ABORTION AND THE RIGHT OF PRIVACY

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Among the various methods of birth control, abortion is undoubtedly one of the most effective. Although it has been practiced since ancient times,[1] abortion to this day persists as the most controversial method – from the religious, medical, and legal viewpoints.

To a predominantly Catholic country like the Philippines, legalized abortion remains inconceivable. Despite the recent enactment of an integrated population program[2] and extensive government efforts at curbing a suicidal population growth rate, the issue of legalizing abortion has not even sufficiently broken into the peripheries of public discussion to at least merit the term "controversy."

Our present laws are very definite about the matter. Abortion is the only birth-control method that is disallowed by the Revised Population Act,[3] and the Revised Penal Code penalizes it as a crime.[4] The possibility that abortion could be part of a woman's constitutional right to privacy has, up to now, been largely ignored even by out local legal circles.

This attitude of feigned indifference cannot and will not last for long. As inevitably as conception must terminate in either birth or a miscarriage, a country which has one of the highest birth rates in the world[5] must, sooner or later, come to terms with the issue of legalized abortion. The fact that we are a nation with a Catholic majority will, of course, add to the labor pains.

Be that as it may, it is perhaps significant that the initial thrust into this future controversy will emerge not from the religious nor the medical but from the legal sector. Because Philippine constitutional law is principally American in origin and since its development has been along close parallel lines with the American law, the repercussions of the recent U.S. Supreme Court's decision on abortion will surely be felt here in due time. The broad expanse of the Pacific is belied by the

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[1] It was widely practiced by the Greeks and the Romans. Although the Persians knew the use of abortifacients, criminal abortions were severely punished by them. See Roe v. Wade, *infra*.

[2] Revised Population Act of 1971, as amended by Pres. Decree No. 79 (1972).

[3] Rep. Act No. 6365 (1971), as amended, sec. 4(i).

[4] Arts. 256-259.

[5] The Philippines with an annual birth rate of 3.2 per cent ranks second only to Mexico.

jurisprudential propinquity of the two legal systems and will not prevent the waves created by the decision in *Roe v. Wade*[6] from shortly reaching Philippine shores.

Lest there be a misimpression, this paper is not meant to advocate the legalization of abortion nor to argue against it. Its purpose is limited to a discussion of the U.S. Supreme Court's decision in *Roe v. Wade* — to the effect that abortion is part of a woman's constitutional right to privacy. In particular, this paper seeks to analyze the *ratio decidendi* involved in the said case and to trace the same principles in the corpus of Philippine jurisprudence, if they exist there.

"Abortion" defined

Webster[7] defines abortion as:

"1. The act of giving premature birth; specifically, the expulsion of the fetus prematurely, particularly at any time before it is viable, or capable of sustaining life; miscarriage.

"2. *In medicine,* abortion... is the expulsion of the fetus during the first sixteen weeks of pregnancy, a later expulsion occurring before the time of viability being then called a miscarriage. An expulsion occurring after the fetus is viable, but before the normal time, is generally termed premature delivery or labor.

"3. *In law,* the term abortion usually implies criminality in producing miscarriage, the latter term denoting any premature birth irrespective of its cause."

Medically, abortion is defined as the expulsion of a non-viable fetus. A non-viable fetus is one not yet developed sufficiently to exist independently of the mother. Abortions are either spontaneous or induced. Spontaneous abortions are those produced by natural causes. Induced abortions are all abortions other than spontaneous abortions, and are either criminal or therapeutic depending on whether the abortion falls within the exceptions stated or implied in the provisions of criminal laws condemning abortion.[8]

Under Philippine jurisdiction, Carrara's definition seems to be the most widely accepted. Abortion is defined as "the willful killing of the fetus in the uterus, or the violent expulsion of the fetus from the maternal womb which results in the death of the fetus".[9] Abortion as a felony

[6] Roe v. Wade, 35 L.Ed. 2d 147, 41 U.S. Law Wk. 4213 (1973), (hereinafter simply referred to as Roe v. Wade).

[7] WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d unabridged ed., 1954).

[8] Trout, *Therapeutic Abortion Laws Need Therapy,* 37 TEMP. L.Q. 172, 173-4 (1964), as cited in Note, *The Unborn Child and the Constitutional Conception of Life,* 56 IA. L. REV. (1971).

[9] 2 REYES, RESERVED PENAL CODE, 413 (Rev. ed., 1971), citing Guevarra,

is divided into various categories (each of which will be discussed presently), and is distinguished from "infanticide,"[10] which is the killing of any child less than three days of age.

Countries with Legalized Abortion

Legalized abortion is not a novel thing. Numerous countries have legalized abortion,[11] mostly by express statutory provisions. Five of the six most populous nations in the world – the People's Republic of China, India, the Soviet Union, the United States and Japan, (Indonesia, which is the fifth largest, is the lone exception) – now permit legal abortion in early pregnancy.[12] The aggregate population count of these five countries alone constitutes more than half of the entire world's. On the basis of statistical counts as of 1972, a total of nearly 2.2 billion persons out of a world total of about 3.8 billion now live in countries where abortion is legal.[13]

The People's Republic of China now not only permits abortion on request but also provides abortion as a free public service.[14] It was first permitted under restrictive conditions in 1954,[15] which conditions were extensively liberalized in 1957.[16] At present, all applications for abortion or sterilization in China are free of restrictions of age, number of children, and approval procedures, although generally, abortion is

[10] REV. PEN. CODE, Art. 255, *infra*, note 131.

[11] Those countries with legalized abortion are: Bulgaria, People's Republic of China, Czechoslovakia, Cyprus, Denmark, Finland, Germany (East), Hungary, Iceland, India, Japan, Norway, Poland, Romania, Sierra Leone, Singapore, Sweden, Tunisia, Uganda, U.S.S.R., United Kingdom, United States, Uruguay, Vietnam (North), Yugoslavia, Zambia. The discussion here is based on Lee, *Brief Survey of Abortion Laws of Five Largest Countries*, PREGNANCY TERMINATION (Series F), No. 1, F-1 (April, 1973). (Hereinafter referred to as Lee).

[12] *Ibid*, p. F-7.

[13] *Ibid*, p. F-1.

[14] *Ibid*, p. F-2.

[15] The grounds, laid down by the Ministry of Health of the Central People's Government, were:

"1. Where continued pregnancy is medically considered undesirable;

"2. Where the spacing of childbirth is already too close and where a mother with her baby only 4 months old had become pregnant again and experiences difficulty of breast-feeding; and

"3. For special or too heavy work or study."

"The operation may be done upon the joint application of the couple, the certification of a doctor and the approval of the organization to which they belong. Where the reason is one of special or too heavy work or study, any request for operation must first be certified and endorsed by the key personnel of the responsible organization and also approved by a medical organization."

Statement of Shao Li-tzu at the First National People's Congress, *Peking Kuang Ming Jih Pao*, December 19, 1954; as cited by Lee, p. F-2.

[16] "Special Report from Peking," as reported in *Wenhui Pao*, Shanghai, April 12, 1957; cited by Lee, p. F-2.

discouraged if the pregnancy exceds two months.[17] Recent visitors to China report that abortion is common, often encouraged, after the first birth.[18]

Luke T. Lee observes that although a dichotomy exists in the traditional Chinese legal system between *li* (Confucian ethics) and *fa* (written code), whereby the former prevails over the latter in the event of a conflict, the integration of abortion into free family planning services was undoubtedly a decision made by the Communist Party based on its perception of what the *li* in the new society ought to be rather than upon any judicial decision or published legislation.[19]

Until 1972, abortion in India was permitted only upon the sole ground of saving the life of the mother. Nonetheless, an official report in 1967 estimated that the number of abortions each year was perhaps as high as 6.5 million — 2.6 million natural and 3.9 million induced.[20] The new Medical Termination of Pregnancy Bill of 1971 which came into effect in January 1972, now allows abortion on broader grounds[21] coupled with certain favorable legal presumptions,[22] and with minimal

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[17] The following minimal conditions, however, still remain:

1. abortion can only be performed once a year (obviously as a consideration to the mother's health);
2. the duration of pregnancy should be less than 10 weeks; and,
3. the person must be healthy.

The general grounds for procuring abortion are:

1. failure of contraceptives; and
2. without taking any contraceptive measures, when the woman is unfit to give birth for various reasons such as too frequent intervals between births, multiple pregnancies, economic conditions, and relationships of work.

Planning Childbirth and Promoting Late Marriage, Medical and Health Data, No. 5, July 1970, Shanghai, as cited by Lee, p. F-2.

[18] Faundes & Tapani Luukkainen, *Health and Family Planning Services in the Chinese People's Republic*, Studies in Family Planning, July 1972 (2) as cited by Lee, p. F-2.

[19] Lee, p. F-2.

[20] *Ibid.*

[21] These present grounds are:

1. that the continuance of the pregnancy would involve a risk to the life of the pregnant woman or, of grave injury to her physical or mental health; or
2. 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.

[22] Suppletorily, Indian law also presumes that:

a) where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such unwanted pregnancy constitutes a grave injury to the mental health of the pregnant woman; and
b) where any pregnancy occurs as a result of failure of any contracept ve device or method used by any married woman or her husband, the anguish caused by such unwanted pregnancy may constitute a grave injury to the mental health of the pregnant woman.

medical conditions.[23] Because Indian law allows abortion upon presumed grave injury to the mental health of the pregnant woman as a result of contraceptive failure, the law in effect permits abortion on request in view of the difficulty, if not impossibility, of proving that a pregnancy was not caused by contraceptive failure.[24]

Russian and then Soviet abortion policy has shifted several times in the last two centuries. Before the nineteenth century, Russian law prohibited abortion absolutely — allowing for no exception even for medical reasons. In 1920, abortion was permitted if performed by doctors in hospitals. In 1936, however, abortions were once more prohibited except when continued pregnancy would pose a serious danger to the life or health of the mother or when the parents suffered from serious inheritable diseases such as epilepsy, idiocy and progressive paralysis.[25] Succeeding decrees in 1954[26] and 1955[27] relaxed these restrictions. Except for a list of "contraindications"[28] under which no abortion may be performed, abortions in the Soviet Union are now subject to penalties only when performed in unauthorized institutions, under unsanitary conditions, or by unauthorized persons. Special permission is required if pregnancies are more than 12 weeks old.

In Japan, abortion was first legalized by the Eugenic Protection Law of 1948. Under this law, abortion was allowed only upon prior approval

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[23] These medical requirements are:
1. that the abortion be performed by a registered medical practitioner if the length of the pregnancy does not exceed twelve weeks;
2. where the pregnancy exceeds twelve but not twenty weeks, that there be a concurrence of opinion of two medical practitioners that it is necessary; and
3. that the abortion be performed at a hospital established or maintained, or for the time being approved for the purpose, by the Government.

[24] Lee, p. F-4.

[25] *Ibid.*

[26] On September 2, 1954, a decree of the Presidium of the Supreme Court abolished criminal penalties for women who consented to the interruption of pregnancy. As cited by Lee, p. F-4.

[27] On November 23, 1955, a further decree permitted abortions if done by qualified medical personnel in medical facilities. This was done "in order to give women the possibility of deciding by themselves the question of motherhood" and to allow "women to participate more actively in economic, social and cultural life." *Ibid.*

[28] As provided by a Ministry of Health instruction on December 28, 1955, these "contraindications" include:
1. acute or chronic gonorrhea;
2. acute or chronic inflammatory conditions of the sexual organs;
3. purulent foci, irrespective of localization;
4. acute infectious diseases; and
5. a previous abortion within the preceding six months.

Ibid.

by a Eugenic Protection Committee, and for strictly "eugenic" reasons.[29] Subsequent amendments to the Eugenic Protection Law in 1949[30] and 1952 included economic as well as health factors as legal justifications for induced abortion and eliminated the need for prior committee authorization. At present, the only remaining requirements for performing an abortion are the physician's discretion and the consent of the woman or her spouse. If the spouse cannot be identified, or fails to declare his intention, or disappears after conception has occurred, the consent of the pregnant woman alone is sufficient. The difficulty or impossibility of disproving the serious adverse effect of pregnancy upon health has resulted in such a liberal interpretation of the law that in practice, every healthy woman can now obtain abortion, and most of such operations have indeed been performed on economic grounds.[31]

In the U.S.: Roe v. Wade; Doe v. Bolton

While in most countries — like China, India, the Soviet Union, and Japan — abortion was legalized through either an express statute, decree, instruction, or order, the American case is unique in the sense that uniform legalization was achieved through judicial resolution. The decision in *Roe v. Wade* thus provides a very fertile ground for further discussions of constitutional law implications and, understandably enough, a wider arena for continuing disputes.

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[29] In all other cases, the performing physician should first obtain approval from the committees which must be satisfied that the following conditions have been met:

a) that a woman was afflicted with one or more specified diseases;

b) that the health of the mother might be seriously affected by the continuation of pregnancy or by delivery; or

c) that the pregnancy resulted from threat or act of violence.

Ibid.

[30] The pertinent provision of the law, as amended, now reads as follows: "The physician designated by the Medical Association, which is a body corporate established n the prefectual district (hereinafter called the 'designated physician'), may carry out the operation for interruption of pregnancy, at his discretion in the case of persons subject to the provisions of any of the following items, with the consent of the person in question or the spouse:

"1) a person or his spouse, who suffers from psychosis, mental deficiency, psycopathy, hereditary disease or hereditary malformation;

"2) a relative in blood within the 4th degree of consanguinity of a person or his spouse from hereditary psychosis, hereditary mental deficiency, hereditary psychopathy, hereditary bodily disease or hereditary malformation;

"3) a person or his spouse who is suffering from leprosy;

"4) a mother whose health may be affected seriously by the continuation of pregnancy or delivery, from the physical or the economic viewpoint.

"5) a person who has conceived as the result of an act of violence or a threat or while unable to resist or refuse. (Par. 1 of Art. 14, The Eugenic Protection Law of 1948, as amended)."

[31] Lee, p. F-7.

This is not to say, however, that abortion was totally proscribed in the entire United States before *Roe v. Wade* was decided upon by the U.S. Supreme Court. The United States of America has a federal system of government whereby the various states comprising the union separately exercise their legislative functions in their own respective jurisdictions, subject only to the limitations provided in the Federal Constitution. Thus, even prior to *Roe v. Wade,* at least four – Alaska, Hawaii, New York, and Washington – of the fifty states of the union had abortion laws which were liberal enough to remain unaffected by the decision.[32]

The relevant statutes of fifteen states[33] will require considerable rewriting to conform with the guidelines set by the Court while the rest of the states,[34] with older anti-abortion laws which have been entirely invalidated by *Roe v. Wade,* must write new laws.

In the ultimate analysis, the result of *Roe v. Wade* is not exactly to legalize abortion for the first time in all the fifty states of the union, but rather: (a) to legalize abortion in states where they were previously proscribed, and (b) to provide for standard or uniform guidelines whereby abortion may be legally procured, for all of the fifty states. regardless of whether they totally or restrictively allowed abortion or entirely prohibited it before.[35] In addition, the decision also conceded to the various states the right to regulate the abortion procedures at a certain stage of pregnancy, and even to prohibit it entirely during the last stage.[36]

I. *Roe v. Wade*

This case[37] was brought on appeal to the U.S. Supreme Court from the U.S. District Court for the Northern District of Texas.

There were three plaintiffs originally.

a) Jane Roe (the decision intimated that the name was a pseudonym), a resident of Dallas Country, Texas, instituted the action in March 1970, seeking a declaratory judgment to the effect that the Texas

[32] "Effect on States of Abortion Vote", New York Times, January 23, 1973.

[33] *Ibid.* These states are: Alabama, Arkansas, California, Colorado, Delaware, Florida, Georgia, Kansas, Maryland, Mississippi, New Mexico, North Carolina, Oregon, South Carolina, and Virginia.

[34] *Ibid.* These states are: Arizona, Connecticut, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode-Island, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

[35] *Infra.*

[36] *Infra.*

[37] *Supra,* note 6.

criminal abortion statutes[38] were unconstitutional on their face, with a prayer for injunction to restrain the defendant (the District Attorney) from enforcing the said statutes.

Alleging that she was unmarried and pregnant, Roe wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions." She complained that she was unable to obtain 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 further claimed that the Texas statutes were unconstitutionally vague and that they abridged her right to personal privacy protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.[39] By amending her complaint, Roe purported to sue "on behalf of herself and all other women" similarly situated.

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[38] *Infra.*

[39] The aforementioned amendments provide:

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment 9

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment 14

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.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

b) James Hubert Hallford, a licensed physician, sought to intervene, alleging that he had been previously arrested for violations of the Texas abortion statutes and that there were two such pending prosecutions against him. Describing the conditions of patients who came to him seeking abortions, he averred that in many cases, he was unable to determine whether they fell within or outside the exception[40] recognized by the law in question. He claimed that the statutes were vague and uncertain, and further maintained that they violated his right to practice medicine. His own and his patients' rights to privacy in the doctor-patient relationship, rights which were guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth amendments were alleged to have been similarly transgressed.

Dr. Hallford's intervention was, however, dismissed because he made no allegation of any substantial and immediate threat to any federally protected right which could not be asserted in his defense against state prosecutoin. Neither was there allegation of harassment or bad faith prosecution.

c) John and Mary Doe (pseudonyms, likewise), a married but childless couple, filed a companion complaint, claiming similar constitutional deprivations and seeking identical reliefs. Mrs. Doe was alleged to be suffering from a "neural-chemical" disorder, because of which her physician "advised her to avoid pregnancy until such time as her condition has materially improved," although a pregnancy at that present time would not present a "serious-risk" to her life. Pursuant to medical advice, she had discontinued use of birth-control pills. If she became pregnant, she would want to terminate the pregnancy by an abortion performed by a competent, licensed physician under safe, clinical conditions. By amendment to their complaint, the Does also converted their action into a class suit.

The complaint of the Does was likewise dismissed because of its speculative character and for lack of an actual controversy:

> We thus have as plaintiffs a married couple who have, as their asserted immediate and present injury, only an alleged "detrimental effect upon [their] marital happiness" because they are forced to "the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible pregnancy." Their claim is that sometime, in the future, Mrs. Doe might become pregnant because of possible failure of contraceptive measures, and at that time in the future, she might want an abortion that might then be illegal under the Texas statutes.

[40] The exception is Art. 1196, which provides:

"Art. 1196. By medical advice.

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

> This very phrasing of the Does' position reveals its speculative character. Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place and all may not combine. In Does' estimation, these possibilities might have real or imagined impact upon their marital happiness. But we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy. (following citations are omitted)[41]

The issue of justiciability and standing

Of the three original plaintiffs therefore, only the petition of Jane Roe was taken into consideration by the court.

The defendant-appellee (Wade) suggested at the outset that the case of Roe should have been similarly dismissed because it had become moot, since she and all other members of her class were no longer subject to any 1970 pregnancy. Wade noted that the record did not disclose that Roe was (still) pregnant at the time of the District Court hearing on May 22, 1970, or on the following June 17 when the said court's opinion and judgment were filed. The usual rule on this matter is that an actual controversy must exist at all stages of the appellate or *certiorari* review, and not only at the date the action is initiated.

The issue of justiciability and standing, as thus raised by the defendant-appellee, was, however, liberally construed by the Court by classifying cases involving pregnancy as examples of "non-mootness."

> But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review." (citations omitted)[42]

Two sides of the controversy

In capsulized forms, the main contentions of the two opposing sides were as follows:

1. Plaintiff-appellant Roe contended that the Texas statutes in question improperly invaded the right of a pregnant woman to choose

[41] Roe v. Wade, p. 10.
[42] *Ibid.*

to terminate her pregnancy. In support of this contention she invoked the First, Fourth, Fifth, and Ninth Amendments, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Federal Constitution.

Specifically, Roe argued that this right of the pregnant woman to choose to terminate her pregnancy was included in the concept of personal "liberty" as embodied in the Fourteenth Amendment's Due Process Clause (Section 1); or in the personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras as decided in *Griswold v. Connecticut,*[43] and *Eisenstadt v. Baird;*[44] or among those rights reserved to the people by the Ninth Amendment[45] as decided also in *Griswold v. Connecticut.*

2. The defendant-appellee, on the other hand, countered that a pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus which is a "person" within the language and meaning of the Fourteenth Amendment,[46] and therefore equally protected by it. The situation was, therefore, inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which the *Eisenstadt, Griswold, Stanley, Loving, Skinner, Pierce,* and *Meyer,* cases[47] were respectively concerned.

In addition, Wade contended that the State had an important and legitimate interest in preserving and protecting the health of the pregnant woman and another equally important and legitimate interest in preserving and protecting the "potentiality of human life."

The Decision

By a majority vote of 7 with 2 dissenting,[48] the U.S. Federal Supreme Court through Mr. Justice Blackmun held:

> 1. A state criminal abortion statute of the current Texast type, that excepts from criminality only a *life saving* procedure on behalf of the mother, without regard to pregnancy stage and without recog-

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[43] 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965).

[44] 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed. 2d 349 (1972).

[45] *Supra,* note 39.

[46] *Supra,* note 39.

[47] Eisenstadt v. Baird, *supra,* note 44; Griswold v. Connecticut, *supra,* note 43; Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed. 2d 542 (1969); Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed. 2d 1010 (1967); Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 39 A.L.R. 468, 69 L.Ed. 1070 (1929); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 29 A.L.R. 1446, 67 L.Ed. 1042 (1923).

[48] Mr. Chief Justice Burger and Mssrs. Justice Douglas, Brennan, Stewart, Marshall, and Powell joined in the opinion of Mr. Justice Blackmun. (Burger, C.J., and Douglas and Stewart, J.J., filed concurring opinions. Mssrs. Justice White and Rehnquist filed dissenting opinions.)

nition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(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.

(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.

2. The State may define the term "physician", . . . 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.[49]

In reaching the abovementioned decision, the Court researched extensively into the history of abortion, and thoroughly examined the state purposes and interests underlying the various criminal abortion laws.

Its findings and conclusions are as follow:

1. *Ancient attitudes.* Despite the Court's admission that these are not capable of precise determination, it nonetheless noted that at the time of the Persian Empire, abortifacients were already known although criminal abortions were then severely punished.[50] In Greek times as well as in the Roman Era, abortion was resorted to without scruple.[51] Greek and Roman law afforded little protection to the unborn, and if abortion was proscribed in some places, it seems to have been on a concept of a violation of the father's right to his offspring. 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.[52] Ancient religion did not ban abortion.[53] By "ancient religion," the Court probably meant Greek mythology which was also adopted by pre-Christian Rome.

2. *The Hippocratic Oath.* The Court acknowledged that the Oath represents the apex of the development of strict ethical concepts in medicine with its influence enduring to this day. It bears the name of the great Greek (Hippocrates), described as the Father of Medicine,

[49] Roe v. Wade, *supra*, note 6 at 49, 50.
[50] Citing CASTIGLIONI, A HISTORY OF MEDICINE, 84 (2d ed. 1947).
[51] EDELSTEIN, THE HIPPOCRATIC OATH, 10 (1943).
[52] *Ibid*, p. 13-14.
[53] Citing EDELSTEIN, 13-14.

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.[54] The Oath adjures physicians not to "give a deadly drug to anybody if asked for it, nor * * * make a suggestion to this effect. Similarly [he should not] give to a woman an abortive remedy."[55]

Posing the question — Why did the Oath not completely dissuade abortion as practiced in Hippocrates' time and that of Rome? — the Court, by way of explanation, adopted the theory of Dr. Edelstein that the Oath, which was not uncontested even in Hippocrates' day, merely echoed the Pythagorean doctrines which held the dogma that the embryo was animate from the moment of conception, and abortion meant the destruction of a living being.[56] On the other hand, most Greek thinkers, including Plato[57] and Aristotle,[58] commended abortion, at least prior to viability, and in no other stratum of Greek opinion, except among the Pythagorean circles, was the strict view of the Hippocratic Oath held. Thus, Edelstein concluded that the Oath originated from a group representing only a small segment of Greek opinion, and that it certainly was not accepted by all ancient physicians. The Oath came to be popularly accepted only during the end of antiquity and upon the emergence of Christian teachings. From a mere manifesto of a minority group (the Pythagoreans), the Oath, therefore, became "the nucleus of all medical ethics" and "was applauded as the embodiment of truth."[59]

It was in this historical context that the U.S. Supreme Court interpreted the long accepted and revered statement of medical ethics forbidding abortion. The Oath was a mere manifesto and not, as it is generally believed, the expression of an absolute standard of medical conduct.

3. *The Common Law.* The Court observed that under common law, abortion performed before "quickening," *i.e.,* the first recognizable movement of the fetus *in utero,* appearing usually from the 16th to the 18th week of pregnancy,[60] was not an indictable offense.[61] This was because prior to this quickening period, the embryo or fetus is

[54] Citing CASTIGLIONI, 148.
[55] Citing EDELSTEIN, 3.
[56] *Ibid,* p. 18.
[57] Citing V PLATO, THE REPUBLIC, 461.
[58] Citing VII, ARISTOTLE, POLITICS, 1335 b 25.
[59] EDELSTEIN, 64.
[60] Citing DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1261 (24th ed. 1965).
[61] Citing III E. COKE, INSTITUTES, 50 (1648); 1 W. HAWKINS, PLEAS OF THE CROWN, c. 31, sec. 16 (1762); 1 BLACKSTONE, COMMENTARIES 129-130 (1765); M. HALE, PLEAS OF THE CROWN, 433 (1778).

not yet "formed," or has not yet become recognizably human, or it is not yet infused with a "soul", or has not yet become "animated." This period during quickening was referred to as "mediate animation," the start of which Christian theology and canon law have fixed to be 40 days after conception for a male and 80 days for a female. Prior to the point of mediate conception or during the period before quickening, the fetus was commonly regarded as part of the mother and its destruction, therefore, was not homicide. The absence 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. Because of this, Bracton,[62] therefore, focused upon quickening as the critical point and its significance was echoed by later common law scholars.

As to abortion of a "quick" fetus, although the Court granted that the subject was still disputed, it nonetheless adopted what to it appeared as the later and predominant view: that such was "at most a lesser offense" than homicide. It observed that Coke took the position that abortion at this period was "a great misprision and no murder."[63] Blackstone was claimed to follow this, saying that while abortion after quickening had once been considered manslaughter (homicide in Philippine jurisprudence), "modern law" took a less severe view.[64] By going a step farther, the Court remarked that a recent review of the common law precedents actually argued that even post-quickening abortion was never established as a common law crime.[65]

4. *The English statutory law.* The Court noted that England's first criminal statute, Lord Ellenborough's Act of 1803,[66] made abortion of a quick fetus a capital crime but provided lesser penalties for the felony of abortion before quickening, thereby preserving the quickening distinction. This distinction, however, disappeared in 1837 and did not reappear in the Offenses Against the Person Act of 1861 which formed the core of English anti-abortion law until the liberalizing reforms of 1967. In 1929, the Infant Life (Preservation) Act came into being making the willful act of destruction of "the life of a child capable of being born alive" a felony if performed with the necessary intent. It likewise contained a provision that one was not to be found guilty

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[62] Citing II BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND, 341 (Thorne ed. 1968).

[63] Citing E. COKE, *supra.*

[64] Citing I BLACKSTONE, COMMENTARIES, 129-130 (1765).

[65] Citing C. MEANS, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?* 17 N.Y.L. FORUM 335 (1971).

[66] 43 Geo. 3, c. 58.

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."

In the 1939 case of *Rex v. Bourne*,[67] it was held that an abortion necessary to preserve the life of the pregnant woman was exempted from the criminal penalties of the 1861 Act. The phrase "preserving the life of the mother" was also construed broadly, *i.e.*, "in a reasonable sense," to include a serious and permanent threat to the mother's health.

The most recent English statute on the matter is the Abortion Act of 1967.[68] This 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 likewise 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.* The Court pointed out that in the United States, the law in effect in all but a few states until the mid-19th century was the pre-existing English common law.

Connecticut was the first state to enact abortion legislation in 1821 by adopting part of Lord Ellenborough's Act relating to a woman "quick with child,"[69] except that the death penalty was not imposed. Pre-quickening abortion was made a crime only in 1860.[70]

In 1828 New York enacted legislation making the destruction of an unquickened fetus only a misdemeanor, and that of a quick one second-degree manslaughter.[71] This statute also incorporated a concept of therapeutic abortion, *i.e.*, if "necessary to preserve the life of [the] mother," or upon advice by two physicians that it is necessary for such purpose. The said New York law served as a model for early anti-abortion statutes.

[67] 1 K.B. 687 (1939).
[68] 15 and 15 Eliz. 2, c. 87.
[69] CONN. STAT., Tit. 20, Sec. 14 (1821).
[70] CONN. PUB. ACTS, c. 71, Sec. 1 (1860).
[71] N.Y. REV. STAT., pt. IV, c. 1, Tit. II, Art. 1, Sec. 9, at 661, and Tit. VI, Sec. 21, at 694 (1829).

By 1840, only eight American states had statutes dealing with abortion. It was also during this year that Texas received the common law.[72]

It was only after the American Civil War that legislation began generally to replace common law. Most of these early statutes dealt severely with abortion after quickening but were more lenient towards pre-quickening ones. Attempted abortions were punished equally with completed acts. While many statutes initially exempted therapeutic abortions upon the physician's opinion, this exemption soon disappeared and the subsequent amendments required that the procedure be actually necessary for the purpose.

In the middle and late 19th century, the quickening distinction gradually disappeared from most of the states' statutes and the degree of the offense and its corresponding penalties were increased. By the end of the 1950's most of the states had banned abortions except therapeutic ones.[73] Only Alabama and the District of Columbia permitted abortion to preserve the mother's health.[74]

During the past several years, however, the Court noted a trend toward liberalization of abortion statutes in about one-third of the states.

The Court concluded its study of the history of abortion laws in the various states of the Union with this observation:

> 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 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.[75]

6. *The position of the American Medical Association.* A significant shift in the stance of AMA vis-a-vis abortion — from one of staunch anti-abortionism to a more permissive one — was observed by the court.

By way of review of its history, the Court intimated that in the late 19th century the attitude of the medical profession in the U.S. may have in fact played a significant role in the enactment of stringent criminal abortion legislation during that period.

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[72] Act of January 20, 1842, Sec. 1, set forth in 2 GAMMEL, LAWS OF TEXAS, 177-178 (1898).

[73] Quay, 447-520.

[74] ALA. CODE, Tit. 14, Sec. 9 (1958); D.C. CODE ANN., Secs. 22-201 (1967).

[75] Roe v. Wade, *supra*, note 6 at 25.

As early as May 1857, an AMA Committee on Criminal Abortion was appointed to investigate criminal abortion "with a view to its general suppression."[76] The Committee then offered, and the Association adopted, resolutions protesting "against such unwarranted destruction of human life," calling upon legislatures to revise their abortion laws, and requesting the cooperation of state medical societies to press the subject.[77]

In 1871, the same committee submitted a long and vivid report recommending, *inter-alia,* that it "be [made] 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."[78]

In 1967, the AMA House of Delegates adopted the recommendation of its Committee on Human Reproduction 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."[79] Similarly adopted were the additional requirements that two other physicians "chosen because of their recognized professional competence [must] have examined the patient and have concurred in writing," and that the procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals (JCAH).[80]

By 1970, however, the theretofore consistent anti-abortionist position of the AMA began to soften. By this time, "polarization of the medical profession on this controversial issue" was duly noted by a reference committee. On June 25, 1970, the AMA House of Delegates adopted the preambles and most of the resolutions offered by the reference committee. The said 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."[81] 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

[76] Citing the AMA Committee on Criminal Abortion Report, 12. Transcripts of the AMA 73-77 (1859), to the Twelfth Annual Meeting.
[77] *Ibid*, p. 28, 78.
[78] Citing 22 Trans. of the AMA 258 (1871).
[79] Citing Proceeding of the AMA House of Delegates, 40-51 (June, 1957).
[80] *Ib d.*
[81] The actual text is reproduced in Roe v. Wade, pp. 28-29.

law, and that no party to the procedure should be required to violate personally held moral principles.[82]

7. *The position of the American Public Health Association (APHA)*. In contrast to the AMA position on the matter, the Court pointed out, that of the APHA appears to favor legalization of abortion.

In October 1970, the Executive Board of the APHA adopted the Standards for Abortion Services, which calls for:

(a) rapid and simple abortion referrals being made readily available;

(b) counseling to simplify and expedite the provision of abortion services;

(c) psychiatric consultations not being made mandatory;

(d) a wide range of individuals — from appropriately trained, sympathetic volunteers to highly skilled physicians — qualifying as abortion counselors; and

(e) the discussion of contraception and/or sterilization with each abortion patient.[83]

The APHA Executive Board also recommended that abortions in the second trimester and early abortions in the presence of existing medical complications be performed in hospitals as in-patient procedures. Among the factors pertinent to life and health risks associated with abortion and recognized as important were: (a) the skill of the physician; (b) the environment in which the abortion is performed; and, above all, (c) the duration of pregnancy.[84]

8. *The position of the American Bar Association (ABA).* The Court took note of the fact that the ABA House of Delegates, at its February 1972 meeting, approved the Uniform Abortion Act[85] that was drafted

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[82] Citing Proceedings of the AMA House of Delegates, 221 (June, 1970).

[83] Citing Recommended Standards for Abortion Services, 61 Am. J. Pub. Health 396 (1971).

[84] *Ibid*, p. 397.

[85] The UNIFORM ABORTION ACT provides:

Section 1. [*Abortion Defined; When Authorized.*]

(a) "Abortion" means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.

(b) An abortion may be performed in this state only if it is performed:

(1) by a physician licensed to practice medicine [or osteopathy] in this state or by a physician practicing medicine [or osteopathy] in the employ of the government of the United States or of this state, [and the abortion is performed [in the physician's office or in a medical clinic, or] in a hospital approved by the Department of Health] or operated by the United States, this state, or any department, agency, or political sub-division of either;] or by a female upon herself upon the advice of the physician; and

(2) within [20] weeks after the commencement of the pregnancy [or after [20] weeks only if the physician has reasonable cause to believe (i) there is a substantial risk that continuance of the pregnancy would endanger the life

and approved the preceding year by the Conference of Commissioners on Uniform State Laws.[86]

The Act was based largely and was ostensibly an improvement on the New York law.[87] It permits abortion within the state if performed by a licensed physician in a hospital approved by the Department of Health or operated by the federal or state governments, or if performed by a female upon herself upon advice of the physician. In both cases the abortion must be performed within 20 weeks after the commencement of the pregnancy. After 20 weeks, abortion may be had only if the physician has reasonable cause to believe: (a) that there is substantial risk that continuance of the pregnancy will endanger the life, or would gravely impair the physical or mental health of, the mother; (b) that the child would be born with grave physical or mental defect; or (c) that the pregnancy resulted from rape, incest, or illicit intercourse with a girl under the age of 16 years.

II. *Doe, et al. v. Bolton, et al.* (*post*)[88]

This companion case to *Roe v. Wade* was decided on the same date but subsequent to it.

The law in question here is a Georgia statute which proscribed abortion except as performed by a duly licensed Georgia physician when necessary in his "best clinical judgment." Under this statute, the limited grounds for a valid abortion are: (a) when continued pregnancy would endanger a pregnant woman's life or permanently injure her health; (b) when the fetus would very likely be born with serious defects; or (c) when the pregnancy resulted from rape.[89] In addition to the requirement that the patient be a Georgia resident,[90] the statute likewise imposes three procedural conditions, to wit: (1) that the abortion be performed in a hospital accredited by the Joint Commission on Accredita-

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of the mother or would gravely impair the physical or mental health of the mother, (ii) that the child would be born with grave physical or mental defect, or (iii) that the pregnancy resulted from rape or incest, or illicit intercourse with a girl under the age of 16 years of age].

Section 2. [*Penalty.*] Any person who performs or procures an abortion other than authorized by this Act is guilty of a [felony] and, upon conviction thereof, may be sentenced to pay a fine not exceeding [$1,000] or to imprisonment [in the state penitentiary] not exceeding [5 years], or both.

Section 3. [*Uniformity of Interpretation.*] This Act shall be construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.

Section 4. [*Short Title.*] * * *

Section 5. [*Severability.*] * * *

Section 6. [*Repeal.*] * * *

Section 7. [*Time of Taking Effect.*]

[86] Citing 58 A.B.A.J. 380 (1972).

[87] Prefatory Note of the Uniform Abortion Act.

[88] Supreme Court of the United States, No. 70-40, January 22, 1973.

[89] Georgia Criminal Code, Sec. 26-1202(a).

[90] *Ibid*, Sec. 26-1202(b).

tion of Hospitals (JCAH); (2) that the procedure be approved by the hospital staff abortion committee; and, (3) that the performing physician's judgment be confirmed by independent examinations of the patient by two other Georgia-licensed physicians.[91]

Appellant Doe, an indigent married Georgia citizen, who was denied abortion after 8 weeks of pregnancy for failure to meet the conditions in section 26-1202(a) (grounds for procuring legal abortion), sought declaratory and injunctive relief, contending that the Georgia statute was unconstitutional.

The District Court ruled that the limitations of the grounds upon which an abortion may be legally procured [Sec. 26-1202(a)] were invalid because they infringed upon the privacy and personal liberty of the appellant, but held that the state's interest in health protection and the existence of a *"potential* of independent human existence" justified regulation by the state as to "the manner of performance as well as the quality of the final decision to abort" [Sec. 26-1202(b)].

Upon appeal to the Federal Supreme Court by the plaintiff, who claimed entitlement to broader relief, the Court, by a majority vote of 7 with 2 against, and speaking through Mr. Justice Blackmun, once more held:

1) A woman's constitutional right to an abortion is not absolute, as decided in *Roe v. Wade*.

2) The requirement that a physician's decision to perform an abortion must rest upon his "best clinical judgment" is valid.

3) The three procedural conditions [Sec. 26-1202(b)] violate the Fourteenth Amendment:

a) the JCAH accreditation requirement is invalid because, *inter alia*, it fails to exclude the first trimester of pregnancy (*Roe v. Wade*);

b) the interposition of a hospital committee on abortion is unduly restrictive of the patient's rights, which are already safeguarded by her personal physician; and,

c) the required acquiescence by two co-practitioners also has no rational connection with a patient's needs, and unduly infringes on her physician's right to practice.

4) The Georgia residence requirement violates the Privileges and Immunities Clause by denying protection to persons who enter Georgia for medical services there.

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[91] *Ibid.*

The Fundamental Questions Involved in Abortion

Before reaching the landmark decision in *Roe v. Wade,* the U.S. Supreme Court had to resolve, as a matter of course, certain fundamental questions inherent in the litigation. Although other parenthetical issues were also raised in the process, the Court chose to refrain from resolving them in the meantime for reasons which we shall presently see.

1. *The right of privacy v. State interests.* At the very outset in *Roe v. Wade,* the U.S. Supreme Court conceded that the U.S. Federal Constitution does not explicitly mention any "right of privacy."[92] By tracing a long line of decisions,[93] however, the Court recognized that a right of personal privacy does exist under the U.S. Constitution.

In varying contexts, the Court or the individual justices have, in the past, indeed found at least the roots of that right in the First Amendment,[94] in the Fourth and Fifth Amendments,[95] in the penumbras of the Bill of Rights,[96] in the Ninth Amendment,[97] or in the concept of liberty guaranteed by Section 2 of the Fourteenth Amendment.[98] The decisions in these various cases emphasize that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty"[99] are included in this guarantee of personal privacy. They likewise make it clear that the right has some extension to activities relating to marriage,[100] procreation,[101] contraception,[102] family relationships[103] and child rearing and education.[104]

The Court postulated that this right of privacy, whether found in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action or 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.*[105]

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[92] Roe v. Wade, p. 36.

[93] The Court opined that this goes perhaps as far back as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 35 L.Ed. 734 (1891).

[94] Citing Stanley v. Georgia, *supra,* note 47.

[95] Citing Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968); Katz v. U.S., 389 U.S. 347, 350, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967); Boyd v. U.S., 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886); Olmstead v. U.S., 277 U.S. 438, 478, 48 S.Ct. 564, 66 A.L.R. 376, 72 L.Ed. 944 (1928).

[96] Citing Griswold v. Connecticut, *supra,* note 47.

[97] *Ibid,* p. 486.

[98] Citing Meyer v. Nebraska, *supra,* note 47.

[99] Citing Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288 (1937).

[100] Citing Loving v. Virginia, *supra,* note 47.

[101] Citing Skinner v. Oklahoma, *supra,* note 47.

[102] Citing Eisenstadt v. Baird, *supra,* note 47.

[103] Citing Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944).

[104] Citing Pierce v. Society of Sisters, *supra,* note 47 and Meyer v. Nebraska, *supra,* note 47.

[105] Roe v. Wade, p. 40.

Were it otherwise, the Court enumerated the possible harmful effects a pregnant woman may suffer thus:

> * * * The detriment that the State would impose upon the pregnant woman by denying this choice 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.[106]

At the same time, however, the Court rejected the appellant's claim that a 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. Upon the point, the Court granted that the state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life.

What, then, should be the extent of the state's intervention and at what point may it properly intervene?

By once more invoking judicial precedents, the Court ruled that where certain "fundamental rights" are involved, regulations limting these rights may be justified only by a "compelling state interest."[107] *Legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.*[108] Previous decisions striking down state laws have generally scrutinized the state's interest 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.[109]

With respect to the State's *important and legitimate interest in the health of the mother,* the "compelling point," in the light of medical knowledge, *is at approximately the end of the first trimester.* The justification cited by the Court is that *until the end of the first trimester*

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[106] *Ibid.*

[107] Citing Kramer v. Union Free School District, 395 U.S. 621, 627, 89 S.Ct. 1886, 23 L.Ed. 2d 583 (1969); Shapiro v. Thompson, 394, U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969); Sherbert v. Verner, 374 U.S. 398, 406, 83 S.Ct. 1790, 10 L.Ed. 2d 965 (1963).

[108] Citing Griswold v. Connecticut, *supra*, note 47; Aptheker v. Secretary of State, 378 U.S. 500, 508, 84 S.Ct. 1659, 12 L.Ed. 2d 992 (1964); Cantwell v. Connecticut, 310 U.S. 296, 307-308, 60 S.Ct. 900, 128 A.L.R. 1352, 84 L.Ed. 1213 (1940); Eisenstadt v. Baird, *supra*, note 47.

[109] *Ibid.*

mortality in abortion is less than the mortality in normal childbirth.[110] From and after this point (the end of the first trimester), therefore, a state may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. State regulation in this area could include requirements as to the qualifications of the person who is to perform the abortion, as to the licensure of that person, as to the medical facility in which the procedure is to be performed and the licensing of such facility.

Upon the other hand, for the period of pregnancy *prior* to this "compelling point" (during the first trimester or from conception to approximately the end of the third month subsequent), the attending physician, in consultation with his patient, is free to determine, without state interference, whether in his medical judgment the patient's pregnancy should be terminated. Once that decision is reached, the abortion may be performed free of any state regulation. Needless to say, during the entire first trimester, *the only requisite left for having an abortion is simply for a pregnant woman to find a doctor who is willing to perform it.* Further, since the court decision stipulated no ground rules which would otherwise guide the doctor in deciding whether to perform the abortion or not — except by his own "medical judgment" — abortion during this period *virtually becomes available at the mere request of the patient.*

Apropos of the state's acknowledged important and legitimate interest in *potential life,* the Court set the compelling point at *"viability"* — which is defined as the potentiality to live outside the mother's womb, albeit with artificial aid, and is usually placed at about 28 weeks but may occur earlier even at 24 weeks from conception.[111] The justification cited for this is that from this stage on, *the fetus then presumably has the capacity of meaningful life* outside the mother's womb. Hence, from this point on till birth, the term "potential existence" starts to achieve a practical meaning.

Various writers define constitutional law as the delicate balancing of individual freedoms and liberties as against the State's power to regulate human conduct. Under this definition, the case of *Roe v. Wade* becomes a classic example indeed of such a judicial balancing between the right to privacy of a woman in terminating her pregnancy on the one hand, and on the other, the State's "legitimate interest", ostensibly in protecting the pregnant woman's health and the potentiality of human life. By dividing pregnancy into a number of stages and by providing a

[110] Citing Potts, *Postconception Control of Fertility,* 8 INT'L. OF G & O 957,967, (1970, *et. seq.*).

[111] Citing L. MELLMAN & J. P. WILLIAMS, OBSTETRICS, 493 (14th ed. 1971); DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 1689 (24th ed. 1965).

timetable defining the stage at which a pregnant woman could procure abortion practically on demand, and the stage at which the State may intervene to protect its interests, the decision sought to satisfy both sides by giving practical effects to their respective claims.

2. *The fetus: When does life begin?* The appellee in *Roe v. Wade* argued that the fetus is a "person" within the language and meaning of the Fourteenth Amendment and is thereby equally protected by it. Further, they argued 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.

The Court pointed out that the Constitution does not define the term "person" and in all of the instances whereby the word is used, there is no assured indication that it has any possible pre-natal application. On the contrary, the term appears to have application only postnatally, Therefore, and with the further observation that throughout the major portion of the 19th century the then prevailing abortion practices were far freer than they are today, the Court promptly held that *the word "person" as used in the Fourteenth Amendment does not include the unborn* and that *the fetus had never been recognized in the law as persons in the whole sense.*[112]

Relative to the most sensitive and difficult question of "when does life begin?", the Court wisely chose the path of avoidance:

> * * * 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.[113]

It might as well be, for were it otherwise, the Court would have found itself unnecessarily mired in a drawn-out academic and semantic dispute.[114] In the light of new embryological data and novel medical techniques such as menstrual extraction, the "morning-after" pill, implantation of embryos, artificial insemination, and even artificial wombs, the Court hinted that it is more inclined to view conception as a "process over time" rather than an event.[115]

3. *What rights, if any, of the father are involved?* One other fundamental question which the Court similarly refused to pass upon is the

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[112] Roe v. Wade, p. 43.

[113] *Ibid.*

[114] The Court cursorily discussed the various schools of thought on the matter, *e.g.*, the Stoics, the Greeks, and the Jewish and Christian faiths. *Ibid*, pp. 44, 45.

[115] *Ibid*, p. 45.

right of the prospective father in cases of abortion. Stated in another way, what interests does a father have vis-a-vis the fetus and what rights of his will be involved should his pregnant wife obtain legal abortion without his consent?

As we have observed earlier, there are decisions upholding a person's right (we naturally assume that the husband is similarly encompassed herein) to activities relating to marriage,[116] procreation,[117] contraception,[118] family relationships,[119] and child rearing and education.[120]

Assuming that the pregnant woman is married, would her right to obtain an abortion, which is part of her constitutional right to privacy, be paramount or superior to that of her husband who does not consent to the abortion?

The Court did not fail to mention the possibility of an irreconcilable conflict between the rights involved arising in such a case. But once more, it refused to resolve the question:

> Neither in this opinion nor in *Doe v. Bolton, post,* do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, * * * We are aware that some statutes recognize the father under certain circumstances. North Carolina, for example, * * * requires written permission for the abortion from the husband when the woman is a married minor * * * We need not now decide whether provisions of this kind are constitutional.[121]

4. *The medical side of the controversy.* Because the intervention of Dr. Hallford was dismissed by the Court, it failed to pass upon another fundamental question involved in the controversy, *i.e.,* what rights, if any, are the physicians entitled to vis-a-vis legal abortion? Stated more specifically, suppose a doctor refuses to perform abortion because of religious or other similar reasons, and due to such refusal the patient suffered injuries thereby, should the physician be held liable?

The Uniform Abortion Act[122] proposed by the American Bar Association mentioned this aspect in passing in its Prefatory Note:

> This Act does not contain any provision relating to medical review committees or prohibitions against sanctions imposed upon medical personnel refusing to participate in abortions * * * Such provisions, while related, do not directly pertain to when, where, or by whom abortions may be performed; *however, the Act is not drafted to exclude such a provision by a state wishing to enact the same.* (emphasis supplied)

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116 See note 100.
117 *Ibid,* p. 104.
118 *Ibid,* p. 105.
119 *Ibid,* p. 106.
120 *Ibid,* p. 107.
121 Roe v. Wade, fn 67, p. 50.
122 For the actual text, see note 85.

Abortion Under Philippine Jurisdiction

Philippine law prohibits abortion absolutely, for whatever reason, however and by whomever committed.

Thus, the Revised Penal Code penalizes abortions whether committed intentionally[123] or unintentionally[124] and whether practiced by the woman upon herself or by her parents,[125] or by a physician or a midwife.[126] Mere dispensing of any abortives without a proper prescription is similarly proscribed.[127]

As was noted earlier, Philippine law distinguishes the crime of abortion from that of "infanticide"[128] which is the killing of any child less than three days of age.

In *People v. Detablan,*[129] our Supreme Court made the aforesaid distinction in holding that: (1) where the fetus, although about six

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[123] ART. 256. *Intentional Abortion.* — Any person who shall intentionally cause an abortion shall suffer:

1. The penalty of *reclusión temporal,* if he shall use any violence upon the person of the pregnant woman.
2. The penalty of *prisión mayor* if, without using violence, he shall act without the consent of the woman.
3. The penalty of *prisión correccional* in its medium and maximum periods, if the woman shall have consented.

[124] ART. 257. *Unintentional Abortion.* — The penalty of *prisión correccional* in its minimum and medium periods shall be imposed upon any person who shall cause an abortion by violence, but unintentionally.

[125] ART. 258. *Abortion practiced by the woman herself or by her parents.* — The penalty of *prisión correccional* in its medium and maximum periods shall be imposed upon a woman who shall practice an abortion upon herself or shall consent that any other person should do so.

Any woman who shall commit this offense to conceal her dishonor, shall suffer the penalty of *prisión correccional* in its minimum and medium periods.

If this crime be committed by the parents of the pregnant woman or either of them, and they act with the consent of said woman for the purpose of concealing her dishonor, the offenders shall suffer the penalty of *prisión correccional* in its medium and maximum periods.

[126] ART. 259. *Abortion practiced by a physician or midwife and dispensing of abortives.* — The penalties provided in Article 256 shall be imposed in its (sic) maximum period, respectively, upon any physician or midwife who, taking advantage of their scientific knowledge or skill, shall cause an abortion or assist in causing the same.

Any pharmacist who, without the proper prescription from a physician, shall dispense any abortive shall suffer *arresto mayor* and a fine not exceeding 1,000 pesos.

[127] *Ibid.*

[128] The Revised Penal Code provides:

> ART. 255. *Infanticide.* — The penalty provided for parricide in article 246 and for murder in article 248 shall be imposed upon any person who shall kill any child less than three days of age.
>
> If the crime penalized in this article be committed by the mother of the child for the purpose of concealing her dishonor, she shall suffer the penalty of *prisión correccional* in its medium and maximum periods, and if said crime be committed for the same purpose by the maternal grandparents or either of them, the penalty shall be *prisión mayor.*

[129] C.A.-G.R. No. 4630, August 31, 1939, 40 O.G., Supp. 5, 30 (Aug., 1941).

months old and has already acquired a human form, can not as yet subsist by itself outside the maternal womb, it has not yet acquired all conditions for legal viability, and hence, its killing falls under abortion; (2) if on the other hand, *the fetus could already sustain an independent life after its separation from the maternal womb and it is killed,* the crime is infanticide.

In *U.S. v. Vedra,*[130] an actual prior live birth becomes an essential requisite when the Court held that *the child must be born alive and fully developed,* that is, it can sustain independent life, for its killing to fall under the classification of infanticide.

Should the birth be one of the full term? Supposing, for instance, the offender should exert violence on a pregnant woman, thereby causing a live premature delivery of her five-month old fetus, and immediately thereafter, the same offender kills it, would the felony fall under abortion or infanticide?

To consummate the crime of abortion the fetus must die. If it survives in spite of the attempt to kill it the crime would be *frustrated intentional abortion* when all the acts of execution have been performed by the offender.[131] If abortion is not intended and the fetus does not die, in spite of the violence intentionally exerted, the crime may only be physical injuries. There is no frustrated abortion in view of lack of intention to cause an abortion.[132]

A. *Unintentional abortion* is committed only by violence, that is, "actual physical force." Thus, where a man points a gun at a pregnant woman, at the same time telling her that he will kill her, and because of fright she suffered an abortion, the offender is guilty of threats only.[133] Where, however, the accused struck a woman—three months pregnant—on her hip with a bottle, thereby causing hemorrhage and miscarriage, he was held guilty of *unintentional abortion.*[134]

Philippine jurisprudence also considers a hybrid of *unintentional abortion through reckless imprudence.* In *People v. Jose,*[135] where a truck driver bumped a *calesa* thereby causing one of its passengers to have an abortion, the driver was held guilty of the said offense. Along the same view, an accused was held guilty of the *complex crime of homicide with unintentional abortion* when he struck a pregnant woman, as a result of which she suffered hemorrhage, resulting in the premature delivery of one of her twin babies, the other not having been

[130] 12 Phil. 96 (1908).
[131] REYES, LUIS B., THE REV. PENAL CODE, Bk. II, 414.
[132] *Ibid,* p. 415.
[133] *Ibid,* p. 416, citing Dec. Supreme Court of Spain of November 30, 1887.
[134] U.S. v. Jeffrey, 15 Phil. 391 (1910).
[135] C.A.-G.R. No. 9010-R, November 28, 1953, 50 O.G. 705 (Feb., 1954).

born because the woman died. Some writers are also of the opinion that there could be a *complex crime of parricide with unintentional abortion,* and perhaps also of *murder with unintentional abortion.*[136]

Is the accused liable for abortion even if he did not know that the woman was pregnant? There seem to be two conflicting views on this matter in Philippine jurisprudence. The first view is that the accused would nonetheless still be guilty. Thus in *U.S. v. Jeffrey*[137] the offender was held liable also for the abortion even though he did not know that the offended party was pregnant. On the other hand, where the offended party was only two months pregnant and her condition was therefore not noticeable, it was held in *People v. Carnaso*[138] that for the crime of abortion, even unintentional, to be committed, the accused must have had knowledge of the pregnancy.

B. *Intentional Abortion.* Article 256 of the Revised Penal Code penalizes intentional abortion, if committed by a third person upon a pregnant woman: (a) with the use of violence, or (b) without such violence if he acted without the consent of the woman, and (c) even with the consent of the woman.[139]

Article 258 on the other hand, penalizes abortion practiced by the woman upon herself or by her parents. The second paragraph of the same article, mitigates the liability of a pregnant woman who practices abortion upon herself if the purpose is to conceal her dishonor.[140] Her parents or either of them, however, do not enjoy the same mitigating circumstance (third paragraph).

Because the pregnant woman is held liable without any qualification as to cause, in both cases where she practices abortion upon herself and when she consents to any person doing so even if the purpose is to conceal her dishonor, one cannot but conclude that *Philippine law forbids abortion absolutely.* It would therefore seem that *the Revised Penal Code does not allow abortion even for eugenic purposes, or to protect the life and/or health or interest of the mother, or even if the pregnancy resulted from rape or incest.*

In the case of *Geluz v. Court of Appeals,* [141] however, our Supreme Court said, by way of *obiter,* that "abortion*** *without medical necessity* to warrant it [is] a criminal and morally reprehensible act" — thereby

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136 *Op. cit.*, REYES, p. 416.

137 *Supra,* note 134.

138 C.A.-G.R. No. 03099-CR, April 7, 1964, 61 O.G. 3620 (June, 1965), citing Dec. Supreme Court of Spain, July 2, 1839; V. VIADA 125.

139 See note 123.

140 See note 125.

141 G.R. No. L-16439, July 20, 1961, 2 SCRA 801 (1961).

implying that "medical necessity" may and could warrant abortion, and if it so does warrant, abortion does not become a criminal act.

Aside from this, the only conceivable instance wherein abortion could perhaps escape legal sanction is if and when it is considered either a justifying or exempting circumstance under Articles 11 and 12, respectively, of the Revised Penal Code.[142]

Hence, if a physician should, according to his best medical judgment in good faith, perform an abortion upon a pregnant woman to save her life or to protect her health, he must still prove that the act was done in order to avoid an evil or injury which actually existed, that the injury was greater than that done to avoid it, and that there was no other practical and less harmful means of preventing the said evil or injury.

A woman who performs an abortion upon herself could perhaps escape penalty by invoking and proving the exempting circumstance of an "irresistible force" or "uncontrollable fear of an equal or greater injury."

Article 259 penalizes any physician or midwife who, taking advantage of his scientific skill or knowledge, causes or assists in causing an abortion.[143] This provision does not make any qualification or exception whatsoever. When it comes to pharmacists, the law is even harsher because the second paragraph of this article penalizes any pharmacist *who simply dispenses any abortive without the proper prescription.*[144] To hold a pharmacist liable under this law, he need not know that the abortive would be used to cause an abortion because the act constituting the offense is the very dispensing of the abortive without a proper

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[142] The Revised Penal Code provides:

ART. 11. *Justifying circumstances.* — The following do not incur any criminal liability:

x x x x x

4. Any person who, in order to avoid an evil or injury, does an act which causes damage to another, provided that the following requisites are present:

First. That the evil sought to be avoided actually exists;

Second. That the injury feared be greater than that done to avoid it;

Third. That there be no other practical and less harmful means of preventing it.

x x x x x

ART. 12. *Circumstances which exempt from criminal liability.* — The following are exempt from criminal liability:

x x x x x

5. Any person who acts under the compulsion of an irresistible force.

6. Any person who acts under the impulse of an uncontrollable fear of an equal or greater injury.

x x x x x

[143] See note 126.

[144] *Ibid.*

prescription. It is not even necessary that the abortive be actually used.[145] If the pharmacist knew that the abortive would be used to cause an abortion and abortion resulted from the use thereof, he would be an accomplice in the crime of *intentional abortion,* properly falling under Article 256.[146]

Abortion in this country is not only penalized but is proscribed, policy-wise. As was mentioned earlier, it is the only birth-control method which is disallowed by the Revised Population Act of 1971.[147]

The status of the fetus and parental rights vis-a-vis abortion under Philippine jurisdiction.

The New Civil Code provides:

ART. 40. Birth determines personality; but the conceived child shall be considered born for all purposes that are favorable to it, provided it be born later with the conditions specified in the following article.

ART. 41. For civil purposes, the foetus is considered born if it is alive at the time it is completely delivered from the mother's womb. However, if the foetus had an intra-uterine life of less than seven months, it is not deemed born if it dies within twenty-four hours after its complete delivery from the maternal womb.

It will be noted that in the abovementioned provision, Philippine law confers practical emphasis on the so-called "viability period." Thus, once the fetus has reached this stage, it shall be considered born so long as it was alive at the time of its delivery although it survives even only for an hour or for a few minutes thenceforth. On the other hand, the fetus which has not yet reached this "viability period" (here the Civil Code sets it at seven months of intra-uterine life), must survive for at least twenty-four hours after its complete delivery to be deemed legally born.

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[145] *Op. cit.,* REYES, pp. 418, 419.

[146] *Ibid.*

[147] Sec. 4. *Purposes and Objectives.* The POPCOM shall have the following purposes and objectives:

x x x x

(f) To encourage all persons to adopt safe and effective means of planning and realizing desired family size so as *to discourage and prevent resort to unacceptable practice of birth control such as abortion* . . . (emphasis supplied).

x x x x

(i) To make make available all acceptable methods of contraception, *except abortion,* to all Filipino citizens. . . . (emphasis supplied). (The Revised Population Act of 1971).

The distinction between a "viable" fetus and a "non-viable" one is significant in the determination of whether its killing would fall under abortion or infanticide.

The fetus under Philippine jurisdiction is not endowed with civil personality and is incapable of having rights and obligations.

In *Geluz v. C.A.*[148] our Supreme Court held:

> [A]n unborn foetus * * * is not endowed with personality. Under the system of our Civil Code, "la criatura abortiva no alcanza la categoría de persona natural y en consecuencia es un ser no nacido a la vida del Derecho" (Casso-Cervera, "Diccionario de Derecho Privado," Vol. 1, p. 49), being incapable of having rights and obligations.

Thus, following this decision no action for pecuniary damages on account of personal injury or death could be instituted *on behalf* of the unborn child, and no such right of action could derivatively accrue to its parents or heirs.[149]

This is not to say, however, that the parents are not entitled to collect any damages at all. Under the said case, where the husband sued the physician for actual damages on behalf of the unborn fetus which was aborted by the latter from the former's wife, allegedly without the husband's knowledge, the Supreme Court said:

> * * * [S]uch damages [to which the parents are entitled] must be those inflicted directly upon them, as distinguished from the injury or violation of the rights of the deceased [fetus], his right to life and physical integrity. Because the parents can not expect either help, support or services from an unborn child, they would normally be limited to moral damages for the illegal arrest of the normal development of the *spes hominis* that was the foetus, i.e., on account of distress and anguish attendant to its loss, and the disappointment of their parental expectations (Civ. Code Art. 2217), as well as to exemplary damages, if the circumstances should warrant them (Art. 2230). * * *[150]

In this particular case, the complaining husband was not awarded damages, evidently because his indifference to the previous abortions of his wife indicated that he was unconcerned with the frustration of his parental hopes and expectations. The decision also ordered that a copy thereof be furnished to the Department of Justice for their information, investigation, and action against the physician. It should be noted, however, *that the wife who procured the abortion upon herself was not prosecuted, nor was such even suggested by the Court.*

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[148] *Supra*, note 141.
[149] *Ibid.*
[150] *Ibid*, p. 804.

The Constitutional "Right of Privacy": U.S. and the Philippines.

The "right of privacy" has come to be popularly defined as the "right to be let alone."[151]

Clinton Rossiter describes it as:

> * * * a special kind of independence, which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns, if necessary in defiance of all pressure of modern society * * * [I]t seeks to erect an unbreachable wall of dignity and reserve against the whole world. The free man is the private man, the man who still keeps some of his thoughts and judgments entirely to himself, who feels no over-riding compulsion to share everything of value with others, not even those he loves and trusts.[152]

Mr. Justice Brandeis calls privacy "the most comprehensive of rights and the most valued by civilized men,"[153] and Mr. Justice Douglas considers it the "beginning of all freedom."[154]

Westin likens privacy to a series of zones or regions leading to a "core self" thus:

> This core self is pictured as an inner circle surrounded by a series of larger concentric circles. The inner circle shelters the individual's "ultimate secrets" * * * The next circle outward contains "ultimate" secrets, those that can be willingly shared with close relations, confessors * * * The next circle is open to members of the individual's friendship group. The series continues until it reaches the outer circles of casual conversation and physical expression that are known to all observers.[155]

One of the earliest and most succinct dissertations on the source and extent of this right was that made by a Georgia court in the case of *Pavesich v. New England Life Insurance Co.*[156] where it stated:

> * * * The right of privacy has its foundations in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private, and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of

[151] The phrase is said to have been used first by Thomas Cooley in his treatise on tort law (COOLEY ON TORTS 29 [2nd ed., 1888]), as cited by CORTES, THE CONSTITUTIONAL FOUNDATIONS OF PRIVACY (hereinafter referred to as CORTES), U.P. Law Center (1970).

The first time it was employed in an American case was by Mr. Justice Brandeis in Olmstead v. U.S., *supra*, note 95, as cited by Mr. Douglas in his concurring opinion in Roe v. Wade, *supra*.

[152] KOMITZ & ROSSITER (EDS.), THE PATTERN OF LIBERTY, 15-17, cited by CORTES.

[153] Olmstead v. U.S., *supra*, note 95, cited by CORTES, p. 2.

[154] Public Utilities Comm. v. Pollak, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068 (1952); also cited by CORTES, p. 2.

[155] A.F. WESTIN, PRIVACY AND FREEDOM, 34 (1967), cited by CORTES, p. 3.

[156] 122 Ga. 190, 50 S.E. 68, 69 LRA 101 (1905).

a private nature as he does the withdrawal of those rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law. This idea is embraced in the Roman's conception of justice, which "was not simply the external legality of acts, but the accord of external acts with the precepts of the law, prompted by internal impulse and free volition." * * * It may be said to arise out of those laws sometimes characterized as "immutable," because they are natural, and so just at all times and in all places that no authority can either change or abolish them."* * * * It is one of those rights referred to by some law writers as "absolute" — "such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it."[157]

The word "privacy" is not entirely foreign in the matrix of Philippine laws.

Our present Constitution makes express mention of the "privacy of communication"[158] and our New Civil Code mentions it under the Chapter on Human Relations, and confers actionability upon its violation.[159]

The Revised Penal Code makes trespass to dwelling a criminal act and duly penalizes it.[160] Any public officer in the Philippines to whom the secrets of any private individual shall become known by reason of his office, and who shall reveal such secrets, shall suffer the penalties of *arresto mayor* and a fine not exceeding 1,000 pesos.[161]

At this point, however, a note of caution. The aspect of "privacy" in the field of constitutional law is very extensive indeed. Its coverage ranges from some of the most intimate bodily functions and personal behavior of an individual to violations of corporate proprietary rights in commerce and industry.

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[157] *Ibid*, as quoted by CORTES, p. 17-18.

[158] Article IV (Bill of Rights) of the Constitution provides:

SEC. 4. (1) The *privacy* of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety and order require otherwise. (emphasis supplied)

[159] The New Civil Code provides:

ART. 26. Every person shall respect the dignity, personality, *privacy* and peace of mind of his neighbors and other persons. The following and similar acts, though they may not constitute a criminal offense, shall produce a cause of action for damages, prevention and other relief:

(1) Prying into the *privacy* of another's residence;

(2) Meddling with or disturbing the *private* life or family relations of another; x x x x x (emphasis supplied)

[160] ART. 280. *Qualified trespass to dwelling.* — Any private person who shall enter the dwelling of another against the latter's will, shall be punished by *arresto mayor* and a fine not exceeding 1,000 pesos.

If the offense be committed by means of violence or intimidation, the penalty shall be *prisión correccional* in its medium and maximum periods and a fine not exceeding 1,000 pesos.

x x x x

[161] REV. PENAL CODE, Art. 280.

In this light, it would therefore be more propitious to delineate the limited aspect of "privacy" we have initially concerned ourselves with — that portion of a woman's constitutional right to privacy which is directly involved in the abortion question — since the avowed purpose of this paper is to trace the principles enunciated in *Roe v. Wade* in the corpus of Philippine jurisprudence.

The concurring opinion of Mr. Justice Douglas in *Roe v. Wade* is very enlightening in this regard. He opined therein that although the Ninth Amendment in the American Federal Constitution does not create federally enforceable rights, it nonetheless mandates that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage *others retained by the people.*" Simply stated: Although the American Constitution enumerates certain constitutional rights, the said enumeration does not preclude other "customary, traditional, and time-honored rights, amenities, privileges, and immunities that come within the sweep of the 'Blessings of Liberty' mentioned in [its] preamble," and that are *independent of, and in addition to,* those expressly enumerated.

In Mr. Justice Douglas' opinion, these customary, traditional and time-honored rights may be subdivided into three general categories:

First is the individual's control over the development and expression of one's intellect, interests, tastes, and personality which are protected by the First Amendment, and to his mind, *are absolute and permitting of no exceptions.*[162] Included under this category are the Free Exercise Clause of the First Amendment, the right to remain silent as respects one's own beliefs,[163] and the privacy of first-class mail,[164] all of which are "rights retained by the people" within the meaning of the Ninth Amendment.

Second is the freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children.[165] Although these rights are subject to some control by the police power, they are nonetheless "fundamental," and in order for any legislative action to circumscribe these rights the

[162] Citing Terminiello v. Chicago, 337 U.S. 934, 69 S.Ct. 1490, 93 L.Ed. 1131 (1949); Roth v. U.S., 354 U.S. 476, 508, 77 S.Ct. 1304, 1 L.Ed. 2d 1498 (1957) (dissent); Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 697, 79 S.Ct. 1362, 3 L.Ed. 2d 1512 (1959) (concurring); New York Times Co. v. Sullivan, 376 U.S. 254, 293, 84 S.Ct. 710, 95 A.L.R. 2d 1412, 11 L.Ed. 2d 686 (1964).

[163] Citing Watkins v. U.S., 354 U.S. 178, 196-199, 77 S.Ct. 1173, 1 L.Ed. 2d 1273 (1957).

[164] Citing U.S. v. Van Leeuwen, 397 U.S. 249, 253, 90 S.Ct. 1029, 25 L.Ed. 2d 282 (1970).

[165] For the cases cited, see notes 98-104.

statute must be narrowly and precisely drawn, and a "compelling state interest" must be shown in support of the limitation.[166]

Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll or loaf. These rights, though fundamental, are likewise subject to regulation on a showing of "compelling state interest." Some of these rights, *e.g.*, walking, strolling, and wandering are "historically part of the amenities of life" as they have been known.[167] These rights also protect the inviolability of a person from compulsory stripping and exposure[168] and from certain bodily restraints. In *Meyer v. Nebraska*,[169] the Court said:

> Without doubt, it [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy these privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Do the bases for Roe v. Wade exist in Philippine Jurisprudence?

The final question. But first, a cursory review of the decision in *Roe v. Wade.*

In that case, the plaintiff-appellant invoked, in support of her contention, the First, Fourth, Fifth, Ninth, and the Fourteenth Amendments[170] of the American Federal Constitution. The U.S. Supreme Court held *that the woman, at least during and before the end of the first trimester of her pregnancy, is entitled to abortion as part of her constitutional right of privacy,"* whether this right be found in the Fourteenth Amendment's concept of personal liberty and restrictions upon state actions, or in the Ninth Amendment's reservation of rights to the people. Likewise, this constitutional right is composed of, or stems from, the following corollary specific rights earlier established by the same Court in previous cases:

1. the extension of the right of privacy to activities relating to marriage as held in *Loving v. Virginia;*[171]

2. to procreation, as held in *Skinner v. Oklahoma;*[172]

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[166] Citing as examples: Kramer v. Union Free School District, *supra*, note 107; Shapiro v. Thompson, *supra*, note 107; Carrington v. Rash, 377 U.S. 941, 84 S.Ct. 1352, 12 L.Ed. 2d 305 (1965); Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965 (1963); NAACP v. Alabama ex rel. Patterson.

[167] Citing Papachristou v. City of Jacksonville, 405 U.S. 156, 164, 92 S.Ct. 839, 31 L.Ed. 2d 110 (1972).

[168] Citing Union Pac. R. Co. v. Botsford, *supra*, note 93.

[169] Meyer v. Nebraska, *supra*, note 47.

[170] See note 39.

[171] *Supra*, note 100.

[172] *Supra*, note 101.

3. to contraception, as held in *Eisenstadt v. Baird*[173] *and Griswold v. Connecticut;*[174]

4. to family relationships, as held in *Prince v. Massachusetts;*[175] and

5. to child rearing and education, as held in *Pierce v. Society of Sisters*[176] and *Meyer v. Nebraska.*[177]

A brief discussion of the abovementioned cases:

Loving v. Virginia concerns the validity of the Virginia anti-miscegenation statute absolutely prohibiting a "white person" from marrying any person other than another "white person". The plaintiff-appellant in this case, a "white person" married a "colored person" in the District of Columbia, and shortly thereafter, returned to Virginia where they were both residents. On their return they were charged with violation of the said statute, and were both sentenced to one-year imprisonment. Their motion to vacate their sentences on the basis of unconstitutionality of the anti-miscegenation statute was denied by the trial court, which denial was affirmed by the Virginia Supreme Court of Appeals.

On appeal to the U.S. Supreme Court, the conviction was reversed on the ground that a statute which prohibits marriages between persons solely on the basis of racial classification violated both the Fourteenth Amendment's Equal Protection Clause and Due Process Clause which guarantee the freedom to marry. In the opinion delivered by Chief Justice Warren which was unanimously concurred in, the Court held that marriage is one of the basic civil rights of man, fundamental to our very existence and survival; that while it is a social relation subject to the state's police power, such power is limited by the commands of the Fourteenth Amendment. The freedom to marry is one of the vital personal rights protected by the due process clause as essential to the orderly pursuit of happiness by free men. Hence, the Fourteenth Amendment requires that the freedom of choice to marry should not be restricted by invidious racial discrimination and that the freedom to marry or not to marry resides with the individual and cannot be infringed upon by the state.

Skinner v. Oklahoma involves a peculiar Oklahoma statute (the Habitual Criminal Sterilization Act) which defines a "habitual criminal" and provides for a judgment that such person shall be rendered sexually sterile — by the operation of vasectomy in case of a male and of salpin-

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173 *Supra*, note 102.
174 *Supra*, note 96.
175 *Supra*, note 103.
176 *Supra*, note 104.
177 *Supra*, note 47.

gectomy in case of a female — upon a finding of the court or jury that he or she has been convicted of two or more crimes amounting to felonies involving moral turpitude either in Oklahoma or in any other state, in addition to a term of imprisonment.

The defendant in this case, having been convicted previously for stealing chicken, and twice for armed robbery, was sentenced to undergo vasectomy, which sentence was affirmed by a vote of 5-4 by the Supreme Court of Oklahoma.

An appeal on the basis of violation of the Fourteenth Amendment was interposed in the U.S. Supreme Court. In upholding the appeal and in reversing the conviction on the ground that the Oklahoma statute violated the equal protection clause of the Fourteenth Amendment, the Court remarked:

> * * * We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. * * *[178]

The bone of contention in *Eisenstadt v. Baird* was the constitutionality of a Massachussetts statute which, while permitting married persons to obtain contraceptives, nonetheless prohibits their distribution to unmarried persons. The defendant-appellee in this case was convicted and imprisoned for giving a single woman vaginal foam. Thereafter, he filed a petition for *habeas corpus* which was dismissed by the U.S. District Court for the District of Massachussetts, which order of dismissal was in turn vacated by the U.S. Court of Appeals for the First Circuit. Upon appeal by the sheriff, the U.S. Supreme Court held that the Massachussetts statute violated the equal protection clause. The difference in treatment as to married and unmarried persons provided for by the statute in question was held to be "not justified on the basis that it deterred premarital sex," where it could not be assumed that the state had prescribed pregnancy and the birth of an unwanted child as punishment for fornication.

Further, the Court declared that under the right of privacy, an individual, whether married or single, has the right to be free from unwarranted government intrusion into matters so fundamentally affecting a person as to decisions whether to bear or beget a child, or not.

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[178] *Supra*, p. 541.

Analogous to *Eisenstadt v. Baird* is the case of *Griswold v. Connecticut* where the U.S. Supreme Court, by a 7-2 decision, declared unconstitutional a statute penalizing the use of contraceptives. The petitioner Griswold in this case was the Executive Director of the Planned Parenthood League of Connecticut, who together with its medical officer, were found guilty as accessories for having given information, instruction and medical advice to married persons regarding contraception.

The Court, speaking through Mr. Justice Douglas, held that the Connecticut anti-contraceptive statute when applied to a married couple, violated the right of marital privacy:

> We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[179]

Citing several judicial precedents, the decision further postulated:

> * * * specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. * * * Various guarantees create zones of privacy. * * *[180]
>
> x x x x x
>
> The present case, then, concerns a relationship [marriage] lying within the zone of privacy created by several fundamental constitutional guarantees. * * *[181]

It is said that it was in this case that the "right of privacy" as an independent constitutional right was established for the first time.[182]

The plaintiff-appellant in *Meyer v. Nebraska* was convicted for teaching German in violation of a statute forbidding the teaching in school of any language other than English. On appeal, the Fourteenth Amendment was invoked and in overturning the conviction, the U.S. Supreme Court held:

> * * * It [the liberty guaranteed by the Fourteenth Amendment] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (citations omitted)[183]

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179 *Supra*, p. 486.
180 *Ibid*, p. 484.
181 *Ibid*, p. 485.
182 CORTES, p. 39, citing Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 229 (1965).
183 Meyer v. Nebraska, *supra*, p. 399.

The statute in question in *Pierce v. Society of the Sisters of the Holy Name* and its accompanying case, *Pierce v. Hill Military Academy,* is the Oregon Compulsory Education Act which requires every parent or guardian or other person having control or charge or custody of a child between 8 and 16 years, with certain exceptions, to send him to a public school for the period of time a public school shall be held. The two defendants, both "private schools" attacked the statute on the ground that the enactment conflicted with "the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, [and] the right of schools and teachers therein to engage in a useful business or profession," *inter alia.* Following the doctrine adopted in *Meyer v. Nebraska,* the Court ruled that the act in question indeed "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."

The citation of *Prince v. Massachusetts* as a precedent in *Roe v. Wade,* on the other hand, constitutes a peculiar legal wrinkle in the reasoning employed by the Court in the latter case.

In *Prince v. Massachusetts,* the defendant-appellant was convicted of violating Massachusetts' child labor law for allowing her 9-year old niece, of whom she was the guardian, to sell religious literature in public. In affirming the conviction, the Court overruled her principal contention that the said law interfered with her and her niece's religious freedom. This was the principal issue in this case. In addition, the Court made a passing reference to parental rights over their children thus:

> * * * [T]his Court had sustained the parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the state's requirement of attendance at public schools. * * * It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.* * * And it is in recognition of this that these decisions [citing Meyer v. Nebraska and Pierce v. Society of Sisters] have respected the private realm of family life which the state cannot enter.[184]

The abovementioned reference, however, was a mere *obiter dictum* in the said case, the main issue of which was religious freedom as against certain provisions of the state's child labor laws.

Be that as it may, the Court in *Roe v. Wade* unequivocally held that *Prince v. Massachusetts* established certain "family relationships" as an additional hue in the growing penumbra of the right of privacy.

[184] Pierce v. Massachusetts, *supra*, p. 166.

In the midst of these rights, therefore—the rights to marriage, procreation, contraception, family relationships, and child rearing and education as congealed together and in turn emanating as penumbras of the constitutional right of privacy—the right of a woman to obtain an abortion is nestled and was thus conceived and given life in *Roe v. Wade.*

Do these composite rights exist in Philippine jurisprudence as well?

Indeed, they do, both by express constitutional and statutory provisions.

Principally, the "equal protection of the laws" and the "due process" clauses of the Fourteenth Amendment of the American Constitution, whence the said rights are primarilly derived, find similar expression in the Philippine Constitution.

Thus, the latter guarantees:

> SECTION 1. No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.[185]

The "liberty" protected by the above-quoted provision of the Philippine Constitution is said to be "that degree of freedom which respects and takes into account the freedom which the other members of the community are entitled to enjoy."[186]

While as to "liberty" and "life" only those of natural persons are protected,[187] protection over property covers those of both natural and artificial persons.[188]

It could even perhaps be said that these composite rights (the right to marriage, procreation, etc.) achieve more prominence and better expression under Philippine laws than their American counterparts in the sense that, while in the later they gained acceptance only through judicial precedence or because of the principle of *stare decisis,* they are, in Philippine jurisprudence, clearly and unequivocally provided for in various statutory provisions.

As to marriage, the principal provision of the New Civil Code is the following:

> ART. 52. Marriage is not a mere contract but an inviolable social institution. Its nature, consequences and incidents are governed by law and not subject to stipulation, except that the marriage settlements may to a certain extent fix the property relations during the marriage.

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[185] PHILIPPINE CONST. (1973), Art. IV (Bill of Rights), Sec. 1.

[186] SINCO, VICENTE G., PHILIPPINE POLITICAL LAW: PRINCIPLES AND CONCEPTS, p. 614, 11th ed., 1962.

[187] *Ibid*, p. 615, citing Northwestern Life Ins. Co. v. Riggs, 203 U.S. 243, 27 S.Ct. 126, 51 L.Ed. 168 (1906).

[188] *Ibid*, p. 615, citing Smith Bell & Co. v. Natividad, 40 Phil. 136 (1919).

Anti-miscegenation, which was the source of controversy in *Loving v. Virginia,* is totally unheard of in this country, where the only requisites for a valid marriage are: (a) the legal capacity of the contracting parties; (b) their consent freely given; (c) the authority of the person performing the marriage; and (d) a marriage license, except in a marriage of exceptional character.[189]

As to who may contract marriage, the law provides:

> ART. 54. Any male of the age of sixteen years or upwards, and any female of the age of fourteen years or upwards, not under any of the impediments mentioned in articles 80 to 84, may contract marriage.[190]

Philippine law regards a person's procreative ability and his right to it as almost sacrosanct. Thus, any act which intentionally hinders or deprives a person of this right is severely penalized. The Revised Penal Code goes to the extent of distinguishing the mutilation of an essential organ of reproduction from that of other organs and consequently imposes a heavier penalty upon the former:

> ART. 262. *Mutilation.* — The penalty of *reclusión temporal* to *reclusión perpetua* shall be imposed upon any person who shall intentionally mutilate another by depriving him, either totally or partially, of some essential organ for reproduction.
>
> Any other intentional mutilation shall be punished by *prisión mayor* in its medium and maximum periods.

In *U.S. v. Esparcia,* the Philippine Supreme Court quoted the justification given by Viada, a renowned scholar in penal laws, for such distinction, thus:

> "At the head of these crimes, according to their order of gravity, is the mutilation known by the name of 'castration' which consists of the amputation of whatever organ is necessary for generation. The law could not fail to punish with the *utmost severity* such a crime, which, although not destroying life, deprives a person of the means to transmit it. * * *"[191]

As to the availability of contraceptive materials and the right of local citizens to obtain them, the Philippine government does not only *provide almost complete access*[192] *to them but encourages their use as*

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[189] NEW CIVIL CODE, Art. 53.
[190] *Ibid,* Art. 54. The impediment referred to are found in the following: Arts. 80, 81, 82, 83 & 84.
[191] 36 Phil. 841 (1917), citing III VIADA, CODIGO PENAL, 70.
[192] R.A. No. 4729, however, penalizes the sale of any contraceptive drug or device, whether for or without consideration unless such sale or distribution is by a duly licensed drug store, or pharmaceutical company and with the prescription of a qualified medical practitioner. The purpose of this law, it is believed, *is not to discourage* the use of contraceptive materials but rather, to protect the health of the buying public.

well, and in certain cases, even distributes them for free, as a matter of policy.

This official policy derives recognition and support from both constitutional and statutory provisions.

The Philippine Constitution mandates:

> SEC. 10. It shall be the responsibility of the State to achieve and maintain population levels most conducive to the national welfare.[193]

In this regard, the Population Commission, the principal government agency charged with the over-all formulation, implementation and co-ordination of our population programs, is empowered to:

1) Encourage all persons to adopt safe and effective means of planning and realizing desired family size *by making available all acceptable methods of contraception to all persons* desirous of spacing limiting or preventing pregnancies;

2) Provide family planning services as part of overall health care; and

3) *Make available all acceptable methods of contraception to all Filipino citizens.*[194]

There are very few other rights under Philippine laws which are as pervasive and zealously protected as, and regarded with more favor than, the Filipino's family rights and his parental rights over child rearing and education.

Once more, the Constitution, in Article II (Declaration of Principles and State Policies), solemnly proclaims:

> SEC. 4. The State shall strengthen the family as a basic social institution. *The natural right and duty of parents in the rearing of the youth* for civic efficiency and the development of moral character shall receive the aid and support of the Government. (emphasis supplied)

This constitutional precept finds concrete realization and overwhelming support in the following provisions of the New Civil Code:

> ART. 216. The family is a basic social institution which public policy cherishes and protects.
>
> ART. 218. The law governs family relations. No custom, practice or agreement which is destructive of the family shall be recognized or given any effect.
>
> ART. 219. Mutual aid, both moral and material, shall be rendered among members of the same family. Judicial and administrative officials shall foster this mutual assistance.

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[193] Article XV (General Provisions), Sec. 10.

[194] The Revised Population Act of 1971, as amended by P.D. No. 79 (Dec. 8, 1972), Sec. 4(f), (h), and (i), respectively.

ART. 220. In case of doubt, all presumptions favor the solidarity of the family. Thus, every intendment of the law or facts leans toward the validity of marriage, the indissolubility of the marirage bonds, the legitimacy of children, the community of property during marriage, the authority of parents over their children, and the validity of defense for any member of the family in case of unlawful aggression.

ART. 222. No suit shall be filed or maintained between members of the same family unless it should appear that earnest efforts toward a compromise have been made, but that the same have failed, subject to the limitations in article 2035.

ART. 311. The father and mother jointly exercise parental authority over their legitimate children who are not emancipated. * * *

ART. 313. Parental authority cannot be renounced or transferred, except in cases of guardianship or adoption approved by the courts, or emancipation by concession.

ART. 315. No descendant can be compelled, in a criminal case, to testify against his parents and ascendants.

ART. 316. The father and the mother have, with respect to their unemancipated children:

(1) The duty to support them, to have them in their company, educate and instruct them in keeping with their means, and to represent them in all actions which may redound to their benefit.

(2) The power to correct them and to punish them moderately.

Articles 216-222 as above-quoted are intended to sustain the solidarity of the family "which is the main foundation of the social structure."[195]

In *Perez v. Samson,*[196] the custody of a child, although harshly treated by the mother but not by the father, was adjudged to be retained by the parents in preference to the same claim by the Social Welfare Commission.

Paramount is the right of the parents to the custody of their child and no court can make this right subservient to that of any other person seeking custody of the said child, the extreme poverty of the parents notwithstanding.[197] Sentimental reasons and the maternal and spiritual welfare of the child are, likewise, not decisive factors in determining the question of its custody.[198] A child who is under seven years of age cannot be separated from the mother unless the court finds compelling reasons for such measure.[199]

[195] Report of the Code Commission, p. 17.

[196] C.A.-G.R. No. 9117-R, September 20, 1952, 48 O.G. 5368 (Dec., 1952).

[197] Cunanan v. Reyes, C.A.-G.R. No. 7710-R, February 7, 1952.

[198] Bacayo v. Calum, C.A.-G.R. No. 15273-R, August 20, 1957, 53 O.G. 8607 (Dec. 15, 1957).

[199] NEW CIVIL CODE, Art. 363.

CONCLUSION

It is very difficult to deny that all the composite rights constitutive of the constitutional "right of privacy," and upon which *Roe v. Wade* rests, indeed exist and are likewise enjoyed by Filipino women. In a sense, the grant of said rights under Philippine law is more express and comparatively unequivocal.

Were local jurisprudence to adopt the *ratio decidendi* of the said case, (should similar issues be raised in a local abortion case) an identical result is inevitable and such will not be the first time we will be adopting, *if and when we do adopt it,* a novel constitutional law doctrine from the Americans.[200]

Does this therefore sound the death knell for the Revised Penal Code's provisions on *intentional abortion*—at least as far as the pregnant woman herself and her physician are concerned?

Whether the Philippine Supreme Court will, in the future, actually apply the legal reasonings postulated in *Roe v. Wade* is, however, a matter that could only properly pertain to the realm of speculation.

For in the right words of Irene R. Cortes:

> The judicial balancing of interests is not done in a vacuum. Cultural, social, religious, as well as legal considerations come into play. A Philippine court dealing with such a challenge [of an abortion case], would take into account *certain values* in Philippine society.[201]

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[200] Witness for instance the "Miranda and Escobedo doctrines" which were earlier rejected by the Philippine Supreme Court in as late a case as People v. Jose, et al. (G.R. No. L-28232, February 6, 1971). The same doctrines have now been extended constitutional recognition here (See the Philippine Constitution of 1973, Article IV, Bill of Rights, Section 20).

[201] CORTES, IRENE R., *Population and Law: The Fundamental Rights Aspects in the Philippine Setting*, 48 PHIL. L.J., p. 319.