Viability and Abortion

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VIABILITY AND ABORTION

INTRODUCTION

In 1972 Chief Justice Burger, dissenting from the Supreme Court's decision in *Eisenstadt v. Baird*,[1] stated: "The commands of the Constitution cannot fluctuate with the shifting tides of scientific opinion."[2] Despite this admonition, the following year the Court decided *Roe v. Wade*,[3] which leaves the fundamental right of privacy, as it applies to abortion,[4] awash upon a very choppy sea of scientific opinion. The Court's reliance on the medical concept of "viability" has created uncertainty, for not only is that concept difficult to define with precision in terms of current medical knowledge, but its meaning will undoubtedly change with the continuing advance of medical technology. Clearly, the result in *Roe* would have been better had the majority heeded Chief Justice Burger's comments in *Eisenstadt* and moored its ultimate holding in *Roe* in a more permanent harbor than that provided by scientific opinion.

I. ROE V. WADE: ESTABLISHMENT OF THE VIABILITY STANDARD

In *Roe v. Wade* the Court concluded "that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."[5] The Court found that the state has two compelling interests[6] which relate to abortion: an interest in protecting maternal health[7] and an interest in potential human life.[8] However, the interests of the state are not compelling at all times: "Each grows in substantiality as the woman approaches term . . . ."[9]

The state's interest in protecting maternal health becomes

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[1] 405 U.S. 438 (1972). The case involved a Connecticut statute concerning distribution of contraceptives.

[2] *Id.* at 470 (Burger, C.J., dissenting).

[3] 410 U.S. 113 (1973).

[4] *See id.* at 155.

[5] *Id.* at 154.

[6] The Court stated that because a "fundamental right" is involved, any regulation of the right must be justified by a "compelling state interest . . . ." *Id.* at 155.

[7] *Id.* at 162.

[8] *Id.*

[9] *Id.* at 162-63.

compelling "at approximately the end of the first trimester."[10] That point was chosen because "until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth."[11] The Court referred to the fact that most laws prohibiting abortion were enacted at a time when intra-abdominal procedures were extremely dangerous due to the lack of antiseptic techniques and antibiotics. Thus, to the woman, the risks attendant upon abortion were almost always greater than the risks involved in carrying the fetus to term, and the first abortion laws were apparently designed to protect pregnant women from the dangers of abortion procedures.[12] In contrast, statistics cited by the Court indicate that modern medical practices have made early abortion, *i.e.*, first trimester abortion, at least as safe as normal childbirth. Consequently, the state's interest in protecting pregnant women from dangerous abortion procedures becomes compelling only at the end of the first trimester, when abortion supposedly becomes more hazardous than normal childbirth. After the first trimester, therefore, the state may regulate abortion in furtherance of its interest in maternal health.[13]

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[10] *Id.* at 163. It may be helpful to note that the normal human gestation period is 266 days or 38 weeks. However, fertilization usually occurs about two weeks after the woman's last menstrual period. Thus, if one dates a pregnancy from the last menstrual period, it will add about two weeks to the length of the pregnancy. Dating from the last menstrual period is termed the "gestational method," and produces a 40 week pregnancy, with the actual age of the fetus about two weeks less than the length of the pregnancy. The "conceptional method" dates a pregnancy from the actual time of conception and produces a 38-week pregnancy, with the actual age of the fetus and the length of the pregnancy coinciding. *See* Comment, *Roe v. Wade and the Traditional Legal Standards Concerning Pregnancy*, 47 TEMP. L.Q. 715, 735-36 (1974). Thus, when one speaks of the age of a fetus without indicating whether the gestational method or the conceptional method of dating the pregnancy is being used, confusion is created.

In using the term "trimester," the Court was using standard, although imprecise, language. A trimester is, alternatively, 1/3 of the total duration of gestation (*i.e.*, about 89 days or 12 2/3 weeks) or three months (*i.e.*, about 90-92 days or 13 weeks). Because these alternatives differ by a number of days, there is always some confusion when the term "trimester" is used.

[11] 410 U.S. at 163.

[12] Certainly one of the most carefully documented, thorough, and interesting expositions of this theory is Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971) [hereinafter cited as Means].

[13] 410 U.S. at 148-50.

The state's interest in potential human life becomes compelling at viability.[14] The Court declared that viability is the crucial point because "the fetus then presumably has the capability of meaningful life outside the mother's womb."[15] The Court went on to state that protection "of fetal life after viability thus has both logical and biological justifications,"[16] without further explanation as to the nature of these justifications.[17]

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[14] *Id.* at 163. The Court defined viability as "potentially able to live outside the mother's womb, albeit with artificial aid." *Id.* at 160 (citation omitted). Other definitions include: "Capability of living. A term used to denote the power a new-born child possesses of continuing its independent existence." BLACK'S LAW DICTIONARY 1737 (rev. 4th ed. 1968). "Capability of living; the state of being viable; usually connotes a fetus that has reached 500 grams in weight and 20 gestational weeks." STEDMAN'S MEDICAL DICTIONARY 1388 (22nd ed. 1972). The Department of Health, Education and Welfare has published guidelines for experimentation using human fetuses. They define viability as "the ability of the fetus, after either a spontaneous delivery or an abortion, to survive to the point of independently maintaining vital functions . . . ." Department of Health, Education and Welfare, National Institutes of Health, Protection of Human Subjects, Policies and Procedures, 38 Fed. Reg. 31738, 31740 (1973) [hereinafter cited as HEW Policies]. The Supreme Court of Michigan defined a viable child as "an unborn child whose heart is beating, who is experiencing electronically measurable brain waves, who is discernibly moving, and who is so far developed and matured as to be capable of surviving the trauma of birth with the aid of the usual medical care and facilities available in the community." Larkin v. Cahalan, 208 N.W.2d 176, 180 (Mich. 1973).

[15] 410 U.S. at 163.

[16] *Id.*

[17] The Court has been criticized elsewhere for confusing the definition of viability with a reason for specifying viability as the crucial point. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 YALE L.J. 920, 924 (1973); Comment, 47 TEMP. L.Q., *supra* note 10, at 728-29. The criticism seems to be well-founded. If, as the Supreme Court said, viability marks the point at which "the fetus . . . has the capability of meaningful life outside the mother's womb," 410 U.S. at 163, why should it also mark the point at which the state may proscribe removal of the fetus from the mother's womb? The Court offered no real explanation for its choice of viability as the crucial point and failed to explain why the state's interest in protecting potential life becomes compelling at that point. Furthermore, there seems to be no logical reason for allowing the state to proscribe abortion at the point when artificial means could sustain the life of the fetus. The fact that a pregnancy has progressed to the point at which a machine could keep the fetus alive is not a convincing justification for requiring the woman to choose between an unwanted pregnancy and an illegal abortion. The potential life could be protected just as effectively if the fetus were artificially sustained after abortion.

On a very practical level, the Court may be granting recognition to the fact that most abortions are sought for personal rather than medical reasons and to avoid parenthood rather than to avoid pregnancy per se. D. CALLAHAN, ABORTION: LAW, CHOICE AND MORALITY 97 (1970). After the fetus is viable, there is the very real possibility that the abortion will produce a living infant, thereby thwarting the very reason for which

The Court fashioned its analysis of the limited right to abortion around these two compelling interests, and summarized its holding as follows:

> (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 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.[18]

This holding, and especially section (c), has raised problems which have appeared in subsequent litigation and which ultimately could result in basic changes in the nature of the limited right to abortion supposedly guaranteed in *Roe*.

II. THE VIABILITY QUESTION: HOW IS THE STANDARD DEFINED?

The *Roe* decision makes viability a crucial point in pregnancy; after that point is reached, the state may regulate or proscribe abortion unless the procedure is necessary to preserve the woman's life or health.[19] However, the Court did not make clear exactly when viability is reached. Although the opinion

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the abortion was sought. Note, *Fetal Experimentation: Moral, Legal, and Medical Implications*, 26 STAN. L. REV. 1191, 1204 (1974). If an abortion produces a living infant, the woman can still avoid parenthood by surrendering the child for adoption. However, this option is strictly theoretical in many instances. Some women find the idea of surrendering a child to be much more traumatic than abortion, while other women who would be emotionally capable of surrendering a child may be deterred by the knowledge that certain types of infants (mainly those of minority or mixed racial heritage) do not have good prospects for adoption. Thomson, *A Defense of Abortion*, 1 PHILOSOPHY & PUBLIC AFFAIRS 47 (1971), in THE RIGHTS AND WRONGS OF ABORTION 3, 22 (M. Cohen, T. Nagel, and T. Scanlon eds. 1974); D. SCHULDER & F. KENNEDY, ABORTION RAP 23, 28-29 (1971).

[18] 410 U.S. at 164-65.

[19] *Id.* at 165.

indicated that viability occurs at between 24 and 28 weeks,[20] it also defined viability as "potentially able to live outside the mother's womb, albeit with artificial aid,"[21] and made reference to "new medical techniques such as . . . artificial wombs."[22] Thus, the question is whether *Roe* placed viability at 24 to 28 weeks, or whether viability will shift as medical technology, neonatal care, and the new science of fetology become more sophisticated, thereby placing the point at which the fetus can survive outside of the womb ever earlier in pregnancy.[23] This issue has arisen in several recent cases, which indicate, through a variety of analyses, that viability is being interpreted as a shifting phenomenon, tied to the 24 to 28-week period only by the current state of medical technology.

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[20] *Id.* at 160. The Court cites L. HELLMAN & J. PRITCHARD, WILLIAMS OBSTETRICS 493 (14th ed. 1971) on this point. Upon checking the source, one finds that viability at 20 weeks is also mentioned.

[21] 410 U.S. at 160.

[22] *Id.* at 161 (citation omitted).

[23] A similar question arises with regard to the point at which the state's interest in maternal health becomes compelling. While the Court stated that this interest becomes compelling "at approximately the end of the first trimester," 410 U.S. at 163, the choice of that particular time was based on the "fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth." *Id.* The Court also indicated that this point was fixed "in light of present medical knowledge . . . ." *Id.* This leaves open the question of whether, if medical advances make second or third trimester abortions safer than normal childbirth, the state's interest in protecting maternal health remains compelling at the point fixed in *Roe* or whether the state's interest becomes compelling only at the point at which abortion is no longer safer than normal childbirth. Conversely, if medical technology were to be developed which made normal childbirth safer than abortion at any time, would the state's interest in maternal health be compelling at all times during pregnancy? For the view that the point at which the state's interest becomes compelling will shift with the relative safety of abortion and normal childbirth, *see* Note, *Implications of the Abortion Decisions: Post Roe & Doe Litigation and Legislation,* 74 COLUM. L. REV. 237, n.11 and accompanying text (1974). For a discussion of the possible fluctuation between abortion safety and normal childbirth safety, *see* Comment, 47 TEMP. L.Q., *supra* note 10, at 734-35, 738. For a discussion of the constitutional significance of the relative safety of abortion and childbirth, and for the view that abortion at any time during the first 24 weeks of pregnancy is safer than normal childbirth, *see* Means, *supra* note 12, at 382-401. Practically speaking, the point at which the state's interest in maternal health becomes compelling is relatively unimportant because the regulations that may be imposed by the state at that point are minimal when compared with the maximum level of regulation that is allowable after viability.

III. POST-ROE CASES: INTERPRETATION OF THE VIABILITY STANDARD

A. *Viability as a Matter for the Physician's Judgment*

Wolfe v. Schroering[24] involved an attack on the 1974 Kentucky abortion law[25] prohibiting abortions after the fetus could "reasonably be expected to have reached viability,"[26] except to preserve the life or health of the woman. The plaintiffs contended that by using the term "trimester" in *Roe*, the Supreme Court meant to divide pregnancy into three equal segments of approximately three months each, with the state's interests in maternal health and in potential life becoming compelling as the second and third trimesters, respectively, are reached. The district court rejected this contention: "A close inspection of the language in the *Roe* decision reveals that the Court spoke only of a single trimester, the first. The Court used no language to indicate that the stages of pregnancy, divided by points of compelling state interests, were evenly divided."[27] The court did, however, recognize the tension created by the fact that the Supreme Court not only gave a definition of viability, but also stated that viability occurs at 24 to 28 weeks:

> The question, then, is whether the [*Roe*] decision flatly holds that viability occurs no sooner than 24 weeks . . . . We think not. Viability is a condition in which the fetus "presumably has the capability of meaningful life outside the mother's womb." *Roe*, 410 U.S. at 163. Because the point at which viability may be ascertained varies, the state's interest in preserving the fetus also varies as to the time it becomes compelling. Thus, the state will have to rely on the doctors and their medical judgment to determine viability.[28]

A similar analysis was used in *Planned Parenthood of Cen-*

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[24] 388 F. Supp. 631 (W.D. Ky. 1974) (three judge court).

[25] KY. REV. STAT. §§ 311.710 *et seq.* (Supp. 1974) [hereinafter cited as KRS].

[26] KRS § 311.780: "**Prohibition of abortion after viability—Exceptions.**— No abortion shall be performed or prescribed knowingly after the unborn child may reasonably be expected to have reached viability, except when necessary to preserve the life or health of the woman . . . ."

[27] 388 F. Supp. at 635.

[28] *Id.* at 636.

tral Missouri v. Danforth[29] to uphold the definition of viability found in the 1974 Missouri abortion law:[30] "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems . . . ."[31] The plaintiffs attacked the definition on the basis that it did not distinguish among trimesters and, when taken in conjunction with another part of the statute,[32] would prohibit "non-therapeutic abortions at an earlier point than is constitutionally permissible under *Roe* . . . ."[33] It was also contended that "in order to be constitutionally valid, a statutory definition of viability should establish a specific point in gestation when the fetus is to be considered viable."[34] The plaintiffs urged that the 24th week was an appropriate point at which to place viability.[35]

The court rejected the plaintiffs' argument, and interpreted *Roe* as leaving the decision as to when viability occurs to the judgment of the physician involved:

> We do not think it is properly the function of the legislature or the courts to fix viability at an inflexible point in gestation. The time when viability is achieved will vary with each pregnancy, and the determination of whether a fetus is viable in a particular case must be left to the attending physician.[36]

The approach taken in *Wolfe* and *Danforth* limits the manner in which legislation may deal with the state's compelling interest in potential life. Presumably, any statutory definition of viability that is based solely upon the age of the fetus would be considered improper by the *Wolfe* and *Danforth*

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[29] 392 F. Supp. 1362 (E.D. Mo. 1975) (three judge court), *application for stay of enforcement of Missouri House Bill No. 1211 pending appeal granted,* 420 U.S. 918 (1975).

[30] House Bill No. 1211, VERNON'S ANNOTATED MISSOURI STATUTES, 1975 Appendix Pamphlet at 1 [hereinafter cited as VAMS].

[31] House Bill No. 1211 § 2(2), VAMS 1975 Appendix Pamphlet at 2.

[32] House Bill No. 1211 § 5, VAMS 1975 Appendix Pamphlet at 2. "No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable."

[33] 392 F. Supp. at 1368.

[34] *Id.*

[35] *Id.*

[36] *Id.*

courts. They would require that the decision be left to the physician, and that it be based upon all relevant factors, of which fetal age is only one.[37] This approach allows a physician to abort a fetus at any time during pregnancy, so long as the fetus is not viable. Thus, a third trimester abortion, based upon the nonviability of the fetus rather than upon the need to preserve the life or health of the woman,[38] is theoretically possible. However, this approach offers little certainty to the physician who must decide whether an abortion may be legally performed, and leaves the physician open to criminal prosecution if, after the abortion, it is determined that the fetus was in fact viable.[39] This could have, and perhaps already has had,[40] a chilling effect: if a physician thinks there is any possibility, however remote, that a fetus might be viable, and if there is no point during the second or third trimesters before which the

[37] For a discussion of the various factors which must be considered in attempting to determine whether a fetus is viable, *see* Note, *Roe! Doe! Where are You?: The Effect of the Supreme Court's Abortion Decisions,* 7 U. CAL. DAVIS L. REV. 432, 449 (1974).

[38] Whether the rationale upon which a third trimester abortion is based (nonviability of the fetus or need to preserve the life or health of the mother) will have significant impact remains to be seen. For the view that the need standard imposes no serious obstacle to obtaining a third trimester abortion, *see* Granfield, *The Legal Impact of the Roe and Doe Decisions,* 33 JURIST 113, 118 (1973), and Note, 7 U. CAL. DAVIS L. REV., *supra* note 37, at 451-53.

[39] As one of the elements of an illegal abortion, the fact that the fetus was viable would have to be proven by the prosecution. Larkin v. Cahalan, 208 N.W. 2d 176, 180-81 (Mich. 1973). Because viability is dependent upon a number of factors, *see* note 37 *supra,* the task of proving that the fetus was viable could present serious difficulties. However, abortion is an emotionally charged subject, and the personal feelings of jurors might be so strong that a physician would be convicted on the basis of jurors' personal moral beliefs rather than on the medical facts of the case. *See* United States v. Vuitch, 402 U.S. 62, 78-80 (1971) (Douglas, J., dissenting in part). Dr. Kenneth Edelin, recently convicted of manslaughter in Massachusetts as a result of an abortion procedure (based on the theory that the fetus was viable and therefore its destruction was manslaughter), has commented that the jurors at his trial did not understand the medical facts presented to them and voted for conviction on the basis of their own moral and political beliefs. Televised interview with Kenneth Edelin, M.D., BLACK PERSPECTIVE ON THE NEWS, taped April 2, 1975. Reversal at the appellate level would be slight satisfaction to a physician whose reputation and practice had been harmed by a criminal abortion conviction.

[40] It is open to question whether there are currently any physicians in Kentucky who are regularly performing second trimester abortions, due in part to uncertainty as to how courts will interpret viability. Interview with Robert Shier, M.D., Department of Obstetrics & Gynecology, University of Kentucky Medical Center, in Lexington, Kentucky, March 24, 1975 [hereinafter cited as Interview with Robert Shier, M.D.]. *See also* Louisville Courier-Journal, April 8, 1975, at A-1, col. 3.

fetus is legally presumed to be nonviable, the physician will not risk prosecution by performing an abortion after the first trimester.[41]

B. *Presumption of Nonviability Before 24 Weeks*

In *Hodgson v. Anderson*[42] an attack was launched on the 1974 Minnesota abortion law,[43] which defines viability as "able to live outside the womb even though artificial aid may be required. During the second half of its gestation period a fetus shall be considered potentially 'viable.' "[44] Another part of the statute proscribes abortions after viability except upon the written certification of the physician that the abortion is necessary to preserve the life or health of the woman,[45] while a third section requires that any postviability abortion be "performed under circumstances which will reasonably assure the live birth and survival of the fetus."[46]

The plaintiffs argued that the statutory definition contravened *Roe*, in that the latter placed viability at 24 to 28 weeks, while the statute placed it at 20 weeks.[47] The defendants countered that *Roe* did not prescribe any particular point during pregnancy at which viability occurs, and that a 20-week cutoff point constituted a reasonable legislative determination. The court held the definition unconstitutional, stating:

> We do not accept the suggestion of the defendants that the Supreme Court's comment on viability was only dicta. It appears to this Court that after reviewing the historical, medical, and legal attitudes on abortions, the Supreme Court

[41] With the further development of medical technology, it is conceivable that viability could intrude upon the first trimester, thereby allowing state regulation even during that period. *See* note 81 *infra*.

[42] 378 F. Supp. 1008 (D. Minn. 1974) (three judge court), *appeal dismissed for want of jurisdiction sub nom.* Spannaus v. Hodgson, 420 U.S. 903 (1975).

[43] MINN. STAT. ANN. § 145.411 (Supp. 1975-76).

[44] MINN. STAT. ANN. § 145.411(2) (Supp. 1975-76).

[45] MINN. STAT. ANN. § 145.412(3)(2)(Supp. 1975-76): "It shall be unlawful to perform an abortion when the fetus is potentially viable unless: (2) the attending physician certifies in writing that in his best medical judgment the abortion is necessary to preserve the life or health of the pregnant woman . . . ."

[46] MINN. STAT. ANN. § 145.412(3)(3)(Supp. 1975-76).

[47] The 20-week figure was reached by using the gestational method of dating pregnancy. *See* note 10 *supra*.

> concluded that as between cases the point of viability will vary, and whether or not the fetus is in fact viable must be left to the medical judgment of the physician. In any event, under present technology, it does not arise prior to 24 weeks. It appears that the Court made its comments on viability to prevent the very thing that has happened here, which is the attempt to set viability by legislative definition and thereby, in effect, unreasonably interfere with what the Court has determined to be a fundamental right.[48]

Essentially, the *Hodgson* court indicated that under *Roe* the state could not arbitrarily designate a particular point during pregnancy as the point at which the fetus becomes viable. According to *Hodgson,* the determination of viability is a medical question rather than a legal question, and must be answered by the physician on a case-by-case basis. The court also noted that, considering the current state of medical technology, it would presume that a fetus is not viable at any time prior to 24 weeks.

The practical effect of *Hodgson* is to permit abortions until at least 24 weeks, under the presumption that viability does not occur prior to that time, and to allow abortions after 24 weeks if, in the physician's judgment, the fetus is not viable. This approach has the virtue of offering the physician some degree of certainty as well as flexibility; the fetus is presumed nonviable prior to 24 weeks but an abortion after 24 weeks is permitted if the fetus is nonviable.[49] However, the actual viability of the fetus is still open to review in abortions performed after 24 weeks, and, given the difficulty of accurately determining fetal viability and the severity of the potential consequences of an error in judgment, physicians are likely to remain hesitant to perform such abortions. Moreover, the actual length of the pregnancy and age of the fetus are open to litigation in all abortions, with the physician subject to criminal sanctions if the prosecution can prove that the fetus was in fact older than

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[48] 378 F. Supp. at 1016.

[49] Current medical techniques are such that diagnosis of a defect or a disease that might render a fetus nonviable is often not possible until relatively late in the pregnancy. *See* D. CALLAHAN, ABORTION: LAW, CHOICE & MORALITY 93 (1970); Note, *Abortion After Roe & Doe: A Proposed Statute,* 26 VAND. L. REV. 823, 829 (1973).

24 weeks.[50] Because there is always some degree of error in judging the length of pregnancy and the age of a fetus,[51] the practical effect of this post-facto review may be to establish a cutoff point for abortions some weeks before the 24-week figure designated by the court.

C. *Presumptive Lack of Viability During the First Trimester*

In *Larkin v. Cahalan*[52] the Supreme Court of Michigan was called upon to interpret that state's assaultive abortion[53] and manslaughter by abortion[54] statutes in light of the *Roe* decision. The court held that, as used in the statutes, the word "child" referred to:

> a viable child in the womb of its mother; that is, an unborn child whose heart is beating, who is experiencing electronically measurable brain waves, who is discernibly moving, and who is so far developed and matured as to be capable of

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[50] One of the points alleged in the manslaughter prosecution of Dr. Kenneth Edelin in Massachusetts was that the aborted fetus was actually older than the 20 to 22 weeks that Dr. Edelin estimated. Guild Notes, March, 1975, at 4, col. 1.

[51] In addition to the two methods of dating a pregnancy which were mentioned in note 10 *supra,* and the fact that statutes and courts are usually silent as to which method is referred to, there are other problems. When dating a pregnancy from the patient's last menstrual period, a physician must necessarily rely upon information provided by the patient. Such information is often erroneous. Interview with Robert Shier, M.D., *supra* note 40. Other methods of dating a pregnancy, such as uterine size, degree of vigor exhibited by the fetus, quality of fetal heart tones (with or without amplification) and use of ultra-sound to determine fetal size, all involve a rather subjective evaluation on the part of the physician. The physician's estimate as to the age of the fetus may also include an error factor of as much as plus or minus four weeks. Deposition of Ronald Lubbe, M.D., at 29, Wolfe v. Schroering, 388 F. Supp. 631 (W.D. Ky. 1974) (three judge court) [hereinafter cited as Deposition of Lubbe].

[52] 208 N.W.2d 176 (Mich. 1973).

[53] MICH. COMP. LAWS ANN. § 750.322 (1968): "WILFUL KILLING OF UNBORN QUICK CHILD—The wilful killing of an unborn quick child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter."

[54] MICH. COMP. LAWS ANN. § 750.323 (1968): "DEATH OF QUICK CHILD OR MOTHER FROM USE OF MEDICINE, ETC., WITH INTENT TO DESTROY SUCH CHILD—Any person who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall, in case the death of such child or of such mother be thereby produced, be guilty of manslaughter."

> surviving the trauma of birth with the aid of the usual medical care and facilities available in the community.[55]

The court left the question of viability to be determined by the trier of fact on the basis of the evidence offered.[56] On the issue of whether *Roe* had limited the compelling nature of the state's interest in potential life to sometime after 24 to 28 weeks, the court said: "By reason of *Roe v. Wade,* we are compelled to rule that as a matter of federal constitutional law, a fetus is conclusively presumed not to be viable within the first trimester of pregnancy."[57] Without the benefit of further explanation from the court, it is difficult to understand how this conclusion was reached. While *Roe* made it clear that there can be no state regulation of abortion in the first trimester, because neither the state's interest in maternal health nor its interest in potential life is compelling during that period,[58] that opinion also indicated that, given current medical technology, the state's interest in potential life does not become compelling until approximately 24 to 28 weeks.[59] Thus, *Larkin's* conclusive presumption of nonviability during the first trimester appears inconsistent with the flexible standards of *Roe*. By defining the presumption in this manner, the Michigan court has chosen a point which seems too early, in terms of present medical knowledge, but which may one day be too late, if medical advances continue to expand the period of viability.[60]

Although *Larkin* theoretically allows post-first trimester abortions based upon the physician's medical judgment that the fetus is not viable, the practical effect of the *Larkin* analysis is to leave all such abortions open to post-facto review. As indicated by the preceding discussion on the impact of such review, it seems clear that this approach will probably decrease the number of post-first trimester abortions.

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[55] 208 N.W.2d at 180.

[56] The court specifically provided for the admissibility of scientific evidence on the question of viability. *Id.*

[57] *Id.*

[58] 410 U.S. at 163-64.

[59] *Id.* at 160.

[60] *See* note 81 *infra.*

IV. PROBLEMS CREATED BY THE VIABILITY STANDARD AND SUGGESTED SOLUTIONS

The four cases discussed above exemplify some of the possible approaches to the viability problem. Despite the differing results reached in these cases, two points stand out: 1) each of the cases relied, to some degree, upon the *physician's judgment* to determine viability, and 2) the one court that gave any effect to the Supreme Court's reference to 24 to 28 weeks as the point at which viability occurs, did so only in light of *present medical technology. Wolfe* and *Danforth* left the question of viability solely to the physician, regardless of the length of pregnancy or the age of the fetus.[61] *Hodgson* left the question of viability to the physician's judgment after 24 weeks, but was careful to indicate that the 24-week figure is dependent upon "present technology."[62] Under *Larkin,* the decision is within the physician's discretion after the first trimester.[63]

A. *The Physician's Judgment*

It seems clear from these cases that, in general, the question of viability will be left to the physician's judgment. The problems that are likely to result from this approach have been discussed in relation to the individual cases. Briefly, when a physician is called upon to make a complex medical judgment, such as that of viability, with the knowledge that criminal sanctions may be invoked if the wrong decision is made and with the knowledge that the decision will be reviewed by the courts after the fact, there will be a chilling effect.[64] Fewer physicians will be willing to perform abortions and more women will be forced to choose between a dangerous, illegal abortion and the birth of an unwanted child, with its attendant responsibilities and disabilities.

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[61] Wolfe v. Schroering, 388 F. Supp. 631, 636 (W.D. Ky. 1974) (three judge court). Planned Parenthood of Central Mo. v. Danforth, 392 F. Supp. 1362, 1368 (E.D. Mo. 1975) (three judge court), *application for stay of enforcement of Missouri House Bill No. 1211 pending appeal granted,* 420 U.S. 918 (1975).

[62] Hodgson v. Anderson, 378 F. Supp. 1008, 1016 (D. Minn. 1974) (three judge court), *appeal dismissed for want of jurisdiction sub nom.* Spannaus v. Hodgson, 420 U.S. 903 (1975).

[63] Larkin v. Cahalan, 208 N.W.2d 176, 180 (Mich. 1973).

[64] *See* note 40 *supra.*

A possible solution to this problem is the establishment of a subjective standard on the question of viability: If a physician in good faith believes that the fetus is nonviable, an abortion should be legal, regardless of whether or not the fetus is in fact viable. There are at least two reasons for utilizing a subjective standard. First, there is no single, simple, positive-or-negative laboratory test or examination technique to determine whether a fetus is viable. The medical judgment as to viability involves a number of variables, including the length of pregnancy,[65] the race and weight of the fetus,[66] whether the lungs of the fetus can be inflated,[67] the multiparity of the woman,[68] and the presence or absence of maternal diabetes.[69] It is a difficult judgment to make: "Even in the most experienced hands, the length of the gestational period can be difficult to determine."[70] Further, no other medical judgment is subject to criminal sanctions if it should prove to be wrong. Thus, based upon the difficulty inherent in making the judgment and the serious consequences that attach to this particular judgment if it is in error, the physician's good faith belief that the fetus was nonviable should constitute a total defense to a criminal abortion prosecution. Second, due to the emotionally charged nature of abortion, it may be easier to find physicians who will testify against a fellow member of the profession in an abortion case than in a malpractice case.[71] The moral beliefs of such witnesses could affect their testimony on the question of whether the accused should have known that the aborted fetus was viable. By utilizing a subjective standard, the question would not be whether the accused should have known that the fetus was viable, but whether the accused did in fact believe that the fetus was viable. The only issue would be the good faith of the accused physician.

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[65] *See* Note, 7 U. CAL. DAVIS L. REV., *supra* note 37, at 449.

[66] *See id.*

[67] HEW Policies, *supra* note 14, at 31740.

[68] *See* Comment, 47 TEMP. L.Q., *supra* note 10, at 736.

[69] *See id.*

[70] Note, 7 U. CAL. DAVIS L. REV., *supra* note 37, at 433.

[71] Televised interview with Kenneth Edelin, M.D., BLACK PERSPECTIVE ON THE NEWS, taped April 2, 1975. The emotionally charged nature of abortion also affects the jury, to the further detriment of the physician on trial. *See* note 39 *supra*.

There is British precedent for using a subjective, good faith standard when dealing with the physician's decision to perform an abortion. The 1967 Abortion Act[72] delineates the conditions under which an abortion may be performed[73] and prescribes severe sanctions for abortions which are not performed in accordance with the statute.[74] An abortion "is lawful if any two registered practitioners have, *in good faith,* formed the opinion and have certified their opinions . . . ."[75] that the circumstances meet the criteria as set out in the statute. The British statute differs from the solution suggested here only in that it requires two good faith opinions rather than one. The British experience seems to indicate that a subjective, good faith standard on the question of the physician's judgment as to viability would be a practical method of freeing the physician from the constraints imposed by post-facto review.

B. *Artificial Viability*

In *Roe v. Wade* the Supreme Court defined a viable fetus as one "potentially able to live outside the mother's womb, *albeit with artificial aid*"[76] and stated that such "[v]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."[77] The cases subsequent to *Roe* clearly indicate that these statements are being interpreted by courts and legislatures to mean that viability occurs at 24 to

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[72] ABORTION ACT 1967, c. 87.

[73] Abortion is permitted if two physicians certify in good faith, that the continuance of the pregnancy:

(1) would involve a greater risk to the life of the pregnant woman than the termination of the pregnancy; or

(2) that it would involve a greater risk of injury to the physical or mental health of the pregnant woman than the termination of the pregnancy; or

(3) that it would involve a greater risk to the physical or mental health of any existing children of the pregnant woman's family than the termination of the pregnancy; or

(4) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Addison, *The Impact of the Abortion Act 1967 in Great Britain,* 38 MEDICO-LEGAL J. 15 (1970).

[74] *Id.* at 17.

[75] *Id.* at 15 (emphasis added).

[76] 410 U.S. at 160 (emphasis added).

[77] *Id.*

28 weeks, *given today's medical technology*.[78]

This interpretation raises the question of whether the development of means of artificially sustaining fetal life outside of the uterus should affect the legal concept of viability; *i.e.*, is "artificial viability"[79] within the meaning of the term "viability" as used in *Roe*? The answer to this question has important implications for the future, because viability marks the point at which the state's interest in potential life becomes compelling.[80] If, as the post-*Roe* cases suggest, the answer to this question is affirmative, then as medical technology renders fetuses viable at earlier points during gestation,[81] there will be a concomitant movement of the point at which the state's interest in potential life becomes compelling.[82] The most obvious result of such movement is that abortions will be proscribed and subject to criminal sanctions at earlier points during gestation. The amount of time available for diagnosis and decision-making will shrink, thereby making it increasingly difficult for

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[78] Although three of the cases mentioned the 24 to 28-week figure, one proceeded to ignore it, Wolfe v. Schroering, 388 F. Supp. 631, 636 (W.D. Ky. 1974) (three judge court); one stated that "the Supreme Court did not elect to preempt the physician's judgment," Planned Parenthood of Central Mo. v. Danforth, 392 F. Supp. 1362, 1368 (E.D. Mo. 1975) (three judge court), *application for stay of enforcement of Missouri House Bill No. 1211 pending appeal granted*, 420 U.S. 918 (1975); and one qualified its mention by reference to "present technology," Hodgson v. Anderson, 378 F. Supp. 1008, 1016 (D. Minn. 1974) (three judge court), *appeal dismissed for want of jurisdiction sub nom.* Spannaus v. Hodgson, 420 U.S. 903 (1975). Larkin v. Cahalan, 208 N.W.2d 176 (Mich. 1973) did not refer to the 24 to 28-week figure.

[79] This phrase refers to viability that is dependent upon some artificial means.

[80] 410 U.S. at 163.

[81] Developments in medical techniques will one day render fetuses viable at early stages of gestation. Viability at 12 to 14 weeks has been mentioned, Note, 7 U. CAL. DAVIS L. REV., *supra* note 37, at 450-51, and even earlier dates are possible, Comment, 47 TEMP. L.Q., *supra* note 10, at 737. In the geographical area served by Cincinnati hospitals, 20 to 30-week fetuses had only approximately a 10% chance of survival in 1965; today, in the same area, 20 to 30-week fetuses have a 25% to 30% chance of survival. Improved technology and increased experience in caring for early fetuses are responsible for the increased survival rates. Deposition of Lubbe, *supra* note 51, at 41, 42. Also, the continued development and increased availability of prostaglandins will produce greater numbers of viable fetuses, not because prostaglandins make the fetus viable at an earlier point, but because prostaglandins do not injure the fetus as do other methods of abortion (*e.g.*, saline or suction). Note, 26 STAN. L. REV., *supra* note 17, at 1194; Interview with Robert Shier, M.D., *supra* note 40.

[82] *See* Comment, 47 TEMP. L.Q., *supra* note 10, at 737; Note, 7 U. CAL. DAVIS L. REV., *supra* note 37, at 434-36.

many women to obtain safe, legal abortions.[83] In time, it may even develop that conception and viability will be coterminous,[84] thus resurrecting the system under which abortion is available only to preserve the life or health of the woman. In view of these undesirable possibilities, the wisdom of including artificial viability within the legal definition of viability seems questionable.

On a practical level, the decision in *Roe* appears to embody a compromise designed to balance the interests of those who feel that a woman has a right to control her own biological functions with the interests of those who feel that a fetus has a right to be carried to term. From this perspective, the choice of naturally occurring viability as the point at which abortion may be proscribed is both functional and sensible. It occurs at a point that is far enough advanced to allow adequate time for diagnosis and decision-making, thus accommodating the woman's right to control her biological functions. Moreover, it roughly coincides with the point at which, because of fetal size, danger to maternal health, and personal distaste, most physicians would refuse to perform an abortion anyway,[85] thus accommodating those who feel that the fetus has a right to be carried to term. In contrast, there is less justification for allowing the state to proscribe abortion at the point of artificial viability. Because artificial viability would occur much earlier during pregnancy, physicians would have less motivation (based on fetal size, danger to maternal health, or personal distaste) to refuse to perform an abortion than they would have after natural viability occurs. For the same reason, prohibition of abortion at artificial viability and thereafter would severely

[83] The time factor is especially important among young, poor, unmarried women, who often lack knowledge of the symptoms of pregnancy or believe that other bodily conditions can produce the same symptoms, and who obviously have a strong motivation to deny to themselves as well as to others that they might be pregnant. Among this group, the woman may wait until the pregnancy is obvious before consulting a physician, at which point it is usually well into the gestation period. Televised interview with Kenneth Edelin, M.D., BLACK PERSPECTIVE ON THE NEWS, taped April 2, 1975. In addition, even when the pregnancy is diagnosed early, the woman would be under the pressure of an early deadline while making a decision as to whether to have an abortion.

[84] *See* note 81 *supra*.

[85] *See* Comment, 47 TEMP. L.Q., *supra* note 10, at 736; Note, 7 U. CAL. DAVIS L. REV., *supra* note 37, at 453.

limit the ability of the woman to obtain a legal, safe abortion, and would probably increase the number of dangerous, illegal operations.

This analysis demonstrates that the concept of viability as the point at which the state's interest in potential life becomes compelling, and thus the point at which the state may proscribe abortions, should be limited to natural viability, and should not be extended to include the artificial viability that will undoubtedly be engendered by future medical technology. As Chief Justice Burger indicated in *Eisenstadt*,[86] the rights that are protected by the Constitution cannot rise and fall with medical technology.

CONCLUSION

By placing the compelling state interest in potential life at the point of viability, the Supreme Court left to the physician's judgment the determination of whether the state has a compelling interest in any particular case. Given the emotionally charged nature of the issue and the possible imposition of criminal sanctions, physicians will be unwilling to perform abortions after the first trimester if their professional judgment as to the viability of the fetus is open to post-facto review. In order to avoid this result it is necessary to establish a subjective, good faith standard by which the physician's judgment as to viability will be measured.

By referring to "artificial means" in its definition of viability, the Supreme Court has defined a fundamental right in terms of a scientific concept that is uncertain at the present time and likely to change in the future. In order to maintain the balance between competing interests which the Court struck in *Roe*, viability should be interpreted to mean only natural viability.

The flexibility of the *Roe* decision has been praised: "By focusing on compelling state interests rather than the traditional trimesters of pregnancy, *Roe* has achieved a flexibility which will allow it to survive in a world of rapidly changing

[86] Eisenstadt v. Baird, 405 U.S. 438, 470 (1972) (Burger, C.J., dissenting).

medical technology."[87] That view seems too sanguine in light of the problems discussed above. Although the flexibility in *Roe* may allow the opinion to survive, it could easily destroy the right which the opinion sought to guarantee. Only by exempting the accuracy of the physician's judgment concerning viability from post-facto review and by limiting the legal definition of viability to natural viability, will the limited right to abortion which *Roe* sought to insure continue to be a reality.

Chris Macaluso

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[87] Comment, 47 TEMP. L.Q., *supra* note 10, at 738.