Journal of Criminal Law and Criminology

Volume 64 | Issue 4 Article 2

1974

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ABORTION

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In *Roe v. Wade*[1] a pregnant single woman brought a class action against the Texas criminal abortion statute which only allowed abortions "for the purpose of saving the life of the mother."[2]

Confronted with one of the most emotional and controversial issues ever before the Supreme Court of the United States—the right of a woman to abort an unborn fetus—Justice Blackmun's majority opinion relied heavily on current medical knowledge in delineating the various interests involved in the abortion decision. Holding the statute unconstitutionally overbroad, the Court ruled that the abortion decision is entirely within the province of the woman and her doctor during the first three months of pregnancy. State interests in the second trimester were limited to regulation of abortion procedures to protect the health of the mother. Once the fetus reaches viability during the third trimester, however, the Court held that the state has a legitimate interest in prohibiting any abortion other than one to preserve the life or health of the mother.

The Court in *Doe v. Bolton*,[3] a companion case, dealt with various procedural requirements imposed by the State of Georgia upon persons seeking abortions.[4] While striking down provisions requiring that (1) the hospital performing the abortion be accredited by the Joint Committee on Accreditation of Hospitals, (2) the abortion be approved by a hospital abortion committee, and (3) judgment of the patient's physician be confirmed by two other doctors, the Court upheld the hospital's right to decide whether it would allow abortions and the right of physicians and hospital employees to refrain from participating in such operations for moral or religious reasons.

Mr. Justice Blackmun's opinions, supported by six other Justices of the Court,[5] mark an expansion of an individual's right to personal privacy, as well as a possible rejuvenation of the concept of substantive due process.

The movement for more liberal abortion laws undoubtedly received much of its impetus in 1962 when Sherri Finkbine made her highly publicized trip to Sweden to have her thalidomide-deformed fetus aborted. At that time virtually all of the states prohibited abortion except to save or preserve the life of the mother, while the remaining few states allowed abortions to preserve the mother's health.[6] The Model Penal Code of the American Law Institute which was proposed later that year, however, contained provisions permitting abortions if the doctor believes there is a substantial risk that (1) continuance of the pregnancy would gravely impair the physical or mental health of the mother, (2) the child would be born with a grave physical or mental defect or (3) the pregnancy resulted from rape, incest or other felonious intercourse.[7] The first state to pattern a statute after this suggested provision was Colorado in 1967.[8] Almost one-third of the states had similar abortion statutes when Jane Roe brought her action against the Texas abortion statute in March 1970.[9] Twenty-one other states, in contrast, then had criminal abortion statutes on their books which were passed between 1835 and 1868.[10] By the end of 1970 only four states had repealed criminal penalties for abortions performed in the early states of pregnancy.[11]

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

[2] VERNON'S ANN. TEX. P. C. art. 1191–94, 1196 (1961).

[3] 410 U.S. 179 (1973).

[4] The Georgia abortion statute, GA. CODE ANN. §§ 26-1201–03 (1968), was patterned after the ALI Model Penal Code which suggests allowing abortions in three situations (*see* n. 6 and text *infra*). The limitation of abortions to those specific situations was held invalid by a federal district court but that court refused to strike down other provisions regulating the manner of making the decision to abort as well as the performance of the abortion. 319 F. Supp. 1048 (N.D. Ga. 1970). Due to an appeal by the defendants pending before the Fifth Circuit on the portion of the statute held unconstitutional, the Supreme Court in Doe v. Bolton confined its examination to the issues raised by the plaintiffs' appeal challenging the constitutionality of those remaining procedural provisions.

[5] Justice Blackmun delivered the opinion of the Court in which Chief Justice Burger and Justices Douglas, Brennan, Stewart, Marshall and Powell joined. Chief Justice Burger and Justices Douglas and Stewart filed concurring opinions. Justice White filed a dissenting opinion in which Justice Rehnquist joined. Justice Rehnquist filed a dissenting opinion.

[6] 410 U.S. at 139 nn. 34, 35.

[7] MODEL PENAL CODE, § 230.3 (Proposed Official Draft, 1962).

[8] COLO. REV. STAT. ANN. §§ 40-2-50 to 53 (Penn. Cum. Supp. 1967).

[9] 410 U.S. at 140 n.37.

[10] *Id.* at 176–77 n.2 (Rehnquist, J., dissenting).

[11] *Id.* at 140 n.37.

This divergent treatment of the abortion question is reflected in court decisions involving such statutes.[12] Since 1969, seven state laws prohibiting abortions except for preserving the life of the mother have been held unconstitutional by federal district and state supreme courts,[13] while seven similar state statutes have been upheld.[14] In addition, two state laws modeled after the Model Penal Code were held constitutional[15] while one was held unconstitutional.[16]

People v. Belous,[17] decided by the California supreme court in 1969, was the first decision to declare a criminal abortion statute unconstitutional and its reasoning is typical of similar holdings which followed. The California court found:

> The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's 'right of privacy' or 'liberty' in matters related to marriage, family, and sex.[18]

Then, stating that a compelling state interest is necessary to override a fundamental right, the court acknowledged the state interest in protecting the health of the pregnant mother but found it insufficient to outweigh the countervailing right to privacy of the woman.

Because the California Legislature amended its abortion statute subsequent to the filing of Dr. Belous' action,[19] the *Belous* court merely held the old statute unconstitutional. Noting that therapeutic abortions in the first trimester are safer than childbirth, the court commented that the legislative intent to protect the mother might be fulfilled by permitting abortions when their mortality rate is less than that of childbirth. Four other courts which held abortion statutes unconstitutional reasoned in a similar manner and limited abortions to the early stages of pregnancy.[20]

Most of the courts which upheld abortion laws recognized a woman's right to privacy and then asked whether a compelling state interest exists to justify abridging such a right. The "potential to become a person," [21] the "universal belief in the sanctity of human life; ... potential or otherwise," [22] and the constitutional rights of the fetus as a person,[23] were among the interests which those courts found to be superior to the pregnant woman's right to personal privacy. Several of the courts which refused to hold abortion laws uncon-

[12] The Supreme Court's decision in United States v. Vuitch, 402 U.S. 62 (1971), apparently added to the confusion. In that case the Court reversed a district court's ruling that a District of Columbia criminal abortion statute was unconstitutionally vague in its exception permitting abortions when necessary to preserve the mother's life or health. As a result, some courts and legal scholars felt the Supreme Court was "of no mind to strike down all substantive limitations on abortions." Sigworth, *Abortion Laws in the Federal Courts—the Supreme Court as Supreme Platonic Guardian*, 5 IND. LEG. F. 130, 133 (1971). The *Vuitch* Court, however, did qualify the statute by (1) placing the burden on the prosecution to prove that a physician's decision was not within the statutory exception, (2) requiring an implied presumption that the physician acted in good faith and (3) interpreting health to include mental health. The Florida supreme court, as a consequence, held in State v. Barquet, 262 So. 2d 431 (Fla. 1972), that the state abortion statute was unconstitutionally vague, but cited *Vuitch* as the primary support for its dicta:

> If the statutes contained a clause reading 'necessary to the preservation of the mother's life *or health*,' instead of the clause 'necessary to preserve *the life*,' the statutes could be held constitutional.

262 So. 2d at 433.

A reading of the *Vuitch* opinion, however, indicates that it is not inconsistent with *Roe* since the Court in *Vuitch* specifically stated it had only dealt with the vagueness issue, thus bypassing privacy arguments based on *Griswold*.

[13] Y.W.C.A. v. Kugler, 342 F. Supp. 1048 (D. N.J. 1972); Abele v. Markle, 342 F. Supp. 800 (D. Conn. 1972); Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971); Roe v. Wade, 314 F. Supp. 1217 (N.D. Texas 1970); Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970); People v. Belous, 71 Cal. 2d 954, 458 P.2d 194 (1969), *cert. den.*, 397 U.S. 915 (1970); State v. Barquet, 262 So. 2d 431 (Fla. 1972).

[14] Crossen v. Attorney General, 344 F. Supp. 587 (E.D. Ky. 1972); Doe v. Rampton, — F. Supp. — (D. Utah 1971); Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970); Rosen v. La. State, 318 F. Supp. 1217 (E.D. La. 1970); Cheaney v. Indiana, 285 N.E.2d 265 (Ind. 1972); State v. Abodeely, 179 N.W.2d 347 (Iowa 1970); State v. Munson, 201 N.W.2d 123 (S.D. 1972).

[15] Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971); Spears v. State, 257 So. 2d 876 (Miss. 1972).

[16] Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970).

[17] 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

[18] *Id.* at 963, 458 P.2d at 199, 80 Cal. Rptr. at 359.

[19] CALIF. HEALTH & SAFETY CODE §§ 25955.5–25959 (West Supp. 1972).

[20] Y.W.C.A. v. Kugler, 342 F. Supp. 1048, 1072 (D. N.J. 1972) ("in its early stages"); Abele v. Markle, 342 F. Supp. 800, 804 (D. Conn. 1972) ("within an appropriate period after conception"); Doe v. Scott, 321 F. Supp. 1385, 1391 (N.D. Ill. 1971) ("at least during the first trimester"); Babbitz v. McCann, 310 F. Supp. 293, 301 (E.D. Wis. 1970) ("four months or less"). The decision in State v. Barquet, 262 So. 2d 431 (Fla. 1972), achieved virtually the same result by holding the entire Florida abortion law unconstitutional, thereby allowing the common law to become applicable.

[21] State v. Munson, 201 N.W.2d 123, 127 (S.D.1972).

[22] Crossen v. Attorney General, 344 F. Supp. 587, 591 (E.D. Ky. 1972).

[23] Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970).

stitutional specified that any changes in those statutes would have to be made by their state legislatures,[24] though one expressed the belief that the statute needed reform.[25]

The central issue of the abortion cases, therefore, involves the weighing of the woman's right to personal privacy which encompasses the right to terminate her pregnancy against the right to life of the fetus as well as the State's concern for the mother's health and for potential human life. The willingness of a court to perform such a balancing, rather than to leave it for a legislative determination, also was a factor.

Roe presented these issues squarely before the Supreme Court. Jane Roe, a pregnant single woman, brought a class action seeking a declaratory judgment that the Texas criminal abortion laws were an unconstitutional violation of her right to choose to terminate her pregnancy; she also sought an injunction restraining the defendant, a county district attorney, from enforcing the statutes. She based her claimed right on the concept of personal liberty found in the due process clause of the fourteenth amendment, the right to privacy protected by the Bill of Rights and its penumbras as recognized in *Griswold v. Connecticut*,[26] or the rights reserved to the people by the ninth amendment.

A three-judge district court declared the Texas statute void for vagueness and overbreadth.[27] It held that the choice of whether to have children is a fundamental right of single women and married couples protected by the ninth amendment through the fourteenth amendment. The court did not make any detailed inquiry into countervailing state interests, stating that "even compelling state interests will not save it from the consequences of unconstitutional overbreadth." [28] The judges refused to provide any guidelines for abortion decisions, finding it "sufficient to state that legislation concerning abortion must address itself to more than a bare negation of that right." [29]

The Supreme Court's approach was somewhat different. After resolving the questions of standing and justiciability, Justice Blackmun's majority decision surveyed the history "of man's attitudes toward the abortion procedures over the centuries," [30] beginning with ancient attitudes and working through the common law to English and American statutory law in the nineteenth and twentieth centuries. The purpose of this background was apparently to show the historical distinctions between quickening, the first recognizable movement of the fetus in utero occurring at approximately the 16th to 18th week of pregnancy, and viability, the ability of the fetus to exist outside the mother's body beginning the 24th to 28th week of pregnancy.[31]

The Court then outlined the various interests arising out of the abortion decision. The pregnant woman's interest was said to stem from her right to personal privacy. Encompassed within this concept of privacy are the fundamental rights to marry, procreate, raise children and use contraceptives. Contrary to the district court's focus on the ninth amendment, the Court expressed its belief that this right of privacy is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state actions . . . [and is] broad enough to encompass a woman's decision whether or not to terminate her pregnancy." [32]

In an apparent attempt to provide some boundaries to this right of personal liberty, the Court specified:

> . . . it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions.[33]

As a consequence, the right had to be qualified and considered against the other interests involved. Because this right of privacy which includes the decision to abort a pregnancy is fundamental, the Court held that only a compelling state interest and a narrowly drawn statute would justify its regulation.[34]

Although the Court recognized that the fetus itself would have a right to life if a "person" within the meaning of the fourteenth amendment, it could

[24] Cheaney v. Indiana, 285 N.E.2d 265, 269 (Ind. 1972); State v. Munson, 201 N.W.2d 123, 127 (S.D. 1972).

[25] Crossen v. Attorney General, 344 F. Supp. 587, 591 (E.D. Ky. 1972).

[26] 381 U.S. 479 (1965).

[27] Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970).

[28] *Id.* at 1223.

[29] *Id.* at 1224.

[30] 410 U.S. at 117.

[31] The survey also indicated that during most of the nineteenth century "a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today." *Id.* at 140.

[32] *Id.* at 153.

[33] *Id.* at 154.

[34] The Court noted that these principles had been applied in lower court decisions on the constitutionality of abortion laws. *Id.* at 156.

find no constitutional or common law basis for such a contention. This conclusion, however, did not provide an answer to Texas' argument that, notwithstanding the fourteenth amendment, life begins at conception and, therefore, the State has a compelling interest in protecting that life. The Court attempted to circumvent the religious and moral problems presented by this contention with the statement:

> 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.[35]

The opinion then examined some of the situations in which the unborn have been held to have legal rights. Wrongful death cases for stillborn children were distinguished by the fact that such actions vindicate the interests of the parents. Similarly, property rights of unborn children were distinguished because of the fact that a live birth generally is needed to perfect them. As a result, the Court concluded, "the unborn have never been recognized in the law as persons in the whole sense." [36]

Modern medical techniques and statistics showing mortality rates for normal childbirth to be higher than rates for abortions in the early stages of pregnancy were given as reasons for holding the State's interest in the health of the mother to be less than compelling in the first trimester. The increase in mortality rates for abortions as pregnancy progresses results in a proportionate increase in the state interest in protecting the mother.

The various interests of the State in the health of the mother and in the potentiality of human life become compelling at different points during the pregnancy. At those points the State may impose reasonable regulations to protect the particular interest. Thus, the mother's interest predominates in the first trimester. During that period the woman *and* her physician are free to determine whether the pregnancy should be terminated without regulation by the State. Among the factors to be considered by the physician and the mother at that time are the possibility of "a distressful life and future" [37] for the mother and the rest of her family and the "problem of bringing a child into a family already unable, psychologically and otherwise, to care for it." [38] The second trimester is a period in which the state interest in the mother's health is substantial enough to allow regulation of "the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." [39] The state interest in potential life becomes compelling when viability is attained, allowing the State to "go so far as to proscribe abortion during that period except when it is necessary to preserve the life or health of the mother." [40] Finally, the Court held that states may prohibit anyone but duly licensed physicians from performing abortions. The Texas statute was then held unconstitutional for violating the due process clause of the fourteenth amendment.

Before analyzing the Court's reasoning in *Roe*, its decision in the companion case of *Doe* deserves mention because of its elaboration on certain procedural requirements contained in abortion statutes.[41]

The Court held that the portion of the Georgia statute requiring a doctor's "best clinical judgment that an abortion is necessary" [42] was not vague because of the latitude given the physician in his decision. As in *Roe*, a broad range of factors was listed as bearing upon the physician's decision: "physical, emotional, psychological, familial and the woman's age . . . [a]ll these factors may relate to health." [43]

The statute's required concurrence of two other physicians[44] was ruled unconstitutional since no other medical or surgical procedure necessitates such a confirmation and because a licensed physician's best clinical judgment should be sufficient. It should be noted, however, that the decision does not strike the requirement that the doctor reduce his decision to writing even though it is doubtful that other medical or surgical procedures entail such a report.

The requirement that the abortion be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals[45] was held not to be

[35] *Id.* at 159.
[36] *Id.* at 162.
[37] *Id.* at 153.
[38] *Id.*
[39] *Id.* at 163.
[40] *Id.* at 163–64.
[41] *See* note 4 *supra*. In addition to Mary Doe, the Court held that the physician-appellants had standing and presented a justiciable controversy because of their assertion of "a sufficiently direct threat of personal detriment." 410 U.S. at 188.
[42] GA. CODE ANN. § 26-1202(a) (1968).
[43] 410 U.S. at 192.
[44] GA. CODE ANN. § 26-1202(b)(3) (1968).
[45] *Id.* § 26-1202(b)(4).

"reasonably related to the purposes of the Act." [46] The Court qualified this holding by suggesting that reasonable standards for licensing facilities performing abortions would be valid. The possibility of a state requiring abortions to be performed solely in licensed hospitals led to Justice Blackmun's statement 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.[47]

A provision in the statute requiring a hospital committee's advance approval of all abortions[48] was held to have no constitutional justification. Such approval does not add to the protection of potential life but merely limits the right of a woman to receive medical care prescribed by her physician and the right of her physician to administer that care. In addition, other provisions protect the interests of hospitals. A hospital, for instance, is free to decide not to admit a patient seeking an abortion.[49]

Finally, the Court struck down a state residency requirement[50] because it would not allow a State to limit the use of its medical facilities to its own residents.

While various points from the concurring and dissenting opinions will be raised in an analysis of the Court's reasoning in these cases (especially *Roe*), a brief overview of those opinions seems necessary. In his concurrence to *Roe* and *Doe*, Chief Justice Burger expressed a belief that the decisions will not result in abortion on demand because of physicians' observance of the standards of their profession. Justice Stewart's concurring opinion to *Roe* welcomed the decision's reliance upon the due process clause of the fourteenth amendment rather than upon *Griswold's* right of privacy. He candidly wrote:

> now . . . the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the 'liberty' that is protected by the Due Process Clause of the Fourteenth Amendment.[51]

In his dissent to both decisions, Justice White labelled them "an improvident and extravagant exercise of the power of judicial review" and indicated the issue "should be left with the people and to the political processes." [52] Dissents by Justice Rehnquist in each case expressed disagreement with the "compelling state interest" test, indicating that the proper test is whether the law "has a rational relation to a valid state objective." [53] His dissent to *Roe* also questioned whether the right to abort an unborn fetus can be found in our society's collective conscience (as required of all fundamental rights) because of legislation existing in most states prohibiting abortions.

In order to evaluate the legal rationale behind the *Roe* decision and to speculate about its future impact upon the law, an examination of several major aspects of the opinion is warranted, including the Court's (1) apparent resort to a substantive due process approach, (2) use of the concepts of privacy and liberty and (3) treatment of the woman's right to abort as a fundamental right which can only be denied by a compelling state interest.

As pointed out by Justices Stewart and Rehnquist, the result reached by the Court in these decisions required an approach similar to that of substantive due process. The doctrine of substantive due process evolved during an era of the Court's history when it was willing to substitute its own "social and economic beliefs for the judgment of legislative bodies" [54] by invalidating various state regulations of business conditions.[55] Just as the Court then was charged with sitting as a "superlegislature to weigh the wisdom of legislation," [56] the weighing of the various interests and the distinctions drawn between the three periods of pregnancy make the abortion decisions susceptible to a similar criticism. What makes the Supreme Court more capable than a state legislature of determining what particular set of medical facts are significant for the abortion question? The moments of quickening and viability which are em-

[46] 410 U.S. at 194.
[47] *Id.* at 195.
[48] GA. CODE ANN. § 26-1202(b)(5) (1968).
[49] *Id.* § 26-1202 (e).
[50] *Id.* §§ 26-1202 (b)(1)(b)(2).
[51] 410 U.S. at 168.
[52] *Id.* at 222.
[53] *Id.* at 173.
[54] Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).
[55] Lochner v. New York, 198 U.S. 45 (1905), is a case frequently cited as applying a substantive due process test to invalidate social welfare legislation. It involved a law establishing maximum working hours for bakeries. *See also* Adkins v. Children's Hospital, 261 U.S. 525 (1923) (laws setting minimum wages for women); Coppage v. Kansas, 236 U.S. 1 (1915) (laws invalidating "yellow dog" contracts which were employer-imposed agreements not to join a union).
[56] Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952).

phasized by the Court are actually quite variable,[57] thus placing the decision on a questionable foundation. What is a court to do, for instance, if medical technology develops to the extent that viability is attained earlier than the seventh month? According to the Court's rationale, an earlier viability date would mean that the State's compelling interest in the potential human life would occur earlier. A state, therefore, would be able to prohibit abortions at a date earlier than the one adopted in *Roe*. Equally possible is a decrease in mortality rates for abortions in later stages of pregnancy. When the mortality rate becomes lower than that of natural childbirth, the logic of the *Roe* opinion would put the threshold of the State's interest in protecting the mother's health at a later stage of pregnancy. The possible confusion which could result is obvious. An additional consideration is whether the concept of viability will retain any significance as medical advances occur in the areas of artificial insemination and artificial wombs.[58]

Another weakness is the lack of a constitutional basis for the Court's discussion of the woman's right to abort an unborn fetus which it believes is encompassed within the concept of a right or guarantee of personal privacy.

The right of privacy itself is a nebulous concept due to its application in situations varying from tort actions of defamation,[59] to searches and seizures,[60] to cases involving the use of contraceptives.[61] To include the right to an abortion within this broad range, however, is not easy. Even the *Griswold* decision, which went farthest in extending the right of privacy from the "penumbras" of the Bill of Rights, involved a right significantly different from the one presented in *Roe*. As one state supreme court commented,

> Those cases [*Griswold* and *Eisenstadt v. Baird*] involved the right to receive contraceptives while this case involves abortion, the *fundamental distinction* being the difference *between prevention and destruction*.[62]

Stated simply, the use of contraceptives discussed in *Griswold* was confined to the privacy of the marriage relationship, which involves "a right of privacy older than the Bill of Rights . . . intimate to the degree of being sacred." [63] The destruction of an unborn fetus, on the other hand, involves, at the very least, a pregnant woman, her doctor, and a social and religious milieu which "strongly affirms the sanctity of life." [64] To use Justice Blackmun's own words, "The pregnant woman cannot be isolated in her privacy." [65]

In addition to this difficulty of fitting the right to abort into past conceptions of privacy, the Court's determination that it is a fundamental right found in the concept of personal liberty of the due process clause of the fourteenth amendment is equally lacking of legal precedent. As the Court itself recognized,[66] those rights deemed fundamental in the past—the right to raise children,[67] to educate children,[68] to procreate,[69] and to marry[70]—are quite different from the right to terminate a pregnancy. One basic difference is that those rights are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." [71] The same cannot be said about the right to abort.

The Court's application of a compelling state interest test to determine whether a state interest can abridge this "fundamental" right to terminate a pregnancy is also subject to criticism. In the past, legislation in the area of social welfare and economics which came under attack on due process grounds was subjected to a test of whether there is a "reasonable basis" or a "rational relation" between the statute and its purpose.[72] The stricter compelling state interest test, in contrast, has been reserved for first amendment[73] and equal protec-

[57] *See, e.g.*, Y.W.C.A. v. Kugler, 342 F. Supp. 1048, 1083 (D.N.J. 1972) (Garth, J., concurring in part, dissenting in part).

[58] In fact, Justice Blackmun recognized the progress being made on those medical techniques. 410 U.S. at 161 n.62.

[59] *See generally* PROSSER, LAW OF TORTS, 802–18 (4th ed. 1971).

[60] *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967).

[61] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

[62] Cheaney v. Indiana, 285 N.E.2d 265, 269 (Ind. 1972) (emphasis in original) referring to Griswold v. Connecticut, 381 U.S. 479 (1965), and Eisenstadt v. Baird, 405 U.S. 438 (1972)).

[63] 381 U.S. at 486.

[64] Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J., concurring).

[65] Roe v. Wade, 410 U.S. 113, 159 (1973).

[66] *Id.*

[67] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[68] Meyer v. Nebraska, 262 U.S. 390 (1923).

[69] Skinner v. Oklahoma, 316 U.S. 535 (1942).

[70] Loving v. Virginia, 388 U.S. 1 (1967).

[71] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[72] *See, e.g.*, Wyman v. James, 400 U.S. 309 (1971); Dandridge v. Williams, 397 U.S. 471, 485 (1970); Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955). One writer is especially critical of the fact that a stricter test should be applied to abortion cases than to *Dandridge*, which involved a statute limiting AFDC payments. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920, 938–39 (1973).

[73] *See, e.g.*, NAACP v. Button, 371 U.S. 415 (1963); Thomas v. Collins. 323 U.S. 516 (1945).