The Politics of Abortion in the United States

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In 1973, the Supreme Court of the United States handed down the ruling that recognized a woman's constitutional right to abortion. The plaintiff in the case known as *Roe* v. *Wade* was a Texas woman who had become pregnant in 1969, allegedly as a result of rape. Although she later admitted to having made that part of the story up, she proceeded to sue the state legislature in order to obtain an abortion, which at the time was illegal in Texas. Until Roe v. Wade reached the Supreme Court, the question of abortion rights had been left entirely up to the states, and a trend towards liberalization of formerly narrow restrictions upon those rights had begun to manifest itself in the late 1960s.

Despite its reputation as less "activist" than its predecessor, the Burger Court—so named after its Chief Justice, Warren Burger—decided by a 7-2 majority to strike down abortion restrictions as infringing upon a fundamental individual right to privacy. That a right is recognized as fundamental by the Constitution means that neither federal nor state legislatures may abridge it unless they can cite compelling interest in doing so. It is a matter of Supreme Court practice that a state's "compelling" reasons for abridging a fundamental right are virtually never upheld.

Thus, abortion rights in the United States are different from abortion legislation in most European countries, where women's control over their reproductive destinies is a matter, not of the constitutional rights of individual citizens, but of parliamentary discretion. Moreover, European women are often not at liberty to make up their own minds at all, but remain dependent on the goodwill of the medical profession, since abortion may only be obtainable on "medical" grounds. That is the case notably in Great Britain.

Roe v. *Wade* did not, however, grant women total freedom to terminate a pregnancy at any time for any reason. The Court's opinion, written by Justice William Blackmun, provides for a trimester structure, according to which

government may not interfere with the woman's decision at all during the first trimester of pregnancy, and may only do so during the second trimester if it is necessary to protect the woman's health. In the third trimester, however, the fetus is deemed to be "viable," i.e. able to survive outside the womb. At this advanced stage of pregnancy, the state's interest in keeping the fetus alive allows it to prohibit abortion, unless the purpose is to save the mother's life.

The ruling in *Roe* v. *Wade* was soon made subject to much criticism—legal as well as philosophical and medical, from opponents as well as from supporters. Abortion has become such a central issue that no political candidate, from the local to the presidential level, can avoid taking a stand on it and it would appear to have been decisive in several elections. An understanding of American politics is therefore incomplete if it does not take into account the abortion question, its impact on women's lives, and such related issues as fetal rights and fetal protection policies.

Abortion rights have a long history in the United States.[1] Before the nineteenth century, common law "inherited" from the English allowed women to terminate pregnancies before quickening (i.e. before the first instance of fetal movement), and apparently even post-quickening abortions were not liable to prosecution. Thus, although early American settlers did wish to extend some measure of protection to unborn children, not even in Puritan New England did they see abortion as murder.

The earliest anti-abortion statute dates from 1821, and within a relatively short time such statutes were enacted in a majority of states. Contrary to what one might think, it was the medical profession, rather than the church, which was behind this sudden change in attitudes, a change which coincided with two important social trends. One was that the birthrate among Protestants (the group that has consistently taken the greatest advantage of the availability of abortion) was declining at a time when non-Protestant immigration was on the rise; the other was a change in gender roles as more and more women began to work outside the home. It seems obvious that anti-abortion legislation, if not uniquely or perhaps even consciously designed for this purpose, would nevertheless have served to counteract both these trends, helping to increase the birthrate and tying women to the hearth.

The twentieth century brought about new changes in values and ideologies. During the two World Wars, women were actively encouraged to join the labor force, and once there, they were difficult to drive out. In fact, their

1 Further details can found in Laurence H. Tribe, *Abortion: The Clash of Absolutes* (New York: Norton, 1990), ch.3, and in Rosalind P. Petchesky, *Abortion and Woman's Choice* (London : Verso, 1985), chs. 2 - 3. The former represents a fairly neutral legal approach, the latter a marxist-feminist sociological one. Here I shall only mention those facts which seem to me to be of direct relevance to other points made in my argument.

number has continued to expand throughout every decade following World War II, especially during the 1960s and 1970s. At the same time, the virtual absence of any governmental commitment to child care makes it hard for American women to reconcile participation in the work force with high fertility. Furthermore, as Laurence H. Tribe explains, economists argued from the 1920s onwards that population control was the key to prosperity.2 Finally, the growing importance of the women's movement which emerged in the late nineteenth century, and which called for greater autonomy for women in all areas, encouraged increasing numbers of young women to embark on higher education and consequently to postpone marriage.3 Apart from the post-war "baby boom," which Rosalind P. Petchesky calls an "anomaly," the U.S. fertility rate has been consistently decreasing since the beginning of this century.[4] The result has been a social and political climate favorable to the legitimation of abortion, over and above the already widely available option of "therapeutic" abortion (involving medical certification that the mother's life or health would be at stake, if the pregnancy were carried to term). Thus, the decision in Roe v. Wade may be seen—not as government granting women a new and supplementary right—but rather as an official recognition of a right of which women had already availed themselves, since "by the late 1960s as many as 1,200,000 women were undergoing illegal abortions each year."[5]

Roe v. Wade almost immediately galvanized a right-wing pro-life movement into action. Its leaders, predominantly religious fundamentalists, choose to consider the fetus as a person endowed with a soul from the moment of conception, and therefore condemn abortion as murder. Legally, if the fetus has the status of a person in the constitutional sense, it must be afforded the same rights to "equal protection under the law" granted to its mother under the Fourteenth Amendment. This is highly problematical, however, because another Fourteenth Amendment provision, which reads: "No state shall ... deprive any person of life, liberty, or property, without due process of law," happens to be the principal instance cited in support of Roe's "right to privacy," a right which is nowhere explicitly mentioned in the Constitution.

Roe does not define the fetus as a person, nor does the pro-choice movement consider it to be so. The result is a fundamental, unresolvable moral chasm between the two opposing points of view. The issue of the fetus' "personhood" simply cannot be argued on the basis of legal reason, as it is one which belongs squarely in the domain of theology. Thus, as one might expect, surveys have shown a clear correlation between regular church attendance

2 Tribe, *Abortion.*, p. 41.
3 Cf. *Petchesky, Abortion and Woman's Choice,* Tables 3-2 & 3-3, pp. 109-110.
4 Ibid., p. 114, Figure 3-1, p. 104.
5 *Ibid.,* p. 123; Tribe, *Abortion,* p. 41.

(irrespective of denomination) along with a literal interpretation of the Bible, and opposition to unrestricted abortion rights.[6]

For the past 18 years, the pro-life movement has gone all out in an attempt to restrict women's right to, and the availability of, abortion as much as possible. The ultimate goal is to overturn *Roe* altogether. There are two basic ways of achieving this: one is through legislation, the other is by effecting the appointment of sympathetic judges to state and federal courts, and, of course, especially to the Supreme Court. Since the pro-life movement is financially powerful and influential, it has enjoyed a large measure of governmental support, in particular during the years of the Reagan administration, and has met with considerable success.

As far as legislative efforts are concerned, the following deserve mention: On the congressional level, the most important piece of anti-abortion legislation is the 1977 bill known as the Hyde Amendment (after Republican Representative Henry Hyde who sponsored it). This bill disallowed federal Medicaid funding of abortions, except in cases where the woman's life or health would be in danger. This, in fact, represents a watered-down version of the bill originally proposed by Hyde, which would have cut off funding regardless of the circumstances. Medicaid is a welfare program designed to provide medical assistance for the poor, and before 1976, it paid for 33% of all legal abortions.[7] The Hyde Amendment thus places a disproportionate burden on poor, non-White women. These women constitute the majority of those eligible for Medicaid and are, at the same time, three times more likely to choose abortion than White middle- or working-class women. Since they typically have at least one live child, they presumably prefer abortion, because they find themselves unable to provide adequately for the children they already have.[8] By ruling out this option, government is therefore in effect aggravating, rather than attenuating their situation, making the women and their families even more dependent on the welfare system. The Hyde Amendment was later held by the Supreme Court to be within the boundaries of the Constitution (case of *Harris* v. *McRae*, 1980), because it limits abortion access only "indirectly." This applies even if abortion is deemed a medical necessity. In the opinion of the Court, government is perfectly justified in preferring childbirth to abortion and therefore in paying only for the former. It should be kept in mind, however, that states are still at liberty to allocate non-federal funds to abortion services.

In 1989, Democratic Representative Barbara Boxer attempted to amend the

6 Cf. Allen D. Hertzke, *Representing God* in *Washington* (Knoxville, Tenn.: University of Tennessee Press, 1988), tables 4-9, pp. 122-128.

7 Tribe, *Abortion*, p. 151.

8 Petchesky, *Abortion and Woman's Choice*, p, 156, table 4-1, p. 152.

Hyde Amendment by the introduction of a bill which would provide for Medicaid funding if pregnancy was the result of rape. The bill passed both houses, but was ultimately vetoed by President Bush, despite his claim to support the legal availability of abortion in such cases.

Also on the congressional level, some hitherto unsuccessful attempts have been made to pass a constitutional amendment relative to the abortion question. One was introduced by Republican Senator Jesse Helms in 1981 and proposed to grant fetuses the status of persons under the Constitution, thereby officially recognizing abortion as murder. This statute was recognized by the Right as too politically dangerous and subsequently abandoned.

The other proposal, known as the Hatch Amendment (after Republican Senator Orin Hatch), also dates back to the beginning of the Reagan era, and its purpose was to return the decision of whether to allow abortion to either Congress or the states. So far, nothing has come of it, as a constitutional amendment is extremely difficult to bring about (it requires passage by 2/3 of both houses, as well as ratification by 3/4 of the states). Nevertheless, it is a type of measure which commands a certain amount of popular support, both because it does not take a clear stand for or against abortion, but merely proposes to let the people decide, and because it agrees well with the distrust of centralized government which has been characteristic of the last decade in American politics.

Based on the view that democracy is to be understood as majority rule, many Americans feel that Supreme Court decisions such as Roe are undemocratic. This may explain why the abourtion issue is less controversial in many European countries: here a change of existing legislation would require only a new parliamentary majority. However, as both Laurence H. Tribe and Ronald Dworkin point out, American democracy with its tripartite structure is precisely not a majoritarian one: rather, its distinctive feature of checks and balances is aimed at protecting the "inalienable" rights of the individual citizen against the whims of transient majorities.[9] On the state level, there has been a generalized determination to enact legislation that will restrict abortion as a realistic alternative to childbirth to the utmost, just short of unconstitutionality. Many of these laws eventually end up before the Supreme Court.

Since 1973, five new Justices have been appointed to the Court, and a sixth appointment is currently pending. This means that of the original Roe majority, only Justice Blackmun remains. He is now in his early eighties and likely to retire within the foreseeable future, like the other Roe champion, former Justice Thurgood Marshall, who handed in his resignation during the summer of 1991. President Bush's nominee, Judge Clarence Thomas, whose confirmation hearings began in September 1991, publicly declared himself an anti-

9 Tribe, Abortion, p. 80; Ronald Dworkin, "The Future of Abortion," p. 51, *New York* Review of Books, Sept. 28, 1989, pp. 47-51.

abortionist a few years ago.[10]

Of the "newcomers," only one, the 1975 Ford appointee Justice Stevens, is clearly in favor of abortion rights. Three Justices were appointed by Reagan, for whom a nominee's pro-life stance was a decisive factor. They are Justices Scalia, Kennedy and O'Connor, the latter being the only woman ever to serve on the Court. O'Connor has long been a key figure, because she has in several cases provided the swing vote in abortion-related decisions. She would seem to believe in the basic constitutionality of abortion (although she has expressed criticism of *Roe),* but she will support any restriction which is not "unduly burdensome" to the woman.[11] Judging by the decisions handed down by the Court since the beginning of her tenure, her conception of "undue burdens" is a very narrow one, indeed. President Bush, also a pro-life supporter at present, despite his being openly in favor of *Roe* on the occasion of his unsuccessful bid for the Republican presidential nomination in 1980, appointed Justice Souter in the fall of 1990.[12] Souter's position is still not entirely clear, but his vote in the one abortion case which has come before the Court since his appointment indicates that he may be willing to overturn *Roe,* should the opportunity arise. This is a matter of great import, because prior to Souter's replacing the liberal Justice Brennan, abortion-related cases were almost invariably decided by a 5-4 majority, with Justice O'Connor providing the swing vote, as already mentioned. Many pro-choice supporters fear that whereas she may not have wished to take an openly anti-abortion stance as long as her vote was the decisive one, she may have no qualms about it, if she is able to do so in the context of a 6-3 (soon possibly 7-2) conservative majority.[13]

Since *Roe,* the Court has been asked to review a number of cases where states have restricted or otherwise regulated abortion access. The first was the 1976 case of *Planned Parenthood v. Danforth* in which the Court struck down a Missouri regulation giving the father of the fetus, or the mother's parents in the case of a pregnant minor, the right to veto abortion. The Roe majority was still largely intact.

A subsequent case was that of *City of Akron v. Akron Center for Reproductive Health,* dating from 1983. At issue here was an Ohio statute containing several different provisions: First, it mandated a 24-hour waiting period after the woman had signed an "informed consent" form (which required the physician to give information about fetal development). A similar requirement was struck down in the case of *Thornburg v. American College of Obstetricians and Gynecologists* in 1986. Secondly, it imposed hospitalization on

10 "Marching to a Different Drummer," *Time,* July 15, 1991, p. 21.
11 "The Justice in the Middle," *Time,* July 9, 1990, p. 27.
12 "Building a 'Big Tent' Around Abortion" *Time,* February 5, 1990, p. 18.
13 "The Justice in the Middle," *Time,* July 9, 1990, p. 27.

women undergoing second trimester abortions. These provisions were both struck down. A third provision requiring parental consent for pregnant minors was, however, upheld on the condition that a judicial bypass be provided for in the case of "mature" minors, where it would demonstrably be impossible or not in the girl's best interest to inform her parents.

Apart from the fact that Justice O'Connor dissented from the majority in this her first abortion case, *Akron* is interesting because of its ambivalence. While striking down the first two provisions represents a liberal reaffirmation of *Roe*, upholding the third seems to imply the endorsement of a conservative sexual morality, according to which teenagers ought not to have sex. I base this claim on the debate which followed in the wake of last year's cases concerning parental involvement in teenage abortions, viz. *Hodgson v. Minnesota* and *Akron Center for Reproductive Health v. Ohio.* Here, statutes requiring the consent or at least the notification of one or both biological parents were upheld. The statute reviewed in *Hodgson* even went so far as to require the physician, rather than the girl herself, to notify the parents.

Currently, 33 states have similar statutes on the books, and 15 are actively enforcing them.[14] There may, however, be various legitimate reasons why a minor would not wish to let her parents know of her desire to terminate an unwanted pregnancy: she may have no contact with one of her parents; the parents may be likely to react abusively; or she may simply be afraid of disappointing them. Nonetheless, the judicial bypass needed in these cases is sometimes very difficult to obtain, either because few judges agree to conduct such hearings, or because the ones who do tend to refuse bypasses. If the girl is privileged enough to be able to travel to a state that has no parental consent requirement, she may still be able to obtain a legal abortion. If not, she may simply repress the whole thing out of fear and go through with her pregnancy, making herself highly likely to drop out of school and become a welfare case.[15] Alternatively, she may resort to a back-alley abortion, like the 17-year-old girl from Indiana who died a much-publicized death from just such a procedure.[16] Conservatives who claim that statutes of this kind are meant to promote communication between family members, and that unmarried teenagers should "just say no" to sex, are, in my opinion, either acting in bad faith or naively closing their eyes to the realities of life in the late twentieth century. After all, it is a fact not only that very few American families conform to the traditional, two-parent model, but also that roughly 50% of all teenagers are sexually active, with 24% of the girls likely to become pregnant.[17] Further-

14 "Teenage and Pregnant," *Glamour,* March 1991, p. 239.

15 "Abortion's Hardest Cases," *Time,* July 9, 1990, p. 25; Petchesky, *Abortion and Woman's Choice,* pp. 149-151.

16 Cf., "Abortion's Hardest Cases," *Time,* July 9, 1990, p. 22.

17 "Teenage and Pregnant," *Glamour,* March 1991, p. 302; Petchesky, *Abortion and*

more, although it may at first sight seem reasonable to give parents a say in matters affecting their children's health, this argument cannot be a valid one as long as no state has enacted provisions for parental consent when a teenager wishes to carry her pregnancy to term—a condition which is far more dangerous to a young girl than an early abortion.[18]

In the light of both Akron and Thornburg, which declared it unconstitutional to oblige physicians to inform the patient about fetal development, possible negative side-effects of abortion, and alternatives to the procedure, the decision in this year's case of Rust v. Sullivan strikes one as somewhat surprising. In May, the Supreme Court upheld a federal regulation, dating from the days of Ronald Reagan, which prohibits federally funded health clinics from discussing abortion with their clients. Once again, the opinion was handed down by a 5-4 majority, this time with rookie Justice Souter as the decisive vote. Quite apart from the implications of this type of restriction for First Amendment rights to free speech, the target once again seems to be the poor, for whom adequate counselling will no longer be available, unless clinics choose to forgo federal funds. This is hardly feasible, since such a choice would entail the reduction of other services needed by the poor.

The most momentous post-Roe case, however, has been that of Webster v. Reproductive Health Services from 1989. It concerned a Missouri statute which, on the one hand, required doctors to perform a range of (often expensive and possibly dangerous) viability tests on fetuses which they had reason to believe were more than 20 weeks old. On the other hand, it prohibited abortions in any hospital or clinic using state-owned assets. Importantly, the law in question also contained a statement to the effect that a fetus was a human being from the moment of conception. The Supreme Court decided to uphold this law in its entirety. Although it did not accept the Bush administration's invitation to overturn Roe at the same time, many pro-lifers—including Justice Scalia—feel that that is nevertheless the ultimate implication of the Webster decision.[19] Exploiting this weakening of Roe, state legislatures did not hesitate to enact or enforce already existing anti-abortion laws.[20]

Because of its weight, Webster deserves to be examined in greater detail. In relation to that part of the statute which dealt with viability tests, Chief Justice Rehnquist wrote in the majority opinion that in upholding it, the Court was abandoning the rigid trimester structure of Roe which only allowed states to regulate abortion practices in the second trimester in order to preserve the

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Woman's Choice, p. 246. "Abortion's Hardest Cases," *Time*, July 9, 1990, p. 24; Petchesky, *Abortion and Woman's Choice*, Table *6-1*, p. 212.

18 "Abortion's Hardest Cases," *Time*, July 9, 1990, p. 25.

19 Dworkin, "The Future of Abortion," p. 47.

20 Cf. Tribe, *Abortion*, pp. 24-25, 177.

woman's health. Justice O'Connor pointed out at the time, and eminent constitutional scholar Ronald Dworkin concurs, that Rehnquist's statement is legally unjustified, so if Rehnquist nevertheless chose to include it in his opinion "the conclusion is irresistible that he had determined in advance somehow to damage *Roe* v. *Wade* without explicitly overruling it."[21] If this is the case, *Roe's* trimester structure seemed a good place to start, as it has been an oft-criticized aspect of that decision. It implies that because of rapid advances in medical technology, the right to abortion may be drastically reduced if the time of fetal viability can be advanced significantly. It therefore, in Justice O'Connor's words (from her dissenting opinion in *Akron),* puts *Roe* "on a collision course with itself."[22]

The second part of *Webster* has more immediate consequences, because the prohibition on using state-owned assets for abortion purposes should be understood very broadly. Thus, it includes private health clinics performing privately paid abortions, if for instance the clinic happens to be built on land leased from the state. Obviously, if similar laws were to be enforced in a large number of states, the possibility of obtaining a legal abortion would become quite hypothetical for many women. That this can still seen as only an "indirect" restriction on abortion access is amazing. In fact, Ronald Dworkin, in an article written just prior to the *Webster* ruling, refers to the statute as "obviously unconstitutional" and compares it to "a state ... declar[ing] war on its own people because it is angry that the law is on their side."[23]

The third issue that should be addressed in connection with *Webster* is the idea of the fetus as a person. The justification for such a view is essentially not a legal matter. If it is accepted as valid in legal terms, however, it strikes at the very foundation of *Roe*. *Roe* placed the right to abortion in the broader framework of a right to privacy, but once a woman's decision to terminate her pregnancy is seen as involving another person with conflicting interests (since abortion at the current stage of medical technology necessarily entails the death of the fetus), that decision can no longer be considered a private one. Nevertheless, the Supreme Court upheld the Missouri declaration that the fetus was a person from the moment of conception on the grounds that the provision was not designed to restrict abortion access. That may be true in this particular instance, but allowing a declaration so fundamentally incompatible with *Roe* to stand seems like an outright attack on the reasoning upon which *Roe* is based.

From the beginning, several legal scholars have expressed doubts about the validity of the right to privacy laid down in *Roe*. As a matter of fact, Judge

21 Dworkin, "The Future of Abortion," p. 47.

22 As quoted in. Nancy K. Rhoden, "Trimesters and Technology: Revamping Roe vs. Wade," Yale *Law Journal,* Vol. 95, no. 4, 1986, p. 639.

23 "The Great Abortion Case," *New York Review of Books,* June 29, 1989, pp. 53.

Robert Bork's refusal to recognize this and other unenumerated rights as part of the Constitution was the main reason why he failed in 1987 to be appointed to the Supreme Court seat eventually filled by Justice Kennedy. In an article from 1979, another scholar, Donald H. Regan, suggests that a possible "rewriting" of *Roe*, which not only does away with the tenuous right to privacy, but manages to accommodate the view of the fetus as a person.[24]

Regan's article is based on a rather brilliant essay by philosopher Judith Jarvis Thomson, who argues that abortion can be seen alternatively as self-defense, or as the failure to be a "good Samaritan."[25] She establishes an analogy between the involuntarily pregnant woman and a person who during his sleep has been hooked up to a famous, but unconscious, violinist who needs his body for life support. Now, despite society's interest in keeping this gifted artist alive, no one would presumably argue that the other person had no right to detach himself. The distinction between whether he was acting in self-defense, or simply being a "bad Samaritan," would depend partly on the danger to himself, and partly on the length of time he would have had to stay attached to the violinist.

Around this idea, Regan constructs a legal argument based on the fact that the United States has never had any laws requiring an individual to come to the aid of another person, even if the latter's life is in danger. At most, such a principle of "good Samaritanism" (however desirable it may otherwise appear from a purely ethical point of view) is legally applicable only if the individual whose aid is required has voluntarily entered into a sort of "contract" with the other. This may be the case of, for instance, an inn-keeper, if one of his guests has an accident on the premises, or of parents, who are expected to provide for their children. However, a woman wishing to abort her fetus cannot logically be said to have undertaken a voluntary responsibility. Because, if she had, she would presumably not be seeking an abortion.

Thus, Regan argues, prohibiting abortion would place such a woman in a state of "involuntary servitude," which is unlawful under the Thirteenth Amendment. Moreover, given the extraordinary physical imposition inherent in carrying a pregnancy to term, abortion restrictions could also be considered counter to the Eighth Amendment, which precludes the infliction of "cruel or unusual [i.e. corporal] punishment."

Despite the fact that *Roe* is not formulated along these lines, Regan's argument shows that it is possible to make a convincing case for abortion as a constitutionally guaranteed right, even if the fetus is regarded as a person. This is

24 Donald. H. Regan, "Rewriting *Roe* vs. *Wade*," *Michigan Law Review*," Vol. 77, no. 7, 1979, pp. 1569-1646.

25 Judith J. Thomson, "A Defense of Abortion," *Philosophy and Public Affairs*, Vol. 1, no. 1, 1971, pp. 47-66.

important because, along with the gradual chipping away at *Roe*, there has in recent years emerged a phenomenon known as "fetal rights," which seems to trade on the assumption that a fetus is, indeed, a person in its own right, *and* one who is temporarily and innocently confined to another's body, at that.

As late as 1989, Ronald Dworkin still took for granted that

> Even if the fetus is a human being, it is in a unique situation politically as well as biologically for a reason that could properly be thought *sufficient to deny it constitutional status.* The state can take action that affects it, in order to protect or advance its interests, only through its mother, and only through means that would necessarily restrict her freedom in ways *no man or other woman's freedom could constitutionally be limited,* by dictating her diet and other personal and intimate behavior, for example.[26]

Since then, the media have increasingly focused attention on cases where women have been prosecuted for what might be termed "prenatal child abuse," including in particular the delivery of drugs to the unborn (via the umbilical cord). Such charges have been brought in at least 17 states.[27]

Many of the cases involve women addicted to drugs or alcohol whose babies have suffered sometimes severe damage as a result. While we can certainly all deplore estimates to the effect that "each year as many as 375,000 newborns in the U.S. could suffer harm from their mother's prenatal abuse of illegal drugs," post-festum incarceration of the mother hardly seems to be the answer.[28] Especially since a New York study showed that 54% of drug treatment clinics in the City refused to accept pregnant women. The figure rose to 87%, if the woman was addicted to crack.[29]

But substance abuse is not the only instance where fetal rights have been cited: A forced cesarean was performed on a young woman who was seriously ill with cancer, resulting in her death and that of her child. Another woman who failed to follow her doctor's advice relative to a problematical pregnancy was charged with a criminal misdemeanor when she gave birth to a brain-damaged baby, who later died.[30] In view of that fact that women are now dragged into court because their fetuses have been injured or killed in automobile accidents, it is not unlikely that we may soon see women indicted for having smoked cigarettes or drunk wine with meals while pregnant.[31]

"Fetal protection policies" arguably belong in this context as well. These are best known from the case of UAW v. *Johnson Controls,* which came before

26 "The Great Abortion Case," p. 50; my italics.

27 "Here Come the Pregnancy Police," *Glamour,* Aug. 1990, pp. 204.

28 "Do the Unborn Have Rights?" *Time,* Special issue, Fall 1990, pp. 22-23.

29 "Here Come the Pregnancy Police," *Glamour,* Aug. 1990, p. 265.

30 *Ibid.,* p. 203; "A New Assault on Feminism," *The Nation,* March 26, 1990, p. 409.

31 "Here Come the Pregnancy Police," *Glamour,* Aug. 1990, pp. 203,266; Tribe, *Abortion and Woman's Choice,* p. 235.

the Supreme Court in the spring term of 1991. The Court unanimously struck down the rights of certain industries (in casu, a battery manufacturer, but several other companies had instituted similar rules) to bar all fertile women from jobs which might expose them to toxic substances. It should be emphasized, however, that four of the nine Justices wrote minority opinions to the effect that excluding fertile women from hazardous jobs might be justified in certain circumstances. This means that, Justice Marshall being gone, so is the majority who felt that such policies could never be constitutional.[32]

The official rationale behind the policies was the desire to avoid law suits, should any female employee give birth to a less than perfectly healthy infant. What made them suspect, however, was first, that the substances in question may also be detrimental to male fertility; secondly, that jobs were being withheld even from women with no desire to procreate; and, thirdly, that no attempts were made to improve the safety of the work environment.

Feminist observers noted at the time that the consequence of upholding fetal protection policies would be to deny women access to a very large number of well-paid jobs in traditionally male industries. This should be seen in a social context of high unemployment, where the median wage of men has decreased by 19% in real terms between 1973 and 1987. Moreover, the percentage of young women entering the job market during the next decade is predicted to be more than fifty percent higher than that of men. In this light, President Bush's pro-life stance as well as his vetoing the Boxer Amendment, no longer seem inconsistent with the veto he put on the Family and Medical Leave Act of 1990 (which would have mandated *unpaid* maternity leave for employees of medium-sized and large companies), or with his refusal to establish national standards of child care.

In any case, the concept of fetal rights not only presupposes that the fetus is a person, but also that its interests take precedent over those of its mother. In order for this to make sense, the fetus must be seen as fundamentally innocent, and the mother as selfish and irresponsible. Hence, as K. Pollitt observes,

> as the "rights" of the fetus grow and respect for the capacities and rights of women declines, it becomes harder and harder to explain why drug addiction is a crime if it produces an addicted baby, but not if it produces a miscarriage, and *why a woman can choose abortion, but not vodka.* And that is just what the pro-lifers want.[33]

If the pro-life movement can succeed in linking abortion to fetal rights in the public mind, they will be able to exploit two facts: On the one hand, surveys show that most Americans are ambivalent about abortion—they feel it is somehow morally wrong, yet do not want to outlaw it. On the other hand, they are

32 "Members Gratified by Decision on 'Fetal Protection' Law," *Congressional Quaterly,* March 23, 1991, p. 749.

33 "A New Assault on Feminism," *The Nation,* March *26,* 1990, p. 414; my italics.

quite willing to assert a woman's responsibility towards a fetus she has elected to keep.[34] As the idea of the fetus' personhood is reinforced, the discomfort which most people experience at the thought of annihilating a potential human life may well come to weigh more heavily in the scales than their belief in women's right to control their own bodies.

Even if abortion should eventually be outlawed anew, it will not disappear as a social fact. The estimated number of illegal abortions performed before 1973 is sufficient proof of that. While pro-lifers claim that they are working to save lives, it is likely that they are in reality doing quite the opposite: overturning ***Roe*** would simply force those women not fortunate enough to be able to afford convenient overseas voyages to go back to being butchered by quacks, risking permanent infertility or even death.

One last, but important aspect of the abortion debate concerns its impact on American political life as a whole. It is a +ell-known fact that elections in the United States are increasingly dominated by single issues, rather than coherent ideologies. Abortion is perhaps the most salient single issue of all (although the war on drugs and street crime are close contenders at the moment). Quite possibly, this poses a real threat to democracy. As Ronald Dworkin puts it, "ordinary voters are in a worse, not better, position to express their convictions and preferences across the range of political issues when politicians are forced to treat one issue as the only one that counts"[35]

Until 1989, it was primarily pro-life supporters who consistently voted for sympathetic candidates, but since Webster, the pro-choice side would seem finally to have come out of hibernation.[36] The new involvement means that women are now being forced to spend time and energy fighting for something which has long been recognized as a fundamental liberty.[37] The consequence may be to frustrate the political energy of women who feel forced to vote for pro-choice candidates with whose policies they may not otherwise agree. Another possibility is, however, that women who see their established rights undermined may stimulate a major realignment of American party politics.

34 Cf., Dworkin, "The Great Abortion Case," p. 49.
35 "Future of Abortion," p. 51.
36 Tribe, Abortion, p. 179.
37 **Ibid.,** p. 194-195.