ROE AND DOE

Clarke D. Forsythe, Senior Counsel at AUL, researched for twenty-five years to come up with Abuse of Discretion, an in depth look at Roe v. Wade and Doe v. Bolton and their consequences. The companion cases were released in January 1973 following a decade-long reform movement and struck down all state anti-abortion laws. Roe, an attack on Texas abortion law, legalized abortion subject to state regulation after viability, except in the case of abortion to preserve the life or health of the mother. Doe, an attack on Georgia abortion law, defined "health" to include "emotional well being" effectively eliminating any abortion prevention after fetal viability to birth. Hence, we have legal abortion from conception to birth as in only three other countries: North Korea, China, and Canada.

Several cultural changes were behind legalized abortion including: population explosion fears, the sexual revolution, the pill, false claims of 5,000-10,000 back alley abortion deaths annually (235 actual deaths reported in 1965), the Sherri Finkbine thalidomide abortion in Sweden, the rubella scare in 1965, and the mantras "it's a matter for a woman and her doctor" (most abortion doctors are strangers to their patients), and "abortion is safer than childbirth", which were all favorite liberal media topics. In addition the American Law Institute published its model abortion law, and several doctor, lawyer, and other elite groups including the AMA pressured for change.

The pressure groups facing failures in state legislatures turned their attention to the courts. In the 1965 case of Griswold v. Connecticut the Supreme Court created a general constitutional right to privacy to strike down a criminal prohibition of the marital use of contraception. In 1971 Judge Brennan in Eisenstadt v. Baird concerning contraception sales inserted a "buried bone" in some broad language in a draft opinion stating that right to privacy must apply to the decision whether "to bear or beget a child". In September 1971 Justices Hugo Black and John Harlan, probable prohibition proponents, retired, and four liberal Judges Douglas, Brennan, Thurgood Marshall, and Potter Stewart teamed to strike down state anti-abortion laws in Roe and Doe.

The two cases were accepted by the seven-member Supreme Court to review procedural issues without factual records regarding complex historical, legal, medical, and constitutional issues surrounding abortion. There were two oral arguments with the second devoted mainly to procedural issues with limited attention to constitutionality of abortion prohibition.

Drafting the Roe opinion was assigned to Justice Harry Blackmun. He relied on the now refuted Cyril Means account of the legal history of abortion, misunderstood the evidentiary born-alive rule to conclude abortion was allowed up to birth,

accepted a court created viability rule to allow more time for unrestricted abortion decisions, adopted the abortions are safer mantra, and expanded the right to privacy to cover abortions.

Abortion became legal from conception to birth even though no state had such a law, the public majority did not favor it, the legal history of abortion did not sanction it, the life of the mother by 1960 was rarely threatened by pregnancy, 90% of illegal abortions were by physicians, state regulation of abortion mills was eliminated, the physical and mental health of women face long-term risks, the population explosion was a myth, women have not been emancipated by abortion, common ground legislature is blocked, etc.

The unborn child is recognized today to have rights to protection under prenatal tort, wrongful death, and fetal homicide laws, but not a constitutional right to life against the abortion "right" that belongs to the mother. It remains to be seen if this inhumanity will be corrected.