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Nancy J. Linck

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CONSTITUTIONAL LAW—THE "ABORTED" EVOLUTION OF FETAL RIGHTS AFTER *Roe v. Wade*—*Douglas v. Town of Hartford*, 542 F. Supp. 1267 (D. Conn. 1982).

I. INTRODUCTION

On January 22, 1973, the Supreme Court in *Roe v. Wade*[1] held that " 'person' [within the meaning of the fourteenth amendment] . . . does not include the unborn";[2] almost a decade later, on July 2, 1982, T. Emmet Clarie, a Connecticut Federal District Court Judge, in denying a motion to dismiss, held in *Douglas v. Town of Hartford*[3] that a "viable fetus is a 'person' within the meaning of 42 U.S.C. § 1983".[4] Are these two decisions consistent or do they reflect a direct conflict? This note suggests that there is a direct conflict which cannot be resolved simply by distinguishing a case based on the fourteenth amendment from one based on section 1983; an examination of the legal history and purpose of section 1983 makes this point clear.[5]

Given that the cases are in direct conflict, is there some analysis of Judge Clarie's decision that might provide a rationale for his apparent flouting of the Supreme Court's holding in *Roe*?[6] In the *Douglas* opinion, the judge reasoned that since fetal protection had been extended in a number of recent cases,[7] it should not be denied in this one.[8] In this note his rationale is strengthened by an examination of 1) the evolution of fetal rights both before and after the *Roe* decision[9] and 2) the problems and potential conflicts created by that decision.[10]

This examination makes it clear that the *Roe* decision has interfered with the evolution of fetal rights and has made it extremely difficult, if not impossible, to provide protection to the potentially

1. 410 U.S. 113 (1973).
2. *Id.* at 158.
3. 542 F. Supp. 1267 (D. Conn. 1982).
4. *Id.* at 1269. 42 U.S.C. § 1983 (Supp. V 1981).
5. *See infra* notes 139-48 and accompanying text.
6. *See infra* notes 150-53 and accompanying text.
7. 542 F. Supp. at 1270.
8. *Id.*
9. *See infra* notes 17-56 and accompanying text.
10. *See infra* notes 57-110 and accompanying text.

viable fetus.[11] Lawmakers at both the federal and state levels have responded with "solutions"[12] that are untenable at this point in our history when the concerns expressed by the *Roe* Court[13] are still valid. This note examines those "solutions" and their consequences[14] and suggests that Judge Clarie's decision may offer a more acceptable alternative.[15] This alternative solution would extend such protection in a way that would allow both continued recognition of a woman's constitutionally protected right to an abortion as well as a balancing of that right against the fetus's equally protected right at the point of potential viability.[16]

II. FETAL RIGHTS EVOLUTION

A. *Tort Law*[17]

The beginning of common law tort actions involving injury to the fetus can be traced back to 1884 when, in *Dietrich v. Northampton*,[18] the court held that there was no cause of action for prenatal injuries.[19] As early as 1898, however, the dissenting opinion in *Allaire v. St. Luke's Hospital*[20] argued that such an action should be allowed when the fetus is viable.[21] The first real turning point came in 1946 when the court in *Bonbrest v. Kotz*[22] extended protection to a viable fetus which was born alive;[23] today such protection is available in essentially all jurisdictions.[24] The viability distinction was abandoned soon thereafter[25] and today is not a requirement in most

11. *Id.*
12. *See infra* text accompanying notes 105-20.
13. 410 U.S. at 153.
14. *See infra* notes 113-28 and accompanying text.
15. *See infra* notes 129-68 and accompanying text.
16. *See infra* notes 154-60 and accompanying text.
17. The evolution of tort law in this area has been thoroughly traced both before and after *Roe* in a number of law reviews. *See, e.g.*, Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 MO. L. REV. 639 (1980); King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647 (1979); Murphy, *The Evolution of The Prenatal Duty Rule: Analysis by Inherent Determinants*, 7 U. DAY. L. REV. 351 (1982).
18. 138 Mass. 14 (1884).
19. *Id.* at 17.
20. 76 Ill. App. 441 (1898), *aff'd per curiam*, 184 Ill. 359, 56 N.E. 638 (1900).
21. *Id.* at 454 (Windes, J., dissenting).
22. 65 F. Supp. 138 (D.D.C. 1946).
23. *Id.* at 141-42.
24. *See* Kader, *supra* note 17, at 642. For a list of cases that have followed *Bonbrest*, see M. Shaw & C. Damme, *Legal Status of the Fetus,* GENETICS AND THE LAW 14 n. 14 (A. Milunsky & G.J. Annas eds. 1976).
25. Hornbuckle v. Plantation Pipeline, 212 Ga. 504, 93 S.E.2d 727 (1956).

jurisdictions.[26]

Pre-*Roe* tort actions involving the interpretation of statutes showed an evolutionary process similar to that in the common law area. Three years after *Bonbrest* was decided, one state court declared that a viable fetus, born alive, was a "person" within its constitution.[27] A decade later, a court in the same state held that there was a cause of action for wrongful death if a viable fetus was injured and then stillborn.[28] It was in this case that the well-known twin hypothetical originated.[29] The evolutionary process was continued in 1967 when the Massachusetts Supreme Judicial Court held that a nonviable fetus who had been injured and then had lived two and one-half hours after birth was a "person" within the state's wrongful death act.[30]

After the *Roe* decision, the opinions in the civil statutory law area can generally be grouped in three main classes, with a number of strong dissents in each. In the first group, the courts have essentially ignored the *Roe* holding and have continued to extend protection to the fetus by allowing a wrongful death action whether or not the fetus was viable at the time of injury.[31] In the second, the courts have held that, *if* viable, a fetus is a "person" within the statute, allowing recovery without a live birth requirement.[32] Earlier, one court in this group had interpreted the same statute to include the nonviable fetus.[33] The courts in the third group have taken the *Roe* decision even further and declared that a fetus, viable or not, is not a

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26. *See* Kader, *supra* note 17, at 644.

27. Williams v. Marion Rapid Transit, 152 Ohio St. 114, 128-29, 87 N.E.2d 334, 340 (1949).

28. Stidam v. Ashmore, 109 Ohio App. 431, 433, 167 N.E.2d 106, 108 (1959).

29. In the twin hypothetical, twin fetuses were injured shortly before birth; one died before, and the other immediately after, birth. The court pointed out there was no valid reason to allow recovery for one and not for the other. *Id.* at 108.

30. MASS. GEN. LAWS ANN. ch. 229, § 2 (West 1983-1984). Torigian v. Watertown News Co., 352 Mass. 446, 449, 225 N.E.2d 926, 927 (1967).

31. *E.g.,* Huskey v. Smith, 289 Ala. 52, 265 So.2d 596 (1972); Presley v. Newport Hosp., 117 R.I. 177, 365 A.2d 748 (1976). For examples of cases that have allowed a nonviable fetus to recover only if born alive, see, Wallace v. Wallace, 120 N.H. 675, 421 A.2d 134 (1980); Scott v. Kopp, 494 Pa. 487, 431 A.2d 959 (1981).

32. *E.g.*, Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So.2d 354 (1974); Green v. Smith, 71 Ill. 2d 501, 377 N.E.2d 37 (1978); Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); Danos v. St. Pierre, 402 So.2d 633 (La. 1981); Mone v. Greyhound Lines, 368 Mass. 354, 331 N.E.2d 916 (1975); Libbee v. Permanente Clinic, 268 Or. 258, 518 P.2d 636 (1974). This appears to be the majority position at this time. Weitl v. Moes, 311 N.W.2d 259, 277-78 (Iowa 1981) (Larson, J., dissenting).

33. *Compare* Mone v. Greyhound Lines, 368 Mass. 354, 355, 331 N.E.2d 916, 917 (1975) (statute includes only viable fetuses) *with* Torigian v. Watertown News Co., 352 Mass. 446, 449, 225 N.E.2d 926, 927 (1967) (statute includes nonviable fetuses).

"person,"[34] echoing that argument in *Roe*.[35] This was also the position taken by a federal district court in Florida when an action was brought under the Federal Tort Claims Act[36] for the stillborn death of a viable fetus due to a hospital's malpractice.[37]

Fetal rights in common law tort actions have continued to evolve since *Roe*. Several recent cases have held that even a preconception tort which results in injury to the fetus generates a cause of action.[38] Clearly, the evolution of fetal rights was advancing toward greater protection before *Roe*,[39] contrary to an argument the Court made in *Roe*,[40] and has continued to do so since that decision,[41] in spite of the problems created by it.[42]

B. *Criminal Law*

In the area of criminal law, there is less evidence of the evolution of fetal rights before *Roe*, but at least one state has defined the crime of murder to include the killing of a fetus.[43] After *Roe*, the courts attempted to interpret statutes in a manner consistent with that decision. In two cases, when a viable fetus was injured and then lived a short time after birth, the crime of murder was charged.[44] When the fetus was not viable at the time of injury, however, courts have found it necessary to dismiss the charge of either murder[45] or manslaughter,[46] regardless of the atrocity of the crime.

Courts have been particularly troubled when the injury oc-

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34. *E.g.*, Justus v. Atchison, 19 Cal. 3d 564, 580, 565 P.2d 122, 132-33, 139 Cal. Rptr. 97, 107-08 (1977); Weitl v. Moes, 311 N.W.2d 259, 273 (Iowa 1981).

35. 410 U.S. at 158.

36. 28 U.S.C. §§ 1346, 2671-2680 (1976 & Supp. V 1981).

37. Simon v. United States, 438 F. Supp. 759, 760-61 (S.D. Fla. 1977).

38. Bergstreser v. Mitchell, 577 F.2d 22 (8th Cir. 1978); Jorgensen v. Meade Johnson Laboratories, 483 F.2d 237 (10th Cir. 1973); Renslow v. Mennonite Hosp., 67 Ill.2d 348, 367 N.E.2d 1250 (1977); Albala v. New York, 54 N.Y.2d 269, 445 N.Y.S.2d 108, 429 N.E.2d 786 (1981).

39. *See supra* notes 17-30 and accompanying text.

40. 410 U.S. at 161-62.

41. *See supra* notes 31-38 and accompanying text.

42. *See infra* notes 57-85 and accompanying text.

43. CAL. PENAL CODE § 187 (Deering 1971 & Supp. 1983).

44. People v. Greer, 79 Ill. 2d 103, 402 N.E.2d 203 (1980); State v. Anderson, 135 N.J. Super. 423, 343 A.2d 505 (1975), *rev'd and remanded on other grounds*, 173 N.J. Super. 75, 413 A.2d 611 (1980).

45. People v. Smith, 59 Cal. App.3d 751, 129 Cal. Rptr. 498 (1976).

46. Commonwealth v. Edelin, 371 Mass. 497, 359 N.E.2d 4 (1976); Larkin v. Cahalan, 389 Mich. 533, 208 N.W.2d 176 (1973).

curred at approximately the time the fetus became viable.[47] Some courts have solved this problem by simply declaring that the relevant statute does not apply to the unborn;[48] others have declared it unconstitutionally vague.[49] With the *Roe* decision in the background, criminal law, even in areas not involving abortion, cannot evolve past a *Bonbrest*-type analysis.[50]

C. *Abortion Law and The Problems Created by The* Roe *Decision*

In 1821 the first criminal abortion statute was adopted in Connecticut, making it a crime to abort a fetus after quickening.[51] By 1860, Connecticut's statute had been revised to extend protection to the fetus before quickening,[52] and by the late 1950's a large majority of states had banned abortion except to save the life of the mother.[53] At the time *Roe* was heard, however, the evolutionary trend in the abortion area was actually away from absolute fetal protection.[54] Perhaps recognizing a need to balance a woman's interest in the birth process and the difficult problems some pregnancies presented for both society and the mother, the states began to move toward liberalization of the abortion laws in certain circumstances.[55] Yet the need for greater protection for the unborn had not been forgotten in other areas of the law.[56]

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47. The time is indefinite, usually occurring between twenty-four and twenty-eight weeks, but may occur earlier as medical technology advances. *Roe,* 410 U.S. at 160-61.

48. *E.g.*, State v. Brown, 378 So.2d 916 (La. 1979); State v. Amaro, 448 A.2d 1257 (R.I. 1982); State v. Larsen, 578 P.2d 1280 (Utah 1978).

49. *E.g.*, People v. Apodaca, 76 Cal. App. 3d 479, 142 Cal. Rptr. 830 (1978).

50. An analysis that distinguishes between a viable and nonviable fetus. *See supra* note 13 and accompanying text.

51. *Roe*, 410 U.S. at 138-39 n.29. Quickening is a time when life is first felt by the mother. BLACK'S LAW DICTIONARY 1122 (rev. 5th ed. 1979).

52. *Roe*, 410 U.S. at 138-39 n.30.

53. *Id.* at 139.

54. Fourteen states had adopted ALI's Model Penal Code § 230.3 which permitted abortion if the child were going to be born mentally retarded or physically defective, if the pregnancy were a result of rape or incest, or if the mother's life were in danger. *Id.* at 139-40 n.37. While *Roe* was pending, the court in Abele v. Markle, 351 F. Supp. 224 (D. Conn. 1972), held that a recently passed statute only permitting abortion to save the mother's life was unconstitutional and, further, that a fetus was not a "person" until birth. *Id.* at 229. For an excellent discussion of this movement, see, Morgan, *infra* note 63, at 1726.

55. *Roe*, 410 U.S. at 139-40 n.37.

56. The New Therapeutic Abortion Act, CAL. HEALTH & SAFETY CODE §§ 25950-25954 (Deering 1982), legalized abortion in California during the first twenty weeks of pregnancy if the mother's mental or physical health would be gravely impaired by carrying the child to term. In the criminal law forum, however, the California Supreme Court held that a man who had maliciously killed a viable fetus could not be charged with

The Court in *Roe* struck down a Texas criminal abortion statute as unconstitutional based on a woman's fundamental right to privacy or autonomy, a right which allowed her to choose to end her pregnancy.[57] The state was held to have an interest in protecting maternal health and the potential life of the fetus, but neither interest was compelling throughout pregnancy.[58] Supposedly, after *Roe*, a balancing test would be applied after the first trimester, but during that trimester no interference by the state would be permitted.[59] After the first trimester, the state's compelling interest in the mother's health would be considered,[60] but only at the point when the fetus had become viable would the state's compelling interest in protecting it be weighed.[61] The Court held that " 'person' [within the fourteenth amendment] . . . does not include the unborn."[62] Criticisms of the majority opinion in *Roe* have been strong,[63] and some, including the dissent, have declared that the Court was engaged in legislation.[64] Nevertheless, since *Roe*, the Court has tended, with the exception of the funding cases,[65] not only to follow, but also to expand their holding.[66]

In *Doe v. Bolton*,[67] a companion case to *Roe*, a statute patterned after the American Law Institute's Model Penal Code, and similar to that in one fourth of the states at the time of *Roe*, was substantially

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murder, Keeler v. Superior Court, 2 Cal. 3d 619, 639, 470 P.2d 617, 630, 87 Cal. Rptr. 481, 494 (1970). In response, the legislature amended CAL. PENAL CODE § 187 to include the killing of a fetus in the definition of murder. PERKINS & BOYCE, CRIMINAL LAW AND PROCEDURE 47 n.a (5th ed. 1979).

57. 410 U.S. at 152-54.

58. *Id.* at 164-65.

59. *Id.* at 163.

60. *Id.* at 164-65.

61. *Id.* at 163-64.

62. *Id.* at 158.

63. *E.g.*, Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Morgan, *Roe v. Wade and the Lesson of the Pre-Roe Case Law*, 77 MICH. L. REV. 1724 (1979).

64. *E.g.*, *Roe,* 410 U.S. at 174 (Rehnquist, J., dissenting); Ely, *supra* note 63, at 926; Morgan, *supra* note 63, at 1730.

65. Williams v. Zbaraz, 448 U.S. 358 (1980); Harris v. McRae, 448 U.S. 297 (1980); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); and Beal v. Doe, 432 U.S. 438 (1977). In all of these cases the Court held that neither the Constitution nor federal legislation required public funding for abortions. *Zbaraz, 448 U.S. at 369; McRae*, 448 U.S. at 311; *Poelker*, 432 U.S. at 521; *Maher*, 432 U.S. at 469; *Beal*, 432 U.S. at 443-48.

66. *See infra* notes 67-75 and accompanying text. *See also* G. GUNTHER, *infra* note 69, at 610.

67. 410 U.S. 179 (1973).

invalidated.[68] Procedural restrictions, such as requiring a licensed hospital and approval by an abortion committee, were struck down as not rationally related to the patients needs.[69]

The holding in *Roe* invalidated abortion statutes in a majority of the states,[70] and after *Roe* the difficulty in drafting any sort of statute that would withstand constitutional attack became apparent.[71] In *Colautti v. Franklin*,[72] the Court found the language of Pennsylvania's criminal abortion statute vague, even though it was patterned after the language of *Roe*;[73] but, in *Planned Parenthood v. Danforth*,[74] the Court also struck down a statute which defined the point at which the fetus would be protected in terms of the age of the fetus.[75] Apparently, for such a statute to withstand constitutional attack, it must precisely define the point at which the fetus becomes viable, a point that cannot be precisely defined, or it must base that point and, therefore, the decision whether or not to abort, on the physician's subjective determination.[76]

The Supreme Court decisions since *Roe* clearly indicate that, although the state may regulate abortion after viability, before that point it may not provide the potentially viable fetus with any protec-

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68. *Id.* at 182 (citing *Roe*, 410 U.S. at 140 n. 37).

69. *Id.* at 193-98. G. GUNTHER, CONSTITUTIONAL LAW 600 (10th ed. 1975).

70. *See* Ely, *supra* note 63, at 920 (citing *Roe*, 410 U.S. at 118 n.2 and *Doe*, 410 U.S. at 181-82).

71. A number of statutes which were designed to provide some measure of protection for the fetus have been struck down as unconstitutional: Colautti v. Franklin, 439 U.S. 379, 397-401 (1979) (statute subjecting the physician to criminal liability if certain prescribed standards were not followed when the fetus might be viable); Planned Parenthood v. Danforth, 428 U.S. 52, 67-79 (1976) (statute prohibiting the use of saline amniocentesis and requiring the consent of either the parents or the husband); Hodgson v. Lawson, 542 F.2d 1350, 1358 (8th Cir. 1976) (statute defining point of potential viability at twenty weeks); Word v. Poelker, 495 F.2d 1349, 1351-52 (8th Cir. 1974) (city ordinance requiring that clinics be licensed and that they meet certain standards of cleanliness, training, and recordkeeping); Women's Medical Center v. Roberts, 530 F.Supp. 1136, 1145-47 (D.R.I. 1982) (statute requiring a twenty-four hour waiting period and that woman be informed of certain facts about the fetus and abortion). For a discussion of the difficulty in designing a criminal abortion statute today, see Note, *Viability and Fetal Life in State Criminal Abortion Laws*, 72 J. CRIM. L. & CRIMINOLOGY 324 (1981).

72. 439 U.S. at 390.

73. G. GUNTHER, *infra* note 69, at 616.

74. 428 U.S. 52 (1976).

75. *Id.* at 64.

76. *Colautti*, 439 U.S. at 392-97. Apparently, if the aborting physician knew the fetus was viable, or was in some way culpable in not knowing, and still aborted it, then he could be convicted of criminal abortion, provided that the mother's life or health were not at stake. *Id.*

tion which the aborting physician has not chosen to extend.[77] Therefore, because the point of viability is difficult to determine, viable fetuses may be destroyed[78] if the aborting physician makes a judgmental error. That such little protection for the potentially viable fetus exists presents a problem for those who believe a life capable of being preserved should be preserved. Under *Roe*, even a viable fetus does not, in its own right, command constitutional protection but must depend for its right to life on what the state may consider a compelling interest. Such an interest has not fared well when balanced against the fundamental right of the mother.[79]

The *Roe* decision has created another problem by interfering with the evolution toward more fetal protection in many branches of law. It is tolerable that the different branches of law may be at different evolutionary stages in the development of fetal rights,[80] but each branch must be allowed to evolve at some finite rate, one that society can tolerate, and one that leads toward a more unified system. The evolutionary process has been interrupted in a number of areas as a result of the way in which the *Roe* decision has been applied.[81] This is particularly true in the area of abortion law; an examination of the cases in that area after *Roe* exposes the fiction of the state's ability to protect the potentially viable fetus.[82] Even when the fetus is found to be viable, the mother's health may sufficiently outweigh the state's compelling interest in protecting it.[83] It is likely that a state's compelling interest will seldom balance favorably

77. *See, e.g.,* Doe v. Bolton, 410 U.S. 179, 191-92 (1973); *Colautti,* 439 U.S. at 393-94.

78. *E.g.*, Planned Parenthood v. Danforth, 428 U.S. 52, 75-79 (1976) (the use of saline amniocentesis in the second trimester cannot be prohibited); Planned Parenthood Ass'n v. Ashcroft, 664 F.2d 687, 690 (8th Cir. 1981), *aff'd*, 103 S. Ct. 2517, 2520 (1983) (hospitalization requirements for dilatation and evacuation—the only second trimester procedure used in Missouri—were held not reasonably related to the mother's health). In neither saline amniocentesis nor dilatation and evacuation is the life of the fetus preserved. *See infra* notes 177-78 and accompanying text.

79. Even after viability, the mother's health may outweigh the state's compelling interest in protecting the viable fetus. *Roe,* 410 U.S. at 165.

80. For example, constitutional law utilizes the fiction of viability that tort law abandoned more than two decades ago. *See supra* notes 26 & 61 and accompanying text.

81. *See supra* notes 33-37, 44-46, & 70-76 and accompanying text.

82. *See supra* note 71 (examples of protective provisions in a number of statutes that have been struck down). *See also* L. WARDLE & M.A.G. WOOD, A LAWYER LOOKS AT ABORTION 157-73 (1982) (citing additional cases in which such statutes have been invalidated).

83. 410 U.S. at 165. It is unclear what the Supreme Court meant by "health," as it did not specify whether mental as well as physical health was included or to what degree the mother's health must be threatened.

against a woman's constitutional right.[84] On its face, however, there is room for both growth and change in the *Roe* decision, as it dictates a balancing of a mother's liberty interest against the state's compelling interest in protecting potential life at viability. If such a balancing test were in reality adopted, as the states express a greater interest in protecting the unborn, as they clearly have done,[85] the scales should shift toward giving that interest greater weight.

D. *Potential Conflicts*

The law in the area of fetal rights has changed since and, in fact, was changing before the *Roe* decision. In all areas of law where fetal rights are protected, there is a potential conflict with a woman's right to choose to abort. Such conflict has been explicitly recognized in the following cases.

In *Chrisaafogeorgis v. Brandenberg*,[86] a viable fetus was killed in an automobile accident. The court allowed a wrongful death action[87] by defining "person" within the statute[88] to include a viable fetus.[89] Dissenting, Justice Ryan argued that a fetus is not a "person" within the statute[90] and expressed his concern regarding the potential conflict with the *Roe* decision by asking if the father would have a cause of action for wrongful death in an abortion case.[91] The dissent expressed the belief that the legislature should correlate wrongful death statutes with abortion statutes to avoid such a conflict.[92]

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84. Recently, the Supreme Court decided three abortion cases. Simopoulos v. Virginia, 103 S. Ct. 2532 (1983); City of Akron v. Akron Center for Reproductive Health, 103 S. Ct. 2481 (1983); Planned Parenthood Ass'n v. Ashcroft, 103 S. Ct. 2517 (1983). In both the *Akron* and *Planned Parenthood* cases, the Court held, among other things, that the hospitalization requirement for all second trimester abortions was unconstitutional. *Akron*, 103 S. Ct. at 2493; *Planned Parenthood*, 103 S. Ct. at 2520. Since during the second trimester the state's compelling interest is only in the mother's health and not in the preservation of the potential life of the fetus, *Roe*, 410 U.S. at 164-65, safer modern procedures make hospitalization unnecessary to protect that interest, at least into the early part of the second trimester. *Akron*, 103 S. Ct. at 2495-96. With these decisions, the states have lost much of their ability to monitor abortions in which fetuses may be viable. Although such monitoring may not have protected viable fetuses so long as they were destroyed before there was any opportunity for evaluation, *supra* note 78 and accompanying text, it may have been a deterrent to physicians contemplating the aborting of a potentially viable fetus.

85. *See supra* notes 31-32 & 38 and accompanying text.

86. 55 Ill. 2d 368, 304 N.E.2d 88 (1973).

87. *Id.* at 374, 304 N.E.2d at 91.

88. Illinois Wrongful Death Act, ILL. REV. STAT. ch. 70, §§ 1, 2 (1981).

89. 55 Ill.2d at 374-75, 304 N.E.2d at 92.

90. *Id.* at 377-79, 304 N.E.2d at 93-94 (Ryan, J., dissenting).

91. *Id.* at 379-81, 304 N.E.2d at 94-95.

92. *Id.* at 381, 304 N.E.2d at 95.

In *Parks v. Harden*,[93] the majority held that an unborn was an "eligible individual" for whom the mother could collect AFDC[94] benefits. The dissent noted that, under the majority's holding, a woman might collect benefits the first six months of pregnancy and then abort the fetus before viability.[95] The dissent argued that it was inconsistent to extend benefits out of concern for the fetus's wellbeing and then allow the mother to abort her "eligible individual."[96] Although the majority decision was overruled in *Burns v. Alcala*,[97] such an argument reflects the basic philosophical conflicts which may develop in light of the *Roe* decision when there is an attempt to extend fetal protection.

In *Wallace v. Wallace*,[98] a case in which a nonviable fetus was killed in a motor vehicle accident, the court held that "it would be incongruous for a mother to have a federal constitutional right to deliberately destroy a nonviable fetus . . . and at the same time for a third person to be subject to liability to the fetus for his unintended but merely negligent acts."[99] The dissent expressed the belief that a fetus can be a "person" for one purpose and not for another.[100] Such an analysis would lead to the same result as would application of a balancing test,[101] and the dissenting judge might have recognized this alternative approach had he carried his analysis further.

In *Curlender v. Bio-Science Laboratories*,[102] a wrongful life action[103] was allowed when the parents were not given sufficient facts to make a conscious choice.[104] The court noted, in dicta, that if the parents were given such facts and made the wrong choice, then the child could sue them.[105] If one can be held liable for making the

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93. 504 F.2d 861, 872 (5th Cir. 1974).

94. Aid to Families with Dependent Children. Social Security Act, 42 U.S.C.A. §§ 601-612 (West 1974 & Supp. 1982).

95. 504 F.2d at 877 (Ainsworth, J., dissenting).

96. *Id.*

97. 420 U.S. 575, 578 (1974).

98. 120 N.H. 675, 421 A.2d 134 (1980).

99. *Id.* at 679, 421 A.2d at 137. The court failed to recognize that the difficulty is not removed at the point of viability, as the mother may still have such a right if her life or health is endangered. *Roe*, 410 U.S. at 165.

100. 120 N.H. 684, 421 A.2d at 140 (Douglas, J., dissenting).

101. In the former case, the mother's constitutionally protected right to abort a nonviable fetus would outweigh the fetus's right to protection; in the latter case there is no constitutional interest to counterbalance the same fetal right.

102. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (Ct. App. 1980).

103. A wrongful life action is one by the child rather than the parents, as in one for wrongful birth. Berman v. Allen, 80 N.J. 421, 423, 404 A.2d 8, 10 (1979).

104. 106 Cal. App. 3d at 829, 165 Cal. Rptr. at 488.

105. *Id.* In response to this problem, the California legislature passed a bill

wrong choice and not aborting, then it logically follows that one may also be held liable for deciding to abort if that decision is later found to be the wrong one. The problematic ramifications of such a logical argument are clear.

In the case of *Grodin v. Grodin*,[106] the court allowed an action to be brought against the mother for prenatal injuries suffered due to her negligence.[107] Although the court did not explicitly recognize a potential conflict, one may easily be perceived. In *Danos v. St. Pierre*,[108] the court argued that it made no sense to allow the tortfeasor to escape punishment because the fetus was dead rather than injured.[109] If this argument is applied to a situation such as that in *Grodin*, then a mother could be held liable for the death of a fetus caused by her negligence. This is only a small, logical step away from holding her liable for the intentional killing of her unborn.[110]

These five cases offer only a sampling of the numerous conflicts which have arisen or may arise as a consequence of *Roe*. Such conflicts are the result of extending fetal protection on the one hand[111] and withdrawing it on the other.[112]

III. Possible Solutions to the Problem

A. *Congressional Solutions*[113]

Two types of federal legislation have been initiated and a number of bills have been introduced in response to *Roe*. One of

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preventing such an action. Cal. Civ. Code § 43.6 (Deering 1983). Murphy, *supra* note 17, at 364-65 n.31.

106. 102 Mich. App. 396, 301 N.W.2d 869 (Ct. App. 1980).

107. *Id.* at 401-02, 301 N.W.2d at 871. Intrafamily immunity, with two exceptions, has been abolished in Michigan. *Id.* at 399, 301 N.W.2d at 870.

108. 402 So.2d 633 (La. 1981).

109. *Id.* at 638.

110. *See generally* Comment, *Parental Liability for Prenatal Injury*, 14 Colum. J.L. & Soc. Probs. 47 (1978). The author of the foregoing comment points out that it would seem illogical to hold parents liable for negligently injuring their unborn but not for aborting it. *Id.* at 83.

111. *See supra* notes 17-43 and accompanying text.

112. *See supra* notes 57-76 and accompanying text.

113. *See generally* Committee on Federal Legislation, *Anti-Abortion Proposals Before the 97th Congress*, 37 Rec. A.B. City N.Y. 559 (1982); Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250 (1975); Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation*, 68 Va. L. Rev. 333 (1982); Kolb, *The Proposed Human Life Statute: Abortion as Murder?*, 67 A.B.A.J. 1122 (1981); M. Rosenberg & K.J. Lewis, Constitutional Authority to Enact a Human Life Statute: A Constitutional Analysis of S. 158 (1981).

these, the Helms-Hyde bill,[114] declares that human life shall exist from the moment of conception and that "person" includes all human life. Stephen H. Galebach, the originator of the bill, argues that, since the *Roe* Court declined to define when life begins, it is up to the legislature to do so.[115] He further argued that the Court's holding that "person" does not include the unborn rests on its inability to define the beginning of human life.[116] The effect of such legislation would be to give the fetus greater protection by extending to it a constitutional interest of its own from the moment of conception; this, in turn, would require a genuine balancing against the constitutional interest of the mother from that moment.

Some proponents of the right-to-life movement questioned the constitutionality of such bills and decided that a constitutional amendment would be more effective.[117] Two types of amendments have been drafted: the first prohibits all abortions[118] and the second allows abortion only to save the life of the mother.[119] The effect of either of these would be to extinguish a woman's constitutionally protected liberty interest and establish an extremely rigid system.[120] Court decisions and legislation that are rule-oriented are often rigid[121] and not susceptible to a smoother, albeit slower, evolution which would allow for society's changing needs.[122] In fact, it may be the rule-oriented nature of *Roe*[123] which makes that decision so inflexible.

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114. S. 158, 97th Cong., 1st Sess. § 1(a)(b), 127 CONG. REC. 58420 (1981). This bill is also known as the "Human Life Statute." G. GUNTHER, CONSTITUTIONAL LAW 114 (10th ed. Supp. 1981).

115. G. GUNTHER, *supra* note 114, at 115.

116. *Id.*

117. *Id.* at 48.

118. *E.g.*, S.J. Res. 19, H.R.J. Res. 104, 97th Cong., 1st Sess. (1981) (partially reprinted in G. GUNTHER, *supra* note 114, at 48).

119. *E.g.*, S.J. Res. 17, H.R.J. Res. 125, 97th Cong., 1st Sess. (1981) (partially reprinted in G. GUNTHER, *supra* note 114, at 48).

120. Although some amendments are written broadly and are subject to judicial interpretation, one which defines "person" to include "unborn offspring at every stage of their biological development," G. GUNTHER, *supra* note 114, at 48 (citing S.J. Res. 17, H.R.J. Res. 125, § 1), and which requires that "[n]o unborn person shall be deprived of life by any person . . . [except when] required to prevent the death of the mother," *id.* (citing § 2), cannot be interpreted to allow survival of the mother's right to an abortion except when her death is imminent.

121. For a discussion of the rigidity problem in the area of wrongful death actions, see Note, *Wrongful Death and The Stillborn Fetus: A Common Law Solution to a Statutory Dilemma*, 43 U. PITT. L. REV. 819, 830-34 (1982).

122. For an example of such an evolution in tort law, see *supra* notes 17-42 and accompanying text.

123. *See supra* note 64.

B. *The States' Solution*

Some states have managed to extend protection to the fetus through their own "solution." By refusing public aid for abortions to indigent women, these states force women who have insufficient funds and who are unable to secure aid elsewhere, to bear unwanted children they cannot afford to raise.[124] Such a denial of aid has been held constitutional by the Supreme Court in *Beal v. Doe*,[125] *Maher v. Roe*,[126] and *Poelker v. Doe*.[127] This "solution" is most disturbing in that it defeats one of the important justifications for the *Roe* Court's nationalization of a woman's right to abort—that of extending the right equally to all, including those who could not afford to travel to a state in which abortion was legal. Further, this solution does not provide equal protection for all unborn at any particular point in their development—it only protects the unborn of the poor.[128]

C. *A Possible Alternative—The* Douglas *Case*

Neither leaving the situation as it is, with both the real and potential problems resulting from the *Roe* decision, nor adopting legislation to move rigidly and abruptly in the other direction provides a very satisfactory answer. The problems of unwanted pregnancies pointed out in *Roe*[129] still plague society. Science is attempting to help solve such problems; in the future, early transplantation of a fetus into a barren womb or a test tube may be possible, and better methods of birth control may be available. Further, society may become more tolerant of out-of-wedlock pregnancies and a woman's surrender of her child for adoption, but the problems as they exist today cannot be ignored. At present, it is absolutely necessary to allow women, rich and poor, to exercise their constitutional right to abortion before viability. On the other hand, it is also necessary to provide greater protection to the potentially viable fetus. None of the solutions offered by lawmakers accomplishes these goals;[130] Judge Clarie's holding in the *Douglas* case may do so.

The facts of *Douglas* are as follows: On July 8, 1981, Rosalie

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124. *See* Jones, *Abortion and the Consideration of Fundamental, Irreconcilable Interests*, 33 SYRACUSE L. REV. 565, 571 (1982).

125. 432 U.S. 438, 447-48 n. 15 (1977).

126. 432 U.S. 464, 469-70 (1977).

127. 432 U.S. 519, 521 (1977).

128. *See* Jones, *supra* note 124, at 571 n.38 (citing Cates, *The Hyde Amendment in Action*, 246 J. A.M.A. 1109-11 (1981)).

129. 410 U.S. at 153.

130. *See supra* text accompanying notes 113-28.

Douglas, then approximately six months pregnant, was allegedly hit on the head with a nightstick by a Hartford police officer while she was attempting to aid her sister.[131] Paul, Ms. Douglas' son, was born on October 22, 1981, apparently with prenatal injuries caused by the officer's blow.[132] Both the mother and the infant alleged violation of their constitutional rights because of police brutality and claimed actual and punitive damages under section 1983 against the unnamed police officers and the town of Hartford.[133] On July 2, 1982, the defendants moved to dismiss the charges on several grounds.[134] The court, however, disagreed with the defendants' argument that the fetus is neither a "citizen" nor a "person" within the meaning of the fourteenth amendment.[135] Instead, the court denied the motion and held that a viable fetus is a "person" and thus has standing to sue under section 1983.[136] Judge Clarie's opinion restated the plaintiffs' arguments, emphasizing the expansion of fetal rights in a wide variety of legal contexts,[137] but made no mention of the *Roe* decision, in spite of the fact that the defendant's main argument was based on *Roe*.[138]

This case cannot be distinguished from *Roe* based solely on the fact that the action was brought under section 1983. Section 1983 was a codification of a portion of the Ku Klux Klan Act of 1871, enacted to enforce the fourteenth amendment.[139] The Act is remedial only[140] and may be invoked either when constitutional rights

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131. Memorandum of Law as to Claims of Paul Douglas at 1.

132. *Id.*

133. *Id.*

134. 542 F. Supp. at 1268.

135. *Id.* at 1269-70.

136. *Id.*

137. *Id.* at 1270. The plaintiffs had cited a number of cases supporting the proposition that the recent trend in the state courts is toward expansion of fetal rights. Memorandum of Law as to Claims of Paul Douglas at 2-3 (citing Justus v. Atchison, 19 Cal. 3d 564, 139 Cal. Rptr. 97, 565 P.2d 122 (1977); Simon v. Mullin, 34 Conn. Supp. 139, 380 A.2d 1353 (1977); and Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973)).

138. Memorandum of Law in Support of Defendant at 2.

139. 1979 U.S. CODE CONG. & AD. NEWS 2609-10. A right of action was created in federal court against state and territorial officials who refused to enforce states laws against those who violated the rights of freed slaves and union sympathizers. Supreme Court decisions have extended § 1983 protection so that governments and their officers may be liable if they violate the civil rights of persons within their jurisdiction. *Id.*

140. A statute which is remedial only gives a means of obtaining redress and does not furnish the right. BLACK'S LAW DICTIONARY 1162-63 (rev. 5th ed. 1979). *E.g.*, Maher v. Gagne, 448 U.S. 122, 129 n.11 (1980); Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617-18 (1979); Davis v. Foreman, 251 F.2d 421, 422 (7th Cir. 1958); Hernandez v. Pierce, 512 F. Supp. 1154, 1158 (S.D.N.Y. 1981); Harley v.Schuylkill, 476

have been violated[141] or when there has been some deprivation of rights under federal law.[142]

Under section 1983, only the person injured has standing to sue.[143] The definition of "person" for purposes of section 1983 must be found within the substantive law being enforced.[144] Therefore, in cases such as *Douglas*, in which deprivation of constitutional rights is alleged, the meaning of "person" must be found within the Constitution, or, more precisely, within the fourteenth amendment.[145] Courts employing this approach have held, based on *Roe*, that a fetus is not a "person."[146] Further, one court noted that since *Roe*, no case has held that a fetus is a "person" within the Constitution.[147] Although there are very few section 1983 cases involving fetal rights, courts, in other contexts, have consistently sought the meaning of "person" for purposes of section 1983 within the Constitution.[148]

In light of the remedial nature of section 1983 and the explicit holding in *Roe* that " 'person' . . . does not include the unborn,"[149] it is difficult to see how Judge Clarie could arrive at his holding in

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F. Supp. 191, 194 (E.D. Pa. 1979). *See also* Scott v. City of Anniston, 430 F. Supp. 508, 515 (N.D. Ala. 1977), *aff'd in part, rev'd in part*, 597 F.2d 897 (5th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980) (argument that "a statute can be no broader than its [c]onstitutional base"—referring to Title VII of the 1964 Civil Rights Act rather than to § 1983).

141. *E.g.*, Baker v. McCollan, 443 U.S. 137, 146-47 (1979); Firnhaber v. Sensenbrenner, 385 F. Supp. 406, 409 (E.D. Wis. 1974).

142. *E.g.*, Greenwood v. Peacock, 384 U.S. 808, 829-30 (1966); Gage v. Commonwealth Edison Co., 356 F. Supp. 80, 87 (N.D. Ill. 1972).

143. Jones v. Hildebrant, 191 Colo. 1, 8-9, 550 P.2d 339, 345, *cert. granted,* 429 U.S. 1061, *dismissed*, 432 U.S. 183 (1976). There have been arguments made that, where parents allege a financial loss, this traditional rule should be relaxed, *e.g.*, Clark v. Lutcher, 436 F. Supp. 1266, 1269 (M.D. Pa. 1977); but in Burns v. Alcala, 420 U.S. 575 (1975), the Court held that the unborn do not have a right to sue for AFDC (Aid to Families with Dependent Children) benefits under § 1983. *Id.* at 577.

144. Harman v. Daniels, 525 F. Supp. 798, 799-800 (W.D. Va. 1981); McGarvey v. McGee Womens Hosp., 340 F. Supp. 751, 753 (W.D. Pa. 1972), *aff'd,* 474 F.2d 1339 (3d Cir. 1973).

145. *See supra* notes 139-44 and accompanying text.

146. Harman v. Daniels, 525 F. Supp. 798, 800 (W.D. Va. 1981); McGarvey v. McGee Womens Hosp., 340 F. Supp. 751, 754 (W.D. Pa. 1972), *aff'd,* 474 F.2d 1339 (3d Cir. 1973).

147. Harman v. Daniels, 525 F. Supp. 798, 800 (W.D. Va. 1981). *Harman* was relied on heavily by the defense in *Douglas*, as it was both factually and legally on point. The *Harman* court found that a fetus did not have an action under § 1983 because § 1983 protection extended no further than that given by the fourteenth amendment. *Id.* at 799-800.

148. *E.g.,* Adams v. Park Ridge, 293 F.2d 585, 587 (7th Cir. 1961); Trapper Brown Construction v. Electromech, 358 F. Supp. 105, 106-07 (D.N.H. 1973); Tobin v. Rizzo, 305 F. Supp. 1135, 1139 (E.D. Pa. 1969).

149. 410 U.S. at 158.

Douglas without intentionally flouting the Supreme Court. The judge may have reached such a holding based on several lines of reasoning. It is hard to believe he thought that the two actions could be distinguished based on the difference between a section 1983 case and one under the fourteenth amendment. It is more likely he recognized that justice requires there be a remedy for such an injury, and that, since, in this case, there was no constitutional interest to counterbalance the interest of the plaintiff as there was in *Roe*, the remedy should be applied.

On the other hand, Judge Clarie's analysis may have been far more complex. On examination of his dissent in *Abele v. Markle*,[150] it is clear he believed that Connecticut had a strong interest in preserving the life of the unborn and that action such as was taken in *Roe* should be left to the legislature.[151] Now almost ten years after *Roe*, the judge may believe that 1) the *Roe* Court's argument that fetal rights are not well-recognized[152] may be less valid today and 2) the holding that the fetus is not a "person" within the fourteenth amendment has created a dichotomy in the legal rights of the fetus which is leading to intolerable conflicts in our laws. Support for such a conclusion is found in the previous analysis of fetal rights evolution and of the conflicts resulting from the *Roe* decision.[153]

Judge Clarie held that a viable fetus is a "person."[154] Such a definition would extend the same protection *after viability* as would be provided from the point of conception by adoption of the "Human Life Statute."[155] It would allow a balancing similar to that promised by the *Roe* Court, but, in fact, seldom done in a manner favorable to the potentially viable fetus.[156] Such a step, requiring *one constitutional interest to be weighed against another*,[157] would possi-

150. 351 F. Supp. at 224, 233-36 (D. Conn. 1972) (Clarie, J., dissenting). While *Roe* was pending the court, in *Abele*, struck down Connecticut's abortion statute in much the same manner that the *Roe* Court struck down Texas' statute. 351 F.Supp. 224, 232 (D. Conn. 1972).

151. 351 F. Supp. 224, 235 (D. Conn. 1972) (Clarie, J., dissenting).

152. 410 U.S. at 161-62.

153. *See supra* notes 26, 31, 32, 38, 86-112 and accompanying text.

154. *Douglas*, 542 F. Supp. at 1269.

155. *See supra* note 114 and accompanying text.

156. *See supra* note 71.

157. The *Roe* Court argued that, if the fetus were a "person," then the mother would have no right to abort, 410 U.S. at 156-57; but this reasoning is fallacious in that, if two constitutional rights are in conflict, they must be balanced. Ely, *supra* note 63, at 926 n. 48. *Cf.* Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (a case in which the first amendment rights of the press were balanced against the sixth amendment right to a fair trial).

bly allow consideration at the point of viability of such factors as the father's wishes, the burden on the mother, and the availability of a home for the child. Further, with a weightier interest potentially in the balance, and as the point at which that interest may become operative, safeguards to protect that interest from being ignored would likely be allowed.[158] If states were allowed to establish a period of potential viability, based on the fetus's age, in which such a balancing would be required, the burden placed upon the physician would be lessened.[159] Such a period could be extended back to the earliest point at which the fetus could survive outside the womb to provide some protection to all viable fetuses.[160]

If appealed, it seems likely that Judge Clarie's holding will be reversed, as it is difficult not to conclude that his decision conflicts with that of the Supreme Court.[161] This may be unfortunate because such a holding might provide the preferred small evolutionary step. There are several arguments, however, that might allow this decision to stand. First, the premise that " 'person' . . . does not include the unborn"[162] was unnecessary for the Court's decision in *Roe*.[163] Second, the Court's definition of "person" is only relevant in a context where the beginning of life is unknown but is not relevant to the point at which life is known to exist.[164] Finally, since the *Roe* case involved a Texas statute and Texas, according to the Court,[165] had shown little interest in protecting the fetus, in *that situation* " 'person' . . . does not include the unborn";[166] on the other hand, since Connecticut has always expressed great interest in the preservation of life, it may appropriately define a viable fetus as a "person" within

158. Under the *Roe* decision, during the second trimester, the state's only compelling interest is in that of the mother's health. 410 U.S. at 164-65. For that reason, techniques which may destroy the fetus are allowed if they are the safest for the mother. *Colautti*, 439 U.S. at 397-98 (saline amniocentesis); Planned Parenthood Ass'n v. Ashcroft, 664 F.2d 687, 689 (8th Cir. 1981), *aff'd*, 103 S. Ct. 2517 (1983) (dilatation and evacuation).

159. *See supra* note 76 and accompanying text.

160. Such a suggestion is similar to that made by King, *supra* note 17, that the law "should err on the safe side . . . to give all [fetuses] that may be viable a chance." *Id.* at 1680 n.146.

161. *See supra* text accompanying notes 139-49.

162. *Roe*, 410 U.S. at 158.

163. *See supra* note 157. If the *Roe* Court erred and a balancing test would be done whether or not the fetus was a "person," then the holding that the fetus is not a "person" was unnecessary to reach the Court's decision.

164. This argument is similar to that of Galebach, G. GUNTHER, *supra* note 114, at 115.

165. *Roe*, 410 U.S. at 150-52.

166. *Id.* at 158.

the fourteenth amendment.[167]

A simple answer to the mystery of Judge Clarie's decision would be to attribute it to his own resistance to liberalized abortions,[168] but there may be more behind it.[169] The fact that he did not refer to *Roe* is, admittedly, disturbing; but it may have been strategically wise if, in fact, this small evolutionary step is to be allowed to stand. Whether the judge's "solution" is a conscious one is a question only the judge can answer.

IV. CONCLUSION

The conflict that exists between the protection of a woman's constitutional right to privacy and the rights of the unborn cannot be completely resolved today.[170] The "solutions" offered by federal and state lawmakers are unacceptable and would create more problems than they would solve.[171] Rather than extending protection to the unborn at the point of conception, as these "solutions" would do,[172] the *Douglas* definition of "person" extends protection only to a *viable* fetus and allows the mother's right to abortion to remain intact, at least to the point at which the fetus may be viable.[173] At that point, since there potentially is a second constitutional interest, that of the fetus, a true balancing of that interest against the mother's would be necessary.[174]

Admittedly many of the potential conflicts in areas of law in which fetal rights' evolution has been "aborted" would remain unresolved, even if Judge Clarie's definition of "person" is accepted. Such a definition, however, would at least allow extension of fetal rights to the point of potential viability.[175]

The *Douglas* holding provides, at most, one small step down the evolutionary path. The future will require more steps, but, hopefully, not until the time when both the constitutional rights of the mother and that of the fetus may be protected equally and simultaneously. Science and society must work together to provide the final

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167. *See Abele*, 351 F. Supp. at 233-36 (Clarie, J., dissenting). *See also* 542 F. Supp. at 1270.

168. *Abele*, 351 F. Supp. at 233-36 (Clarie, J., dissenting).

169. *See supra* notes 152-53 and accompanying text.

170. *See supra* notes 129-30 and accompanying text.

171. *See supra* notes 113-28 and accompanying text.

172. *Id.*

173. *See supra* notes 154-58 and accompanying text.

174. *Id.*

175. Some courts since *Roe* have refused to extend protection to the fetus at any stage. *See supra* notes 34 & 48 and accompanying text.

solution.[176] For now, one small step may prove sufficient to quiet the anger of those concerned that viable fetuses may be killed *in utero*[177] or removed in sections[178] and yet would allow a mother's constitutional right to privacy to remain intact until the point of potential viability and to be balanced equally against the fetus's right to life as a "person" after that point.

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176. *See supra* notes 129-30 and accompanying text.

177. The result of the abortion procedure using saline amniocentesis. *Colautti*, 439 U.S. at 397-98.

178. The result of dilatation and evacuation. Planned Parenthood Ass'n v. Ashcroft, 655 F.2d 848, 865 (8th Cir. 1981), (citing TIETZE, INDUCED ABORTION: 1979, 68 (3d ed. 1979)), *aff'd*, 103 S. Ct. 2517 (1983).