

The Social History of Crime and Punishment in America: An Encyclopedia

Roe v. Wade

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On January 22, 1973, the Supreme Court handed down a 7–2 decision in *Roe v. Wade*. The court declared unconstitutional a Texas law that considered an attempt to procure an abortion a criminal act unless done by a physician to save a woman's life. The court found the Texas statute interfered with a doctor's right to pursue the best medical treatment for patients.

A number of factors led to abortion reform. The thalidomide scare in 1962 resulted from a drug marketed in Europe as a cure for morning sickness; while the Food and Drug Administration did not approve it for distribution in the United States, some Americans traveling abroad brought home the pills. Reports confirmed that the drug caused severe birth defects, especially early in pregnancy. Similarly, German measles swept the nation between 1962 and 1965, posing a 50 percent chance of fetal deformity in pregnant women afflicted with the disease. Some doctors ignored state laws and performed abortions, bringing legal action against themselves as they endeavored to help their patients. The introduction of the European vacuum or suction aspiration in 1967 to replace the bloodier dilation and curettage procedure made abortion more acceptable to many physicians. Some physicians requested that the American Law Institute (ALI) investigate ambiguous state laws and devise a model reform law that would permit greater freedom to medical practitioners. The ALI's recommendation allowed abortion when a woman's physical or mental health was endangered, the fetus was physically or mentally defective, or pregnancy resulted from rape or incest.

Issues outside the medical realm also influenced pressure for change. This era witnessed an expansion of human rights with movements for civil, women's, and privacy rights. Apprehension regarding overpopulation meshed with concerns over mounting welfare expenditures, especially among recipients of Aid to Families with Dependent Children. Rhetoric regarding the cost-saving potential of abortion swayed many legislators prior to *Roe v. Wade* to begin decriminalizing abortion. California was the first state to liberalize its abortion law in 1967, followed by 11 other states by 1970; these laws modeled the ALI recommendation. Four states in 1970—New York, Alaska, Washington, and Hawai'i—passed laws that went beyond the ALI model, in effect legalizing abortion on demand.

In addition to legislative activity, there were more than 25 abortion cases pending before state courts when the Supreme Court decided to hear *Roe v. Wade*. Two years earlier, the court had heard its first case devoted solely to abortion in *United States v. Vuitch* (1971). The court overturned the 1901 anti-abortion statute in the District of Columbia as unconstitutionally vague because a doctor's decision to perform an abortion to protect the woman's health could later be second-guessed by a jury. The court declared abortion to be a surgical procedure and as such was left to doctors to decide its medical necessity. *Roe v. Wade* confirmed this medical jurisdiction.

Jane Roe's Case

Norma McCorvey, alias Jane Roe, lived in Dallas County, Texas. Her marriage had failed and her mother and stepfather were raising her 5-year-old daughter when she became pregnant at age 21 in 1969. She wanted an abortion because of the economic hardship of raising a child as a single mother and because of the social stigma attached to illegitimacy. McCorvey met attorneys Linda Coffey and Sarah Weddington, who represented her as Jane Roe; they challenged the Texas statute passed in 1854 and revised in 1857 that prohibited abortion unless the woman's life was at stake. They presented two main arguments. First, McCorvey could not secure an abortion because the pregnancy did not threaten her life; she did not [p. 1574 ↓] possess funds to travel elsewhere to obtain a legal abortion. Second, the Texas law violated her privacy protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution.

The case came before the federal court in Dallas in 1970. The court rejected the law because it denied Jane Roe her Ninth Amendment right of privacy to decide whether or not to procreate. While the court issued a declarative relief that the law was unconstitutional, it did not issue an injunctive relief mandating the law not be enforced against physicians, assuming the state would comply with the court's decision. District Attorney Henry Wade, however, decided to proceed with prosecutions, providing Weddington and Coffey with the basis for a Supreme Court appeal.

John Tolle, Jay Floyd, and Robert Flowers from the Texas attorney general's office served as lawyers for the state. They argued that Jane Roe had no standing before

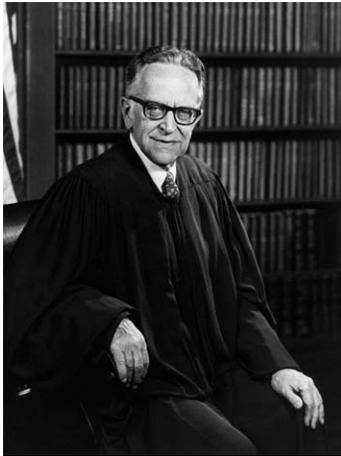
the court because she was no longer pregnant by the time her case reached litigation. The court disagreed: if “termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage.... Our law should not be that rigid.” Jane Roe would represent pregnant women in a class-action suit. Tolle et al. also argued that the state had a compelling interest to protect the legal rights of the fetus.

Weddington, with help from Coffey, presented Roe's case twice. They argued in December 1971, but the retirements of Justices John Harlan and Hugo Black in September had left the court with only seven justices, who were hesitant to decide this case without a full bench. They reargued in October 1972 after President Richard Nixon appointed Justices Lewis Powell and William Rehnquist, two men Nixon assumed would reject abortion liberalization. Weddington's main argument was that privacy rights declared in *Griswold v. Connecticut* (1965) should extend to a woman's decision whether or not to bear a child. Amicus briefs supporting this claim came from the American College of Gynecologists and Obstetricians, the New York Academy of Medicine, and Planned Parenthood Federation of America.

Blackmun's Majority Opinion

Justice Harry Blackmun wrote the majority opinion. Drawing on history, Blackmun found that ancient codes and ancient religions did not proscribe abortion. Common law did not prohibit abortion prior to quickening (first sign of fetal movement). As he argued, “a woman enjoyed a substantially broader right to terminate a pregnancy” at common law, at the time of the drafting of the U.S. Constitution, and during much of the 19th century than she did in the 1970s. He located the legislative change in the latter half of the 19th century when states passed abortion statutes for three main reasons. The laws were part of a Victorian effort to curb illicit sex, but Texas did not advance this reason as part of the argument in *Roe*. The laws also attempted to protect women from dangerous abortions, but medical advancements had abrogated this reason. Lastly, Tolle argued the laws were there to protect prenatal life, but Blackmun could not find this assertion in the 19th-century legislation; [p. 1575 ↓] the law claimed to protect the mother's life. The availability of abortion in the early 19th century confirmed his belief that a fetus is not a person under the Constitution.

*U.S. Supreme Court Justice Harry A. Blackmun's official 1976 portrait. Although Blackmun is best known as the author of *Roe v. Wade*, he made great contributions in the fight against race discrimination and protecting disadvantaged citizens.*



In addition to history, Blackmun drew upon the privacy foundation laid in *Griswold*, *Loving v. Virginia* (1967), and *Eisenstadt v. Baird* (1972). Blackmun contended that “This right of privacy, whether it be found in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the district courts determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.” This right to abortion was “fundamental” and could only be regulated if a “compelling” state interest exists.

Blackmun expanded on this notion of state interest when he introduced the trimester approach to abortion. During the first trimester, state interest in protecting maternal health is not compelling enough to interfere with the woman's decision to abort because mortality rates for abortion were as low as or lower than for childbirth. In the second trimester, the state may have a compelling interest to regulate but not prohibit abortion to protect maternal health because mortality rates were higher for abortion than childbirth. By the third trimester, the state has a compelling interest to protect a viable fetus and thus may prohibit abortions unless the mother's health or life is at stake. Blackmun acknowledged the arbitrary nature of his trimester framework: Neither side

arguing before the court had introduced this concept. Blackmun maintained that it left states the right to set medical guidelines between the first and third trimesters.

Doe v. Bolton, the companion case to *Roe*, declared Georgia's abortion statute unconstitutional. The court struck down the approval of a hospital staff committee and two consulting physicians prior to an abortion; the attending physician's approval is sufficient. The court also rejected the residency requirement because no other medical procedure had such a prerequisite. The state could not interfere with the exercise of a woman's right to abortion by prohibiting or limiting access to it.

Justices Byron White and William Rehnquist dissented. White argued that no language existed in the Constitution to support the right to abortion. In his view, the court "simply" announced an unfounded right for pregnant women; he found the decisions to be "an improvident and extravagant exercise of the power of judicial review." Rehnquist agreed that the court had overstepped its boundary, breaking a long-standing tenet that the court should not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Privacy, in his opinion, did not apply to abortion because the procedure occurs with a medical professional in a hospital or clinic, not the privacy of one's home. He also took issue with Blackmun's historical analysis: The fact that most states for over a century had prohibited abortion unless to save the mother's life meant that a right to abortion was not "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Criticisms

Some legal scholars have critiqued the majority decisions in these cases. They believe abortion rights would have been on firmer ground had the court invoked sex equality considerations rather than due process and privacy. Justices could have looked to *Reed v. Reed* (1971) in which the court unanimously ruled that dissimilar treatment of men and women was unconstitutional based on the Fourteenth Amendment's equal protection clause, but the court did not pursue this track. The shaky grounding of *Roe* in privacy galvanized antichoice groups to propose overturning *Roe* by constitutional amendment and numerous state and federal laws to limit abortion. The trimester approach has set up a possible collision course as technology allows safer abortions

later into pregnancy and moves back the point of viability earlier in pregnancy. It has led to state efforts to institute mandatory viability testing before performing an abortion. Some scholars believe the court should have struck down the Texas law and gone no further, allowing the battles to be played out in state legislatures that were already passing liberalized abortion statutes. By delineating the medical and trimester approach, the court sparked bitter debate on the issue for decades.

In sum, *Roe* and *Doe* invalidated state power to criminalize abortion. They struck down nearly all state abortion laws, including those that had [p. 1576 ↓] been liberalized prior to 1973. The court ruled that abortion fell under the right to privacy recognized in *Griswold* and protected by the Fourteenth Amendment's due process. Yet the court did not remove all restrictions nor mandate access to abortion. The ultimate decision to abort rests not with the woman but with her physician, confirming the medical rather than feminist framework of the judgment. Since 1973, the court has upheld the right of public hospitals to refuse to perform abortions; parental consent laws as long as judicial bypass exists; and 24-hour waiting periods. Still, the basic ruling in *Roe* remains intact in 2010.

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See Also

- 1851 to 1900 Primary Documents
- [Abortion](#)
- [Eisenstadt v. Baird](#)
- [Griswold v. Connecticut](#)

Further Readings

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