

5-1-2014

The Walk of Life: The History of the Anti-Abortion Movement and the Quest to Overturn Roe v. Wade

James Andrew Moretto

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship

Recommended Citation

Moretto, James Andrew, "The Walk of Life: The History of the Anti-Abortion Movement and the Quest to Overturn Roe v. Wade" (2014). *Law School Student Scholarship*. 539.
https://scholarship.shu.edu/student_scholarship/539

James Moretto

Professor Poirier

Law and Sexuality

April 29, 2013

**The Walk of Life: The History of the Anti-Abortion Movement and the Quest to Overturn
*Roe v. Wade***

Introduction

In the United States, opinions on social and political issues are often varied and have helped shaped what has become known as the “Culture War.” One issue which causes that division is the issue of abortion. The Supreme Court’s holding that a woman’s right to choose was a fundamentally protected right has induced strong feelings for both those who agreed with it and those who disagreed with it. This paper will focus on the history of the anti-abortion or pro-life movement before and after *Roe v. Wade* and will examine that case in addition to other cases which have influenced abortion policy in the United States. This paper will also examine the attitudes of one of the largest anti-abortion groups: the Catholic Church. In addition, this paper will discuss the shifting political climate which has influenced the chances of it being made illegal as well as the extremes some within the movement will go to. Finally, this paper will examine the rights of a father in regards to abortion and if concerns about these rights would in any way help the Anti-Abortion movement.

Changing times and technology: Abortion policy before *Roe v. Wade*

The Nineteenth Century

“Abortion policy in the United States began with nineteenth-century laws and medical practice.”¹ The first law that placed any restriction on abortion in the United States was a Connecticut state law passed in 1821 which made it a crime to abort a fetus after “quickening”; a term referring to recognizable movement by the fetus.² More laws soon developed, including one passed in New York in 1829 which allowed for a “therapeutic exception,” which permitted a woman to receive an abortion if her life was in immediate danger or such a danger to her life could be accounted for by at least two physicians.³

The reasoning behind these early anti-abortion statutes was subject to a shifting social climate. After *Roe*, different groups interpreted the passing of such laws in ways to benefit their position. Members of the Anti-abortion movement argued that these laws were enacted in order to preserve the life of the fetus.⁴ They point to the fact that many jurisdictions added a protection against all kinds of feticide, and some even made feticide after quickening a capital offence.⁵ In addition to this, some states used regular homicide statutes to prosecute feticide.⁶

Those in favor of abortion being legal argued that such laws were in place not for the health of the fetus, but rather to protect the health of the mother. Medical procedures at the time were hardly advanced. Many people believe that the true reason these laws were enacted was to

¹ RAYMOND TATALOVICH, BYRON W. DAYNES, *THE POLITICS OF ABORTION: A STUDY OF COMMUNITY CONFLICT IN PUBLIC POLICY MAKING* 16 (1981).

² *Id.* at 16-17.

³ *Id.*

⁴ *Id.* at 19.

⁵ *Id.*

⁶ TATALOVICH & DAYNES, *supra* note 1, at 19.

protect the woman from a procedure that could very well result in infection or even death, both of which were commonplace in all surgeries.⁷

Some feminists have argued that the intention behind these early abortion laws had nothing to do with the health or safety of either the mother or the fetus. Rather, they argue that these early laws were an effort to control women.⁸ At the time, most early feminists were in favor of the anti-abortion laws.⁹ They believed that with education and with the enfranchisement of women, abortions would become unnecessary.¹⁰

Two social changes which emerged in the Nineteenth Century may have also caused the government to fear that more abortions were taking place. First, as more and more people (women included) began to move away from farms, the importance of having children dropped.¹¹ On a farm, each hand, including those of children, were necessary; in the cities, a child could be seen as an “economic liability.”¹² The second reason was increasing amounts of jobs for young, single women outside the home combined with an increased importance of education for both sexes.¹³ This combination led to a decline in the birth rate in the 1840’s and a decline the overall birthrate by half between 1810 and 1890.¹⁴ Thanks in part, to urbanization, combined with new economic opportunities, by 1850, the woman most likely to have an abortion was an upper to middle class white Protestant.¹⁵

⁷ DALLAS A. BLANCHARD, *THE ANTI-ABORTION MOVEMENT AND THE RISE OF THE RELIGIOUS RIGHT* 13 (1994).

⁸ TATALOVICH & DAYNES, *supra* note 1, at 19.

⁹ *Id.* at 20.

¹⁰ *Id.*

¹¹ BLANCHARD, *supra* note 7, at 13.

¹² *Id.*

¹³ *Id.* at 13-14.

¹⁴ *Id.* at 13.

¹⁵ *Id.*

“By the middle of the 19th Century, there was, by some estimates, one induced abortion for every four live births.”¹⁶ This drop in fertility coincided with an increase in the visibility of abortions.¹⁷ This increased visibility included several “at-home” abortion methods that were advertised as being for “menstrual blockage,” but they were unsafe and largely ineffective.¹⁸ These methods included: strenuous exercise, soap solutions and mild poisons, and physical intrusions within the uterus.¹⁹

The Catholic Church

One of the most vocal groups advocating for the banning of abortion is the Catholic Church. However, the Church’s opposition to abortion is a fairly modern development. The traditional view of the Church in the nineteenth century was the same of that of Aristotle: a fetus was not a human being until “animation.”²⁰ As such, between 1450 and 1750, the Church only viewed abortion as acceptable before quickening or if the mother’s life was in danger.²¹ And while abortion was still viewed as a sin, it was considered a sin in the same way masturbation or contraception was a sin: it went against the view that sex was for procreation.²² In addition, the Church taught that a fetus only gained a soul after forty days for a male and eighty days for a female.²³

However a change in technology combined with a new Church teaching would alter the Church’s teachings. First, the discovery of fertilization in the late nineteenth-century increased

¹⁶ LAWRENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 29 (1990).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 31.

²¹ BLANCHARD *supra* note 7, at 11.

²² TRIBE, *supra* note 16, at 31.

²³ *Id.*

the weight of the argument that life only began at conception.²⁴ In 1701, Pope Clement I declared that the Immaculate Conception was a holy day of obligation.²⁵ In 1854, Pope Pius IX changed Church dogma to reflect that Virgin Mary was without sin at the time of her conception; this dogma became known as the Immaculate Conception.²⁶ Due to this alteration of doctrine, the status of women within the Church particularly with regards to their “sacredness” as child bearers.²⁷

The Medical Community

Medical opinion on abortion during the mid-nineteenth-century varied from doctor to doctor, depending on a variety of scientific, ideological, and moral factors.²⁸ At the time, doctors had been separated into two groups. There were those doctors who followed the Hippocratic Oath to do no harm, who were known as “regular” doctors while those who did not who were known as “quacks” or “irregular” doctors.²⁹ (It is perhaps worth noting, that the same Hippocrates whom the medical oath is named after was against abortion.)³⁰ During the nineteenth century, most doctors of the time disagreed with the quickening theory of abortion because to them no stage of pregnancy was more or less important than another; conception was viewed as the start of the process which would end in birth.³¹ At the same time, doctors defended the value of human life more so than any other group of people, save the clergy.³² Because of this, doctors viewed an attack on the fertilized egg as an attack on life itself.³³

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ BLANCHARD, *supra* note 7, at 11.

²⁸ TATALOVICH & DAYNES, *supra* note 1, at 21.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

Politically, “regular” doctors viewed abortion as a procedure which resulted in dissent among their ranks.³⁴ In order to gain some unity, a member of the recently formed American Medical Association (AMA) named Horatio Robinson Storer, was asked to chair a Committee on Criminal Abortion.³⁵ The committee released a report to the AMA in 1859 which gave three reasons for what they called a “general demoralization.”³⁶

First, the committee claimed “a wide-spread ignorance of the true character of the crime—a belief, even among mothers themselves, that the f[e]tus is not alive till after the period of quickening.”³⁷ The second reason given was that the “agents alluded to is the fact that the professions themselves are frequently supposed careless of f[e]tal life...”³⁸ Finally the committee gave as its third reason that abortion was prevalent because of “grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth [,] as a living being.”³⁹

The committee went on to say that “[w]ith strange inconsistency, the law fully acknowledges the f[e]tus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it and to its life denies all protection.”⁴⁰ The committee’s report also included a rather unflattering description of women who would seek out an abortion. It claimed that a woman who sought an abortion were selfish, immoral, and “[u]nmindful of the course chosen for her by Providence.”⁴¹

³⁴ BLANCHARD, *supra* note 7, at 11.

³⁵ *Id.*

³⁶ *Id.* at 22.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ BLANCHARD, *supra* note 7, at 22.

⁴¹ TRIBE, *supra* note 16, at 33.

The Twentieth Century

From the dawn of the twentieth century to 1950, it was estimated that as many as one in three pregnancies was terminated by induced abortion, though Tribe states that the data was not completely reliable.⁴² As the times changed, so did the reasons for providing an abortion. In the 1930s it was argued that poverty was a reason to provide an abortion; in the '40s and '50s, abortions were being performed for psychiatric reasons.⁴³ A new concern that developed in the 1950s was the child's "quality of life."⁴⁴ However, there was also a new reluctance from doctors to perform abortions. In the 1950s thanks to increased medical care and technology, there was more safety and as such, many doctors found less justification in performing abortions because the mother's life was in danger.⁴⁵

The Laws Begin to Change

In the 1960s, the laws began to change with advances in technology and in response to changing attitudes of the time. Starting in 1966, 14 states reformed their abortion laws to allow for therapeutic exceptions while 4 states got rid of their old laws. Only four States (New Jersey, Massachusetts, Louisiana, and Pennsylvania) had no mention of therapeutic exceptions.⁴⁶ In 1967, twenty-eight additional states considered abortion reform laws; by 1970 twelve had passed them.⁴⁷ Among the reasons these laws were reformed were advisements made by the American Law Institute (ALI). The ALI suggested abortion be allowed in three circumstances: Physical and mental health of the mother, physical and mental health of the child, and pregnancy as a

⁴² *Id.* at 34.

⁴³ *Id.* at 35.

⁴⁴ *Id.* at 36.

⁴⁵ *Id.* at 35.

⁴⁶ TATALOVICH & DAYNES, *supra* note 1, at 24.

⁴⁷ TRIBE, *supra* note 16, at 42.

result of rape, incest, or unlawful intercourse.⁴⁸ Those states that chose to reform their laws added a variety of different factors which took the suggestions of the ALI into account, but differed in their strictness and interpretation.⁴⁹ Pro-Abortion advocates used holdings from the Supreme Court to help them reform the laws: specifically *Griswold v. Connecticut*⁵⁰ and *Eisenstadt v. Baird*⁵¹. *Griswold*, which held that married couples had the right to use contraceptives under the theory of a right to privacy under the Constitution, was used to by pro-abortion advocates to argue that the decision to have children and when to have children should be protected, and as such, abortion should be made available.⁵²

From a judicial standpoint, other than state court decisions to reform statutes in Massachusetts and New Jersey, the courts hadn't directly dealt with the issue of abortion.⁵³ In 1969, the first federal court ruling with regards to abortion was made in *U.S. v. Vuitch*⁵⁴. The district court for DC held that the abortion law governing Washington D.C. was unconstitutional because the phrase which allowed abortions in order to "preserve the mother's health or life" was too vague. The decision was appealed and 1971 and the Supreme Court was set to hear the first abortion case in its history.⁵⁵

In its decision, the Supreme Court in *U.S. v Vuitch*⁵⁶ held that under the Constitution, the DC law was not unconstitutionally vague, but defined the term in question within the statute to include a mother's psychological and physical well-being.⁵⁷ In response to this ruling, more

⁴⁸ TATALOVICH & DAYNES, *supra* note 1, at 24-25.

⁴⁹ *Id.* at 25.

⁵⁰ 381 U.S. 479 (1965).

⁵¹ 405 U.S. 438 (1971).

⁵² TATALOVICH and DAYNES, *supra* note 1, at 26.

⁵³ *Id.*

⁵⁴ 305 F. Supp. 1032 (D.D.C 1969).

⁵⁵ TATALOVICH & DAYNES, *supra* note 1, at 27.

⁵⁶ 402 U.S. 62 (1971).

⁵⁷ TATALOVICH & DAYNES, *supra* note 1, at 27.

lawsuits were brought on the grounds of the rights of the woman, the vagueness of the statutes in question, the issue of privacy, and equal protection.⁵⁸ All of these lawsuits and reforms, combined with changing attitudes and technology helped pave the way for the landmark case most associated with abortion in the United States: *Roe v. Wade*.

Roe v. Wade

Background Facts

*Roe v. Wade*⁵⁹ began when a woman named Norma McCorvey (who would be given the name “Roe” to protect her identity) claimed she was raped in Georgia and sued for a right to an abortion in Texas.⁶⁰ She sued in Texas because she could not afford to travel to a jurisdiction where abortions were legal.⁶¹ However, she was denied access to an abortion because her life was not in danger.⁶² Roe framed her claim on right to privacy grounds while Texas argued it held control of fetal life from the time of conception.⁶³ The District Court agreed with Roe in part and held that a woman had a fundamental right whether or not to have children and that the Texas abortion statute was unconstitutional due to vagueness.⁶⁴ However, the District Court refused to grant her injunctive relief due to abstention.⁶⁵ It was on this issue to which she appealed to the Supreme Court.⁶⁶ Before the Supreme Court, handed down its decision, Roe had a change of heart, and decided to have her child.⁶⁷ Roe was joined at the Supreme Court level by a couple

⁵⁸ *Id.* at 28.

⁵⁹ 410 U.S. 113 (1973)

⁶⁰ BLANCHARD, *supra* note 7, at 28.

⁶¹ TATALOVICH & DAYNES, *supra* note 1, at 177

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Roe v. Wade*, 314 F. Supp. 1217, 1224 (N.D. Tex. 1970), *aff'd in part rev'd in part*, 410 U.S. 113 (1973), *holding modified by* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992).

⁶⁶ TATALOVICH & DAYNES, *supra* note 1, at 177.

⁶⁷ BLANCHARD, *supra* note 7, at 29.

that viewed abortion as a potential method of birth control and a doctor seeking to protect himself from criminal liability but only Roe was found to have standing.⁶⁸

The Court's Opinion

On January 22, 1973, The Supreme Court, in a 7-2 decision, held that abortion was a right protected by a constitutional guarantee of privacy.⁶⁹ The Court divided pregnancy into three periods (trimesters) with the woman and her physician having a controlling opinion on whether an abortion was appropriate.⁷⁰ In the first trimester, state interests which could overrule a woman's choice and regulate or proscribe abortion in the other two trimesters are of no significance.⁷¹ States could interfere in the second trimester but only to protect the mother's health.⁷² It was only in the third trimester that the State could pass laws to protect the fetus.⁷³ With the Supreme Court's holding "the unborn child was no longer treated as someone possessing the rights of a human being..."⁷⁴

While the opinion appears to strike some balance between those in favor and those against abortion, upon closer examination the holding of the Court only supports those in favor of abortion.⁷⁵ The authors of *The Politics of Abortion: A Study of Community Conflict in Public Policy Making* note:

While appearing to weigh in delicate balance the interests of individual privacy against legitimate state interest to protect life, and while claiming to reject

⁶⁸ TATALOVICH & DAYNES, *supra* note 1, at 177.

⁶⁹ MICHELE MCKEEGAN, ABORTION POLITICS: MUTINY IN THE RANKS OF THE RIGHT 129 (1992), (discussing Roe v. Wade, 410 U.S. 113 (1973), *holding modified by* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992)).

⁷⁰ TATALOVICH & DAYNES, *supra* note 1, at 178 (discussing Roe v. Wade, 410 U.S. 113 (1973), *holding modified by* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992)).

⁷¹ *Id.*

⁷² MCKEEGAN, *supra* note 69, at 129.

⁷³ *Id.*

⁷⁴ TATALOVICH & DAYNES, *supra* note 1, at 178 (discussing Roe v. Wade, 410 U.S. 113, 159 (1973), *holding modified by* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992)).

⁷⁵ *Id.*

requests for an unqualified right to abortion, the Court really supported only the interests of the pregnant woman's decision to choose whether or not to have an abortion.⁷⁶

One issue that is central to debate on abortion is when life begins. The Supreme Court in *Roe* refused to deal with this question.⁷⁷ Before 1973, state courts concluded that life began well before viability.⁷⁸ The opinion of Justice Blackmun stated the reasoning for the decision not to answer this question: "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."⁷⁹ This question is important to the anti-abortion movement as it represents the difference between the Court protecting a woman's privacy or condoning the killing of humans.⁸⁰ This omission would lead to Rhode Island to include in its amended abortion law a statute declaring that the unborn were persons under the law.⁸¹ Rhode Island was not alone in changing its state statute on abortion. The only state law to survive after the ruling made in *Roe* was the New York statute.⁸² As a result of the Supreme Court's opinion, the number of abortions skyrocketed from 616,000 in 1973 to 1.2 million in 1976 and 1.5 million in 1979.⁸³

Responses to Roe

The majority opinion in *Roe* left many dissatisfied. In his dissent, Judge Rehnquist protested the Court's requirement of a compelling reason for regulation of abortion and the idea that the right to an abortion was "fundamental."⁸⁴ He further attacks the idea that abortion is

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Roe*, 410 U.S. at 159.

⁸⁰ TATALOVICH & DAYNES, *supra* note 1, at 178.

⁸¹ *Id.* at 179.

⁸² TRIBE, *supra* note 16, at 13.

⁸³ TATALOVICH & DAYNES, *supra* note 1, at 178.

⁸⁴ TRIBE, *supra* note 16, at 13 (discussing *Roe v. Wade*, 410 U.S. at 117 (Rehnquist, J., dissenting)).

protected under the right of privacy as understood in the Fourth Amendment and the Fourteenth Amendment: “Nor is the ‘privacy’ that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy.”⁸⁵ With regards to the liberty found in the Fourteenth Amendment: “But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective.”⁸⁶

Justice Rehnquist concludes by noting the Supreme Court’s “sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court’s opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.”⁸⁷

“Even scholars who support legal abortion have admitted that Blackmun’s work was shoddy.”⁸⁸ John Hart Ely was critical of the opinion of *Roe* saying “What is frightening about *Roe* is that this super protected right [to abortion] is not inferable from the language of the Constitution, the framers’ thinking respecting the specific problem in issue, any general value derivable from the provisions they included or the nation’s government structure.”⁸⁹ He also claims “*Roe* is bad because it is bad constitutional law or rather because it is not constitutional

⁸⁵ *Roe*, 410 U.S. at 172 (1973) (Rehnquist, J., dissenting) (quoting *Katz v. United States*, 389 U.S. 347 (1967)).

⁸⁶ *Id.* at 173 (1973) (quoting *Williamson v. Lee Optical Inc.*, 348 U.S. 483, 491 (1955))

⁸⁷ *Id.*

⁸⁸ Ramesh Ponnuru, *The Party of Death: The Democrats, The Courts, The Media, and the Disregard for Human Life* 13 (2006) (discussing John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 935-36 (1973)).

⁸⁹ *Id.* at 14.

law and gives almost no sense of an obligation to try to be.”⁹⁰ Others who supported abortion were not happy with *Roe* arguing that the Court didn’t go far enough in its reform.⁹¹

The Modern Anti-Abortion Movement Begins

Prior to the Court’s holding, the primary anti-abortion groups were Catholic.⁹² After *Roe* was handed down, the Church engaged in a crusade against abortion from 1973 to 1975.⁹³ The Catholic Church threatened excommunication, the refusal of participation in the Eucharist, and even the refusal of baptism to a child of a pro-choice mother.⁹⁴ The Catholic Bishops’ Conference allocated more money for national right to life efforts and in 1973, Catholic bishops recommended to the National Catholic Conference the following: that they organize right to life groups in every state; have dioceses fund church and ecumenical anti-abortion projects; aid the national right to life association in any way they could; and use one day a month to fast and pray in “reparations” for abortions.⁹⁵

The Catholic Church was not alone in its efforts. Immediately after the opinion was handed down, the Court received letters against the decision and around Easter, members of both the Senate and the House of Representatives also received letters.⁹⁶ Because *Roe* had recognized a constitutional right, there were two ways anti-abortion activists could try and change the law; amend the constitution or reseal the judiciary⁹⁷ There were attempts by anti-abortion activists to propose a constitutional amendment banning abortion, but receiving enough political consensus

⁹⁰ *Id.*

⁹¹ TATALOVICH & DAYNES, *supra* note 1, at 179.

⁹² BLANCHARD, *supra* note 7, at 32.

⁹³ TRIBE, *supra* note 16, at 143.

⁹⁴ *Id.*

⁹⁵ BLANCHARD, *supra* note 7, at 32.

⁹⁶ *Id.*

⁹⁷ TRIBE, *supra* note 16, at 16-17.

to do this was and probably still is very unlikely therefore, anti-abortion activists attempted to put new judges in the lower courts that would narrow the scope of *Roe*.⁹⁸

Judicial Aid

In 1977, Anti-abortion activists achieved the results they were looking for in the holdings of three cases. In *Beal v. Doe*⁹⁹, the Court held that the states had no duty to fund non-therapeutic abortions.¹⁰⁰ In *Maher v. Roe*¹⁰¹, the Court held it was not a violation of the Constitution to not pay for non-therapeutic abortions despite paying for childbirth.¹⁰² Justice Powell's opinion noted that the state was at liberty to favor birth over abortion and to use public funds to further its aims.¹⁰³ Finally, in *Poelker v. Doe*¹⁰⁴, the court allowed a city to provide publically financed services for childbirth without doing the same for abortion.¹⁰⁵

Political Allies

The Anti-abortion activists would gain a very strong ally in their campaign to control the judiciary was given the highest office in the land when Ronald Reagan was elected President.¹⁰⁶ In addition to Reagan, key losses for Democratic candidates led to a Republican controlled Senate.¹⁰⁷ During Reagan's first term, two different proposals were presented in congress; the Helms Human Life Statute (Helms Bill) which sought to include a statute which would have defined a person to include an embryo from the moment of conception, and the Hatch Human Life Federalism Amendment (Hatch Amendment) which sought to override *Roe* by proposing a constitutional amendment that would leave it up to each state to decide if abortion should be

⁹⁸ *Id.* at 17.

⁹⁹ 432 U.S. 438 (1977).

¹⁰⁰ TATALOVICH & DAYNES, *supra* note 1, at 180 (discussing *Beal v. Roe*, 432 U.S. 438 (1977)).

¹⁰¹ 432 U.S. 464 (1977).

¹⁰² TATALOVICH & DAYNES, *supra* note 1, at 180 (discussing *Maher v. Doe*, 432 U.S. 464 (1977)).

¹⁰³ *Id.*

¹⁰⁴ 432 U.S. 519 (1977).

¹⁰⁵ TATALOVICH & DAYNES, *supra* note 1, at 180 (discussing *Poelker v. Doe*, 432 U.S. 519 (1977)).

¹⁰⁶ *Id.*

¹⁰⁷ TRIBE, *supra* note 16, at 161.

legal.¹⁰⁸ Each proposal had different problems. The Helms Bill faced numerous constitutional hurdles and many prominent anti-abortion activists did not feel it could be passed.¹⁰⁹ The Hatch Amendment faced the problem of the more dedicated within the ranks of the anti-abortion movement as an amendment that would simply let the states decide rather than outlaw abortion would be considered “heresy.”¹¹⁰ The Hatch Amendment was reported favorably by the Senate Judiciary Committee, but failed to even garner a majority when put up to a vote.¹¹¹ However, Reagan’s involvement with the anti-abortion movement and a likewise aligned congress did allow several reforms to abortion law to take place. In 1984, Reagan sent an anti-abortion delegation to Mexico City to attend the United Nations World Conference.¹¹² That same year, Reagan affirmed the Hyde Amendment, which forbade the allocation of federal funds into family planning organizations which promoted abortion.¹¹³ He also banned the importation of RU-486, which was a pill that could be taken that would cause an abortion, and prohibited the use of fetal tissue in all medical research that was receiving federal funds.¹¹⁴

A New Supreme Court

Reagan’s appointment of Justices is perhaps the greatest contribution he made to anti-abortion efforts. Reagan’s first appointment, Sandra Day O’Connor was initially met with resistance because she did not disclose her opinions on *Roe* due to the fact that she felt she would have to soon decide the issue and wanted to remain impartial¹¹⁵ However, she was nonetheless confirmed by a 99 to 0 vote.¹¹⁶ In 1986, Chief Justice Burger stepped down and Reagan

¹⁰⁸ *Id.* at 162-63 (discussing S. 158, 97th Cong. (1981) and S.J. Res. 110, 97th Cong. (1981)).

¹⁰⁹ *Id.* at 162 (discussing S. 158, 97th Cong. (1981)).

¹¹⁰ *Id.* at 163. (discussing S.J. Res 110, 97th Cong. (1981)).

¹¹¹ *Id.* at 164.

¹¹² Blanchard, *supra* note 7, at 33.

¹¹³ *Id.* (discussing H.R.6040, 98th Cong. (1984)).

¹¹⁴ *Id.*

¹¹⁵ TRIBE, *supra* note 16, at 167.

¹¹⁶ *Id.*

nominated Justice Rehnquist to replace him as Chief Justice and nominated Antonin Scalia to take Rehnquist's place.¹¹⁷ Both Justices were approved.¹¹⁸ Burger, who had sided with the majority in *Roe* in 1973 had, by 1986 claimed that the Supreme Court should reexamine the Court's decision.¹¹⁹ Finally, after Justice Powell retired, Anthony Kennedy was placed on the Court following the failed nomination of Robert Bork due to his beliefs on the constitutional right of privacy not existing.¹²⁰ These new nominations to the Supreme Court would face the issue of abortion head on in the 1989 case *Webster v. Reproductive Health Services*.¹²¹

Webster and its Aftermath

In *Webster*, an abortion clinic challenged a Missouri law which included the following provisions: a restriction on abortions performed in public institutions even if the woman was paying with her own money; a preamble of the statute which declared that life began at conception; and a required test of fetal viability if a woman seeking an abortion was believed to be more than twenty weeks pregnant.¹²² This case attracted much attention from the public. The Court received 78 amicus briefs from individuals and groups not directly associated with the case but interested in its outcome more than ever had been submitted before.¹²³ Most of the debate centered on the law's mandatory testing provision. Tribe notes the following:

On one hand , [the Missouri law] states that the physician must “us[e] and exercis[e] the degree of care, skill, and proficiency commonly exercised by the ordinary skillful, careful and prudent physician engaged in similar practice under the same or similar conditions” yet at the same time, [it] insists that “[i]n making this determination of viability, the physician *shall perform*...such medical

¹¹⁷ *Id.* at 168.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 168-70.

¹²¹ 492 U.S. 490 (1989).

¹²² TRIBE, *supra* note 16, at 20 (discussing *Webster v. Reprod. Health Services*, 492 U.S. 490 (1989)).

¹²³ *Id.* at 21.

examinations and tests as are necessary to make a finding of the gestational age, height, and lung maturity of the unborn child.¹²⁴

The contradiction results from the fact that a prudent physician would never conduct the tests called for on a fetus that seemed twenty weeks old because tests measuring fetal weight are not accurate in this age range and the test for fetal lung capacity was “contrary to acceptable medical practice until 28-30 weeks of gestation, and imposes significant health risks for both the pregnant woman and the fetus.”¹²⁵ If the Missouri law required that these tests be performed at this time during the pregnancy, the law would be struck down, not only because of the law under *Roe*, but because there is no rational purpose for the test considering the risks involved.¹²⁶ However, if the Missouri statute was read to only require a test that would help in determining fetal viability the law would have been upheld, because of a four week margin of error in determine gestational age (as most doctors believed that twenty-four weeks was the earliest when a fetus was considered viable) and because government as a compelling interest in making sure no abortions take place after viability if the mother’s health or life is not a factor.¹²⁷

While the Court chose to uphold the Missouri law, there was no reasoning that was endorsed by a majority of the Justices.¹²⁸ Justice Rehnquist, who was joined by Justices White, and Kennedy, construed the statute to require that only the tests that would determine viability warranted by a doctor’s “reasonable and professional skill and judgment[.]”¹²⁹ As such, it was unnecessary to automatically strike down the statute.¹³⁰ Furthermore, they agreed that the statute’s intention, which would protect the life of the fetus rather than that of the mother, would

¹²⁴ *Id.* (emphasis added by the author).

¹²⁵ *Id.*

¹²⁶ *Id.* at 21-22.

¹²⁷ *Id.* at 22.

¹²⁸ *Id.*

¹²⁹ *TRIBE*, *supra* note 16, at 22 (discussing *Webster v. Reprod. Health Services*, 492 U.S. 490 (1989)).

¹³⁰ *Id.*

add to the cost of an abortion and as such be illegal under the *Roe* standard because these tests would take place in the second trimester in some circumstances when the actual age was less than that of estimation, which would lead to a conflict with *Roe*.¹³¹ While this reason was tenuous and read *Roe* rather “sweepingly,” it allowed the three Justices to show that either the testing provision or the *Roe* framework had to be abandoned, which allowed the three Justices to attack *Roe*.¹³² In his opinion, Rehnquist noted that it was with the state’s interest to protect human life throughout all stages of pregnancy and that this interest would allow Missouri’s interference with the mother’s right to choose an abortion, which he classified as simply a liberty interest, and therefore the Court need not examine closely the state’s reasoning for limiting abortions.¹³³

Justice Antonin Scalia, while agreeing the law should be upheld, argued that rather than “merely gutting the central point of *Roe*’s protection of a special liberty interest” the correct option would be to simply overturn *Roe* altogether.¹³⁴ This meant that four of the Justices of the Supreme Court agreed that unlike the right to free speech or freedom of assembly, abortion should not have a special protection from the government.¹³⁵ Four of the remaining Justices disagreed and held that they would protect the right to an abortion as fundamental.¹³⁶ Justice Blackmun was joined by Justices Marshall and Brennan voting to strike down much of the Missouri law due to its interference with that right while Justice Stevens wrote his own opinion

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 23.

¹³⁴ *Id.*

¹³⁵ *TRIBE*, *supra* note 16, at 23.

¹³⁶ *Id.* at 23 (discussing *Webster v. Reprod. Health Services*, 492 U.S. 490, 560 (1989)).

in which he argued that mandated viability testing was unduly burdensome and was not defensible even if the right to an abortion was not specially protected.¹³⁷

It was Justice O'Connor who would be the deciding vote. In her opinion, she agreed to uphold the Missouri statute and claimed that she would uphold any abortion regulations as long as there was no undue burden proscribed and said that she would be open to a reconsideration of *Roe*.¹³⁸ In his dissent, Justice Blackmun noted that while it did not overturn *Roe*, the Court's holding in *Webster* made overturning seem very likely. "[But] [T]he signs are evident and very ominous, and a chill wind blows."¹³⁹ Despite Justice Blackman's concerns, that chill wind would soon blow in the other direction after the Supreme Court's decision in *Planned Parenthood v. Casey*.¹⁴⁰

Abortion Affirmed: Casey Upholds the Right to an Abortion

In the time period before *Casey* was decided, both Justice Brennan and Justice Marshall left the Supreme Court, they were replaced by Justices Souter and Thomas.¹⁴¹ The case itself came about when Planned Parenthood of Southeastern Pennsylvania challenged The State's regulations on abortion.¹⁴² In response, the state, joined by Solicitor General Kenneth Starr, urged the Court to overturn *Roe*.¹⁴³ Planned Parenthood argued that Pennsylvania's statute could not be upheld unless the Court was prepared to listen to the urgings of Starr and the state itself.¹⁴⁴

¹³⁷ *Id.*

¹³⁸ *Id.* at 24.

¹³⁹ *Webster*, 492 U.S. at 560.

¹⁴⁰ 505 U.S. 833 (1992).

¹⁴¹ WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW*, 178 (3d ed. 2011).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

On June 29, 1992, the Supreme Court rendered its decision which consisted of a plurality comprised of Justices O'Connor, Kennedy, and Souter who were joined in a concurrence by Justices Blackmun and Stevens, reaffirmed the constitutionality of *Roe*'s holding and added that, at least in most cases, the states could not outright ban abortions.¹⁴⁵ In addition, the Court struck down several aspects of the Pennsylvania statute including the requirement that a woman tell her husband if she was seeking an abortion.¹⁴⁶ However the Court also did uphold parts of the statute including the requirement that physicians inform women about fetal development; alternatives to abortions; and that after receiving the information about development and alternatives, a waiting period of twenty-four hours before obtaining an abortion.¹⁴⁷ In addition, the Court upheld the requirement that physicians keep records of abortions performed that were subject to public disclosure and the requirement that unmarried females who were not self-supporting and under the age of eighteen to get a parent's permission before obtaining an abortion.¹⁴⁸ Justice Blackmun, who had expressed fear in *Webster* that *Roe* would be overturned concurring in overturning the spousal notification provision, but dissented from the narrowing of *Roe* and the joint opinion's upholding of the twenty-four hour waiting requirement, the informed consent requirement, and the parental consent provision on the grounds that strict scrutiny would not allow such restrictions.¹⁴⁹

Justices Rehnquist, White, Scalia and Thomas wrote a separate opinion in which they held that *Roe* should have been overturned and that the Court had erred originally when it

¹⁴⁵ BLANCHARD, *supra* note 7, at 111 (discussing *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, (1992)).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 930 (1992) (Blackmun, J., concurring).

declared that abortion was a fundamental right.¹⁵⁰ Their opinion added that none of the cases *Roe* cited “...endorsed an all-encompassing “right of privacy,” as *Roe* claimed.”¹⁵¹

Many on both sides of the abortion issue were not happy with the decision the Court reached.¹⁵² In effect, the Court appeared to be attempting to find a middle ground.¹⁵³ While the Court did uphold *Roe* and did overturn several aspects of the Pennsylvania statute, those aspects it did keep were quite restrictive on abortion, specifically limiting access for the poor and juvenile.¹⁵⁴ Perhaps even more intriguing is the potential disclosure of physician records which seems to undermine one of the very tenets *Roe* was founded on: the right to privacy with regards to a woman’s body.¹⁵⁵

Extremism and Violence

As noted before, the issue of abortion often invokes strong feelings on both sides. One unfortunate side effect of these feelings is the potential for violence. In the late 1970s and early 1980s more activist and radical groups, including Joseph Scheidler’s Pro-Life Action League (currently known as the Pro-Life Action Network (“PLAN”)) began to form.¹⁵⁶ Some of these groups would take to picketing outside of abortion clinics and asking women not to kill their babies.¹⁵⁷ When this had little effect, more extreme measures such as epoxy cement being placed in locks and stink bombs being released in abortion clinics were used.¹⁵⁸ More disturbing were

¹⁵⁰ *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 839 (1992)

¹⁵¹ *Id.*

¹⁵² BLANCHARD, *supra* note, 7 at 111.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 53.

¹⁵⁷ *Id.*

¹⁵⁸ BLANCHARD, *supra* note 7, at 53.

various bomb threats and threats being made to employees of the clinic and even to some judges.¹⁵⁹

Sadly the violence of these acts only increased. Bombings and arsons started in 1977 and by the end of 1978 there had already been twelve.¹⁶⁰ After a decline, in 1984, the violence renewed and, while the numbers have declined, the rate has exceeded that of the years before 1984.¹⁶¹ Bombing and arson were not the only methods of violence used. Other methods included burglary, assaults, kidnappings, and even the taking of hostages.¹⁶² From the years of 1973 to 1980, there were 61 recorded acts of violence; from 1980 to 1984, there were 273.¹⁶³ Other specific incidents of violence that occurred in 1991 include a woman blown back into the street from an explosion as she opened a door; clinic workers being attacked by a priest with an ax; a physician and his wife kidnapped and held underground, and a physician being shot 1993.¹⁶⁴ Reagan denounced this violence in 1985 after a string of bombings and for a while, the violence was lessened; however it would pick-up again in the Clinton years after the shooting deaths of two doctors and the statements by a few that supported murder as a tactic.¹⁶⁵

Two such incidents drew reaction from various groups. On March 10, 1993, Dr. David Gunn was shot and killed by Michael Griffin.¹⁶⁶ Griffin admitted to shoot Dr. Gunn three times in the back as Gunn entered an abortion clinic in Florida where he worked.¹⁶⁷ A few months

¹⁵⁹ *Id.* at 53-54.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 59.

¹⁶³ *Id.*

¹⁶⁴ BLANCHARD, *supra* note 7, at 54.

¹⁶⁵ *Id.* at 58.

¹⁶⁶ *Id.* at 100.

¹⁶⁷ *Id.*

later, in August of 1993, Rachelle Shannon shot Dr. George Tiller as he left an abortion clinic.¹⁶⁸ Tiller was wounded in his arms, but was able to resume his practice.¹⁶⁹ Shannon had been in communication with Griffin prior to this incident and had referred to him as a hero.¹⁷⁰ Most Anti-abortion groups quickly denounced the attacks including the National Right to Life Committee but some people were quick to defend the attacks.¹⁷¹ One such defender, David Trosch, who was a priest and a pastor, submitted a drawing of the shooting of an abortionist with the phrase “Justifiable Homicide.”¹⁷² Dallas A. Blanchard notes that the majority of the most violent anti-abortionists are men who are under thirty-five and are fundamentalists within their religion which was usually Catholic, Protestant, or Mormon.¹⁷³ He further notes that these individuals often engaged in prior anti-abortion activities and that they were often “encapsulated” and had no significant social ties to groups other than those that would enforce their particular world view.¹⁷⁴

Even over twenty years after the court’s decision in *Casey*, violence, and attempted violence continues. At around midnight on New Year’s Eve of 2011, a homeless man by the name of Bobby Joe Rogers set fire bombed a family planning clinic in Florida and claimed he acted due to a “strong disbelief in abortion.”¹⁷⁵ Just two years earlier, Dr. George Tiller, regarded by many as one of the most prominent abortionists, was shot and killed in the foyer of his church

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ BLANCHARD, *supra* note 7, at 100.

¹⁷¹ *Id.*

¹⁷² *Id.* at 101.

¹⁷³ *Id.* at 58.

¹⁷⁴ *Id.* at 58-9.

¹⁷⁵ *Homeless man sets fire to Florida family planning clinic because he opposes abortion, authorities say*, THE ASSOCIATED PRESS Apr. 29, 2013, available at <http://www.nydailynews.com/news/national/homeless-man-set-fire-florida-family-planning-clinic-opposes-abortion-authorities-article-1.1001689#ixzz2Ru0i8s1B>

while serving as an usher.¹⁷⁶ His murder prompted President Obama to say “However found our differences as Americans over difficult issues such as abortion, they cannot be resolved by heinous acts of violence.”¹⁷⁷ The pro-abortion side has also been accused of violence. Anti-abortion activists have rallied against Dr. Kermit Gosnell, who was charged with the murder of one of his patients due to an overdose of painkillers, and seven babies within his abortion clinic.¹⁷⁸ It is alleged that Dr. Gosnell delivered many babies alive before killing them including fetuses that were in the sixth, seventh, and eighth month of development.¹⁷⁹ The District Attorney Seth Williams added in a news conference that “My comprehension of the English language can't adequately describe the barbaric nature of Dr. Gosnell[.]”¹⁸⁰ While Dr. Gosnell’s alleged crimes are not an act of violence upon the Anti-abortion movement, and are heinous beyond compare, they are an example of a crime that the anti-abortion movement argues occurs every day: the killing of innocent lives; which, unfortunately, some believe can only be avenged through violence.

The Father’s Rights and Abortion

Despite abortion being a procedure which only women can undergo physically, it is a procedure that men are also affected by. One issue of particular interest to me not only as a male, but as a man who one day seeks to have a family is the issue of father’s rights with regards to abortion. Since *Roe*, only one case directly dealt with the issue of the father’s rights.¹⁸¹ That case

¹⁷⁶¹⁷⁶ Joe Stumpe, *Abortion Doctor Shot to Death in Kansas Church*, N.Y. TIMES Apr. 29, 2013, <http://www.nytimes.com/2009/06/01/us/01tiller.html?ref=georgertiller&r=0>

¹⁷⁷ *Id.*

¹⁷⁸ Nbcnews.com, ‘House of Horrors’ alleged at abortion clinic, (Apr. 29, 2013, 8:49pm), http://www.nbcnews.com/id/41154527/ns/us_news-crime_and_courts/t/house-horrors-alleged-abortion-clinic/#.UX8URbVvPF8

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Maria F. Walters, *Who Decides? The Next Abortion Issue: A Discussion of Fathers' Rights*, 91 W. VA. L. REV. 165, 174-75 (1988).

was *Parenthood of Central Missouri v. Danforth*.¹⁸² In *Danforth* several claims were raised. One of them was the constitutionality of a Missouri statute which required written consent from the spouse of the woman who was seeking an abortion.¹⁸³ The appellees argued that a marriage was an institution and each partner counted as co-equals so any change in the family status should be made jointly.¹⁸⁴ The Court ruled against the appellees and held:

The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.¹⁸⁵

The dissent disagreed and argued that nothing in *Roe* or in the Constitution demanded that a mother's interest in obtaining an abortion outweigh a father's interest in seeing the child mature.¹⁸⁶ The majority opinion addressed the dissent's argument in a footnote saying that the dissent fails to note that such a provision like one which was included in the Missouri statute would grant a husband a universal right to veto any abortion decision of his wife.¹⁸⁷ "However, the majority denied any 'per se' finding and replied that it was this particular statute which was unconstitutional because it gave a unilateral power of veto to the spouse in all instances."¹⁸⁸ Because of this, the majority in *Danforth* left open the possibility of finding rights for the father such as a determination made on a case to case basis.¹⁸⁹ "However, in light of recent cases in the

¹⁸² 428 U.S. 52 (1976).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 71 (1976).

¹⁸⁶ *Id.* at 93 (White, J., dissenting).

¹⁸⁷ Walters, *supra* note 181, at 176.

¹⁸⁸ *Id.* at 77.

¹⁸⁹ *Id.*

lower courts where fathers are asserting their rights, it appears that some court must eventually address the father's rights in the abortion decision.”¹⁹⁰

One argument that fathers have been making is a request that the mother’s right to privacy be balanced against the privacy interests of the father.¹⁹¹ They also argue that while *Danforth* prohibits an absolute veto power, it does permit examinations on a case by case basis of the competing paternal interests.¹⁹² One example of a case in which this had been used is *In re the Unborn Child H*¹⁹³ where an eighteen year old mother wished to obtain an abortion despite the father’s protests, because she wanted to “look nice in a bathing suit this summer” and did not wish to share the baby with the father was permanently restrained from having an abortion.¹⁹⁴ The Court’s reasoning was that the case in question involved no state concerns unlike *Danforth* which was a state statute and marriage relationship, and unlike *Roe* which also involved state action.¹⁹⁵ “The court held that the rights of the father in the life of his unborn child are of constitutional dimension under the fourteenth and ninth amendments as well as the Indiana common law.”¹⁹⁶ The court held that in this case, “[t]he father's constitutional rights were found to outweigh those of the mother ‘on the basis of the facts.’”¹⁹⁷ The case went to the Indiana Supreme Court, but the mother in question chose to test the restraining order and had the abortion.¹⁹⁸ This article did not note the decision of the Indiana Supreme Court as the case had yet to be decided at the time.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 182.

¹⁹² Walters, *supra* note 181, at 182.

¹⁹³ No. 84C01-8804-JP-185, slip op. (Vigo County Cir. Ct., Indiana, April 8, 1988).

¹⁹⁴ Walters, *supra* note 181, at 182-183.

¹⁹⁵ *Id.* at 183.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

Another case which is of note is *Conn v. Conn*¹⁹⁹ in which a nineteen year old pregnant wife asked for the dissolution of her marriage and informed her husband that she would terminate the child unless he agreed to put it up for adoption.²⁰⁰ The father, wishing to stop the abortion argued for a case by case balancing of the facts because there were times where the constitutional rights of the father outweighed those of the mother.²⁰¹ The Indiana Circuit Court held that neither *Roe* nor *Danforth* provided an answer and that it was within the scope of the judiciary's powers to weigh the competing interests.²⁰² The case went to the Indiana Court of Appeals, where the injunction was overturned with the Court's reasoning being that *Roe* and *Danforth* were dispositive and that decision to have an abortion only concerned the mother.²⁰³ When the case was brought before the Indiana State Supreme Court, the Indiana Court of Appeals ruling was upheld, however, in the dissent, Judge Pivarnik, set various factors that he believed should be used when determining whether an injunction should be granted.²⁰⁴

¹⁹⁹ 525 N.E.2d 612 (Ind. App. 1988); *aff'd* 526 N.E.2d 958 (Ind. 1988).

²⁰⁰ Walters, *supra* note 181, at 183.

²⁰¹ *Id.*

²⁰² *Id.* at 183-184

²⁰³ *Id.* at 184.

²⁰⁴ These are:

- a) whether the [mother] has consulted with a physician, and if so, is he in agreement with [the mother's] decision to abort,
- b) the likelihood of the child being born with grave mental or physical defects,
- c) should [the mother] be ordered not to have an abortion whether she would likely suffer any harm—medical, emotional, psychological, or otherwise,
- d) whether the continuation of the pregnancy and childbirth will likely interfere with [the mother's] education, employment, or employment opportunities,
- e) whether an abortion will likely cause any harm to [the father], either emotionally, psychologically, or otherwise,
- f) whether [the mother] is sincere in her desire for an abortion, and whether [the father] is sincere in his desire that [the mother] not terminate the pregnancy,
- g) whether the [mother] will properly care for herself during the pregnancy,
- h) how the expenses associated with prenatal care and delivery of the child will be paid,
- i) whether the pregnancy, followed by birth of a child, will cause financial hardship on either [the father] or [the mother], or their respective families,
- j) whether [the father] is capable of fathering another child, and
- k) whether [the father] is likely to be capable, and willing, to rear the child upon birth.

(*Conn v. Conn*, 525 N.E.2d 958, 961 (Ind. 1988)). (Pivarnik, J., dissenting).

The case ended there as certiorari was denied by the United States Supreme Court.²⁰⁵ In some cases, fathers have succeeded in obtaining temporary restraining orders to stop abortions, but have become discouraged when the mothers chose to violate said order and were unwilling to proceed with their case.²⁰⁶

While the rights of a father have been presented and even accepted by low level courts, it does not seem likely that the current understanding of a father's rights with regards to abortion will change. And even if they had, anti-abortion activists would still not approve of the fact that abortions were still available. It would seem that the best bet for fathers who wish to have a say in the abortion process might be for them to argue that abortion should be illegal because as of now, the courts have not recognized their rights as parents before birth. Although a challenge to abortion based on a violation of Equal Protection Clause for men seemed a plausible idea, no information could be obtained for any arguments supporting such a theory.

Conclusion

In conclusion, the future of abortion in the United States remains uncertain. With aging Justices on the Supreme Court likely to soon be replaced, the Court could soon undergo a political shift as it did in the Reagan years. If this occurs, one question will be who will be the President of the United States at the time, as their stance on abortion will influence the type of judges that will be nominated. While the indemnity of the next president is unknown, what is certain is that as the law evolves so will both sides of the movement. The anti-abortion movement has shifted as views on abortion have shifted, even within an organization like the Catholic Church, now staunch opponent of abortion but once permitting it. As time goes on, opinions will continue to evolve, and politically abortion will remain a hot-topic issue. What will

²⁰⁵ Walters, *supra* note 181, at 184-185.

²⁰⁶ *Id.* at 185

not change however, is that as long as abortion is legal, there will be an effort to at the very least severely restrict it if not ban it entirely. Hopefully, such efforts will result in ink being spilled rather than blood, and words replacing explosions. It is safe to say that despite the dire straits they may find themselves in, anti-abortion activists will keep trying until the United States is closer to what they view is the correct path legally and morally and closer to doing the walk of life.