Chapter-V
Legislative Development in U.K., Ireland and U.S.A.
CHAPTER V

LEGISLATIVE DEVELOPMENT IN U.K., IRELAND, & U.S.A.

A. Abortion Law in United Kingdom

Historically, in Anglo-American law, abortion had been criminalized, at least from the point of “quickening” (15-18 weeks) and often severely punished. Liberalisation of abortion laws began to occur in the later 1960’s.

Henry Bracton, (1216-1272) “the Father of Common Law”, apparently regarded abortion (at least after 5 or 6 weeks) as homicide. It seems that at early common law abortion was a felony, therefore a hanging offence. Later commentator, Coke and Blackstone, held expressly that abortion after quickening was not the crime of murder, but a separate crime (a “grave misprision”). It is unclear whether pre-quickening abortion was still criminalized. The Miscarriage of woman Act of 1803\(^1\), introduced a statutory abortion scheme in England. Pre-quickening abortion was made a felony and post-quickening abortion was a capital crime. In 1837, with abolition of the death penalty\(^2\), the quickening distinction was removed and all abortion was punished as a single felony. In 1861, the Offences Against Person Act\(^3\),

\(^1\) “Lord Ellenborough’s Act,” 43 Geo. 3, p-58
\(^2\) 7 Will. 4 & 1 Vict., p-85-6
\(^3\) 24- & 25 Vict., p-100-105
introduced a replacement statutory scheme, where, as before, all abortions were felonies.

In 1929, the Infant Life (Preservation) Act⁴ was passed. It supplemented the Offences Against Person Act 1861, and included a defence for bonafide efforts to save the mother’s lives. A common law health exception to the Offences Against Person Act was introduced in 1938 by Rex V. Bourne⁵, Finally, the Abortion Act 1967, while maintaining the general prohibition of abortion, introduced broad exceptions for genetic defects and the mental and physical health of the mother. Under this law, abortion is generally permitted if a pregnancy is unwanted, as childbirth is seen as more of a health threat than early abortion.

At common law, procuring or attempting to procure termination of pregnancy before ‘quickening’ was not an indictable offence.⁶ It was only after quickening that the abortion was punishable as an offence i.e., before 1803 the legal prohibition of induced abortion was confined to the period after the foetus had quickened, that is, moved in the womb. This goes back to an ancient speculation as to the time when life commenced.⁷

Saint Thomas Aquinas defined the soul as the first principle of life in those things that live, and he added that the life is shown

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⁴ 19 & 20 Geo. 5, p.34
⁵ [1939] 1 K.B. 687, 3 All E.R. 615 (1938)
⁶ Blackstone: W. Commentaries, I p.129
⁷ Williams, Glanville: The Sanctity of Life and the Criminal Law p 141 (1957)
principally by two actions, knowledge and movement. It was easy to imagine that the animus, life or soul, entered the body of the unborn infant when it turned or moved in the womb. Hence the rule of the common law, dating from the time of Bracton (a contemporary of Saint Thomas) that life is taken to start, at the time of quickening when the foetus moved in the womb, an event that usually occurs about halfway through the pregnancy (around 20th week). By United Kingdom's first criminal abortion statute, Lord Ellenborough's Act 1803, the crime of abortion was pushed back to commencement of the pregnancy and distinction between an abortion before quickening and after quickening abolished. In 1861 the Offence Against the Person Act, 1861 in section 58 and 59 made procuring or attempting to procure abortion a felony (offence) repealing the Act of 1803. The Crime now rests on the Offences Against the Person Act, 1861, Section 58, which establishes a uniform maximum punishment of imprisonment for life whether the abortion is attempted before or after the quickening.

The Act of 1861 (subject to abortion Act 1967 and Human Fertilization and Embryology Act 1990, Section 37) prohibits procuring miscarriage from any time after the conception of the child until its birth. The Sections covers two cases:

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8 Summa Theological, Part I. Question 75, Art. 1
9 Supra note 6, p-130
12 See, Offences Against Person Act, 1861, Section 58
(1) Where a pregnant woman administers to herself any poison or noxious thing or uses any instruments or other means to procure her own miscarriage, and

(2) Where anyone else unlawfully uses means with intent to procure abortion whether the woman is pregnant or not. Punishment under the section on conviction may extend up to imprisonment for life. Instances of means given in the statute are 'poison or other noxious thing' and any instrument. The crime consists not in the procuring of miscarriage but in the attempt to do so. It is immaterial that the attempt is unsuccessful or even that (where someone other than the woman herself is charged) the woman is not with child.

The Offences Against Person Act, 1861, also punishes supply or procuring of noxious drugs or instruments knowing it to be unlawfully used for causing abortion with imprisonment, which may extend up to five years.

In a case of 1949, the trial judge sentenced a husband who had tried to abort his wife and killed her to five year's penal servitude, but owing to particular circumstances the court of Criminal Appeal reduced the sentence.

Lord C. J. said: 'In the case the appellant was living with his wife and two children in circumstances, which were truly deplorable.

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13 The Statute is apparently not confined to these two instances, and it has been extended to an abortion attempted by manipulation with the hand. See R. V. Spicer (1955) Criminal Law Review 772.

14 See The Offences Against Person Act, 1861, Section 59

They were all living in one small room, and the prospect of another child being added to their number was such as might have moved anyone to the greatest pity... The circumstances were that this man and his wife were trying to prevent another little life from being brought into the conditions in which they were living. The offence is, though, a serious one, but there are circumstances which enable the court to take a merciful view.¹

Allied to the crime of miscarriage is the statutory offence—The Infant Life (Prevention) Act 1929. The Act is aimed at protecting the destruction of child. Section 1 of the Act as amended by the criminal justice Act 1948 states:

Any person, who, with intent to destroy the life of a child capable of being born alive, by any willful act causes a child to die before it has an existence independent of its mother, shall be guilty of an offence, of child destruction...and shall be liable on conviction...to imprisonment for life.

Owing to close proximity between the offence of miscarriage (Act of 1861) and child destruction (Act of 1929) the two offences may overlap at times. For instance, procuring a miscarriage so as to kill a child capable of being born alive may fall under the Act of 1861 as well as the Act of 1929. To overcome such an eventuality, sub-section 2 to section 2 of the Act of 1929 provides that where upon the trial of any person for,

(i) The murder or manslaughter of any child,¹⁶ or

¹⁶ Offences Against Person Act, 1861, Section 10 provides for trial of murder or manslaughter
(ii) Infanticide, or

(iii) An offence under section 58 of the Offences Against Person Act, 1861, the jury are of the opinion that the person charged is not guilty of any offences mentioned there in, but it is shown by the evidences that accused is guilty of the offence of child destruction, he may be convicted accordingly.

A notable development in the English law was the case of Rex v. Bourne in which the court apparently answered in affirmative the question whether an abortion necessary to preserve the life of the pregnant woman was exempted from criminal liability under the Act of 1861. In the case a wider meaning was given to the words “for the purpose only of preserving the life of the mother” by Macnaghten J. Thus the extension of abortion in Britain can be traced to this case. The decision concerned a fourteen-year-old girl who became pregnant as a result of being raped. The girl’s parents, fearing for her mental well being, arranged for the defendant to carry out an abortion. Bourne, an eminent obstetrics surgeon and gynecologist, thought that the operation ought to be performed in view of the age of the girl and the fact that she had been raped with great violence and so he terminated the pregnancy. After the operation the defendant informed the police as to what he had done in order to obtain a

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17 The Infanticide Act 1938, Section 1(1) provides for punishment for causing death of a child under the age of twelve months
19 [1939] 1 K.B. 687 (Held, all therapeutic abortion are lawful)
further definition of the present law. As a result of his confession
the defendant was charged under Section 58 of the Offences
Against the Person Act, 1861, for unlawfully procuring the
abortion of the girl.

Justice Macnaughten who delivered the judgment observed
that though the law with regard to procuring of an abortion under
Section 58 of the Act of 1861, under which the accused was
charged, did not expressly incorporate the words, i.e., 'for the
purpose only of preserving the life of the mother' they represent
the common law and were implicit by the words 'unlawful'
occurring in the impugned section.

In his judgment Macnaughten J looked at the historical
background to the Act:

The defendant is charged with an offence against S-58 of the
Offences Against the Person Act, 1861... The protection, which
the common law afforded to human life,—extended to the unborn
child in the womb of its mother. But as in the case of homicide, so
also in the case where an unborn child is killed, there may be
justification for the act.

In interpreting the Act, Macnaughten J held that although
abortion was generally a criminal offence, the Act allowed for the
termination of pregnancy for the purpose of preserving the life of
the mother. He reached this conclusion by adopting a 'reasonable'
approach to the interpretation of the Act and said:

See, Offences Against Person Act, 1861, for the text of S-58
“Those words for the purpose only of preserving the life of the mother ought to be construed in a reasonable case, and, if the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor, who under those circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother.”

The judge said that:

(i) the operation was done bonafide to save the life of the mother, the defendant was entitled to an acquittal;

(ii) the bonafide object of avoiding the practically certain physical or mental breakdown of the mother will afford an excuse;

(iii) if a doctor in good faith thinks it necessary ‘for the purpose of preserving the life of the mother’ not only is entitled to perform the operation, but it is his duty to do so; and

(iv) the burden of proving that the procurement of abortion was not lawful was upon the crown. The preservation of the life of the mother, is not confined to action taken to save her from danger but could arise where the whole physical or mental health of the mother were endangered as depicted in the present case.  

21 Rex V. Bourne, [1938] 3 All E.R. p.619
22 Supra note 19, p.313
The court further held that the phrase ‘for the purpose of preserving the life of the mother’ is wide and should be liberally interpreted to cover the acts that are dangerous to the health of the mother and will shorten the life as ‘the life depends upon health and health may be so gravely impaired that it may result in death’. If the doctor performs the operation terminating pregnancy under such circumstances, it would be presumed that he acted in good faith for the purpose of preserving the life of the mother. In *Bergmann and Ferguson*, Morris J is reported to have said that the court will not look too narrowly into the question of danger to life where the danger to health is anticipated then in *Newton and Stungo*. Ashworth J stated that the procurement of abortion is unlawful unless the same is done in good faith “for the purpose of preserving the life or health of the woman” and health included mental as well as physical health.

Since the Crown, in *Bourne* case, failed to comply with the obligation of discharging the burden of proving that the operation was not procured in good faith for the purpose of preserving the life of the mother, the jury gave a verdict of acquittal.

The question of good faith or bad faith is essentially a question of fact. Section 2 of The Abortion Act 1967, requires the opinion of Medical practitioners to be certified in a particular form and notice of the termination of pregnancy and other

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23 (1948) Unreported; The Sanctity of life, 154; IBMJ 1008, quoted in, Supra note 18, p-341
24 (1958) Crime L.R. 469
25 Smith and Hogan, op.cit pp. 141-42
26 Supra note 21, p.612

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information to be given in good faith. In *R V Smith*,\(^{27}\) the appellant
a medical practitioner was charged with unlawfully using an
instrument to procure a miscarriage. The appellant on payment of
a fee agreed to terminate pregnancy of woman of 19 years, who
wanted an abortion without examining her internally or asking
her medical history. The doctor also did not obtain the opinion of
two doctors as required. When the woman was on the operation
table, it was found that she was starting inevitable abortion; thus
operation became not a termination but a facilitating and tidying
up of an inevitable abortion.

It was contended that the appellant did not act in good faith
when he operated and had formed no bonafide opinion as to the
balance of risk between termination and continuance of pregnancy
as required under the law.

The Court of Appeal held that a verdict of bad faith where
there is no evidence as to professional practice and medical
probabilities is often likely to be regarded as unsafe; but this
depends upon the nature of the other evidence.\(^{28}\) For example:

An opinion may be absurd professionally and yet formed in
good faith; conversely an opinion may be one, which a doctor
could have entertained and yet in the particular circumstances of a
case may be found either to have been formed in bad faith or not
have been formed at all.\(^{29}\)

\(^{27}\) [1974] 1 All E.R. 376
\(^{28}\) Smith and Hogan, op. cit, p-346
\(^{29}\) Supra note 27, p.381
If one or both of the doctors has expressed an opinion in bad faith but the operation is performed by a third, D, who is unaware of the bad faith, the condition of the Act are not satisfied but it is submitted that D has a defence i.e. he lacks mensrea for, on the facts as he believes them to be, his act is a lawful one. The doctor in bad faith might, however, be convicted for procuring illegal abortion.\textsuperscript{30}

\textbf{a. The Abortion Act 1967}

The law relating to abortion is modified in important respects by the Abortion Act 1967. In the Act: “the law relating to abortion’ means Sections 58 and 59 of the \textit{Offences Against Person Act 1861}, and any rule of law relating to the procurement of abortion.”\textsuperscript{31}

In course of time it was realized that the strict provision of law of abortion contained in Sections 58 and 59 of the Offences Against the Person Act 1861 was doing more harm than good. The women whose pregnancy had been an outcome of sexual violence, for instance rape, incest etc, or those deserted by their husbands, and over burdened mothers living in poverty with large families failed to get a medical abortion. Of course the abortion could be bought but with a heavy price. Consequently, most of the women would go to ‘back street abortionists’ wielding a knitting needle, syringe, or stick leading to a great risk to their life. At times

\textsuperscript{30} Cogan and Leak, 1976 Q.B.217, All E.R. (1975) 2, 1059

\textsuperscript{31} See, Hogget, “The Abortion Act, 1967, quoted in Smith and Hogan, Supra note 18 p-345
unwilling mothers used dangerous methods on themselves or committed suicide. It was also noticed that although illegal abortions were taking place in thousands, as in case of India before the passing of the Medical Termination of Pregnancy Act of 1971, yet conviction were negligible. The police would not look upon abortion as real crime.\(^{32}\)

In view of these evils, a strong opinion among the people grew that a woman had a right to control her own fertility and that the abortion should be legalized. At the same time a powerful religious lobby basing itself upon their “Sanctity of life” was opposed to any move for change in law. As a compromised measure the Abortion Act 1967,\(^{33}\) was passed which substantially liberalized the law of abortion though it did not concede all the demands of the pro-abortionists.

The Act of 1967 has legalized the termination of pregnancy by a registered medical practitioner under certain specified circumstances. Section 1 of the Act provides:

**Medical Termination of Pregnancy –**

1. Subject to the provisions of these sections, a person shall not be guilty of an offence under the law relating to abortion\(^{34}\), when a registered medical practitioner terminates pregnancy if two registered medical practitioners are of the opinion, formed in good faith.

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\(^{32}\) Ben Whitaker, The Police, 1971, pp. 36-37

\(^{33}\) The Act of 1967 is a small Act consisting of seven sections. The Act does not apply to Northern Ireland vide Section 7(3) of the Act.

\(^{34}\) The Abortion Act 1967, Section 6
(a) that the continuance of pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or

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

Thus the combined effect of the paragraph (a) and (b) to subsection 1 is that, a pregnancy may lawfully be terminated on health and eugenic grounds. Health ground includes the health of the woman and that of existing children of the family. Health has been defined by the World Health Organisation broadly to include, “the state of complete mental, physical or social well being, and not merely absence of disease or infirmity”.

In determining whether the continuance of pregnancy would involve such risk of injury to health as is mentioned in paragraph (a) of subsection (1) of the Act of 1967, account may be taken of the pregnant woman’s actual or reasonably foreseeable environment. In this context a wider view of the health may be taken depending upon various factors such as, social, psychological, economic etc., to determine the desirability of the termination of pregnancy in a particular situation. It would inter

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36 Supra note 34
alia; cover cases of over burdened mothers.\textsuperscript{37}

However, the risk of injury feared from allowing the pregnancy to continue must be "greater than if the pregnancy were terminated," in order to bring the act of termination of pregnancy within the purview of the exception clause to Section 1(4) of the Abortion Act of 1967.\textsuperscript{38} The Act for the first time allows the interest of the children of the family to be taken into consideration while deciding the desirability of the termination of pregnancy. The protection of the interest of the children of the family would thus be a valid ground for termination of a pregnancy.

The termination of pregnancy on the eugenic ground is basically justified upon the ground that the child if born would be seriously handicapped and would be a burden to the welfare of the parents and society at large.

The Abortion Act, 1967, unlike Indian\textsuperscript{39}, does not permit termination of a pregnancy on grounds of rape. However, the act of rape could influence the decision of doctors in invoking the health grounds, in the sense that the continuation of pregnancy poses a real and substantial risk to the life and health of the mother.\textsuperscript{40} Similarly, the pregnancy caused by the failure of any device or method used by a married couple for the purpose of limiting the number of children cannot justify termination of a

\textsuperscript{37} Glanville Williams Op cit. p-260
\textsuperscript{38} Supra note 34, Section 1(1) (a)
\textsuperscript{39} Medical Termination of Pregnancy Act, 1971
\textsuperscript{40} Rex V. Bourne, [1938] 3 All E.R. 615
pregnancy as under the Indian Law. In such a situation, the ground of health of the children may successfully be pleaded in invoking the termination of pregnancy.

As noted above, the Abortion Act, 1967 did not provide any limitation as to the time of termination of pregnancy. As per Act, of 1967, a pregnancy could be terminated at any time until the birth of the child. This weakness was subject to vehement criticism by Lane Committee, which recommended that the law should be amended to provide a definite upper time limit of twenty four weeks for termination of pregnancy (of course the other conditions of the Act being satisfactory up to that time should be lawful, and termination of pregnancy thereafter be treated as unlawful.

b. Human Fertilization and Embryology Act 1990

The Human Fertilization and Embryology Act, 1990 in order to remove the shortcomings in the Act of 1967, amended the Abortion Act 1967, on suggestion of Lane Committee.

Abortion with the woman’s consent is allowed if two doctors certify that a ground for abortion exists. Where the continuance of pregnancy would involve a risk to the life of the woman, greater than if the pregnancy were terminated, abortion is permitted without any time limit. It is also permitted where the pregnancy has not exceeded twenty-four weeks and the continuance of the

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41 Supra note 39 Section 3
42 Cmnd. 5579 (1974), Para 283, quoted in Smith & Hogan op. cit p.346
pregnancy would involve a risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing child of her family. In assessing the risk to the health of the woman and her existing children, doctors may take into account the woman's actual or reasonably foreseeable environment.' Furthermore, if there is substantial risk, if the child is born, it will suffer from such physical or mental abnormalities as to be seriously handicapped, abortion is permissible within the first twenty-four weeks.43

The introduction of the 1990 Act, (Human Fertilization and Embryology Act) revised the 1967 Act by stipulating five different grounds for a legal abortion. The law still requires two registered medical practitioners to define the need for an abortion [except Section 1(4)], and for a registered medical practitioner to perform the abortion.

Section 1[1 (a)] states that an abortion is possible if the pregnancy has not exceeded its twenty fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family.

The other grounds for termination, which follow in Section 1(1) all eliminate the twenty-four week, time period allowing for the performance of abortions up to term.

43 Supra note 2, p-32
Section 1[1 (b)] allows for the termination of pregnancy 'to prevent grave permanent injury to the physical or mental health of the pregnant woman'

Section 1[1 (c)] allows for termination if the continuance of the pregnancy would involve risk to the life of the pregnant woman greater than if the pregnancy were terminated.'

Section 1 [1 (d)], allows for termination of pregnancy in cases where there is a substantial risk that if the child was born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Section 1(4), allows for the bypassing of the two doctor necessity in cases where the termination of a pregnancy is of an immediate expediency to save the life of, or prevent grave permanent injury to the health of the woman.

In determining the risk involved with the continuance of a pregnancy, Section 1(2) of the 1990 Act states that account must be taken of the pregnant woman’s actual or reasonably foreseeable environment. The revised 1967 Act places a much greater emphasis on the needs of a pregnant woman in making a decision concerning the termination of the pregnancy. It allows for a greater consideration of her needs by not including set time limits [except in Section 1(1) a], by expanding the grounds for termination, and by distancing the effects of the 1929 Act and the issue of the foetus being viable. The 1990 Act established that the
1967 Act is no longer dependant on the 1929 Act.44

A discernable attitude of the courts towards the issue of abortion can be seen in the limited case law since the revision of the 1967 Act. In a case45, court, placed the considerations and desires of the mother as paramount when considering the possibility of an abortion, once due considerations had been given to all possibilities. This case is unique and may prove problematic in later interpretations considering the age of the mother, (twelve years old) but it can only be hoped that similar consideration will occur for all woman seeking termination of pregnancy. We can see the application of method used in Re B appropriate for subsequent case based on the court's determination of the validity of mother's wishes. The court followed the decision in Gillick46 case, which said that an individual under the age of 16 who was of sufficient maturity and intelligence and understood the implications of the medical treatment involved had the legal capacity to consent to medical treatment. It is established that regardless of the woman's age, so long as there is full understanding of treatment involved then the consent of the woman must be accepted.

In Re B47 the court heard a considerable amount of medical evidence, which both favoured and spoke against abortions. Hollis J, though, found that the medical experts who testified against abortion were putting the rights of the unborn child as paramount

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44 See, Section 5, of Abortion Act, 1967
45 Re B [1991] 2 FLR 426
46 Gillick V. West Norfolk and Wisbeck Area Health Authority and another, [1986] AC112; [1986] IFLR, 224
47 Supra note 45, p. 426
and above considerations of how the continuance of the pregnancy would affect the mother. In the end, the court found that the negative implications upon the mother that would occur with the continuance of the pregnancy for outweighed the implications of terminating the pregnancy, and accordingly allowed for the operation to take place.

Since the revised 1967 Act has not been brought into question in any subsequent cases, the full impact of its effects is still unknown. The revised 1967 Act and the limited application that so far exists has led some commentators to claim that the UK may now have one of the most liberal abortion laws in Western Europe.  

**c. Legal Safeguards**

To safeguard the interest of the pregnant woman the law has provided three procedural safeguards. Contravention of the provisions would make termination of a pregnancy illegal and contrary to law. These safeguards are:

(i) the pregnancy must be terminated by a registered medical practitioner;

(ii) two registered medical practitioners must have formed opinion in good faith that the abortion is necessary; and

(iii) the treatment for the termination of pregnancy must be

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49 Abortion Act 1967, Section 5(2)
50 Ibid, Section 1(1)
carried out in a National Health Service Hospital or in a nursing home, an approved by the Secretary of the State.\textsuperscript{51}

However, the above mentioned, last two procedural safeguards do not apply where the doctors are of the opinion formed in good faith, that the termination of a pregnancy is immediately necessary to safe the life, or to prevent grave permanent injury to the physical or mental health of the pregnant woman.\textsuperscript{52}

d. Termination of Pregnancy by Medical Practitioners \textit{vis-à-vis} Nurses

The defences provided by the Act are available “when a pregnancy is terminated by a registered medical practitioner.” In 1981 an important question as to legality of role of nurse in termination of pregnancy by medical induction was debated before the House of Lords in \textit{Royal College of Nursing of the United Kingdom V. Department of Health and Social Security}.\textsuperscript{53} There are two stages in medical induction, the first being the insertion of catheter by means of a pump or drip apparatus and second, the administration of fluid. The first stage was carried by the doctors and the second by nurses under the doctor’s instructions but in his absence (although he would be on call) The causative factor in inducing labour and thus in terminating the pregnancy was the

\textsuperscript{51} Abortion Act, 1967. Section 1(3)

\textsuperscript{52} Abortion Act, 1967. Section 1(4)

\textsuperscript{53} [1981] 1 All E.R. 545
administration of fluid, which was done by the nurse and not the doctor.\textsuperscript{54} Moreover, the Act obviously did not contemplate that every action in the steps leading to a termination of pregnancy would be done personally by the doctor. If, however, the doctor were to delegate more and more of the process to others, there would come a point when it could no longer be said that the pregnancy had been terminated "by a registered medical practitioner" – and at that point the termination/abortion would become unlawful.\textsuperscript{55}

The Department of Health and Social Security issued a circular to the nursing profession stating that no offence was committed within section 1(1) of the Abortion Act, 1967 by nurses who terminated the pregnancy by medical induction. If a doctor decided on the termination, initiated it and remained responsible throughout for its overall conduct and control. The Royal College of Nursing disputed the contention and brought a declaration against the Department of Health and Social Security in the court that the advice was wrong and that the act carried out by the nurses in terminating a pregnancy by the induction method contravened the provisions of section 1(1) of the Abortion Act of 1967.

The lower court upheld the department's contention. The college appealed to the court of Appeal, which reversed the decision of the lower court holding that the whole process of

\textsuperscript{54} Supra note 19, p-318
\textsuperscript{55} Smith and Hogan, op. cit. p-346-47
medical induction had to be carried out by a doctor and not merely under a doctor’s instructions if it was to come under section 1(1) of the Act of 1967. The department appealed to the House of Lords against the decision.

The House of Lords by a majority of three to two set aside the unanimous verdict of the court of appeal and restored the verdict of lower court. The court held that if the doctor prescribed the treatment for the termination of a pregnancy, remained in charge and accepted responsibility throughout, and the treatment was carried out in accordance with his directions, the pregnancy was terminated by ‘a registered medical practitioner’ for the purposes of section 1(1) of the Act of 1967, and any person taking part in the termination was entitled to the protection afforded under the Act of 1967. But if the doctor were to direct the whole procedure by correspondence or over telephone, the operation would presumably be unlawful.

This Act also gives the right to a person to object and refuse to participate in any treatment relating to termination of a pregnancy, if his conscience does not permit him to do so. However one cannot refuse to participate in treatment, which is necessary to save the life or to prevent grave injury to the physical or mental health of the pregnant woman. In Bourne, Macnaughten J took the view that there was not only a right but also a duty to

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56 Ibid  
57 Abortion Act, 1967, Section 4 (1)  
58 See, Abortion Act 1967, Section 6
perform the operation where only the doctor procuring an abortion could save a woman’s life:

"...If a case arises where the life of a woman could be saved by performing the operation and the doctor refused to perform it because of his religious opinion and the woman died, he could be brought before the court on a charge of manslaughter by negligence".\(^5^9\)

A secretary or clerk however, will not get the benefit of Section 4(1) of the Act of 1967, if he or she refuses to type a letter arranging an abortion or termination of pregnancy, as the act does not amount to counseling or procuring the termination of pregnancy.\(^6^0\)

The right to seek abortion is the sole prerogative of the pregnant woman. Neither the husband, nor common law husband\(^6^1\) may have any say in this matter, and cannot restrain the doctor who is to perform the abortion.\(^6^2\) However, the woman’s choice in terminating pregnancy is not unlimited exercise of a right and the law does not allow for it. The need for two medical practitioners to determine if the conditions are met does place a restriction on the rights of the woman. It can be argued that this restriction is reasonable considering the major health implications, which are involved with abortion. This idea was put forth by Scarman J in R

\(^{5^9}\) Supra note 19 p. 348 and Bourns [1939] 3 All E.R. p-618
\(^{6^0}\) Sal ford Health Authority, exp. The Times, 5\(^{th}\) Jan (1988) C.A. (Civ. Div.) quoted in supra note 19, p.318
V Smith⁶³, when he stated that the legality of an abortion has much to do with the opinion of a qualified doctor. This limitation can only be seen as reasonable if doctors and patients have equal access to all the information regarding abortion, whether it advocates abortion or not should not be considered. This further assumes that doctor will provide information in an unbiased way. This opinion was viewed by Macnaughten J in R. V. Bourne⁶⁴, he felt that any doctor who felt absolutely that abortions should not be performed should not be in medical practice, since there will exists times where the operation is necessary.

B. Abortion Law in Ireland

Abortion is an issue which has been the subject of intense and, indeed, divisive debate in practically every society. So in Ireland too. In 1983, following a vigorous campaign by a number of groups who felt that there should be a specific constitutional prohibition on abortion, an amendment was made to the constitution which sought to give effect to that aspiration. There was, however, at the time the contrary view that the Constitution already contained sufficient safeguards in relation to abortion and that the amendment was unnecessary and could possibly lead to ambiguities.

In 1992, a case, which has become known as the X case, came before the Supreme Court where it was decided that, under

⁶³ [1974] 1 All E.R. 376 at 378
⁶⁴ [1938] 1 All E.R. 618
the constitution, abortion is permissible in the state where the continuation of pregnancy poses a real and substantial risk to the life, as opposed to the health, of the mother and where such a risk could not be averted except by means of an abortion. A substantial risk to the life of the mother included *a risk of suicide*. The current position therefore is that constitutionally termination of pregnancy is not legal in Ireland unless it meets the conditions laid down by Supreme Court in the *X* case.

**a. Statutory Provisions**

Abortion is illegal in Ireland. Irish basic law is totally opposed to granting any individual either as a servant of the state or a private individual, the power to take the life of another innocent human being. A law like British Abortion Act, 1967 allows a whole class of people (i.e. pregnant women) in far from limiting circumstances to kill another whole class of people (i.e. their unborn children) as a matter of right and without the due process of a court of law. This is totally contrary to Irish law. The unlawful killing of an unborn child is a criminal offence under the provisions of section 58 and 59 of the Offences Against the Person Act 1861, carrying a maximum punishment of penal servitude for life. The protection given to unborn child applies from the date of conception.

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66 Abortion Act 1967, Section 7 (3)
The above-mentioned two sections of the Offences Against the Person Act, 1861 are relevant to the question of abortion. It should be noted that these two sections of the Offences Against the Person Act, 1861, did not make the destruction of the life of a child in the process of being born a criminal offence. It has been argued that the law on homicide applied only to born persons and the law on abortion only to foetuses in the womb and that therefore a child could be vulnerable at the time of birth. The meaning of Section 58 of Offences Against Person Act, 1861, was considered in Bourne case. This case involved a fourteen-year-old girl who had become pregnant as a result of multiple rapes. An abortion was carried out by Dr. Bourne, who was then tried under section 58. In his ruling, Macnaghten J. accepted that abortion to preserve the life of a pregnant woman was not unlawful. Furthermore, he ruled that, where a doctor was of the opinion that the probable consequence of a pregnancy was to render a woman a

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68 Section 58, states:
Every woman being with child who with intent to procure her own miscarriage shall unlawfully administer to herself any poison or noxious thing or shall unlawfully use any instrument or other means whatsoever with the like intent and whosoever with intent to procure the miscarriage of any woman whether or not she be with child shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing or shall unlawfully use any instrument or other means with the like intent, shall be guilty of felony...

Section 59 states:
Whosoever shall unlawfully supply or procure any poison or other noxious thing or any instrument whatsoever knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or not be with child, shall be guilty of misdemeanour...

69 Offences Against Person Act, 1861 (now fall to be interpreted in the light of judgment of Supreme Court in X case)

70 Supra note 65 Appendix I p-413

71 See, R V. Bourne [1939] 1 KB 687
mental and physical wreck, he could properly be said to be operating for the purpose of preserving the life of the mother.

However, no court has relied on the *Bourne* judgment and in a case,\textsuperscript{72} Keane J expressed the opinion that the preponderance of judicial opinion in this country would suggest that the Bourne approach could not have been adopted in this country consistently with the constitution prior to the Eighth Amendment.

b. Abortion and the Constitution

Prior to the insertion of the Eighth Amendment in 1983, Article 40.3 of the Irish constitution stated:\textsuperscript{73}

Article 40.3.1: The state guarantees in its laws to respect and, as far as practicable, by its laws to defend the personal rights of the citizen.

Article 40.3.2: The state shall, in particular, by its laws, protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.

The courts' judgment in a number of case, in consonance with these and other articles of the constitution, suggest that the constitution implicitly prohibits abortion and further said that the right to privacy of a pregnant woman does not extend to a right to terminate a pregnancy, 'the right to life is a sacred trust to which

\textsuperscript{72} *Society for the Protection of Unborn Child V. Grogan and others* (Unreported, March 6, 1997, p-7)

\textsuperscript{73} Pylee, M.V. op. cit p-810
all the organs of government must lend their support' and 'the unborn child' has a right to life and it is protected by the constitution.  

This lead to a referendum held on 7 September 1983 and the people voted to insert the Eighth Amendment. This became Article 40.3.3 and read as—

The state acknowledges the right to life of the unborn child and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate that right.

The interpretation of the amendment was further considered in X case, which arose in 1992. This case evoked considerable debate on abortion, in public and legal experts, a vexed question of law and fact as regards to the life of the unborn and right to life of the mother was involved.

The defendant in the X case was a fourteen-year-old girl who became pregnant after being raped by the father of one of her school friends. The girl and her parents decided that the best course of action was to travel to England to procure an abortion. The parent made known to the Gardai that they were considering this course of action and suggested that someone in England could carry out a forensic test on the foetus to ascertain the identity of the father. This issue of having scientific tests to be carried out on

75 Pylee, M.V. op. cit. p.810
retrieved foetal tissue so as to determining paternity, attracted the services of Director of Public Prosecution, for consultation, which in turn informed the Attorney General. But in the meantime the Attorney-General obtained an interim injunction in the High Court restraining the girl and her parents from:

(i) interfering with the right to life of the unborn,
(ii) leaving the jurisdiction for nine months; and
(iii) procuring or arranging an abortion within or outside the country

The High Court, while referring to the constitutional provision i.e., Article 40.3.3, observed that the right to life of the unborn is guaranteed under the constitution and that it was the duty of the various organs of the government including judiciary to defend and vindicate that right. Thus the High Court granted an interlocutory injunction in broadly similar terms and the case was appealed to the Supreme Court.\(^\text{77}\)

In 1992 the Supreme Court gave judgment in the case. Pointing out the state's duty to have "due regard" for the life of the mother. A majority of the members of the Supreme Court held that, if it were established, as a matter of probability, that there was "real and substantial risk" to the life, as distinct from the health, of the mother. The risk to life could include a threatened suicide, and that this real and substantial risk could only be

\(^{77}\) Id., p-12
averted by the termination of her pregnancy, such a termination was lawful.

The court accepted the evidence that had been adduced in the High Court that the girl had threatened to commit suicide. In the court’s view, her right to terminate her pregnancy was therefore protected by the Article 40(3) (3) as amended in the constitution. After the Supreme Court’s ruling in Attorney General V. X,\(^78\) the amendment had been turned on its head to provide equal protection to the life of the mother. The Supreme Court’s judgment on the substantive issue of abortion was welcomed by the women’s movement. However, its ruling on the right to travel raised widespread concern. The High Court had ruled that the state’s duty to protect the life of the unborn amounted to public policy derogation from the freedom of movement guaranteed under EC law.\(^79\) The Supreme Court agreed. However, in its view, the right to travel to terminate a pregnancy was protected only if the mother’s right to life was in danger. In the balancing of rights, a woman’s right to travel could not, \textit{per se}, take priority over the right to life of the unborn. If compelled to carry her child to full term and deemed that this threat of suicide constituted a “real and substantial” risk to the life of the mother. On this basis, the injunction granted by the High Court was lifted.

Following on the X decision three amendments were

\(^{78}\) Attorney General V. X (1992) I.R. 1.7

\(^{79}\) Society for the Protection of Unborn Children V. Grogan, (1994) I. I.R. 46 (Ireland High Court)
proposed to the constitution in 1992. The Fourteenth Amendment of the constitution, (which was approved) related to the provision of information. It stated:

"This subsection shall not limit freedom to obtain or make available, in the state, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state."

Legislation was introduced in the form of the Regulation on Information (Services outside the State for Termination of Pregnancies) Bill, 1995 which laid down by law, as contemplated by the recent 'information' amendment of the constitution, conditions under which information relating to services lawfully available in another state. This Act permits a doctor or advisory agency to provide abortion information to pregnant women in the context of full counseling as to all available options and without any advocacy of abortion. Abortion referral is specifically in the absence of a clear legislative framework, the Irish Medical Council Guidelines continued to exclude a threat of suicide as a ground for terminating a pregnancy.

In November 1997, the uncertain implications of Attorney General V. X resurfaced in the "C" case. This case involved, a thirteen year old girl, ("C"), who was a member of traveling

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80 Supra note 65, p-27
81 Ibid
82 See, Irish Medical Council, A Guide to Ethical Conduct and Behaviour, (5th ed. 1998). The Medical Council is a regulatory body established by the Medical Practitioners Act, No. 4 (1978)
community, became pregnant as the result of an alleged rape carried out by an adult male. The Eastern Health Board, which had taken the girl into care, applied to the District Court for orders allowing it to take the girl abroad for an abortion and to make all necessary arrangements for the abortion.

The District court made an order directing that the child ‘C’ be brought to such place as may be appropriate to terminate her pregnancy, having heard from two psychiatrists that the girl was likely to commit suicide if such termination was not carried out.

C’s parents sought to prevent any such abortion from taking place by challenging the District Court orders in the High Court by way of an action for judicial review. In the course of his judgment delivered on 28 November 1997, Geoghegan J, accepted that where evidence had been given to the effect that the pregnant girl might commit suicide unless allowed to terminate her pregnancy, there was a real and substantial risk to her life and such termination was therefore a permissible medical treatment of her condition where abortion was the only means of avoiding such a risk. In its judgment the High Court followed the X decision.

Thus, in current Irish law termination of pregnancy is not lawful in the state unless it meets the condition laid down by Supreme Court in the X case.
C. Abortion Law in United States of America


The law with respect to abortion in mid-19th century America followed existing common law of England in all but a few states. The abortions before “quickening” were permitted as per traditional common law. Thus, no indictment would occur for aborting a foetus of a consenting female prior to “quickening.” But, by the time of Civil War, an influential anti-abortion movement began to affect legislation by inducing states to add to or revise their statutes in order to prohibit abortion at all stages of gestation. By 1910, every state had anti-abortion laws, except Kentucky whose courts judicially declared abortion to be illegal. In 1967, forty-nine states and the District of Columbia classified the crime of abortion as a felony. The concept of “quickening” distinction (i.e., woman with child and woman quick with child) was no longer used to determine criminal liability but was retained in some states to set punishment. Non therapeutic abortions (unless done to save or preserve the life of the mother) were essentially unlawful. The states varied in their exceptions for therapeutic abortions. Forty-two states permitted abortions only if necessary to save the life of the mother. Other states allowed abortion to save a woman from “serious permanent bodily injury”

In a landmark decision the U.S. Supreme Court in Roe v. Wade, 410 U.S. 113 (1973), (a centerpiece of abortion law in the United States) determined that the constitution protects a woman’s decision whether or not to terminate her pregnancy.

or her “life and health.” Three states allowed abortions that were not “unlawfully performed” or that were not “without lawful justification,” leaving interpretation of those standards to the courts.86

This however, represented the high water mark in restrictive abortion laws in the United States, for 1967 saw the first victory of any abortion reform movement with the passage of liberalizing legislation in Colorado. The movement had started in early 1950s and centered its efforts on a proposed criminal abortion statute developed by the American Law Institute as parts of its Model Penal Code that would allow abortions when childbirth posed grave danger to the physical or mental health of a woman, when there was high likelihood of foetal abnormality, or when pregnancy resulted from rape, incest or felonious intercourse.

Between 1967 and the Supreme Court’s 1973 decisions87 in *Roe and Doe*, approximately one-third of the states had adopted, either in whole or in part, the Model Penal Code’s provisions allowing abortions in instances other than where only the mother’s life was in danger. Also, by the end of 1970, four states Alaska, Hawaii, New York and Washington) had repealed criminal penalties for abortions performed in early pregnancy by a registered medical practitioner, subject to stated procedural and

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health requirements.\textsuperscript{88}

The first U.S. Supreme Court decision dealing with abortion was delivered in 1971. In \textit{United States V. Vuitch},\textsuperscript{89} the court denied a vagueness challenge to the District of Columbia abortion statute. A majority of the court (Black, C.J. Berger, Harlan, White and Blackmun) held that the "health" exception was not unconstitutionally vague. The net effect of \textit{Vuitch} decision was to expand the validity of abortion under the District of Columbia law's provision allowing abortions where "necessary for the mother's...health.

\textbf{b. The Supreme Court's 1973 Abortion Rulings}

Between 1968 and 1972, the constitutionality of restrictive abortion statutes of many states was challenged on the grounds of vagueness, violation of fundamental right of privacy, and denial of equal protection. These challenges met with mixed success in the lower courts. However, the landmark events in establishing the basic law governing abortion in the United States were the January 1973 decisions of the United States Supreme Court. In 1973, the Supreme Court issued its rulings in \textit{Roe V. Wade} and \textit{Doe V. Bolton}.\textsuperscript{90} In these companion cases the court found that Texas and

\textsuperscript{88} Irving J. Solan, "The Law Governing Abortion Contraception & Sterilization" (1988), p-10
\textsuperscript{89} New York
\textsuperscript{90} [1971] 402 U.S. 62
\textsuperscript{90} In \textit{Roe V. Wade}, 410 U.S. 113 (1973), the U.S. Supreme Court determined that the constitution protects a woman's decision whether or not to terminate her pregnancy. In the companion case \textit{Doe V. Bolton}, 410 U.S. 179(1973), the court further held that a state may not unduly burden a woman's fundamental right to abortion by prohibiting and substantially limiting access to the means of effectuating her decision.
Georgia statutes regulating abortion interfered to an unconstitutional extent with a woman’s right to decide whether to terminate her pregnancy. The Texas statute forbade all abortions except “for the purpose of saving the life of the mother.” The Georgia enactment permitted abortions when continued pregnancy seriously threatened the woman’s life or health, when the foetus was very likely to have severe birth defects, or when the pregnancy resulted from rape. The Georgia statute required, however, that abortion be performed only at accredited hospitals and only after approval by a hospital committed and two consulting physicians.

The court held that states may not categorically prescribe abortions by making their performance a crime, and the states may not make abortions unnecessarily difficult to obtain by prescribing elaborate procedural guidelines. The constitutional basis for the decisions upon the conclusion that the Fourteenth Amendment right of personal privacy embraced a woman’s decision whether to carry a pregnancy to term.⁹¹ Regarding the scope of the right of the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action”, the court stated that it included only personal rights and can be deemed “fundamental” or implicit in the concept of ordered liberty “and bears some extension to activities related to marriage, procreation, contraception, family

⁹¹ Roe, 410 U.S. 152 (1973)
relationship, and child rearing and education.”

Such a right... the court concluded is broad enough to include a woman’s decision whether or not to terminate her pregnancy.

With respect to protection of the right against state interference, the court held that since the right of personal privacy is a fundamental right, only a “compelling state interest” could justify its limitation by a state. Thus while it recognized the legitimacy of the state interest in protecting maternal health and the preservation of the foetus potential life, and the existence of a rational connection between these two interests and the state’s anti-abortion law, the court held these interest insufficient to justify an absolute ban on abortions. The court concluded that until the end of the first trimester, an abortion is no more dangerous to maternal health than child birth itself, and found that: “With respect to state’s important and legitimate interest in the health of the mother, the ‘compelling’ point, in light of present medical knowledge, is approximately the end of the first trimester.” Only after the first trimester does the state’s interest in protecting maternal health provide a sufficient basis to justify state regulation of abortion, and then only to protect this interest.

The compelling point with respect to state’s interest in the potential life of the foetus “is at viability.” Following viability, the state’s interest permits it to regulate and even prohibit an

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92 Roe, 410 U.S. 152-53 (1973)
93 Ibid pp-148-50
94 Ibid pp-148-50
95 Roe, 410 U.S. 163 (1973)
96 Id at 164
abortion except when necessary, in appropriate medical judgment for the preservation of the life or health of the mother.97 The court defined viability in Wade’s case.98 It summarized its holding as follows:

This landmark (7-2) abortion decision voided the abortion laws of nearly every state. Striking down a Texas statute that prohibited all abortions except to save the mother’s life, the Supreme Court per Blackmun, held that abortion was a constitutional right that the state could only abridge after the first six months of pregnancy. More specifically the court held that:

1. the court had jurisdiction;
2. Roe’s case was not mooted, despite the birth of her child, because the case was “capable of repetition, yet evading review”;
3. the right to privacy includes the right to abortion;
4. since abortion is a fundamental right, state regulation must meet the “strict scrutiny” standard, which means the state must show it has a “compelling interest” in having the law;
5. the word “person” in the 14th Amendment, does not apply to unborn;
6. the state has an important interest in both preserving the health of a pregnant woman and in protecting foetal life;

97 Ibid
98 Roe, 410 U.S. 160 (1973). The Court defined viability as the point at which the foetus is potentially able to live outside the mother’s womb although with artificial aid.
7. the state's interest in maternal health becomes compelling at three months;
8. the state's interest in foetal life becomes compelling at viability—six months;
9. the state may not regulate abortion at all during the first trimester;
10. the state may regulate abortion during the second three months, but only for the protection of the woman's health;
11. the state may regulate or ban abortion during the third trimester to protect foetal life. 99

In *Doe* case, the court reiterated its holding in *Roe* that the basic decision of when an abortion is proper rests with the pregnant mother and her physician, but extended *Roe* case by warning that as states may not prevent abortion by making their performance a crime, state may not make abortions unreasonably difficult to obtain by prescribing elaborate procedural barriers. In *Doe*, the companion case to *Roe*, the Supreme Court striking down parts of a “liberalized” statute from Georgia with health/rape/incest exceptions. Holding, (7-2) per Blackmun, that woman has a constitutional right to abortion from six months to birth, if her doctor, “in his best clinical judgment,” in light of the patients age, “physical, emotional, psychological and familial” circumstances, finds it “necessary for her physical or mental health.” The court struck down state requirements that abortion be

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99 *Roe*, 410 U.S. 164-65 (1973)
performed in licensed hospitals; that abortion be approved before hand by a hospital committee; and that two physician concur in the abortion decision.\textsuperscript{100}

The court in \textit{Roe} case, also dealt with the question whether a foetus is a person and thereby protected under the Fourteenth Amendment and other provisions of the constitution. The court indicated that constitution never specifically defines, "person," but added that in nearly all the sections where the word person appears, "the use of the word is such that it has application only post-natally". None indicates with any assurance, that it has any possible pre-natal application.\textsuperscript{101} The court emphasized that, given the fact that in the major part of the 19\textsuperscript{th} century prevailing legal abortion practices were far freer than today, the court was persuaded "that the word 'person', as used in the Fourteenth Amendment, does not include the unborn."\textsuperscript{102}

The court did not, however, resolve the question of when life actually begins. It instead articulated the legal concept of "viability", defined as the point at which the foetus is potentially able to live outside the womb, although the foetus may require artificial aid.\textsuperscript{103} Viability was defined as occurring between 24 to 28 weeks of gestation.

The effect of \textit{Roe} decision on woman in the United States to terminate pregnancies was profound. After \textit{Roe}, abortion

\textsuperscript{100} \textit{Doe v. Bolton} 410 U.S. 196 (1973)  
\textsuperscript{101} \textit{Roe}, 410 U.S. 157 (1973)  
\textsuperscript{102} Id. at 158  
\textsuperscript{103} Id. at 160
procedure in the United States became widely available, legal, safe and simple. Within few years of the decision, data indicated that the mortality rate for women undergoing legal abortions—was 10 times lower than the mortality rate for women that has illegal abortions and five times lower than the rate for women undergoing childbirth.\textsuperscript{104}

c. Public Funding of Abortions

Two categories of public funding cases have been heard and decided by Supreme Court. Those involving:

1. funding restrictions for non-therapeutic (elective) abortions; and
2. funding limitations for therapeutic (medically necessary) abortions.

Restrictions on Public Funding of Non Therapeutic or Elective Abortions

The Supreme Court in three related decisions\textsuperscript{105} ruled on the question whether the Medicaid statute or the constitution requires public funding of non therapeutic (elective) abortions for indigent women or access to public facilities for the performance of such abortions. The court held that the states have neither a statutory nor a constitutional obligation in this regard.

Public Funding of Therapeutic or Medically Necessary Abortions

The 1977 Supreme Court decisions leave open the question whether Federal law, such as the Hyde Amendment could validly prohibit governmental funding of therapeutic abortions. In *Mc Rae*, a divided court held (5-4) per Stewart that, although abortion is held to be a constitutional right that does not mean that the state is obliged to pay for abortions. The court held that the equal protection and Due Process Clauses simply do not require the state to fund the exercise of protected liberties—since this protection is against state interference, not private economic hardship. In a companion case raising similar issues, the court held that a state of Illinois statutory funding restriction comparable to the Federal Hyde Amendment also did not contravene the constitutional restrictions of the Equal Protection Clause of the Fourteenth Amendment. The court's ruling means there is no statutory or constitutional obligation of the states or Federal Government to fund all medically necessary abortions.

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106 Ibid
Informed Consent/Waiting Periods.

In Planned Parenthood of Central Missouri V. Danforth, the court held that informed consent statutes, which require a doctor to obtain the written consent of a woman after informing her of the dangers of abortion and possible alternatives, are constitutional if the requirements are related to maternal health. The requirements of an informed consent statute must also be narrowly drawn so as not to unduly interfere with the physician-patient relationship, although the type of information required to be given to a woman of necessity may vary according to trimester of her pregnancy.

While upholding record keeping and consent from requirements, the court, per Blackmun, struck down Missouri laws that mandated:

1. written spousal consent for elective/non therapeutic abortions;
2. parental consent for minors;
3. that late term abortions be performed in a manner that best permits a viable child’s survival and a law that
4. banned second trimester saline abortions as a danger to maternal health.

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109 428 U.S. 52 (1976)
In city of Akron V. Akron Centre for Reproductive Health\textsuperscript{110}, along with various other provisions, the court struck down the informed written consent section of the ordinance. This provision required that the attending doctor should inform the woman "of the status of her pregnancy, the development of her foetus, the date of possible viability, the physical and emotional complications that may result from an abortion, and the availability of agencies to provide her with assistance and information with respect to birth control, adoption and childbirth."\textsuperscript{111} The attending physician was also required to tell the patient of the risks involved and any other information, which in the physician's medical judgment would be critical to her decision of whether to terminate the pregnancy. The court found that this informed consent requirement to be constitutionally unacceptable because it essentially gave the government unreviewable authority over what information was to be given to a woman before she decide whether have an abortion.\textsuperscript{112} The Supreme Court also invalidated the 24-hour waiting period as "an arbitrary and inflexible waiting period."

**Spousal/Parental Consent**

The court in Danforth,\textsuperscript{113} found that spousal consent statutes, which require a written statement by the father of the foetus

\textsuperscript{110} [1983] 462 U.S. 416
\textsuperscript{111} \textit{City of Akron}, 462 U.S. p-442
\textsuperscript{112} Id. at p-445
\textsuperscript{113} Supra note 25
affirming his consent to the abortion, are unconstitutional, if the statutes allow the husband unilaterally prohibit the abortion in the first trimester.

With respect to parental consent statutes, the Supreme Court held that in *Danforth* that statutes, which allow a parent or guardian to absolutely prohibit an abortion to be performed on a minor child, were unconstitutional. Subsequently in *Bellotti v. Baird* the court, entitled a minor to some proceeding which allows her to prove her ability to make an informed decision independent of her parents or, even if she is incapable of making the decision, at least showing that abortion would be in her best interest.

In a 1983 decision the Supreme Court upheld Missouri’s parental consent requirement, which, did provide an alternative procedure by which a pregnant immature minor could show in court that she was sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would in her best interests.

In *City of Akron*, the court invalidated the challenged Akron ordinance provision relating to where abortion can be performed. The requirement stated that any second trimester abortion had to be performed in a full-service hospital. The accreditation of these facilities required compliance with

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114 443 U.S. 622 (1979)
comprehensive standards governing an executive variety of health and surgical services. The result was that abortions under this section of the Akron ordinance could not be performed in outpatient facilities that were not part of an acute-care, full service hospital. The court found this restriction unconstitutional, noting that the possibility of having to travel to find facilities could result to both financial expense and added risk to a woman’s health.

In *Simopoulos V. Virginia*\(^{117}\), the Supreme Court ruled that Virginia’s mandatory hospitalization requirement for second trimester abortion was constitutional. The court distinguished the requirement in question from those it invalidated in city of *Akron* and *Ashcroft*, which mandated that all second trimester abortions be performed in acute care facilities. In *Simopoulos*, the court said that, in contrast, the Virginia law did not require that second trimester abortions be performed exclusively in full-service hospitals. The court said; under “Virginia’s hospitalization requirement, outpatient surgical hospitals may qualify for licensing as ‘hospitals’ in which second trimester abortions lawfully may be performed.”\(^{118}\)

The Supreme Court’s articulation of the concept of viability has required further elaboration, particularly with regard to the critical question that at what point a foetus has reached viability. In *Roe*, the court defined viability as the point at which the foetus

\(^{117}\) *Roe*, 462 U.S. 506 (1983)

\(^{118}\) *Simopoulos*, Id. at p-516
is “potentially able to live outside the mother’s womb, albeit with artificial aid”. Such potentiality, however, must be for “meaningful life” and this cannot encompass simply momentary survival.

In Ashcroft, the court found that the second physician requirement during the third trimester was permissible under the constitution because it “reasonably furthers the State’s compelling interest in protecting the lives of viable foetuses...”

The 1983 Supreme Court decisions in City of Akron, Ashcroft, and Simopoulos, settled questions relating to hospital requirements for second trimester abortions, informed consent requirements, waiting periods, parental notification and consent. The Supreme Court reaffirmed its decision in Roe and its intention to continue to follow the trimester framework balancing a woman’s constitutional right to decide whether to terminate a pregnancy with the state’s interest in protecting potential life, which becomes “compelling” at the point of viability, i.e., when the foetus can exist outside of mother’s womb either on its own or through artificial means. Again, in 1986, the court reaffirmed Roe in Thornburg V. American College of Obstetricians and Gynaecologists. The last case where a majority of court would adhere completely to Roe. The court struck down provisions of a Pennsylvania state law requiring:

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119 Roe, 410 U.S. p-160 [1973]
120 Roe, 410 U.S. p-163 [1973]
121 Supra note 33, p.486
122 476 U.S. 747 (1986)
1. that a woman receive information on abortion alternatives and human development in utero;
2. that a woman receive information about the possible health dangers of abortion;
3. the keeping detailed statistical records of abortions;
4. that post-viability abortions be performed in such a way as to allow a child to survive the procedure, unless this would significantly increase risk to the woman;
5. that a second physician be present at post viability abortions to care for a child who survives the procedure.

The court held that these provisions:
i. invaded the privacy of the woman and her doctor;
ii. were calculated by the Pennsylvania legislature to "intimidate" women and try to dissuade them from having abortions;
iii. impermissibly put the lives of viable foetuses over the health concerns of women.

Blackmun's opinion is peculiarly acrimonious, as he sees in these statutes a conscious refusal of the Pennsylvania Legislature to heed the constitutional mandate of Roe. Even prior supporters of Roe (like C.J. Burger) seem to think that Blackmun's opinion has gone too far in rejecting even limited state regulation, including informed consent mandates.

In 1989, the Supreme Court upheld the constitutionality of
the State of Missouri's abortion statute. In this 5-4 decision, while the majority did not overrule Roe, it indicated that it was willing to apply a less stringent standard of review to state restrictions on abortion. Thus Webster was the first sharp departure from Roe. The court, (5-4) per Rehnquist, let stand a Missouri statute stating that:

1. human life began at conception;
2. barring the use of state property for performing abortions; and
3. requiring viability tests for advanced pregnancies, i.e., requiring physicians believing a woman desiring an abortion to be at least 20 weeks pregnant to perform tests to determine whether the foetus is viable. Webster set the stage for the court's 1992 decision in Casey.

The majority opinion in Webster became splintered when justices reviewed the Missouri provision respecting a doctor's testing for viability at 20 weeks of pregnancy.

In Roe, the court held that in the second trimester of pregnancy, the state could regulate abortion only in the interests of the health of the mother; and that it is only after viability (when the foetus can exist outside the womb on its own or through artificial means) that states are allowed to actually restrict abortions in the interests of protecting the foetus, i.e., potential life. A plurality disagreed with the Roe reasoning in this context.

\[123 \text{ Webster V. Reproductive Health Services, 492 U.S. 490 (1989)}\]
and with the trimester framework upon which, it is predicted. Chief justice Rehnquist and justices White and Kennedy instead proposed to apply a new standard of review for state abortion restrictions: whether the state regulation “permissibly furthers the state’s interest in protecting potential human life.” They concluded that the Missouri law’s viability testing requirements did and therefore found that provision to be constitutional. The plurality put in doubt the whole concept of “viability” as the basis of determining when the state’s interest in regulating abortion pertains: “we do not see why the state’s interest in protecting potential human life should come into existence only at the time of viability, and there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability”.

Thus in a plurality the court held\(^\text{124}\) that the state has a “compelling” interest in foetal life throughout pregnancy and that the trimester framework of Roe and its viability line ought to be discarded. If states had a “compelling interest” in preserving life in utero throughout pregnancy—then by Roe’s own terms a state could forbid all non therapeutic abortions. Justice O’Connor declined to join this part of the opinion, though her earlier opinion in *Akron*\(^\text{125}\) had expressly held the same thing. So the court declined to play out this position by overturning Roe. Instead, the court merely upheld the legislation in front of it. The court left abortion law in flux—not expressly overturning Roe, but not

\(^{124}\) Id. p-519

\(^{125}\) Supra note 34
following it either. In the eyes of many, the court seemed poised to do away with Roe. A number of legislatures took the cue and began to pass new abortion restrictions. *Hodgson V. Minnesota*\(^{126}\) (5-4 against absolute notice, 5-4 for by-pass). The court held that the 14\(^{th}\) Amendment requires a judicial by pass process in a law mandating parental notice to both parents of an underage girl. The law may require a 48-hour waiting period between notification and the abortion to give the parents a “realistic opportunity” to talk to the daughter.

*Ohio V. Akron Centre. For Reproductive Health*\(^{127}\), (6-3) A state may require parental notification before an abortion is performed on an under age girl, provided that the law allows a judicial by-pass if the judge believes it is in her best interest.

e. A Shift in Direction: *Planned Parenthood of South Eastern Pennsylvania V. Casey*\(^{128}\)

*Planned parent hood V. Casey* is one of the most important in the series of United States Supreme Court decisions addressing the constitutionality of state abortion restrictions. Although Planned Parenthood was only decided in mid-1992, it is clearly the product of another era- an era in which a ‘litmus test’ on abortion and *Roe V. Wade*\(^{129}\) (the Supreme Court’s 1973 decision declaring a woman’s right to an abortion a ‘fundamental constitutional

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\(^{126}\) 497 U.S. 417 (1990)

\(^{127}\) 497 U.S. 502 (1990)

\(^{128}\) 505 U.S. 833 (1992)

\(^{129}\) (1973) 410 U.S. 113
right') appeared to govern the selection of Federal judges.\textsuperscript{130} Yet, despite the election of President Clinton, Planned Parenthood is of immediate and continuing relevance not only because it remains the most recent Supreme Court abortion decision\textsuperscript{131}, but also because of its extended discussion of \textit{stare decisis}.

The \textit{Casey case}\textsuperscript{132} was decided by the U.S. Supreme Court on June 29, 1992. In a highly fractionated 5-4 decision, the court reaffirmed the basic constitutional right to an abortion while simultaneously allowing some new restrictions. The plurality opinion indicated that state laws, which contained an outright ban on abortion, would be unconstitutional. Nevertheless, the court rejected the trimester framework set forth in Roe and the strict scrutiny standard of judicial review of abortion restriction and held that states have legitimate interest in protecting the health of the woman and the life of the unborn child from the outset of the pregnancy. The court adopted a new analysis, "Undue burden." Court will now need to ask the question whether a state abortion restriction has the effect of imposing an "undue burden" on a woman's right to obtain an abortion. "Undue burden" was defined

\textsuperscript{130} Both President Reagan and President Bush were elected on Republican Party Platforms that supported a constitutional amendment forbidding abortion and the "appointment of judges who respect traditional family values and the sanctity of innocent human life." Dworkin, \textit{Life’s Dominion} (New York: Knopf, 1993) p-8

\textsuperscript{131} The court has thus far declined to review lower court decisions that might have provided a basis for clarification of its Planned Parenthood holding on 15\textsuperscript{th} November 1993, the court refused to review

\textsuperscript{132} \textit{Planned Parenthood V. Casey}, 505 U.S. 833 (1992);\textit{Barnes V. Mississippi}, a Fifth Circuit decision that found constitutional a Mississippi law requiring woman under 18 to obtain the consent of both parents or a judge before having an abortion, quoted in, \textit{"Planned Parenthood V. Casey: The Role of Stare Decisis, Vaness Laird, Modern Law Review Limited} (1994) p-461. \textit{Casey}, 505 U.S. p 877 (1992)
as a “substantial obstacle in the path of a woman seeking an abortion of a non viable foetus.”

The Court applied this new analysis to the Pennsylvania statute and concluded that four of the provisions did not impose an “undue burden” on the right to abortion and were constitutional. Those provisions upheld were the 24-hours waiting period, an informed consent requirement, a parental consent provision for minors and a record keeping requirements. The court also upheld the “medical emergency” definition under which other requirements can be waived. The spousal notification provision, requiring a married woman to tell her husband she intends to have an abortion, did not survive the “undue burden” test and it was struck down as being unconstitutional.

The Supreme Court decision in Casey also adopted a more lenient standard for analyzing the constitutionality of abortion restrictions than had been articulated in previous rulings. The court ruled that the state’s interest in protecting the potentiality of human life extended throughout the course of the pregnancy, and thus the state could regulate, even to the point of favouring child birth over abortion, from the outset, if it does not “unduly burden” a woman’s right to choose the abortion. Under Roe, which utilize the trimester framework, during the first trimester of pregnancy, the woman’s decision to terminate her pregnancy was reached in consultation between her and her doctor with virtually no state involvement. Also under Roe, abortion was a fundamental right”
that could not be restricted by the state except to serve a “compelling” state interest. Roe’s strict scrutiny form of review resulted in most regulation being invalidated during the first two trimesters of pregnancy. The “Undue burden” standard seems to allow more regulation during that period. This is evident from the court’s overruling, in part, two of its earlier decisions which had followed Roe: City of Akron and Thornburgh v. American College of Obstetricians and Gynecologists. In those cases, the court applying strict scrutiny, struck down 24-hour waiting periods and informed consent provisions. In contrast, the court in Casey upheld similar provisions after applying the undue burden standard. This decision has replaced Roe v. Wade as the dominant precedent on abortion in this country. It is long and comprehensive and is probably the best single examination of all the legal perspectives available. This case may represent the closest Roe v. Wade has ever come to being overturned.

The Presidential administration that came into office (after Casey decision) in January 1993 took swift action on the issue of federal limitations on abortions, thus suggesting that the abortion debate may have taken a new direction. On 22 January 1993 (the twentieth anniversary of Roe v. Wade), and only a few days into the new presidency, the policies of the previous administrations that were intended to discourage women from obtaining abortions

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were rescinded. First, the President of the United States lifted restrictions on abortion counseling at federally financed family planning clinics that had been in effect since 1992 as well as the ban on federal research using foetal tissue from aborted fetuses that was imposed in 1989. Another Presidential order allowed physicians at United States military hospitals to resume performing abortions for armed services personnel and for their dependants that paid the cost. Federally financed abortions for military personnel have been barred since 1979 except in cases where the life of the pregnant woman was in danger. A fourth order cleared the way for United States funds to flow to international efforts providing abortions and other family planning services. Previously, the Government policy stipulated that the United States Government would not support international programmes that offered abortion services.\textsuperscript{135}

In \textit{Stenberg V. Carhart}\textsuperscript{136}, following the Casey case the court appeared reluctant to review another abortion case. Contrary decisions by the U.S. Court of Appeals regarding the validity of state statutes prohibiting “partial-birth” abortions have prompted the court to decide \textit{Stenberg V. Carhart}.

So – called “Partial-birth” abortion is performed in the second and third trimester of pregnancy. The term “partial birth abortion” refers generally to a method of abortion commonly called “dialation and extraction” or “D & X” by the medical

\textsuperscript{135} Ibid

\textsuperscript{136} 530 U.S. 914, 120 S. Ct. 2597 (2000)
community. D & X involves the extraction, from the uterus and into the vagina, of all of the body of a foetus except the head.\textsuperscript{137} The foetus is then killed by extracting the contents of the skull, and an intact foetus is delivered.\textsuperscript{138} D & X is one of several abortion methods. A partial breach delivery is not considered a "birth" at common law, where it is the passage of the head that is essential. "Dilation and evacuation" or "D & E" is most common procedure.\textsuperscript{139} D & E involves the dilation of cervix and the dismemberment of the foetus inside the uterus.\textsuperscript{140} Foetal parts are later removed from the uterus either with forceps or by suction. The procedural similarities between the D & X and D & E procedures have prompted concern that the language of state partial-birth abortion bans may prohibit both methods of abortion.\textsuperscript{141}

Laws to ban this uniquely controversial late term abortion procedure have been passed in at least thirty states. In \textit{Stenberg}, a Nebraska physician who performs abortions at a specialized abortion facility sought a declaration that \textit{Nebraskas} partial birth

\begin{footnotesize}
137 See \textit{Stenberg}, 120 S. Ct at 2607-08 (2000)
138 Ibid
139 Id. p 2606
140 Ibid
141 See \textit{women's Medical Professional Corporation V. Voinovich}, 523 U.S. 1036 (1998) ("The primary distinction between the two procedure is that the D & E procedure in a dismembered foetus while the D & X procedure results in a relatively intact foetus. More specifically, the D & E procedure involves dismembering the foetus in utero before compressing the skull by means of suction, while D & X procedure involves removing intact all but the head of the foetus from the uterus and then compressing the skull by means of suction. In both procedures, the foetal head must be compressed, because it is usually too large to pass through a woman’s dialated cervix. In the D & E procedure, this is typically accomplished by either suctioning the intercameral matter or by crushing the skull, while in D & X procedure it is always accomplished by suctioning the intracranial matter")
\end{footnotesize}
abortion ban statute violates the U.S. constitution. The Nebraska statute provides:

"No partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness or physical injury, including a life endangering physical condition caused by or arising from the pregnancy itself."\(^{142}\)

The term partial birth abortion is defined by the statute as an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery.\(^{143}\)

The term "partially delivers vaginally a living unborn child before killing the unborn child" means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child."\(^{144}\)

Carhart, among his arguments, maintained that the meaning of the term "Substantial portion" in the Nebraska statute is unclear and thus, could include the common D & E procedure in its ban of partial-birth abortions. Because the Nebraska legislature failed to provide a definition for "Substantial portion," the U.S. Court of Appeal for the Eighth Circuit interpreted the Nebraska statute to

\(^{142}\) Nebraska. Rev. Statute, Section 28-328 Subsection(1)
\(^{143}\) Nebraska. Rev. Statute, Section 28-326 (9)
\(^{144}\) Ibid

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prohibit both the D & X and D & E procedures: "if, 'substantial portion' an arm or leg-and surely it must then the ban...includes both the D & X and D & E procedures."\textsuperscript{145} The Eighth circuit acknowledged that during the D & E procedure, the physician dismembers the foetus in the uterine cavity using sharp instruments such as forceps, and suction and then removes the foetal parts by pulling them out piece by piece through the cervical".

The state, argued that the statute applied only to the deliberate and intentional performance of a partial birth abortion; that is, the partial delivery of a living foetus vaginally, the killing of the foetus, and the completion of the delivery.\textsuperscript{146} However the Eighth circuit found that the D & E procedure involves all the same steps: "The physician intentionally brings a substantial part of the foetus into the vagina, dismembers the foetus, leading to foetal demise, and complete the delivery. A physician need not let out with the intent to perform a D & X procedure in order to violate the statute."\textsuperscript{147}

The Supreme Court affirmed the Eighth circuit decision by a 5-4 margin. The court based its decision on two determinations \textit{First}; the court concluded that the Nebraska statute lacks any exception for the preservation of the health of the mother. \textit{Second}, the court found that the statute imposes an undue burden on the

\textsuperscript{145} \textit{Carhart v. Stenberg}, 192 F. 3d 1142, 1150 (8th Circle. 1999)
\textsuperscript{146} Ibid
\textsuperscript{147} Ibid
right to choose abortion because its language covers more than the D & X procedure.

Despite the court's previous instructions in *Roe and Casey*, that abortion statute must include an exception where it is "necessary, in appropriate medical judgment, for preservation of the life or health of the mother," the state argued that Nebraska's partial birth abortion statute does not require a health exception because safe alternatives remains available to women and a ban on partial birth abortions would create no risk to the health of the women. Although the court conceded that the actual need for the D & X procedure is uncertain, it recognized that the procedure could be safer in certain circumstances. Thus, the court stated, "a statute that altogether forbids D & X creates a significant health risk... the statute consequently must contain a health exception." The court finds partial birth abortion legislation constitutional if it meets the required criteria.

Thus it is always difficult for a court of appeals to predict how justices of Supreme Court will apply a phrase with as much plasticity as "undue burden". But the best estimate is that "Undue" rather than "burden" is the key word, and that "undue" means not only "substantial" (a small cost or inconvenience is not "undue") but also that the burden must be undue in relation to the woman's interests, rather than undue in relation to the court's

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149 *Id* 2613
150 *Ibid*
assessment of society’s interests. An “undue burden” on an abortion decision for health reasons will presumably be judged differently than those that are purely elective in nature.

In Casey, the Supreme Court apparently applied the “undue burden” standard to Doe—type health situations. However, Casey offers little guidance in applying the standard, other than to say that a statute that does not “in any way pose a significant threat to the life or health of the woman” is constitutional, which is obvious enough.

f. Chronology of the development of Abortion Law

Before 1970 most states enact laws in 19th century generally prohibiting abortions; movement to reform or repeal statutes forms in 1950s, advances slowly through 1960s.

1970s Abortion-reform movement gains in state legislatures, then wins constitutional ruling from U.S. Supreme Court; decision spawns “right-to-life” movement.

1970

New York and three other states pass abortion “repeal laws.”

1973

Supreme Court’s Roe V. Wade decision establishes a woman’s qualified constitutional right to abortion during most of pregnancy; “right-to-life” groups seek to limit or overturn ruling.

151 Planned Parenthood V. Casey 505 U.S. 880 (1992)
152 Doe V. Bolton, 410 U.S. 179 (1973)
1977
Supreme Court allows states to deny abortion funding under Medicaid; three years later, court similarly upholds Hyde amendment barring use of federal funds for abortion for poor women.

1980s Presidents Reagan and Bush support antiabortion initiatives; Supreme Court, in conservative shift, upholds some abortion regulations.

1983
Parental consent for abortion for minors upheld by Supreme Court if law allows "judicial-bypass" procedure; court invalidates "informed consent" and waiting-period provisions.

1984
Reagan adopts "Maxico City" policy to bar U.S. funds to groups that promote abortion overseas.

1989
Missouri abortion law upheld by Supreme Court in 5-4 vote; four justices criticize Roe, one short of majority.
1990s Supreme Court reaffirms Roe's "essential holding," with modification; President Clinton adopts abortion-rights stands on several issues.

1991
Supreme Court upholds rule barring abortion counseling at federally funded family-planning clinics.
1992
Three-justice plurality provides key votes for Supreme Court to reaffirm Roe while giving states leeway to regulate abortion unless laws impose "undue burden" on women's rights; ruling upholds most provisions of Pennsylvania law, including waiting period and informed consent.

1993
President Clinton reverses several Reagan-era anti-abortion policies on Roe's 20th anniversary ... First killing of doctor who performs abortions.

1994
Congress approves Freedom of Access to Clinic Entrances Act to establish criminal and civil penalties for use of force to intimidate abortion-clinic staff, patients.

1996, 1997 Clinton vetoes bills passed by Congress to ban "partial-birth & abortions".

2000
Present President Bush supports antiabortion initiatives in Congress, controlled by Republicans after midterm elections.

2000
Supreme Court on June 28 strikes down Nebraska statute banning "partial-birth" abortions...Food and Drug Administration in September approves the "abortion pill" RU-486...Texas Gov.
Goerge W. Bush soft-pedals anti-abortion views during presidential campaign, wins disputed election.

2001
President Bush re-establishes “global gag rule” on his first workday, barring federal funds for international organizations that promote abortions; draws fire from abortion-rights groups on judicial nominations.

2002
Bush signs Born-Alive Infants Protection Act on Aug. 5... Health and Human Services regulation approved Sept. 27 allows states to define fetus as “unborn child for purposes of prenatal care under federal health-insurance program.

2003
*Roe’s 30th* anniversary marked by demonstrations by both sides... Partial-birth abortion ban approved by Senate March 12, with House expected to follow and send to Bush to become law subject to certain court test.

A careful perusal of the different countries would reveal that the countries are divided on the issue. Some of the countries permit abortion freely, others permit with limitations and some do not permit at all. The difference in approach is perhaps because of the strong feelings and attitude of the people, influence of the religion and various other social, economic, psychological and
moral factors etc., that influence the state to allow or not to allow abortion or to permit or not to permit abortion with qualifications.

The most commonly cited instances in which abortion is permitted include the following:

(a) Intervention to save the life of the woman (life ground);
(b) Preservation of the physical health of the woman;
(c) Preservation of the mental health of the woman (broad health grounds);
(d) Termination of Pregnancy resulting from rape or incest (juridical grounds);
(e) Suspicion of foetal impairment (foetal defect);
(f) Termination of pregnancy for economic or social reasons (social grounds).

These are the grounds for abortion that are coded in the first section of each country. A few countries may recognize additional grounds for abortion, including the presence in the mother of the human immunodeficiency virus (HIV); the age of the mother, when the pregnant woman is a minor; or contraceptive failure.

(i) Intervention to save the life of the woman

The performance of abortion is most commonly permitted on the grounds of saving the life of the pregnant woman. However, in general, the life threatening situations are not specified but left to the judgment of the physicians performing and/or approving the performance of the abortion. Almost all countries allow abortions
to be performed to save the life of the pregnant woman either explicitly or under the general criminal law principle of necessity.

(ii) **Preservation of physical health of the woman**

In the majority of countries, abortion is permitted when it is necessary to preserve the physical health of woman. The term "physical health," however has been defined in a number of different ways. In general, the countries of the British Commonwealth permit a broader definition of health than do the African or Latin American countries adhering to civil law.

(iii) **Preservation of the mental health of the woman**

Many abortion laws specifically provide for the legal performance of abortions in cases involving a threat to the mental health of the pregnant woman. “Mental health” however, varies significantly. In most of the Commonwealth countries, mental health is defined to include emotional distress caused to children of the marriage or emotional distress caused to the pregnant woman as a result of her environment. In these cases, the country is said as permitting abortions for socio-economic reasons.

(iv) **Termination of pregnancy resulting from rape or incest**

Permitting abortions to be performed in cases of rape or incest is a common provision of the world’s abortion laws. Even in countries with restrictive abortion legislation, such as the Latin
American countries, abortion is allowed on these grounds. Some countries specifically mention rape and incest in their legislation. Other countries refer to these as cases in which the pregnancy is the result of a "criminal offence", with no specification of the nature of the offence. This phrasing of law is somewhat broader, encompassing statutory rape (consexual sex with a minor) as well as forced rape or incest.

(v) Suspicion of foetal impairment

As the case with juridical the grounds for abortion, abortions are often permitted on the grounds of foetal impairment in countries with restrictive abortion laws.

(vi) Termination of pregnancy for economic or social reasons

The phrasing of laws permitting abortion on socio medical, social or economic grounds varies widely. Some specifically mention social or economic conditions while others only imply them. For example, in Barbados, the abortion law specifies that, in determining whether the continuation of the pregnancy would involve a risk of injury to the health of the pregnant woman, the medical practitioner must take into account the "pregnant woman’s social or economic environment, whether actual or foreseeable." In New South Wales, Australia, where similar wording is employed, reference is made to social and economic stresses.
(vii) Availability on request: abortion permitted on all grounds

In countries that allow abortions to be performed on request, a pregnant woman seeking an abortion is not required to justify her desire to have an abortion under the law. She needs only to find a physician who is willing to perform an abortion. In a number of countries, such as Albania, Belgium and France, she may be required to state that she is in a situation of crisis or distress. The requirement, however, is purely a formality and the decision to have the abortion is still completely her own so long as she finds a physician who agrees to perform the abortion.