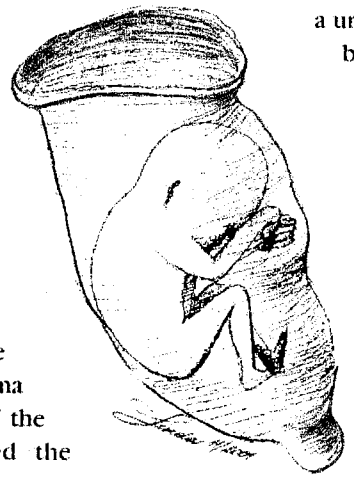
Abortion Law in the United States

State Interest and the Right of Privacy

Linda Krákorová

A single woman from Texas finds herself pregnant. A joyful event for most, an unpleasant surprise for others. Having a child was nothing the woman desired at that time and it seemed there was no remedy available to her. What she wanted was to be allowed freely to decide whether or not to obtain an abortion. Unfortunately for her, this freedom of choice was something the state in which she lived sought to limit. The woman decided to fight for the rights she believed to have and brought her case to court. Her name was Norma McCorvey but it was her legal name that has become renowned: as "Jane Roe." Norma McCorvey challenged the constitutionality of the Texas criminal abortion laws and marked the American legal history in the area of abortion law.



US Abortion Law as Time Goes by

The abortion law existed, at first, as a part of the common law inherited from England. Abortion after *quickening*[1] (about 15-18 weeks) was a crime under English common law and it was punished severely. Its legal qualification slightly varied in different times. Early common law regarded abortion as felony – a hanging offense and the "Father of common law," Henry Bracton,[2] held that abortion was homicide. Its successors, Coke and Blackstone, were not so convinced of abortion's nature as a murder, but they thought abortion after quickening was a crime of its own – a *grave misprission*. Although after-quickening abortion was strictly criminalized, it remains unclear, whether pre-quickening abortion was criminalized as well. In 1803, England introduced a statutory abortion scheme in the **Miscarriage of Woman Act**[3] and thus rooted abortion criminalization in a statutory law.

In the early 1820's American states began the codification of the common law inherited from England including abortion law, then a part of criminal law. The legal regulation of abortion was not dealt with on a federal level by any statute valid for and enforceable in all the states. Every state approached it in its own way, though they would all, to a lesser or greater degree, follow the English pattern when dealing with abortion.

The first state to pass a specific abortion law was Connecticut in 1821, followed by New York in 1828. The rest of the states followed and the codification process did not cease until the 1850's. Although the laws criminalized abortion from the very beginning, the regulation became even more rigid in 1860 when England established a uniform abortion prohibition and was followed by a major part of the United States. Such was the existing state until the second half of the 20th century. Abortion was prohibited with health exceptions, i.e. an abortion in respect to preserve the mother's life. It was not until the 1960's and the 1970's that rape, incest and some further health exceptions were included and the tight abortion regulation relaxed. Still, the fundamental upheaval was yet to come.

The call for democracy and liberalisation in this area brought radical changes to state laws. Cases appearing before courts called for the limitation of the state interference with individual constitutional rights. The concept of abortion law suddenly acquired an entirely new dimension. The abortion laws passed until now independently by every state, began to be challenged on the grounds of their alleged lack of compliance with the **U.S. Constitution.** The question being whether the choice to have an abortion is a woman's exclusive right as guaranteed by the **Constitution** or whether it lacks any constitutional backing and is, therefore, at the mercy of state legislatures.

Cases eventually reached the U.S. Supreme Court, the legal opinions of which are binding upon all the courts of the country. The issue of abortion became a matter of federal importance and interest. Numerous Supreme Court decisions rendered void the laws previously valid in various states. The Court created yet another body of abortion law and it began to dominate the subject. Those cases which reached the Supreme Court and were successful, narrowed the area in which the state legislatures were allowed to regulate abortion in any way and the state legislatures found themselves with their hands tied.

What the cases tried to prove was that abortion was, in fact, a constitutional right. The year 1973 brought a genuine revolution in the U.S. abortion law. This was when *Roe v. Wade* came before the courts and a woman's choice to seek abortion was declared part of the constitutional *right of privacy*. Two more cases of comparable importance were yet to come. *Webster* (1989) and *Planned Parenthood v. Casey* (1992) slightly departed from *Roe* but were careful not to overrule it.

The latter two enabled the states legislatures to regulate abortion more freely, expanding the tiny room left after *Roe*.

Abortion Case Law/Cases in Action

The abortion cases tend to follow the same pattern: a pregnant woman seeking abortion, obstetricians or an organization defending the woman's rights sue their state claiming that its abortion laws are unconstitutional in that they violate or oppose a right contained in any of the constitutional amendments. There were many cases before and after *Roe*. In all the cases significant aspects of the state abortion laws were pointed to.

In *Poe v. Ullman* (1961)[4] the Supreme Court dismissed the challenge to a Connecticut criminal statute prohibiting the use and counselling regarding the use of contraceptives. In *Griswold v. Connecticut* (1965)[5] a Connecticut law banning distribution, use, etc., of contraceptives was voided. The court developed the *penumbra* (shadow) *doctrine* which claimed that there are more constitutional rights than those enumerated in the **Constitution** and that if one seeks, he may find another constitutional right between the gaps. Eight years later, the court in *Roe* premised their decision on similar grounds and subsumed the right to abortion into the *right of privacy*.

United States v. Vuitch (1971)[6] was one of the cases where the claimants attacked the *health exceptions*, a term used frequently in abortion laws, for being too vague. Although the claimants shielded themselves with the **Fourteenth Amendment** to the **Constitution** and the concept of *due process*, they had no success. The case did not consider any privacy claims, as *Roe* later would. *Eisenstadt v. Baird* (1972)[7] put an end to a Massachusetts statute prohibiting the distribution of contraceptives by anyone other than doctors and pharmacists to married persons. The court argued that such law violates the *equal protection* clause by discriminating against unmarried people. It is now 1973 and *Roe v. Wade*[8] comes to dominate the scene.

Roe v. Wade in Action

Ms. Roe believed that Texas criminal abortion laws violated one of her constitutional rights. In her view, it was the due *process* clause of the **Fourteenth Amendment**. This Amendment guaranteed all citizens' rights to privacy against any state interference. The majority of judges agreed with her reasoning. *Roe v. Wade* (1973) was the first case to subsume the woman's right to terminate her pregnancy into the *right of privacy* and thus to declare the right to abortion a constitutional right. Nevertheless, the state was not deprived entirely of the possibility of protecting its interests, i.e. the woman's health and the potentiality of human life. The judges in *Roe* developed a trimester framework which favours the individual right or the state's legitimate interest according to the stage the pregnancy has reached. Before the end of the first trimester, the only individual able to prevent the abortion is the woman's physician, the state has no power to regulate abortion at this stage whatsoever. After the first trimester, the state may intervene to protect the mother's health. Finally, in stages subsequent to *viability* (the child would be able to live outside the mot-

her's womb) "the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgement, for the preservation of the life or health of the mother."[9]

Roe proved its colossal impact when abortion laws of nearly every state were voided by the decision. It was then, that abortion law experienced an important shift as to its sources.

Roe Overruled?

Roe has continued to be hailed the seminal case in the U.S. abortion law due in large part to the consequences the decision brought. Until today, important decisions appear before the courts that constantly change the concept. *Doe v. Bolton* (1973)[10] strikes down those parts of Georgia statute, which dealt with health, rape and incest exceptions. The judges held, that a woman has a constitutional right to abortion from six months to birth, if her doctor finds it necessary for her physical or mental health. *Planned Parenthood of Central Missouri v. Danforth* (1976).[11]

The first sharp departure from *Roe* came with *Webster v. Reproductive Health Services* (1989).[12] The court held that the trimester framework ought to be discarded, because the state has a compelling interest in fetal life throughout pregnancy. Although the judges did not follow *Roe*, nor did they overrule it. A similar situation comes about in 1992. *Planned Parenthood v. Casey* (1992)[13] was careful not to overturn *Roe*, still here we see *Roe* the closest in its history to being overruled.

In 1982 the **Pennsylvania Abortion Control Act** was to take effect. Before it actually did so, five abortion clinics, a physician and a class of doctors who provided abortion services, brought a suit with the object of having certain parts of the act declared unconstitutional. There were five provisions, which, in the petitioners' view, burdened a woman seeking abortion with too great a duty to provide information, and were, therefore, unconstitutional. The challenged provisions required that a woman seeking an abortion give her informed consent prior to t he procedure and that she be provided with certain information at least 24 hours before the abortion is performed; another provision mandates the informed consent of one parent for a minor to obtain an abortion; the third demands that a married woman seeking an abortion must notify her husband; the fourth defines „medical emergency" so as to excuse compliance with the foregoing requirements; and other provisions impose certain reporting demands on facilities providing abortion services.

The judges in this case justified the claimants' opinion in one aspect only - no husband's consent to his wife's abortion may be required. Such demand was held unconstitutional. Judges applied the so-called *undue burden standard*, which would consider providing such information an excessive obstacle for a woman seeking abortion. Where the judges departed from *Roe* was in refusing to retain the trimester framework. They considered it much too rigid and preferred a somewhat more vague borderline between the relevant stages whilst protecting the woman's choice of having the abortion prior to viability. "Overruling *Roe's* central holding would not only reach an unjustifiable result under *stare decisis* principles, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law."[14]

The U.S. Abortion Law 2001

The majority opinion in *Webster* suggested that "a woman's interest in having an abortion is a form of liberty protected by the *due process* clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest."[15] *Roe*, together with *Doe* and *Casey*, significantly narrowed the sphere of action of the state with respect to abortion laws. Until today, almost every state does have some sort of abortion regulation. Some of the states have even never replaced, now unenforceable, general abortion bans, voided by *Roe* or the requirement of spousal consent or notice struck down by *Casey*. Today's abortion laws usually concentrate on post-viability bans, partial-birth abortion bans, informed consent, licensed physician requirement, etc.

The Apple of Discord

The abortion issue has always been an utterly controversial one. On one side, there is the constitutional right the woman believes to have in respect to abortion, clashing with the laws of individual states, that have been an attempt to regulate the problem. It is obvious that the abortion controversiality lies in its, let us call it, emotionality. What ones regard as homicide depriving a potential life of the chance to be born, others view as the mother's chance to right her mistake and have a child when the time is right for her, as for her - now impatiently awaited - offspring. In this article, however, the question, points elsewhere.

The adversaries try to find backing for their arguments in law. While anti-abortion opinion used to correspond with the content and aim of state laws, abortion advocates went further. They sought protection against the state laws in the **Constitution,** a set of legal rules sacred to and worshipped by American citizens, as well as, looked up to by admirers of democratic establishments, as the highest guarantee of one's liberties and a huge milestone in the development of American democracy. The struggle continues. Is the mother the one who always gets the best for her child? Has the state the right to decide whether she has this power or not? If the state does not fight for the child, who will then? But what right does it have to interfere with the mother's personal life? Where does her personal life end and give its way to the state's interest?

The apple of discord was succinctly illustrated in 1972

when Justice Brennan, Jr. delivered his opinion in the *Eisenstadt* case,[16] "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." If Ms. Roe achieves the performance of these words, her mission will have been successful.

1 The first motion of the fetus in the womb felt by the mother, occurring usually about the middle of the term of pregnancy.
2 (1216-1272).
3 Lord Ellenborough's Act, 43 Geo. 3, c.58.
4 367 U.S. 497.
5 381 U.S. 470.
6 402 U.S. 62.
7 405 U.S. 438.
8 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147.
9 *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), pp. 163-165.
10 410 U.S. 179.
11 428 U.S. 52.
12 492 U.S. 490.
13 505 U.S. 833.
14 *Planned Parenthood v. Casey*, No. 91-744, Justice O'Connor, Justice Kennedy and Justice Souter delivering opinion, pp. 864-869.
15 supra, p. 966.
16 *Eisenstadt* at 453.

Linda Krákorová is a fourth-year student at the Charles University Law Faculty in Prague. She is a member of the Editorial Board of the Common Law Review.

Separate but Equal?

The United States Supreme Court's Approach to Racial Segregation in the 20th Century

Michal Bobek

....All men are created equal[1]

...Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[2]

Introduction

Despite the relatively plain meaning of the **Fourteenth Amendment** to the **U.S. Constitution** (1868), the reality of equality in the United States has been a far cry from the spirit underlying this strong language. Following the Civil War and the reconstruction period in the United States, a new spirit of equality swept the nation. New laws were passed that explicitly protected the political and civil rights of the black community. Nevertheless, along with these changes came the return of "white man's government" in the South. As a result, new ways were discovered to circumvent the constitutional requirement of equality.

From today's point of view, the situation in the South was anything but pleasant at the end of the 19th century. Every attempt was made to "keep the Negro in his place."[3] Social discrimination and intimidation were constant. Blacks were expected to move off the sidewalk to make room for whites. They were to address whites with great respect while blacks were called by their first names. They were excluded from higher education. By laws created and enforced by the state, blacks had to use separate parks, waiting rooms and coaches. The intermarriage of whites and blacks was prohibited while a black man who even looked at a white woman ran the risk of hanging or castration. Similar laws in all Southern States created a system of racial segregation under which blacks and whites were required to use separate public facilities. Blacks were indeed, as argued by Cox, "condemned to social, political, and economical inequality from the cradle to their segregated graves."[4]

The aim of this essay is to demonstrate the active and sometimes ambiguous role the United States Supreme Court played in (de)segregation of the public space in the 20th century. We will follow the Court through its judgments on its bumpy road from the firm confirmation and acceptance of segregation in *Plessy v. Fergusson*,[5] the reversal of its previous ruling in *Brown v. Board of Education*,[6] and finally, the approval of the *Affirmative Action* in *University of California v. Bakke*.[7] How did such an unadulterated u-turn over an eighty year period come about?

Mr. Plessy & Equality?

In accordance with local custom, the State of Louisiana enacted a statute in 1890 requiring railroads to provide "equal but separate accommodation for the white and colored races."[8] In fact, this law really only forbad blacks from entering 'white' cars since (understandably) no case has ever been reported where a white man desired to enter a 'black' coach. The controversy arose when Mr. Plessy, allegedly seven-eighth Caucasian and one-eighth African, attempted to use a coach