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ABORTION: THE COURT DECIDES
A NON-CASE

I. THE RIGHT OF PRIVACY

It took the Supreme Court 105 years to discover that the Fourteenth Amendment guarantees a personal right of privacy that invalidates state statutes forbidding abortion except to save the mother's life.¹ As Mr. Justice Rehnquist pointed out, in a dissent that no member of the Court attempted to answer, at least thirty-six states had such anti-abortion statutes when the Fourteenth Amendment was adopted.² None was attacked on the ground that they offended the newly adopted amendment. The only conclusion possible from this history is that the drafters did not intend to

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AUTHOR'S NOTE: This article is sharply critical, but nothing derogatory is intended. The author reveres the Court as an institution, and regards its members as able, dedicated men. In the *Abortion Cases*, however, they took the wrong fork in the road, as will be demonstrated by what follows.

Much credit is due Miss Patricia O'Hara, a 1974 graduate of Notre Dame Law School, for the excellent job she did in researching some of the material used in this paper. Mrs. Katherine Farmann, Law Librarian at Notre Dame, produced, as if by magic, cases and other materials from scraps of information culled from the press. Dr. George Godersky and Dr. Hun-Koo Cho, highly regarded gynecologists and obstetricians in South Bend, Indiana, were most helpful in explaining medical aspects of abortion.

¹ From 1868, when the Fourteenth Amendment was adopted, to 1973, when *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973) (the *Abortion Cases*) were decided.

² 410 U.S. at 174-75.

have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.”³

It was only in the recent past that a small but clamorous band began to agitate for abortion on demand.⁴ In *Roe v. Wade*, the Court has yielded to the pressure of this strident minority. Mr. Dooley once wrote that even the Supreme Court follows the election returns. Mr. Dooley to the contrary notwithstanding, in these cases—indefensible on any ground—the Court disregarded the election returns in the only states in which the abortion issue has recently been on the ballot. In 1972, in Michigan and North Dakota, crushing majorities voted against abortion.⁵ Moreover, in light of recent congressional action,⁶ it is hard to believe that what the

³ *Id.* at 177.

⁴ The abortion crusade began in 1966 or thereabouts. Its roots no doubt go several years further back. LADER, *ABORTION II: MAKING THE REVOLUTION* (1973).

⁵ HILGERS, *INDUCED ABORTION* 19 (2d ed. 1973).

⁶ The Legal Services Corporation Act of 1974, P.L. 93-355, § 1007(b) provides that: “No funds made available by the Corporation under this title, either by grant or contract, may be used—(8) to provide legal assistance with respect to any proceeding or litigation which seeks to procure a non-therapeutic abortion or to compel any individual or institution to perform an abortion, or assist in the performance of an abortion, or provide facilities for the performance of an abortion, contrary to the religious beliefs or moral convictions of such individual or institution; . . .”

A similar provision is contained in the Health Programs Extension Act of 1973, P.L. 93-45, § 401(c); and the Foreign Assistance Act of 1973, P.L. 93-189, § 114, provides: “None of the funds made available to carry out this part shall be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions.”

Moreover, Congress has quietly been passing with little public notice a series of anti-abortion amendments tacked onto other legislation. See, e.g., *Boston Evening Globe*, 26 March 1974, p. 11, col. 1.

In May 1972 the New York Legislature voted to repeal that state’s abortion law, passed in 1970, which legalized abortion on demand until the twenty-fourth week of pregnancy. The repealer was vetoed by Governor Rockefeller. *New York Times*, 14 May 1972, p. 1, col. 1. Since then the 1970 law has been amended to provide that (1) after the twelfth week of pregnancy abortions must be performed in a hospital, and only on an in-patient basis, and (2) after the twentieth week a second physician must be present “to take control of and provide immediate medical care for any live birth that is the result of the abortion.” *New York Times*, 16 June 1972, p. 1, col. 3.

A month later the Pennsylvania legislature, by a wide margin, passed a bill restricting abortions in that state. The bill was vetoed by Governor Shapp. The veto was overridden by a vote of 41 to 8 in the Senate, 157 to 37 in the House; and the bill is now law. Among its provisions: Except for therapeutic abortions (1) a married woman must obtain the consent of her husband, and (2) no abor-

Court has legislated would be passed by Congress or approved by a popular referendum. To be sure, the Court ought not to be a political weather vane. It owes allegiance to the Constitution, not to the electorate. Nevertheless, the will of the people, as expressed at the polls and by the legislatures they choose, is relevant. It is relevant because it demonstrates that the right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental."⁷ And the Court acknowledged in *Wade* that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in [the constitutional] guarantee of personal privacy" which the Court has created.⁸

II. PRIVACY: WHAT IS IT?

The word "privacy" is defined as follows in *Webster's Third New International Dictionary* (Unabridged):

1 a : the quality or state of being apart from the company or observation of others : SECLUSION (unwilling to disturb his [~]) b : isolation, seclusion, or freedom from unauthorized oversight of observation (protected by law in the enjoyment of [~]) 2 *archaic* : a place of seclusion or retreat: private apartment (remote woodland *privacies*) 3 a : private or clandestine circumstances : SECRECY: b *archaic* : a private or personal matter : SECRET 4 *obs* : FAMILIARITY, INTIMACY 5 *privacies pl, archaic* : GENITALIA, PRIVATES

Thus, like the flowers that bloom in the spring, privacy has nothing to do with the case.

If it is agreed, *arguendo*, that privacy does have something to do with the case, the question remains: What basis is there, in the Con-

tion may be performed after the fetus is viable; (3) in the case of a therapeutic abortion of a viable fetus, precautions must be taken to insure that it is aborted alive; (4) taking the life of a premature baby aborted alive is second degree murder punishable by life imprisonment; (5) except in emergency situations, before undergoing an abortion a woman must sign a statement affirming that she has been advised, among other things, that "there may be detrimental physical and psychological effects which are not foreseeable"; (6) advertising or soliciting for abortions is forbidden, as are fees for abortion referrals. *Philadelphia Inquirer*, 11 September 1974, p. 1, col. 1. In October, the Massachusetts legislature overrode Governor Sargent's veto of an abortion bill.

⁷ *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

⁸ 410 U.S. at 152.

stitution or in the cases, for holding that the role of privacy diminishes as pregnancy lengthens until the fetus becomes viable (capable of surviving outside the mother's womb)? According to Mr. Justice Blackmun, this occurs between the twenty-fourth and twenty-eighth weeks of pregnancy, usually the latter, that is, after about seven months.⁹ When viability is achieved, privacy apparently runs out, in consequence of which, state legislatures are free to forbid abortion except to preserve the life or health of the mother.¹⁰ We are not informed what basis there is for holding that the role of privacy declines from absolute dominance at the beginning of pregnancy to zero importance at viability. The conclusion is a judicial invention based on legislative not judicial considerations. There is nothing private about a hospital abortion—a fact which Mr. Justice Blackmun seems not to understand. The admissions office must be told that the patient is entering the hospital for surgery, and the name of the surgeon must be given. So the admissions office will know. And, of course, everybody in the operating room will know. Every surgical procedure—even a routine tonsilectomy—involves risks. To guard against the risks common to all operations and those peculiar to abortions, all the nurses on the surgical service must be told. Anything else would render the hospital, and perhaps the surgeon, liable for damages in case of untoward circumstances. Thus, a very considerable number of hospital personnel will know—will have to know.

No, there is nothing private about an abortion. Yet privacy is what makes an abortion legal. What an upside down use of the English language!

If the abortion is not performed in a hospital, but in a facility such as a clinic, required by the state to possess all the staffing and services necessary to perform the operation safely, the number of persons "in the know" might be somewhat reduced. It still would be true that there is nothing private about an abortion.

It is appropriate to call attention at this point to the fact that the women who challenged the constitutionality of the Texas and Georgia statutes did so under fictitious names. Why? The obvious answer is that they wanted privacy in the usual and commonly understood meaning of that term. Anonymity had a value to them. Is it not ironical that each won her case on the ground that the statutes

⁹ 410 U.S. at 160.

¹⁰ *Id.* at 163–64.

she attacked invaded her right of privacy? "When *I* use a word, Humpty Dumpty said . . . it means just what I choose it to mean—neither more nor less."¹¹ Mr. Justice Blackmun has proclaimed his solidarity with Humpty Dumpty.

In *Doe v. Bolton*,¹² Mr. Justice Douglas said that the right of privacy was called by Justice Brandeis (dissenting in a wiretapping case) the right "to be let alone." But in the present context, that proves too much. Is there a right "to be let alone" while committing a felony, or disturbing the peace, or doing any other unlawful act? So the right "to be let alone" begs the question, which is whether abortion is lawful when a state has made it a crime. The Court simply legislated the legality of abortion and, in seeking a basis for this usurpation of legislative power, seized upon the right of privacy as its reason.

Mr. Justice Blackmun conceded that the "Constitution does not explicitly mention any right of privacy."¹³ Nevertheless, he said that:¹⁴

[T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . [O]nly personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" . . . are included in this guarantee of personal privacy.

To support these propositions he cited a long line of cases. But a few pages later, the learned Justice flatly contradicted himself, saying:¹⁵

The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. . . . The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt*, *Griswold*, *Stanley*, *Loving*, *Skinner*, *Pierce*, and *Meyer* were respectively concerned.

These were among the cases cited in the preceding paragraph to support the Court's propositions about privacy.¹⁶

¹¹ CARROLL, THROUGH THE LOOKING GLASS, c. VI.

¹² 410 U.S. 179, 213 (1973).

¹³ 410 U.S. at 152.

¹⁴ *Ibid.*

¹⁵ *Id.* at 159.

¹⁶ *Ibid.*

In his dissent in *Miller v. California*¹⁷ Mr. Justice Douglas said: "The difficulty is that we do not deal with constitutional terms, since 'obscenity' is not mentioned in the Constitution or Bill of Rights." Neither is "privacy" mentioned in the Constitution or Bill of Rights. The dissenting opinion of the eminent jurist in *Miller* cannot be reconciled with his concurring opinion in *Bolton*. Consistency demands that he change his vote in one or the other case. Like crabbed age and youth, they cannot live together.

Our nation is approaching its bicentennial. From the beginning, there have been rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental"¹⁸—rights "implicit in the concept of ordered liberty."¹⁹ They are proclaimed in the Declaration of Independence. But we have not had from the beginning a constitutional right to an induced abortion. On the contrary, abortion was a crime for over a century, that is, from 1821²⁰ until 22 January 1973, when the Court discovered that we had all been wrong all along and that rights we have had from the birth of our country entitle a pregnant woman to an induced abortion.

The *Abortion Cases* are regressive. They contravene *Ferguson v. Skrupa*.²¹ In that case, Justice Black, speaking for the Court, declared: "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."²² But the majority in the *Abortion Cases* did just that. It substituted its judgment for the judgment of the Texas and Georgia legislatures. Mr. Justice Stewart mentioned this in his concurring opinion in *Wade*, but felt bound by *Eisenstadt v. Baird*²³ which recognized:²⁴

"[T]he 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." That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy.

¹⁷ 413 U.S. 15, 40 (1973).

¹⁸ 291 U.S. at 105.

¹⁹ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

²⁰ Mr. Justice Rehnquist, in *Wade*, pointed out that the first state law dealing directly with abortion was enacted by the Connecticut legislature in 1821. 410 U.S. at 174.

²¹ 372 U.S. 726 (1963).

²³ 405 U.S. 438, 453 (1972).

²² *Id.* at 730.

²⁴ 410 U.S. at 169-70.

And that, in turn, necessarily means abortion on demand.

III. THE MOTHER

Mr. Justice Blackmun all but weeps about the miseries of motherhood:²⁵

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.

Mr. Justice Blackmun seems unconscious of the fact that women want children. The few who don't, and those who don't want any more, need not become pregnant. In view of easily available contraceptive devices, there is only a minimal possibility of an unwanted pregnancy.²⁶ It is incredible that not a single member of the Court mentioned this everyday fact of life. On the contrary, the majority decided on an either/or basis, either the miseries of motherhood or abortion.

Doe v. Bolton holds that a pregnant woman has a constitutional right to an abortion if a continuation of the pregnancy would endanger her life or seriously and permanently injure her health, according to the best clinical judgment of a duly licensed physician. The Court had previously held that the word "health" includes psychological as well as physical well-being and is not unconstitutionally vague.²⁷

What then is "health"? The World Health Organization has given us the answer: "Health is a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity."²⁸

²⁵ *Id.* at 153. Mr. Justice Douglas likewise sheds a tear. 410 U.S. at 214-16.

²⁶ The pill is better than 98 percent effective. The IUD is better than 96 percent effective. The diaphragm is 95 percent to 97 percent effective. The condom, when used with contraceptive foam, is better than 97 percent effective. These figures are taken from *BASICS OF BIRTH CONTROL*, a pamphlet produced and distributed by Planned Parenthood.

²⁷ *United States v. Vuitch*, 402 U.S. 62 (1971).

²⁸ *Constitution of the World Health Organization*, in *YEARBOOK OF THE UNITED NATIONS* 1946-47, Annex III, p. 793.

Mr. Justice Blackmun seems to agree:²⁹

We agree with the District Court . . . that the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health.

In view of the breadth of the meaning of health, as defined by the World Health Organization, and the statement by Mr. Justice Blackmun in which he uses much the same language, a pregnant woman is constitutionally entitled to an abortion for any reason or no reason—that is, abortion on demand. For approximately the first three months she needs no reason or excuse.³⁰ Thereafter she needs only to imagine, or magnify, or invent, some complaint and so persuade a practitioner, which will not be difficult, to do the procedure. She may be telling the truth; she may be a hypochondriac; she may be malingering. These possibilities present a real diagnostic problem that may resist solution. But time is of the essence. If there is to be an abortion, the sooner it is done the better; the longer it is put off the more dangerous it becomes. And remember that, according to the Court's opinion, not only physical but emotional, psychological, and familial factors, as well as the woman's age, are relevant for diagnostic purposes.³¹ So the pressure is very great to perform the abortion she insists on. And remember, too, that "[i]nduced abortions are a source of easy income for doctors."³² All this adds up to abortion on demand.

Yet, in his concurring opinion in *Bolton* the Chief Justice said:³³

I agree that, under the Fourteenth Amendment to the Constitution, the abortion statutes of Georgia and Texas impermissibly limit the performance of abortions necessary to protect the health of pregnant women, using the term health in its broadest medical context. . . .

. . . Plainly the Court today rejects any claim that the Constitution requires abortion on demand.

And Mr. Justice Blackmun said:³⁴ "*Roe v. Wade, supra*, sets forth our conclusion that a pregnant woman does not have an absolute

²⁹ 410 U.S. at 192.

³⁰ *Id.* at 164.

³¹ *Id.* at 192.

³² *Abortion in Japan after 25 Years*, 14 *MEDICAL WORLD NEWS* 37 (9 November 1973).

³³ 410 U.S. at 207, 208.

³⁴ *Id.* at 189.

constitutional right to abortion on her demand." It is a pity that neither Mr. Justice Blackmun, who wrote the Court's opinion, nor the Chief Justice, seems to have understood what the Court decided.

If a woman is poor she is entitled to an abortion at the public expense. In *Klein v. Nassau County Medical Center*,³⁵ a United States District Court held invalid a directive of the New York welfare commissioner that the defendant medical center refuse to perform abortions unless the procedure was medically indicated. The Supreme Court remanded the cases (both the commissioner and the medical center appealed) for further consideration in light of *Wade* and *Bolton*.³⁶

In primitive times . . . family life was dominated by the supreme power possessed by the father, which was lawfully exercised not only over the slaves of his household, but also over his wife and children. The pater familias had the option either to acknowledge the children borne by his wife (in which case he took the new-born child in his arms and raised it with a gesture that endowed it with legitimacy) or else to expose them out of doors, leaving them for anyone who wished to take them, which, in practice, amounted to condemning them to death, or at the best, to slavery.³⁷

The Supreme Court has endowed the modern woman with the same brutal power before her baby's birth that the Roman father possessed after his baby's birth.

So in response to the argument that abortion protects the mother's health, the Japanese experience indicates that her health may be adversely affected by termination of her pregnancy. Japan passed its Eugenic Protection Law in 1948. The following year 250,000 legal abortions were performed. In 1972 there were no fewer than 1.5 million abortions. What has been the effect? Dr.

³⁵ 347 F. Supp. 496 (E.D. N.Y. 1972). Not all states will pay the bill. See Butler, *The Right to Abortion under Medicaid*, 7 CLEARINGHOUSE REV. 713 (April 1974).

³⁶ 412 U.S. 925, 926 (1973).

³⁷ GRIMAL, *THE CIVILIZATION OF ROME* 119 (1963). See also CARCOPINO, *DAILY LIFE IN ANCIENT ROME* 77 (1940): ". . . until the beginning of the 3d century, when abandoning a child was considered the equivalent of murder, he [the Roman father] might expose his new-born child to perish of cold and hunger or be devoured by dogs on one of the public refuse dumps unless it was rescued by the pity of some passer-by."

T. A. Ueno, a professor at Tokyo's Nihon University, believes that³⁸

the sudden change from pregnancy causes an imbalance of the sympathetic nervous system and has many other ill effects. Among them: dysmenorrhea, sterility, habitual spontaneous abortion, extrauterine pregnancies, cramps, headaches, vertigo, exhaustion, sleeplessness, lumbago, neuralgia, debility and psychosomatic illness, perforation of the uterus, cervical lesions, infections, bleeding, and retention of some tissue.

"We can now say the law is a bad one," he told the International Academy of Legal and Social Medicine meeting in Rome; "The sooner Japan returns to a solid law which forbids the taking of the life of the unborn, the better for our nation."^{38a}

The ill effects of abortion have become plain elsewhere as well:³⁹

While abortion on demand is a growing trend in the U.S., another nation with a long history of free abortion—Czechoslovakia—has recently begun to tighten its liberal policy.

One reason: a rising incidence in premature births due to cervical scarring, which is the legacy of repeated abortion. Until recently, 6% of premature deliveries were the result of cervical incompetence; that figure has risen to 9% and continues to mount, according to a Czech official. To a large extent, the situation can be explained by the fact that only one Czech woman in ten uses any kind of contraceptive measure. Most count on their gynecologist to do the job. . . .^{39a}

³⁸ Note 32, *supra*. ". . . a growing number of women are turning against abortion. According to a survey conducted by the Prime Minister's Office, more than half of all married women have had at least one abortion. Of these 88 percent were against them. Forty percent said 'they were bad and should not be permitted,' while 48 percent felt that 'abortions were not good but could not be avoided.'"

"Women now want something better than abortion. They want reliable means of preventing unwanted pregnancies." Pearce, *Birth Crisis Seen in Japan*, South Bend Tribune, 26 July 1974, p. 15, col. 1.

^{38a} Note 32 *supra*.

³⁹ *Czechs Tighten Reins on Abortion*, 14 MEDICAL WORLD NEWS 106H, 106J (12 October, 1973).

^{39a} In Japan "About half the Japanese women who have abortions admit that they did not even try to prevent conception." See note 32, *supra*. The evidence, therefore, is squarely against Dr. Alan F. Guttmacher, president of Planned Parenthood, who said in a recent article: "Those who favor liberalization want to substitute safe abortion for the dangerous, clandestine variety, until contraception is so widely practiced that unwanted pregnancy—and therefore the need for abortion—disappears." (Emphasis supplied). See the November 1973, issue of *READER'S*

Drs. Vedra and Zidovsky [of the Institute for the Care of Mother and Child in Prague] are doubly concerned about the uprising in premature deliveries because their institution is known for high-quality obstetric care. The perinatal mortality rate stands at only 18 per 1000, one of the lowest in the world. And 70% of perinatal mortality can be attributed to prematurity, they stress.

Repeated abortion can have two effects: The cervix can become damaged and weakened, leading to spontaneous abortion or premature delivery; or the cavity of the endometrium can become damaged, leading to the formation of scar tissue and to spontaneous abortion. . . .

Another consequence of the abortion situation which Drs. Vedra and Zidovsky have noticed: a growing number of children born prematurely who must attend special schools because they are not as intelligent as their full-term peers.

IV. THE FATHER

The embryo does not put itself into the mother's uterus; it is begotten by a man. The child is as much his as hers; it is theirs. Has the father no right to a voice in the abortion decision? Inexplicably the Court completely disregards this question, except for Mr. Justice Blackmun's statement: "We are aware that some statutes recognize the father under certain circumstances."⁴⁰

The fact is that the Court itself has recognized rights of the father. It has held in three recent cases that an unwed father has a Fourteenth Amendment right to a hearing in custody and adoption proceedings. In *Stanley v. Illinois*⁴¹ the Court held unconstitutional Illinois statutes which presume that an unmarried father is unfit to have the care and custody of his offspring, and therefore is not entitled to a hearing as to his fitness in fact. Mr. Justice White there said:⁴²

It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."

DIGEST at 144. Dr. Guttmacher should know it doesn't work that way. Easy abortion *decreases* the use of contraceptives, and this *increases* the demand for abortion and the number of abortions performed.

⁴⁰ 410 U.S. at 165 n. 67.

⁴¹ 405 U.S. 645 (1972).

⁴² *Id.* at 651.

A few weeks after *Stanley*, the Court decided *Vanderlaan v. Vanderlaan*,⁴³ a custody case, and *Rothstein v. Lutheran Social Services of Wisconsin*,⁴⁴ an adoption case. In each case, the Court reversed a lower court, which had held against the father's rights, and remanded with instructions to reconsider in light of *Stanley*. Since a father, whether married or unmarried, has a constitutional right to be heard in proceedings for the custody or adoption of the child he has sired, how is it possible to say that, before birth, the child may be aborted without a putative father's consent?

If the mother, whether married or unmarried, has a constitutional right to an abortion, and the father, whether married or unmarried, is denied the right to veto the abortion, it seems to me that he is denied the equal protection of the law. This follows from the decision in *Stanley* in which the Court held (all members concurring):⁴⁵

Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and . . . by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied *Stanley* the equal protection of the law guaranteed by the Fourteenth Amendment.

So here. If the mother, who conceived the child, is entitled to an abortion and the father, who begot the child, is denied the right to protest, he is discriminated against. In *Doe v. Doe*⁴⁶ a husband specifically challenged the absence of a consent provision in the New York law. The couple involved had separated before the wife discovered she was pregnant. After the woman told her husband that she would have an abortion, he obtained a restraining order to stop her from terminating the pregnancy. Before *Doe* could serve the order, his wife entered a hospital and had her abortion. *Doe* then obtained an order compelling his wife to show cause why she should not be held in contempt of court for ignoring the injunction. *Doe* presented both constitutional and contractual arguments. These evidently did not impress the Court, which held the wife not in contempt. How could she be, since the abortion was performed before the restraining order was served on her? The important fact about the case, however, is that a restraining order was issued to protect the life of his offspring.

⁴³ 405 U.S. 1051 (1972). ⁴⁴ *Ibid.*

⁴⁵ 405 U.S. at 649.

⁴⁶ Nassau County Sup. Ct. (24 May 1972). See Note, *Consent Provisions in Abortion Statutes*, 1 FLA. STATE U.L. REV. 645, 654-55 (1973).

In the absence of a statutory provision requiring his consent, *Jones v. Smith*⁴⁷ held against a putative father who sought to restrain the mother of his unborn child from having an abortion. The Court bowed respectfully before *Wade* and *Bolton* but reached its decision primarily on state grounds. The Florida statute provided:⁴⁸

One of the following shall be obtained by the physician prior to terminating a pregnancy:

(1) The written request of the *pregnant woman and if she is married, the written consent of her husband, unless the husband is voluntarily living apart from the wife.*

The Florida court held:⁴⁹

The situation in the case under consideration involves neither a married woman nor a "husband." Moreover, the "consent" of a potential putative father is not included within nor is it required by the terms of the termination of pregnancy law. Therefore, if we were to resolve this question solely on the basis of the applicability of the Florida statute, the appellant would simply have no basis to claim his consent was necessary. . . .

. . . Our decision is based upon our interpretation of the decisions of the Supreme Court of the United States and Florida Statute 458.22, F.S.A., as they relate to the right of a potential putative father to enjoin the natural mother from terminating her pregnancy. No such "right" exists.

This case is inconsistent with *Stanley*. It denies the putative father the equal protection of the law.

If the child is the father's as much as the mother's, is not the surgeon who performs the abortion liable to the father who has been thus deprived of the child he begot? In *Touriel v. Benveniste*,⁵⁰

⁴⁷ 278 So.2d 339 (Fla. 1973), *cert. den.* 94 S. Ct. 1486 (1974).

⁴⁸ *Id.* at 342. The statute is quoted in the opinion and the emphasis was supplied by the court.

⁴⁹ *Id.* at 342, 344. A number of states require a father's consent to abortion. See, e.g., Wash. Rev. Code § 9.02.070 (1973 Supp.)

Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973) concerned Utah Code Annotated Title 76, c. 7. Unlike the Florida statute, the Utah Code requires that "[i]n all cases, consent must be given by the father of the fetus." The court held "all of the statutes and portions of statutes contested herein invalid *in toto*." It did not discuss the requirement that "consent must be given by the father of the fetus." No review was sought of the judgment in this case.

⁵⁰ Civil Docket No. 766790, Los Angeles Super. Ct., 20 October 1961. For a discussion of this case, see *The Expectant Father Protected: Tort Action Allowed against Abortions*, 14 STAN. L. REV. 901 (1962).

the husband sued the doctor who had performed an illegal abortion on plaintiff's wife without his consent. It was held that the plaintiff had a legally protectable interest in his unborn child, which was separate from his wife's interest and thus unaffected by her consent.

The Supreme Court has not spoken to this question. In this situation no prudent surgeon will perform an abortion without the consent of the father as well as the mother. For to do so would be to invite litigation. And litigation there will be. The Court has decided that the father has rights after birth. On what ground could it decide that he has no rights before birth? The *Abortion Cases* demonstrate that the Court can do strange things when it usurps legislative power. It can also change its collective mind and frequently has done so.⁵¹ The hospital where the abortion is done may also face the prospect of being sued by an unconsenting father.

V. THE CHILD IN THE WOMB

In *Wade*, the Court held that an unborn child is not a person "in the whole sense,"⁵² whatever that means, and thus is not entitled to the protection of the Fourteenth Amendment. Dean Prosser, however, had no difficulty in describing an unborn child as a person: "All writers who have discussed the problem have joined in condemning the old rule, and in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother."⁵³ *Webster's Third New International Dictionary* (Unabridged) defines "child" as follows: 1 a : an unborn or recently born human being : FETUS, INFANT, BABY.

In *Carver v. Hooker*, decided after the *Abortion Cases*, the district court said:⁵⁴

⁵¹ See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932) (Brandeis, J., dissenting).

⁵² 410 U.S. at 162.

⁵³ Prosser, *LAW OF TORTS* 336 (4th ed. 1971).

⁵⁴ 369 F. Supp. 204, 212, 215, 216 (D. N. H. 1973), *aff'd*, 43 U.S.L.W. 2057 (1st Cir. 18 July 1974), *cert. filed*, 43 U.S.L.W. 3138 (5 Sept. 1974). *Accord*, *Doe v. Lukhard*, 363 F. Supp. 823 (E.D. Va. 1973) *aff'd*, 493 F.2d 54 (4th Cir. 1974), *cert. filed*, 43 U.S.L.W. 3041, 24 May, 1974); *Green v. Stanton*, 364 F. Supp. 123 (N.D. Ind. 1973), *aff'd*, 499 F.2d 155 (7th Cir. 1974); *Wilson v. Weaver*, 358 F. Supp. 1147 (N.D. Ill. 1973), *aff'd*, 499 F.2d 155 (7th Cir. 1974); *Wisdom v. Norton*, 372 F. Supp. 1190 (D. Conn. 1974); *Whitfield v. Minter*, 368 F. Supp. 798 (D. Mass. 1973); *Stuart v. Canary*, 367 F. Supp. 1343 (N.D. Ohio 1973); *Harris v. Mississippi State Dept. of Public Welfare*, 363 F. Supp. 1293 (N.D. Miss. 1973); *Alcala v. Burns*, 362

The narrow question for consideration here is whether or not New Hampshire's practice of denying the unborn children of otherwise childless women AFDC [i.e., aid for families with dependent children] benefits conflicts with the Social Security Act and is, therefore, illegal under the Supremacy Clause of the Constitution. Cast in these terms, the problem is the familiar one of statutory interpretation: Does the phrase "dependent child," as used in the Social Security Act, include the unborn children of otherwise pregnant women? . . .

. . . one major continuing Congressional concern has been the development and expansion of prenatal care programs. This policy is inconsistent with the exclusion of unborn children from the definition of "dependent children" and the consequent denial of AFDC benefits to pregnant women, whether otherwise childless or not. . . .

New Hampshire's practice of denying AFDC benefits to otherwise childless pregnant women is in conflict with the Social Security Act and, therefore, violates the Supremacy Clause. Plaintiffs are entitled to a permanent injunction enjoining defendants from denying them AFDC benefits on this basis.

In a Canadian case, *Reynolds v. Reynolds*,⁵⁵ the Supreme Court of Ontario issued a temporary order restraining "the defendants, and each of them, their servants and agents, and anyone on their behalf . . . from taking the life of the infant Plaintiff either by performing or undergoing an abortion." Thereupon the mother, a defendant, agreed to bear her child, which she did. A similar case had been disposed of in the same way a year earlier.⁵⁶

In both Canadian cases the Therapeutic Abortion Committee of the hospital in question had recommended a therapeutic abortion.

F. Supp. 180 (S.D. Iowa 1973), *cert. granted*, 43 U.S.L.W. 3208, 15 Oct. 1974. *Contra*, Parks v. Harden, 354 F. Supp. 620 (N.D. Ga. 1973).

See also Wagner v. Finch, 413 F.2d 267, 268-69 (5th Cir. 1969): ". . . the illegitimate child of a deceased father, conceived before but born after, the father's death, is sufficiently 'in being' to be capable of 'living with' the father at the time of his death. The fact that a worker dies before the birth of a child already 'in being' is no legal or equitable reason to prohibit that child from benefits." And see Kyne v. Kyne, 38 Cal. App.2d 122, 127 (1940). Held: An unborn child may bring suit by a guardian *ad litem* to compel the father to provide support. The Court said: "Obviously, a child must be supported both before, as well as after, birth. It is clearly to the best 'interests' of the child that its father be compelled to support it, if the mother cannot, prior to its birth. [Support: food, shelter, etc.]"

⁵⁵ No. 864, S. Ct. of Ontario, 1 November 1973.

⁵⁶ Roe v. Riverside Hospital, No. 70, S. Ct. of Ontario, 26 January 1972.

Yet in both cases delivery was normal and the mother suffered no ill effect.⁵⁷ These cases indicate the unreliability of medical advice that a therapeutic abortion is necessary.^{57a}

Professor John T. Noonan, Jr., has pointed out that the mother's personal right of privacy, on which the Court professes to rely in *Wade*, had escaped attention for over a century.⁵⁸ The Court thus gives the Constitution an evolving meaning. In respect of "person," as used in the Fourteenth Amendment, on the other hand, the Court gives the Constitution a static meaning. "Person" means exactly what it meant when the Constitution was adopted. This is another of the Court's inconsistencies.

Instead of the incomplete history to which he devoted so many pages in *Wade*—incomplete because it contains no syllable concerning the genesis, purpose, and adoption of the Fourteenth Amendment—Mr. Justice Blackmun would have been well advised to turn to modern science. If he had, he could not have written, as he did:⁵⁹

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.

In fact, of course, the Court decides that life does not begin before live birth. This follows from its repeated references to the

⁵⁷ The Reynolds baby suffered a dislocated hip. It is not known whether this happened before, during, or after delivery. In any case, a baby's dislocated hip can be corrected with little or no difficulty, provided the condition is detected within three months after birth.

^{57a} There was filed in the *Reynolds* case, a lengthy affidavit by an experienced obstetrician and gynecologist, Andreas J. Nuyens, detailing the development of a fetus in support of his conclusion: "Modern science makes it irrefutably clear that the unborn offspring of human parents is in fact an autonomous human being qualitatively no different from the born offspring."

⁵⁸ 25 NATIONAL REVIEW, 2 March, 1973, 260, 262-63. At page 262 of the same article Professor Noonan describes the page after page of history which Mr. Justice Blackmun recounts (but does not rely on) in *Wade* as "undigested," indeed "untasted," and as a "charade." Of the Court's holding he says, at 264: "What it is appropriate for the state to protect is not a human being, but a human being with the 'capability of meaningful life.'" Professor Noonan concludes: "Our old way of looking on all human existence as sacred is to be replaced by a new ethic more discriminating in choosing who shall live and who shall die. The concept of 'meaningful life' is at the core of these decisions."

⁵⁹ 410 U.S. at 159.

“potential” life of the fetus. Thus, with characteristic inconsistency, the Court does what Mr. Justice Blackmun says it is “not in a position to do.”

As suggested above, the Court could have avoided this self-contradiction if it had consulted modern science. Thus Dr. Jerome Lejeune, a French geneticist of international fame who discovered the chromosome abnormality responsible for mongolism, declared at a symposium in Quebec:⁶⁰

[Life] begins . . . at conception. This is not questioned by any scientific person.

The fetus is a human being. Genetically he is complete. This is not an opinion, it is a fact. . . . At sixty days . . . the whole man is already there. His finger prints are formed. You could read his palm and give him his identity card.

Dr. Thomas W. Hilgers, former Fellow in Obstetrics and Gynecology at the Mayo Graduate School of Medicine and now teaching at St. Louis University, agrees with Dr. Lejeune. He has written:⁶¹

There is no scientific evidence which would indicate that human life begins at any other point than the moment of conception (i.e., the union of the egg from the female and the sperm from the male).

In the midst of the abortion debate, a great deal of time has been spent on arguing when life begins. It is unfortunate that so much time has been spent on this question, since the answer had been known for decades. Human life begins at the moment of conception—at that moment when sperm and egg unite—and that is a scientific fact! It is at this moment that a totally new and unique individual, never before in existence and never again to be duplicated, comes to be.

Mr. Justice Blackmun repeatedly speaks of “the” patient. In fact there are two patients, the pregnant woman and her unborn child. Dr. Hilgers wrote:⁶²

Over the last several years, medicine has developed new techniques whereby the unborn child can be treated while still in the womb. The first major development was about ten years ago when Dr. A. W. Liley, an obstetrician from Auckland,

⁶⁰ *Le Devoir* (Montreal), 6 May, 1974, p. 3, col. 1. Translated from the French by Jeanne Rodes.

⁶¹ *INDUCED ABORTION*, 1 (2d ed. 1973). ⁶² *Id.* at 9–10.

New Zealand, first performed an intrauterine transfusion to treat an infant afflicted with Rh disease. This marked the beginning of the new science of fetology, the study of the unborn, and Dr. Liley is generally considered to be the "father of fetology."

Since that time a number of other advances have been made, the most dramatic of which has been the direct surgical operation on the unborn. A pioneer in this field, Dr. Stanley Asensio, of the University of Puerto Rico School of Medicine, has actually taken the fetus out of the mother's womb, performed the operation and then placed him back into the womb only to be later delivered as a healthy, normal child. The operation is so delicate that the surgeon must use fluid-filled gloves when handling his tiny patient.

The study of the unborn is still a relatively new science and yet, in its short existence, it has put into perspective what the obstetrician has known for years, i.e., when working with the pregnant woman, there are two patients to be considered.

A therapeutic abortion is seldom required.^{62a} It is necessary in the case of cancer of the uterus and conception in the fallopian tube; in these situations, unless it is done, the death of *both* mother and child is a virtual certainty. There may be other conditions indicating a therapeutic abortion, but they are rare and diminishing.⁶³

A woman determined to have an abortion experiences little difficulty in obtaining medical advice that a termination of her pregnancy is indicated on therapeutic grounds. Since this is so, should not the fetus be entitled to representation? Its life is at stake, and will be extinguished for no better reason than that a physician or committee of physicians, has certified that the mother's life or health requires it. Considerations of decency and fairness, civilized instincts, demand the appointment of a guardian *ad litem* to cross-examine those who have condemned the fetus to death and to produce evidence to rebut the medical reasons advanced in support of the abortion decision. Mr. Justice Blackmun acknowledged that "unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians ad litem."⁶⁴ How much more appropriate, indeed necessary, when life is at stake?

^{62a} For descriptions of the methods of abortion in general use, see HILGERS & HORAN, eds., *ABORTION AND SOCIAL JUSTICE* 2913 (1972).

⁶³ *Id.* at 37-52.

⁶⁴ 410 U.S. at 162.

In *Byrn v. New York City Health and Hospital Corp.*,⁶⁵ plaintiff was a guardian *ad litem* for infant Roe and all similarly situated members of a class of unborn infants scheduled for abortion in public hospitals under the operation and control of defendant. In that capacity plaintiff sought a declaratory judgment that New York's 1970 abortion "liberalization" statute was unconstitutional. The Court conceded that an unborn child "is human, if only because it may not be characterized as not human and it is unquestionably alive." It held, nevertheless (two judges dissenting), that the question of conferring legal personality on the unborn was a matter of policy to be decided by the legislature. But no member of the Court questioned either the propriety of plaintiff's appointment as guardian *ad litem* or the propriety of his action in filing suit in that capacity. And in *Klein v. Nassau County Medical Center*⁶⁶ a guardian *ad litem* was permitted to intervene.

In *Raleigh Fitkin—Paul Morgan Memorial Hospital v. Anderson*⁶⁷ the hospital brought an action seeking authority to administer blood transfusions to defendant if they should become necessary to save her life and the life of her unborn child. Defendant had notified the hospital that she did not wish blood transfusions for the reason that they would be contrary to her religious convictions as a Jehovah's Witness. The Court held:⁶⁸

We are satisfied that the unborn child is entitled to the law's protection and that an appropriate order should be made to insure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge at the time.

We have no difficulty in so deciding with respect to the infant child. . . .

The judgment [which had been against the hospital] is accordingly reversed and the matter remanded to the trial court with directions (1) to appoint a special guardian for the infant; (2) to substitute such guardian as party plaintiff; (3) to order the guardian to consent to such blood transfusions as may be required to preserve the lives of the mother and child; and (4) to direct the mother to submit to such blood trans-

⁶⁵ 31 N.Y. 2d 194 (1972), *app. dism.*, 410 U.S. 949 (1973).

⁶⁶ 347 F. Supp. 496 (E.D. N.Y. 1972).

⁶⁷ 42 N.J. 421 (1964), *cert. den.* 377 U.S. 985 (1964).

⁶⁸ *Id.* at 423-24.

fusions and to restrain the defendant husband from interfering therewith.

Thus the Court placed a higher value on preserving the life of the unborn child than on the constitutional guarantee of freedom of conscience and of religion.

VI. THE HOSPITAL

In *Doe v. Bellin Memorial Hospital*⁶⁹ the plaintiff sought an injunction requiring the hospital to make its facilities available to her for an abortion. The Court upheld the hospital's refusal, saying:⁷⁰

There is no constitutional objection to the decision by a purely private hospital that it will not permit its facilities to be used for the performance of abortions. We think it is also clear that if a state is completely neutral on the question whether private hospitals shall perform abortions, the state may expressly authorize such hospitals to answer that question for themselves.

The Georgia abortion statute which was reviewed in *Doe v. Bolton* . . . contained such a provision. The Supreme Court did not expressly pass on the validity of that provision, but since it was attacked in one of the amicus briefs, and since the Court reviewed the entire statute in such detail, it is reasonable to infer that it considered such authorization unobjectionable.

Thus, we assume that there is no constitutional objection to a state statute or policy which leaves a private hospital free to decide for itself whether or not it will admit abortion patients or to determine the conditions on which such patients will be accepted.

The hospital was the recipient of funds under the Hill-Burton Act and was subject to detailed regulation by the State of Wisconsin. These facts were apparently regarded as irrelevant by the Court.

In Indiana the attorney general has ruled that public as well as private hospitals may refuse abortion patients.⁷¹

⁶⁹ 479 F.2d 756 (7th Cir. 1973). *Accord*, *Watkins v. Mercy Medical Center*, 364 F. Supp. 799 (N.D. Idaho, 1973); *Allen v. Sisters of St. Joseph*, 361 F. Supp. 1212 (N.D. Tex. 1973); *aff'd*, 490 F.2d 81 (5th Cir. 1974); *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974).

⁷⁰ 479 F.2d at 759-60.

⁷¹ Official Op. No. 9 (19 April 1974). This ruling is contrary to the cases which

VII. TURNING BACK THE CLOCK

As I said above, the *Abortion Cases* have overruled, *sub silentio*, *Ferguson v. Skrupa*, in which Justice Black, speaking for the Court, said: "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."⁷²

In *Munn v. Illinois* the Court held: "For protection against abuses by legislatures the people must resort to the polls, not to the courts."⁷³ *Lochner v. New York*⁷⁴ and *Tyson v. Banton*⁷⁵ are back in the saddle again. In the latter case Justice Holmes, dissenting, said:⁷⁶

I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.

His dissent, which was joined by Justice Brandeis, eventually was accepted as the law, and the question became whether or not such laws as those challenged in *Wade* and *Bolton* have a rational relation to a valid state objective.⁷⁷ In view of *Wade* and *Bolton*, nobody can say that is still the law.

VIII. AN ALTERNATIVE

It is common knowledge that many people wish to adopt a baby. Unhappily the demand exceeds the supply; there aren't enough babies to go around. Hence would-be adoptive parents are put on a waiting list. In view of *Stanley*, the consent of the father,

hold that a public hospital must allow abortions in the first trimester of pregnancy. Cf. *Hathaway v. Worcester City Hospital*, 475 F.2d 701 (1st Cir. 1973); *Doe v. Hale Hospital*, 500 F.2d 144 (1st Cir. 1974). There appears to be no absolute duty to allow abortions in the second and third trimesters. *Nyberg v. City of Virginia*, 495 F.2d 1342 (8th Cir. 1974), *cert. den.*, 95 S. Ct. 169 (1974).

⁷² 372 U.S. at 730.

⁷³ 94 U.S. 113, 134 (1876).

⁷⁴ 198 U.S. 45 (1905).

⁷⁵ 273 U.S. 418 (1927).

⁷⁶ *Id.* at 446.

⁷⁷ See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955).

if he is known, should now be required. If he refuses his consent, the baby is placed in a foster home pending the outcome of judicial proceedings. Thus adoptive parents must wait two or three years before their wish is fulfilled. If there were fewer abortions, there would be more babies to adopt.

IX. CONCLUSION

The *Abortion Cases* have settled nothing. They are full of contradictions and non sequiturs, so lacking in any basis in the Constitution or prior cases that they cannot stand. Even those who, for whatever reason, advocate abortion must deplore the Court's shoddy performance, devoid of judicial craftsmanship, in these inexcusable cases. Like *Minersville School District v. Gobitis*⁷⁸ and *Roth v. United States*,⁷⁹ sooner or later they will be reversed, expressly or *sub silentio*.

Indeed, the reversal process already has begun. In *Bolton* the Court held:⁸⁰

Appellants and various *amici* have presented us with a mass of data purporting to demonstrate that some facilities other than hospitals are entirely adequate to perform abortions if they possess these qualifications [that is, all the staffing and services necessary to perform an abortion safely]. The State, on the other hand, has not presented persuasive data to show that only hospitals meet its acknowledged interest in insuring the quality of the operation and the full protection of the patient. We feel compelled to agree with appellants that the State must show more than it has in order to prove that only the full resources of a licensed hospital, rather than those of some other appropriately licensed institution, satisfy these health interests.

The Chief Justice concurred.

Five months later (on 21 June 1973) that portion of *Bolton* quoted in the preceding paragraph was reversed *sub silentio* by *Paris Adult Theatre I v. Slayton*.⁸¹ The opinion in that case was written by the Chief Justice (Mr. Justice Blackmun concurring), and the Court held:⁸²

⁷⁸ 310 U.S. 586 (1940).

⁷⁹ 354 U.S. 476 (1957).

⁸⁰ 410 U.S. at 195.

⁸¹ 413 U.S. 49 (1973).

⁸² *Id.* at 61-63.

From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. . . . On the basis of these assumptions both Congress and state legislatures have, for example, drastically restricted associational rights by adopting antitrust laws, and have strictly regulated public expression by issuers of and dealers in securities, profit sharing "coupons" and "trading stamps," commanding what they must and may not publish and announce. . . .

. . . The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional.

If we accept the unprovable assumption that a complete education requires certain books . . . and the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior? . . . The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

Thus *Bolton* holds that the state has the burden of producing empirical data to support its statutes, while *Slayton* holds that the state need not produce empirical data but may rely on unprovable assumptions.

Slayton was decided five months after *Wade*. Five months after *Slayton*, on 5 December 1973, *North Dakota State Board of Pharmacy v. Snyder's Drug Stores*⁸³ was decided. In *Wade* the Court relied on the "compelling state interest" test.⁸⁴ In the *North Dakota* case the Court says nothing about a "compelling state interest." What it does is to adopt the position of the dissent of Mr. Justice Rehnquist in *Wade*, as follows:⁸⁵

The test traditionally applied in the area of social and economic legislation is whether or not a law such as that chal-

⁸³ 414 U.S. 156 (1973).

⁸⁴ 410 U.S. at 155.

⁸⁵ *Id.* at 173.

lenged has a rational relation to a valid state objective.
Williamson v. Lee Optical Co., 384 U.S. 483, 491 (1955).

And so on. The *Abortion Cases* will not last. Sooner or later those monstrous cases will join the long and lengthening list of cases in which the Court has reversed itself. More than forty years ago Justice Brandeis, dissenting in *Burnet v. Coronado Oil & Gas Co.*⁸⁶ collected a goodly number of cases in which the Court had reversed itself. His list would be much longer today and continues to grow. This willingness to correct its mistakes is a tribute to the Court. In time it will correct the mistake it made in the *Abortion Cases*.⁸⁷

⁸⁶ 285 U.S. 393, 406 n. 1, 407 n. 2 (1932).

⁸⁷ Senator Hatfield has said: "Abortion is a form of violence. That is the undeniable reality. Like the war in Indochina, it is the destruction of life. It furthers the dehumanization of life. It cheapens life.

"Abortion is not a Catholic issue. Indeed, as a non-Catholic, I have joined Sen. James L. Buckley (Cons.—N.Y.) and Sen. Harold E. Hughes (D—Iowa) in introducing Senate Joint Resolution 19. This constitutional amendment, cosponsored by five other senators, would restore the fundamental right to parenthood." Hatfield, *On Many Fronts We Have Lost Respect for Human Life*, Los Angeles Times, 8 August, 1973, Part II at 7.