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Abortion: Roe v. Wade and the Montana Dilemma

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INTRODUCTION

On January 22, 1973, the United States Supreme Court decided Roe v. Wade, holding Texas's criminal abortion statutes unconstitutional in their entirety. In May, 1973, Montana's criminal abortion statutes were likewise struck down, leaving Montana with no criminal sanctions against abortion. This note will discuss the implications of Roe v. Wade, the current abortion situation in Montana, and the possibilities for legislative action.

ABORTION AND THE SUPREME COURT

Texas, like Montana and most other states, has for many years prohibited abortion except to save the life of the pregnant woman. Plaintiff Jane Roe, unmarried and pregnant, was unable to obtain a "legal" abortion in Texas, because her life was not endangered. Asking for a declaratory judgment that the Texas abortion statutes were unconstitutional on their face, she attacked the statutes on the grounds that they were unconstitutionally vague, and that they violated her right to personal privacy.

A three-judge federal district court ruled that the "fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment," and that the Texas statutes were void because they were

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3Revised Codes of Montana, § 66-1041 (1947) (hereinafter cited as R.C.M. 1947) provides penalties for practicing medicine without a license, however. For other relevant existing statutes, see Section A, No Specific Abortion Legislation, infra.
4Roe v. Wade, supra note 1 at 709. Texas Revised Statutes, Arts. 1191-1194 and 1196, enacted in original form in 1854; R.C.M. 1947, §§ 94-401 and 94-402, enacted in original form in 1864. The Court footnotes twenty other state statutes similar to Texas's, including R.C.M. 1947, § 94-401. The Court also points out that until after the war between the states, common law governed abortion in most states, id. at 720, and that abortion was not a common law crime before quickening (the point when the mother feels the fetus move), and possibly even after. Id. at 717-18.
5"Jane Roe" is a pseudonym. Dr. James Hubert Hallford, a licensed physician, was granted status as plaintiff-intervenor, in his own right and for his married and single patients. John and Mary Doe (pseudonyms for a married couple) filed a companion complaint, alleging that though Mary Doe was not pregnant, a possible pregnancy might endanger her health, according to her physician's judgment.
6She also asked for an injunction against the defendant, Dallas County Attorney, to prevent him from enforcing the statutes.
8Id. at 1225.
unconstitutionally vague and an overbroad infringement of personal privacy rights protected by the Ninth Amendment.⁹

On appeal,¹⁰ the Supreme Court, in a seven to two decision with the majority opinion written by Mr. Justice Blackmun,¹¹ held the Texas statutes in violation of the Due Process Clause of the Fourteenth Amendment.¹² Addressing itself to the issue of personal privacy, the Court said, "A right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."¹³ This right, or the roots of it, have been found in the First, Fifth, Ninth, and Fourteenth Amendments, and in the "penumbras of the Bill of Rights."¹⁴ It includes "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,'"¹⁵ and it applies to some extent to marriage, procreation, contraception, family relationships, and child rearing and education.¹⁶ As to abortion, the Court held:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."¹⁷

In finding the right of privacy broad enough to include the abortion decision, however, the Court specifically rejected the contention that a woman has an absolute right to "terminate her pregnancy at whatever time, in whatever way, and for whatever reasons she alone chooses."¹⁸

⁹Id.
¹⁰The district court's declaratory judgment applied to both Roe and Hallford, and both appealed from refusal of their request for an injunction against defendant. Because Dr. Hallford was currently under indictment for performing abortions under the challenged statutes, the Court denied him declaratory relief, remitting him to his defenses in the pending criminal prosecution.
¹¹The Does appealed from the district court holding that they lacked standing to sue and did not present a current controversy.
¹²The defendant filed cross appeals from the grant of declaratory relief to Roe and Hallford. Both sides took protective appeals to the United States Circuit Court of Appeals for the Fifth Circuit, which were held in abeyance pending Supreme Court decision.
¹³Justices White and Rehnquist dissenting.
¹⁴Roe v. Wade, supra note 1 at 732-33.
¹⁵Id. at 726. Though the right to privacy is not explicitly mentioned in the Constitution, compare the 1972 Montana Constitution, Art. II, § 10, Right of Privacy. "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."
¹⁶Id.
¹⁷Id.
¹⁹Id. at 727.
²⁰Id. Some amici argued that "one has an unlimited right to do with one's body as one pleases." To this the Court answered: "It is not clear to us that the claim . . . bears a close relationship to the right of privacy previously articulated in the Court's decisions."
Though her right is "fundamental,"\(^{10}\) and is therefore subject to state
regulation only where the state can show a "compelling interest,"\(^{20}\) the
state does have two interests which become increasingly "compelling"
as the pregnancy progresses. These are the state's interest in protecting
maternal health,\(^{21}\) and in preserving potential human life.\(^{22}\)

Neither of these interests is "compelling" through the entire preg-
nancy, however, and the Court set out guidelines to show at what point
each may influence or override the right to privacy. Given the statistical
safety of first trimester abortion,\(^{23}\) as compared with childbirth,\(^{24}\) the
state's interest in preserving maternal health becomes "compelling" only
in the second trimester. Thus:

(a) For the stage prior to approximately the end of the first tri-
mester, the abortion decision and its effectuation must be left to the
medical judgment of the pregnant woman's attending physician.\(^{25}\)
(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.\(^{26}\)

The interest in preserving potential human life matures with the
development of the fetus, becoming "compelling" only when the fetus
is capable of independent life outside the uterus:\(^{27}\)

(c) For the stage subsequent to viability, the State, in promoting
its interest in the potentiality of human life, may, if it chooses,
regulate, and even proscribe, abortion except where it is necessary,
in appropriate medical judgment, for the preservation of the life
and health of the mother.\(^{28}\)

In regard to the rights of the unborn, the Court first concluded
that "the word 'person,' as used in the Fourteenth Amendment, does not

\(^{10}\) Id. at 728.
\(^{20}\) Id. "Where certain 'fundamental rights' are involved, the Court has held that regu-
lation limiting these rights may be justified only by a 'compelling state interest'
[footnotes omitted], and that legislative enactments must be narrowly drawn to ex-
press only the legitimate state interests at stake."'\(^{21}\)
\(^{20}\) Id. at 731.
\(^{22}\) Id.
\(^{23}\) 'Trimester' is approximately three months of pregnancy.
\(^{24}\) Id. at 724.
\(^{25}\) Id. at 732. At this stage then, the state may regulate only through its general li-
censing provisions for physicians, and other provisions generally regulating the prac-
tice of medicine, including penalties for practicing medicine without a license.
\(^{26}\) Id. Applying this to pregnancy: "Examples of permissible state regulation
in this area are requirements as to the qualifications of the person who is to perform
the abortion; as to the licensure of that person; as to the facility in which the abor-
tion is to be performed, that is, whether it must be a hospital or may be a clinic or
some other place of less-than-hospital status; as to the licensing of the facility; and
the like." Note that these provisions do not apply to the first trimester of preg-
nancy. See discussion supra note 25.
\(^{27}\) Viability' is the term for the point at which the fetus is capable of sustaining
independent life outside the uterus. 'Viability is usually placed at about seven
months (28 weeks) but may occur earlier, even at 24 weeks.' Roe v. Wade, supra note
1 at 730.
\(^{28}\) Id. at 739. It should be noted that in United States v. Vuitch, 402 U.S. 62, 71-72
(1971), the Court construed 'health' to include 'psychological' as well as 'physi-
cal' health.
include the unborn." The Court then declined to "resolve the difficult question of when life begins," in light of the lack of consensus in medicine, philosophy, and theology. Noting that the law has been hesitant to accord legal rights to the unborn "except in narrowly defined situations and except when the rights are contingent upon live birth," the Court summarized, "In short, the unborn have never been recognized in the law as persons in the whole sense."

The Court did not reach questions concerning the constitutionality of statutes protecting rights of fathers, for instance by requiring written consent for abortion by the husband of a married minor, because such issues were not before the Court.

Applicable to the entire pregnancy, the state may "define the term 'physician' . . . to mean only a physician currently licensed by the State, and may proscribe abortion by a person who is not a physician so defined." Further, up to the point in pregnancy where compelling state

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²²Roe v. Wade, supra note 1 at 279. The Court observed that the Constitution does not define "person," and then examines the use of the word in various parts of the Constitution, concluding: "[I]n nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application." See also, Doe v. Israel, 358 F. Supp. 1193 (D. R.I. 1973), voiding a state statute attempting to establish a "conclusive presumption" that life begins at conception and that at the moment of conception the fetus is a person with Fourteenth Amendment rights.

²³Roe v. Wade, supra note 1 at 730.

²⁴Id. at 730-31.

²⁵Id. at 731. This analysis of the "personhood" of the fetus has been roundly criticized by a number of commentators. For criticism by a commentator who finds Roe v. Wade "bad constitutional law" without being personally opposed to its result, see Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L. J. 920, 923-26 (1973).

²⁶Roe v. Wade, supra note 1 at 733, n. 67. It is difficult to see how the Court would uphold any statutory provisions requiring consent of a married woman's husband, or consent of the putative father for an unmarried woman, in view of the Court's clear holding that the abortion decision is to be made between the woman and her physician free from state interference in the first trimester, and delineating permissible state regulation, only in ways reasonably related to the woman's health, in the second trimester. In the last trimester, abortion may be totally proscribed except where necessary to save the woman's life or health, see discussion supra note 28, and it is equally difficult to see how under those circumstances a husband's or father's consent could be required without direct violation of a woman's Fourteenth Amendment Due Process rights.

See Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973), holding that the putative father is not a necessary party to a woman's and physician's suit attacking a private hospital's regulations prohibiting abortions, and quoting Justice Stewart's concurring opinion in Roe v. Wade, supra, note 1 at 735. "Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment [citations omitted]. As recently as last term . . . we recognized 'the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" Roe v. Wade, supra note 1 at 735.

See also Jones v. Smith, 278 So.2d 339 (Fla. 1973) holding that a putative father has no "right" to enjoin a pregnant natural mother from terminating her pregnancy.

In Roe v. Wade, supra note 1, the Court also did not specifically rule on statutes requiring compulsory psychiatric or other counseling as a prerequisite to abortion, but the same reasoning would apply to them.

²⁷Roe v. Wade, supra note 1 at 732-33.
interests allow for state intervention, “the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.” The usual judicial and “intra-professional” remedies are available against a physician who abuses this responsibility.

The Court noted that in making the abortion decision, the woman and her physician will necessarily consider physical, psychological, economic, and sociological factors. These are the same factors which make clear the detriment to the woman if the state forbids her this decision. A statute not distinguishing between early and late abortions, and allowing abortion only to save the woman’s life, “sweeps too broadly,” denying the woman her Fourteenth Amendment due process rights.

The Court summarized its holding, clarifying its scope:

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.

The Court also footnoted twenty state statutes similar to Texas’s, including Montana’s R.C.M. 1947, § 94-401.

The implications of Roe v. Wade are even more far-reaching when read with its companion case, Doe v. Bolton, invalidating much of Georgia’s recently enacted abortion legislation patterned on the American Law Institute’s Model Penal Code. In Doe v. Bolton, the Court affirmed the federal district court’s invalidation of certain provisions: (1) listing permissible reasons for abortions; (2) requiring verification

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Id. at 733.

Id.

Id. at 727. “Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.”

Id.

Id. at 732.

Id. The Court did not clarify the Due Process question further. For criticism, see Ely, supra note 32.

“Roe v. Wade, supra note 1 at 732.

Id. at 709.

83 S. Ct. 739 (1973).


“CODE OF GEORGIA ANNOTATED (1933) (hereinafter cited as GA. CODE ANN.), § 26-1202 (a) allowing exceptions from criminal penalties where: (1) continuation of the pregnancy endangers the woman’s life or would seriously and permanently injure her health; (2) the fetus will very likely be born with serious, permanent and remedial mental or physical defects; or (3) pregnancy resulted from forcible or statutory rape.

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from state officials of probable cause to believe that rape had occurred where this was given as reason for abortion;\textsuperscript{46} and (3) allowing the solicitor general of the judicial circuit, or a close relative of the fetus, to seek a declaratory judgment on whether a proposed abortion would violate any constitutional or other legal rights of the fetus.\textsuperscript{47}

The Court modified the district court's decision in \textit{Doe v. Bolton}, however, by also holding unconstitutional the provisions: (1) requiring that all abortions be performed in licensed hospitals, and that those hospitals must be accredited by the Joint Commission on Accreditation of Hospitals;\textsuperscript{48} (2) requiring that abortions be approved by the hospital's own abortion committee;\textsuperscript{49} (3) requiring that two Georgia-licensed physicians in addition to the woman's own physician physically examine the woman and concur in her physician's recommendation;\textsuperscript{50} and (4) restricting abortions to Georgia residents.\textsuperscript{51}

In the aftermath of these decisions, many states' criminal abortion statutes have been invalidated in whole or part.\textsuperscript{52} In addition, statutes prohibiting the dissemination of information about abortion or abortion services,\textsuperscript{53} and regulations of public hospitals prohibiting abortion, have also fallen.\textsuperscript{54}

\textit{MONTANA AFTER ROE v. WADE}

The decision on \textit{Roe v. Wade} came down during the First Session of the Forty-Third Montana Legislature, when the House had before it

\textsuperscript{46}GA. CODE ANN., § 26-1202(b)(6).
\textsuperscript{47}GA. CODE ANN., § 26-1202(b)(7)(c).
\textsuperscript{48}GA. CODE ANN., § 26-1202(b)(4).
\textsuperscript{49}GA. CODE ANN., § 26-1202(b)(5).
\textsuperscript{50}GA. CODE ANN., § 26-1202(b)(3).
\textsuperscript{51}GA. CODE ANN., § 26-1202(b)(1).

In addition, a number of cases were vacated and remanded by the Supreme Court, for further consideration in light of \textit{Roe v. Wade}, and other states have enacted new legislation.


\textsuperscript{54}Nyberg v. City of Virginia, .. F. Supp ....., (D. Minn. Aug. 9, 1973). As to private hospitals, see \textit{Doe v. Bellin Memorial Hospital}, 479 F.2d 756 (7th Cir. 1973), holding that a private hospital may refuse to permit abortions contrary to hospital policy even where the hospital is receiving federal funds under the Hill-Burton Act, 42 U.S.C. §§ 291-291z, and is subject to detailed state regulation.
House Bill 463, an abortion bill substantially in conformity with *Roe v. Wade* guidelines. The decision produced much confusion and antagonism in the legislature, possibly because of misunderstandings of the decision itself or of the binding effect of a Supreme Court decision, and also possibly because of moral objections to abortion, or the feeling that the bill was a political hot potato. The bill was amended in committee, in several apparently non-conforming ways, before it reached the floor of the House, where it passed.

In the meantime, State Attorney General Robert L. Woodahl issued an opinion on the status of Montana's criminal abortion statutes in light of *Roe v. Wade*. He did not mention the Court's "Due Process" summary, or its footnoting of R.C.M. 1947, § 94-401. Instead he applied a general principle of questionable applicability in view of the summary and footnote: "Montana's criminal abortion statutes are presumed to be constitutional and in full force and effect until ruled otherwise." He said that while Montana's statutes "appear to be similar" to Texas's, Montana, unlike Texas, had provided R.C.M. 1947, § 94-402, forbidding submission to abortion. R.C.M. 1947, § 94-402 presented "a different legislative purpose and enactment which has not been ruled on by the United States Supreme Court." He did not, however, specify what that different purpose might be. The opinion implies that the Court found a right of privacy broad enough to encompass the abortion decision, but not broad enough to prevent the state from punishing a woman who acted on the decision.

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56 The bill defined "abortion," provided that abortions be done by licensed medical practitioners in medical facilities, provided that abortions after the sixth month of pregnancy could only be done to save the life or health of the woman, required that records be kept but that names of persons submitting to abortion were to be confidential, repealed R.C.M. 1947, §§ 94-401 and 94-402, provided criminal penalties for violation, and contained both severability and "conscience" clauses.
57 House Bill 463/02. (Note that the 02 represents the first amended version of House Bill 463.) The significant amendments were: (1) requiring signed consent of the fetus's father, (2) requiring two consultations with a counselor approved by a Montana mental health clinic as prerequisite, and (3) leaving §§ 94-401 and 94-402 in force, subject to the provisions of this bill.
59 Id. at 732.
60 Id. at 709.
62 *Id.* § 94-401 reads: "Every person who provides, supplies, or administers to any pregnant woman, or procures any such woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two years nor more than five years."
63 *35 Op. ATT'Y. GEN. 9* (1973). § 94-402 reads: "Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than one nor more than five years."
The Attorney General then recommended his own bill, including:
(1) a policy statement, asserting in particular the compelling state interest in preserving potential life; (2) repeal of R.C.M. 1947, §§ 94-401 and 94-402, with re-enactments of both in language identical to the originals; (3) provisions substantially within Roe v. Wade guidelines and patently contradictory to the re-enactments of R.C.M. 1947, §§ 94-401 and 94-402; (4) a severability clause holding valid any parts not specifically ruled invalid; and (5) a "conscience clause" relieving from participation persons or institutions with moral objections to abortion. 65

The House passed these recommendations as amendments to H.B. 463, 66 and the Senate then passed the amended bill with several amendments of its own. 67 From the Senate, the bill went into conference committee, where, with the committee unable to agree, it remained until adjournment. 68 An interim conference committee was appointed to study the matter in preparation for the next legislative session. 69

In April, 1973, plaintiff Mary Doe, 70 a married woman six to seven weeks pregnant, filed suit in a Montana federal district court seeking a declaratory judgment that R.C.M. 1947, §§ 94-401 and § 94-402 were unconstitutional under Roe v. Wade. 71 She also asked the court to enjoin defendants Attorney General Woodahl and Missoula County Attorney Robert L. Deschamps from enforcing the statutes. On May 2, 1973, the court 72 held R.C.M. 1947, §§ 94-401 and 94-402 unconstitutional when applied to a woman during the first trimester of pregnancy, 73 and issued a temporary restraining order to prevent the defendants from enforcing the statutes against Doe or her physician. 74 On May 29, 1973, under Roe v. Wade guidelines, the court held Montana's criminal abortion statutes unconstitutional as a unit. 75

Despite fears of many people, Doe v. Woodahl has not turned Montana into an "abortion mill," 76 although the incidence of legal abortion

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65Id.
66House Bill 463/03. (Note that 03 represents the second amended version of House Bill 463.)
67Senate Judiciary Committee, REPORT ON HOUSE BILL 463 (1973).
68House-Senate Conference Committee, REPORT ON HOUSE BILL 463 (1973).
70'Mary Doe" is a pseudonym.
71Roe v. Wade, supra note 1.
74Id.
75Doe v. Woodahl, supra note 2.
76Since Roe v. Wade, supra note 1, applies nationally, and in light of the many states in which the abortion law has significantly changed in the past few years, supra note 52, this fear was groundless.
in the state is certainly rising. Many Montana women still go out of state for abortions because in-state abortions are generally performed in hospitals and are quite expensive. Apparently only one Montana hospital, St. Peter's Community Hospital in Helena, has publicly announced a change of policy to allow abortions in accord with Roe v. Wade guidelines, although others less publicly have loosened their former restrictions.

Permissible state regulation of abortion under Roe v. Wade is probably adequately accomplished by existing Montana medical statutes, hospital regulations, and physician's professional standards. Thus, no specific abortion legislation is necessary. Even so, it is certain that the Montana legislature will be under great pressure to enact such legislation in the next session.

Under Roe v. Wade, the law is clear. In Doe v. Woodahl, the court referred to the Attorney General's abortion opinion, and addressed the Montana legislature in the following terms:

I have considered whether this Federal Court should abstain from granting relief beyond that given in the temporary restraining order and have concluded that in the public interest any doubt about the invalidity of the Montana abortion law should be removed. The official position of the State of Montana is that the Montana laws will be presumed to be constitutional until a court of competent jurisdiction rules to the contrary. This position shadows the constitutional rights of women as delineated in Roe v. Wade, supra, and confuses the members of the medical profession who may be called upon to perform abortions. By this order the Montana Legislature

77Montana hospitals and referral services confirm this, although there are no solid statistics. Statistics for the pre-Doe v. Woodahl period do not exist, and those since are largely informal except as they appear in hospital records. There is little indication of a rise in the absolute numbers of women having abortions. Much of the in-state rise in legal abortions may be attributed to women now getting legal abortions from physicians in hospitals, whereas before they may have resorted to illegal, possibly self-induced abortion. Part can also be attributed to women having in-state abortions where previously they would have gone out of state.
78Primarily to Washington State.
79If any Montana physician is presently performing abortions in a medical office as allowed under Roe v. Wade, supra note 1, it is apparently a carefully guarded secret.
80In Missoula, the hospital fees and physician's fees presently average from $225 to $250 for a first trimester abortion.
82See Section A, No Specific Abortion Legislation, infra.
83See Section A, No Specific Abortion Legislation, infra.
84To people who regard first and second trimester abortion as primarily a medical matter, having specific abortion legislation is as absurd as having specific legislation for any other single medical procedure. The pressure will come, as in the past, from those who absolutely oppose abortion on moral grounds, as well as those who, though not absolutely opposed, fear abuses under existing statutes, regulations, and professional medical standards. In partial answer to the latter, the Court noted that "[T]he abortion determination, so far as the physician is concerned, is made in the exercise of his professional, that is, his 'best clinical' judgment in the light of all the attendant circumstances." Doe v. Bolton, supra note 43 at 747. "The State licenses a physician. If he is derelict or faithless, the procedures available to punish him or to deprive him of his license are well known." Roe v. Wade, supra note 1 at 761 (Douglas, J., concurring).
is advised that the interests of the state in the unborn may be asserted only in a law tailored to conform to the guidelines established in Roe v. Wade, supra.\(^6\)

**LEGISLATION TAILORED TO ROE v. WADE GUIDELINES**

Under Roe v. Wade guidelines, there are three basic approaches to abortion legislation, each of which will be examined in turn. The first of these is no specific abortion legislation; the second is legislation precisely tailored to the Court's summary guidelines;\(^87\) and the third is legislation including the summary guidelines and adding specific provisions designed to be as restrictive as possible without exceeding constitutional limits.

A. **NO SPECIFIC ABORTION LEGISLATION**

At present, abortion in Montana is subject to a number of medical controls, which, taken together, successfully regulate abortion in close conformity with Roe v. Wade guidelines. Some of these controls are strictly “legal,” including statutes or agency regulations, or existing agency powers of regulation which can be drawn upon as needed to provide regulations specific to abortion. Others are “extra-legal,” but are nonetheless enforceable through the courts or through intra-professional sanctions. Because of this, there is no need for specific abortion legislation, legally and practically speaking. Indeed, such legislation may be, in practical terms, superfluous.

During the first trimester of pregnancy, under Roe v. Wade, abortion must be treated as basically a medical matter.\(^88\) It may therefore be regulated by the state only indirectly, in ways already provided by the Revised Codes of Montana. First, abortions in Montana must be performed by licensed physicians. R.C.M. 1947, § 66-1041 provides that practicing medicine in violation of the Medical Practice Act,\(^90\) including practicing without a physician’s license, is a misdemeanor, and that impersonating a physician in any way is a felony. Penalties are provided.\(^90\) Second, physicians’ standards for general professional responsibility extend to abortion procedures. R.C.M. 1947, § 66-1037 defines “Unprofessional Conduct,” including Subsections (b) “performing abortion contrary to law,”\(^91\) and (q) “any other act, whether hereinabove specifically enumerated or not, which, in fact, constitutes unprofessional conduct.” R.C.M.

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\(^6\)Id.

\(^8\)Roe v. Wade, supra note 1 at 732.

\(^10\)Id. at 733.

\(^87\)R.C.M. 1947, Title 66, Chapter 10.

\(^90\)Misdemeanor penalties under R.C.M. 1947, § 66-1401 include either or both a fine from $250 to $1,000 and imprisonment in the county jail from 90 days to one year. Further, ‘‘each daily failure to comply with, or each daily violation of, the provisions of this act, shall constitute a separate offense.’’ The felony penalty is imprisonment in the state penitentiary from one to ten years at hard labor.

\(^91\)This Subsection may have limited application if Montana has no criminal abortion statute, but would continue to operate on valid regulatory provisions.
1947, § 66-1038 provides punishment for unprofessional conduct, including suspension or revocation of a physician's license, or other disciplinary action as the state board of medical examiners may deem proper. Third, the state may require physicians to submit medical data on all abortions performed. The state Department of Health and Environmental Sciences has the responsibility, under R.C.M. 1947, § 69-4105, to administer public health laws, "including but not limited to ... vital statistics, ... hospitals and hospital related facilities." R.C.M. 1947, § 69-4106 defines powers, duties and functions of the Department, including the adoption and enforcement of "rules and standards for carrying out provisions of section 69-4105 and for the preservation of public health and prevention of disease." These statutes clearly grant the Department power to require that physicians submit medical data on all abortions performed.

During the second trimester of pregnancy, the state may regulate abortion only in ways reasonably related to the woman's health. All of the provisions discussed above would apply here. In addition, the Montana Administrative Code provides detailed regulations and standards for the licensing and maintenance of hospital and medical facilities. It further sets personnel requirements in such facilities, and requires that specific patient records be kept and periodically mailed to the Department.

The Department's regulatory powers under R.C.M. 1947, § 69-4105 and § 69-4106 may also be used to restrict the places where late abortions may be performed. Under Roe v. Wade guidelines, the Department cannot require that first trimester abortions be performed in clinics or hospitals. It would, however, have the power to require that later abortions be done in facilities with adequate equipment, supplies, and personnel, because the only abortion procedures which are medically acceptable after the first trimester require facilities beyond those available in a physician's office.

During the third trimester of pregnancy, the state may (but not must) proscribe any abortions except those necessary to save the life or health of the pregnant woman. During this trimester all of the statutes and regulatory powers enumerated above would apply. In addi-
tion, hospital policies and regulations, physicians' professional standards, and women's own great objections, interpose to prevent third trimester abortion except in circumstances endangering the woman's life or health.

The first restriction is the medical definition of "abortion": destruction of the products of conception before the eighth lunar month of pregnancy (prior to the stage of viability). After viability, spontaneous abortion is considered premature labor. Although this definition is not legally binding upon a physician's practice, physicians are very reluctant, for moral or medical reasons, to terminate a third trimester pregnancy for any but the gravest of health reasons.

Since third trimester abortion is a serious medical procedure, a physician who performed such an abortion without grave reasons would very likely be subject to disciplinary action through medical organizations, and through intervention of the state board of medical examiners, under their power to punish unprofessional conduct.

Also, since the powers of the Department of Health and Environmental Sciences may be used to require that abortions after the first trimester be performed in adequate facilities, a physician who performed such procedure elsewhere would certainly be subject to disciplinary action. It should be noted, too, that hospital policy in Montana uniformly prohibits abortions after the stage of viability except where medically necessary. Thus, a physician seeking to perform a third trimester abortion is accountable not only to his own conscience and professional standards, but also to the regulatory agencies discussed above, and to the hospitals or clinics whose facilities he seeks to use.

As to women themselves, available statistics from states with several years' experience under liberal abortion laws indicate that women

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These definitions do not often include intentional termination of pregnancy after viability, since most were drafted before states began liberalizing their laws in 1967.


*In Roe v. Wade*, supra note 1 at 732, the Court footnotes an opinion by the A.M.A. Judicial Council (1970): In the matter of abortions, as of any other medical procedure, the Judicial Council becomes involved whenever there is alleged violation of the Principles of Medical Ethics as established by the House of Delegates.

*Roe v. Wade*, supra note 1 at 731-32.

This might be done by the Department of Health and Environmental Sciences, or by the board of medical examiners, under their existing regulatory powers. It might also be done through the A.M.A. or other professional organizations.

The Missoulian, supra note 81.

Hospitals routinely provide internal mechanisms for dealing with physicians who abuse the privilege of practicing on the premises. The hospital can refuse to permit procedures which violate its own policies and regulations, and may withdraw the practice privilege from physicians who abuse it.
seek first trimester abortion in preference to later abortion, and resort
to later abortion only where first trimester abortion was, for a variety
of reasons, not available.\footnote{Roe v. Wade, supra note 1.}

At all points in its opinion in \textit{Roe v. Wade},\footnote{Id. at 733.} the Court specifically
uses the term "\textit{may}," not "\textit{must}," when referring to permissible regu-
lation of abortion. In view of the Court’s clear holding that the abortion
decision is inherently and primarily a medical decision to the point in
pregnancy where compelling state interests allow greater regulation,\footnote{These statutes are, of course, still in the Code, though not enforceable because of \textit{Doe v. Woodahl}, supra note 2. This provision would remove them.} and that the areas of greater regulation either are or can be accom-
plished through existing agencies and channels, there is no need for
specific abortion legislation.

\section{B. Legislation Tailored to \textit{Roe v. Wade} Summary Guidelines}

This approach may recommend itself to those who wish to clarify
by statute the broad outlines of Montana’s abortion law, including the
third trimester prohibition, but who, because of the present powers of
regulation discussed in Section A, above, see no need for further pro-
visions. Such a bill would include:

\begin{quote}
Section 1. R.C.M. 1947, §§ 94-401 and 94-402 are repealed.\footnote{Abortions in Montana at present must be performed by a licensed physician, supra note 89. Use of "licensed medical practitioner" would allow abortions during the first trimester to be performed by paramedics under a physician’s supervision, if the Medical Practice Act is ever amended to permit that.}

Section 2. (A) Abortions during the first trimester of pregnancy
must be performed by a licensed medical practitioner.\footnote{This provision is wholly unnecessary, since the Department of Health and Environmental Sciences already has the power to require this.}

(B) Abortions from the end of the first trimester until the end
of the second trimester must be performed by a licensed medical practi-
tioner in a licensed hospital or other medical facility.\footnote{These figures are computed by method of abortion rather than by stage of pregnancy. They do represent stage of pregnancy, however, since the suction method and the dilation and curttage (D\&C) can be used only during the first trimester, and the amnio-infusion method and the hysterotomy are used only after the first trimester. In New York City from July 1, 1970, to June 30, 1972, there were 402,000 abortions: 261,700 (suction); 84,600 (D\&C); 53,300 (amnio-infusion); 2,400 (hysterotomy). Roughly 86\% were performed during the first trimester. The percent of first trimester abortions has steadily increased since the early days under the new law, indicating further that women, once aware of the availability of abortion, will seek it at the earliest possible moment. Data from other states supports the above. Women seeking abortion after the first trimester almost invariably do so for definite reasons such as the following: (1) medical or legal obstacles delaying what should have been a first trimester abortion into the second trimester; (2) uncertainty as to the period of gestation because of menstrual irregularities, lack of other common physical symptoms of pregnancy, or menopause; (3) sudden abandonment by a husband or being widowed by his death.}

\end{quote}
(C) Abortions may not be performed during the last trimester of pregnancy unless such abortion is necessary to preserve the life or health of the pregnant woman. Last trimester abortions must be performed by a licensed medical practitioner.113

Section 3. Names and identities of persons submitting to abortion shall remain confidential among medical and medical support personnel directly involved in the abortion, and among persons working in the facility where the abortion was performed whose duties include billing the patient or submitting claims to an insurance company, keeping facility records, or processing abortion data required by state law.114

C. PERMISSIBLE RESTRICTIVE ABORTION PROVISIONS

These provisions may be added to those in Section B, above, for legislation as restrictive as Roe v. Wade guidelines will allow:

1. First trimester abortions must be performed by licensed physicians.115

2. Abortions after the first trimester of pregnancy must be performed in licensed hospitals.116

3. Abortions after the first trimester of pregnancy must be performed by licensed physicians, and, if the abortion procedure to be used requires surgery, by licensed physicians with a specialization in surgery.117

4. No person, hospital or clinic shall be required to participate in an abortion, except when the life or health of the pregnant woman is endangered by a medical emergency necessitating abortion. No person, hospital or clinic shall be held liable for such non-emergency refusal, nor shall the same be subject to any disciplinary or recriminatory action for such non-emergency refusal.118

5. Any person who knowingly and purposely violates this act shall be fined not more than one thousand dollars ($1,000) or imprisoned in the state prison not more than five (5) years, or both such fine and imprisonment.119

113 Note that "health" includes both physical and psychological health. United States v. Vuitch, supra note 28.
114 This provision is intended to protect abortion patients' privacy. It may also be unnecessary, but should probably be included if the state decides to regulate abortion by criminal statutes.
115 This provision is a total redundancy. See notes 89 and 111, supra.
116 See note 26, supra.
117 Id.
118 This "conscience clause" is tempered by the exception for emergency situations, to provide for the possible but rare sudden medical emergency when refusal to participate might cost the woman her life or permanently impair her health.
119 These penalties are intended to be in accord with criminal penalties in the new Montana Criminal Code.
6. It is the intent of the legislature that if a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.\textsuperscript{120}

Several other provisions may suggest themselves to those who wish restrictive legislation. Anything beyond the provisions outlined above, however, is of doubtful constitutionality. The general questions of rights of fathers and husbands, and of requiring counseling as prerequisite to abortion, are dealt with elsewhere in this paper.\textsuperscript{121} Some persons, however, may wish specifically to restrict the conditions under which minors may obtain abortions, by requiring written consent from the minor's parent or guardian if she is unmarried, or written consent from her husband if she is married.

The constitutionally protected right of individual privacy makes both of these provisions questionable.\textsuperscript{122} In addition, the Declaration of Rights in the 1972 Montana Constitution specifically recognizes the right of individual privacy,\textsuperscript{123} and the rights of minors.

The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.\textsuperscript{124}

It should be noted that "the protection of such persons" refers to protection of the minor, not to protection of the unborn.\textsuperscript{125} In light of the frequently adverse and well known effects of child bearing and child rearing upon minors, including a higher incidence of pregnancy and delivery complications than for women over twenty, psychiatric complications, possible termination of education, possible "forced" marriage or the stigma of unwed motherhood,\textsuperscript{126} it is difficult to see how requir-

\textsuperscript{120}Some of the above provisions have not been thoroughly tested under Roe v. Wade, although in most details they are clearly sound. Even if all had been tested, this provision would still be wise.

\textsuperscript{121}See, note 33, supra.

\textsuperscript{122}Roe v. Wade, supra note 1.

\textsuperscript{123}Mont. Const. art. II, § 10.

\textsuperscript{124}Mont. Const. art. II, § 15.

\textsuperscript{125}The Montana Constitution does not define "person" as including the unborn. Since the Court in Roe v. Wade, supra note 1 at 729-730 finds that Fourteenth Amendment protections do not extend to the unborn, it would not be possible for the Montana Constitution to extend that very protection.

\textsuperscript{126}Coe and Blum, The Out-of-Wedlock Pregnancy, 40 Obstetrics and Gynecology 807 (1972). This study incorporates findings from a number of other studies, showing that the incidence of perinatal deaths, prematurity, maternal physical and psychological illness is higher among unwed mothers than among married mothers. The divorce rate for couples married after the woman became pregnant is also significantly higher than the divorce rate for couples in which the woman was not pregnant at marriage. Although these studies focus upon the unwed mother, the average age of the subjects in each study was under twenty. Menken, The Health and Social Consequences of Teenage Childbearing, 4:3 Perspectives 45 (1972) directly supports these and other, similar conclusions. C. Reiterman, Unwanted Children, Abortion and the Unwanted Child 115 (1971) studies unwanted children in California, noting that from 30 to
ing such consent would "enhance the protection of such persons." It may be argued that "protection" is necessary where the pregnant minor is immature or unstable, but it is even more difficult to see how the burden of child rearing, or of carrying the pregnancy to term and then releasing the child for adoption, will enhance maturation or stability.  

CONCLUSION

Although Montana at present is without any specific abortion laws, channels exist for regulation of abortion, as do legal sanctions against violators. It is certain that the Montana legislature will be faced in 1974 with the question of abortion, and that pressure will be great to enact specific legislation. Although such legislation is not necessary, the legislators may wish to act. If so, it is hoped that they will keep firmly in mind that Roe v. Wade is presently the law of the land, and that "the interests of the state in the unborn may be asserted only in a law tailored to conform" to the Roe v. Wade guidelines. Non-conforming legislation can only create more confusion, and fresh litigation.

50% of teenage brides are pregnant at marriage, and that a major cause of school dropouts in California is premarital pregnancy, "sometimes followed by hasty marriage." Reiterman at 116.

The Court also takes judicial notice of some of these problems, in Roe v. Wade, supra note 1 at 727.


128 Doe v. Woodahl, supra note 2.

129 Id.