CASE NOTES

Constitutional Law—Abortion—Does a Woman Have a Constitutional Right under the Ninth Amendment to Choose Whether to Bear a Child after Conception. *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970).

On March 3, 1970, Jane Roe, a pregnant woman, brought suit against the District Attorney of Dallas County, Texas, seeking a declaratory judgment on the constitutionality of the Texas abortion statutes and an injunction against the enforcement of these laws.[1] Jane Roe's basic challenge was that the Texas abortion laws[2] were unconstitutionally overbroad in that they deprived a pregnant woman of her right to choose whether to bear children, a right alleged to be secured by the ninth amendment to the United States Constitution.[3] The three-

1. This was only the second time in the 114-year history of the Texas abortion statutes that they were challenged on constitutional grounds, the first time being in 1908. Jackson v. State, 55 Tex. Crim. 79, 115 S.W. 262 (1908).

2. The first abortion statutes were adopted in 1856. TEX. PEN. CODE arts. 531-36 (1856). They were subsequently codified as TEX. PEN. CODE arts. 536-41 (1881), and arts. 641-46 (1895), (1901). In these drafts the term abortion was not defined. Therefore, in 1907, TEX. PEN. CODE art. 641 (1895), (1901) (originally art. 531), was amended to contain a definition of abortion. Tex. Laws 1907, ch. 33, at 55. The abortion statutes as amended, were then codified as TEX. PEN. CODE arts. 1071-75 (1911) and arts. 1191-96 (1925), (1961):

> Art. 1191. 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.
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> Art. 1192. Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.
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> Art. 1193. If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.
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> Art. 1194. If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.
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> Art. 1195. Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years.
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> Art. 1196. Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

TEX. PEN. CODE ANN. art. 1195 (Supp. 1969-1970) was not challenged in this case.

3. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

judge federal court for the Northern District of Texas held that the woman had a constitutionally protected right under the ninth amendment to choose whether to have the child that she was carrying, that the Texas abortion statutes deprived her of this right, and that since there was no subordinating state interest that outweighed this right, the Texas abortion laws were unconstitutionally overbroad.[4]

The theory that the ninth amendment could contain fundamental rights not enumerated in the first eight amendments to the Constitution was first articulated in *Griswold v. Connecticut*,[5] a case contesting the state proscription against the giving of contraceptive information. In reaching its decision, the Court stated that there were certain rights, such as the right of association of people, the right to educate a child in a school of the parent's choice, and the right to study any particular subject, or any foreign language, which were not mentioned in the Constitution nor in the Bill of Rights, but which had been construed to be included in the first amendment to the Constitution.[6] The Court then stated that specific guarantees of the Bill of Rights have penumbras which help give them life and substance, one of which is the right of privacy.[7] The concurring opinion of Mr. Justice Goldberg, with whom Chief Justice Warren and Mr. Justice Brennan joined, enlarged the right of privacy to include the marital relation:

> To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.
> . . . I believe that the right of privacy in the marital relation is fundamental and basic—a personal right "retained by the people" within the meaning of the Ninth Amendment.[8]

4. A physician was given leave to intervene and alleged that TEX. PEN. CODE ANN. art. 1196 (Supp. 1969-1970), was unconstitutionally vague in that it deprived a physician of warning of what produces criminal liability in that portion of his practice dealing with abortion. The court held that this statute was unconstitutionally vague in violation of the due process clause of the fourteenth amendment to the United States Constitution ("nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1). For a discussion of the constitutional vagueness argument, see Comment, *Abortion-Constitutional Law—A Law that Allows an Abortion Only When "Necessary to Preserve" the Life of the Mother Violates a Qualified Constitutional Right to an Abortion and is Unconstitutionally Vague*, 48 TEXAS L. REV. 937 (1970). In the original petition, a married couple was also named as plaintiffs, however, the court ruled that they failed to allege facts sufficient to create a present controversy, and therefore denied them standing.

5. 381 U.S. 479 (1965).

6. *Id.* at 482.

7. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Frank v. Maryland, 359 U.S. 360 (1959); Breard v. Alexandria, 341 U.S. 622 (1951).

8. Griswold v. Connecticut, 381 U.S. 479, 491, 499 (1965).

In addition to the right of privacy in the marital relation as enunciated in *Griswold*, the Supreme Court has ruled that there are other fundamental rights retained by the people. Among them are the rights of the individual,[9] the right of privacy within the family unit,[10] the right of privacy of the individual in his own home,[11] and the freedom of inquiry, thought, and to teach.[12] Having as a background the rights of privacy, the question became whether these rights would extend to the right of an individual to choose whether to have an abortion. In discussing this question, the California Supreme Court in *People v. Belous*[13] stated that the fact that a fundamental right was not enumerated in the Constitution was no impediment to the existence of that right, and that none of the briefs filed in the case refuted the existence of such a fundamental right. Upon this basis, the court held that a woman has a fundamental right to choose whether to bear children,[14] thus expanding the fundamental right concept of *Griswold* into the area of abortions. In a case decided after *Belous*, the United States District Court for the District of Columbia, in considering a challenge of the abortion statutes of the District of Columbia,[15] stated that a woman's liberty and right of privacy extended to family, sex and marriage matters, and may well include the right to remove an unwanted child at least in the early stages of pregnancy.[16] These two recent cases, *Belous* and *Vuitch*, are examples of the judicial trend to expand the fundamental right concept into the area of abortion laws.

Once it is decided that a fundamental right exists, then a state is required to show a compelling subordinating interest before it can infringe on these personal liberties.[17] It becomes the duty of the court to determine whether the action of the state bares a reasonable relationship to the achievement of the governmental purpose asserted to justify the

9. Skinner v. Oklahoma, 316 U.S. 535 (1942).

10. Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

11. Stanley v. Georgia, 394 U.S. 557 (1969) (the right to possess obscene matter in the home).

12. Wieman v. Updegraff, 344 U.S. 183, 195 (1952).

13. 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

14. "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's [Cal. Sup. Ct.] repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." People v. Belous, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969).

15. D.C. CODE ANN. § 22-201 (1961).

16. United States v. Vuitch, 305 F. Supp. 1032, 1035 (D.D.C. 1969). *See also*, Babbitz v. McCann, 306 F. Supp. 400 (E.D. Wis. 1970). (The Supreme Court will hear argument on the *Vuitch* case during its October, 1970 term, N.Y. Times, Apr. 28, 1970, at 1, col. 2).

17. Bates v. Little Rock, 361 U.S. 516, 524 (1960); *accord*, Zwickler v. Koota, 389 U.S. 241, 250 (1967). N.A.A.C.P. v. Alabama, 377 U.S. 288, 307 (1964).

statute.[18] One of the most frequent arguments advanced has been the state's interest in preserving life. The basis of this argument is the rights of the fetus; in other words, the unborn child has the right to be born, and in many jurisdictions has a cause of action under a wrongful death statute.[19] Another frequently urged justification is the regulation of morals. This is best exemplified by the argument that the state has an interest in discouraging fornication and other illicit sexual conduct, and that prevention of abortion is a means of accomplishing this end. Another argument similar to this is the state's interest in protecting the health of the mother, the theory behind this being that an abortion may lead to serious medical complications or even death. Finally, it has been suggested that abortion statutes will protect the fundamental rights of the other individuals in society, the rationale being that the mere possession of a fundamental right does not give a person the right to infringe upon the rights of others. The opinion in *Belous* affords a good example of how courts have dealt with these state interest contentions. There, in speaking to the right of the fetus argument, the court stated that the law has always recognized the pregnant woman's right to life takes precedence over any interest the state may have in the unborn, supporting this by the fact that the abortion laws of all fifty-one United States jurisdictions make an exception in favor of the life of the prospective mother.[20] The court also stated that the state may not require the degree of risk inherent in a statute which would prohibit an abortion where death from childbirth, although not medically certain, would be substantially certain or more likely than not.[21] It seems, therefore, that in order for a state to interfere with this fundamental right of the woman, the state interest must be one which greatly overrides the interest of the woman. This idea is further exemplified by the statement of Judge Gessell in *United States v. Vuitch*:

> The asserted constitutional right of privacy, here the unqualified right to refuse to bear children, has limitations. Congress can undoubtedly regulate abortion practice in many ways, perhaps even establishing different standards at various phases of pregnancy, if informed legislative findings were made after a modern review of the medical, social, and constitutional problems presented.[22]

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18. Bates v. Little Rock, 361 U.S. 516, 525 (1960).

19. For a full discussion of the rights of the fetus controversy, see Note, *Abortion—Nature and Elements of the Offense—The Shot Heard Round the Nation*, 46 N.D.L. REV. 249, 252-55 (1970).

20. People v. Belous, 458 P.2d 194, 203, 80 Cal. Rptr. 354, 363 (1969).

21. *Id.*

22. United States v. Vuitch, 305 F. Supp. 1032, 1035 (D.D.C. 1969).

In *Roe v. Wade*, the principal case, a federal court once again expanded the concept of a fundamental right into the area of abortion. In relying upon the rationale used in *Griswold*, the court reasoned that the list of rights included in the first eight amendments of the Constitution was not meant to be exclusive and that there were rights which should not be denied protection solely because they were not specifically enumerated in the first eight amendments. The court stated that the essence of the interest to be protected was the right of choice over the events which bear in a fundamental manner on the privacy of individuals. The court went further to say that in determining what rights are "fundamental," they must look to the traditions and conscience of the people to determine if a right is one to be regarded as fundamental.[23] Using this criteria, the court ruled that the freedom to choose in matters of abortions has been accorded the status of a fundamental right, alluding to the reasoning in the *Belous* and *Vuitch* decisions.

The *Roe* court felt that since the only exception to the prohibition of abortion in Texas was one necessary to preserve the life of the mother,[24] the Texas laws did not allow the woman any choice as to whether to bear the child which she is carrying. The court ruled that this restriction upon the fundamental freedom to choose, in other words a fundamental right, was unconstitutional in its scope as an infringement upon a constitutionally secured and protected right.

Having reached the decision that the Texas abortion statutes infringed upon a fundamental right, it became necessary to decide whether or not there was a compelling subordinating state interest sufficient to warrant such infringement. The court recognized the following state interests present in Texas in the abortion area: (1) the interest of the state in seeing that abortions are performed by competent persons; (2) the interest of the state in seeing that abortions are performed in adequate surroundings; and (3) the concern over the "quickened" fetus. In reaching its decision, the court stated that even though a statute serves a compelling state interest, this will not save it from the consequences of unconstitutional overbreadth.[25] While the court admitted that the right to choose to have an abortion is not

23. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

24. TEX. PEN. CODE ANN. art. 1196 (Supp. 1969-1970).

25. *See* Thornhill v. Alabama, 310 U.S. 88 (1940). A three-judge federal court for the Northern District of Texas has recently ruled that the fundamental right concept also applies to the right of consenting married adults to practice sodomy in private, declaring TEX. PEN. CODE art. 524 (1952) to be unconstitutionally overbroad, Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970).

unqualified, it stated that a statute designed to regulate such choice must restrict itself solely to compelling state interests which the Texas abortion statute did not do, in that it prohibited all abortions except those necessary to save the life of the mother.[26]

In addressing itself to the issue of the requested injunction against the enforcement of the Texas abortion statutes, the court denied the relief, ruling that the mere possibility of erroneous application of constitutional standards will usually not result in the irreparable injury which is necessary to justify a disruption of state proceedings, and that in order for a federal court to intervene in state criminal prosecutions the challenged statute must be justifiably attacked on its face as abridging free expression or attacked as applied for the purpose of discouraging protected activities.[27] The court then stated that it did not believe that Jane Roe could seriously argue that the Texas abortion statutes were vulnerable on their face as abridging free expression, and that the challenge as to discouraging protected activity had not been lodged in this case. As the result of this decision Texas is faced with the dilemma of having abortion statutes which have been declared unconstitutional, but which have had no restrictions placed upon their enforcement.

At the time of this writing, fourteen states[28] have passed abortion reform measures based largely on the proposals of the American Law Institute in the *Model Penal Code*.[29] The proposed statute contained three basic justifications for termination of pregnancy by a licensed

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26. TEX. PEN. CODE ANN. art. 1196 (Supp. 1969-1970).

27. *See* Dombrowski v. Pfister, 380 U.S. 479, 484, 490 (1965).

28. Alaska, N.Y. Times, May 1, 1970, at 10, col. 2; ARK. STAT. ANN. § 41-304-08 (Supp. 1969); The Theraputic Abortion Act, CAL. HEALTH & SAFETY CODE § 25950-54 (West Supp. 1967) (it does not provide for an abortion necessary for eugenic reasons); COLO. REV. STAT. ANN. § 40-2-50-52 (1967) (for a full discussion of the Colorado laws, see Comment, *Colorado's New Abortion Law*, 40 U. COLO. L. REV. 297 (1968)); DEL. CODE ANN. tit. 24, § 1793 (1969); GA. CODE ANN. tit. 26, §§ 1201-03, 9920a-21a, 9925a (1969); H.B. 61, 5th Legis., 1st Sess. (1969), amending HAWAII REV. STAT. ch. 768-6 (1955); KAN. GEN. STAT. ANN. § 21-3407 (Supp. 1969); MD. ANN. CODE art. 43, § 149E-G (Supp. 1969) (the Maryland legislature passed a measure which would repeal this law and leave the abortion decision entirely up to the woman and her doctor, N.Y. Times, Apr. 1, 1970, at 1, col. 7, however, this legislation was vetoed by the governor, *id.*, May 27, at 43, col. 2); MISS. CODE ANN. § 2223 (1957), *as amended*, Miss. Laws, ch. 358 (1966) (only if the pregnancy resulted from rape); N.M. STAT. ANN. §§ 40-A-5-1 to 3 (Supp. 1969); N.C. GEN. STAT. § 14-45.1 (1967); ORE. REV. STAT. §§ 435.405-.495, 677.188, 677.190, 465.110 (1969) (for a full discussion of the Oregon law, see Comment, *Abortion Oregon Style*, 49 ORE. L. REV. 302 (1970)). The state of New York has passed perhaps the most liberal law yet in that the only restriction is that it be done by a licensed physician and only up to the sixth month of pregnancy, NEWSWEEK, April 20, 1970, at 77. There is a reform proposal in the state of Washington which will be presented to the voters of that state in November of 1970, S.68, 41st. Legis., 2d Extraord. Sess. ch. 3 (1970). It is believed that South Carolina and Virginia have also passed similar reform measures, however, specific information was not available.

29. MODEL PENAL CODE § 230.3 (Proposed Official Draft 1962).

physician in a licensed hospital, after two physicians have certified in writing the circumstances which justify the abortion:

> (1) If a physician believes there is a substantial risk that continuation of pregnancy would gravely impair the physical or mental health of the mother; or (2) If the physician feels that the child would be born with grave physical or mental defects; or (3) If the pregnancy resulted from rape, incest, or other felonious intercourse.[30]

In 1969, a bill was introduced into the Texas legislature which proposed adding a statute on humane abortions to the revised civil statutes of the state of Texas.[31] The proposed measure, similar to that of the *Model Penal Code*, failed to be passed during the legislative session, leaving the state of statutory abortion law in Texas unchanged.[32]

The term anomolous has been defined as something which is irregular or exceptional. The decision in *Roe v. Wade* affords a good example of an anomoly in that the Texas abortion statutes were declared unconstitutional but nothing was done to impede the prosecution of persons under these statutes. Such a decision, it is submitted, serves no purpose other than to express an opinion on the validity of the Texas abortion laws by a three-judge federal court. Is such a ruling even necessary? It seems imperative that some action be taken, whether legislative or judicial, to remove the cloud of uncertainty which presently surrounds the Texas abortion statutes as a result of the decision in *Roe v. Wade*.

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30. H.B. 323, 61st Legis. 1st Sess. (1969).
31. *Id.*
32. *See* note 2 *supra*.