

State Protection of the Viable Unborn Child After Roe v. Wade: How Little, How Late?

Grover Rees III

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this occur, the decision of *Virginia Citizens* is destined to join *Lochner v. New York* as the "twentieth century archetype of a judicial mistake."⁴⁵

Paul Preston

STATE PROTECTION OF THE VIABLE UNBORN CHILD AFTER *ROE V. WADE*:
HOW LITTLE, HOW LATE?

In 1974, Missouri enacted a statute prohibiting the abortion of a viable fetus, except when necessary to preserve the life or health of the mother.¹ Viability was defined 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."² Two physicians sued for injunctive and declaratory relief, claiming that abortion could not constitutionally be prohibited prior to the 28th week of gestation. The United States Supreme Court held that a state may prohibit the abortion of a fetus which might survive outside the womb, regardless of the period of gestation, unless the abortion is necessary to preserve maternal life or health. *Planned Parenthood of Central Missouri v. Danforth*, 96 S. Ct. 2831 (1976).³

Until recently, regulation and prohibition of abortion were generally thought to be constitutionally within the police power of the states. Abortion had been a crime at common law,⁴ and specific anti-abortion statutes were

45. STEPHENSEN, *supra* note 37, at 218.

1. VERNON'S ANN. MO. STAT. §§ 188.010 - .085 (Supp. 1975), enacted by Missouri Laws 1974, p. 809 §§ 1-16.

2. *Id.* § 188.015(3) (Supp. 1975), enacted by Missouri Laws 1974, p. 809 § 2(3).

3. The Court's treatment of the following subjects in the instant case is not discussed in this Note: standing, state requirement of a woman's "informed consent" prior to an abortion, state requirement of spousal consent prior to an abortion, state requirement of parental consent prior to an abortion performed upon an unmarried minor, and reporting and record-keeping requirements. The Court's holding on a state prohibition of the saline amniocentesis method of abortion after the first 12 weeks of gestation is discussed in the text at notes 62-68, *infra*. The Court's holding on a state requirement that a physician take measures to preserve a fetus' life and health during abortion is discussed in the text at notes 58-61, *infra*.

4. 3 E. COKE, INSTITUTES *50; 1 W. BLACKSTONE, COMMENTARIES *129; 2 H. BRACON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE *279. But the Court expressed uncertainty as to whether the common law regarded abortion as homicide, or a lesser crime, or never "firmly established" as a crime at all, in *Roe v. Wade*, 410 U.S. 113, 132-36 (1973). The Court relied heavily on Means, *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Arise*

enacted within a few decades after the ratification of the United States Constitution.⁵ By the time of the adoption of the fourteenth amendment in 1868, most states had such statutes.⁶ During the 1960's a sustained national effort to achieve the enactment of permissive abortion laws met with limited success: most states continued to prohibit abortions except to save the life of the mother,⁷ and no state permitted an abortion after the 24th week of gestation, except in limited "therapeutic" instances.⁸ By 1973, the Supreme Court had declined invitations to find state anti-abortion laws unconstitutional for vagueness,⁹ overbreadth,¹⁰ and denial of substantive rights.¹¹

In *Roe v. Wade*¹² and its companion, *Doe v. Bolton*,¹³ the Court for the

from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?, 17 N.Y.L. F. 335 (1971), for its doubts about the status of abortion as a common-law crime. The Means article is rebutted in Byrn, *An American Tragedy: the Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 815-27 (1973).

5. E.g., CONN. STAT., Tit. 20, §§ 14, 16 (1821); N.Y. REV. STAT., pt. 4, ch. 1, Tit. 2, §§ 8, 9, pp. 12-13 (1828) (cited in *Roe v. Wade*, 410 U.S. 113, 175 n.1) (1973) (Rehnquist, J., dissenting).

6. *Roe v. Wade*, 410 U.S. 113, 175 (1973) (Rehnquist, J., dissenting).

7. *Id.* at 118 & n.2 (1973).

8. By 1970, fourteen states had adopted abortion laws based on the American Law Institute's "model" statute, set forth in the appendix to *Doe v. Bolton*, 410 U.S. 179, 205-07 (1973). The ALI proposal banned all abortions at any stage of gestation, except in "therapeutic" cases. Four other states—Alaska, Hawaii, New York and Washington—had adopted laws more permissive than the ALI model, and all others had more restrictive laws, usually permitting abortion only to save the mother's life. *Roe v. Wade*, 410 U.S. 113, 139-40 & n.37 (1973). Among the more permissive states, New York and Washington prohibited "non-therapeutic" abortions after 24 weeks and after quickening, respectively. N.Y. PENAL LAW § 125.05(3) (McKinney Supp. 1970); WASH. REV. CODE ANN. § 9.02.060 (Supp. 1970). Alaska's and Hawaii's permissive abortion statutes, both passed in 1970, defined abortion as a procedure to "terminate the pregnancy of a nonviable fetus." ALASKA STAT. § 11.15.060 (1970); HAWAII REV. STAT. § 453-16 (Supp. 1970).

9. *United States v. Vuitch*, 402 U.S. 62, 67-73 (1971).

10. In *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970), the district court granted a declaratory judgment that a state statute prohibiting an abortion unless necessary to save the life of the mother was unconstitutionally overbroad. The defendant district attorney appealed from the declaratory judgment, and the Supreme Court dismissed the appeal on other grounds. 400 U.S. 1 (1970). A subsequent district court judgment granting the plaintiffs injunctive relief, 320 F. Supp. 219 (E.D. Wis. 1970), was vacated by the Supreme Court on other grounds, 402 U.S. 903 (1971), leaving the "overbreadth" issue unresolved. See also note 11, *infra*.

11. See Polityka, *From Poe to Roe: a Bickelian View of the Abortion Decision—Its Timing and Principle*, 53 NEB. L. REV. 31, 47 (1974). Among the opportunities the Court had to reach the merits on abortion were *United States v. Vuitch*, cited in note 9, *supra*, and *Babbitz v. McCann*, cited in note 10, *supra*.

12. 410 U.S. 113 (1973).

13. 410 U.S. 179 (1973).

first time announced constitutional standards by which all fifty state anti-abortion laws were effectively nullified.¹⁴ *Roe* held that a "right of privacy," not explicitly mentioned in the Constitution but secured either by the ninth amendment or by the fourteenth amendment,¹⁵ "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."¹⁶

Roe did not, however, recognize an absolute right to unregulated abortion. The state was held to have interests in maternal health,¹⁷ as well as in the protection of "potential life,"¹⁸ justifying some restrictions on abortion. Specifically, the Court held that the state's interest in protecting the mother becomes "compelling" at about the twelfth week of gestation (the end of the "first trimester")¹⁹ and at that point the state may regulate the manner in which abortions are performed. The Court also held that the interest in potential life does not become compelling until *viability*, defined by the Court as that point when the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid."²⁰ Only after viability may states actually forbid abortion, and then only when the procedure is not

14. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 2 (1973).

15. 410 U.S. at 152.

16. *Id.* at 153. The Court found that many Americans regard the unborn child as a person entitled to full protection from the moment of conception. *Id.* at 160-61. However, the Court also found that the unborn are not protected by the fourteenth amendment. *Id.* at 158. Examining the Texas statute in question, the Court further determined that (1) since the law permitted abortion to save the life of the mother, (2) since the mother herself was not subject to criminal penalties for abortion, and (3) since criminal abortion carried a lower penalty than murder, it did not reflect a genuine belief in the humanity of the fetus. *Id.* at 157 n.54. *But see* Epstein, *Substantive Due Process by Any Other Name: the Abortion Cases*, 1973 SUP. CT. REV. 159, 179-80 (1973). Thus the *holding* in *Roe* technically leaves open the possibility that a state might show its anti-abortion law to be based on the conviction that human life begins at conception, and therefore to be a constitutional protection of persons within its jurisdiction. Speaking directly to this issue in dictum, however, the majority in *Roe* said a state may not "by adopting one theory of life . . . override the rights of the pregnant woman . . ." *Id.* at 162. Subsequent to *Roe*, Rhode Island passed an anti-abortion law specifically declaring that the unborn child is a human being from the moment of conception; this law was found unconstitutional under the rule of *Roe*. *Doe v. Israel*, 358 F. Supp. 1193 (D.R.I. 1973), *cert. denied*, 416 U.S. 993 (1974). However, the case did not involve a law whose legislative history reflected a long and settled state policy, outside the context of the recent abortion controversy, that unborn children be afforded the full protection of state law.

17. 410 U.S. at 150, 163.

18. *Id.*

19. *Id.* at 163.

20. *Id.* at 160.

necessary to preserve the mother's life or health.²¹ The Court stated that viability "is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."²²

Doe set the standard for determining whether an abortion is necessary to preserve maternal life or health: the "best clinical judgment" of the physician chosen by the woman desiring the abortion.²³ A state's compelling interest in the potential life of the viable unborn child does not justify legislative restriction of post-viability abortions to situations in which the mother's *physical* health is endangered; the physician's judgment "may be exercised in light of all factors—physical, emotional, psychological, familial and the woman's age—relevant to the well-being of the patient."²⁴

The Court in *Roe* gave no convincing explanation for its choice of viability as the point at which state protection of the fetus might begin. Unlike conception, quickening, and birth, the point of viability signals no *inherent* change in the fetus; rather, it is a function of the available life-sustaining apparatus.²⁵ Nor did the Court explain why a being with a *present* capability of "meaningful life outside the mother's womb,"²⁶ biologically identical to a prematurely born infant of the same age,²⁷ is still only "potentially" human, and why it may be destroyed to protect the emotional, psychological or familial well-being of the mother.²⁸ Finally,

21. *Id.* at 163-64.

22. *Id.* at 160. The Court cited L. HELLMAN & J. PRITCHARD, WILLIAMS OBSTETRICS 493 (14th ed. 1971), and DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1689 (24th ed. 1965).

23. 410 U.S. at 191-92. The statute challenged in *Doe* had restricted the exercise of the physician's judgment to certain specific situations, and further limited the physician's judgment by requiring corroboration by other physicians and approval by hospital committees. The district court ruled that all of these restrictions were unconstitutional. The Supreme Court upheld the lower court ruling of unconstitutionality of the certification and corroboration requirements; although the other restrictions were not before the Court in *Doe*, *id.* at 192-200, they were unconstitutional under the *Roe* guidelines. See *Roe v. Wade*, 410 U.S. 113, 164-65 (1973).

24. 410 U.S. at 192.

25. For the view that viability is an illogical point to begin state protection of the fetus, see, e.g., Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 924-25; Comment, *Medical Responsibility for Fetal Survival Under Roe*, 10 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 444, 449 n.28. For a defense of the point of viability as a practical choice, more related to the prevailing practices and to the aesthetic norms of society than to inherent changes in the fetus, see Tribe, *supra* note 14, at 26-28.

26. 410 U.S. at 163.

27. See Byrn, *supra* note 4, at 807 n.5; Harrison, *The Supreme Court and Abortional Reform: Means to an End*, 19 N.Y.L. F. 685, 688-89 (1974). See also Means, *supra* note 4, at 409-10; Tribe, *supra* note 14, at 27.

28. See Destro, *Abortion and the Constitution: the Need for a Life-protective*

the Court in *Roe* did not indicate what measures, if any, a state might take to advance its compelling interest in protecting a viable fetus when the mother's physician has determined that an abortion is necessary for health reasons.²⁹

The uncertainty about the reasons behind the Court's guidelines might have been of philosophical interest only, had the rules themselves not been ambiguous. Regulation for maternal health can begin at "approximately the end of the first trimester."³⁰ This rule apparently rests on a finding of fact (based on data available in 1972 and reflecting 1972 levels of medical expertise and technology)³¹ that at about 12 weeks, mortality in abortion begins to exceed mortality in full-term childbirth.³² Likewise, the Court noted that viability "is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."³³ But the detailed rules on permissible state regulation did not specify a particular date for viability;³⁴ and the

Amendment, 63 CAL. L. REV. 1250, 1310 (1975); Ely, *supra* note 25, at 921 n.19; Comment, *Roe v. Wade and the Traditional Legal Standards Concerning Pregnancy*, 47 TEMP. L.Q. 715, 729 (1974).

29. The "health-related" harms to the mother listed in *Roe* are not exclusively risks of pregnancy per se: "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 All these are factors the woman and her responsible physician necessarily will consider in consultation." 410 U.S. at 153. This paragraph may recognize a right to destroy the fetus, not just to terminate the pregnancy. But if a state permitted termination of pregnancy, requiring that the viable fetus be saved if possible, and took over the care of the child so that maternal responsibility ended with the abortion, could the mere *existence* of the child be a threat to the mother's mental health, warranting its destruction? See Rice, *The Dred Scott Case of the Twentieth Century*, 10 HOUSTON L. REV. 1059, 1082-87 (1973); Tribe, *supra* note 14, at 27-28 & n.128. *But cf.* Tribe, *supra* note 14, at 4 n.24. See also text at notes 57-75, *infra*.

30. 410 U.S. at 164.

31. See 410 U.S. at 149 n.44. If technology should render abortion at later than 12 weeks of gestation safer than childbirth, the argument can be made that the state can no longer regulate for maternal health at 12 weeks. But if childbirth becomes safer, or new statistical evidence reveals that abortion is more dangerous before 12 weeks than the Court found in *Roe*, presumably the state could regulate even earlier to protect maternal health. See Comment, *Viability and Abortion*, 64 KY. L.J. 146, 150 n.23 (1975). It is important to note that under *Roe*, the woman's privacy interest is no greater before 12 weeks than afterward; rather, the state's interests have not yet become "compelling." 410 U.S. at 162-64. Should scientific developments cause either of the state's interests—maternal health or protection of the viable fetus—to mature prior to 12 weeks, this barrier should fall at least as easily as the 24-week barrier which was at issue in the instant case.

32. 410 U.S. at 149, 163. See Tribe, *supra* note 14, at 4.

33. 410 U.S. at 160.

34. *Id.* at 164.

Court's explicit statement that a fetus is viable if it might survive "with artificial aid"³⁵ seemed to recognize that the moment of viability will change as medical skill and technology advance.³⁶

In form, *Roe* and *Doe* were "a sort of guidebook, addressing questions not before the Court and drawing lines with an apparent precision one generally associates with a commissioner's regulations";³⁷ in substance, however, they were an invitation to legislate and litigate.³⁸

The Missouri law challenged in the instant case was a legislative attempt to find the limits of *Roe* and *Doe*.³⁹ It requires that the attending physician certify in advance, "with reasonable medical certainty," that the fetus is not viable. No abortion can be performed without such prior certification, unless it is necessary to preserve the life or health of the mother.⁴⁰ The certification requirement applies to every abortion, even if performed during the first trimester; its constitutionality was not challenged.⁴¹

Plaintiffs did object, however, to the de facto definition of viability.⁴² As "artificial life-supportive systems" are developed which enable a fetus to survive indefinitely when removed from the womb at 18 weeks, 12 weeks, or one week, such a fetus would be viable under the Missouri definition, and no doctor could certify to the contrary with "reasonable medical certainty." Such developments would upset the three-stage division articulated in *Roe*. Plaintiffs argued that this definition of viability was unconstitutional in that it contained no reference to a gestational period, thereby failing to "incorporate and reflect the three stages of pregnancy."⁴³

Justice Blackmun's majority opinion⁴⁴ in the instant case clearly holds

35. *Id.* at 160.

36. The Court noted the potential development of "artificial wombs" as a factor complicating the determination of when life begins. *Id.* at 161. See also text at notes 45-49, *infra*.

37. Ely, *supra* note 25, at 922 & n.21.

38. See Comment, *Implications of the Abortion Decisions: Post Roe and Doe Litigation and Legislation*, 74 COLUM. L. REV. 237, 268 (1974).

39. Section 1 of the statute stated the legislature's intention "to reasonably regulate abortion in conformance with the decisions of the supreme court of the United States." VERNON'S ANN. MO. STAT. § 188.010 (Supp. 1975), enacted by Missouri Laws 1974, p. 809 § 1.

40. *Id.* § 188.030 (Supp. 1975), enacted by Missouri Laws 1974, p. 809 § 5.

41. 96 S. Ct. at 2838.

42. See text at note 2, *supra*.

43. 96 S. Ct. at 2838.

44. Justices Brennan, Stewart, Marshall and Powell joined in Justice Blackmun's opinion. The Court was unanimous in upholding the Missouri statute's definition of viability. But *cf.* text at notes 50-57, *infra*.

that the three stages of *Roe* are not immutable barriers to state regulation of abortion. As the point of viability is advanced, the state's compelling interest in the "potential life" of the unborn child may be asserted earlier. In upholding the Missouri definition, Blackmun stressed that the Court in *Roe* had "purposefully" left the point of viability "flexible," that this point was "dependent upon developing medical skill and technical ability," and that the *Roe* time periods had been calculated "in the light of present medical knowledge."⁴⁵

Standing alone, the Court's upholding of the Missouri definition of viability might be seen as a major victory for those who wish to protect the unborn child. Today, viability is generally placed not at 28 weeks but at 20 weeks.⁴⁶ One expert has predicted that by 1981, doctors will be able to keep a "first-trimester" fetus alive indefinitely.⁴⁷ As the point of viability moves toward the moment of conception, the *Roe* formula would seem to advance the state's compelling interest in the potential life of the viable fetus accordingly.⁴⁸ With the development of the artificial womb anticipated in

45. 96 S. Ct. at 2837. "We noted that this point 'is usually placed' at about seven months or 28 weeks, but may occur earlier." *Id.* at 2838, citing *Roe v. Wade*, 410 U.S. 113, 160 (1973). Two things are noteworthy about this paraphrase of a key sentence in *Roe*: the use of quotation marks to draw attention to the word "usually," and the unexplained omission of half of the *Roe* formula. In *Roe*, Justice Blackmun said viability "may occur earlier, even at 24 weeks," strongly implying that 24 weeks was an extreme lower limit. *Id.* at 160. In the instant case, however, his emphasis on flexibility and advancing technology reflects a recognition that there may be no such lower limit.

46. STEDMAN'S MEDICAL DICTIONARY, ILLUSTRATED 1388 (22d ed. 1972). The point of viability, as defined by the Court in *Roe*, is when the fetus "potentially" can survive. 410 U.S. at 160. Since 1971, developments have advanced the point of viability. See Byrn, *supra* note 4, at 807 n.5; Comment, *Landmark Abortion Decisions: Justifiable Termination or Miscarriage of Justice?*, 4 PACIFIC L.J. 821, 854-55 (1973); *Roe v. Wade and the Traditional Legal Standards*, *supra* note 28, at 737; J. Willke, *Twenty-One Premature Babies*, in *Symposium: Life-Death Decisions in Medicine*, presented at Boston Museum of Science, June 26, 1976. See B. & J. WILLKE, HANDBOOK ON ABORTION 25 (revised edition 1975).

47. "Within five years . . . we will have life-support apparatus that will allow us to sustain an embryo removed from the uterus at any stage of development[.]" Interview with Bernard N. Nathanson, M.D., *Good Housekeeping*, March 1976, at 69. Dr. Nathanson, an obstetrician-gynecologist associated with St. Luke's Women's Hospital in New York, is a former director of the Center for Reproductive and Sexual Health. While technology is now available to overcome many of the problems facing infants removed from the womb even at the earliest stages of development, rapid development of total life-support systems such as those envisioned by Dr. Nathanson would depend on a major commitment of funds, either from government or the private sector, to an effort to co-ordinate and apply the technology. No such commitment has been forthcoming.

48. See note 36 *supra*.

Roe, the process would be complete: every unborn child would be a viable unborn child. From the moment of conception, the woman's right to privacy would be outweighed by the state's compelling interest in protecting the viable fetus. *Roe* would thus contain the seeds of its own obsolescence.⁴⁹

Other aspects of the instant case, however, confuse the issue.

Prominent among these is the majority dictum that 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, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.⁵⁰

This statement implies some limitations on the state's ability to impose sanctions on a physician who is personally not impressed with viability as a criterion, and who might perform an abortion involving the destruction of a viable unborn child in the absence of such sanctions. Moreover, the Court cites, evidently with approval, a federal district court case overturning a state statute which set viability at 20 weeks.⁵¹ This may indicate that even if it should become common medical knowledge that the point of viability is at, for example, 12 weeks, states may not pass statutes acknowledging this fact. However, if a physician is required to certify with "reasonable medical

49. See Comment, *Roe and Doe: Compelling State Interest Test in Substantive Due Process*, 30 WASH. & LEE L. REV. 628, 646 (1973).

50. 96 S. Ct. at 2839.

51. *Id.* at 2839 & n.5. In *Hodgson v. Anderson*, 378 F. Supp. 1008 (D. Minn. 1974), *aff'd sub. nom. Hodgson v. Lawson*, — F.2d — (U.S.C.A. 8th Cir. 1976), the district court rejected the defendants' contention that the 24-28 week standard of viability mentioned in *Roe* was "only dicta," and said that "at any point prior to 24 weeks . . . the state may regulate only insofar as such regulations are related to maternal health." 378 F. Supp. at 1016. However, in the instant case the Supreme Court read *Hodgson* as resting on the district court's finding that "defendants have presented no evidence . . . that viability does in fact occur at 20 weeks." *Id.* So the Court did not say conclusively that such evidence could not be presented in support of a statutory definition of viability occurring at 20 weeks.

Subsequent to the Supreme Court's decision in the instant case, the Eighth Circuit upheld the *Hodgson* decision, stating that *Roe v. Wade* "placed the earliest point of viability at the twenty-fourth week," and that the Court in *Danforth* had "cited with approval" this aspect of *Roe*. 45 U.S.L.W. 2198. This seems a clear misreading of the Court's holding in the instant case. See note 45 *supra*.

The Court in the instant case also cited *Wolfe v. Schroering*, 388 F. Supp. 631 (W.D. Ky. 1974), which upheld a state statute prohibiting abortions, except for maternal health reasons, after the fetus could "reasonably be expected to have reached viability." *Wolfe* was cited for the proposition that a state need not fix by statute a specified number of weeks as the point of viability. 96 S. Ct. at 2839.

certainty" that the fetus is not viable, and if sanctions may be imposed for abortions performed where such certainty did not exist, then state legislative enactment of the precise date of viability is not essential to protection of the fetus.

Justice Stewart, in a concurring opinion joined by Justice Powell, noted that the Missouri statute does not punish a doctor "for erroneously concluding that the fetus is not viable."⁵² He would have upheld the definition only on the narrow ground that it "has almost no operative significance."⁵³ Since there is no punishment, "there is thus little chance that a physician's professional decision to perform an abortion will be 'chilled.'"⁵⁴ If this caveat were adopted by the Court as a basis to overturn state laws punishing the abortion of viable unborn children, its effect would be uncertain:

1) If Justice Stewart means only that a state may not punish a doctor who, *in good faith*, erroneously certifies that a fetus is not viable, then abortion would remain available up to the "upper limit" of medical opinion as to viability. A doctor could be required to demonstrate that he reasonably believed the fetus had no potential for survival, even with the aid of artificial life-support systems.

2) If, however, the concurring opinion implies that the courts could admit no evidence as to whether a certain fetus was in fact viable at the time of abortion, or as to the body of medical knowledge defining the limits of "good faith error"—if, in other words, the doctor's uncontroverted assertion that he believed in good faith that the fetus was not viable would be sufficient for acquittal, regardless of objective evidence—then a conviction would be virtually impossible to obtain. Such an unusual restriction on state law would effectively circumvent the *Roe* holding that the right to abortion is not absolute.

Notwithstanding the holding that protection of the viable fetus may occur prior to 24 weeks, Justice Stewart's suggestion that a state definition of viability which had any "operative significance" might be unconstitutional,⁵⁵ together with the majority's apparent confidence in the "judgment of the responsible attending physician,"⁵⁶ leaves serious questions as to how the state may prevent *any* abortion.⁵⁷

52. 96 S. Ct. at 2850.

53. *Id.*

54. *Id.*

55. 96 S. Ct. at 2850.

56. *Id.* at 2839.

57. Justice Stewart's implication that a law punishing the destruction of a viable fetus would "chill" a doctor's "professional decision to perform an

There is another lingering uncertainty: does the state retain an interest in protecting the viable unborn child, even after a doctor has determined that an abortion is necessary to preserve the mother's health? The instant case gives two indications as to what states may do to protect the viable fetus when a "life or health" abortion is performed. First, the Missouri law required the physician to take the same care to preserve the life and health of the fetus as would be required if the fetus were intended to be born alive. Failure to take such care, where death of the fetus results, would constitute manslaughter.⁵⁸ The court declared this provision unconstitutional on the narrow ground that it applied to a non-viable as well as to a viable fetus.⁵⁹ If the inference can be drawn that such a manslaughter provision would be constitutional as applied to a viable fetus, then the Court has implicitly acknowledged that the state may treat the viable fetus as a *person*. Such an inference tends to be defeated, however, by the Missouri Attorney General's contention that the manslaughter provision was intended to apply only when live birth had already resulted.⁶⁰ Moreover, if a state could recognize the legal personality of the viable fetus *in utero*, it could presumably forbid any abortion, even for maternal health reasons, if it threatened the life of the fetus. This is contrary to the rule of *Roe v. Wade*.⁶¹ Nevertheless, the Court's language in overturning the Missouri provision strongly suggests that a state may require a doctor to make every reasonable effort to preserve the life of a viable fetus, and that the state may impose severe penalties for failure to make such efforts.

May the state forbid a *method* of abortion which will kill a viable fetus? If there is an alternative method which is reasonably safe for the mother, the logic of the Court's discussion of the Missouri standard-of-care provision would indicate that it may.⁶² The two most widely used methods of second-trimester abortion are saline injection and prostaglandin.⁶³ The

abortion" presumably means that some abortions of *non-viable* fetuses would not take place because of doctors' fear of prosecution if a "borderline case" should in fact be viable. The alternative, however, is to allow the abortion of viable fetuses—"at least potential" human beings whom the Court has said the state may protect.

58. VERNON'S ANN. MO. STAT. § 188.035(1) (Supp. 1975), enacted by Missouri Laws 1974, p. 809 § 6(1).

59. 96 S. Ct. at 2847-48.

60. *Id.* at 2847.

61. 410 U.S. at 164-65.

62. *Cf. Tribe, supra* note 14, at 27 & n.120. *But cf. Tribe, supra* note 14, at 27 n.118.

63. *See Planned Parenthood of Central Missouri v. Danforth*, 96 S. Ct. 2831, 2845 (1976). *Id.* at 2854 (White, J., dissenting).

latter method merely brings on premature labor, often producing a live child; the former method almost always kills the fetus.⁶⁴ In the instant case, the Court invalidated a provision outlawing the saline injection method after 12 weeks of pregnancy.⁶⁵ But this holding rested on the Court's finding that prostaglandins were not widely available in Missouri in 1974, so that outlawing saline injection abortions had the effect of outlawing virtually all second-trimester abortions.⁶⁶ Also, Missouri purported to assert only its maternal health interest, not its interest in protecting a viable fetus.⁶⁷ Logically, a state's compelling interest in protecting a viable fetus should include the right to prohibit a method of abortion which may kill or injure the fetus, provided the prohibition does not threaten maternal health.⁶⁸ The Court's holding on the Missouri saline injection provision does not contradict this conclusion, and its treatment of the standard-of-care provision supports it.

Advocates of abortion can be expected to challenge the proposition that the mother's health interest extends only to terminating her pregnancy, and not to an absolute right to destroy a viable fetus.⁶⁹ Where a child results from rape or incest, or may be deformed, the usual purpose of an abortion is to prevent the child from being born alive, *not* just to relieve the mother of the burdens of pregnancy. There may be instances in which a doctor will argue that his patient's mental health is endangered by the continued existence of the child, even if she never sees it.⁷⁰ Should the Court hold that states may protect the viable fetus even during "mental health" abortions, it would leave such women without a remedy acceptable to them. However, if the

64. See *Viability and Abortion*, *supra* note 31, at 161 n.81; see also Comment, *Haunting Shadows from the Rubble of Roe's Right of Privacy*, 9 SUFFOLK U.L. REV. 145, 154 n.51 (1974).

65. 96 S. Ct. at 2845.

66. *Id.* Three Justices would have upheld the Missouri ban on saline amniocentesis. *Id.* at 2853-4 (White, J., concurring in part and dissenting in part, joined by Burger, C.J., and Rehnquist, J.). Three additional members of the Court would have upheld such a ban "if two abortion procedures had been equally accessible." *Id.* at 2856 (Stevens, J., concurring in part and dissenting in part); see *id.* at 2851 (Stewart, J., concurring, joined by Powell, J.).

67. *Id.* at 2844.

68. Cf. Tribe, *supra* note 14, at 27 & n.120; *Haunting Shadows*, *supra* note 64, at 153-55. *But cf.* Tribe, *supra* note 14, at 27 n.118.

69. See, e.g., Tribe, *supra* note 14, at 4 n.24; *Medical Responsibility for Fetal Survival Under Roe*, *supra* note 25, at 453, 455; note 29, *supra*.

70. See, e.g., *Viability and Abortion*, *supra* note 31, at 148 n.17. If the inference may be drawn from the Court's treatment of the Missouri standard-of-care provision that a state may treat a viable fetus as a "person," then presumably the right to termination of pregnancy after viability does not include a right to destroy

invocation of "mental health" is sufficient to grant a right to destroy a viable fetus, then the exception could soon swallow the rule: some doctors might regard every unwanted child as a threat to mental health.⁷¹ Given the broad *Doe* definition of health,⁷² it would be impossible to prove them wrong in court.

In deciding that a state may protect any fetus potentially able to survive outside the womb with artificial aid, regardless of the period of gestation, *Danforth* answered an important question raised by *Roe v. Wade*. However, future cases must clarify several questions raised or left unanswered by the instant case:

1) As advancing technology enables the fetus to survive outside the womb at much earlier stages of gestation, will the Court continue to affirm the principle that the state may protect such a fetus, even though the woman's "right to privacy" is thereby circumscribed much more narrowly than *Roe* contemplated?

2) May the state punish a doctor who kills a viable fetus, even where a trial would involve an investigation into the "good faith" or reasonableness of his medical judgment?

3) Does the mother's health interest include only the right to terminate her pregnancy, and not the right to destroy the viable fetus, when such destruction is unnecessary to termination? Specifically, when a doctor has determined that an abortion is necessary to preserve the mother's health, may the state require that due care be taken to preserve the life of the viable fetus, and prohibit any method of abortion which will destroy the fetus, so long as a safe alternative method is available?

If the Court should answer each of these questions in the affirmative, advancing technology might bring about its own resolution of the abortion controversy. A woman would have the right to terminate her pregnancy at any time;⁷³ but the state could require that the child, when removed from the womb, be given the benefit of artificial life-support systems until such time as he could live without them. Understandably, however, advocates of a

the fetus, even where maternal health is endangered. But see the discussion of this point in the text at note 60, *supra*.

71. See note 29, *supra*.

72. See text at notes 23-24, *supra*.

73. Logically, the state's interest in regulating abortion would disappear if fetal life and maternal health were no longer endangered. Strict application of the *Roe* and *Doe* rules, however, in a situation where medical technology had rendered every fetus viable, would require only that a woman seeking an abortion find a physician who regarded the abortion as necessary to preserve her "health" in light of "all factors—physical, emotional, psychological, familial and the woman's

constitutional amendment to protect the unborn child will be unlikely to abandon their efforts in reliance on hypothetical scientific developments and on the reasoning of the instant case. Indeed, the Court might prove reluctant to see the "right to abortion" circumscribed by science, and might re-strike the *Roe* balance by answering one or more of the above questions in the negative—thus rendering the state's "compelling interest" in protecting the viable unborn child ineffective as a limit on abortion.

Grover Rees, III

PREDIAL LEASES AND PERSONAL RIGHTS

Plaintiff, who purchased property after the expiration of a lease between his author-in-title and defendant lessee, sought to compel defendant to remove constructions it had erected during the lease. The plaintiff claimed the right to compel removal by virtue of a specific provision contained in the lease and on the basis that the lessor's obligations arising under the lease¹ continued after its termination. The Louisiana Supreme Court *held* on rehearing that the lessor's right to compel removal of constructions is a personal right that does not pass as an accessory to the sale of the property. *Prados v. South Central Bell*, 329 So. 2d 744 (La. 1976).

The distinction between a personal right and a real right² is not always clear. A right is deemed personal if it is the correlative of a duty owed by the person of the debtor;³ it is termed real if it is a right that confers direct and immediate authority over the thing of another person.⁴ At Roman law this

age—relevant to the well-being of the patient." *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

1. LA. CIV. CODE arts. 2719, 2720.

2. It is improper to speak only of rights and ignore the function of obligations. Rights are simply the correlatives of obligations. For purposes of convenience, the author will use the term "rights," but one should not ignore the obligations which attach to the rights. See 1 A. YIANNPOULOS, PROPERTY § 113 in 2 LOUISIANA CIVIL LAW TREATISE 337 (1966) [hereinafter cited as YIANNPOULOS].

3. *Reagan v. Murphy*, 235 La. 529, 105 So. 2d 210 (1958); 2 C. Aubry & C. Rau, DROIT CIVIL FRANCAIS § 172 (7th ed. Esmein 1961) in J. Mayda, 2 CIVIL LAW TRANSLATIONS 62 (1969) [hereinafter cited as 2 AUBRY & RAU]; YIANNPOULOS at § 90.

4. LA. CIV. CODE arts. 1997, 2010; *Reagan v. Murphy*, 235 La. 529, 105 So. 2d 210 (1958); 2 AUBRY & RAU at § 172; 1 M. Planiol, CIVIL LAW TREATISE pt. 2, no. 2158 at 270 (11th ed. La. St. L. Inst. transl. 1959) [hereinafter cited as 1 PLANIOL]; Comment, *Real Rights in Louisiana*, 21 LA. L. REV. 462 (1961).