2169, 2190 (1986) (Burger, C.J., dissenting); *id.* at 2206 (O'Connor, J., dissenting).

94. The right of privacy cases that led to the Court's decision in *Roe* basically started with

prepared to overrule all cases founded upon an implicit right of privacy. Finally, the Court has stated that the first rationale, that the fetus is a person, places the Court in the difficult position of defining life. The Court has consistently refused to take this position and has argued that it is unqualified to do so. Moreover, this basis also restricts the state's freedom to regulate abortion and pregnancy decisions.

Overruling *Roe* would have little effect on how decisionmaking should be allocated between the state and the woman when conflicts about prenatal caretaking develop. *Roe* simply does not address the crucial issue of how broad the right of privacy is outside of abortion. Nor does *Roe* clarify the pregnant woman's authority as mother of the fetus in pregnancy and abortion decisionmaking. Most important, none of the possible rationales for overruling *Roe* obviates the confusion, or settles the more difficult questions about life, death, and the appropriate circumstances in which to choose one over the other. Until the Supreme Court defines those limits, assumptions will continue to be made, and the various alternatives explored. However, the problems will not be resolved with any certainty. This raises important questions. What is to be gained in this area by overruling *Roe*? Alternatively, will anything of significance be lost if the Court retreats from *Roe*? Section IV examines these questions.

IV. OVERRULING *ROE*

A. *Possible Reasons for Overruling a Case*

Our system of government highly values legal precedent.[95] Carrying principles forward to future decisions enhances predictability, reliability, and fairness in the overall system.[96] In addition, courts are more efficient when they draw on prior cases and attempt to distinguish

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the contraceptive cases, *see* Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); and cases involving marriage and the family, *see* Loving v. Virginia, 388 U.S. 1, 12 (1967) (right to marry is fundamental right within guarantee of personal privacy); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (right of privacy protects family relationships).

95. *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Recent debates abound over the proper approach to constitutional interpretation; that is, whether judges should adhere to an originalist view or adopt a nonoriginalist view of that document. *See infra* notes 169-74 and accompanying text. Regardless of a particular court's position in the debate, however, the court should be principled and consistent in applying the approach it has chosen. Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 663-64 (1985).

96. *See generally* Hardisty, *Reflections on Stare Decisis*, 55 IND. L.J. 41 (1979) (explanation of various forms of judicial usage of stare decisis).

present cases in establishing the rule that governs a particular situation. But perhaps one of the most important reasons for following precedent is that the process gives an aura of objectivity to the judiciary.[97] The longer a principle has been adhered to, the more likely that it has become accepted both socially and politically. Thus, the Court is subjected to less criticism for adhering to the rule of law.

As important as precedent is in our system, however, the Court has discretion to disregard precedent and overrule prior decisions.[98] The Supreme Court has suggested that its discretion to overrule cases is broader in constitutional cases.[99] Allowing the Supreme Court the power to extricate the judiciary from the effects of "bad" decisions is reasonable.

What constitutes a "bad" decision is the heart of the matter. To avoid the appearance of acting arbitrarily or in a politically biased manner, the Court must objectively justify its decision to overrule precedent.[100] Justification for deviating from precedent generally is based on some change in circumstances. Something happens, between the time of the original ruling and that of the overruling, that draws into question the continuing validity of the original case.[101] For some

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97. Bennett, *Objectivity and the Constitution*, 132 U. PA. L. REV. 445, 483-85 (1984); Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 983, 999-1000 (1978). *But see* Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 436 (1985) ("it is hopeless to suppose that choices [made by judges] will be anything but political, sociological, and psychological"); Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 624-25 (1985) (objectivity depends on the norms or values chosen by the judges to be relied upon).

98. *See, e.g.*, United States v. Butler, 297 U.S. 1, 79 (1936) (Court bound by "own sense of self-restraint" in overruling prior decision). *See generally* Note, *supra* note 7, at 374-75 (suggesting "[t]he world of constitutional adjudication would surely profit from a rejection of stare decisis"); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) ("[w]hether [stare decisis] shall be followed or departed from is a question entirely within the discretion of the court").

99. Justice Brandeis argued that overruling a constitutional decision through legislative action was practically impossible. He suggested, therefore, that the Court's responsibility to follow precedent in such cases was less clear. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-07 (1932); *see also* Thornburgh v. American College of Obstetricians & Gynecologists, 106 S. Ct. 2169, 2192 (1986) (White, J., dissenting) (arguing in support of overruling *Roe*, "it is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken"). *But see* Israel, Gideon v. Wainwright: *The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 217 (suggesting that an "overruling decision represents a source of danger to both professional and popular acceptance of the Court as the disinterested interpreter of the Constitution"); *infra* § III.B.3 (discussion of proper role of the Court in our government).

100. Israel, *supra* note 99, at 219-29.

reason, the original case is no longer perceived as "right." The most obvious change that would make an original ruling wrong would be a constitutional amendment.[102] Short of constitutional amendment, changes in circumstances that warrant a departure from precedent become much less obvious, or at least much more debatable.

Generally, changes, excluding amendment, that would explain a decision to overrule a prior case fall into three categories.[103] Most obviously, if the Court's personnel changes, the previous minority might gain enough votes or influence to become the majority decision.[104] Although this smacks of politics and ruins the Court's image of being above such influences, nothing prevents the President from nominating for vacancies on the Bench candidates who are likely to vote a particular way. In fact, it would be unusual for the President to select a candidate who did not ostensibly conform to the President's ideologies.[105]

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101. *Id.* Judge Cardozo suggested that four principles guide the legal process: the rule of analogy or method of philosophy; the method of historical evolution; the method of tradition (customs); and the method of sociology (mores of the day). Cardozo, *The Nature of the Judicial Process*, in C. AUERBACH, L. GARRISON, W. HURST, & S. MERMIN, THE LEGAL PROCESS 367 (1961). For other approaches, see *infra* note 103.

102. For example, the eleventh amendment, which grants immunity to the states, reversed the Court's decision in Chisholm v. Georgia, 2 Dall. (2 U.S.) 419 (1793).

103. Professor Israel has greatly influenced my thinking in this area. He suggests three reasons that have caused the Court to deviate from past decisions: changed conditions, the lessons of experience, and the requirement of later precedent. Israel, *supra* note 99, at 219-26. Professor Monaghan would add a fourth reason to the list. "Precedent may also be overruled by reexamination and reinterpretation of the basis for the earlier decision." Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 3 n.4 (1979). I would include this reason in Professor Israel's "lessons of experience" category, and I have gone one step further and merged that category with Professor Israel's last one, "requirements of later precedent." These are all closely related.

104. *See, e.g.*, The Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1872) (two vacancies on the Court allowed it to gain a majority and overrule Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869), decided three years earlier).

105. It would be highly improper for the President to exact a commitment from a judicial nominee that the candidate would vote a certain way on a given issue. Blaustein & Field, *"Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 152, 182 (1958). For example, if President Reagan had asked Justice Scalia if he would vote to overrule *Roe*, that would have been an improper interference of the executive with the judiciary in violation of the separation of powers. At the same time, Justice Scalia's record and views on abortion were publicly known and the President undoubtedly considered the likelihood that Nominee Scalia would vote to overrule *Roe* if given the opportunity. However, some commentators argue that the Court must be a democratic institution, accountable to the people. *See also infra*, AUTHOR'S ADDENDUM (discussing Judge Bork's views and the President's preference for conservative ideology). *See generally* M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982). If

Often changes in the political and social climate also cause the Court to take a second look at prior holdings. For the most part, these types of changes evolve over time and involve more than one Court. The new opinion evidences a shift in society's basic values. Racial classification,[106] particularly the Court's decision to overrule *Plessy v. Ferguson's*[107] "separate but equal" doctrine in *Brown v. Board of Education*,[108] is a classic example. In striking down the state law that required racially segregated schools, the Court studied the "effect of segregation on public education."[109] The Court noted the growing significance of and increasing need for a good education to prepare children for the future.[110] Psychological studies unavailable at the time of *Plessy* demonstrated the harmful effect of segregation on public school children.[111] In light of this evidence, the *Brown* Court held that the "separate but equal" philosophy of *Plessy*, followed for sixty years, could no longer govern society.[112]

The third reason the Court elects not to follow precedent stems from a change in perception by various Court members about the ability of it and the lower courts to adhere to particular principles embodied within the overruled case.[113] Subsequent decisions usually highlight the freakish nature of the overruled case. The Court's decisions about the applicability of the Fair Labor Standards Act to the

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"democracy" means following the will of the majority, then the President and elected officials might have a duty to find out how a judicial nominee will vote on particular issues. *See* Rees, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913 (1983). In our government, however, "democracy" has an additional quality; it encompasses the value of protecting the minority view. Protecting popular democratic principles, therefore, is the legislature's responsibility. The judiciary, in contrast, is the safekeeper of the minority's rights. *See*, E. CHEMERINSKY, INTERPRETING THE CONSTITUTION (Praeger Pub. Co., N.Y. (forthcoming 1987)).

106. A number of commentators use the opinion in Brown v. Board of Educ., 347 U.S. 483 (1954), to illustrate this basis for overruling precedent. *See, e.g.*, Blaustein & Field, *supra* note 105, at 157; Israel, *supra* note 99, at 220-21. For other examples involving the economic changes, see Blaustein & Field, *supra* note 105, at 175.

107. 163 U.S. 537 (1896).

108. 347 U.S. 483 (1954).

109. *Id.* at 492.

110. *Id.* at 493.

111. *Id.* at 494-95.

112. *Id.* at 495. *But see* Blaustein & Field, *supra* note 105, at 157 (suggesting that *Brown* could have been distinguished from *Plessy* because it focused upon public education, not public transportation). The case that overruled *Plessy* then would have been Gayle v. Browder, 352 U.S. 903 (1956), which held that segregation in public transportation facilities was unconstitutional. *See* Blaustein & Field, *supra* note 105, at 158. The authors note, however, that the *Gayle* Court did not say it was overruling *Plessy*, and cited to *Brown* for its decision. *Id.*

113. Israel, *supra* note 99, at 223-26.

states provide a recent example. In *National League of Cities v. Usery*,[114] the Court held that states were not bound by the minimum wage and hour provisions of the Act, because regulations of those employment conditions were "traditional government functions" protected by the tenth amendment.[115] For nine years, the Court struggled with its opinion in *National League of Cities*, straining to adhere to its holding that the tenth amendment restricted Congress' power under the commerce clause to regulate minimum wage and hour provisions of employment.[116] Finally, in *Garcia v. San Antonio Metropolitan Transit Authority*,[117] a majority of the Court concluded that the decision in *National League of Cities* "departed from a proper understanding of congressional power under the Commerce Clause."[118] Justice Blackmun, writing for the majority, acknowledged the burden upon an overruling court to justify its decision, and felt that "[d]ue respect for the reach of congressional power within the federal system mandate[d]" that the Court depart from *National League of Cities*.[119]

Of the three primary reasons for overruling precedent, a change in Court personnel is the least valid.' It casts a shadow over the judiciary's independence.[120] Overruling precedent because social conditions change also is controversial. It raises fundamental questions about the judiciary's role in our government. Is it or is it not an anti-majoritarian institution?[121] Regardless of the answer, once a principle is decided, another question is whether there are compelling reasons to adhere to it.[122]

A departure from precedent because the Court believes a prior decision was wrong is perhaps the least problematic reason for deviating from precedent. An individual Justice should be entitled to a change of mind. The ability to reflect upon the law in light of experience is

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114. 426 U.S. 833 (1976) (overruled by Garcia v. San Antonio Metro. Transit Auth., 105 S. Ct. 1005 (1985)).

115. *Id.* at 852.

116. *See generally* L. TRIBE, CONSTITUTIONAL CHOICES 121-37 (1985).

117. 105 S. Ct. 1005 (1985).

118. *Id.* at 1021.

119. *Id.*

120. *See* Israel, *supra* note 99, at 218, 228-29.

121. *See supra* note 105; *infra* § III.B.3.

122. *See, e.g.*, Bennett, *supra* note 97, at 485-86 ("The legitimacy of *Roe v. Wade* . . . should be debated in terms of institutional continuity and of its substantive merits and not by reference to one or another dubious and inevitably incomplete standard of authoritativeness."); Monaghan, *supra* note 103, at 8 (author would be "reluctant now to disturb [*Roe*'s] authority," although he believes it was incorrectly decided); *see also* Note, *supra* note 7, at 359-61 (arguments for and against overruling *Roe*).

a value that should not be undermined; in fact, it should be fostered. The more successful the individual Justices are in providing objective reasons for a change of mind, so that only their scholarship is open to criticism, the less they can be criticized for structuring constitutional law to reflect their personal beliefs. Public faith in the judiciary will also be enhanced if the Justices' reasoning is at least made public for review.[123]

B. *Changed Circumstances Since* Roe *Do Not Justify Overruling* Roe

1. Changes in Court Personnel

Roe was a seven to two opinion written by Justice Blackmun and joined by former Chief Justice Burger and Justices Brennan, Douglas, Marshall, Powell, and Stewart. Justices White and Rehnquist dissented. For ten years, this balance was maintained on the critical issue of whether abortion should be allowed, although the Justices disagreed on the limits of state power to regulate it.[124]

In 1983, however, the vote shifted to six to three in *City of Akron v. Akron Center for Reproductive Health.*[125] At issue in *Akron* was the validity of a state law requiring all second-trimester abortions be performed in a hospital.[126] In striking down the statute, the Court recognized that, because of advances in medical technology, certain abortions during the early weeks of the second trimester could be performed as safely in an outpatient clinic as in a hospital.[127] Thus, the statute failed to further the state's interest in protecting maternal health during the early weeks of the second trimester.[128] Moreover, because hospital abortions cost nearly twice as much as those performed in outpatient clinics,[129] the statute imposed an undue burden upon a woman's constitutional right of privacy.[130]

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123. When the Court fails to give any reasons for its decision to overrule precedent, Professors Blaustein and Field characterize the decision as "unwarranted." Blaustein & Field, *supra* note 105, at 177.

124. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622 (1979). All but Justice White agreed that the state could require parental consent for the immature minor seeking an abortion if the minor could not otherwise demonstrate that it would be in her best interest to proceed without such consent. Justice White believed that parental consent could be required for all minors. *Id.* at 656 (White, J., dissenting).

125. 462 U.S. 416 (1983).

126. *Akron*, 462 U.S. at 422 n.3.

127. *Id.* at 436.

128. *Id.* at 437.

129. *Id.* at 434-35 ("in-hospital abortion costs $850-$900, whereas a dilatation-and-evacuation (D&E) abortion performed in a clinic costs $350-$400") (footnote omitted).

130. *Id.* at 438-39.

Justice O'Connor, who replaced Justice Stewart on the Bench, provided the third dissenting vote in *Akron*. Moreover, Justice O'Connor impugned the entire *Roe* trimester framework in her dissenting opinion.[131] She suggested that as medical technology continues to improve, the state's interest in regulating to protect maternal health will decrease as the pregnancy develops. Justice O'Connor also asserted that medical technology will move viability up to an earlier stage. She concluded, therefore, that *Roe* is on a collision course with itself.[132] The implication of her dissent in *Akron* is that she would vote with Chief Justice Rehnquist and Justice White to overrule *Roe*.

During the 1986 term, the vote shifted again and is now at five to four to uphold *Roe*. In *Thornburgh v. American College of Obstetricians & Gynecologists*,[133] the Court struck down various abortion regulations. These regulations included informed consent provisions, reporting provisions, and provisions that the physician take all reasonable steps to keep a possibly viable fetus alive during an abortion procedure.[134] The decision proved too much for the former Chief Justice, who believed that the regulations legitimately served the state's interests as articulated in *Roe*.[135] Because the majority struck down provisions he felt were constitutional, he concluded that it was time to reconsider *Roe*.[136]

If *Roe* were overruled, it would probably be by a five to four vote. Former Chief Justice Burger's retirement is unlikely to affect the vote because Justice Scalia probably will align with the *Thornburgh* dissenters as did Chief Justice Burger, leaving it at five to four to uphold *Roe*. Thus, the swing vote would have to come from one of the Justices who originally voted in favor of *Roe*.

Even if the newly constituted Court overruled *Roe*, the members should not be criticized for politicizing the vote. Votes along political lines have been less than predictable with respect to the changes in personnel since *Roe*. When *Roe* was decided, President Nixon had just appointed Chief Justice Burger to replace Chief Justice Warren. The President also had appointed Justices Blackmun, Rehnquist, and Powell to the Bench. At the time, one would have predicted that all

131. *Id.* at 453-59 (O'Connor, J., dissenting).
132. *Id.* at 458 (O'Connor, J., dissenting).
133. 106 S. Ct. 2169 (1986).
134. *Id.* at 2181-84.
135. *Id.* at 2190 (Burger, C.J., dissenting).
136. *Id.* (Burger, C.J., dissenting).

of Nixon's appointees would have voted to uphold the anti-abortion statute in *Roe*. In fact, Justice Rehnquist was the only one who did. Similarly, Justice Douglas voted for *Roe*, and one would have expected his replacement, Justice Stevens, appointed by President Ford, to have nullified his vote. Instead, Justice Stevens has vigorously supported *Roe*.[137] Justice O'Connor, appointed by President Reagan, is the only member of the Court who voted as one might have predicted. Her vote successfully nullified Justice Stewart's. The change in personnel, therefore, would result in a six to three split. The present five to four split comes from former Chief Justice Burger's dissent in *Thornburgh* and his suggestion that perhaps *Roe* should be reconsidered.[138] Justice Scalia will substitute his vote for the former Chief Justice's, unless he fails to live up to predictions.

2. Changes in Social Conditions

Have changes in society occurred since *Roe* to justify a swing voter's reversal of the opinion on this basis? Anti-abortionists certainly have nationalized their opinion.[139] The pervasiveness of their message reflects their tremendous lobbying power, but whether most Americans disfavor abortion is unclear.[140] One recent study recorded that only sixteen percent of the polled population wanted all abortions outlawed, while forty percent wanted abortion to be legal in cases of incest, rape, or when the mother's life was jeopardized.[141] In the same poll, however, sixty-six percent of the sample agreed with the statement that "abortion is sometimes the best thing in a bad situation."[142] Only forty-one percent wanted to amend the Constitution to reflect their beliefs.[143]

Marbury v. Madison[144] authorized Supreme Court review of the law regardless of popular sentiment.[145] After all, if the Court were

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137. Justice Stevens spoke adamantly in *Thornburgh* about adhering to stare decisis and sharply criticized Justice White's dissent for advocating that *Roe* should be overruled. 106 S. Ct. 2169, 2185-90 (Stevens, J., concurring).

138. *See supra* text accompanying notes 133-36 (discussion of *Thornburgh*).

139. *See supra* notes 3-4.

140. *See Abortion and Ambivalence: One Issue that Seems to Defy a Yes or No*, N.Y. Times, Feb. 23, 1986, at D22, col. 4.

141. *Id.*

142. *Id.*

143. *Id.*

144. 5 U.S. (1 Cranch) 137 (1803).

145. This issue raises larger questions about the role of the Court in a democracy. *See infra* § III.B.3.

persuaded to make decisions on particular issues according to public opinion polls, *Brown* and other cases supporting civil rights for racial minorities probably would not exist.[146] Although *Brown* deviated from prior decisions, the Court justified its position in the opinion.[147] If people want to guarantee that the law reflects popular sentiment, then perhaps the legislature should be the final arbiter of what the law is.[148] But our system gives the Supreme Court the role of final legal arbiter. Just as the Court fulfilled that role in *Brown* by protecting blacks against racial prejudice, so should it fulfill that role by protecting a woman's right to choose, regardless of how most Americans feel about abortion.

One societal change that may influence some Justices' decisions about the continuing validity of *Roe* is the progress being made in neonatology.[149] Since *Roe*, medical advancements enable some prema-

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146. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (upheld right of interracial couple to marry, though racism was quite prevalent at the time). *But see* Bowers v. Hardwick, 106 S. Ct. 2841 (1986). In *Hardwick*, the Court upheld an anti-sodomy statute as applied to homosexuals. Justice Blackmun's dissenting opinion in *Hardwick* highlights the parallels between that case and *Loving*. *Hardwick*, 106 S. Ct. at 2854 n.5 (Blackmun, J., dissenting). Just as desegregation was unpopular and blacks were a scorned group at the time of *Loving*, homosexuality is very unpopular today, and gay people generally are ostracized from the mainstream.

Brown, although a unanimous decision, was arguably decided incorrectly, because the Court deviated too far in its interpretation of the Constitution according to its textual language and the framers' intent. *See, e.g.*, M. PERRY, *supra* note 105, at 66-69 (suggesting that if one accepts the theory that the Constitution should be interpreted according to what the framers' original understanding was, then "*Brown* must be deemed illegitimate"); *see also* Wechsler, *supra* note 95, at 32-35 (state enforced segregation is not an issue of discrimination but one of freedom to associate). Supporters of this position conclude that because the framers did not intend to eliminate segregation, *Brown* violates the proper way of interpreting the Constitution. If the Court had voted to uphold the "separate but equal" law, that would have been the "correct" way to interpret the Constitution. A vote the other way in *Brown* would also have supported popular sentiment about race relations. *But see* Simon, *supra* note 97, at 629 ("an outcome opposite to that reached by the [*Brown*] Court would have been impossible to justify as a matter of political morality and, therefore, law") (footnote omitted).

The majority in *Hardwick*, in fact, reached its conclusion to uphold the anti-sodomy statute by choosing to interpret the Constitution according to what the framers intended. *Hardwick*, 106 S. Ct. at 2844-46. Ironically, the *Hardwick* Court, similar to the *Brown* Court, can also be criticized for interpreting the Constitution inappropriately. The critics of *Hardwick* would argue that the Court cannot possibly know what the framers intended, and that the Constitution must evolve to reflect modern conceptions of protected constitutional rights. The Court's decision to uphold the anti-sodomy statute may reflect popular sentiment about homosexuality in this country, but whether it reflects popular sentiment about the right of privacy is unclear. This is the debate that presently has *Roe* at its center. *See infra* § III.B.3.

147. *See supra* notes 109-12 and accompanying text.

148. Simon, *supra* note 97, at 605.

149. Justice O'Connor, in particular, has questioned the validity of *Roe's* trimester

ture babies to live beyond previous expectations.[150] As the point of viability occurs at earlier stages of gestation, some have suggested that *Roe's* trimester scheme for regulating abortion loses its validity.[151]

Overruling *Roe* because of changes in medical technology would be premature and speculative. The point of viability continues to fall primarily at the beginning of the last trimester.[152] Viability does not

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framework in light of medical advancements. *See supra* notes 5, 131-132. Justices Rehnquist and White joined her on this issue in *Akron.* 462 U.S. at 452-59 (White and Rehnquist, J.J., dissenting).

For recent literature on the progress being made in infant health care, see R. BOLOGNESE, R. SCHWARTZ, & J. SCHNEIDER, PERINATAL MEDICINE: MANAGEMENT OF THE HIGH RISK FETUS AND NEONATE (2d ed. 1982); Battaglia, *Neonatal Surgery: Changing Patterns 1972-1980,* 17 J. PEDIATRIC SURGERY 666 (1982); Dibbins, Curci, McCrann, *Prenatal Diagnosis of Congenital Anomalies Requiring Surgical Correction: Implications for the Future,* 149 AM. J. SURGERY 528 (1985); *see also* Rhoden, *supra* note 13, at 639 (medical technology should not rule abortion law because that would conflict with the spirit of *Roe,* which implied that viability meant that a fetus was substantially developed).

150. *See* Goldenberg, *Survival of Infants with Low Birth Weight and Early Gestational Age, 1979 to 1981,* AM. J. OBSTETRICS & GYNECOLOGY, July 1, 1984, at 508; Progress in Perinatal Medicine III, 3rd International Berlin Meeting of Perinatal Medicine, 12 J. PERINATAL MEDICINE 1 (1984); Stahlman, *Newborn Intensive Care: Success or Failure,* 105 J. PEDIATRICS 162 (1984).

151. *See supra* note 5; *see also* Ely, *supra* note 50, at 923-26 (noting that the point of viability will change with medical developments and criticizing the court for selecting viability as the point at which the state interest in protecting the fetus becomes compelling); Epstein, *supra* note 50, at 180-83 (discussing the court's attempt to balance the interests of the woman, the fetus, and the state); Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve,* 36 HASTINGS L.J. 155, 168-71 (1985) (suggesting that the Court abdicated its responsibility in *Roe* by making viability the critical point and deferring to the physician to advise how and when technological advancements will affect fetal development). *But see* Rhoden, *supra* note 13 (suggesting that although viability concept may change with technology, the trimester scheme of *Roe* illustrates the understanding that the fetus becomes more like a person as it matures).

152. At the time of *Roe,* medical knowledge indicated that viability occurred at about 28 weeks of gestation. *Roe,* 410 U.S. at 160. The *Roe* Court also acknowledged that viability could occur as early as 24 weeks, the dividing line between the second and third trimesters. *Id.*

Even today, no clear consensus exists among medical professionals as to when viability occurs, or whether it should be measured by gestational age or weight. Lenow, *supra* note 61, at 11. One study defined viability at 26 weeks gestation. Koops, Morgan, & Battaglia, *Neonatal Mortality Risk in Relation to Birth Weight and Gestational Age: Update,* 101 J. PEDIATRICS 969, 975 (1982). The authors of another study, using birth weight as the indicator, noted that in the early 1970s neonatal survival for infants weighing less than 1,000 grams was 10%. Hoskins, Elliot, Shennan, Skidmore, & Keith, *Outcome of Very Low-Birth Weight Infants Born at a Perinatal Center,* 145 AM. J. OBSTETRICS-GYNECOLOGY 135, 138 (1985). Their study indicated that by 1985 survival increased to 79% for infants between 750 and 1,000 grams. *Id.* Survival rates for infants weighing between 599 and 750 grams, however, was only 39%. *Id.*

routinely occur before that stage of development.[153] Moreover, medical technology could be years away from simultaneous occurrence of conception and viability.[154] Until medical technology advances to that stage of development, questions about a woman's right not to conceive and bear a child will continue to exist, and the viability versus non-viability distinction in *Roe* will remain valid.

Viability has not progressed to a point significantly earlier in the pregnancy, but this fact does not obviate the dilemma; it merely postpones the search for a solution. Even if viability occurs at conception, fundamental questions about the state's proper role in a woman's

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Robert Weir defines infants born between 24 and 30 weeks gestational age with birth weights between 500 and 1,500 grams as extremely premature neonates. R. WEIR, SELECTIVE NONTREATMENT OF HANDICAPPED NEWBORNS 39 (1984). His statistics of these infants in neonatal intensive care units indicate that their chance of survival at 26 weeks is approximately 25%, while survival at 29 weeks is 90%. *Id.*

In short, many of the available statistics about premature infant survival rates fall within the expectations of *Roe*. For example, two noted authorities in neonatal medicine reported in 1985 that a 24 week old fetus (weighing 650 grams) will usually die soon after birth; a 28 week old fetus (weighing 1,100 grams) may survive with expert care; and a 32 week old fetus (weighing 1,800 grams) should survive with proper care. J. PRITCHARD, P. MACDONALD & N. GANT, *supra* note 18, at 143.

153. A few infants born before the 24th gestational week have survived in recent years. Justice O'Connor cited one example of an infant born at 22 weeks of gestation who survived. *Akron*, 462 U.S. at 457 n.5 (citing Washington Post, Mar. 31, 1983, at A2, col. 2). The fourth smallest infant reported to have survived may be a 440 gram infant born at 25 weeks gestational age. This infant was cared for in a neonatal intensive care unit and the doctors report this case to be the smallest infant whose progress was followed and studied scientifically. Pleasure, Dhand, & Kaur, *What is the Lower Limit of Viability?*, 138 AM. J. DISEASES OF CHILDREN 783 (1984).

154. The viability issue has focused upon the fetus' ability to live outside of the womb, which is how the *Roe* Court defined the term. It is unclear, however, whether the Court meant to limit its understanding of viability to the particular woman's womb, or if the fetus was only viable when it could survive outside of any womb. The possibility for implanting a fertilized egg into another woman's womb means that it can survive outside of the original mother's womb. It cannot survive outside of any womb, however, for more than 3-4 days. Would this mean then, that viability has become possible at conception? My colleague, Jannis Goodnow, raised this question in one of our discussions. For an excellent analysis of current reproductive technology from *in vitro* fertilization and surrogate motherhood to the future possibility of ectogenesis, see P. SINGER & D. WELLS, MAKING BABIES: THE NEW SCIENCE AND ETHICS OF CONCEPTION (1985). A comprehensive treatment of established law and emerging theories in all areas of human procreation is found in HANDLING PREGNANCY AND BIRTH CASES (W. Winborne ed. 1983). *See also* Andrews, *The Stork Market: The Law of the New Reproductive Technologies*, A.B.A. J., Aug. 1984, at 50 (discussing artificial insemination, in vitro fertilization, and surrogate motherhood); Robertson, *supra* note 36 (discussing scope of artificial conception and the constitutional protection); Waddlington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465 (1983) (analyzing existing law dealing with artificial conception and areas of potential modification).

childbearing decision still need to be examined. Presumably, some abortions would always be permissible.[155] For example, many statutes except from criminal liability abortions that are performed because the fetus was conceived as a result of incest or rape.[156] Other statutes allow the woman to abort a fetus that would be born with severe defects.[157] Whether these statutes would remain valid if *Roe* were rejected would depend on the Court's rationale in the overruling case.[158] Recall that the ramifications of a holding that the fetus is a person differ from those of a holding that restricts the right of privacy. Furthermore, the question of whether quality of life can be a factor in regulating the pregnancy would still be unanswered. Thus, overruling *Roe* because the Court injudiciously tied its rationale to medical science overlooks the more serious shortcomings of *Roe*. These shortcomings can be resolved, however, only by clarifying what *Roe* omitted, not by overruling the decision.

Thus far, neither a change in personnel nor a change in social conditions will justify a decision to overrule *Roe*. The final question is whether certain members of the Court feel that they can no longer adhere to *Roe* and continue to be consistent with some of the principles they have announced since that decision. Has one of the Justices in the *Roe* majority deviated from his stand on the right of privacy doctrine so that *Roe* is no longer consistent with it? Alternatively, has one Justice of the *Roe* majority changed his mind about the proper role of the federal judiciary in defining the right of privacy?

3. Changes in Ability to Adhere to Other Principles

Justice White and Chief Justice Rehnquist find *Roe* problematic because they believe that the right to choose abortion cannot be found or implied in the Constitution. Adhering to the standard adopted by the Court in a case decided thirty-six years before *Roe*,[159] and applied

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155. Even the Texas statute in *Roe* excepted from criminal prosecution abortions that were necessary to save the mother's life. *Roe*, 410 U.S. at 117-18 n.1. However, even without *Roe* a woman could probably not be forced to sacrifice her life for that of the fetus. *See generally* Regan, *supra* note 23.

156. *See, e.g.*, 410 U.S. at 183. The *Doe* Court noted that the American Law Institute's MODEL PENAL CODE, § 230.3 (Proposed Official Draft 1962) had similar exceptions. *Id.* at 182, 205-06. For statutes with similar provisions, see ARK. STAT. ANN. § 41-2554 (1977); COLO. REV. STAT. § 18-6-101 (1986); DEL. CODE ANN. tit. 24, § 1790 (1981); KAN. STAT. ANN. § 21-3407(2) (1981).

157. *See supra* note 41.

158. *See supra* § II.

159. Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).

in *Roe*,[160] Justice White wrote in his *Thornburgh* dissent that the right of privacy protects only those rights that are either "implicit in the concept of ordered liberty"[161] or "deeply rooted in this Nation's history and tradition."[162] He and Chief Justice Rehnquist believe that abortion does not fit this standard.[163]

The Court's decision in *Bowers v. Hardwick*[164] raises some doubt about the continuing validity of *Roe*. In *Hardwick*, the Court held by a five to four vote that the right of privacy does not include the right to engage in homosexual sodomy.[165] Justice White, writing for the *Hardwick* majority, held that because laws proscribing homosexual sodomy have deep historical origins,[166] it is "facetious" to suggest that the right to engage in homosexual sodomy is "deeply rooted in this Nation's history or tradition," or "implicit in the concept of ordered liberty."[167] Former Chief Justice Burger and Justices Rehnquist, O'Connor, and Powell joined his opinion.

What do *Hardwick* and homosexuality have to do with *Roe* and abortion? The opinion in *Hardwick* bears on the stability and validity of *Roe* in a number of ways. The suggestion that implied rights are only those that have been around a long time opens up the unending and unendable debate about the proper way for the Supreme Court to interpret the Constitution.[168] Should the Supreme Court interpret the Constitution according to its literal language, gaining insight into the gray areas only by looking at the original intent of the framers? This

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160. 410 U.S. at 152.

161. 106 S. Ct. at 2194 (White, J., dissenting).

162. *Id.* The language "deeply rooted in this Nation's history and tradition" comes from Justice Powell's plurality opinion in Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (footnote omitted), in which the court held invalid a zoning law that narrowed the definition of family to exclude relatives outside the nuclear family.

163. Former Chief Justice Burger seemed to agree with them by suggesting in *Thornburgh* that it was time to reconsider the validity of *Roe*. *Id.* at 2190 (Burger, C.J., dissenting).

164. 106 S. Ct. 2841 (1986).

165. *Id.* The Court had implicitly decided this question in Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), in which the Court affirmed without opinion a lower court's decision to uphold its anti-sodomy statute. Justices Brennan, Marshall, and Stewart voted to hear oral arguments in that case. The *Hardwick* Court left open the question of the validity of an anti-sodomy statute as applied to heterosexual couples. 106 S. Ct. at 2843.

166. *Id.* at 2844.

167. *Id.* at 2846.

168. Professor Perry suggests that the debate about the meaning of the Constitution is "interminable," because "any argument for or against a particular conception of judicial role — *any* such conception . . . is, in the nature of things, contingent, speculative, and provisional, and therefore revisable." Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551, 588 (1985) (footnote omitted).

position is known as the "originalist" view.[169] The majority in *Hardwick* comes close to answering yes to this question.[170] In contrast, is the Supreme Court free to read into the Constitution to protect values that are not explicit in the Constitution, but that necessarily derive from it according to modern mores? This position is known as the "non-originalist" view.[171] The majority in *Roe* adheres to the non-originalist view.[172]

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169. Although "originalists" differ among themselves about what they mean by the term, generally they suggest that judges are limited in their discretion to interpret the Constitution by the textual language of the document, and by the original intent of the framers. Prior to the use of the term "originalism," coined by Professor Brest, *see* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980), the term "interpretivism," coined by Professor Grey, described the general concept. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975). *See generally* J. ELY, DEMOCRACY AND DISTRUST (1980); M. PERRY, *supra* note 105, at 101 (Perry suggests, however, that courts should depart from an originalist approach in "individual rights" cases for the sake of promoting moral growth); Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695; Michaels, *Response to Perry and Simon*, 58 S. CAL. L. REV. 673 (1985); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981); Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209 (1983).

170. Justice White said in *Hardwick*, "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Hardwick*, 106 S. Ct. at 2846. *But see supra* note 146 (comparison of *Brown* Court's view of its role in determining validity of racial segregation laws).

171. Advocates of the "non-originalist" or "non-interpretivist" camp suggest that judges are not, and cannot be, confined to the literal textual language, and that resort to the original intent of the framers is impossible. They believe that it is legitimate, even necessary, to interpret the Constitution according to modern principles and values. *See supra* note 146 and accompanying text (comparison of the different views of Court's role in *Brown* and *Hardwick*). *See generally* Munzer & Nickel, *Does the Constitution Mean What it Always Meant?*, 77 COLUM. L. REV. 1029 (1977); Simon, *supra* note 97; Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482 (1985); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 783 (1983).

172. In the words of Mr. Justice Frankfurter: "Great concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. For they related to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *Roe*, 410 U.S. at 169 (Stewart, J., concurring) (quoting National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)). For discussions of the view that the Constitution embodies certain implied rights, in particular the right of privacy, see Craven, *Personhood: The Right to Be Let Alone*, 1976 DUKE L.J. 699; Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner*, 61 WASH. L. REV. 293 (1986); Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980). *But see*, Ely, *supra* note 50, at 943 (suggesting that *Roe* lacks even colorable support for the text or history of the Constitution); Epstein, *supra* note 50, at 185 (criticizing

It is conceptually difficult to distinguish why the right to choose abortion is included in the right of privacy and the right to engage in consenting homosexual sodomy is not.[173] The line of cases leading to *Roe*[174] support extending the right of privacy to protect from state interference the sexual activity of consenting adults.[175] As Justice Blackmun said in his *Hardwick* dissent, "This case is no more about 'a fundamental right to engage in homosexual sodomy,' . . . this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'"[176] That right is deeply rooted in this Country's tradition.[177]

Justice White and Chief Justice Rehnquist probably would concede that there is no principled basis to justify including the right to choose abortion within the right of privacy, and excluding the right to engage in homosexual sodomy from constitutional protection.[178] All along, they

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"entire method of constitutional interpretation that allows the Supreme Court in the name of Due Process both to 'define' and to 'balance' interests on the major social and political issues of our time"); Perry, *supra* note 168, at 601 ("We know enough about the common original understanding of section one of the fourteenth amendment to conclude that *Roe v. Wade* cannot plausibly be explained in originalist terms." (footnote omitted)).

173. The Court, at least implicitly, acknowledged its responsibility to attempt to distinguish *Hardwick* from prior right of privacy cases, but limited its effort to the conclusion that *Hardwick* does not resemble the prior cases. *Hardwick*, 106 S. Ct. at 2844. Writing for the majority, Justice White continued, "Moreover, any claim that [previous right of privacy] cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable." *Id.* If one wonders what the distinction is between homosexuality and other right of privacy issues to justify denying constitutional protection to consenting homosexual adults, Justice White's explanation is unilluminating. *See generally* Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305 (1987) (ninth amendment provides textual support for right of privacy to engage in consenting adult homosexual sodomy).

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

175. *See* Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideas in the Constitution?*, 58 NOTRE DAME L. REV. 445, 488-90 (1983); Massey, *supra* note 173, at 331-37; *see also* Karst, *supra* note 172, at 664-65 ("'freedom of personal choice in matters of marriage and family life' . . . goes beyond the relationships of marriage and family to other forms of intimate association" (quoting *Roe*, 410 U.S. at 169 (Stewart, J., concurring)). *But see* Gray, *Eros, Civilization and the Burger Court*, LAW & CONTEMP. PROBS., Summer 1980, at 83 (suggesting that since its decision in *Griswold*, the Court has not indicated that it would support a right to sexual freedom).

176. *Hardwick*, 106 S. Ct. at 2848 (Blackmun, J., dissenting).

177. *Id.*

178. In *Hardwick*, Justice White "accepted" the validity of *Roe*, and quickly attempted to distinguish homosexuality from abortion. 106 S. Ct. at 2844. His arguments supporting a distinction, however, were tautological and unpersuasive. *See supra* note 173. A reading of Justice White's entire opinion in *Hardwick* implies that he only accepted the decisions in *Roe* and other

have been arguing that *Roe* cannot be justified because the right to choose abortion is not implicit in the Constitution. *Hardwick*, then, presents the Court's dilemma most poignantly: have Justice White and Chief Justice Rehnquist mustered enough support to retreat from *Roe*?

Newly appointed Justice Scalia probably would agree that the right of privacy does not extend to abortion. Justice O'Connor would contribute the fourth vote to retreat from *Roe*. However, her reasons for departing from *Roe* may not be based upon the belief that the right of privacy does not include the right to choose abortion under any circumstances. Her opinions in *Akron* and *Thornburgh* reflect an ambivalence between aligning with Justice White and Chief Justice Rehnquist on the basic right of privacy question raised in *Roe*, and accepting the right of privacy holding in *Roe*, but rejecting *Roe*'s trimester framework for reviewing the validity of state abortion regulations.[179] Although her vote in *Hardwick* indicated she believes the right of privacy is limited, she may again choose to avoid the issue in that future abortion case when *Roe* is revisited. She has laid an adequate foundation for overruling *Roe* on the rationale that medical technology has rendered *Roe* obsolete.[180] Some viewers, therefore, see the consistency between a vote by Justice O'Connor to overrule *Roe* and her vote in *Hardwick*.

Justice Powell's position on the scope of the right of privacy is unclear after *Hardwick*. His opinions and votes in the abortion and other right of privacy cases indicate that he aligns more with a non-originalist view of the Constitution in this area. As recently as his decision in *Akron*, Justice Powell reaffirmed his position that "the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution."[181]

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right of privacy cases for expediency, and that he really believes that neither abortion nor homosexuality is constitutionally protected under the right of privacy.

179. For example, in *Akron* Justice O'Connor wrote the dissenting opinion, which Justice White and then Justice Rehnquist joined. She intimated that *Roe*'s holding that the right of privacy protects the right to have an abortion was invalid, but she was willing to accept *Roe*'s holding and describe how the state regulations at issue were nonetheless valid under *Roe*. *Akron*, 462 U.S. at 452-53, 459 (O'Connor, J., dissenting). In *Thornburgh*, Justice O'Connor wrote a separate dissent from Justice White and specifically agreed with only part of his dissent, which was joined by Justice Rehnquist. Justice O'Connor separated her opinion from that part of Justice White's dissent that addressed whether the right of privacy could be found in the Constitution. *Thornburgh*, 106 S. Ct. at 2213 (O'Connor, J., dissenting).

180. *See supra* notes 149-51 and accompanying text.

181. *Akron*, 462 U.S. at 427 (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J.,

Addressing fears of Lochnerism in one right of privacy case, Justice Powell stated that we should be concerned "lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment."[182] Since *Roe*, Justice Powell has not hinted at a retreat from his position that the right of privacy is broad enough to encompass a woman's decision to have an abortion.[183] Still, his opinions in right of privacy cases reflect some judicial restraint. For example, Justice Powell has strongly advocated deference to state legislatures in cases involving marriage.[184] He also has suggested that not all regulations affecting privacy rights require justification under a strict compelling state interest test.[185] He does suggest in those cases, however, that laws restricting the right

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dissenting from dismissal of appeal)).

182. Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion) (footnote omitted).

183. In every abortion case in which he has participated, Justice Powell has voted to protect a woman's right to choose abortion. However, he has voted against upholding a woman's right to receive government funding to have an abortion. *See* Harris v. McRae, 448 U.S. 297 (1980); Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977). In each of those decisions, he stressed the difference between the right to have an abortion and the right to have an abortion funded by the government. This distinction may not withstand logical analysis. *See generally* Appelton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721 (1981); Ginsburg, *supra* note 48, at 377; Law, *supra* note 48, at 1016-28; Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191 (1978); Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McRae, 32 STAN. L. REV. 1113 (1980); Tribe, *Commentary: The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985). Justice Powell departs from his supporters on the funding issue when it comes down to the abortion itself. His vote with respect to the minor woman has also been more constrained. Justice Powell requires parental consent for any immature minor who cannot demonstrate to a judge that an abortion without parental involvement would be in her best interest. H.L. v. Matheson, 450 U.S. 398 (1981) (Powell, J., concurring); Bellotti v. Baird, 443 U.S. 622 (1979).

184. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 398-99 (1978) (starting point for reviewing validity of state law that required judicial consent before resident who had court order to support minor issue not in resident's custody could marry is recognition that domestic relations issues have traditionally been left to the state).

185. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977). In *Carey*, the Court reviewed the validity of state regulations governing the distribution and advertisement of contraceptives. Justice Powell voted to strike down the restrictive regulations, except as they applied to minors. In doing so, however, he stated that the Court unnecessarily extended the reach of *Griswold* and *Roe* by requiring that the state regulations in question serve a "compelling state interest." *Id.* at 705 (Powell, J., concurring). He found that this heightened standard of

of privacy are subject to constitutional limitations and that some level of judicial review is appropriate.[186]

Without judging the correctness of Justice Powell's view on constitutional interpretation, because there is no right answer,[187] it is unclear why in *Hardwick* he departed from his previous position. The majority opinion, which he joined, adamantly espouses an originalist view of the right of privacy doctrine. Although Justice Powell wrote a concurring opinion, he did not attempt to explain how he interprets the Constitution so that abortion and other matters relating to sexual privacy and autonomy are protected by the right of privacy, and homosexual sodomy between consenting adults is unprotected. Rather, his concurrence seems to be an attempt to minimize the impact of his vote by suggesting that the eighth amendment prohibits states from excessively punishing adults who engage in homosexual sodomy.[188] One must wonder: If Justice Powell can adequately explain the distinction he is making, why did he not offer such an explanation in *Hardwick*? His vote in *Hardwick* raises the question whether he is beginning to believe that the right of privacy cases have led the Court too far away from its proper function. If so, would Justice Powell vote to overrule *Roe*?

If Justice Powell chooses to retreat from *Roe*, one would expect him to justify his departure from stare decisis. This task would not

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judicial review is not required whenever "sexual freedom" is implicated. *Id.* His opinion in *Carey*, however, is consistent with the view that some level of judicial review is appropriate to protect from unreasonable state interference the individual right of privacy to have access to contraceptives; *see also Zablocki*, 434 U.S. at 397-99 (1978) (not all state regulations governing marital relationship are subject to compelling state interest test) (Powell, J., concurring) (dicta).

186. *See, e.g., Zablocki*, 434 U.S. at 399-400 (Powell, J., concurring) ("The Due Process Clause requires a showing of justification 'when the government intrudes on choices concerning family living arrangements' in a manner which is contrary to deeply rooted traditions." (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion)); *Carey*, 431 U.S. at 705 (regulation of distribution of contraceptives, while not subject to strict scrutiny, "is [not] free from judicial review").

187. Professor Perry suggests that the disagreement will always remain, and that the most that we can hope for is to understand "where" and "why" we disagree. Perry, *supra* note 168, at 589; *see also* Brest, *supra* note 95, at 662 (supporting the view that decisionmakers are influenced by personal background and concerns, and indicating that this has always been a problem in constitutional law); Simon, *supra* note 97, at 629-30 (suggesting through examples that objective interpretation of the Constitution is not always possible). *But see* Bennett, *supra* note 97 (distinguishing the question of the role of stare decisis from the question involving constitutional interpretation); Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 286 (1985) (suggesting moral questions have right answers).

188. *Hardwick*, 106 S. Ct. at 2847-48 (Powell, J., concurring).

be easy. His majority opinion in *Akron* begins with a reminder of the importance of stare decisis and announces that *Roe* should be upheld on such principles.[189] Is it possible that *Hardwick* marks the absurdity of the right of privacy doctrine in Justice Powell's mind, causing him to question the validity of *Roe*? Notwithstanding his commitment to abortion and related right of privacy issues, as well as his belief in adhering to precedent, would he vote to overrule *Roe* to be consistent with his decision in *Hardwick*?

Consistency need not be Justice Powell's goal. But if it is, absent an adequate justification for distinguishing between *Roe* and *Hardwick*, the history of Justice Powell's view of the Constitution in the area of privacy rights shows that the inconsistency stems from *Hardwick*, not the other cases. Rather than retreat from those decisions, Justice Powell would appear more objective and free from personal bias on abortion and homosexual rights if he changed his vote in the next *Hardwick*-type case. Of course, he is free to remain inconsistent, preserving his credibility in the abortion line of cases, and leaving the appearance that he allowed his personal bias against homosexual rights to influence his vote in *Hardwick*.

To summarize, it appears that the votes to overrule *Roe* are not present. The pressure on Justice Powell, if he cares to appear consistent, objective, and free from personal prejudice, may be too great for him to retreat from *Roe* and its progeny. It would be far easier for him to remove himself from the position as the potential swing vote by acknowledging his inconsistency and expressing a willingness to live with it, or by retreating from his position in *Hardwick*. Short of these measures, a vote by Justice Powell to overrule *Roe* would severely undermine the principles of stare decisis and the perception that the Supreme Court is above personal bias. Principles of legal precedent and judicial objectivity weigh in favor of adhering to *Roe*.

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189. *Akron*, 462 U.S. at 420 n.1. The *Akron* Court noted that "[t]he doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." *Id.* (footnote omitted). The Court noted at least three important reasons for adhering to the doctrine of stare decisis in abortion cases. First, *Roe* was argued and reargued before the Court. *Id.* at 420. Second, seven Justices, including the Chief Justice, joined the *Roe* opinion. *Id.* Finally, the principles of *Roe* have been applied in a litany of cases, all of which have upheld a woman's right of privacy to choose abortion over childbirth. *Id.* The Court then cited to H.L. v. Matheson, 450 U.S. 398 (1981); Harris v. McRae, 448 U.S. 297 (1980); Bellotti v. Baird, 443 U.S. 662 (1979); Colautti v. Franklin, 439 U.S. 379 (1979); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977); Bellotti v. Baird, 428 U.S. 132 (1976); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Connecticut v. Menillo, 423 U.S. 9 (1975).

V. CONCLUSION

Abortion is unpleasant; even to talk about abortion is unpleasant. Abortion raises questions of morality, questions about life and death, and questions that make people uncomfortable because there are no right answers. This article has attempted to demonstrate that with or without *Roe*, the difficult questions concerning the state's role in prenatal caretaking will continue unanswered. Unless the Supreme Court addresses the assumptions underlying the abortion controversy, overruling *Roe* will not resolve the problem of allocating decisionmaking responsibility between the woman and the state during the woman's pregnancy. Regardless of whether the fetus is a person, whether the woman's right of privacy extends to abortion, or whether the states should be making these decisions, fundamental constitutional questions about life and death, parental authority over the fetus, and the scope of the woman's right of privacy outside of abortion have not been answered by the Supreme Court. *Roe* provides a building block for answering these questions. If the Supreme Court overruled *Roe* the situation would become more chaotic and uncertain. Most important, a decision to overrule *Roe* cannot be justified. Nothing has happened since *Roe* to warrant a reversal. If the Supreme Court departed from *Roe* now, its institutional credibility would be severely undermined.

AUTHOR'S ADDENDUM

Justice Powell announced his retirement from the Court on June 26, 1987, as this article was being printed.[190] President Reagan nominated Robert H. Bork, a judge on the Court of Appeals for the District of Columbia, to assume Justice Powell's position.[191] In response to the public outcry over Judge Bork's nomination, Senator Joseph Biden, Chair of the Judiciary Committee, promised President Reagan a battle in opposition to Judge Bork's confirmation.[192] Such a battle highlights many of the principles focused upon in section IV of this article.

Because Justice Powell provided the fifth and decisive vote in several important civil rights cases,[193] many perceive his successor as the

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190. *See* Taylor, *Powell Leaves High Court; Took Key Role on Abortion and on Affirmative Action*, N.Y. Times, June 27, 1987, 1, at § 1, col. 6.

191. *See* Boyd, *Bork Picked for High Court; Reagan Cites His 'Restraint'; Confirmation Fight Looms*, N.Y. Times, July 2, 1987, § 1, at 1, col. 6.

192. *See* Greenhouse, *Senators' Remarks Portend a Bitter Debate Over Bork*, N.Y. Times, July 2, 1987, § 1, at 8, col. 1.

193. *See, e.g.*, *supra* text accompanying notes 181-89 for a discussion of Justice Powell's

holder of the trump card in future civil rights cases. Consequently, the nominee's views about how to interpret the Constitution, and the Court's role in our government, are of utmost importance in selecting a replacement for Justice Powell.

Judge Bork is an originalist; he is committed to interpreting the Constitution according to the original intent of the framers.[194] Consistent with an originalist view, he believes that the *Roe* decision is unconstitutional.[195] Although Judge Bork commented that President Reagan did not ask him before the nomination how he would vote on issues such as abortion,[196] the President surprised no one by nominating to the Bench a conservative like Judge Bork. If Judge Bork is confirmed, many people believe the Court probably will overrule *Roe*.[197] If Judge Bork is not confirmed, President Reagan's second nominee probably will also adhere to a conservative ideology, causing continued speculation as to whether *Roe* will be overruled.

Thus, the crucial question in the battle for Justice Powell's seat on the Bench is whether the Senate should block confirmation of a nominee on ideological grounds.[198] If the answer is "no," then the answer must also be "no" to the question whether it is proper for the President to nominate a candidate on ideological grounds. But what criteria, other than the obvious ones of qualifications, may the President realistically consider in trying to distinguish among many qual-

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pivotal position in *Hardwick*. *Cf.* Taylor, *Powell's Pivotal Votes Marked '87 Court Term*, N.Y. Times, June 28, 1987, § 1, at 1, col. 1 (list of split decisions in the Court's 1987 Term in which Justice Powell provided swing vote).

194. *See, e.g.*, Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971) ("Where constitutional materials do not clearly specify the value to be preferred, . . . [t]he judge must stick close to the text and the history, and their fair implications, and not construct new rights."); Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1089 (1981) (describing Bork as a "moderate originalist"). *Cf. In Bork's Words: Abortion, Death Penalty, Gay Rights*, N.Y. Times, July 2, 1987, § 1, at 8, col. 1 (Judge Bork stated in a speech at the University of San Diego Law School, Nov. 25, 1985: "Original intent is the only legitimate basis for constitutional decision . . . .").

195. *See* Rosenthal, *Bork Fight Gives Abortion Rights Convention Something to Shout About*, N.Y. Times, July 13, 1987, § 1, at 8, col. 1; Taylor, *A Committed Conservative*, N.Y. Times, July 2, 1987, § 1, at 1, col. 4, at 8, col. 5.

196. *See* Taylor, *Bork's Evolving Views: Far From the New Deal*, N.Y. Times, July 8, 1987, § 1, at 1, col. 1.

197. *See* Rosenthal, *supra* note 195, at 8, col. 1; Dionne, *Abortion, Bork and the '88 Campaign*, N.Y. Times, July 8, 1987, § 1, at 13, col. 1.

198. *See* Greenhouse, *Ideology as Court Issue*, N.Y. Times, July 3, 1987, § 1, at 1, col. 3. *See generally* Friedman, *Review Essay, Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 YALE L.J. 1283 (1986).

ified potential nominees? By nature, the President's decision to nominate a particular individual to the Supreme Court is a political one. By nature, the confirmation process also is a political one. Moreover, the President's choice as the top candidate probably sets the political tenor for the confirmation process. This is certainly true in the case of Judge Bork's nomination.

Once on the Bench, the newly appointed Justice will soon establish a voting record guaranteed to please some and displease others. Criticism of the Justice's votes should focus upon the justifications for those votes. For example, imagine that the newly appointed Justice votes to overrule *Roe* based upon a belief that the Court interpreted the Constitution erroneously in deciding that case. The Justice's opinion of *Roe* on that basis can be neither right nor wrong, because no one can authoritatively determine how the Constitution can and should be interpreted.

In contrast, as the newly appointed Justice's voting record becomes established, the Justice can be criticized for being internally inconsistent, as Justice Powell appeared to be on various right of privacy issues discussed in the text above. Equally important, and of greater immediate concern in trying to fill the current vacancy, the newly appointed Justice can be judged harshly for a cavalier disregard for precedent. If the Court is to retain its role as the supreme, neutral, and objective institution in our democratic national government, then the newly appointed Justice cannot vote to overrule a prior case without a written justification. Moreover, any such justification should be divorced from the Justice's personal ideological beliefs about constitutional interpretation. Any Justice who fails to attempt a principled explanation for a retreat from stare decisis, or who totally disregards precedent because of a disagreement with the prior majority's views of constitutional interpretation, would legitimately be open to sharp criticism for "politicizing" the vote. Most important, whenever a Justice votes to overrule a case and fails to provide a written explanation that is divorced from personal ideological beliefs, that Justice casts doubts upon the Court's institutional credibility.

In summary, it is somewhat ironic that the political battle opposing Judge Bork is aimed at preventing him from sitting on the Court and having the potential to "politicize" votes in Supreme Court opinions. Nevertheless, the framers assured (in reality, even if not in theory) that the nomination and confirmation process would be political by providing in the Constitution for the President to appoint Supreme Court Justices with the advice and consent of the Senate.[199] Once the

199. U.S. CONST. art. II, § 2.

executive and legislative branches agree on a candidate, however, the Constitution also assures that the Justice is protected from the political process by being given life tenure and a salary that cannot be diminished.[200] It is imperative, then, that the Supreme Court Justices provide reasons for each opinion — reasons that are as devoid of political influence and personal ideological beliefs as is humanly possible.

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200. *Id.* at art. III, § 1.