"TO RE-ESTABLISH ALL THINGS IN CHRIST" (Ephesians 1:10)

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U.S. SUPREME COURT APPROVES DEATH PENALTY FOR THE UNBORN

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(Special to **The Wanderer**)

WASHINGTON, D.C. — In a sweeping 7 to 2 decision, the Supreme Court struck down on January 22nd the abortion laws of Texas, Georgia, and all but four of the other 50 States. On the basis of a "right to privacy" allegedly guaranteed by the due process clause of the 14th Amendment, the Court majority ruled that during the first three months of pregnancy, a woman and her doctor have the unconditional right to decide whether she will bear or abort her unborn child.

Moreover, after the first three months, but before the child reaches "viability," the Court ruled, the doctrine of "compelling State interest" allows the State to set health care standards for the mother but does not allow any protection to be given to the fetus. After the fetus reaches "viability" occasionally referred to in the decision as "quickening" and loosely assigned to the sixth or seventh month, the States "may regulate or even proscribe" abortions, if they so choose, except that no State may prohibit abortions that are "necessary, in the appropriate medical judgment, for the preservation of the life or health of the mother." It is understood that "health" includes mental health and other intangible factors, as established last Spring in **U.S. vs. Vuitch** (the District of Columbia case in which the Supreme Court overturned the conviction of Dr. Milan Vuitch, a well-known abortionist).

Justice Harry A. Blackmun wrote the majority opinion, in which Justices Burger, Douglas, Stewart, Marshall, Powell, and Brennan (reputedly a Roman Catholic) concurred. Justice Byron R. White and William H. Rehnquist filed dissents, neither of which, significantly, was based on the crucial right to life issue.

The Texas case (**Roe v. Wade**) challenged a strict law allowing abortion only to save the life of the mother, which had been on the books in Texas since 1857. The Georga case (**Doe v. Bolton**), by contrast, struck down the model "liberal" law proposed by the American Law Institute in 1962. It allowed abortion for deformity, rape, and incest as well as to preserve the mother's life and "health," provided the operation was performed at an approved hospital, with the concurrence of two doctors, and the consent of the hospital "committee."

FLIP A COIN

Thus the Supreme Court decision leaves standing only the ultra-permissive laws of New York, Alaska, Hawaii, and Washington. In fact, the decision makes possible laws even more permissive than any presently in existence (though it does not require them). For example, a bill is now being prepared in the New York Legislature to remove all restrictions on abortion straight through to the ninth month, indeed, up to the day of birth. Thus, the only distinction in the future between abortion and, shall we say, the delivery by Caesarean section, will be the intention of the mother. Indeed, a child in the process of being born but only partially emerged from the womb could either be delivered as an infant or killed as an abortion, the child's legal status being six of one and half a dozen of the other.

Justice Blackmun, in the introduction to his opinion, establishes the perspective in which the Court's decision must be viewed. He acknowledges his awareness "of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires." He continued, "one's philosophy, one's experience, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and the family and their values, and the moral standards one establishes and seeks to observe are all likely to

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influence and to color one's thinking and conclusions about abortion. . . . Our task of course is to resolve the issue by Constitutional measurement free of emotion and of predilection. . . . We bear in mind, too, Mr. Justice Holmes' admonition in his now vindicated dissent in **Lochner v. New York**, 198 U.S., 45, 76 (1905): 'It (the Constitution) is made for people of fundamentally differing views and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States'."

ARBITRARY DECISIONS?

Here an extreme intellectual disorder is already visible. If the question of constitutionality can prescind totally from the natural law then the Constitution itself is made to rest on nothing but arbitrary majority will. If philosophy, moreover, religious training, and "one's exposure to the raw edges of human existence" serve only to "color" one's thinking on abortion, as Blackmun suggests, then it follows that the real truth about abortion must come from a source independent of philosophy, religion, and ordinary human experience. But to believe that constitutional jurisprudence can serve as such a source amounts to adopting a thoroughgoing and philosophically untenable nominalism.

After setting forth the background of the Texas case and establishing the standing of the parties (**Roe and Wade**) Justice Blackmun states the essence of the challenge: "The principle thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal 'liberty' embodied in the Fourteenth Amendment's due process clause; or in personal, marital, familial, and sex privacy said to be protected by the Bill of Rights or its penumbras . . . or among those rights reserved to the people by the Ninth Amendment. . . . Before addressing this claim we feel it, desirably briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us and then to examine the State purposes and interests behind the criminal abortion laws."

Justice Blackmun's treatment of medical and legal history will undoubtedly call forth many a scholarly rejoinder. His conclusion is that "the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the nineteenth century."

The Hippocratic Oath, is dismissed by Blackmun who cites the opinion of one L. Edelstein: "(the Oath) is a Pythagorean manifesto and not the expression of an absolute standard of medical conduct." This opinion, concludes Justice Blackmun, "is a satisfactory and acceptable explanation of the Hippocratic Oath's apparent rigidity. It enables us to understand, in historical context, a long-accepted and preferred statement of medical ethics." Thus, morality and the ethical force of an oath are set aside by a pure appeal to historical relativism.

THE JUSTICE IS BLIND

The handling of English common law comes next. Here Blackmun bypasses the opinion of Bracton (13th century), who held that abortion of a living fetus was homicide, as well as the opinion of Coke (17th century), who held abortion to be "a great misprision," and favors instead the more liberal view of Blackstone. In stating that abortion, according to some scholars, was never established as a common law crime, Blackmun misses the significance of the fact that until the 16th century, abortion was handled in ecclesiastical courts in England and hence belonged to Canon Law.

After a brief look at English and American statutory law, Justice Blackmun reaches this conclusion: "It is thus apparent that at common law, at the time of the adoption of our Constitution and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today."

Immediately after this statement, Blackmun writes: "The anti-abortion mood prevalent in this Country in the late 19th century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period." He does not bother to note that this medical and legal "mood" was based precisely on startling scientific discoveries about the nature of fetal life!

Having set forth the reasons usually alleged in support of restrictive abortion laws (health care, defense of pre-natal life, etc.), Justice Blackmun turns to the issue of privacy.

"The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as **Union Pacific Railroad Co. v. Botsford** (1891), the Court has recognized that a right of personal privacy or a guarantee of certain areas or zones of privacy does exist under the Constitution. . . .

"This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon State action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's preservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harms may be imminent. Mental and physical health may be taxed by child care. There is also the distress for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors a woman and her responsible physician necessarily will consider in consultation.

"On the basis of elements such as these, appellants and some **amici** argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellants' arguments that Texas has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination is unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some State regulation in areas protected by that right is appropriate. As noted above, a State may properly assert proper interest in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these protective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, 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. The Court has refused to recognize an unlimited right of this kind in the past. **Jacobson v. Massachusetts; Buck v. Bell. . . .**"

HARDLY A MATTER OF A STATE'S RIGHT

(Note: The citation of **Buck v. Bell** at this point is astounding! This was the 1927 case where the Supreme Court upheld the right of a State government to sterilize a mentally defective young woman against her will! Justice Holmes had said, "Three generations of idiots is enough." The citation of such a case in this context can only mean that whereas the individual does not have an absolute right to do with his body as he pleases, the State does!)

"We therefore conclude," says Justice Blackmun, "that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important State interests in regulation."

Having thus established that abortion is a fundamental right, being part and parcel of the fundamental right to privacy, Justice Blackmun goes on to argue that even such a right can be limited or regulated if there is a "compelling State interest." Now, in the present case, Texas argues that there is a "compelling State interest," namely, the protection of the unborn.

Justice Blackmun writes:

"The appellee and certain **amici** argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellants' case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the amendment. The appellant conceded as much on reargument. On the other hand, the appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment."

Justice Blackmun now proceeds to what he considers to be the demolition of this right to life argument:

"The Constitution does not define 'person' in so many words. . . (instances of the use of the word 'person' in the Constitution and its Amendments are then cited) but in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application."

A SLY FOOTNOTE

In a footnote, Blackmun continues, "When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists . . . but if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, then does not the Texas exception appear to be out of line with the Amendment's command?

"There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already pointed out . . . that in Texas the woman is not a principle or an accomplice with respect to an abortion upon her. If a fetus is a person, why is the woman not a principle or an accomplice? Further, the penalty for criminal . . . abortion . . . is significantly less than the maximum penalty for murder prescribed by article 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?"

Then, returning to the body of the decision, Blackmun writes: "All this, together with our observation, **supra**, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person' as used in the Fourteenth Amendment does not include the unborn. . . . Indeed, our decision in **U.S. v. Vuitch** . . . inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection.

"This conclusion however does not of itself fully answer the contentions raised by Texas and we pass on to other considerations.

"The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus. . . . The situation, therefore, is inherently different from marital intimacy . . . as we have intimated above it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

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

"It should be sufficient to now note briefly the wide divergence of thinking on this sensitive and difficult question. . . ."

(Note: the opinions of several religious bodies, ancient and modern, are cited at this point. In referring to Roman Catholic belief, Blackmun cites Daniel Callahan and John Noonan. It is significant that Germain Grisez's definitive study is never cited anywhere in this decision!)

ALL THAT MODERN INSIGHT!

In objection to the right to life view held by Roman Catholics and many others on both scientific and moral grounds, Justice Blackmun cites "new embryological data that purports to indicate that conception is a 'process' over time rather than an event," "new medical techniques such as menstrual extraction, the 'morning after' pill, implantation of embryos, artificial insemination, and even artificial wombs." In what way these things amount to a difficulty for the Roman Catholic view is not spelled out by the Justice. He continues:

"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. For example, the traditional rule of tort law had denied recovery for prenatal injuries even though the child was born alive. That rule has been changed in almost every jurisdiction. In most States recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few courts have squarely so held. In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus at most, represents only the potentiality of life. Similarly, 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**. Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense."

COMPELLING INTEREST TO KILL

From this observation, by a bizarre logic, Blackmun concludes that the unborn ought to be recognized as persons in no sense! He brings the case to an end as follows:

"In view of all this we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant women that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . and that it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'

"With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point in the light of present medical knowledge is at approximately the end of the first trimester. This is so because of the now-established medical fact . . . that until the end of the first trimester mortality in abortion is less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. . . .

"This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

"With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then, presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period except when it is necessary to preserve the life or health of the mother."

ABORTION ON DEMAND!

With that sweeping conclusion, and with the enormously broad definition of "health" already established by **U.S. v. Vuitch**, it is hard to see in what way the present decision is different from abortion on demand, or how any future State law compatible with the decision could avoid amounting to abortion on demand in practice. Nevertheless, Chief Justice Burger maintains that there is a difference. In his concurring opinion, he writes:

"I do not read the Court's holding today as having the sweeping consequence attributed to it by the dissenting Justices; the dissenting views discount the reality that the vast majority of physicians observe the standards of their profession and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortion on demand."

It was of this sentence that Msgr. James T. McHugh, of the USCC Family Life Divison, remarked that it bears a logic "bordering on the absurd."