Abortion in the United States: A Brief Legal History
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Introductory Matter
Abortion in Antiquity

Six years prior to the *Roe* decision, all fifty states had laws prohibiting abortion except to save the life of the mother.[1] This reflected a legal tradition extending back to English Common Law which continued through the founding of the United States and the first two centuries of American law. From the Colonial era through the mid-nineteenth century, abortion was generally associated with out-of-wedlock pregnancies.[2]

Even in antiquity, abortion was not an unfamiliar practice. The noted physician Soranus of Ephesus was a Greek physician who flourished in the early Second Century AD. In his *Gynecology*, Soranus described procedures for abortion including energetic exercise, being shaken by means of draught animals, vigorous leaping, and carrying heavy items. He also describes various oils and concoctions which could be inserted vaginally for abortive purposes as well as abortifacient drugs composes of plant mixtures. Soranus even suggests by intentionally bleeding the woman, saying, "A pregnant woman if bled miscarries." Yet, he is opposed to "separating the embryo by means of something sharp edged for

[1] Norm Geisler and Francis Beckwith, *Matters of Life and Death* (Grand Rapids: Baker Book House, 1991), 46.

[2] One of the earliest, if not the earliest, books to address the legality of abortion is found in the *Decretum Gratiani*, a legal textbook written by Gratian, a canon lawyer from Bologna who flourished in the Twelfth Century. Gratian was the first person to compile all of the church's laws into a single book, which he finished around 1139 AD before being made bishop of Tuscany where he died in 1145. Gratian's canons 32.2.8 – 10 examine whether or not abortion ought to be considered murder. Drawing on Exodus 21:22, Gratian develops the view that those who procure an abortion ought not to be held as murders if the soul has not yet been infused into the body, saying, "He is not a murderer who brings about abortion before the soul is in the body." In Gratian's day, it was commonly thought that until the fetus was "animated" – the mother felt it move – no soul was present. *See* https://www.catholic.com/qa/abortion-has-always-been-gravely-immoral.

danger arises that some of the adjacent parts be wounded."[3] He also noted there was moral debate among physicians in his day, with some saying abortion was inconsistent with the practice of medicine (citing the Hippocratic Oath) and others saying they would perform abortions except in cases where a woman was trying to hide adultery or preserve youthful beauty. He also noted that some physicians performed abortions when the woman is in danger of a crisis pregnancy because "the uterus is small."[4]

In Medieval Europe, herbal concoctions based on plants such as sage, rue, and pennyroyal were given to women hoping to induce an abortion.[5] Yet, modern research says the large doses of pennyroyal needed to cause an abortion can kill the mother or cause her irreversible kidney and liver damage.[6] Modern research confirms that ancient recommendations such as highly toxic rue (*ruta graveolens*) or savin juniper (*juniperus sabina*) are somewhat effective if prepared adequately.[7] Abortions in antiquity were somewhat like playing Russian Roulette with three bullets in the chamber: the woman wanted to take enough of the poison to induce a miscarriage without unintentionally killing herself.

I. Abortion and U.S. Law, 1800s

The history of abortion in the United States has been a point of contention between pro-life and pro-abortion activists. Proponents of liberalizing abortion laws have contended that anti-abortion laws were only passed because the medical establishment (AMA) did not want competition from "non-professional" specialists in abortion and

[3] Soranus, *Gynecology*, Owsei Temkin, trans. (Baltimore: The Johns Hopkins Press, 1956), 1.19.67 – 68.
[4] Ibid., 1.19.60.
[5] Elma Brenner, "Medieval Medicine: Killer or Cure?," *BBC History Magazine* 19.9 (September 2018): 26.
[6] "Vitamins and Supplements: Pennyroyal," *WebMD*, accessed September 29, 2018, www.webmd.com/vitamins/.
[7] Wolfgang Müller, *The Criminalization of Abortion in the West: Its Origins in Medieval Law* (Ithaca: Cornell University Press, 2012), 152.

they wanted to limit the influence of midwives.[8] Furthermore, pro-abortion advocates claim that laws against abortion were passed because the primitive attempts at abortion frequently led to the death of the mother.[9] Since modern abortion procedures are not as dangerous to the life of the mother, the laws prohibiting it became outdated. From the pro-abortion perspective, early laws criminalizing abortion were not based on concerns about the moral status of the child, but were based on concerns about potential harm to the mother. In contrast, pro-life advocates have claimed that abortion was rare in earlier American life and was morally condemned in that era *both* for the death of the child and the danger to the mother.

A. Connecticut, 1821

In May, 1821, members of the Connecticut State Legislature passed a revised Crime and Punishment Law. This was the first time an American legislature had addressed abortion in a statute form. The law said:

> Every person who shall, willfully and maliciously, administer to, or cause to be administered to, or taken by, any person or persons, any deadly poison, or other noxious and destructive substance, with an intention him, her, or them, thereby to murder, or thereby cause or procure the miscarriage of any woman, then being quick with child, and shall be thereof duly convicted, shall suffer imprisonment, in Newgate prison,

[8] See Lawrence Tribe, *Abortion and the Clash of Absolutes* (New York: Norton, 1990), 30.
[9] Actor James Garner (1928 – 2014) said his mother, Mildred Scott Meek Bumgarner, died when Garner was 4 because of uremic poisoning after a botched abortion. Garner's mother was a Christian Scientist who apparently refused to see a doctor for her infection. His mother and father already had three sons. Garner said, "I have no idea whether my father was involved in the decision to have the abortion or whether he blamed himself for her death. We never talked about it as a family." James Garner and Jon Winokur, *The Garner Files: A Memoir* (New York: Simon and Schuster, 2011), 5.

> during his natural life, or for such other term as the court having cognizance of the offence shall determine.[10]

The legal code went on to say that any woman who committed infanticide of a "bastard" child would be forced to stand on a gallows for one hour with a rope around her neck and then be imprisoned for up to one year.[11] One should note the Connecticut law was exclusively concerned with the use of poisons as abortifacients. James Mohr also observed that this law "did not make the woman herself guilty of anything," but rather the focus of criminal prosecution was the person who provided or administered the poison.[12] Thirteen other statutes similar to the Connecticut law were passed in other states between 1821 and 1841.[13]

The authors of the law were most likely very aware of the danger posed by poisons to women who attempted to use them for abortions. The most influential writer addressing abortion in that era was English physician John Burns (1774 – 1850). Writing in 1809, he addressed drugs women took to cause an abortion and said, "It cannot be too generally known, that when these medicines do produce abortion, the mother can seldom survive their effects."[14] Thus, the focus of the law seemed to be apothecaries and physicians who should know better than to give such a dangerous drug to women.[15] Criminal prosecution was not aimed at the women themselves.

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[10] *The Public Statute Laws of the State of Connecticut, as revised and enacted by the General Assembly, in May 1821, With the Acts of The Three Subsequent Sessions Incorporated* (Hartford: H. Huntington, Jr., 1824), 20.14, 96. Internet Archive. Zephaniah Swift, Lemuel Whitman, and Thomas Day were the three legal scholars who drafted the omnibus act at the legislature's request.
[11] Ibid., 20.16, 97.
[12] James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800 – 1900* (Oxford: Oxford University Press, 1978), 22.
[13] Ibid., 21.
[14] John Burns, *Observations on Abortion: Containing an account of the manner in which it takes place, the causes which produce it, and the method of preventing or treating it* (Springfield, MA: Isaiah Thomas, Jr., Thomas Dickman Printer, 1809), 76. Internet Archive.
[15] Mohr, *Abortion in America*, 22.

B. "Quickening" and Abortion Laws

Early abortion laws in the United States made a distinction between abortion before and after "quickening." For example, the 1821 Connecticut law made reference to a woman being "quick with child." *Quickening* refers to the first movements of the child in utero felt by the mother. For many pre-moderns, quickening was often equated with the notion of *ensoulment*, meaning when the mother could feel the child move was deemed as meaning a soul was presence.

Modern pro-abortion advocates often seize on this distinction in early American abortion law between pre- and post-quickening as evidence that Americans in that era were not opposed to early term abortions. Sometimes, modern notions of developmental personhood are anachronistically read back into the thinking of early Americans. For example, James C. Mohr comments on Connecticut's 1821 law and says:

> Prior to quickening there continued to be no crime. Phrased differently, the revisers of 1821 chose to preserve for Connecticut women their long-standing common law right to attempt to rid themselves of a suspected pregnancy they did not want before the pregnancy confirmed itself, even though they risked poisoning themselves in the process. In this respect the law testified eloquently to how deeply committed Americans of the early nineteenth century were to the quickening doctrine, to what they considered to be the commonsensical distinction between a living fetus, on the one hand, which had taken on at least one of the manifestations of separate existence, motion, and an inanimate embryo, on the other hand, the very existence of which, paradoxically, could

> only be proved with complete certainty after it had been aborted.[16]

Mohr subtly bootlegs into his analysis modern notions of developmental personhood, and makes the authors of Connecticut's 1821 law sound much more like enlightened, secular liberals of the late Twentieth Century. Instead, it is better to see the authors of Connecticut's 1821 law as people operating from a worldview largely derived from Christian theism who were operating on the best information they had.

Interestingly, John Burns, an author Mohr cites selectively, strongly condemned abortion on grounds which sound strikingly similar to modern pro-life arguments:

> And here I must remark, that many people at least pretend to view attempts to excite abortion as different from murder, upon the principle that the embryo is not possessed of life, in the common acceptation of that word. It undoubtedly can neither think nor act; but, upon the same reasoning, we should conclude it to be innocent to kill the child in the birth.
>
> Whoever prevents life from continuing, until it arrive at perfection, is certainly as culpable as if he had taken it away after that had been accomplished. I do not, however, wish from this observation, to be understood as in any way disapproving of those necessary attempts which are occasionally made to procure premature labour, or even abortion, when the safety of the mother demands this interference, or when we can thus give the child a chance of living, who otherwise would have none.[17]

[16] Mohr, *Abortion in America*, 22 – 23.
[17] Burns, *Abortion*, 72 – 73.

Burns links abortion and infanticide and insists, much as pro-life advocates today, the arguments made for killing a child in the womb because it lacks sentience or other adult properties could equally be applied to a newborn. He is equally appalled at both. At the same time, he recognizes cases where imminent danger to the life of the mother leaves us with no other moral option that to try and save one life – the life of the mother – if possible. In this way, Burns sounds remarkably similar to Southern Baptists in 2021! Yet Mohr sidesteps this aspect of Burns' argument from a book he grants was very influential at the time. Burns' comments give evidence that people in the early Nineteenth Century were critically aware of the degree to which the way culture treats preborn children will shape the way culture treats newborns.

Modern technology has made the notion of *quickening* antiquated. We now know the child is active and moving even before first felt by the mother. *Much of our modern debate about abortion is the result of two changes: Modern technology has now provided is with an amazingly clear and detailed account of prenatal growth and development from conception to birth. At the same time, modern technology has also made abortion less-risky for the women procuring abortion.*[18]

C. Summary

By 1900, all American states had laws criminalizing abortion. At the same time, abortion was not terribly uncommon in the nineteenth century. Marvin Olasky sums up the typical situation of a woman seeking an abortion during this period when he says, "Abortion, in short, was the last resort of a particular segment of the unmarried: seduced, abandoned, and helpless women, generally

[18] My comment here is not meant to deny post-abortive problems women continue to experience with supposedly safe and legal abortions in the US today. My point is merely that, ongoing post-abortive problems noted, the procedure is not nearly as dangerous to the woman as it was in 1840.

between the ages of sixteen and twenty-five."[19] He also states, "[Abortion] was a recourse to those adrift on particular sidestreams: victims of seduction, prostitutes, and spiritists."[20] However, Olasky goes on to state that at no time was abortion considered legitimate and legal, but it was a practice that did occur.

In 1967, just a few years prior to *Roe* and *Doe*, the American Medical Association adopted a stated policy of opposition to induced abortion except in cases of imminent danger to the mother's physical health or under the most extreme or exception conditions.

How did abortion move from a category of moral disapproval to public approval? It is no coincidence that the *Roe* decision was delivered in 1973. The previous decade saw a turbulent shift in public morality and sexual ethics known as the Sexual Revolution. One consequence of widespread sexual promiscuity is a higher rate of out-of-wedlock pregnancies. While out-of-wedlock births were not terribly uncommon in previous generations, there had been societal pressure for parents to legitimize the child by marrying. This pressure to respect the life and future of the child was reversed during the 1960's. The "free love" generation divorced sexual activity from responsibility. In many ways, liberalizing of abortion laws is the logical conclusion to the abandonment of sexual restraint. Furthermore, the decades prior to the 60's had seen a gradual shift in the way abortion was viewed by various constituencies. But how exactly did the Supreme Court carve out a "right for abortion" in the Constitution?

II. Abortion and The Development of the "Right to Privacy"

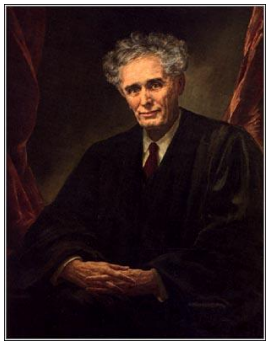
The phrase "right to privacy" does not occur in the U.S. Constitution, so how did it emerge as a "right"? The word "private"

[19] Marvin Olasky, *Abortion Rites: A Social History of Abortion in America* (Wheaton, IL: Crossway Books, 1992), 40.
[20] Ibid., 289.

only appears once in the Constitution in the Fifth Amendment's declaration that "private property" shall not be taken for public use without just compensation.

A. Justice Brandeis and the Right to Privacy

Perhaps no one is more influential in the development of the concept of the "right to privacy" in American jurisprudence that Louis D. Brandeis (1856 – 1941), who served on the United States Supreme Court from 1916 – 1939. In 1890, he co-authored an article in the *Harvard Law Review* titled "The Right to Privacy" which was the first detailed scholarly examination of the subject. While a Supreme Court Justice, he argued forcefully for a Constitutional "right to privacy" in his dissenting opinion in *Olmstead* v. *United States* (1928). Brandeis said:



> [The makers of our Constitution] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be left alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[21]

In context, the *Olmstead* case revolved around evidence gained by wire-tapping which led to the conviction of people involved in illegal alcohol sales during prohibition. With Brandeis, the "right to privacy" made its official entrance into American jurisprudence.

[21] *Olmstead* v. *United States* 277 U.S. 438 (1928). For those of us living in Missouri, Brandeis first practiced law in St. Louis.

B. *Poe* v. *Ullman* 367 U.S. 497 (1961)

Argued: March 1, 1961 Decided: June 19, 1961

Key Issue: **Contraception and the Right to Privacy**

An 1879 Connecticut law prohibited the use of contraceptive devices as well as giving medical advice concerning their use or otherwise dispensing them. The law said "any person who uses any drug, medicinal article or instrument for the purposes of preventing conception shall be fined not less than forty dollars or imprisoned not less than sixty days." The law further provided that "any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principle offender."[22] The law applied to married couples as well as singles.

A "Mrs. Doe," who had recovered from a tough pregnancy, was informed by her physician that any future pregnancies would be fatal. She challenged the Connecticut anti-contraceptive law since it criminalized her use of contraceptives. In a 5-4 decision, the Supreme Court dismissed the case because it involved *threatened* prosecution, and no actual application of the Connecticut law.

Poe v. Ullman is significant for the history of abortion rights because it is the first time that a Supreme Court Justice mentioned a "Constitutional" right to privacy in relation to reproductive issues. In his dissent, Justice John M. Harlan said, "I consider that this Connecticut legislation . . . violates the Fourteenth Amendment. I believe that a statute making it a criminal offense for *married couples* to use contraceptives is an intolerable and unjustifiable invasion of

[22] The wording for the law in question is found in Alex McBride, "Landmark Cases: *Griswold* v. *Connecticut*," from *The Supreme Court*, a series by the Public Broadcasting System, accessed July 3, 2014, http://www.pbs.org/wnet/supremecourt/rights/landmark_griswold.html.

privacy in the conduct of the most intimate concerns of an individual's personal life."

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

Argued: March 29, 1965 Decided: June 7, 1965

Key Issue: **Contraception and the Right to Privacy: The Court declares a Constitutional "right to privacy."**

1. Background

To reiterate what was stated at the beginning of this section, the phrase "right to privacy" does not occur in the U.S. Constitution.

Griswold v. Connecticut revolved around the same Connecticut law in question from *Poe* v. *Ullman* that prohibited the use of contraceptive devices and the giving of medical advice on their use. The law stated: "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."[23] The case began when Estelle Griswold, executive director of the Planned Parenthood League of Connecticut, along with Charles Lee Buxton, the head of obstetrics and gynecology at Yale University, opened a clinic in New Haven, CT, on November 1, 1961 from which they gave advice to married persons on preventing conception and prescribed contraceptive devices. They opened the clinic hoping they would be prosecuted so they could challenge the Connecticut law. They were convicted of violating the contraception law and fined $100 each, with their conviction being subsequently upheld by Connecticut's Supreme Court.[24] This gave Griswold and Buxton the opportunity to

[23] *Griswold v. Connecticut* 381 U.S. 480 (1965).
[24] This summary of *Griswold* is based on Bernard Schwartz's description n *A History of the Supreme Court* (New York: Oxford Publishing, 1993), 338.

appeal their decision to the U.S. Supreme Court in hopes the Connecticut law would be ruled unconstitutional. Griswold specifically argued that the Connecticut law was a breach of the due process clause in the 14th amendment, which says:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Decision

In a 7-2 decision, the Supreme Court of the United States overturned the conviction. Though Brandeis and Harlan previously had argued for a "right to privacy" in dissenting opinions, this is the first case in which the Court affirmed a **constitutional right to privacy.** Writing for the majority, Justice William O. Douglas (1898 – 1980) said the Connecticut law violated a right to privacy: "The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives, rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship [marriage]."[25] Justice Douglas went on to ask a rhetorical question: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."[26] Douglas agrees that the

[25] *Griswold v. Connecticut* 381 U.S. 485 (1965).
[26] *Griswold v. Connecticut* 381 U.S. 485-486 (1965).

Constitution does not specifically guarantee a "right to privacy," but such a right can be inferred, he claims, from other more explicit Constitutional guarantees.

Since the U.S. Constitution doesn't explicitly mention a right to privacy, how did Douglas claim it exists in the Constitution? Douglas builds his argument in a piecemeal fashion, drawing from several amendments to carve out his philosophical/legal concept of a "right to privacy." Douglas argued the Bill of Rights specific guarantees basic to liberty contain "penumbras formed by emanations from those guarantees that help give them life and substance."[27] In other words, various guarantees within the Bill of Rights create a zone of privacy. One author summarizes Douglas' logic and says, "In other words, the "spirit" of the First Amendment (free speech), Third Amendment (prohibition on the forced quartering of troops), Fourth Amendment (freedom from searches and seizures), Fifth Amendment (freedom from self-incrimination), and Ninth Amendment (other rights), as applied against the states by the Fourteenth Amendment, creates a general "right to privacy" that cannot be unduly infringed."[28] Justices Arthur Goldberg, John Marshall Harlan, and Byron White all wrote concurring opinions in which they agreed that the Connecticut law was unconstitutional, but they each argued individually that the "right to privacy" emerged solely from the due process clause of the 14th Amendment, and not from the Bill of rights. So, they agreed with Douglas' decision, but disagreed on how he claimed the Constitution grants a right to privacy.

[27] *Griswold v. Connecticut* 381 U.S. 484 (1965). "Penumbra" refers to a shaded region surrounding the dark central portions of a sunspot. Douglas is claiming the right to privacy exists just around the edges of the Bill of Rights.
[28] Alex McBride, "Landmark Cases: *Griswold* v. *Connecticut.*

3. *Griswold* the Precedent for *Roe*

Even though *Griswold* was about contraception and not abortion, it is significant for the question of abortion because the right to privacy was the underlying principle invoked in *Roe*. Thus, *Griswold* would become the legal precedent for *Roe.* But remember, *Griswold* was not about abortion; the case addressed contraception.

Soon after the *Griswold* decision, a young lawyer named Roy Lucas (1941-2003) published an article in *The North Carolina Law Review* titled, "Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes." Lucas argued forcefully that the right to privacy asserted by the Court in *Griswold* could be applied to the abortion issue when he said, "The values implicit in the Bill of Rights suggest that the decision to bear or not to bear a child is a fundamental individual right not subject to legislative abridgement – particularly in light of *Griswold v. Connecticut*."[29] Furthermore, Lucas argued that the pre-born child does not have the rights of personhood. Instead, he stated that abortion is more like "the death of an unfertilized egg, not like slaying of a newborn infant."[30] Lucas attempts to push the pro-life position to its most absurd position when he says, "It [Pre-born child] may be a wholly innocent fetus, but it is no more a "person" than the newly fertilized ovum or the spermatozoon which is prevented from fertilizing the ovum by contraceptive means."[31] Lucas' arguments helped set the precedent for the use of *Griswold* as a challenge to abortion laws.

While a student at New York University Law School, Lucas' girlfriend became pregnant. Alan Guttmacher recommended that he

[29] Roy Lucas, "Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statues," *The North Carolina Law Review* 46.4 (June, 1968): 761. I've read some pro-life comments claiming Lucas was the son of a preacher. The NY Times obituary for Lucas says his father worked for Metropolitan Life Insurance Company.
[30] Ibid., 765.
[31] Ibid.

go to Puerto Rico where an abortionist familiar to Guttmacher would perform the procedure.[32] The child which Lucas fathered was aborted in late 1964.

D. *Eisenstadt* v. *Baird* 405 U.S. 438 (1972)

Argued: November 17, 1971 Decided: March 22, 1972

Key Issue: **Availability of Contraceptives to Single Adults**

The facts of the case are as follows: A Massachusetts's law made it a felony for anyone to give away a drug, medicine, instrument, or article for the prevention of conception except in the case of (1) a registered physician administering or prescribing it for a married person or (2) an active registered pharmacist furnishing it to a married person presenting a registered physician's prescription.[33] William Baird[34] gave away Emko Vaginal Foam and a condom to a female student following an open "lecture" concerning birth control and over-population at Boston University. Baird was not a member of the school's faculty, but was already well known as an abortion-rights activist and as someone advocating for widespread distribution of contraceptives. Massachusetts charged Baird with a felony for distributing contraceptives to unmarried men or women. Under Massachusetts law, only married couples could obtain contraceptives; only registered doctors or pharmacists could provide them. Baird was not an authorized distributor of contraceptives. The question before the court was: Did the Massachusetts law violate the right to privacy acknowledged in *Griswold v. Connecticut* and protected from state intrusion by the Fourteenth Amendment?

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[32] This information is from David Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*, updated ed. (Berkeley: University of California Press, 1994, 1998): 335-336.

[33] *Eisenstadt* v. *Baird* 405 U.S. 438 (1972).

[34] Baird is a rabid pro-abortion activist. He claims he became part of the cause after a woman died in his arms from a botched coat-hanger abortion.

In a 6-to-1 decision, the Court struck down the Massachusetts law but not just on privacy grounds. The Court held that the law's distinction between single and married individuals failed to satisfy the "rational basis test" of the Fourteenth Amendment's Equal Protection Clause. Married couples were entitled to contraception under the Court's *Griswold* decision. Withholding the right to contraceptives from single persons without a rational basis proved the fatal flaw. Thus, the Court expanded *Griswold's* "right to privacy" to include sexual choices by single people, thus invalidating the Massachusetts statute. Writing for the majority, Justice William Brennan addressed the privacy issue and said:

> If, under *Griswold,* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that, in *Griswold, supra,* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity, with a mind and heart of its own, but an association of two individuals, each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[35]

In *Eisenstadt v. Baird*, the marital privacy of *Griswold* was transformed into individual autonomy.[36] It is of interest to note that William Brennan (Served as a justice from 1956 – 1999)[37], perhaps more than any other justice in his era, was criticized as an example of a judiciary out of control. As Curtis and Abrahamson state, for many "he

[35] *Eisenstadt* v. *Baird* 405 U.S. 453 (1972).
[36] From Robert Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline* (New York: Regan Books / HarperCollins, 2003, rev. ed.), 103.
[37] Brennan, a Democrat, was nominated to the Court by President Eisenhower during the 1956 election campaign. The only senator to vote against Brennan's nomination was Eugene McCarthy.

epitomized an unrestrained federal judiciary that had arrogated unto itself ultimate control over virtually every facet of daily life, thus demeaning the right of citizens to govern themselves through representative democracy."[38] Brennan held to a theory of an "evolving" Constitution," perhaps nowhere more evidenced than by his efforts to curb government intrusions on individual privacy.[39]

E. Change in Abortion Laws in Individual States

Don't forget: this was the era of the Sexual Revolution: *Roe* and *Doe* didn't emerge from a vacuum! During this time, Women's Liberation groups began demanding loosening of abortion laws. Various student activist groups began demanding for liberalizing abortion laws (when they weren't dodging the draft!). People in the population control movement saw it as a way to cut back on the birthrate.

1. 13 States Loosen Abortion Laws

Between 1965 – 1972, thirteen states liberalized their abortion laws to allow for abortions when the mother's life was in danger, cases of rape or incest, and in cases of severe fetal deformity.[40] (As we will see in *Doe* v. *Bolton*, the definition of "danger" to a mother became very broad.)

2. Another 4 States Legalize Abortion in all cases of a pre-viable baby

Another four states –New York, Washington, Hawaii, and Alaska -- repealed their abortion laws altogether in nearly all cases

[38] Charles G. Curtis and Shirley S. Abrahamson, "Brennan, William Joseph, Jr.," in *The Oxford Companion to the United States Supreme Court*, 2nd ed., Kermit L. Hall, ed. (Oxford: Oxford University Press, 2005), 104.
[39] Ibid.
[40] The states were Arkansas, California, Colorado, Delaware, Florida, Georgia, Kansas, Maryland, New Mexico, North Carolina, Oregon, South Carolina, and Virginia.

before the baby was viable. On March 13, 1970, Hawaii changed its 100-year-old law on abortion and became the first state in the nation to allow abortion essentially at the request of the woman. The Hawaii law made abortion legal if it was performed by a licensed physician in an accredited hospital, if performed before the fetus is viable outside the uterus, and on a woman who has been a resident of Hawaii for 90 days or more immediately prior to the abortion.[41] New York also changed its law in 1970, being the least restrictive abortion law in the country at that time.[42]

3. In the remaining 33 states abortion was illegal

In 1973, the remaining 33 states retained their laws prohibiting all abortions except when the woman's life was in danger. Pennsylvania had actually tightened its abortion laws. Rosemary Nossiff summarizes the impact of various state laws in this era and says, "These conflicting policies provided fertile ground for forces on both sides to further their causes in the courts and legislatures, pitting women's right to privacy against states' rights to regulate abortion and protect maternal and fetal health."[43]

4. Outside the United States

Abortion became legal in England in 1967 with the adoption of the Abortion Act of 1967. This law allowed for the termination of pregnancy prior to the 28th week of gestation to protect the "physical or mental health" of the mother or "any existing child of her family," or "where there is a substantial risk that if the child were born it would suffer such physical and mental abnormalities as to be

[41]Roy G. Smith, Patricia G. Steinhoff, Milton Diamond, Norma Brown, "Abortion in Hawaii: The First 124 Days," *American Journal of Public Health* 61.3 (March 1971): accessed July 7, 2014, http://www.hawaii.edu/PCSS/biblio/articles/1961to1999/1971-abortion.html.

[42] When the New York law was passed, both houses of the state legislature were controlled by Republicans and the state had a Republican governor, Nelson A. Rockefeller.

[43] Rosemary Nossiff, *Before Roe: Abortion Policy in the United States* (Philadelphia: Temple University Press, 2000), 2.

seriously handicapped."[44] England's liberalizing of abortion laws fueled demands for the USA to do the same.

III. *Roe* v. *Wade, Doe* v. *Bolton*

In *Roe v. Wade,* the Supreme Court legalized abortion in all fifty states in the United States, but allowed individual states to forbid abortion in the third trimester of pregnancy except in cases where the mother's health was in danger. *Doe v. Bolton* was the companion decision handed down on the same day as *Roe* in which the Supreme Court defined "mother's health" in the broadest possible context, meaning virtual abortion on demand throughout the entirety of pregnancy. *Doe* clarifies and expands *Roe.* As was noted above, it is no coincidence that *Roe* v. *Wade* came on the heels of the Sexual Revolution in the 1960s. Furthermore, the Supreme Court in this era was an activist court.

A. Background

***Roe* v. *Wade* 410 U.S. 113 (1973)**

Argued: December 13, 1971 Reargued: October 11, 1972 Decided: January 22, 1973

Key Issue: **Abortion On Demand**

Prior to *Roe*, each state determined for itself to what degree abortion was legal or illegal and abortion was illegal in most states. *Roe* mandated every state to make abortion legal.

[44] F.L. Cross and Elizabeth A. Livingstone, eds., *The Oxford Dictionary of the Christian Church* (Oxford: Oxford University Press, 2005), 414.

1. Summary of the facts associated with *Roe.*

A number of pro-abortion activists in Texas had been working to get the state's anti-abortion laws overturned. They needed to find someone who would let them file suit on their behalf. "Jane Roe" was Norma McCorvey (1947 – 2017), a poor girl from Louisiana who spent a good part of her childhood in reform schools. She ran away from home when she was ten and spent several decades supporting herself with odd jobs – as a carnival barker, a waitress, a bartender, apartment cleaner, and a construction worker. In 1970 she was unmarried, living in Texas, and pregnant. At that time the laws of Texas forbid abortion except in cases where the mother's life was in imminent danger. During her crisis pregnancy, Norma met Sarah Ragle Weddington[45], an attorney who wanted to challenge the abortion laws. McCorvey agreed to let Weddington file a lawsuit for her under the name of "Jane Roe." Weddington was joined by Linda Coffee in representing McCorvey. By the time the suit was actually decided, Norma had already given birth to the child in question. In fact, she gave birth to three children during her life and all three were placed in adopted by others. Her case was finally decided in her favor in the ruling now known as *Roe* v. *Wade*.

McCorvey's own life post-*Roe* was an interesting and conflicting saga. In an amazing turn of events, McCorvey professed to becoming a Christian and was baptized in 1995. McCorvey ended a long-standing homosexual relationship, became very active in the pro-life movement, and eventually became a Roman Catholic. In 1998 testimony before the U.S. Senate, she said, "I am dedicated to spending the rest of my life undoing the law that bears my name."[46] Yet, at the end of her life, the FX Network produced a documentary

[45] Weddington herself is the daughter of a Methodist pastor. She went on to serve as assistant to President Jimmy Carter from 1978 – 1981.
[46] Emily Crane, "Mystery of the Child at the Center of *Roe* v. *Wade*," *Daily Mail*, February 19, 2017, accessed May 21, 2018, http://www.dailymail.co.uk/news/article-4240558/Norma-McCorvey-dies-without-reconnecting-daughter.html.

titled *AKA Jane Roe* which claimed that late in life McCorvey reverted to a pro-abortion stance on a sort of death-bed confession.[47]

What do we make of Norma McCorvey's vacillating comments on abortion? There is a tendency for Christians to grasp tightly to anyone who can possibly give us lots of capital in moral debates. It is possible that too many in the pro-life movement only saw Norma as *Jane Roe*, and in this sense she became depersonalized. The truth is she was a lady with a deeply troubled past and a great many wounds and scars from a sinful life very far from God. A new convert with that much pain in her background needed time to be alone with the Lord, to be a member of a healthy fellowship. It is a bad idea to rush any new believer into the spotlight. I think pro-life author Jonathan Van Maren is right when he says:

> Unfortunately, but perhaps inevitably, many people looked at McCorvey and saw Jane Roe the symbol rather than Norma McCorvey, a complex woman with a pain-filled past. The simple story of Jane Roe going to war with the industry she once served was both powerful and irresistible, and in their zeal to overturn *Roe v. Wade* and save lives from abortion, some pro-life advocates easily overlooked the fact that the *real* Norma McCorvey couldn't easily fill a symbolic role.[48]

We must never forget that people come to Christ with all sorts of baggage. Our first goal should be their spiritual maturity, healing from past sins, and growth in sanctification. Our first goal *should not be* to use such people as "trophies" to gain capital in public debates. Given time and maturity, let them tell their stories when they are ready and when wiser Christian counsel suggests they are ready to do so.

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[47] Jonathon Van Maren, "Deathbed Apology: Norma McCorvey's Pro-Life Friends Tell Another Story," *Christianity Today* May 22. 2020, https://www.christianitytoday.com/ct/2020/may-web-only/norma-mccorvey-jane-roe-v-wade-friends-tell-story.html.
[48] Ibid.

2. The Fourteenth Amendment

The *Roe* decision focused on the right to privacy, a concept cobbled together from various sources by the SCOTUS, including the Fourteenth Amendment. The Fourteenth Amendment passed Congress on June 13, 1866 and was ratified by the states on July 9, 1868. Section 1 of the Fourteenth Amendment says:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Amendment's stipulation that no *person* should be deprived of life became central to the abortion debate. If the preborn human child is a person, then the child is protected by the Fourteenth Amendment; if the child is not a person, Fourteenth Amendment protections do not apply.

3. Arguments by the Pro-Abortion Lawyers

Weddington and Coffee argued that Texas abortion laws were in violation of the 14th and 9th amendments. The court itself summarized the substance of the appellant's claim:

> The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due

> Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, *see Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *id.* at 405 U.S. 460 (WHITE, J., concurring in result); or among those rights reserved to the people by the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. at 381 U.S. 486 (Goldberg, J., concurring).[49]

B. The Court's Ruling

In a 7-2 decision, the court essentially granted Coffee and Weddington's argumentation and declared laws proscribing abortion to be illegal based on a supposed "right to privacy" found in the Fourteenth Amendment. One legal precedent for this decision was found in *Griswold* v. *Connecticut*. Harry Blackmun, a Nixon appointee,[50] wrote the majority decision. Blackmun built his argument around three main ideas:

> First, he claimed laws outlawing abortion in the various states had originally been enacted to protect the mother from dangerous and primitive methods of abortion. But these laws, he asserted, did not really have the fetus in mind.
>
> Second, since surgical procedures had advanced technologically, there was no longer any danger to a woman getting an abortion.
>
> Third, he claimed the fetus had not historically been granted the rights of a person. In *Roe*, Blackmun conferred moral status and Constitutional personhood, and the enjoyment of due

[49] *Roe* v. *Wade* 410 U.S. 129 (1973). Penumbra refers to a partial shadow like in an eclipse and here refers to the periphery or outer regions.

[50] Blackmun was Nixon's third nominee to replace Abe Fortas on the Court. Nixon's previous nominees were Clement Haynsworth of South Carolina (defeated 55-45 in November, 1969) and G. Harrold Carswell of Florida (defeated 51-45 in April, 1970). Blackmun (from Minnesota) was approved without opposition in May, 1970.

process and equal protection under the law that personhood confers under the Fourteenth Amendment, upon only the parent, not the preborn human life.[51]

Actually, most of Blackmun's historical propositions were wrong, but they became the basis of his decision anyway.[52]

The results of the *Roe* decision were as follows:

1. The alleged "right to privacy" declared in *Griswold* is expanded to include the right to an abortion.
2 *Roe* essentially abrogates the government's ability to stop abortion.
3. *Roe* declares that late pregnancy abortions cannot be prohibited if the doctor certifies that abortion is necessary to preserve the mother's health The Court's understanding of "mother's health" was defined in a very broad manner in the companion decision, *Doe* v. *Bolton*.
4. *Roe* is based on dividing pregnancy into arbitrary "trimesters." The court brought the term into popular usage.

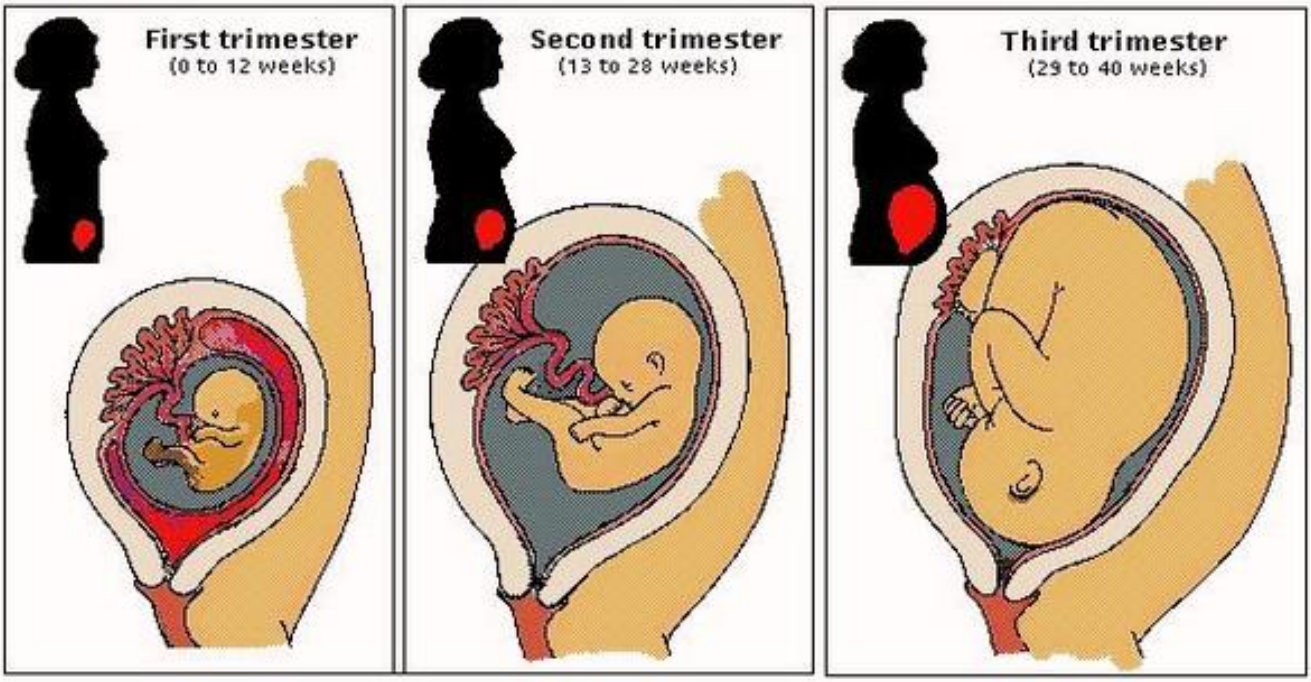
First Trimester: The state can make no regulations regarding abortion.

Second Trimester: The states have the option to regulate abortion procedures in ways related to the mother's health, but states still can not make any regulations with respect to the baby.

[51] James Mumford, "A Bioethics of the Strong," *The New Atlantis* 63 (Winter 2021): 160 – 167, https://www.thenewatlantis.com/publications/a-bioethics-of-the-strong.
[52] Melissa Higgins, with Joseph W. Dellapenna, *Roe v. Wade: Abortion and Woman's Right to Privacy* (North Mankato, MN: ABDO Publishing, 2013): 93.

Third Trimester: The Court assures virtual abortion on demand even at this late stage. The court (Blackmun) stated, "The state . . . may, if it chooses, regulate, and even proscribe abortion [in the third trimester] *except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother*."[53] The wording appears to permit the state to protect the baby after viability, but the companion decision *Doe* v. *Bolton* makes this virtually impossible.

The following diagram shows the baby's development at each of the trimester stages articulated by the SCOTUS.



C. Flaws in *Roe*

The *Roe* decision is fraught with many historical and legal problems. Harvard law professor John Ely summed up the constitutional flaws in *Roe* when he said, "[*Roe*] is, nevertheless, a very bad decision. . . . It is bad because it is bad constitutional law, or

[53] *Roe* v. *Wade* 410 U.S. 165 (1973).

rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."[54] Likewise, Edward Lazarus, who served as a clerk for Justice Blackmun and supports legalized abortion, believes *Roe* is a poorly argued decision and says:

> What, exactly, is the problem with *Roe*? The problem, I believe, is that it has little connection to the Constitutional right it purportedly interpreted. A constitutional right to privacy broad enough to include abortion has no meaningful foundation in constitutional text, history, or precedent – at least it does not if those sources are fairly described and reasonably faithfully followed.[55]

While others have summarized the judicial problems with *Roe*, I will discuss three flaws in Blackmun's presentation related to worldview issues: His marginalization of Hippocratic ethics, his appeal to pre-Christian paganism, and his weak argumentation concerning the beginning of life.

1. Blackmun and the Hippocratic Oath.

The Hippocratic Oath is a short document of obscure origin that was written between 300-400 years before Christ. While it refers to pagan gods, the oath also holds a high view of the sanctity of human life and those who swore by the oath promised not to participate in abortions or euthanasia. With the advent of Christianity, the Hippocratic Oath was eventually noted by Christian physicians for its ethical power. A synthesis of the Christian Worldview and Hippocratic ethics dominated Western medical ethics until the latter half of the Twentieth Century.

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[54] John Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade* (Washington, D.C.: American Enterprise Institute, 1973), 947; reprinted from *Yale Law Journal* 82.5 (April 1973). Ely's comments are especially noteworthy sense he favors legalized abortion.

[55] Edward Lazarus, "The Lingering Problems with *Roe* v. *Wade*, and Why The Recent Senate Hearings on Michael McConnell's Nomination Only Underlined Them," *FindLaw*, October 3, 2002, accessed February 16, 2016, http://writ.news.findlaw.com/lazarus/20021003.html.

The Judeo/Christian/Hippocratic synthesis which upholds the sanctity of innocent human life was a major obstacle to Blackmun's goal of legalized abortion. In order to marginalize the Hippocratic Oath, Blackmun makes reference to the fact that both Plato and Aristotle affirmed abortion and says, "The [Hippocratic] Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. See Plato, Republic, V, 461; Aristotle, Politics, VII, 1335b 25."[56] What Blackmun fails to mention is that in *The Republic* Plato not only affirmed abortion, but eugenics and infanticide as well. For example, in the passage immediately prior to the one the court cites from *The Republic*, Plato argues for a eugenic approach and says "the best men must cohabit with the best women in as many cases as possible and the worst with the worst in the fewest, and that the offspring of the one must be reared and that of the other not, if the flock is to be as perfect as possible."[57] Concerning infanticide, Plato argues that while the "good" offspring should be allowed to live, the "offspring of the inferior, and any of those of the other sort who are born defective, they [nurses] will properly dispose of in secret, so that no one will know what has become of them."[58] It is curious that the court affirms Plato's pro-abortion stance while overlooking, intentionally or unintentionally, his pro-eugenic and pro-infanticide stance. James Bohan's comments are noteworthy at this point and, commenting on the Court's reference to Plato and Aristotle, he says, "Many abortion proponents recoil at the notion that abortion and infanticide are comparable. In reality, however, they are two sides of the same coin."[59]

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[56] *Roe* v. *Wade*, 410 US 131 (1973).
[57] Plato, *The Republic*, in *Loeb Classical Library*, G.P. Goold, ed. (Cambridge: Harvard Univ. Press, reprint 1982), 461.
[58] Ibid., 463.
[59] James Bohan, *The House of Atreus* (Westport, CT: Praeger, 1999), 164.

Blackmun accurately states that the Hippocratic Oath was a minority opinion in Ancient Greece. However, his purpose in doing so is apparently to minimize the importance of the ethical injunctives found in the Oath. His point seems to be, "See, even back in ancient Greece, most people thought abortion was acceptable." In his argumentation, he makes a reasoning fallacy: Just because an opinion is not held by the majority does not mean that it is therefore wrong. Blackmun seems to make rather arbitrary references to opinions in ancient Greece that were pro-abortion, citing Plato and Aristotle's acceptance of abortion while disregarding the issue of infanticide. But Blackmun's argumentation has deeper problems.

2. Blackmun's Appeal to Pre-Christian Paganism

Prior to his discussion of the Hippocratic Oath, Blackmun referred to the practice of abortion in the pre-Christian pagan cultures. Blackmun states, "Greek and Roman law afforded little protection to the unborn. . . . Ancient religion did not bar abortion."[60] By "ancient religion," Blackmun means pre-Christian paganism. Yet even if the pre-Christian pagan culture did affirm abortion, that in and of itself is not a compelling argument for the acceptance of abortion. Harold O.J. Brown's (1933 – 2007) comments are correct when he says, "The ancient world accepted quite a number of things that we rightly reject, e.g., the absolute right of the father to decide upon the death of his children, the practice of slavery, torture, and mutilation, and the custom of gladiatorial combat."[61] The *Roe* decision reverts to the violent morality of ancient Rome and the unborn are afforded little if any protection. In *Roe*, Blackmun leaped backwards over the entire Judeo-Christian legal heritage and returned to a pre-Christian pagan approach to abortion. Thus, at the heart of the *Roe* decision is a question of worldviews: Blackmun

[60] *Roe* v. *Wade*, 410 US 130 (1973).
[61] Harold O.J. Brown, "What the Court Didn't know," *Human Life Review* 1.2 (Spring 1975), 5.

advocates a worldview where the weakest are not protected and might makes right.

3. Blackmun's Inability to Acknowledge When Life Begins.

Beyond Blackmun's tortured attempt at historical justification for killing the unborn, he also makes what is certainly one of the most disturbing statements in the *Roe* decision when he says:

> Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. *We need not resolve the difficult question of when life begins.* When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[62]

In response, it is not difficult at all to determine when human life begins: Each of us began life at conception. One is left to wonder just to which of the experts from medicine, philosophy, and theology Blackmun is referring. What I suspect he is driving at is that many people want to say that certain humans are *persons*, while other humans are not persons. He goes on to say this very thing: "In short, the unborn have never been recognized in the law as persons in the whole sense."[63] This is a case of deadly word-games. By declaring the unborn a "non-person," it then becomes acceptable to perform any type of cruelty upon them. The Supreme Court abused the due

[62] *Roe* v. *Wade*, 410 U.S. 159 (1973). Emphasis added. Jay Floyd, who represented the State of Texas before the Supreme Court in *Roe*, attempted to argue that the unborn have legal standing in his oral presentation before the Court. In fact, Floyd asserted that the State's primary interest was to protect fetal life.

[63] *Roe* v. *Wade*, 410 US 162 (1973).

process clause of this amendment to justify the right to deny life to the unborn.

4. Equivocation in *Roe*

Developmental Personhood

Keep in mind that Blackmun assumes a philosophical concept of developmental personhood, where in personhood is an attribute which one achieves in life, and can also be lost. As such, the preborn human is not considered a person. His background work on the history of the moral standing of pre-born humans in the USA is atrocious, but Blackmun concludes: "All this, together with our observation, *supra*, that, throughout the major portion of the 19th century, prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn."[64]

Equivocation

Equivocation is a reasoning fallacy which occurs when the meaning of a significant term changes in the middle of an argument and thus distorts and usually invalidates the conclusion. Justice Blackmun is guilty of this fallacy in *Roe*, and equivocates regarding the term *life.* Read this quote from *Roe* again, and notice the underlined words "life":

> Texas urges that, apart from the Fourteenth Amendment, **life** begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when **life** begins. When those trained in

[64] *Roe* v. *Wade*, 410 U.S. 158 (1973).

> the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

In Blackmun's first use of the word "life," he is clearly referring to biological life which clearly begins at conception. But in his second use of the term "life," he has changed the meaning and is now discussing the debated notion of "personhood." Without telling the reader, Blackmun changes way he is using the word "life," from *biological life* to a philosophical notion of *personhood.* This is a manipulative and deceptive word-game.

5. *Roe's* Similarities to *Dred Scott*

The reasoning of the court in *Roe* has striking similarities the reasoning used by the Court in 1857 in the infamous *Dred Scott* decision. In *Dred Scott* the Supreme Court declared that Dred Scott was property, not a person. As property, Scott had no rights. Chief Justice Roger Taney went so far as to say in *Scott* that people of African descent were "beings of an inferior order." One reason the Fourteenth Amendment was adopted in 1868 was to undo the Supreme Court's ruling in *Dred Scott* and was added to the Constitution in order to protect the rights of people, African Americans in particular, who had been previously disenfranchised.

In 1973 Blackmun came to a conclusion about the unborn that was very similar to the conclusion reached by the Court concerning black people in *Dred Scott* in 1857. In an evil ironic turn, Blackmun appealed to the Fourteenth Amendment to justify abortion on demand, yet this is the very amendment added to the Constitution in order to secure rights for previously disenfranchised people. In 1973, Blackmun turned the Fourteenth Amendment on its head in order to *disenfranchise* another group of people, pre-born humans. As James

Bohan comments on the courts legal reasoning and says, "There is something terribly perverse . . . about reading the word 'person' in the Due Process Clause as excluding the unborn."[65] The following chart illustrates some similarities between *Dred Scott* and *Roe*:

Slavery	**Abortion**
1. *Dred Scott* (1857)	1. *Roe v. Wade* (1973)
2. 7-to-2 decision	2. 7-to-2 decision
3. Slaves are non-persons	3. Unborn are non-persons
4. Property of owner (master)	4. Property of owner (mother)
5. Abolitionists should not impose morality on slave owner	5. Pro-lifers should not impose morality on mother
6. Slavery is legal	6. Abortion is legal.[66]

D. *Doe* v. *Bolton*[67] 410 U.S. 179

Argued: December 13, 1971 Reargued: October 11, 1972 Decided: January 22, 1973

Key Issue: **Mother's Health Defined in the Broadest Possible Context**

1. Case Facts

Doe v. *Bolton* was a decision delivered on the same day as *Roe* and is the companion case to *Roe*. I encourage students to think of *Roe* and *Doe* as "evil twin sisters." *Doe* v. *Bolton* revolved around the pregnancy of Sandra Race Bensing (aka Sandra Cano, 1947 – 2014), who filed suit under the name "Doe," Bensing was pregnant with her fourth child, though none of her previous children lived with her: one had been adopted by another family and the two others were in foster care. The Supreme Court overturned a Georgia law that had a limited view of "mother's health." The Court asserted a more

[65] James Bohan, *The House of Atreus: Abortion as a Human Rights Issue*, 14. Bohan is an attorney from Pennsylvania.
[66] Geisler and Beckwith, *Matters of Life and Death*, 45.
[67] In Geisler's *Christian Ethics*, "Bolton" is mis-spelled as "Bolten" on page 132.

expansive view of "mother's health," taking it in the broadest possible medical context. The Court stated:

> Medical judgment may be exercised in the light of all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.[68]

Since there is no pregnancy that does not have some consequences for a woman's emotions or family situation, this means abortion on demand, even to the last day of pregnancy. Scott Rae accurately summarizes the impact of *Doe* when he says, "Thus, if the physician sees the pregnancy as a threat to the woman's health in virtually any way, the Court ruled that he can authorize an abortion at any stage of pregnancy. . . . The way in which the Court expanded the idea of the woman's health and how the fetus can threaten it opened the door to abortion for virtually any reason."[69]

2. *Doe* clarifies and expands *Roe*

In *Ethics for a Brave New World,* the Feinbergs do not emphasize strongly enough that *Roe* and *Doe* were decided on the same day. *Roe* v. *Wade* and *Doe* v. *Bolton* are companion decisions: the latter clarifies and expands the first. These two decisions invalidated criminal penalties for performing abortions and established a basic trimester framework for evaluating whether and when the state could impose restrictions on a woman's freedom to obtain an abortion. Politically, the Court's rulings have had the effect of polarizing American politics like no other decisions since *Dred Scott*.

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[68] *Doe* v. *Bolton*, 410 US 192 (1973).
[69] Scott Rae, *Moral Choices*, second ed. (Grand Rapids: Zondervan, 2000), 126.

IV. Rulings Post-*Roe*: Expanding Abortion Rights

Cases concerning abortion continued to appear before the court. Most of them involved attempts by individual states to reign in the extremely broad view of abortion dictated by *Roe* and *Doe*.

A. *Planned Parenthood of Central Missouri* v. *Danforth* 428 U.S. 52 (1976)[70]

Argued: March 23, 1976 Decided: July 1, 1976
Majority: Blackmun, Brennan, Marshall, Powell, Stewart
Minority: Burger, Rehnquist, Stevens, White

Key Issues: Spousal Consent for Abortion; Parental Consent

In this decision, the Supreme Court invalidated laws requiring the father to consent to an abortion. Perhaps more alarmingly, the Court invalidated laws requiring parental consent before a pregnant minor could obtain an abortion. The decision also insisted that states may not prohibit the saline solution technique in second trimester abortions. This ruling gave physicians great latitude on what to do if an undesired fetus is still alive after being taken from the mother.

As of December, 2013, eleven states and the District of Columbia do not require any parental involvement for a minor to get an abortion. The eleven states are California, Connecticut, Hawaii, Maine, Montana, Nevada, New Mexico, New York, Oregon, Vermont, and Washington.[71]

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[70] Scott Rae has a factual error and lists the date for this case incorrectly as 1977. *See* Scott Rae, *Moral Choices*, 124.

[71] A comprehensive explanation of state-by-state laws regarding parental consent for abortion can be found at Planned Parenthood, "Parental Consent and Notification Laws." http://www.plannedparenthood.org/health-topics/abortion/parental-consent-notification-laws-25268.htm

Planned Parenthood v. *Danforth* is the most expansive view of abortion rights one can imagine: an underage young girl can procure an abortion – an invasive medical procedure – without her parents' knowledge. No other medical procedure was treated this way – every other invasive procedure required parental consent, but abortion was placed in a special category of protection. If young girls are not required to tell their parents about an abortion, they become targets of exploitation for selfish young men and teenage boys. If a boy got a girl pregnant, he could simply say, "We'll get an abortion. *Your parents will never know*."

B. *Infant Doe* (1982): Infanticide

Date: April 12, 1982, Circuit Court for the County of Monroe, State of Indiana

Key Issue: **Infanticide is permitted**

On April 9, 1982, a child with Down's syndrome was born in Bloomington, Indiana. Also, the baby had a tracheoesophageal fistula (an opening between the trachea and the esophagus) which made it impossible for the baby to receive nourishment. Normally, there is no connection between the trachea and esophagus, but when a child has a tracheoesophageal fistula there is a connection between the trachea and the esophagus. This is a life-threatening problem requiring immediate intervention. Saliva and gastric secretions may be aspirated into the lungs through the abnormal opening in the trachea. Normal swallowing and digestion of food cannot occur with the abnormal esophagus.

Instead of having the child transferred to another hospital where the tracheoesophageal fistula could be repaired, the parents petitioned the court to let the baby die. According to Judge John Baker who heard the case, the baby's father testified "that he had

been a licensed public school teacher for over seven years and had on occasion worked closely with handicapped children and children with Down's syndrome and that he and his wife felt that a minimally acceptable quality of life was never present for a child suffering from such a condition."[72] The Court gave approval for the parents not to have corrective surgery performed and the baby died of dehydration and starvation soon thereafter. While this case did carry the force of the Supreme Court, it does indicate the logical conclusion of abortion: infanticide.

C. *Webster* v. *Reproductive Health Services* 492 U.S. 490 (1989)

Argued: April 26, 1989 Decided: July 3, 1989
Majority: Kennedy, O'Connor, Rehnquist, Scalia, White
Minority: Blackmun, Brennan, Marshall, Stevens

Key Issues: State Funding of Abortions

In *Webster* v. *Reproductive Health Services* (1989) the Supreme Court moved slightly away from the radical stance of *Danforth.* In this case the Court allowed states more latitude in restricting how public funds are used in relation to abortions. For example, states are allowed, but not required, to prohibit public funding for abortion counseling. Also, states are allowed to prohibit public employees from performing abortions. The court also mandated tests to determine the viability of a baby at more than 20 weeks gestation.

Blackmun's dissent in *Webster* is one of the more famous dissents in Supreme Court history. Blackmun basically attacks the character of the majority and says:

[72] "In the Matter of the Treatment and Care of Infant Doe," Circuit Court for the County of Monroe, State of Indiana, in *Ethical Issues in Death and Dying*, second ed., Beauchamp and Childress, eds. (Upper Saddle River, NJ: Prentice Hall, 1996), 311.

> Nor in my memory has a plurality gone about its business in such a deceptive fashion. At every level of its review, from its effort to read the real meaning out of the Missouri statute to its intended evisceration of precedents and its deafening silence about the constitutional protections that it would jettison, the plurality obscures the portent of its analysis. With feigned restraint, the plurality announces that its analysis leaves *Roe* "undisturbed," albeit "modified and narrowed." *Ante* at 492 U. S. 521. But this disclaimer is totally meaningless. The plurality opinion is filled with winks, and nods, and knowing glances to those who would do away with *Roe* explicitly, but turns a stone face to anyone in search of what the plurality conceives as the scope of a woman's right under the Due Process Clause to terminate a pregnancy free from the coercive and brooding influence of the State. The simple truth is that *Roe* would not survive the plurality's analysis, and that the plurality provides no substitute for *Roe*'s protective umbrella.[73]

Blackmun also returns to his theme of radical moral autonomy and describes abortion as the "quintessentially intimate, personal, and life-directing decision whether to carry a fetus to term."[74] He also scolds the majority for failing to address the issue of privacy and says they disingenuously focus on the flawed reasoning of the "trimesters' outlined in *Roe.*

In his dissent, Blackmun seems oblivious to the fact that state sponsored abortions may in fact violate the "personal dignity and autonomy" of people who find the practice morally objectionable. He fails to grant the basic concern of people who oppose abortion that if the state funds abortions, then the tax revenue garnered from pro-life citizens is used to fund an act they find completely

[73] *Webster* v. *Reproductive Services* 492 U.S. 539 (1989).
[74] Ibid.

objectionable. In a striking irony, Blackmun's notion of autonomy actually becomes coercive.

V. *Planned Parenthood* v. *Casey*

A. Case Facts

Planned Parenthood of Southeast Pennsylvania* v. *Casey
505 U.S. 833 (1992)

Argued: April 4, 1992 Decided: June 29, 1992
Majority: Blackmun, Kennedy, O'Conner, Souter, Stevens
Minority: Rehnquist, Scalia, Thomas, White

Key Issues: **Roe is sustained. The legal basis of Abortion and limitations on access to abortions**

Planned Parenthood v. *Casey* is one of the most important cases in the history of American jurisprudence. This ruling came after twelve years of Reagan/Bush appointees and pro-life groups hoped *Roe* would be overturned. Certain regulations in Pennsylvania law concerning waiting periods before abortions and parental consent for minors were the major issues in this case. Restrictions on abortion are allowed as long as they do not impose and "undue burden" on the woman's access to an abortion.

B. Court's Decision: Core Holding of *Roe* is Sustained

By a 5-4 decision, the court sustained the core holding of Roe: Women have a right to obtain an abortion for the sake of convenience. In joint decision co-authored by Justices O'Connor, Kennedy, and Souter, the Court reaffirmed the core holding of *Roe* that women have the ultimate right to choose an abortion. Two important aspects of the Pennsylvania law were upheld. First, the

Court upheld the validity of a twenty-four hour waiting period in which time a woman would be provided information about the risks involved with abortion. The Court also upheld the validity of a parental consent provision as long as certain stipulations were followed. In this way, the court did give states greater authority to discourage abortion. However, the Court struck down as unconstitutional a provision in the Pennsylvania law requiring a wife to notify her husband that she was getting an abortion.

Remember, the SCOTUS did not mandate that each state enact the stipulations such as parental consent, but if states choose do so, they can. Thus, abortion laws in Missouri and Kansas (conservative) are different from abortion laws in New York (liberal). For example, California allows a minor to get an abortion without parental consent. The California law goes so far as saying the abortion provider is not permitted to inform a parent or legal guardian without minor's consent. The provider can only share the minor's medical records with the signed consent of the minor.[75] It is not hard to imagine a situation where a 14 year old girl experiences bleeding, cramping, and other complications after an abortion. A concerned parent then takes the child to a physician with no idea the young girl has just had an intrusive, surgical procedure. To complicate matters, the abortionist is not required to release any details to the parent concerning the abortion performed on the child, leaving the parent in the dark about his or her child's own health. This is liberal lunacy.

Planned Parenthood v. *Casey* was probably the best chance we will ever see in my lifetime to have *Roe* overturned. In many ways, *Casey* was lost when Judge Robert Bork was viciously and falsely attacked by Democrats and rejected as a Supreme Court justice.[76] The

[75] California Minor and Consent Laws, October 2014, accessed September 21, 2017, http://www.chhs.ca.gov/Child%20Welfare/CA%20Moinior%20Consent%20and%20Confidentiality%20Laws.pdf.

[76] Bork was a brilliant ideological conservative nominated by President Reagan. Bork's nomination was defeated on October 23, 1987, losing in the Senate by a 42 – 58 vote. Instead of Bork, we wound up with Kennedy.

major result of *Casey* is that it shifted the basis for abortion rights from a questionable "right to privacy" (which some justices argued can be found in the due process clause of the 14th Amendment) to the more explicit liberty interests of the Fourteenth Amendment.

C. Radical Moral Autonomy

The Court's attempt to define liberty protected by the Fourteenth Amendment resulted in one of the more expansive statements ever to emanate from the Supreme Court:

> Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[77]

One should note that despite the Court's assertion that they are not taking sides in a moral debate, their decision does indeed advocate a particular moral viewpoint: abortion on demand is a good thing and should be permitted. Furthermore, the majority defined the liberties protected by the Fourteenth Amendment in an excessively broad manner as those matters "central to personal dignity and autonomy."

[77] *Planned Parenthood of Southeastern PA* v. *Casey* 505 U.S. 833 at 851.

Larson and Amundsen accurately summarize the problems with this approach when they say, "The justices obviously wrote this with abortion in mind, but by trying to state a general principle, they created a limitless category."[78] Commenting on this famous paragraph from *Casey*, Larson and Amundsen go on to say:

> This would make fine Fourth-of-July oratory, but it provides no basis for defining the limits of governmental power, which is the function of the Constitution. Undoubtedly for Charles Manson, murder was an intimate and personal choice central to his autonomy, just as taking LSD defined Timothy Leary's concept of meaning and the universe, but surely this does not suggest that the government could not outlaw such activities.[79]

Indeed, the expansive nature of the moral reasoning of *Casey* was vividly demonstrated when the Court in the *Lawrence* v. *Texas* (2003) expanded homosexual rights, a decision largely based on the precedent of *Casey*.

The key legal principle utilized by the court was substantive due process. The Fourteenth Amendment of the Constitution says, "No State shall deprive any person of life, liberty, or property without due process of law." Adopted after the Civil War to correct the evils of slavery, this amendment declares that states may not infringe individual liberty without due process, but it has long been interpreted to have substantive content so as to protect certain individual rights (such as freedoms of speech and religion) from state restriction.[80]

In *Casey*, the court stated, "Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due

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[78] Edward J. Larson and Darrel Amundsen, *A Different Death: Euthanasia and the Christian Tradition* (Downers Grove: InterVarsity Press, 1998), 211.
[79] Ibid.
[80] *See* Edward Larson and Darrel Amundsen, *A Different Death*, 210-216.

Process clause of the Fourteenth Amendment." Pro-life activists have argued consistently that *Roe* must be overturned. Though *Roe* opened the floodgates for abortion on demand, in reality the legal foundation for current abortion rights in the United States is Casey. If abortion on demand is ever reversed, we must overcome *Roe* and *Casey*.

It is of some interest that the "swing vote" in the *Casey* decision was Justice Anthony Kennedy. Kennedy was nominated to the Court by Ronald Reagan in 1988 after the failed nominations of Robert Bork and Douglas Ginsburg. Kennedy was later the author of the infamous *Lawrence* v. *Texas* decision in 2003 which has opened the way for gay marriage. The vociferous opposition and scurrilous tactics used to attack Bork were caused by the fact that pro-abortion advocates in the Senate knew that if Bork were confirmed, then *Roe* would be overturned.

VI. Post-*Casey* Cases

A. "Gag Rule" on Title X

Another legal issue of note was the "Gag Rule" on Title X funding during the Reagan and Bush (Sr.) administrations. This was an executive order that prohibited abortion counseling at clinics receiving federal aid through Title X (Family Planning Section) of the Public Health Services Act of 1970. The Clinton administration rescinded this order in 1993.

B. *Gonzales* v. *Carhart* 550 U.S. 124 (2007)

Argued: November 8, 2006 Decided: April 18, 2007

Majority: Roberts, Scalia, Kennedy, Thomas, Alito
Minority: Stevens, Souter, Ginsburg, Breyer
Key Issue: **Partial Birth Abortion Ban Act of 2003 is sustained.**

On April 18, 2007, the Supreme Court issued their ruling in *Gonzales* v. *Carhart* and upheld the Partial Birth Abortion Ban Act of 2003 by a slim 5-4 majority.[81] Congress had twice passed partial birth abortion bans in the 1990's, but both were vetoed by President Clinton. The Partial Birth Abortion Ban Act of 2003 was approved in 2003 by a 64-34 vote in the Senate and a 281-142 vote in the House. President Bush signed the bill into law in November, 2003.

Partial birth abortion is a late term procedure in which, as typically performed, an intact baby is delivered feet first until only the head is left in the birth canal. The doctor pierces the base of the infant's skull with surgical scissors before inserting a catheter into the opening and suctioning out the baby's brain, killing the child. The majority made clear in their decision that they distinguished between what they termed an "intact dilation and evacuation" as opposed to all dilation and evacuation procedures. The Partial Birth Abortion procedure is known by several different names:

Intact Dilation and Extraction (IDX or Intact D & X)
Intact Dilation and Evacuation (Intact D & E)
Dilation and Extraction (D & X)
Intrauterine Cranial Decompression
Partial Birth Abortion

The procedure was first described by Ohio physician W. Martin Haskell at the 1992 at the National Abortion Federation Risk Management Seminar held in Dallas, TX. Apparently, the procedure had been developed in the early 1980's by a Dr. James McMahon. The

[81] Geisler wrongly dates this case as "2000." See *Christian Ethics*, 2nd ed., 132.

procedure has been used for late-term abortions (abortions after the 20th week of gestation).

LeRoy H. Carhart is a retired Air Force physician who operates an abortion clinic near Bellevue, NE. An advocate of Partial Birth Abortion, he won a case before the Supreme Court in 2000 in which the Supreme Court ruled (5-4) unconstitutional a Nebraska law criminalizing Partial Birth Abortions (*Steinberg* v. *Carhart*). In *Steinberg*, Sandra Day O'Connor voted in the majority. When the 2003 act was passed, Carhart filed suit again and the Eighth Circuit Court ruled in his favor and found the Partial Birth Abortion Act to be unconstitutional. This time the makeup of the Court had changed, O'Connor had been replaced by Samuel Alito, and Carhart lost. In *Gonzales* v. *Carhart*, the four justices who dissented in *Steinberg* were joined by Sandra Day O'Connor's replacement, Samuel Alito, thus giving a 5-4 majority to sustain the 2003 Partial Birth Abortion Act.

C. *Whole Woman's Health* Et Al v. *Hellerstedt, Commissioner, Texas Department of State Health Services,* Et Al

Argued: March 2, 2016 **Decided**: June 27, 2016

Majority: Stephen Breyer authored the decision; joined by Justices Anthony Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan

Minority: Thomas, Alito, Roberts

1. Summary

This SCOTUS decision overturned a Texas law that required protective measures for women seeking an abortion. The law required that an abortionist have hospital privileges within 30 miles of the abortion clinic in case of medical emergencies and that

abortion clinics follow the same safety procedures as all ambulatory surgical centers. From my perspective, these were common sense safety measures and not undue burdens. Had the law taken effect, only ten abortion clinics would have been left open in Texas, clustered around the population centers of Houston, Dallas-Fort Worth, Austin, and San Antonio with another clinic near the Mexican border in McAllen.

The provisions struck by the Court in *Whole Woman's Health* were part of a broader pro-life omnibus package passed by the Texas legislature in 2013. Texas HB2 also included National Right to Life model language to protect unborn children who are capable of experiencing great pain when being killed by dismemberment or other late abortion methods. Remember, an unborn child is capable of feeling pain by 20 weeks after fertilization and earlier. That provision of the Texas law was unchallenged in *Whole Woman's Health v. Hellerstedt.*

2. Critique

One enduring symbol of the pro-abortion movement has been the coat hanger, which they use to symbolize "back alley" coat hanger abortions which they claim were common before the legalization of abortion. The symbol of the coat hanger is intended to communicate that women will seek abortions in unsafe, illegal ways if abortion is again criminalized. The irony of the *Whole Woman's Health* decision is that it weakens protections for the health of women seeking abortions. Requiring an abortionist to have hospital privileges at a nearby hospital means there is immediate access for care in case a woman experiences physical trauma in an abortion gone wrong. *Not requiring* such privileges actually places women seeking an abortion in greater danger. Furthermore, having abortion clinics meet the same standards of other ambulatory clinics was intended to promote women's safety. Kevin Kennedy comments:

> Ambulatory surgical center regulations, meanwhile, govern such things as the width of hallways so that emergency personnel can easily reach patients when transporting them to a hospital. By requiring that abortion clinics meet all requirements normally imposed on ambulatory surgical centers, HB 2 was ensuring that women were no longer subjected to "rusty coat hanger" abortions. Those who objected to the law's ambulatory surgical center requirements were advocating that less care be given to women during the actual surgery involved in the procedure.[82]

Thus, the *Whole Woman's Health* decision actually lowers the standard of care for women seeking an abortion, the antithesis to the message communicated by the symbolic "coat hanger."

D. Summary of Key SCOTUS Decisions

> *Griswold* v. *Connecticut* (1965): Supreme identifies a "right to privacy." *Remember: This case was not specifically about abortion.*
>
> *Roe* v. *Wade* (1973): Abortion must be legal. Based on a "right to privacy."
>
> *Doe v. Bolton* (1973): Clarifies and expands *Roe*. "Mother's health" is defined in the broadest possible context. Think of *Roe* and *Doe* as evil twin sisters.
>
> *Planned Parenthood* v. *Casey* (1992): The core holding of *Roe* is sustained. Abortion rights are shifted from a supposed "right to privacy" the more explicit liberty interests of the Fourteenth Amendment. Radical moral autonomy. Individual states are

[82] Kevin Kennedy, "Analysis: Back Alleys and Coat Hangers," *Baptist Press*, June 27, 2016, accessed June 28, 2016, http://www.bpnews.net/47133/analysis---back-alleys-and-coat-hangers.

allowed to impose some limits if they desire, such as waiting periods and parental consent.

VII. Religious and Moral Influence of Abortion Decisions

Abortion was a central issue motivating the conservative resurgence in the Southern Baptist Convention in the late 1970s and early 1980s. Conservatives were deeply concerned that SBC seminary professors and the Christian Life Commission were advocating for legalized abortion. Furthermore, SBC leadership had pushed through two pro-abortion resolutions, in 1971 and 1974.

A. The Southern Baptist Convention, 1971

Many people are surprised to learn that the Southern Baptist Convention actually passed a pro-choice resolution in 1971 at the annual meeting held that year in St. Louis. Resolutions do not require any specific action of the Convention, but they do express the opinion of the body meeting at that time.

This particular resolution was a strong call for liberalizing of abortion laws. Foy Valentine, executive director of the SBC's Christian Life Commission from 1960 – 1987, was instrumental in the SBC's adoption of the resolution.[83] Though it gave a perfunctory nod to the "sanctity of human life," the last paragraph carried the most troublesome content and used language remarkably similar to the Supreme Court in *Doe* v. *Bolton* in 1973:

> Be it further resolved, that we call upon Southern Baptists to work for legislation that will allow the possibility of abortion under such conditions as rape, incest, clear evidence of severe fetal deformity, and carefully ascertained evidence of the

[83] Greg Warner and Marv Knox, "Ethics Pioneer Foy Valentine Dies Suddenly in Dallas," *Associated Baptist Press*, January 7, 2006.

> likelihood of damage to the emotional, mental, and physical health of the mother.[84]

Commenting on this resolution, Barry Hankins says, "Thus, what the resolution seemed to give on one hand, a strong statement on the sanctity of fetal life, it took back with the other, allowing for abortion where a woman's mental or emotional health might be impaired by a pregnancy."[85] Timothy George accurately summarizes the moral impact of this resolution when he says, "Thus two years prior to the Supreme Court decision of 1973 . . . the Southern Baptist Convention was on record advocating the decriminalization of abortion and extending the discretion of this decision into the realm of personal, privatized choice."[86] George goes on to comment that *Roe* did little more than place a stamp of approval on what the Southern Baptists meeting in 1971 had affirmed.

Other Southern Baptists contributed to the moral confusion at this time. Linda Coffee, one of the two lawyers who argued the *Roe* decision, self-identified at that time as a Southern Baptist and was then a member of Park Cities Baptist Church in Dallas. Commenting on her own religious beliefs, she said immediately following the *Roe* decision that "legal personhood is separate entirely from a moral or religious view of personhood."[87] Even stalwart conservative pastor W. A. Criswell expressed a favorable opinion towards the *Roe* decision. Commenting to *Christianity Today* immediately following the Court's ruling, Criswell said, "I have always felt that it was only after a child was born and had life separate from the mother that it became an individual person, and it has always, therefore, seemed to

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[84] *Annual of the Southern Baptist Convention* (Nashville: Broadman Press, 1971), 72.
[85] Barry Hankins, *Uneasy in Babylon: Southern Baptist Conservatives and American Culture* (Tuscaloosa: University of Alabama Press, 2002), 182. Hankins argues "moderate" Southern Baptists were influenced by the political theory of John Rawls (1921 – 2002) and saw abortion as a religious liberty issue. Rawls was a professor of political philosophy at Harvard and author of *A Theory of Justice* (1971).
[86] Timothy George, "Southern Baptist Heritage of Life," in *Life at Risk*, Land and Moore, eds. (Nashville: Broadman, 1995), 83.
[87] "Abortion Decision a Death Blow?" *Christianity Today* 17.10 (February 16, 1973): 48.

me that what is best for the mother and for the future should be allowed."[88] In the SBC's annual meeting in 1974 in Dallas, TX, convention messengers adopted a resolution reaffirming the 1971 resolution, saying, "That resolution dealt responsibly from a Christian perspective with complexities of abortion problems in contemporary society; Therefore, be it resolved, that we reaffirm the resolution on the subject adopted by the messengers to the St. Louis Southern Baptist Convention meeting in 1971."[89]

As was noted above, during this era of the Southern Baptist Convention, the Convention's voice on moral issues was called the Christian Life Commission. This agency held an annual conference each year addressing various ethical issues. The conference in 1973 was held March 19 -21 in Charlotte, NC, just about two months after the *Roe* and *Doe* decisions. One presentation was titled "Abortion on Request – Implications of the Supreme Court Decision," and it was delivered by David R. Mace (d. December 1, 1990), at that time a professor of sociology at the nominally Baptist Bowman Gray School of Medicine at Wake Forest University. Much like the 1971 SBC Resolution, Mace gave passing affirmation of the value of preborn life, but argued strongly in favor of liberalizing abortion laws. Mace did acknowledge the degree to which the sexual revolution had contributed to demands for abortion. He pointed out that the new widespread availability and use of *imperfect* contraceptives had led to an explosion of unintended pregnancies. He said: "The result is a steadily increasing frequency of problem pregnancies, producing a trail of human misery. Finally, in desperation, we have been compelled to provide legal abortion as a second line of defense to deal with the resulting crisis."[90]

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[88] Ibid.
[89] "Resolution on Abortion and Sanctity of Human Life," The Southern Baptist Convention, June 1974. http://www.sbc.net/resolutions/amResolution.asp?ID=14. (Accessed January 30, 2014).
[90] David R. Mace, "Abortion on Request – Implications of the Supreme Court Decision," *Proceedings of the 1973 Christian Life Commission Seminar "A Future for the Family" Held at the White House Inn Charlotte, NC March 19 – 21, 1973* (Nashville, TN: Christian Life Commission, 1973), 33.

Mace found the SCOTUS's argument concerning when life begins to be convincing and criticized others who had criticized Blackmun for saying "we need not resolve the difficult question of when life begins." Mace seemed unaware of the degree to which Blackmun equivocated when using the phrase "human life" when he actually had in mind debated ideas of "personhood."[91] Mace then had the audacity to say *Roe* does not remove one's rights to oppose abortion, but instead the new law gives "to those who differ deeply from you the right not only to proclaim, but also to practice what *they* believe."[92] Mace omitted any serious discussion of the moral status of preborn human life and circumvented the probing question of *Roe* allowing for the killing of innocent human life. Repeating a talking point often heard in the following years from liberals, Mace reminded, "Though the number of abortions will now inevitably increase, we have a duty to keep it as low as we possibly can."[93] He also added, "Only a few extremists can settle the question by saying that abortion is always right or always wrong. What most of us believe is that it is sometimes right and sometimes wrong, depending on the circumstances."[94] The vagueness of Mace's comment here is probably intended to appeal to the average Southern Baptist who wanted abortion to be legal in life-threatening situations like an ectopic pregnancy. What he omits is an honest discussion of the manner in which "life of the mother" was expanded by *Doe* to include most anything imaginable.

Mace concluded with what appears to be a veiled hope for contraceptives which are so effective that no more "crisis pregnancies" and says:

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[91] I suspect Mace himself engaged in some word games. During this speech, he also said, "Nobody likes abortion; most doctors hate it, my medical students are often quite upset about it. Whatever theory we hold about human life, we know that the fetus has the potentiality to become a human being." P. 35. By "potential human being," I take this to be Mace's way of embracing Blackmun's philosophical view of "personhood" as opposed to human life.
[92] Ibid., 35.
[93] Ibid.
[94] Ibid.

> It offends us deeply to think of destroying an unborn child. . . . We may have to tolerate abortion for a time, as a regrettable necessity. But surely we can and must find a better way. Surely our technology, which can split the atom and put men on the moon, will soon come up with an answer. . . . We therefore declare our faith and our hope that a day will come, and may it come soon, when men and women will be able to express and enjoy their sexuality without demeaning themselves or exploiting others; and there will be no more problem pregnancies, no more avoidable abortions, and no more unwanted children."[95]

These concluding remarks reflect the confused dream of sort of "millennial" sexual utopia ushered in by a contraceptive redeemer. What complete balderdash.

One should not be surprised at some of the SBC confusion during the early 1970s. For example, Sherwood Eliot Wirt was the original editor of Billy Graham's *Decision Magazine.* Writing in 1968, Wirt summarized the Catholic opposition to abortion and then said, "Evangelical opinion may differ from the official Roman view in placing more emphasis on the health and well-being of the mother than on the survival of the fetus. However, evangelicals who take the sinfulness of man seriously would hold it an extremely dangerous practice to give to any man, medically trained or not, the power over life and death."[96] Wirt's commentary is hardly a rousing opposition to abortion; he merely seems to emphasize the distasteful nature of the act. He seems aware of the consequences of medialized killing, but his analysis of the imminent danger of abortion is cursory and poorly argued.

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[95] Ibid., 36.
[96] Sherwood Eliot Wirt, *The Social Conscience of the Evangelical* (New York: Harper & Row, 1968), 141.

Even evangelical Norm Geisler advocated a weak anti-abortion argument in his 1971 book *Ethics: Alternatives and Issues*. He said at that time, "The clear thing which the Scriptures indicate about abortion is that it is not the same as murder."[97] Geisler goes on to affirm what I consider to be a pro-abortion interpretation of Exodus 21:22. Commenting on this specific passage of Scripture, he said, "Apparently, the unborn baby was not considered fully human and, therefore, causing its death was not considered murder."[98] He even affirms a developmental view of personhood, saying, "An unborn baby is a work of God which He is building into His own likeness. It is a being with an ever increasing value as it develops."[99] Geisler even suggested abortion is acceptable prior to viability.[100] It is of some interest to note that less than 20 years later in his 1988 *Christian Ethics: Options and Issues* Geisler advocated quite a more decidedly pro-life stance concerning the moral status of pre-born human life. Commenting on Exodus 21:22, he takes a completely different stance in 1988 than in 1971 and says Exodus 21:22 is a "strong passage affirming that the unborn are of equal value to adult human beings."[101]

The Southern Baptist Convention's approval of abortion on demand in 1971 and the corresponding closely-worded limited endorsement of pre-viability abortion by Geisler in 1971 and Criswell's bland endorsement of abortion in general in 1973 shed light on the confused nature of pre-*Roe* Protestant thought in general and Baptist thought in particular concerning abortion. <u>But in 2003, the Southern Baptist Convention meeting in Phoenix adopted a resolution specifically repudiating the pro-abortion resolutions of</u>

[97] Norm Geisler, *Ethics: Alternatives and Issues* (Grand Rapids: Zondervan, 1971), 218.
[98] Ibid., 219.
[99] Ibid., 219.
[100] Ibid., 223.
[101] Norman L. Geisler, *Christian Ethics: Options and Issues* (Grand Rapids: Baker Book House, 1988), 145. Geisler does not mention his shift in interpretation of Exodus 21:22.

1971 and 1974.

Thankfully, later meetings of the Southern Baptist Convention passed numerous pro-life resolutions. Even more, the denomination adopted a new statement of faith in 2000 which urges Baptists to contend for the sanctity of human life from conception to natural death and says, "We should work to provide for the orphaned, the needy, the abused, the aged, the helpless, and the sick. We should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death."[102]

B. The Broader Moral Impact of Abortion Cases

At the heart of the abortion debate has been the issue of radical moral autonomy. It is no coincidence that the moral reasoning used in *Roe* and *Planned Parenthood v. Casey* was also used in *Lawrence v. Texas* to invalidate laws criminalizing homosexual behavior. Consequent to *Lawrence*, there has been the demand for legalization of homosexual marriages. Sanford Levinson summarizes the moral connection between these cases when he says:

> Once again, it should be clear that abortion is centrally linked with autonomy concerning the conditions of one's life – thus, the adoption of the term "pro choice" by its adherents. Many persons read the sequence of cases from *Griswold* to *Roe* as supporting, under the rubric of "privacy," a general right to what might be termed "sexual autonomy," that is, freedom of choice in regard to one's sexual identity, including its reproductive aspects."[103]

[102] See the *Baptist Faith & Message 2000*, Article XV.
[103] Sanford Levinson, "Privacy," in *The Oxford Companion to the Supreme Court of the United States*, 2nd ed., Kermit L. Hall, ed. (Oxford: Oxford University Press, 2003), 782.

I concur with this summary, but insist that *Roe* was only the beginning, as the results of *Lawrence v. Texas* so clearly demonstrate. More broadly, acceptance of abortion on demand for any and every reason coarsens the national conscience and lowers the bar for acceptable behavior at multiple levels.

Nigel Cameron offers a good summary statement regarding worldview issues and fetal life in the law:

> The profoundly ambiguous character of fetal life in the law and medicine of the West is partly a reflection of the ambiguity of the gestational state itself. But it is, of course, something more. It reflects essentially post-Christian uncertainty about human nature, an uncertainty which has given rise to widespread discussion of the single principle which seemed for so long non-negotiable, the principle of the sanctity of human life.[104]

Last updated March 24, 2021

[104] Nigel M. de S. Cameron, *The New Medicine: Life and Death After Hippocrates* (Wheaton, IL: Crossway Books, 1991), 101.