"Is Abortion Legal Through All Nine Months for Any Reason?"

The Supreme Court has made it virtually impossible to limit abortion by law.

Stephen Wagner

Perspective

Many college students I've observed during JFA outreaches are incredulous when pro-lifers claim abortion is legal through all nine months. Usually the pro-life advocate simply asserts that abortion is legal, and does so repeatedly. This tactic is unfortunate. It doesn't help the student see *why* the pro-lifer believes abortion is legal for all nine months of pregnancy. In most cases, a simple *explanation* of how *Roe v. Wade* actually restricted states with respect to abortion is all that is needed.

Talking Points

- *Roe v. Wade* (1973) divided pregnancy into trimesters (periods of about 13 weeks).
- First trimester: *Roe v. Wade* said that states could not restrict abortion in any way.
- Second trimester: *Roe v. Wade* said states could restrict how abortions are done (licensed medical facility, licensed physician) but that restrictions can't place an undue burden on the woman's private choice to have an abortion.
- Third trimester: *Roe v. Wade* said that states could restrict abortion, but that any restriction must be accompanied by an exception for the health of the mother.
- *Doe v. Bolton* (1973), *Roe v. Wade*'s companion case, defined health so broadly that any woman seeking an abortion for any reason would fall under the definition (e.g. emotional, psychological, and familial factors are listed as health considerations).

Explanation

In *Roe v. Wade*, the Supreme Court struck down a Texas statute that prohibited abortion. In the decision, the Supreme Court said states may not prohibit abortion in any way in the first trimester, that they may only regulate abortion in the second trimester for the purpose of protecting *maternal* health, and that in the third trimester, the state may "regulate, and even proscribe, abortion" except when it is necessary to protect the life *and health* of the mother. That last phrase is the most important phrase, however, because the Court defined *health* in *Doe v. Bolton* (*Roe*'s companion case) to include "all factors - physical, emotional, psychological, familial, and the woman's age - relevant to the wellbeing of the patient." Chief Justice Burger added that the definition of health used must be "in its broadest medical context."

The end result is that virtually any reason given for abortion can be construed as a health risk to the mother and therefore abortion in the third trimester is easily justified in practice. In so many words, the court decided that states could not prohibit abortion in any significant way up until the moment of birth. Not only is this the opinion of many legal scholars (references available on request) but is the fact of the matter in America today. *Casey v. Planned Parenthood* (1992) reaffirmed the basic holding of *Roe v. Wade*, although it grounded the abortion right differently and focused on pre- and post-viability rather than trimesters. Under these decisions, laws that actually restrict women from having abortions can't withstand judicial scrutiny. One proof that abortion is legal in the third tirimester is this: Some abortion providers, like Dr. Hern in Boulder, Colorado, advertise third-trimester abortions for fetal abnormalities and other reasons. Dr. Hern's website (www.drhern.com) lists his late-term abortion services: "Outpatient elective abortion through 26 weeks from the last menstrual period" and "Medically indicated termination of pregnancy up to 36 weeks from last menstrual period (including fetal anomalies, genetic disorder, fetal demise, or severe medical problems)." **See *"Is Abortion Legal?" – Supreme Court Documents* for helpful evidence from the Supreme Court cases discussed above.**

"Is Abortion Legal?" – Supreme Court Documents

Source Material for the Article "Is Abortion Legal through All Nine Months for Any Reason?"

Note: In this article, I've excerpted passages from Roe v. Wade *(1973) and* Doe v. Bolton *(1973), and* Casey v. Planned Parenthood *(1992). I've placed some of the portions relevant to this discussion in bold text. – Stephen Wagner*

Source 1: Section XI of Roe v. Wade

(http://laws.findlaw.com/us/410/113.html)

"To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

   (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

   (b) For the stage subsequent to approximately the end of the first trimester, **the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure** in ways that are reasonably related to maternal health.

   (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life [410 U.S. 113, 165] may, if it chooses, regulate, and even proscribe, abortion **except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.**

2. The State may define the term "physician," as it has been employed in the preceding paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.

   In Doe v. Bolton, post, p. 179, procedural requirements contained in one of the modern abortion statutes are considered. That opinion and this one, of course, are to be read together."

Source 2: Section IV of Doe v. Bolton

(http://laws.findlaw.com/us/410/179.html)

"The vagueness argument is set at rest by the decision in United States v. Vuitch, 402 U.S. 62, 71 -72 (1971), where the issue was raised with respect to a District of Columbia statute making abortions criminal "unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine." **That statute has been construed to bear upon psychological as [410 U.S. 179, 192] well as physical well-being. This being so, the Court concluded that the term "health" presented no problem of vagueness.** "Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered." Id., at 72. This conclusion is equally applicable here. Whether, in the words of the Georgia statute, "an abortion is necessary" is a professional judgment that the Georgia physician will be called upon to make routinely.

We agree with the District Court, 319 F. Supp., at 1058, **that the medical judgment may be exercised in the light of all factors - physical, emotional, psychological, familial, and the woman's age - relevant to the wellbeing of the patient. All these factors may relate to health.** This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman."

Source 3: Section IV of Doe v. Bolton
(http://laws.findlaw.com/us/410/179.html)

"MR. CHIEF JUSTICE BURGER, concurring

I agree that, under the Fourteenth Amendment to the Constitution, the abortion statutes of Georgia and Texas impermissibly limit the performance of abortions necessary to protect the health of pregnant women, **using [410 U.S. 179, 208] the term health in its broadest medical context.** See United States v. Vuitch, 402 U.S. 62, 71 -72 (1971). I am somewhat troubled that the Court has taken notice of various scientific and medical data in reaching its conclusion; however, I do not believe that the Court has exceeded the scope of judicial notice accepted in other contexts."

Source 4: Section I of Casey v. Planned Parenthood
(http://laws.findlaw.com/us/505/833.html)

"It must be stated at the outset and with clarity that Roe's essential holding, the holding we reaffirm, has three parts. **First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State.** Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability **if the law contains exceptions for pregnancies which endanger the woman's life or health.** And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each."

Source 5: Section II of Casey v. Planned Parenthood
(http://laws.findlaw.com/us/505/833.html)

(Also known as "The Mystery Passage.")

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. **At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.** [505 U.S. 833, 852]

