



1993

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Recommended Citation

Gaylord '94, Tom (1993) "Reconciling the Abortion Choice: A Look at Legal and Societal Interests," *Undergraduate Review*: Vol. 6: Iss. 1, Article 10.

Available at: <http://digitalcommons.iwu.edu/rev/vol6/iss1/10>

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Reconciling the Abortion Choice: A Look at Legal and Societal Interests

Tom Gaylord

The Foundation of Adjudicated Privacy Rights

Nowhere in the United States Constitution did the framers specifically grant a right to privacy to the citizens of the United States. In fact, not until the landmark 1965 Supreme Court decision in **Griswold v. Connecticut** was such a right found unambiguously to exist. In **Griswold**, the Court found that a Connecticut law outlawing the use of contraceptives between married persons was violative of a "right to privacy" protected by the Fourteenth Amendment's Due Process Clause (which applies the original Bill of Rights to the states) and the Ninth Amendment, which states "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." In other words, just because the Constitution doesn't explicitly grant a right to privacy, that does not mean one does not exist. Further, in 1972, the Court found unconstitutional a similar Massachusetts law outlawing distribution of contraceptives to unmarried persons, expanding its **Griswold** decision (**Eisenstadt v. Baird**).

Nineteen Seventy-three was a watershed year for the right to privacy and the right to choose to have an abortion. In **Roe v. Wade**, the Court found a "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, (**Griswold**; **Eisenstadt**); or among those rights reserved to the people by the Ninth Amendment" (**Griswold**).

These three cases (along with **Roe's** sister case **Doe v. Bolton**) form the foundation of the right to privacy as adjudicated by the Supreme Court. In establishing, consolidating, and eventually redefining that right, abortion has stood in the limelight.

Abortion in Society

The **Roe** decision, written by Justice Harry A. Blackmun, offered eight societal opinions on or concerning abortion. These were 1) ancient attitudes; 2) the Hippocratic Oath; 3) common law; 4) English statutory law; 5) American law; 6) the position of the American Medical Association; 7) the position of the American Public Health Association; and 8) the position of the American Bar Association.

According to **Roe**, ancient attitudes concerning abortion were generally free. While abortion was prosecuted in the Persian Empire, the basis for this was largely a "concept of a violation of the father's right to his offspring" (**Roe**). Greek and Roman societies were especially free with

abortion and "afforded little protection to the unborn" (**Roe**). Abortion also was not barred by ancient religion. In fact, abortion was acceptable to the Roman Catholic Church into the Nineteenth century, based on St. Thomas Aquinas' theory that "ensoulment" of the fetus did not take place until forty to eighty days after conception (**Webster v. Reproductive Health Services**).

The Hippocratic Oath states, "...I will not give to a woman an abortive remedy." However, according to Dr. J. Edelstein, quoted in **Roe**, "Most Greek thinkers... commended abortion,... For the Pythagoreans, however, it was a matter of dogma... The abortion clause of the Oath... 'echoes Pythagorean doctrines,' and '[i]n no other stratum of Greek opinion were such views held or proposed in the same spirit of uncompromising austerity" (**Roe**).

In common law (court-made, not legislator-made, law), abortion was undisputably legal prior to "quickening," "the first recognizable movement of the fetus in utero..." Although there were differing views in common law as to whether abortion of a quick fetus was a misdemeanor, manslaughter, or no offense at all, the decision in **Roe** states "it now appear[s] doubtful that abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus."

English statutory law has grown less strict on the abortion issue as time goes by. In statutes enacted in 1803, 1828, 1837, 1861, and 1929, abortion was a felony except to preserve the life of the mother. In **Rex v. Bourne** (1939), an English court modified the word 'life' to include health. Finally, the Abortion Act of 1967 allows physicians to take into account maternal life, physical and/or mental health; the health of existing children; possible disabilities or handicaps of the unborn fetus; and even "...the pregnant woman's actual or reasonably foreseeable environment" (**Roe**; emphasis added).

The United States began adopting abortion statutes as early as 1821, with Connecticut distinguishing between quick and unquickened fetuses. Common law however, was generally in effect in the United States as far as abortion was concerned until after the Civil War. After the Civil War, most states that enacted abortion statutes made the quickening distinction. Most also allowed post quickening abortions to preserve the "life" of the mother. By the late Nineteenth century, however, the quickening distinction had largely disappeared and the penalties for abortion had generally increased. By the end of the 1950's, almost all jurisdictions had banned abortion except to save the life of the mother. The Court in **Roe** interpreted the history of abortion in American society in this way:

It is apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the Nineteenth century... a woman enjoyed a substantially broader right to terminate a pregnancy than she does... today... very possibly without such a limitation [on stage of pregnancy], the opportunity to make this choice was present in this country well into the Nineteenth century (**Roe**).

This is an important distinction.

In 1871, the American Medical Association's Committee on Criminal Abortion submitted to the A.M.A. Annual Meeting a report condemning abortion; it was adopted. Once again, it provided for the preservation of the mother's health, but only with the concurring judgment of a "respectable" physician. The A.M.A.'s Committee on Human Reproduction in 1967 opposed abortion except in cases of 1) a threat to the health or life of the mother; 2) a physical deformity or mental deficiency of the unborn fetus; or 3) rape or incest. This recommendation was also adopted. And "[o]n June 23, 1970, the House of Delegates adopted preambles emphasiz[ing] 'the best interests of the patient,' 'sound clinical judgment,' and 'informed patient consent,' in contrast to 'mere acquiescence to the patient's demand'" (Roe).

The most liberal platform in American society has been that of the American Public Health Association. In 1970, it drafted its Standards for Abortion Services. These standards instructed that 1) "Rapid and simple abortion referral must be readily available through state and local public health departments, medical societies, or other non-profit organizations;" 2) "An important function of counseling should be to simplify and expedite the provision of abortion services; it should not delay the obtaining of these services;" 3) "Psychiatric consultation should not be mandatory. . .;" 4) ". . . trained. . . volunteers to highly-skilled physicians may qualify as abortion counselors;" and 5) "Contraception and/or sterilization should be discussed with each abortion patient;" (Recommended Standards for Abortion Services, 61 Am. J. Pub. Health 396 (1971)).

Finally, the American Bar Association, in drafting its 1972 Uniform Abortion Act, sought to accomplish what Roe eventually did, a standard for a national uniform abortion law. The A.B.A. adopted a moderate position on which it appears Roe was partially based. Abortions were unregulated the first twenty weeks of pregnancy; afterward, abortion could only be performed to save the life/health of the mother, to abort a fetus with mental/physical defects, or in cases of rape and incest. In the summer of 1991, the A.B.A. voted to adopt a resolution recognizing a woman's right to choose an abortion, roughly following the Roe trimester framework. After the loss of approximately two hundred members, however, the A.B.A. bowed to internal pressure and rescinded the resolution.

In Roe, the Court laid out three possible reasons that the state might have for outlawing abortion. The first justification was to deter illicit sex. The Court disregarded this as a viable excuse. The second was the risk involved in the abortion procedure. The Court noted that at the time most abortion statutes were enacted, the procedure was very hazardous. However, the advancement of medical technology, especially antiseptic techniques, has made abortion as safe (or safer) a procedure as childbirth at least through the first trimester. Through viability of the fetus (the time when it is capable of life outside the womb, roughly through the second trimester) abortion appears to be as safe (or as dangerous) as childbirth. By the third trimester (post-viability), childbirth is safer than the abortion procedure. This reasoning played a crucial part in what became the "trimester framework" of the Roe decision. The third possible justification for the outlawing of abortion entertained by the Court was a "compelling state interest" to protect the life or future life of an unborn fetus. A state

must demonstrate a "compelling state interest" in order to override a fundamental right, in this case a woman's fundamental right to privacy. The state (Texas in **Roe**, Georgia in **Doe**) argued that its interest in protecting "potential life" overrode the right to privacy. The Court, known for manufacturing judicial "tests," adopted the "trimester framework" test in **Roe**. The result was a finding that state interest did not override the right to privacy in the first trimester (read: the state could place no restrictions on first trimester abortions). Further, state interest from the end of the first trimester until viability is limited to concern for the health of the mother (read: any restrictions placed by the state on second trimester abortions may only be to preserve the health of the mother and not the fetus). Finally, after viability, at which point the fetus may live outside the womb, the Court found that state interest in preserving fetal life overrode the right to privacy (read: in the third trimester (post-viability) a state may go so far as to completely ban abortions, although not in cases of rape, incest, or to preserve maternal health). So, it appears that the Court, in manufacturing the "trimester framework," took into account both the risk associated with the abortion procedure as compared with childbirth, and the point at which the fetus becomes capable of life outside the mother.

In rationalizing the abortion choice, the **Roe** opinion makes a strong social justification for abortion rights. The argument follows,

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician will consider in consultation (**Roe**).

Throughout the Seventies, **Roe** remained unscathed for the most part. Only one decision, **Maher v. Roe** (1979), partly limited the decision in **Roe**. That decision upheld a Connecticut law that allowed state Medicaid funds for childbirth, but not for abortion. In 1983, the Court held that Akron, Ohio's local ordinances requiring a 24-hour waiting period prior to procuring an abortion, that all second and third trimester abortions be performed in a hospital, and that physicians be "vigorous" in counseling against an abortion were unconstitutional (**Akron v. Akron Center for Reproductive Health**).

Nineteen Eighty-nine signalled the death knell for the trimester framework test. The majority in **Webster v. Reproductive Health Services** upheld a Missouri law which "[found]" that life begins at conception; mandates viability testing on any fetus thought to be twenty or more weeks old; and prohibits the use of public employees, facilities, and funds from performing or assisting an abortion or "encouraging or counseling"

a woman to have an abortion. However, the majority did not overturn **Roe v. Wade**, rather they reaffirmed the woman's right to choose an abortion, yet they replaced the trimester framework test with the "undue burden" test. This new test allows a state to enact any statute restricting abortion that did not place an "undue burden" on a woman seeking an abortion. Justice Antonin Scalia, in concurring in the decision, scolded the Court for being "irresponsible" in not overturning **Roe**. Justice Scalia wrote,

It thus appears that the mansion of constitutionalized abortion-law, constructed overnight in **Roe v. Wade**, must be disassembled door-jamb by door jamb, and never entirely brought down, no matter how wrong it may be (**Webster**).

Justices Harry Blackmun, William Brennan, and Thurgood Marshall, dissenting from the decision, agreed that it effectively overturned **Roe v. Wade**. Malcolm Feeley and Samuel Krislov, in Constitutional Law, agree that "There is no question that Justice Scalia is correct. But by writing an opinion that upheld **Webster**, without explicitly overruling **Roe**, the Court has invited a prolonged period of litigation" (Feeley/Krislov 875).

The first sign of that prolonged litigation came in early 1991 when the Court, in **Rust v. Sullivan**, held that a law forbidding abortion counseling in federally-funded clinics and mandating a prepared anti-abortion speech to answer abortion inquiries was constitutional. Few scholars regarded this "gag rule" decision as good law, as it came dangerously close to impinging free speech rights. Whereas most legal scholars predicted that **Rust** would succumb to the same fate as other poorly thought out decisions, such as **Dred Scott** and **Plessy** ("separate but equal"), it was effectively overturned by President Bill Clinton through executive order early this year.

Society's Impact on Abortion Rights: Common Law, Natural Law, and Legal Realism

The largest role society plays in the area of abortion rights is that of lobbyist. Organized groups such as Operation Rescue and Planned Parenthood square off as they try to limit or expand these rights. As is often the case in our society, the group which currently sees itself as being on the losing side of this debate, the pro-lifers, is making the most noise. Aside from these groups, however, can the common theories of law in our society reconcile these two so opposite poles?

English common law, from whence most of American law was derived early on, was somewhat obscure on the question of abortion. Some distinction surfaced between a quick and unquickened fetus. In all cases, abortion of an unquickened fetus was not a crime. In some cases, abortion of a quick fetus warranted a misdemeanor charge. In very rare cases, manslaughter. It was never firmly established, however, that destruction of a quick fetus was criminal under common law. Because common law governed abortion in this country from the ratification of our Constitution until the mid- to late-1800's, the **Roe** Court justified its decision based on the fact that women had the abortion choice for a great portion of our

nation's existence. Today, common law (judge-made law) in the United States relies much more on the political leanings of the judges and justices and much less on the judicial theory of *stare decisis* (a doctrine that translates to "let the decision stand" or respect precedent). The present conservative majority of the Court has weakened, if not overturned *sub silentio*, **Roe v. Wade**, without regard to precedent. When there is again a liberal majority on the Court, the reverse will likely occur. Common law, as it now exhibits itself as political rather than judicial, probably does not carry as much weight as it used to, there being such little regard for precedent. In short, modern common law is sometimes laughable.

Natural law must be argued from two aspects, religious-based and secular-based, because the amorphous concept of natural law has roots in both. From a religious standpoint, abortion may go either way. The **Roe** Court did much research throughout the course of the opinion. On the subject of religion, they made the following finding:

There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics. It appears to be the dominant. . . attitude of the Jewish faith. It may be taken to represent also the position of a large segment of the Protestant community (**Roe**).

St. Thomas Aquinas' "ensoulment theory," that abortion of the seed prior to ensoulment (40-80 days after conception) was not the abortion of man, was "Roman Catholic dogma until the Nineteenth century" (**Roe**). Of course, the Catholic Church is now of the position that life begins at conception, as are many other religions that are not mentioned in **Roe**. It must be determined, therefore, that religious-based natural law, like common law, is unable to reconcile the abortion issue, as once again there are many differing opinions.

Under secular-based natural law, abortion would probably only be legal under the special circumstances found in many restrictive statutes (i.e. preservation of the mother's health, rape, incest, etc.). Those exceptions would be considered "natural" because they are a therapeutic response. Abortion as birth control would probably be considered unnatural because it is a non-therapeutic operation in the strict sense of the term. However, interpreting the word "therapeutic" broadly enough to encompass mental health and emotional well-being may uphold abortion rights under secular based natural law. Furthermore, who really has the power to determine what is and is not natural? Like common law and religious-based natural law, we are left muddled by conflicting interpretations .

Finally, we come to legal realism. Stephen Vago, in his book **Law and Society**, explains the legal realist thought process as co founded by Justice Oliver Wendall Holmes:

....[J]udges are responsible for formulating law, rather than merely finding it in law books. The judge always has to exercise choice when making a decision. He decides which principle will prevail and which party will win. According to the legal realist's position, judges make decisions on the basis of the conception of justness prior to resorting to formal legal precedents. Such precedents can

be found or developed to support almost any outcome. The real decisions are based on the judge's notion of justness. . .[t]hey are then rationalized in the written opinion (Vago 40, 41).

This idea of legal realism figures largely in how **Roe v. Wade** was decided and written. The majority found that guaranteeing the woman's choice to have an abortion was the just outcome, dependent upon what stage of pregnancy she wished to have an abortion. Suffering from a lack of modern precedents, they went as far back as Persian, Greek, and Roman societies to support their conclusion. This is not to say that abortion is not criminal under the legal realist doctrine. The key phrase in Vago's definition is "[s]uch precedents can be found. . . to support almost any outcome." Had the **Roe** majority concluded that the state's compelling interest in salvaging the potential life of the fetus was more just, legal realism could have been applied to support that finding instead. In general, legal realism most often appears when a) a majority (usually a liberal one) seeks to broaden some rights granted explicitly or implicitly by the Constitution, or b) when a majority seeks to disregard *stare decisis* and overturn a previous decision. Historically, legal realism has been a liberal tool, but with the present conservative majority out to limit some liberal decisions, the conservative's might find themselves at the liberal's workbench. Once again, we are unable to reconcile the question of abortion rights with this, our third instrument.

The Future

The trimester framework of **Roe v. Wade** has run its course. This is unfortunate. The trimester framework was the first, and as yet only, uniform abortion law this nation has seen. It's the nearest we had to a reconciliation of the parties involved. Giving more to either side causes the other to have legitimate rights disparaged. Barring a constitutional amendment or an act of Congress, the as yet unsolvable question of abortion appears for some time to be in the hands of a Supreme Court that doesn't want it.

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