CHAPTER 8

POST *ROE VS. WADE*

On January 22, 1973, the U.S. Supreme Court struck down all laws in every state that in any way had protected the lives of developing unborn children. It legalized abortion in all 50 states, for the full nine months of pregnancy, for social and economic reasons.

- It created a new, basic constitutional right for women in the right to privacy which the Supreme Court had created only a few years earlier. That right to privacy was "broad enough to encompass a woman's right to terminate her pregnancy."
- It stated that the law protects only "legal persons" and that "legal personhood does not exist prenatally."
- It authorized no legal restrictions on abortion in the first three months.
- No restrictions from then until viability, except those needed to make the procedure safer for the mother.
- Abortion was allowed until birth, if one licensed physician judged it necessary for the mother's "health."

Roe vs. Wade, U.S. Supreme Court
410 U.S. 113, 1973
Doe vs. Bolton, U.S. Supreme Court
410 U.S. 179, 1973

How did this decision define "health?"

The Court said that abortion could be performed:

> ". . . in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well being of the patient. All these factors may relate to health."

Doe vs. Bolton, U.S. Supreme Court,
No. 70-40, IV, p. 11, Jan. 1973

> "Maternity or additional offspring may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress for all concerned associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically or otherwise, to care for it. In other cases, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors that the woman and the responsible physician will consider in consultation."

Roe vs. Wade, U.S. Supreme Court,
No. 70-18, p. 38, Jan. 1973

But these reasons are social reasons, not health reasons.

That is the situation! The U.S. Supreme Court has specifically defined the word "health" to include a broad group of social and economic problems, as judged by the mother herself. It has further specifically forbidden any state to forbid abortion at any time prior to birth for these reasons, if the mother can find a doctor to do the abortion.

This is also true in every nation in the world. If abortion is allowed for "health," that state or nation has abortion-on-demand; e.g., in England in 1986, 132,000 of 135,000 legal abortions were due to mental health.

The Times, 26 March '88

Then the Supreme Court allowed abortion-on-demand until birth?

Yes.

Can you prove this?

The official report of the U.S. Senate Judiciary Committee, issued after extensive hearings on the Human Life Federalism Amendment (proposed by Senators Hatch and Eagleton), concluded:

"Thus, the [Judiciary] Committee observes that no significant legal barriers of any kind whatsoever exist today in the United States for a woman to obtain an abortion for any reason during any stage of her pregnancy."

Report, Committee on the Judiciary, U.S. Senate, on Senate Joint Resolution 3, 98th Congress, 98-149, June 7, 1983, p. 6

> "Our nationwide policy of abortion-on-demand through all nine months of pregnancy was neither voted on by our people nor enacted by our legislators."

R. Reagan, *Abortion & the Conscience of the Nation*, Thomas Nelson Publishers, 1984, p. 15

Ever since 1973, many had denied that late term elective abortions were legal and/or did not exist. This was totally debunked during the debate on partial-birth abortions, when it was conclusively shown that such abortions were done even late in the third trimester. An example has been abortionist George Tiller ("the killer") in Wichita, Kansas, who specalizes in late second and third trimester abortions

What was the pro-life response to the *Roe vs. Wade* decision?

In the early years it was felt that a reversal by the Court itself was highly unlikely. Accordingly, great effort was expended in formulating and promoting an amendment to the Constitution to reverse these two

decisions. There are two methods of doing this. One is through constitutional convention, and the other is through Congress and state legislatures.

What amendments have been proposed?

The original wording formulated in 1974 by the National Right to Life (NRLC) Committee was:

THE NRLC HUMAN LIFE AMENDMENT

Section 1: With respect to the right to life, the word "Person" as used in this article and in the Fifth and Fourteenth Articles of Amendment to the Constitution of the United States applies to all human beings irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biologic development.

Section 2: No unborn person shall be deprived of life by any person, provided, however, that nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

Section 3: The Congress and the several States shall have power to enforce this article by appropriate legislation.

Later, another version was introduced which came to be called:

THE PARAMOUNT AMENDMENT

The paramount right to life is vested in each human being from the moment of fertilization without regard to age, health, or condition of dependency.

Then, in 1981, these two versions were merged into a new NRLC Amendment often called:

THE NRLC UNITY HUMAN LIFE AMENDMENT

> Section 1: The right to life is a paramount and most fundamental right of a person.
>
> Section 2: With respect to the right to life guaranteed to persons by the Fifth and Fourteenth Articles of Amendment to the Constitution, the word "person" applies to all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring, at every state of their biological development, including fertilization.
>
> Section 3: No unborn person shall be deprived of life by any person, provided, however, that nothing in this article shall prohibit a law allowing justification to be shown for only those medical procedures required to prevent the death of either the pregnant woman or her unborn offspring, as long as such law requires every reasonable effort be made to preserve the life of each.
>
> Section 4: Congress and the several States shall have power to enforce this article by appropriate legislation.

Would all three reverse the Supreme Court Decision?

Yes, but they would go further. Prior to the 1973 Supreme Court Decision, the U.S. had a de facto states' rights situation under which each state could decide if it wanted to forbid or to permit abortion and to what degree. These amendments would reverse the 1973 Supreme Court Decision, but would also go fur-

ther and mandate federal protection for the unborn in all 50 states.

Many legal experts had thought that such protection was already present in the 14th Amendment to the Constitution; but, in the late 1960s, 17 states passed laws to allow abortion for various reasons. Pro-life leaders do not want this to happen again. Accordingly, these amendments would revoke the pre-existing states' rights situation and mandate universal civil rights for all living humans — born or unborn.

Are these amendments likely to be passed?

In order to be reported out to the states, such an amendment must receive a two-thirds vote in both the U.S. Senate and in the U.S. House of Representatives. The three above amendments would provide federal constitutional protection in every state to all children from the time of conception. Such an amendment is not a likely possibility in the immediate foreseeable future. Accordingly, a lesser version was attempted.

That was a states' rights amendment?

Yes. This amendment was proposed, debated and voted on in the U.S. Senate in June of 1983. The vote was 49 for, 50 against. It failed, as it needed two-thirds majority. This amendment was the "Hatch-Eagleton" amendment. It simply stated "a right to abortion is not secured by this constitution."

If passed and ratified, it would have reversed the Supreme Court decisions and returned the nation to the condition prior to the 1973 Supreme Court decision when each state had the power to forbid abortion.

What was the Helms Human Life Bill?

This attempted a different route. Its goal was the passage of a congressional statute declaring that unborn humans were legal persons. This would have been challenged and gone to the Supreme Court, which at

that time had a strong pro-abortion majority. The bill was defeated in the Senate.

What of the Constitutional Convention method?

This method has not been used since the first constitutional convention approved the first ten amendments, the Bill of Rights. Many states have proposed such a "con-con," but the required number of states, 34, has not been reached, and since the mid-1980s there has been little public pressure to call such a convention.

The court decided subsequent cases?

Yes, and the later decisions removed all of the minimal constraints imposed by the '73 decisions.

- Spousal and parental consent was ruled unconstitutional. Prohibition of salt poisoning abortion on medical grounds was ruled unconstitutional.
  Planned Parenthood vs. Danforth, 428 U.S. 52, 1976

- Viability is what the doctor says it is.
  Colautti vs. Franklin, 429 U.S. 379, 1979

- The State is not required to fund "medically necessary" (i.e., elective) abortions for the poor.
  Harris vs McRae, 448 U.S. 297, 1980

- Informed consent is not required. A waiting period is unconstitutional. Mandatory hospitalization for second trimester abortions is unconstitutional. "Humane" disposal of fetal remains is unconstitutional.
  City of Akron vs. Akron Center for Reproductive Health, 103 S. Ct. 2481, 1983

- Informed consent is unconstitutional.
  Thornberg vs. Am. Col., OB&GYN, 106 S. Ct. 2169, 1986

The thrust of all of the above was to effectively eliminate any barriers to induced abortion for any reason throughout the nine months of pregnancy. But then a small change occurred in the Webster decision.

What was the Webster decision?

In February of '89 the Court broadened the restrictions that could be put on the use of tax money to pay for abortions. It also approved a requirement in the State of Missouri that after 20 weeks the abortionist must do viability testing on the preborn baby.

Perhaps its greatest significance was that it was the first loosening of the steady parade of decisions above, and that it held promise of more to come.

U.S. Supreme Court, Webster vs. Reproductive Health Services,
Oct. Term 1988, No. 88-605

The next major change occurred with the Casey decision.

What was the Casey decision?

In June 1992 the U.S. Supreme Court decided *Planned Parenthood of Southeast Pennsylvania vs. Casey*. In it the Court reversed some of its earlier decisions. It ruled that certain reasonable regulations of abortion could be enacted. These included parental notification of a minor daughter's scheduled abortion, informed consent, a 24-hour waiting period and confidential reporting. It struck down a spousal notification clause.

It clearly reaffirmed *Roe vs. Wade* however. In doing so, it rejected *Roe's* trimester scheme and spoke to a dividing line at viability. It essentially rejected the right of privacy as its justification and adopted a new "liberty" standard.

The above restrictions would not apply if they "unduly burdened" her right to abortion. The original definition of "health" remained, and so abortion remained

legal until birth.

U.S. Supreme Court, June 29, 1992
Planned Parenthood of S.E. PA vs. Casey No. 91-744 and 91-902

Could the states pass laws?

Until the Webster and Casey decisions, the states were completely handcuffed. The only laws that the Supreme Court allowed them to pass were laws forbidding the use of public tax money for abortions.

During the 1980s, the federal Congress, by statute, had forbidden federal funding for Medicaid abortions through the famous Hyde amendment. Subsequently, abortion funding was withheld from federal employees' health insurance, the military, public health, Peace Corps and other areas administered by the federal government. Funding was withheld by executive order from overseas organizations that promoted abortion. Funding was cut off from the United Nations Fund for Population Activity and finally from the District of Columbia. During these years, where indicated and possible, most of the states followed suit by state statute or by initiative referendum.

And after the Webster and Casey decisions?

Given considerably more leeway, after the Casey decision, many states passed laws that included:

- Requiring parental notification for the abortion of a minor daughter.
- Some required consent.
- Requiring informed consent of the woman.
- Requiring abortion clinic regulations.
- Limiting fetal experimentation.
- Aid for adoption.

Partial-Birth Abortion

In 1995, Ohio passed the first law forbidding partial-birth abortion. It was declared unconstitutional.

In 1996, a reformulated law was passed by the U.S. Congress but was vetoed by President Clinton. Two years later a second passage met a similar fate.

Meanwhile, almost 30 state legislators had passed laws to forbid this method of killing babies during delivery. Such bans from Nebraska and Wisconsin were considered by the U.S. Supreme Court and struck down by a 5-4 vote in June 2000 *(Stenberg v. Cahart)*.

What of laws against "rescue"?

In response to the somewhat increase in violence against abortion facilities and the shooting of 5 abortionists and clinic staff, U.S. Congress passed the Freedom of Access to Clinics Act (FACE). In addition, the Supreme Court ruled that the RICO (Anti-Racketeering Act) did apply to peaceful abortion protesters. The sum total effect of these draconian laws sharply chilled, not just the symbolic, non-violent sit-ins, but also what had been completely legal — the common First Amendment-protected, peaceful sidewalk counseling and picketing outside of abortion chambers.

It is of interest that the FACE Act has been turned back on an abortionist. A Federal Appeals Court (11th Circuit) ruled for a woman who was forced to be aborted. This effectively criminalized forced abortion.

Jane Roe II v. Aware Women Clinic for Choice
E. Windle et al. U.S. Ct. of Appeals
11th Circuit No. 00-10231, June 8, 2001

What of Roe and Doe?

The Roe of *Roe vs. Wade* was Norma McCorvey. The Doe of Doe vs. Bolton was Sandra Cano. Both have become converts to the pro-life cause.

What are your goals now?

The ultimate human rights goal remains an amendment to the U.S. Constitution which will guarantee

equal protection by law to all living humans from the time their life begins at fertilization until natural death.

The intermediate goal remains the complete reversal of the 1973 *Roe vs. Wade* and *Doe vs. Bolton* decisions by the Supreme Court. This will return to the citizens of each state a right and a responsibility that they had for the first 200 years of our nation's history. This will return the regulation of abortion to each state through its elected state officials, without interference by the federal courts.

Current immediate goals include passage of regulatory legislation at state level to eliminate at least some of the worst abuses of the abortion industry, through parental notification and consent, spousal notification, informed consent, clinic regulations, waiting periods, adequate record keeping, requiring high malpractice insurance, etc.

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