

Abridged version of Roe v. Wade

410 U.S. 113, 93 S.Ct. 1409

Decided: January 22, 1973

NOTE: This is an abridged/condensed version of the opinion using the Court's actual language but with substantial material omission edits and no use of quotation marks. All footnotes and most case citations have been omitted for ease of reading, but those can be found by reading the full, published case.

The abridger/ editor here has highlighted many passages and phrases (by using italics and print bolding) to draw the reader's more careful attention; these are generally identified by the editor by use of the phrase "Emphasis added." Additionally, rather than referring to the parties as appellants or respondents, the editor has substituted the use of plaintiff (Roe or Dr. Hallford) and defendant (State of Texas) because these terms are more familiar to most. Other parties mentioned in the opinion have been eliminated from this abridged version because their claims are outside our principle concern. Plaintiffs, of course, are those who initiate a suit by asserting a claim; defendants say "not so."

This abridged version is intended only to present the Court's basic substantive concerns, principles and holdings for your consideration and fuller understanding. Procedural/technical issues have been excised to narrow our focus.

The full, published opinion may be accessed online at many sites, including:

<https://www.law.cornell.edu/supremecourt/text/410/113>

Abridged version prepared by Lynne Riddle, J.D., Ed.D.; intended solely for educational purposes.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This Texas federal appeal presents a constitutional challenge to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century.

We forthwith acknowledge our 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. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. [Emphasis added.] We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries. 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):

[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.

The Texas statutes that concern us here are Arts. 1191-1194 and 1196 of the State's Penal Code. These make it a crime to "procure an abortion," or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Similar statutes are in existence in a majority of the States.

Texas first enacted a criminal abortion statute in 1854. This was soon modified into language that has remained substantially unchanged to the present time.

[Note: The editor has added the pertinent parts of the Texas statutes here as an aid to the reader.]

2A TEXAS PENAL CODE art. 1196, (1961):

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

2A TEXAS PENAL CODE art. 1191 (1961):

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years if it be done without her consent, the punishment shall be doubled. By 'abortion' is 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.
(Emphases added.)

[Plaintiff] Jane Roe, a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a *declaratory judgment* that the Texas criminal abortion statutes were unconstitutional on their face, and *an injunction* restraining the defendant from enforcing the statutes. [Emphasis added].

[Note: Roe is not suing for money damages; she sued asking the court to "declare" the Texas statute is unconstitutional.]

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was *unable to get a "legal" abortion in Texas because her life did not appear to be threatened* by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, *Ninth, and Fourteenth Amendments*. By an amendment to her complaint, Roe purported to sue "on behalf of herself and all other women" similarly situated. [Emphasis added].

[Plaintiff] James Hubert Hallford, a licensed physician, sought and was granted leave to intervene in Roe's action. In his complaint, he alleged that *he had been arrested previously for violations of the Texas abortion statutes*, and that *two such prosecutions were pending* against him. He described conditions of patients who came to him seeking abortions, and he claimed that for many cases he, as a physician, was unable to determine whether they fell within or outside the exception recognized by Article 1196. *He alleged* that, as a consequence, *the statutes were vague and uncertain, in violation of the Fourteenth Amendment, and that they violated his own and his patients' rights to privacy in the doctor-patient relationship* and his own right to practice medicine, rights he claimed were guaranteed by the First, Fourth, Fifth, *Ninth, and Fourteenth Amendments*. [Emphasis added]

[Note: The editor has added pertinent parts of the 14th and 9th Amendments here as an aid to the reader.]

Fourteenth Amendment, in pertinent part
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
Ninth Amendment
The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

[Note Also: Issues of justiciability, standing, and abstention, while important, are omitted here as unnecessary to the understanding of the opinion's substantive legal principles and holdings regarding the fundamental right of "choice"].

The principal thrust of [plaintiffs'] 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. [Plaintiffs] 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 sexual privacy said to be protected by the Bill of Rights or its penumbras, see *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *id.* at 460 ...; or among those rights reserved to the people by the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. at 486 Before addressing this claim, we feel it desirable 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.

[Note: The lengthy historical "survey" mentioned is excised here but is nonetheless provided at the end of this abridged version because it may be of interest to many of our readers.]

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. 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.*** In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment; in the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights, (*Griswold v. Connecticut*, 381 U.S. at 484-485); in the Ninth Amendment; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. [Emphases added]

These decisions make it clear that ***only personal rights*** that can be deemed "***fundamental***" or "***implicit in the concept of ordered liberty,***" are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage; procreation; contraception; family relationships; and childrearing and education. [Emphases added]

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*** reservation 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 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 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 the woman and her responsible physician necessarily will consider in consultation. [Emphases added].

On the basis of elements such as these, [plaintiffs] 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.** [*Plaintiffs'*] *arguments that Texas either 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, are 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 important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective 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.* [Emphases added]

We, therefore, conclude 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. [Emphasis added].

Although the results are divided, most ... courts have agreed that the ***right of privacy***, however based, is ***broad enough to cover the abortion decision***; that the right, ***nonetheless, is not absolute, and is subject to some limitations***; and that, ***at some point, the state interests as to protection of health, medical standards, and prenatal life, become dominant.*** ***We agree with this approach.*** [Emphasis added]

Where certain "***fundamental rights***" are involved, the Court has held that regulation limiting these rights may be justified only by a "***compelling state interest***," and that *legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.* [Emphasis added].

In the recent abortion cases ..., courts have recognized these principles. *Those striking down state laws* have generally scrutinized the State's interests in protecting health and potential life, and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that ***she should have an abortion in the early stages of pregnancy.*** *Courts sustaining state laws* have held that the *State's determinations to protect health or prenatal life are dominant* and constitutionally justifiable.

The District [trial] Court held that the [defendant, Texas] failed to meet [its] burden of demonstrating that the Texas statute's infringement upon Roe's rights was necessary to support a compelling state interest, and that, although the defendant [Texas] presented "several compelling justifications for state presence in the area of abortions," the statutes outstripped these justifications and swept "far beyond any areas of compelling state interest." [Plaintiffs and defendant] both contest that holding. [Plaintiffs], as has been indicated, claim an absolute right that bars any state imposition of criminal penalties in the area. [Defendant *Texas*] ***argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest.*** As noted above, **we do not agree fully with either formulation.** [Emphasis added.]

A.

*[Texas] 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 [plaintiffs'] case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. The [plaintiffs] conceded as much on reargument. On the other hand, the [defendant Texas] conceded on reargument that **no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.** [Emphasis added]*

*The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution. . . . But in nearly all these instances, the use of the word is such that it has application **only post-natally.** None indicates, with any assurance, that it has any possible pre-natal application.*

*All this, together with our observation, [Note: This refer to the abortion historical summary set out separately below], 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.** This is in accord with the results reached in those few cases where the issue has been squarely presented. Indeed, our decision in *United States v. Vuitch*, 402 U.S. 62 (1971), 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.

B.

*The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which [prior Supreme Court cases such as] *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner*, and *Pierce* and *Meyer* were respectively concerned. 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.** [Emphasis added].*

*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. [Emphasis added].

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. *There has always been strong support for the view that life does not begin **until live birth***. This was the belief of the Stoics. It appears to be the predominant, though not the unanimous, attitude of the Jewish faith. It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family. As we have noted, the *common law* found greater significance in *quickenings*. Physicians and their *scientific colleagues* have regarded that event with less interest and have tended to focus either upon *conception*, upon *live birth*, or upon the interim point at which the fetus becomes "**viable, that is, potentially able to live outside the mother's womb, albeit with artificial aid**". Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks. The Aristotelian theory of "mediate animation," that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this "ensoulment" theory from those in the Church who would recognize the existence of life from the moment of conception. The latter is now, of course, the official belief of the Catholic Church. As one brief *amicus* discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substantial problems for precise definition of this view are posed, however, by *new embryological data that purport to indicate that conception is a "process" over time, rather than an event*, and by new medical techniques such as menstrual extraction, the "morning-after" pill, implantation of embryos, artificial insemination, and even artificial wombs.

*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 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.*** [Emphasis added]

In view of all this, ***we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman 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, whether she be a resident of the State or

a nonresident who seeks medical consultation and treatment there, *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."* [Emphasis added]

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, referred to above . . . , that, *until the end of the first trimester mortality in abortion may be 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.* Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, [i.e. the end of the first trimester] 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. [Emphasis added]

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.* [Emphasis added]

Measured against these standards, Art. 1196 of the Texas Penal Code, in *restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly.* The *statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure.* *The statute, therefore, cannot survive the constitutional attack made upon it here.* . [Emphasis added]

To summarize and to repeat:

1. *A state criminal abortion statute of the current Texas type, that excepts from criminality only a lifesaving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.* . [Emphasis added]

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in *the health of the mother*, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. . [Emphasis added]

(c) For the stage subsequent to viability, the State in promoting its interest *in the potentiality of human life* may, if it chooses, regulate, and even proscribe, abortion *except* where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. . [Emphasis added]

2. The State may define the term "physician," as it has been employed in the preceding paragraphs ... of this opinion, to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. *The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision 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. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

Our conclusion that Art. 1196 ***is unconstitutional means***, of course, that ***the Texas abortion statutes, as a unit, must fall***. The exception of Art. 1196 cannot be struck down separately, for then the State would be left with a statute proscribing all abortion procedures no matter how medically urgent the case.

[The District Court's grant of declaratory relief to plaintiff Roe is affirmed].

It is so ordered.

----- END of OPINION -----

APPENDIX

Court's Brief Survey of the History of Abortion

(Editor's view: While important, this summary is not necessary to understanding the opinion's principles)

It perhaps is not generally appreciated 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 19th century.

1. Ancient attitudes. These are not capable of precise determination. We are told that, at the time of the Persian Empire, abortifacients were known, and that criminal abortions were severely punished. We are also told, however, that abortion was practiced in Greek times as well as in the Roman Era. and that "it was resorted to without scruple." [n10] The Ephesian, Soranos, often described as the greatest of the ancient gynecologists, appears to have been generally opposed to Rome's prevailing free-abortion practices. He found it necessary to think first of the life of the mother, and he resorted to abortion when, upon this standard, he felt the procedure advisable. Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion.

2. The Hippocratic Oath. What then of the famous Oath that has stood so long as the ethical guide of the medical profession and that bears the name of the great Greek (460(?)-377(?) B. C.), who has been described as the Father of Medicine, the "wisest and the greatest practitioner of his art," and the "most important and most complete medical personality of antiquity," who dominated the medical schools of his time, and who typified the sum of the medical knowledge of the past? The Oath varies somewhat according to the particular translation, but in any translation the content is clear:

I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner, I will not give to a woman a pessary to produce abortion, or I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy.

Although the Oath is not mentioned in any of the principal briefs in this case or in *Doe v. Bolton*, post, p. 179, it represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day. Why did not the authority of Hippocrates dissuade abortion practice in his time and that of Rome? The late Dr. Edelstein provides us with a theory: The Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. See Plato, *Republic*, V, 461; Aristotle, *Politics*, VII, 1335b 25. For the Pythagoreans, however, it was a matter of dogma. For them, the embryo was animate from the moment of conception, and abortion meant destruction of a living being. The abortion clause of the Oath, therefore, "echoes Pythagorean doctrines," [p132] and "[i]n no other stratum of Greek opinion were such views held or proposed in the same spirit of uncompromising austerity."

Dr. Edelstein then concludes that the Oath originated in a group representing only a small segment of Greek opinion, and that it certainly was not accepted by all ancient physicians. He points out that medical writings down to Galen (A.D. 130-200) "give evidence of the violation of almost every one of its injunctions." But with the end of antiquity, a decided change took place. Resistance against suicide and against abortion became common. The Oath came to be popular. The emerging teachings of Christianity were in agreement with the Pythagorean ethic. The Oath "became the nucleus of all medical ethics," and "was applauded as the embodiment of truth." Thus, suggests Dr. Edelstein, it is "a Pythagorean

manifesto, and not the expression of an absolute standard of medical conduct."

This, it seems to us, 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 revered statement of medical ethics.

3. The common law. It is undisputed that, at common law, abortion performed before "quickening" -- the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy - was not an indictable offense. The absence [p133] of a common law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins. These disciplines variously approached the question in terms of the point at which the embryo or fetus became "formed" or recognizably human, or in terms of when a "person" came into being, that is, infused with a "soul" or "animated." A loose consensus evolved in early English law that these events occurred at some point between conception and live birth. This was "mediate animation." Although Christian theology and the canon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the 19th century, there was otherwise little agreement about the precise time of formation or animation. There was agreement, however, that, prior to this point, the fetus was to be regarded as part of the mother, and its destruction, therefore, was not homicide. Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40-80-day view, and perhaps to Aquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point. The significance of quickening was echoed by later common law scholars, and found its way into the received common law in this country.

Whether abortion of a quick fetus was a felony at common law, or even a lesser crime, is still disputed. Bracton, writing early in the 13th century, thought it homicide. But the later and predominant view, following the great common law scholars, has been that it was, at most, a lesser offense. In a frequently cited passage, Coke took the position that abortion of a woman "quick with childe" is "a great misprision, and no murder." Blackstone followed, saying that, while abortion after quickening had once been considered manslaughter (though not murder), "modern law" took a less severe view. A recent review of the common law precedents argues, however, that those precedents contradict Coke, and that even post-quickening abortion was never established as a common law crime. This is of some importance, because, while most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law, others followed Coke in stating that abortion of a quick fetus was a "misprision," a term they translated to mean "misdemeanor." that their reliance on Coke on this aspect of the law was uncritical and, apparently in all the reported cases, dictum (due probably to the paucity of common law prosecutions for post-quickening abortion), makes it now appear doubtful that abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus.

4. The English statutory law. England's first criminal abortion statute, Lord Ellenborough's Act, 43 Geo. 3, c. 58, came in 1803. It made abortion of a quick fetus, § 1, a capital crime, but, in § 2, it provided lesser penalties for the felony of abortion before quickening, and thus preserved the "quickening" distinction. This contrast was continued in the general revision of 1828, 9 Geo. 4, c. 31, § 13. It disappeared, however, together with the death penalty, in 1837, 7 Will. 4 & 1 Vict., c. 85, § 6, and did not reappear in the Offenses Against the Person Act of 1861, 24 & 25 Vict., c. 100, § 59, that formed the core of English anti-abortion law until the liberalizing reforms of 1967. In 1929, the Infant Life (Preservation) Act, 19 & 20 Geo. 5, c. 34, came into being. Its emphasis was upon the destruction of "the life of a child capable of being born alive." It made a willful act performed with the necessary intent a felony. It contained a proviso that one was not to be found guilty of the offense unless it is proved that the act which caused the death of the child was not done in good

faith for the purpose only of preserving the life of the mother.

A seemingly notable development in the English law was the case of *Rex v. Bourne*, [1939] 1 K.B. 687. This case apparently answered in the affirmative the question whether an abortion necessary to preserve the life of the pregnant woman was excepted from the criminal penalties of the 1861 Act. In his instructions to the jury, Judge Macnaghten referred to the 1929 Act, and observed that that Act related to "the case where a child is killed by a willful act at the time when it is being delivered in the ordinary course of nature." *Id.* at 691. He concluded that the 1861 Act's use of the word "unlawfully," imported the same meaning expressed by the specific proviso in the 1929 Act, even though there was no mention of preserving the mother's life in the 1861 Act. He then construed the phrase "preserving the life of the mother" broadly, that is, "in a reasonable sense," to include a serious and permanent threat to the mother's health, and instructed the jury to acquit Dr. Bourne if it found he had acted in a good faith belief that the abortion was necessary for this purpose. *Id.* at 693-694. The jury did acquit.

Recently, Parliament enacted a new abortion law. This is the Abortion Act of 1967, 15 & 16 Eliz. 2, c. 87. The Act permits a licensed physician to perform an abortion where two other licensed physicians agree (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated, or (b) that there is a substantial risk that, if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

The Act also provides that, in making this determination, "account may be taken of the pregnant woman's actual or reasonably foreseeable environment." It also permits a physician, without the concurrence of others, to terminate a pregnancy where he is of the good faith opinion that the abortion "is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman."

5. The American law. In this country, the law in effect in all but a few States until mid-19th century was the preexisting English common law. Connecticut, the first State to enact abortion legislation, adopted in 1821 that part of Lord Ellenborough's Act that related to a woman "quick with child." The death penalty was not imposed. Abortion before quickening was made a crime in that State only in 1860. In 1828, New York enacted legislation [n31] that, in two respects, was to serve as a model for early anti-abortion statutes. First, while barring destruction of an unquickened fetus as well as a quick fetus, it made the former only a misdemeanor, but the latter second-degree manslaughter. Second, it incorporated a concept of therapeutic abortion by providing that an abortion was excused if it shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose.

By 1840, when Texas had received the common law, only eight American States had statutes dealing with abortion. It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening, but were lenient with it before quickening. Most punished attempts equally with completed abortions. While many statutes included the exception for an abortion thought by one or more physicians to be necessary to save the mother's life, that provision soon disappeared, and the typical law required that the procedure actually be necessary for that purpose. Gradually, in the middle and late 19th century, the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950's, a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother. The exceptions, Alabama and the District of Columbia, permitted abortion to preserve the mother's health. Three States permitted abortions that were not "unlawfully" performed or that were not "without lawful justification," leaving interpretation of those standards to the courts. In [p140] the past

several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code, § 230.3, set forth as Appendix B to the opinion in *Doe v. Bolton*, post, p. 205.

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. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity [p141] to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

6. The position of the American Medical Association. 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.

An AMA Committee on Criminal Abortion was appointed in May, 1857. It presented its report, 12 Trans. of the Am.Med.Assn. 778 (1859), to the Twelfth Annual Meeting. That report observed that the Committee had been appointed to investigate criminal abortion "with a view to its general suppression." It deplored abortion and its frequency and it listed three causes of "this general demoralization":

The first of these causes is a widespread popular ignorance of the true character of the crime -- a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening.

The second of the agents alluded to is the fact that the profession themselves are frequently supposed careless of foetal life. . . .

The third reason of the frightful extent of this crime is found in the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors, which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowledges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it, and to its life as yet denies all protection.

The Committee then offered, and the Association adopted, resolutions protesting "against such unwarrantable destruction of human life," calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies "in pressing the subject."

In 1871, a long and vivid report was submitted by the Committee on Criminal Abortion. It ended with the observation, We had to deal with human life. In a matter of less importance, we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less.

It proffered resolutions, adopted by the Association, recommending, among other things, that it be unlawful and unprofessional for any physician to induce abortion or premature labor without the concurrent opinion of at least one respectable consulting physician, and then always with a view to the safety of the child -- if that be possible, and calling the attention of the clergy of all denominations to the perverted views of morality entertained by a large class of females --

aye, and men also, on this important question.

Except for periodic condemnation of the criminal abortionist, no further formal AMA action took place until 1967. In that year, the Committee on Human Reproduction urged the adoption of a stated policy of opposition to induced abortion except when there is "documented medical evidence" of a threat to the health or life of the mother, or that the child "may be born with incapacitating physical deformity or mental deficiency," or that a pregnancy "resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the patient," two other physicians "chosen because of their recognized professional competence have examined the patient and have concurred in writing," and the procedure "is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals." The providing of medical information by physicians to state legislatures in their consideration of legislation regarding therapeutic abortion was "to be considered consistent with the principles of ethics of the American Medical Association." This recommendation was adopted by the House of Delegates.

In 1970, after the introduction of a variety of proposed resolutions and of a report from its Board of Trustees, a reference committee noted "polarization of the medical profession on this controversial issue"; division among those who had testified; a difference of opinion among AMA councils and committees; "the remarkable shift in testimony" in six months, felt to be influenced "by the rapid changes in state laws and by the judicial decisions which tend to make abortion more freely available;" and a feeling "that this trend will continue." On June 25, 1970, the House of Delegates adopted preambles and most of the resolutions proposed by the reference committee. The preambles emphasized "the best interests of the patient," "sound clinical judgment," and "informed patient consent," in contrast to "mere acquiescence to the patient's demand." The resolutions asserted that abortion is a medical procedure that should be performed by a licensed physician in an accredited hospital only after consultation with two other physicians and in conformity with state law, and that no party to the procedure should be required to violate personally held moral principles. Proceedings of the AMA House of Delegates 220 (June 1970). The AMA Judicial Council rendered a complementary opinion.

7. The position of the American Public Health Association. In October, 1970, the Executive Board of the APHA adopted Standards for Abortion Services. These were five in number:

- a. Rapid and simple abortion referral must be readily available through state and local public [p145] health departments, medical societies, or other nonprofit organizations.
- b. An important function of counseling should be to simplify and expedite the provision of abortion services; it should not delay the obtaining of these services.
- c. Psychiatric consultation should not be mandatory. As in the case of other specialized medical services, psychiatric consultation should be sought for definite indications, and not on a routine basis.
- d. A wide range of individuals from appropriately trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors.
- e. Contraception and/or sterilization should be discussed with each abortion patient.

Recommended Standards for Abortion Services, 61 Am.J.Pub.Health 396 (1971). Among factors pertinent to life and health risks associated with abortion were three that "are recognized as important":

- a. the skill of the physician,
- b. the environment in which the abortion is performed, and above all
- c. the duration of pregnancy, as determined by uterine size and confirmed by menstrual history.

It was said that "a well equipped hospital" offers more protection to cope with unforeseen difficulties than an office or clinic without such resources. . . . The factor of gestational age is of overriding importance.

Thus, it was recommended that abortions in the second trimester and early abortions in the presence of existing medical complications be performed in hospitals as inpatient procedures. For pregnancies in the first trimester, [p146] abortion in the hospital with or without overnight stay "is probably the safest practice." An abortion in an extramural facility, however, is an acceptable alternative "provided arrangements exist in advance to admit patients promptly if unforeseen complications develop." Standards for an abortion facility were listed. It was said that, at present, abortions should be performed by physicians or osteopaths who are licensed to practice and who have "adequate training." *Id.* at 398.

8. The position of the American Bar Association. At its meeting in February, 1972, the ABA House of Delegates approved, with 17 opposing votes, the Uniform Abortion Act that had been drafted and approved the preceding August by the Conference of Commissioners on Uniform State Laws. 58 A.B.A.J. 380 (1972). We set forth the Act in full in the margin. [n40] The [p147] Opinion of the Court Conference has appended an enlightening Prefatory Note. [n41]

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously. [n42] The appellants and amici contend, moreover, that this is not a proper state purpose, at all and suggest that, if it were, the Texas statutes are overbroad in protecting it, since the law fails to distinguish between married and unwed mothers.

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman. [n43] This was particularly true prior to the [p149] development of antiseptics. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur, and others first announced in 1867, but were not generally accepted and employed until about the turn of the century. Abortion mortality was high. Even after 1900, and perhaps until as late as the development of antibiotics in the 1940's, standard modern techniques such as dilation and curettage were not nearly so safe as they are today. Thus, it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

Modern medical techniques have altered this situation. Appellants and various *amici* refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth. Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the areas of health and medical standards do remain. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety

for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

The third reason is the State's interest -- some phrase it in terms of duty -- in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception. The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. 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.

Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life. Pointing to the absence of legislative history to support the contention, they claim that most state laws were designed solely to protect the woman. Because medical advances have lessened this concern, at least with respect to abortion in early pregnancy, they argue that with respect to such abortions the laws can no longer be justified by any state interest. There is some scholarly support for this view of original purpose. The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health, rather than in preserving the embryo and fetus. Proponents of this view point out that in many States, including Texas, by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another. They claim that adoption of the "quickening" distinction through received common law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception.

It is with these interests . . . that this case is concerned.