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VIABILITY AND FETAL LIFE IN STATE CRIMINAL ABORTION LAWS

INTRODUCTION

Four years ago, in *Floyd v. Anders*,[1] the three-judge[2] District Court for the District of South Carolina struck down sections of South Carolina's criminal abortion statute.[3] The court held that the proscription against abortions performed after the twenty-fourth week of pregnancy was unconstitutional[4] because the state may only forbid abortions when the fetus is viable,[5] and may not arbitrarily pick a particular date for

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[1] 440 F. Supp. 535 (D.S.C. 1977).

[2] A three-judge court is required when a state statute is attacked on grounds that it violates the Constitution and when the constitutional issue raised is substantial. Idewild Liquor Corp. v. Epstein, 370 U.S. 713 (1962); New York State Waterway Ass'n v. Diamond, 469 F.2d 419 (2d Cir. 1972); Mobil Oil Corp. v. Lefkowitz, 454 F. Supp. 59 (S.D.N.Y. 1973); 28 U.S.C. § 2284 (1976). The court agreed to hear the case even though criminal action was pending in the state courts because of the exception to the abstention rule of Younger v. Harris, 401 U.S. 7 (1971), which allows the federal courts to step in if the state statute is "flagrantly and patently violative of express constitutional prohibitions," *id.* at 53, and when the prosecution is not being pursued in good faith. 440 F. Supp. at 540.

[3] Particular sections of the South Carolina statute which were effectively challenged include:

> "Viability" means that stage of human development when the fetus is potentially able to live outside of the mother's womb with or without the aid of artificial life support systems. For the purposes of this article, a legal presumption is hereby created that viability occurs no sooner than the twenty-fourth week of pregnancy.
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> Abortion shall be a criminal act except when performed under the following circumstances . . . (c) During the third trimester of pregnancy, the abortion is performed with the pregnant women's consent, and if married and living with her husband, the consent of her husband, in a hospital, and only if the attending physician and one consulting physician, who shall not be related to or engaged in private practice with the attending physician, certify in writing to the hospital in which the abortion is to be performed that the abortion is necessary based upon their best medical judgment to preserve the life or health of the woman. In the event that the preservation of the woman's mental health is certified as the reason for the abortion, an additional certification shall be required from a consulting psychiatrist who shall not be related to or engaged in private practice with the attending physician. All facts and reasons supporting such certification shall be set forth by the attending physician in writing and attached to such certificate.
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> Consent shall be required prior to the performance of an abortion from the following persons . . . (b) If the woman is unmarried and less than sixteen years of age, consent shall also be obtained from either parent with legal custody or her legal guardian or from any other person standing in *loco parentis*.

S.C. CODE §§ 32-681 to -683 (Supp. 1974).

[4] 440 F. Supp. at 538.

[5] *Id.* at 539.

viability.[6] Having found the statute unconstitutional, the court dismissed the indictments for murder and illegal abortion[7] filed against a doctor who had performed a prostaglandin abortion[8] on a woman in her twenty-fifth week of pregnancy.[9] The court never decided the question of whether the fetus, which lived for twenty days after the abortion, was viable.[10] It held only that the indictments were void because they were based on an unconstitutional statute.

The United States Supreme Court, in March 1979, vacated and remanded this decision[11] because it might have been founded upon an incorrect interpretation of viability "which refers to potential, rather than actual, survival of the fetus outside the womb."[12] In deciding *Floyd v. Anders*, the district court had applied *Roe v. Wade*,[13] whereas the Supreme Court was now relying on *Colautti v. Franklin*,[14] a case decided only two months before *Anders v. Floyd*. In *Colautti*, the Court had struck down a section of Pennsylvania's Abortion Control Act as unconstitutionally vague[15] and, in so doing, had discussed the meaning of "viability."

In order to understand what might happen to *Anders* on remand, or to any other criminal abortion statute which might be challenged on similar grounds, it is necessary to look at *Colautti*, and, more specifically, to see how *Colautti* and other relevant cases deal with viability.

THE ORIGIN OF THE VIABILITY STANDARD

The exact definition of "abortion" varies between statutes, but it generally involves the destruction or premature expulsion of a fetus or

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6 *Id.*

7 *Id.* In South Carolina, both murder and illegal abortion were considered felonies. S.C. CODE § 16-11 (Supp. 1972). Murder carried a sentence of death or life imprisonment. S.C. CODE § 16-52 (Supp. 1974). Illegal abortion carried a punishment of imprisonment for two to five years, or a fine of up to $5000, or both. S.C. CODE § 32-687 (Supp. 1974).

8 A prostaglandin abortion is a technique which involves injecting the pregnant woman with drugs called prostaglandins in order to stimulate uterine contractability, inducing premature expulsion of the fetus. *See* Wolfe v. Schroering, 388 F. Supp. 631, 637 (1974).

9 440 F. Supp. at 538.

10 "The male fetus was alive at the time of delivery. Under the care of hospital personnel, he continued to live for twenty days." *Id.*

The Court did address the question of the fetus' viability, though it did not reach any conclusions, noting, "Seemingly the child was not viable in the sense that he could live indefinitely outside his mother's womb, but he did have the capacity to live for twenty days, as he did." *Id.*

11 Anders v. Floyd, 440 U.S. 445 (1979). 28 U.S.C. § 1253 (1976), allows for direct appeals to the Supreme Court from a three-judge district court which strikes down a state law repugnant to the Constitution.

12 440 U.S. at 445.

13 410 U.S. 113 (1973).

14 439 U.S. 379 (1979).

15 *Id.* at 390.

embryo from the woman's womb.[16] The states protect their own interests by designating as criminal the performance of abortions in certain circumstances. The criminal statutes punish doctors or others who perform abortions,[17] but usually do not apply to women who obtain abortions.[18] Recent cases have challenged the conditions under which a state may designate an abortion to be a criminal act.

Roe v. Wade, which involved the constitutionality of Texas criminal abortion laws,[19] made viability a central point in the abortion controversy. The Court held that prior to viability the states cannot restrict the right of a woman to terminate her pregnancy. However, once the fetus becomes viable, the state may prohibit abortion, except where necessary to preserve the life or health of the mother.[20] Thus, any criminal statutes prohibiting abortion cannot be applied until viability is reached. Consequently, for criminal abortion statutes to be effective, they must be able to identify the point at which they become applicable.

Not all state criminal abortion statutes have properly defined viability. For example, the *Colautti* Court pointed out that "[t]he perils of strict criminal liability are particularly acute here because of the uncertainty of the viability determination itself."[21] Consequently, it found that, "[t]he present statute . . . conditions potential criminal liability on

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[16] *See* Article 1191 of the Texas Penal Code, as presented in Roe v. Wade, 410 U.S. 113, where "abortion" meant that "the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused." Mayberry v. State, 160 Tex. Crim. 432, 271 S.W.2d 635 (1954), defined the crime of abortion as occurring when "a live fetus must be destroyed in the womb, or a premature birth thereof must be caused."

[17] Those persons performing the illegal abortion may also be subject to civil liability if they injure the woman obtaining the abortion. Gaines v. Wolcott, 119 Ga. App. 313, 167 S.E.2d 366, *aff'd*, 225 Ga. 373, 169 S.E.2d 165 (1969); Richey v. Darling, 183 Kan. 642, 331 P.2d 281 (1958); True v. Older, 227 Minn. 154, 34 N.W.2d 700 (1948). Some courts have not recognized the claims of a woman who consented to the procedure. Sayadoff v. Wards, 125 Cal. App. 2d. 626, 271 P.2d. 140 (1954); Bowlan v. Lunsford, 176 Okla. 115, 54 P.2d 666 (1936); Miller v. Bennett, 190 Va. 162, 56 S.E.2d 217 (1949).

[18] The exact charge against the woman obtaining an abortion varies from state to state. Recently a New York court held that statutes which criminalize abortion intended that the woman also be liable to prosecution for the act. Reno v. D'Javid, 85 Misc. 2d 126, 379 N.Y.S.2d 290 (1976), *modified on other grounds*, 55 A.D.2d 876, 390 N.Y.S.2d 421, *aff'd*, 369 N.E.2d 766, 399 N.Y.S.2d 210 (1977). This law is still in effect. In the past, some courts have held that the statute making the performance of abortions a crime did not apply against those upon whom abortions are performed, People v. Reinard, 220 Cal. 2d 720, 33 Cal. Rptr. 908 (1963); State v. Barnett, 249 Or. 226, 437 P.2d 821 (1968), while other courts have held that the woman is a principal, Steed v. State, 27 Ala. App. 263, 170 So. 489 (1963), *cert. denied*, 233 Ala. 159, 170 So. 490 (1965); or an accomplice, Dykes v. State, 30 Mo. App. 129, 1 S.W.2d 754 (1941). Still other states have passed statutes creating separate penalties for the woman, though generally not subjecting her to the same penalties as the abortionists. *See* State v. Tennyson, 212 Minn. 158, 2 N.W.2d 833 (1942).

[19] 410 U.S. at 116.

[20] *Id.* at 163-64.

[21] 439 U.S. 395.

confusing and ambiguous criteria. It therefore presents serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights."[22] The Pennsylvania statute did not meet the requirements which the Court places on criminal laws. The Court explained:

> It is settled that, as a matter of due process, a criminal statute that "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," . . . , or is so indefinite that "it encourages arbitrary and erratic arrests and convictions," . . . is void for vagueness. . . . This appears to be especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights.[23]

Thus, state criminal abortion statutes must precisely define the point of viability. It is a critical point for carrying out the Supreme Court decisions on abortion.[24] Yet, as both *Anders* and *Colautti* indicate, ambiguities still exist as to what qualifies a fetus as viable.

Before any legislature can pass a valid criminal abortion statute, it must understand what the Supreme Court meant by viability and how the term came to play such a major role in the abortion process. Those cases which provide essential background for the definition of viability in *Colautti* include the companion cases of *Roe v. Wade* and *Doe v. Bolton*,[25] and *Planned Parenthood of Central Missouri v. Danforth*.[26] Justice Blackmun authored the majority opinion in all four cases.

CRIMINAL ABORTION STATUTES: THE STATE INTEREST IN PROSCRIBING ABORTION

Roe established that, under certain conditions, the state can regulate[27] and even prohibit abortion procedures.[28] The woman's abortion decision is included in her right of privacy[29] and, thus, protected by the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action."[30] However, the right to abortion is not absolute. Rather, it must be considered against two important state interests: pre-

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22 *Id.* at 394.

23 *Id.* at 391 (citations omitted).

24 Viability, while crucial in criminal abortion statutes, is also important in indicating the point at which some civil regulations might be applied. *See* Williams v. Zbaraz, slip op. (June 30, 1980), where the Supreme Court reversed a district court ruling that held provisions of the Hyde Amendment unconstitutional and had ordered funding for medically necessary abortions prior to fetal viability. Zbaraz v. Quern, 469 F. Supp. 1212 (1979).

25 410 U.S. 179 (1973).

26 428 U.S. 52 (1976).

27 410 U.S. at 163-64.

28 *Id.*

29 *Id.* at 154.

30 *Id.* at 153.

serving and protecting the health of a pregnant woman,[31] and "still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct."[32] The two state interests are balanced against the woman's right of privacy, with the state interests growing in substantiality as the woman's pregnancy progresses.[33] At some point during a pregnancy each state interest becomes compelling.[34] It is only then that a state may pass regulations affecting the abortion process. The Court refuses to recognize as legitimate other interests proposed by the state, such as social concern over discouraging illicit sexual conduct.[35]

With respect to preserving and protecting the health of the pregnant woman, the *Roe* Court found the compelling point to be the end of the first trimester of pregnancy because medical facts existing at the time of the decision established that during the first trimester mortality in abortion was probably lower than mortality in normal childbirth.[36] Thus, before the end of the first trimester, the Court left the abortion decision to the woman and her attending physician, with no state interference allowed.[37] After the first trimester "a state may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."[38]

With respect to the second state interest, protecting the potentiality of human life, the *Roe* Court found viability to be the compelling point.[39] After viability is achieved, a state can choose to proscribe abortion, except when it would be necessary to preserve the life or health of the mother.

The Blackmun majority defended the choice of viability with both logical and biological justifications.[40] It defined viability as an interim point between conception and live birth, usually occurring at about seven months, though it could occur as early as six months.[41] The Court then rejected three other alternatives to viability for use as compelling points: quickening, conception, and live birth. It rejected quickening because it is no longer strongly regarded as relevant by science.[42] It

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31 *Id.* at 157-58.
32 *Id.* (emphasis in original).
33 *Id.*
34 *Id.*
35 *Id.* at 158.
36 *Id.* at 163.
37 *Id.*
38 *Id.*
39 *Id.*
40 *Id.* at 149, 163.
41 *Id.* at 160.
42 *Id.*

rejected conception because of substantial definitional problems, since conception is more of a process than an event.[43] The Court had no problem defining live birth, but rejected it on the basis of legal precedents, declaring, "In areas other than criminal abortion, the law has been reluctant to endorse any theory that life as we recognize it, begins before live birth, or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth."[44] Viability is included under one of those "narrowly defined situations."[45]

In summary, the state may regulate abortion *procedures* after the woman's first trimester of pregnancy based on its interest in the health of the pregnant woman. It may prohibit abortion itself once the fetus is viable, unless the health or life of the mother is at stake, on the strength of the state interest in protecting potential human life. These two interests are separate and distinct. They are *not* combined and then balanced against the woman's privacy interest.[46] They are weighed separately. Therefore, any criminal statute proscribing abortion will be based on the state's interest in protecting fetal life and will consequently take effect once the fetus has attained viability.

PERSONHOOD AND LIFE

The viability/live birth distinction which Justice Blackmun made in *Roe* illustrates two important suppositions made by the Court concerning whether the fetus is a person and whether the fetus is alive. While choosing viability as the compelling point between the state's and woman's interests, the *Roe* Court held that the fetus is not a person.[47] At the same time, however, the Court refused to indicate whether the fetus is alive. These two points are essential for understanding the Court's position on abortion.

As to the first point, it is crucial to the existence of legal abortions to hold that a fetus, either before or after viability, is not a person within the language of the fourteenth amendment. The *Roe* Court recognized that should the claim of personhood be established, the case for legalized abortion would collapse because the fetus' right to life would be guaranteed by the fourteenth amendment.[48] After discussing constitutional in-

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[43] *Id.* at 161.

[44] *Id.*

[45] Viability is mentioned under a tort law exception which allows for recovery for prenatal injuries "if the fetus was viable, or at least quick, when the injuries were sustained." *Id. See* W. PROSSER, THE LAW OF TORTS 335-38 (4th ed. 1971).

[46] *Id.* at 154.

[47] *Id.* at 157-58.

[48] *Id.* at 156-57.

terpretations of the word "person," as well as past caselaw and historical abortion practices, the *Roe* Court decided that the word as used in the fourteenth amendment was not meant to include the unborn.[49] "Person" applies only postnatally.

As for whether the fetus is alive, Justice Blackmun's opinion specifically stated:

> 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.[50]

Instead, when the Court viewed a state's interest in protecting the fetus, it pointed out that:

> Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.[51]

Since *Roe*, however, the Court's decisions have reflected a subtle change in their approach to the problem of potential life. An early indication of the shift occurred in *Planned Parenthood of Central Missouri v. Danforth*.[52] The Missouri criminal abortion statute challenged in *Danforth* defined viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems."[53] The Court found that this definition did not conflict with *Roe's* use of the term viability. Notice that the *Danforth* definition referred to continuing the life of the unborn child, while *Roe* clearly stated that only potential life was at issue.[54] This shift from potential life to continuing life occurred without any comment by the Court, and indicates that the Court may implicitly be acknowledging that the fetus is alive.

Colautti contains even stronger evidence that the Court has taken a stand which it declined to take in *Roe*. Blackmun mentioned in *Colautti* that "the State has a compelling interest in the life or health of the fetus."[55] rather than in the *potential* life of the fetus, as described in *Roe*.

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49 *Id.* at 157-58.

50 *Id.* at 159.

51 *Id.* at 150 (emphasis in original).

52 428 U.S. 52.

53 *See* 428 U.S. at 63 (citing MO. ANN. STAT. § 188.015(2) (Vernon 1974)).

54 *Compare* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. at 63, *with* Roe v. Wade, 410 U.S. at 150.

55 439 U.S. at 389.

More importantly, *Colautti's* definition of viability refers to the fetus as having a "reasonable likelihood of . . . sustained survival,"[56] while *Roe* referred to a fetus as being "potentially able to live."[57] Logically, a fetus would be "potentially able to live" without having to be presently alive, but to speak of a fetus "surviving" would imply that life already exists within the womb. In order to survive, something must already be living.

This switch to living inside the womb and surviving outside the womb is re-emphasized in the *Anders v. Floyd* remand, where the Court noted that viability "refers to potential, rather than actual, survival of the fetus outside the womb."[58] The Justices have quietly switched from the fetus' being "potentially able to live" to the fetus' being "potentially able to survive." This may mean the Court is now admitting that the fetus is alive, something it specifically refused to do in *Roe*.

What difference would a shift from potential life to actual life make to criminal abortion laws? At first glance, the shift seems insignificant. The Court has never held that should a fetus be alive, abortion would be prohibited. Nonetheless, the life/potential life switch could have an enormous effect on the arguments underlying the Court's abortion stand.

A state's interest in actual life is, arguably, stronger than its interest in potential life. While this additional strength may not completely balance out a woman's right to privacy, it is conceivable that the state interest in actual life balanced against the woman's right to privacy would carry greater weight in the balancing test than the state interest in potential life.

More specifically, the *Roe* Court held viability to be the compelling point reached by balancing the state's interest in potential life with the woman's right to privacy. If the Court replaces the state's interest in potential life with the stronger interest in actual life, this would shift the balance of interests, causing the compelling point to come some time earlier than it did in *Roe*. As a result, the states would be allowed to proscribe abortion at this earlier period, closer to conception.

The compelling point for this new balancing test would vary, depending on just when the Court views the fetus as attaining life. Since the Court has never admitted shifting from potential life to actual life, it has avoided the problem of deciding when life begins. Should the Court hold that the fetus is alive at conception, the state would have a consistently stronger interest in protecting the fetus, as discussed above. If, however, the Court should hold that the fetus is alive only once it attains

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56 *Id.* at 388.

57 410 U.S. at 150.

58 440 U.S. at 445 (citing Colautti v. Franklin, 439 U.S. at 388-89).

viability, then the compelling point between the state's interest and the woman's right to privacy would not need to shift. In fact, such a decision by the Court would reinforce its finding in *Roe* of when abortion may be prohibited and when it may not.

While holding that a fetus becomes alive when it attains viability would allow the Court to leave the abortion rulings as they stand, it might further complicate identifying the point of viability. Legislators would need to define when the fetus is potentially able to survive, as well as when the fetus changes from nonliving to living. Selecting some point in fetal development for life to begin might also force the Court to endorse a particular scientific, medical, theological, or philosophical view, a stance which the Court expressly avoided taking in *Roe*.

If the Court admitted that it now views the fetus as alive, there would probably be a renewed interest in getting the Court to admit that it is a person. One argument is that before this change by the Court, the fetus became both alive and a person at the same time—at birth. Now that the moment for life has been moved up, should that not also move up the time at which the fetus becomes a person? The presence of life could be seen as sufficient to establish personhood. Whenever a fetus is recognized as alive, then it should also be recognized as a person.

The problem with this reasoning is that the Court has never admitted that the presence of life establishes personhood. Although the *Roe* Court left the question of fetal life open, it clearly took a stand on the issue of personhood. Fetal life and personhood have typically been treated as two separate issues, and the fact that the Court has now answered the question of whether the fetus is alive does not require that it change its answer as to when the fetus becomes a person. The Court could maintain that it is perfectly consistent to move up the point of fetal life while leaving the right of personhood at the time of birth.

The claim that a fetus is not a person has come under attack even without the Court acknowledging its shift in outlook on fetal life. Several commentators, after looking at the biological, medical, and legal evidence offered by the Court in *Roe* and later cases, have concluded that it is possible to recognize a fetus as a person even before birth.[59]

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[59] For example, Dellapenna, *History of Abortion Technology, Morality and Law*, 40 U. PITT. L. REV. 359 (1979), reviews recent medical advances in abortion-related technology, concluding that "opposition to the recent changes in abortion law also has resulted in large part directly from a developing medical technology . . . ." *Id.* at 416. "This technology has also clarified the certainty of foetal life and illuminated criteria by which personhood can be determined." *Id.* at 416-17 (footnote omitted). "This developing technology strongly reinforces the conviction of many that foeti are people, ..." *Id.* at 415-16.

Gorby makes a more direct attack on the Supreme Court's decision of nonpersonhood. In his article, *"Right" to an Abortion, the Scope of the Fourteenth Amendment, Personhood, and the Supreme Court's Birth Requirement*, 1979 S. Ill. U.L.J. 1, Gorby reviews the *Roe* decision, main-

Similar arguments are currently being addressed by state legislatures and state courts.[60] If the Supreme Court came to recognize personhood as occurring some time before birth, the impact would be tremendous. As Justice Blackmun stated in *Roe*, if a fetus were held to be a person, its right to life would be constitutionally protected.[61] As such a step would require the Court to reformulate its entire stand on abortion, it is doubtful that the Court will be quick to recognize the fetus as a person.

For the time being, as the Court has not openly recognized the fetus as being alive or being a person, viability remains the activating point in state criminal abortion laws. Should the Court change its stand on either point, viability may no longer hold such a central position, and the criminal statutes would have to be revised. Even without a change in the Court's position on these issues, criminal statutes may need to be revised periodically, for while viability has remained a crucial concept, its meaning has changed. The "viability" mentioned by the Court in *Anders* is different than the "'viability" originally defined in *Roe*. State criminal abortion statutes must take such changes into account if they are to remain effective. Criminal laws which were valid after *Roe* may need to be updated to take into account more recent Court decisions such as *Danforth* and *Colautti*.

THE CHANGING DEFINITION OF VIABILITY

The *Roe* Court did not attempt to examine the various factors which might enter into the determination of viability.[62] It did, however, make several statements about the term. As Justice Blackmun summarized in *Colautti*:

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taining that the birth requirement for personhood is arbitrary. He points out that the unborn had no legal representative in court and that, "In *Roe* the Court, in interpreting the scope of 'person' in the fourteenth amendment, applied in a very general sense only two of the several possible methods of construction." *Id.* at 11. Furthermore, these two methods, a historical review of abortion practices and laws and the use of the word "person" in other sections of the Constitution, were applied incorrectly. The other possible methods of construction, the plain meaning of the term "person" and the function of the term would both have supported the notion that the fetus is a person. *Id.*

Gorby also criticizes the Court's avoiding the issue of fetal life and ignoring scientific evidence, such as a fetus' individuality and brain waves which all offer further support of a fetus' personhood. *Id.*

60 *See, e.g.*, ILL. REV. STAT. ch. 38, §§ 18-21 (1975), where the legislative intent is to "declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life from conception under the laws and Constitution of this State." *See also* State v. Brown, 26 CRIM. L. REP. (BNA) 2357, a murder case heard by the Louisiana Supreme Court where the state had amended the criminal code to define "person" as a "human being from the moment of fertilization and implementation."

61 410 U.S. at 156-57.

62 *Id.* at 160.

> We simply observed that, in the medical and scientific communities, a fetus is considered viable if it is "potentially able to live outside the mother's womb, albeit with artificial aid." . . . We added that there must be a potentiality of "meaningful life," . . . not merely momentary survival. And we noted that viability "is usually placed at about seven months (28 weeks), but may occur earlier, even at 24 weeks." . . . We thus left the point flexible for anticipated advancements in medical skill.[63]

Each of these observations from *Roe* has a direct, but slightly altered counterpart in the Court's latest definition of viability in *Colautti*.

"POTENTIALLY ABLE TO LIVE"

Roe's "potentially able to live outside the mother's womb, albeit with artificial aid,"[64] has been replaced by *Colautti's* "reasonable likelihood of . . . survival outside the womb, with or without artificial aid."[65] Thus, "potentially able" becomes "a reasonable likelihood." While this change may have been intended to alleviate the various and confusing applications of the word "potential,"[66] it does little to clear up what is reasonable or likely. For example, should physicians manage to agree as to the probability of a particular fetus' survival, this does not mean that all the physicians will agree that such a probability constitutes a reasonable likelihood of surviving.[67]

"[T]o live outside the mother's womb" has been reworded as "survival outside the womb." Possible implications of the new meaning have been discussed above.[68] "Albeit with artificial aid" now reads "with or without artificial aid." There seem to be no essential differences between these two versions. Both allow for fetal life to be maintained by artificial means. Technological requirements will be discussed further below.

"MEANINGFUL LIFE"

The second statement about viability by the *Roe* Court required

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63 439 U.S. at 387 (citations omitted).

64 410 U.S. at 150.

65 439 U.S. at 388.

66 The Court confounds the meaning of "potential" by using it for two different purposes—once to indicate the possible life of the fetus in the womb and once to assess the likelihood of this fetus surviving outside the womb. In effect, the *Roe* Court speaks of the fetus, which is potentially alive, as being potentially able to live outside the womb, while *Anders* refers to the fetus, which is alive, being potentially able to survive (continue living) outside the womb. Thus, it is consistent for the Court to speak of potential survival.

67 Justice Blackmun notes this problem in Colautti v. Franklin, 439 U.S. at 396 & n.15. Of particular interest is note 15, which cites various doctors' testimony stating when a fetus is viable. Estimates ranged from five percent, to two to three percent, to ten percent, to greater than a ten percent chance of surviving, as well as testimony refusing to be obsessed with a particular percentage figure.

68 *See* text accompanying notes 9-18 *supra*.

that the fetus have the potential for meaningful life.[69] This phrase was not explained in *Roe*, but Justice Blackmun noted in *Colautti* that the term was meant to require more than mere momentary survival.[70] This length of survival requirement also played a role in *Danforth's* definition of viability, which stipulated that the life of the unborn child be continued "indefinitely." The *Danforth* Court pointed out that the Missouri statute is actually more strict than the *Roe* definition as the ability of the fetus' life to be continued indefinitely would probably occur later in pregnancy than the fetus being able to potentially live outside the mother's womb.[71] Thus, the Court requires more than momentary survival but less than indefinite survival. *Colautti* adds support to *Danforth* by requiring sustained survival.[72] Again, no statistical criterion is listed as to what constitutes sustained survival, but it would certainly fall somewhere between momentary and indefinite survival.

"AT ABOUT SEVEN MONTHS"

The *Roe* Court cited gestation as a factor to be considered in viability. By the time of *Colautti*, however, the Court had changed its position, holding that a definition of viability based solely on the factor of gestational age of the fetus will be found unconstitutional.[73] The change was actually a two-step process. After noting in *Roe* that viability is placed at about twenty-eight weeks, but may occur as early as twenty-four weeks, the Court was confronted with a definition of viability in *Danforth* that did not mention the gestational age of the fetus. In responding to a challenge based on the omission of gestational age in the statute, the *Danforth* Court pointed out that the definition of viability in *Roe* was purposely left flexible.[74] The Court then indicated that gestational age need not be included in criminal abortion statutes:

> It is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, ... The definition of viability in [the Missouri Statute] merely reflects this fact.[75]

The *Colautti* Court went further, declaring:

> Neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant of when the

69 410 U.S. at 163.
70 439 U.S. at 388.
71 428 U.S. at 64.
72 439 U.S. at 388.
73 *Id.* at 388-89.
74 428 U.S. at 63.
75 *Id.* at 64.

State has a compelling interest in the life or health of the fetus.[76]

Thus, the Court gradually changed its position. In *Roe*, the Court used weeks of gestation to describe the point at which a fetus becomes viable. In *Danforth*, the Court held that gestational age need not be included in a definition of viability. In *Colautti*, the Court declared that gestational age cannot be used as the single determinant of viability.[77] Furthermore, no other single element may be used to ascertain viability.

Because no one factor can be listed as determining viability, the legislature fashioning a criminal abortion statute is left with two choices—list no factors to be taken into account by a physician, thus leaving the decision up to his good faith judgment, or list several factors for the physician to consider in identifying a viable fetus. In either case, the state must be careful to meet the *Colautti* Court requirements that the criminal abortion law "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden" and that the law be definite enough so as not to encourage "arbitrary and erratic arrests and convictions."[78]

Arguably, such requirements would favor the listing of several factors, yet the suggestion of not listing any factors to be taken into account actually finds some support in Justice White's dissent to *Colautti*, where he noted that "the Court has not yet invalidated a statute simply requiring abortionists to determine whether a fetus is viable and forbidding the abortion of a viable fetus except where necessary to save the life or health of the mother."[79] Obviously, not listing any elements to be considered when determining viability leaves the physician with a great deal of discretion. Such a privilege might lead to abuses by less scrupulous abortionists. Perhaps in anticipation of such an argument, Justice White also pointed out, "Nor has [the Court] yet ruled that the abortionists' determination of viability under such a standard must be final and is immune to civil or criminal attack."[80]

The second way to accommodate the *Colautti* ruling is through the use of several factors to be considered by a physician in determining viability. While the Court has stated that one single factor is inadequate, it has not specified how many elements are sufficient, nor has it consistently cited any factor as being absolutely necessary for defining viability. Many points can be considered in determining viability. Pos-

[76] 439 U.S. at 388-89. The Court is addressing the definition of viability contained in Pennsylvania's 1974 Abortion Control Act, PA. STAT. ANN. tit. 35, § 6605(a) (Purdon 1974).

[77] Based on the ruling in *Colautti*, the definition of viability in *Anders* would probably still be held unconstitutional on remand.

[78] 439 U.S. at 390-91.

[79] *Id.* at 409 (White, J., dissenting).

[80] *Id.*

sible factors that might be combined in order to determine viability include the gestational age of the fetus, the weight of the fetus,[81] the development of the fetus' lungs,[82] the race of the fetus,[83] the mother's general health and nutrition, and the quality of available medical facilities.[84]

Of possible factors previously mentioned, the *Colautti* Court particularly took notice of gestational age, fetal weight, the woman's general health and nutrition, and the quality of the available medical facilities.[85] While the Court views the variables as imprecise, they are still recognized as legitimate factors to be taken into consideration. Any state attempting to define viability in its criminal abortion statute might want to begin with some combination of these elements.

Perhaps a definition of viability might be as simple as "a fetus that has reached 500 grams in weight and 20 gestational weeks."[86] However, not even age and weight are easy to estimate,[87] and when one adds other factors or has to base the decisions on the quality of available medical facilities and developing technology, the viability determination becomes less and less accurate.

Perhaps new factors might also be added to the list of determinants. For example, it may prove useful for future criminal abortion statutes to try to narrow the requirement of sustained survival mentioned earlier to a specific number of days or weeks or hours. The ability of the fetus to survive seems more fundamental to the issue of viability than does the gestational age of the fetus. A survival time criterion might give physicians more practical guidelines for assessing the development of the fetus. While this use of survival time would prove inadequate as a sole factor for determining viability, the possibility remains of using it in conjunction with or in addition to other variables. Of course, such a factor would have the same problems of imprecision as the more traditional factors. However, the survival time criterion could have the advantage of taking into account the development of the fetus, the skills of the physician, and the technology available, all of which are Court requirements which will be discussed below.

A practical example of where a survival time criterion would have

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81 *See* Horan, *Viability, Values and the Cosmos*, 22 CATH. LAW. 1 (1976); Comment, *Roe v. Wade and the Traditional Legal Standards Concerning Pregnancy*, 47 TEMPLE L.Q. 715 (1974).

82 Note, *Choice Rights and Abortion: The Begetting Choice Right and State Obstacles to Choice in Light of Artificial Womb Technology*, 51 S. CAL. L. REV 877 (1978).

83 *See* Note, *Roe! Doe! Where Are You? The Effect of the Supreme Court's Abortion Decisions*, 7 U. CAL. DAVIS L. REV. 432 (1974).

84 439 U.S. at 395-96.

85 *Id.*

86 STEDMAN'S MEDICAL DICTIONARY 1388 (22d ed. 1972).

87 *See* Comment, *supra* note 81.

been useful is *Andres*, which was remanded by the Supreme Court. The South Carolina criminal abortion statute was based only on gestational age and, therefore, would be declared unconstitutional under the *Colautti* decision, should the case ever be refiled. If, however, the statute had been written to include a survival time criterion as one of the several factors, the Court could then look to the facts of the case. The fact that the fetus survived for twenty days after being aborted could play an important part in answering the fundamental question of whether or not the fetus was viable.

It is not clear how the Court will view any of these attempts at accommodating the *Colautti* ruling. In fact, after looking at the complications involved with specifying which factors will designate a fetus as viable, one commentator concluded:

> [A] broad law defining when viability occurs is bound to be arbitrary. Perhaps the Supreme Court's failure to pinpoint the time when viability occurs was an implicit recognition of this fact; yet, how then is the State to implement the Court's holding that State restrictions on abortion can take account of the fetus only after viability?[88]

"ANTICIPATED ADVANCEMENTS IN MEDICAL SKILL"

The *Roe* Court expressly left the point of viability flexible in order to anticipate "advancements in medical skill."[89] The *Colautti* Court required viability to be based on "the judgment of the attending physician on the particular facts of the case before him."[90] In order to understand what these phrases might indicate and why there has been a change from *Roe* to *Colautti*, it is necessary to look at the broader issue of developing medical technology and at some of the problems which arose in *Doe v. Bolton*.

MEDICAL REGULATIONS

Roe's companion case, *Doe v. Bolton*, emphasized the final element in *Colautti's* latest definition of viability. *Doe* concerned the validity of sections of Georgia's criminal abortion statute that regulated abortion procedures. Since the issue was regulation rather than prohibition, the case centered on the state's interest in protecting the life and health of the mother.[91] However, as Justice Blackmun later pointed out in *Colautti*, *Doe* "underscored the importance of affording the physician adequate discretion in the exercise of his medical judgment."[92] This point was

88 *See* Note, *supra* note 82.
89 439 U.S. at 387.
90 *Id.* at 388.
91 *See* text accompanying notes 27-46 *supra*.
92 439 U.S. at 387.

mentioned briefly in *Roe*, where the Court noted that *Doe*:

> vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.[93]

There are two important aspects to this stand by the Court. First, the state may not intervene before the proper compelling point. Second, a decision to abort before these compelling points is a subjective decision to be made by the attending physician. Both of these rulings affect viability and state criminal abortion statutes.

"MAY BE VIABLE"

In *Danforth*, one of the unconstitutional sections of the Missouri criminal abortion statute required that the physician "exercise that degree of professional skill, care, and diligence to preserve the life and health of any fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted."[94] The statute then listed the penalties resulting if a child died because the physician failed to take such measures. The Court struck down the statute because it impermissibly required the physician to preserve the life and health of the fetus at all stages of development. It should have specified that such care need be taken by the physician only after the stage of viability has been reached.[95] This requirement goes back to the earlier ruling in *Roe* that a state can exercise its right over interests in fetal life only after the fetus reaches the compelling point of viability.

The state of Missouri argued that the statute applied only after a live birth resulted from an abortion.[96] Since live birth could only result from a viable fetus, the statute implicitly took into account the Court's criteria in weighing a state's interest. According to Justice Blackmun, the Court was unable to accept such a sohisticated interpretation of the statute.[97] However, Justice White was more sympathetic to the argument. In a separate opinion, concurring in part and dissenting in part, White looked at the same section of the Missouri statute and concluded:

> If this section is read in any way other than through a microscope, it is plainly intended to require that, where a "fetus [may have] the capability

93 410 U.S. at 165-66.
94 428 U.S. at 82.
95 *Id.* at 83.
96 *Id.* at 82.
97 *Id.* at 83.

> of meaningful life outside the mother's womb" . . . the abortion be handled in a way which is designed to preserve that life notwithstanding the mother's desire to terminate it. Indeed, even looked at through a microscope, the statute seems to go no further . . . . Plainly, if the pregnancy is to be terminated at a time when there is no chance of life outside the womb, a physician would not be required to exercise any care or skill to preserve the life of the fetus during abortion no matter what the mother desires. The statute would appear to operate only in the gray area after the fetus *might* be viable but while the physician is still able to certify "with reasonable medical certainty that the fetus is not viable." . . . [T]he statute is constitutional.[98]

Thus, Justice White's dissent described another point in gestational development. There is the time when the fetus is not viable, when the fetus is viable, and, according to White, the time when the fetus may be viable—the gray area. Further, because Justice White felt that the statute was constitutional in its application to this gray area, he indicated that the state's interest in potential life applies to the point where the fetus might be viable as well as when the fetus actually is viable.

The distinction between when a fetus is viable and when it may be viable is addressed again in *Colautti*. The Pennsylvania statute required the physician to exercise the same skill, care, and diligence to preserve the life and health of the fetus which he would use if he intended the fetus to be born. Unlike the Missouri statute, the Pennyslvania Act required that the physician first determine "that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable."[99] If the answer is affirmative, the standard of care provision is triggered. The Court found, however, that the viability determination requirement was ambiguous[100] and void for vagueness, though one commentator maintains, "after reading the decision (*Colautti*) one may decide that the statute was at least no more ambiguous than the opinion which overturned it."[101]

The viability determination requirement was vague, according to the Court, because it contained two ambiguities. First, the statute was based on the distinction between "is viable" and "may be viable." While the state claimed that there was no difference between the two phrases,[102] the Court found that the statute did not support such an argument.[103] Rather, the Court held that "viable" and "may be viable"

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98 *Id.* at 99-100 (White, J., concurring in part and dissenting in part) (emphasis in original).

99 439 U.S. at 382.

100 *Id.* at 390.

101 Young, *Another Abortion Decision*, 65 A.B.A.J. 448 (1979).

102 439 U.S. at 392.

103 *Id.*

do not mean the same thing. It refused, however, to explain what the difference actually was.

> On the one hand . . . it may be that "may be viable" carves out a new time period during pregnancy when there is a remote possibility of fetal survival outside the womb, but the fetus has not yet attained the reasonable likelihood of survival that physicians associate with viability. On the other hand . . . it may be that "may be viable" refers to viability as physicans understand it, and "viable" refers to some undetermined stage later in pregnancy. We need not resolve this question.[104]

The Court felt that the fact that the two terms meant something different was critical and made the statute ambiguous. Regardless of which set of definitions the Court would have chosen, the new terms would still have differed from the definitions of viability in *Roe* and *Danforth*.[105]

Justice White again wrote a dissenting opinion, charging that "only those with unalterable determination to invalidate the Pennsylvania Act can draw any measurable difference insofar as vagueness is concerned between 'viability' defined as the ability to survive and 'viability' defined as that stage at which the fetus may have the ability to survive."[106] He pointed to *Danforth*, where the Court upheld the definition of viability as that stage of fetal development when the life of the unborn child may be continued.[107] Further, Justice White found no inconsistency in saying that a fetus may be viable and saying that a fetus is potentially able to survive.[108]

In spite of Justice White's protests, the Court has held strong to the notion of viability as the compelling point in the state interest. This interest may not be advanced to an earlier point or moved back to a later point by distinguishing between "viable" and "may be viable." *Anders* re-emphasized this point by including under "viability" the ability for potential survival. Thus, there is no need to posit a third stage of development between being viable and not being viable.

THE PHYSICIAN'S ROLE

The second ambiguity contained in the viability determination requirement of the Pennsylvania statute in *Colautti* (and, therefore, necessary to understand before drawing up a new definition of viability in a state criminal abortion statute) is related to the second point emphasized by the Court in *Doe*: a decision to abort before a compelling point is reached is a subjective one to be made by the attending physician.

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104 *Id.*
105 *Id.*
106 *Id.* at 406 (White, J., dissenting).
107 *Id.* at 405.
108 *Id.* at 400-01.

Justice Blackmun explained in *Danforth* that viability was a compelling point purposefully left flexible in *Roe* in order to allow for professional determination, and was left dependent upon medical skills and technical ability.[109]

In *Colautti*, however, the standard being used to assess viability was not clear. The statute required the physician to determine viability "based on his experience, judgment, or professional competence."[110] However, the statute added that if the physician determines that the fetus is viable, again referring to a subjective standard, or if "there is sufficient reason to believe that the fetus may be viable,"[111] then the prescribed standard of care applies. It is unclear whether "sufficient reason to believe" the fetus is viable is still to be based on the subjective judgment of the physician or if other physicians and medical experts are to be consulted for a more objective standard of viability. This second possibility, the Court felt, "portends not an unconsequential hazard for the typical private practitioner who may not have the skills and technology that are readily available at a teaching hospital or large medical center."[112] Thus, the Court said that only a subjective standard is acceptable, which is in line with *Colautti's* definition of viability that required "the judgment of the attending physician on the particular facts of the case before him."[113]

The Court has been quite adamant that the determination of viability is to be made by the physician based on the particular case before him. Yet, the Court also acknowledges that, as medical knowledge advances, the fetus will be able to survive at earlier points in development. This mixes a subjective and objective standard. How these two standards will combine in assessing viability is unclear.

For example, *Colautti* reaffirmed the notion that as medical technology increases and a fetus is able to survive outside the mother's womb earlier, the point of viability will move closer and closer to conception. Such a stand by the Court would eventually bring an end to a woman's right to choose abortion.[114]

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109 428 U.S. at 64.

110 439 U.S. at 391.

111 *Id.*

112 *Id.* at 391-92.

113 *Id.* at 388.

114 One author maintains that *Colautti* helps to create "a spectre of eventual abolition of a woman's right to abortion," and that "in *Roe*, *Danforth*, and *Colautti*, the Court has set a definitional time bomb which threatens to destroy the right of a woman to an abortion." Note, *Colautti v. Franklin: The Court Questions the Use of Viability in Abortion Statutes*, 6 W. ST. U.L. REV. 311 (1979). Indeed, some writers maintain that artificial womb technology now makes it possible to preserve the life of the fetus soon after conception, *see* Note, *supra* note 82. Add to this the fact that a test-tube baby has already been born, and that centers for *in vitro* fertilization are now opening in the United States, TIME, Jan. 21, 1980, at 58; and the ques-

Furthermore, requiring the integration of medical developments with a physician's subjective determination of viability may not be easy for a state to do in a criminal law. Recall the Court's objection to an objective standard of viability in *Colautti*; that a physician may not have access to the latest medical advances.[115] This warning suggests that the subjective standard refers as much to the skills and facilities available to the physician as to the development of a particular fetus.

Given that medical technology will advance and that, therefore, the point of viability will approach conception, eventually the best equipped hospitals and medical centers will no longer be able to continue performing abortions. Such a subjective standard would encourage an abortionist not to keep pace with the latest medical advancements, for by doing so he would, in effect, put himself out of business. How is a legislature to draft a criminal statute which is specific enough to give fair notice to a person of ordinary intelligence of what conduct is forbidden, definite enough so that arrests and convictions are not arbitrary and erratic, and yet flexible enough to take into account the continuing advances in medical skills as well as the subjective determination of a physician? Perhaps the answer lies in such relatively unexplored areas as a survival time criterion. Perhaps, as already noted, any "broad law defining when viability occurs is bound to be arbitrary."[116]

CONCLUSION

Putting together the various developments in the Court's outlook towards viability, one arrives at the present definition as stated in *Colautti*: "Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support."[117] This definition suggests that the Court now recognizes the existence of fetal life, though the Court has never acknowledged changing its position. Furthermore, this definition leaves viability as a shifting rather than a fixed point, moving closer to conception with advances in medical technology.

Perhaps somewhat pessimistically, Justice White, in his dissent to *Colautti* states, "[I]t seems to me that the Court has considerably narrowed the scope of the power to forbid and regulate abortions that the States could reasonably have expected to enjoy under *Roe* and *Danforth*

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tion no longer seems to be "Will large medical advances be possible?" but rather "How soon will these medical advances be made available to the public?"

115 439 U.S. at 391-92.

116 *See* Note, *supra* note 82.

117 439 U.S. at 388.

. . . ."[118] While this may or may not be true, several avenues still remain open to the states in designing criminal abortion statutes, particularly in regard to how a state statute defines viability. Such designs must, of course, be done carefully, keeping in mind the Court's development of the meaning of viability and the Court's due process requirements for criminal statutes.

Justice Blackmun's comment in *Colautti* quickly summarizes the Court's current view of the viability issue. "Viability is the critical point. And we have recognized no attempts to stretch the point of viability one way or the other."[119] It is only after viability has been properly defined that a state criminal abortion statute can survive a constitutional challenge.

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[118] *Id.* at 409.
[119] *Id.* at 389.