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# The Constitutionality of Louisiana's Anti-Abortion Statutes After Webster v. Reproductive Health Services

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## The Constitutionality of Louisiana's Anti-Abortion Statutes After *Webster v. Reproductive Health Services*

The recent Supreme Court decision of *Webster v. Reproductive Health Services*<sup>1</sup> will have a major impact on any state wishing to restrict abortion. Louisiana lawmakers responded quickly to the court's change in position. During the Second Extraordinary Session of 1989, the legislature passed House Concurrent Resolution No. 10 to "express the intent of the Legislature of Louisiana that the district attorneys of this state shall enforce the criminal statutes pertaining to abortion . . . to the fullest extent permitted by and consistent with the U.S. Constitution as interpreted by the United States Supreme Court."<sup>2</sup> Also adopted was a House Study Request directed to the House Committee on Civil Law and Procedure that they might examine *Webster* and make recommendations to the legislature for possible changes in Louisiana abortion laws.<sup>3</sup>

This paper will analyze the *Webster* decision to determine its effect on Louisiana abortion laws. The first section will discuss six abortion issues decided before *Webster*. An exposition of these issues is important to help the reader understand exactly what effect *Webster* has on prior jurisprudence. The six issues discussed are the criminalization of abortions; the prohibition on the use of public funds, employees, and hospitals for the performance of abortions; the requirement of parental and spousal consent or notification; viability determinations and post-viability abortions; the requirement of informed consent; and the regulation of the place where the abortion is performed. This article will also include an analysis of the *Webster* decision. The parameters of the restrictions granted to states will be a primary consideration in this discussion. The next section includes an analysis of Louisiana abortion laws on the same issues, including a discussion of their constitutionality both before and after *Webster*. Finally, additions and changes will be suggested to allow these laws to coincide with the limits of *Webster*.

### I. FEDERAL LIMITS ON ANTI-ABORTION STATUTES— FROM *ROE* TO *Webster*

#### A. *Roe and its Progeny*

##### 1. *Criminalization*

The *Roe v. Wade*<sup>4</sup> decision has been exhaustively analyzed

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1. 109 S. Ct. 3040 (1989).

2. H.C.R. Res. 10, 1989 Leg., 2d Spec. Sess.

3. House Study Request, 1989 Leg., 2d Spec. Sess.

4. 410 U.S. 113, 93 S. Ct. 705 (1973).

elsewhere<sup>5</sup> and need not be reviewed here. A few basic points, however, may be emphasized. The Court in *Roe* struck down a statute that made all abortions illegal, except those performed to save the life of the mother. Extending a familiar privacy right to the abortion decision,<sup>6</sup> the Court recognized that a woman's right to choose an abortion is not absolute, but must be balanced against competing state interests—protecting maternal health and potential life. The Court refused to recognize a fetus as life from the moment of conception, hence implicating the due process clause of the Fourteenth Amendment. They instead considered a fetus only as a potential life. They found that a state has an interest in protecting maternal health and potential life but "[t]hat these interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'"<sup>7</sup> In order to balance these competing state interests against the compelling privacy rights of the mother, the Court set up a "trimester" approach to abortion regulation.

During the first trimester, the state has no interest in potential life or maternal health, thus the abortion decision must be left to the pregnant woman and her attending physician. During the second trimester the state does have an interest in protecting the health of the mother; therefore, the state can regulate the abortion procedure, but only to the extent that it "reasonably relates to . . . maternal health."<sup>8</sup> Finally, the Court found that following viability, the point at which the fetus is capable "of meaningful life outside the mother's womb,"<sup>9</sup> the state's interest in potential life becomes compelling; thus, the state may prohibit abortion except in cases where the mother's life or health is in danger.

After *Roe*, states could no longer enforce statutes making all abortions illegal. Because a state's interest in potential life is significantly recognized only after the second trimester, any abortion performed before that time cannot be illegal.

## 2. *Prohibition on the Use of Public Funds, Employees, and Hospitals for the Performance of Abortions*

According to the United States Supreme Court,<sup>10</sup> states that participate in the Medical Assistance Program are not required to fund

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5. See Henkin, *Privacy and Autonomy*, 74 Colum. L. Rev. 1410 (1974) and Note, *The Abortion Cases: A Return to Lochner, or a New Substantive Due Process?*, 37 Alb. L. Rev. 776 (1973).

6. See *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029 (1972) (concerned the right of unmarried persons to use contraceptives); *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965) (concerned the right of married persons to use contraceptives); and *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571 (1925) (concerned the right of parents to enroll their students in private schools).

7. 410 U.S. at 162-63, 93 S. Ct. at 731.

8. *Id.* at 163, 93 S. Ct. at 732.

9. *Id.*, 93 S. Ct. at 732.

10. *Beal v. Doe*, 432 U.S. 438, 97 S. Ct. 2366 (1977).

nonmedically necessary abortions under Title XIX of the Social Security Act.<sup>11</sup> The Court reasoned that, although a state may not impose unduly burdensome restrictions on the abortion procedure until after the second trimester, the state does have a legitimate and significant interest in potential life throughout the pregnancy. They reasoned that a state could encourage childbirth over abortion through selective allocation of public funds.

A related issue concerned whether under the equal protection clause a state participating in the program was required by the Constitution to pay for the expenses related to abortion during the first trimester when it paid for those related to childbirth. The Court held that indigent pregnant women were not members of a suspect class and that impingement of a fundamental right was not involved.<sup>12</sup> *Roe* held that a state may not impose unduly burdensome restrictions on a woman's right to choose whether to terminate her pregnancy but it did not give her an unqualified right to an abortion.<sup>13</sup> Accordingly, the equal protection claim could be overcome by only a rational interest. The Court determined that encouraging childbirth was such an interest.<sup>14</sup>

Another case<sup>15</sup> concerned the adoption of the Hyde Amendment, an amendment to Title XIX that provided that the federal government is not required to reimburse states for abortion except when the pregnancy results from rape or incest, or when the mother's life is in danger. The Court first determined that the Medicaid program is a cooperative effort of the Federal government and participating states. As such, the state does not have to unilaterally fund the abortion when the Federal government refuses to allow funds for that purpose. On the due process claim against the constitutionality of the Hyde Amendment itself, the Court, in discussing the privacy rights guaranteed by *Roe*, said, "[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."<sup>16</sup> The Court reasoned that while a state may not place restrictions on the woman's right to choose an abortion, "it need not remove those not of its own creation."<sup>17</sup> As to the equal protection claim, the Court found that indigence was not a suspect classification nor was the abortion fundamental. Thus a state's rational interest in encouraging childbirth over abortion could overcome the claim.

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11. 42 U.S.C. § 1396 (1983).

12. *Maher v. Roe*, 432 U.S. 464, 97 S. Ct. 2376 (1977).

13. *Id.* at 473-74, 97 S. Ct. at 2382.

14. For a discussion of restriction on funds for abortion, see Note, *Beal v. Doe, Maher v. Roe, and Non-Therapeutic Abortions: The State Does Not Have To Pay The Bill*, 9 Loy. U. Chi. L.J. 288 (1977).

15. *Harris v. McRae*, 448 U.S. 297, 100 S. Ct. 2671 (1980).

16. *Id.* at 316, 100 S. Ct. at 2688.

17. *Id.*, 100 S. Ct. at 2688.

On the issue of the use of public hospitals for the performance of abortions, the Court held that it is not a violation of equal protection for a city or a state to provide publicly funded hospitals for childbirth but not for abortion, reasoning again that a state has a rational interest in encouraging childbirth.<sup>18</sup>

### 3. *Parental Consent or Notification*

Neither a spouse nor a parent has the absolute right to veto a pregnant woman's decision to undergo an abortion.<sup>19</sup> However, recent Supreme Court cases have held that a state may provide for judicial by-pass of the abortion decision. A state may require that a pregnant minor obtain parental consent absent proof that she is mature or emancipated or that despite her immaturity or lack of emancipation an abortion is in her best interest.<sup>20</sup> The Court has held that unemancipated immature minors may be required to notify their parents of their intent to abort.<sup>21</sup> The notification requirement serves the goal of preserving family integrity, protecting the pregnant minor, and "providing an opportunity for parents to supply essential medical and other information to a physician."<sup>22</sup> There have been no Supreme Court cases on spousal notification. Lower courts, however, have held this requirement invalid.<sup>23</sup>

### 4. *Viability Determinations and Post-Viability Abortions*

A provision requiring a physician to use his experience, judgment, and professional competence to determine whether a fetus is viable or may be viable was held to be impermissibly vague.<sup>24</sup> If the physician believed the fetus was viable or might be viable, he was required to

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18. *Poelker v. Doe*, 432 U.S. 519, 97 S. Ct. 2391 (1977).

19. *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 96 S. Ct. 2831 (1976).

20. See *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035 (1979); *Akron v. Akron Center for Reprod. Health*, 462 U.S. 416, 103 S. Ct. 2481 (1983); and *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 103 S. Ct. 2517 (1983).

21. *H.L. v. Matheson*, 450 U.S. 398, 101 S. Ct. 1164 (1981).

22. *Id.* at 411, 101 S. Ct. at 1172.

23. See *Planned Parenthood of R.I. v. Bd. of Medical Rev.*, 598 F. Supp. 625 (D. R.I. 1984), where the court found no compelling state interest; and *Doe v. Deschamps*, 461 F. Supp. 682 (D. Mont. 1976) where the court found the spousal notification facially unconstitutional because it failed to provide the method for giving notice. See also *Scheinberg v. Smith*, 659 F.2d 476 (5th Cir. 1981), where the court found that the state did have an interest in protecting the husband's interest in the procreative potential of the marriage. However, they remanded to determine whether the provision was narrowly drawn, that is, whether there was more than a de minimis risk that the wife's future childbearing capacity would be hindered because of the abortion. On remand, *Scheinberg v. Smith*, 550 F. Supp. 1112 (S.D. Fla. 1982), the court determined that the risk was only de minimis.

24. *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 96 S. Ct. 2831 (1976).

use the same degree of care to preserve the life of the fetus, that is, he was to use the degree of care he would use if the fetus were to be born rather than aborted. Failure to discharge this duty subjected the physician to criminal liability. The Court held that the provision was unconstitutionally ambiguous. It failed to specify that the duty became operative only after viability, hence, the physician would conceivably be subject to criminal liability for any abortion performed throughout pregnancy.

Because *Roe* commands that post-viability abortions be allowed when the life or health of the mother is in danger,<sup>25</sup> a state may wish to impose certain standards on these abortions. The Court has held that a state may not require a "trade-off" between the health of the woman and fetal survival.<sup>26</sup> That is, a state may not require a physician to use an abortion technique that increases the chance of fetal survival, but also increases the health risks to the mother. The provision in question provided that the abortion technique to be used in post-viability abortions should be one that affords the unborn child the best opportunity of survival unless it would place a significantly greater health risk on the mother.

Finally, a state may wish to provide that a second physician be present during a post-viability abortion to care for the infant. The Court has held that these restrictions are constitutional as long as the statute creates an exception for emergencies.<sup>27</sup>

### 5. *Informed Consent*

Physicians may constitutionally be required to inform the pregnant, woman of the abortion procedure and consequences whenever the abortion is performed despite the fact that *Roe* disallowed a state from interfering with the abortion decision during the first trimester.<sup>28</sup> The Court stated that

[t]he decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision

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25. *Roe v. Wade*, 410 U.S. 113, 164-65, 93 S. Ct. 705, 732 (1973).

26. *Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747, 768, 106 S. Ct. 2169, 2183 (1986). See also *Colautti v. Franklin*, 439 U.S. 379, 99 S. Ct. 675 (1979).

27. See *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 103 S. Ct. 2517 (1983) (where a second physician requirement was found to be constitutional as it included an exception for emergencies); compare *Thornburgh v. American Coll. of Obst.*, 476 U.S. 747, 106 S. Ct. 2169 (1986) (where the second physician requirement was held unconstitutional because it did not include an exception for emergencies).

28. *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 96 S. Ct. 2831 (1976).

and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.<sup>29</sup>

A state may require that a pregnant woman be informed of the abortion method to be employed, the risks associated with it, instructions to follow subsequent to the abortion, and any other information the physician deems relevant to her decision to abort or carry the child to term.<sup>30</sup> However, despite the fact that *Roe* required that the decision to abort be left to the doctor and his patient, the Court has held that a state may not require the physician to be the one to give the information.<sup>31</sup> The Court reasoned that the critical issue was whether the woman received the information, not the person who gave it, although they did hold that a state may set minimum qualifications for the person who imparts it.<sup>32</sup>

A state may not require the pregnant woman be informed that assistance is available for prenatal care, neonatal care, and childbirth and that the father is required to assist in the support of the child.<sup>33</sup> A requirement that the pregnant woman be informed that she may review a list of agencies that offer alternatives to abortion and that she may receive information about the development of the fetus at her request have also been held unconstitutional.<sup>34</sup> The Court has reasoned that such requirements are "designed not to inform the woman's consent but rather to persuade her to withhold it altogether,"<sup>35</sup> and they are unacceptable attempts to structure the dialogue between the pregnant woman and her physician.

#### 6. *Regulation of the Place Where the Abortion is Performed*

*Roe* granted the states the right to regulate the abortion procedure after the first trimester in ways that are reasonably related to maternal health.<sup>36</sup> Requirements that all abortions after the first trimester be performed in a full-service hospital are unconstitutional because such a requirement is not necessarily related to maternal health.<sup>37</sup> The Court

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29. *Id.* at 67, 96 S. Ct. at 2840.

30. *Akron v. Akron Center for Reprod. Health*, 462 U.S. 416, 103 S. Ct. 2481 (1983).

31. *Id.* at 448, 103 S. Ct. at 2502.

32. *Id.*, 103 S. Ct. at 2502.

33. *Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747, 760-61, 106 S. Ct. 2169, 2179 (1986).

34. *Id.* at 759-64, 106 S. Ct. at 2178-80.

35. *Akron v. Akron Center for Reprod. Health*, 462 U.S. 416, 444, 103 S. Ct. 2481, 2500 (1983).

36. *Roe v. Wade*, 410 U.S. 113, 163, 93 S. Ct. 705, 731-32 (1973).

37. 462 U.S. at 431-39, 103 S. Ct. at 2493-97. See also *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 103 S. Ct. 2517 (1983).

found that one popular method of abortion during the early weeks of the second trimester is the dilation and evacuation method that can be performed safely in an outpatient setting.<sup>38</sup> States may require, however, that the abortion be performed in a licensed clinic.<sup>39</sup>

As can be seen by the above cases, the abortion issue remains hotly contested. The Court has been unsympathetic to the views of the states wishing to restrict abortion beyond the limits allowed by *Roe*. With the advent of *Webster*, the tide could be changing, and one may expect even more litigation over the issue.

### *B. Webster v. Reproductive Health Services: The Analysis*

In 1986 suit was brought by three physicians, one nurse, and one social worker employed by the state of Missouri and two nonprofit organizations<sup>40</sup> challenging the constitutionality of several Missouri abortion regulations. At issue in *Webster* were three provisions. They concerned the prohibition of public employees from performing abortions, the prohibition of public facilities for the performance of abortions, and a viability testing requirement. Each will be discussed in turn, with the prohibition against public employees and hospitals being discussed together.<sup>41</sup>

### *C. Restrictions on the Use of Public Employees or Facilities for the Performance of Abortions*

The statutes in question provided that no public employee could perform or assist an abortion, nor could a public facility be used for

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38. 462 U.S. at 434-39, 103 S. Ct. at 2495-97.

39. See *Simopoulos v. Virginia*, 462 U.S. 506, 103 S. Ct. 2532 (1983). In this case, the Court upheld the conviction of a physician who performed an abortion in an unlicensed clinic. The patient, a minor who was five months pregnant, had aborted alone in a motel bathroom.

40. 109 S. Ct. 3040 (1989) (the nonprofit organizations were Reproductive Health Services and Planned Parenthood of Kansas City).

41. Two other Missouri statutes were on appeal to the United States Supreme Court. The first, the Missouri preamble, 1 Mo. Ann. Stat. § 1.205(1.1), (1.2) (Supp. 1990) provided, among other things, that life begins at conception and unborn children have protectable interests. The Court did not pass on the constitutionality of the preamble, finding that it did not, in itself, restrict abortion. Louisiana has a similar provision, La. R.S. 40:1299.35 (Supp. 1990). The second provision, 12 Mo. Ann. Stat. § 188.205 (Supp. 1990) provided that no public funds could be used for encouraging or counseling a woman to have an abortion unless it was necessary to save her life. The Court found that the issue was moot as the appellees contended they were not adversely affected by the statute.



the performance of abortions.<sup>42</sup> Both statutes contained exceptions for abortions necessary to save the life of the mother. The Court found the provisions constitutional as extensions of prior cases. In *Maher v. Roe*,<sup>43</sup> the Court had upheld a provision providing for reimbursement for services related to childbirth but not for abortion. In *Poelker v. Doe*,<sup>44</sup> the Court held that a city may refuse to provide publicly funded hospitals for abortion when it does so for childbirth. Finally, in *Harris v. McRae*,<sup>45</sup> the Court upheld the constitutionality of a federal provision providing that no federal funds would be used to reimburse abortion. In *Webster*, the Court extended the reasoning used in these cases: that the restrictions placed no governmental obstacle in the path of a woman choosing an abortion. The refusal to allow public hospitals or employees to be used for the performance of abortion "leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all."<sup>46</sup> The Court found that neither physicians nor their patients have any constitutional right to have their abortions performed in public hospitals.<sup>47</sup> In rejecting the Court of Appeals reasoning that the state would redeem the cost of the abortion when the patient paid, the Court stated, "Nothing in the Constitution requires States to enter or remain in the business of performing abortions."<sup>48</sup>

#### D. The Viability Testing Requirement

The most important of the three statutes at issue in *Webster* was the one requiring that the physician determine the viability of the fetus before performing the abortion. This issue is important not so much

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42. 12 Mo. Ann Stat. § 188.210 (Supp. 1990) provides in pertinent part: "It shall be unlawful for any public employee within the scope of his employment to perform or assist an abortion, not necessary to save the life of the mother." 12 Mo. Ann. Stat. § 188.215 (Supp. 1990) provides in pertinent part: "It shall be unlawful for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother. . . ."

43. 432 U.S. 464, 97 S. Ct. 2376 (1977). See *supra* text accompanying note 12.

44. 432 U.S. 519, 97 S. Ct. 2391 (1977). See *supra* text accompanying note 18.

45. 448 U.S. 297, 100 S. Ct. 2671 (1980). See *supra* text accompanying note 15.

46. *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3052 (1989).

47. *Id.* As noted by Justice O'Connor in her concurring opinion, there might be some applications of the prohibition on public facilities that are unconstitutional because Missouri defines public facilities as "any public institution, public facility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivisions thereof." 12 Mo. Ann. Stat. § 188.200 (1) (Supp. 1990). So, conceivably abortions could not be performed in hospitals that lease state land or hospitals that use public water or sewerage lines. But because the provision is constitutional under some circumstances, it survived the facial challenge. *Id.* at 3059-60 (O'Connor, J., concurring in part and concurring in the judgment).

48. *Id.* at 3052.

because of the holding, but because of the route taken by the plurality in reaching the holding.

The provision in question requires that the physician perform tests to determine viability when the pregnant woman is carrying a fetus believed to be of twenty or more weeks of gestational age.<sup>49</sup> The plurality held that this requirement was constitutional with Justices O'Connor and Scalia concurring in the judgment. As noted by the plurality, "Section 188.029 creates what is essentially a presumption of viability at twenty weeks, which the physician must rebut with tests indicating that the fetus is not viable prior to performing an abortion."<sup>50</sup>

The Court believed the statute should be interpreted to mean that the physician was required to perform "only those tests that are useful to making subsidiary findings as to viability"<sup>51</sup> and that he "apply his reasonable professional skill and judgment."<sup>52</sup> Those tests that are not relevant to the determination of the viability of the fetus or that would be dangerous to the mother or the fetus are not required by the statute.

In discussing the viability statute, the plurality felt it necessary to call into question the validity of the previous decisions in *Colautti v. Franklin*<sup>53</sup> and *Akron v. Akron Center for Reproductive Health*.<sup>54</sup> The Court in *Colautti* held that neither courts nor legislatures could dictate the elements that should go into a physician's determination of viability. The Court held in *Akron* that, among other reasons, a second trimester hospitalization requirement was invalid because it imposed a substantial increase in the cost of the abortion. The plurality believed that because the viability testing requirement is a legislative determination of factors to determine viability, it was not consistent with *Colautti*, and insofar as it imposed additional costs on what might be second trimester abortions, it was not consistent with *Akron*.<sup>55</sup> Justice O'Connor, however,

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49. 12 Mo. Ann Stat. § 188.029 (Supp. 1990) provides:

Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examination and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother.

50. 109 S. Ct. at 3055.

51. *Id.*

52. *Id.*

53. 439 U.S. 379, 99 S. Ct. 675 (1979).

54. 462 U.S. 416, 103 S. Ct. 2481 (1983).

55. Justice Scalia agreed with the plurality, 109 S. Ct. 3040, 3064 (1989) (Scalia, J., concurring).

believed that the requirement could be upheld under the existing precedents, believing that under the statute the physician still had discretion to determine viability and that the additional costs of the test did not constitute an undue burden.<sup>56</sup>

This difference of opinion is important because if five members of the court were to agree that *Colautti* and *Akron* were no longer valid, states might have far greater power to regulate abortion.<sup>57</sup>

#### E. *The Fate of the Trimester Approach*

In discussing the continued validity of the *Colautti* and *Akron* cases, the plurality stated,

We think that the doubt cast upon the Missouri statute by these cases is not so much a flaw in the statute as it is a reflection of the fact that the rigid trimester analysis of the course of a pregnancy indicated in *Roe* has resulted in subsequent cases like *Colautti* and *Akron* making constitutional law in this area a virtual Procrustean bed.<sup>58</sup>

The plurality felt that the trimester approach is "unsound in principle and unworkable in practice,"<sup>59</sup> and that it more closely resembled a legislative enactment than a constitutional principle.<sup>60</sup> Justice Scalia agreed with the plurality; indeed, he believed that *Roe* should be overruled explicitly.<sup>61</sup> However, as noted above, Justice O'Connor did not think such action was necessary for the resolution of the case. But she has made it clear in past decisions that she believes the trimester approach is outmoded and should be done away with.<sup>62</sup> Thus, there are currently five Justices who believe the trimester approach to abortion regulations should be overruled.<sup>63</sup>

#### F. *The State's Interest in the Fetus—A New Standard of Review?*

The importance of *Webster* may not be so much in what it held as in what it alluded to in dictum. It may be true, as Justice Blackmun's

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56. *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3060-64 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

57. See *infra* text accompanying notes 79-85, 104, and 124-27.

58. 109 S. Ct. at 3056.

59. *Id.* at 3056 (citing *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546, 105 S. Ct. 1005, 1015 (1985)).

60. *Id.* at 3057.

61. *Id.* at 3064 (Scalia, J., concurring).

62. See *Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747, 828, 106 S. Ct. 2169, 2213-14 (1986) (O'Connor, J., dissenting), and *Akron v. Akron Center for Reprod. Health*, 462 U.S. 416, 453-54, 103 S. Ct. 2481, 2505 (1983) (O'Connor, J., dissenting).

63. Justices Kennedy, O'Connor, Rehnquist, Scalia, and White.

dissent says, that "[t]he plurality opinion is filled with winks, and nods, and knowing glances to those who would do away with *Roe* explicitly,"<sup>64</sup> or, as Justice Scalia says in his concurring opinion, "[T]he States [might] have the constitutional power to prohibit it [abortion], and would do so, but we skillfully avoid telling them so."<sup>65</sup>

In overruling the trimester approach to abortion regulation, the plurality stated, "[W]e do not see why the State's interest in protecting potential life should come into existence only at the point of viability."<sup>66</sup> The Court states, "The State here has chosen viability as the point at which its interest in potential life must be safeguarded."<sup>67</sup> These two statements taken together imply that a state might be constitutionally allowed to choose a point earlier in the pregnancy as the point at which it wants to protect potential life. Although the plurality did not specifically indicate that conception could be a point at which the state could protect the potential life, the quoted statements above indicate that it might not be out of the question. Justice O'Connor has also indicated that she believes the states have a compelling interest in the life of the fetus throughout pregnancy.<sup>68</sup>

Also important is the plurality's "permissibly furthers" test. In holding the viability testing requirement valid, they stated, "We are satisfied that the requirements of these tests permissibly further the State's interest in protecting potential human life."<sup>69</sup> If the permissibly furthers test is "nothing more than a dressed-up version of rational-basis review,"<sup>70</sup> as the dissent believes, then almost any state regulation could be upheld as rationally related to the State's interest in protecting potential life.

### G. Justice O'Connor as the Swing Vote

Special note need be taken of Justice O'Connor's views as she is regarded as the key vote.<sup>71</sup> In *Webster* and previous decisions,<sup>72</sup> Justice

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64. *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3067 (1989) (Blackmun, J., concurring in part and dissenting in part).

65. *Id.* at 3066 (Scalia, J., concurring, in part and concurring in the judgment).

66. *Id.* at 3057.

67. *Id.*

68. See *Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747, 828, 106 S. Ct. 2481, 2213-14 (1986) (O'Connor, J., dissenting), and *Akron v. Akron Center for Reprod. Health*, 462 U.S. 416, 459-61, 103 S. Ct. 2481, 2508-09 (1983) (O'Connor, J., dissenting).

69. *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3057 (1989).

70. *Id.* at 3076 (1989) (Blackmun, J., concurring in part and dissenting in part).

71. See Robertson, *The Future of Early Abortion*, A.B.A. J., Oct. 1989, at 72.

72. 109 S. Ct. 3040, 3063 (O'Connor, J., concurring in part and concurring in the judgment); *Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747, 828-30, 106 S. Ct. 2169, 2213-14 (1986) (O'Connor, J., dissenting); *Akron v. Akron Center for Reprod. Health*, 462 U.S. 416, 461-66, 103 S. Ct. 2481, 2509-11 (1983) (O'Connor, J., dissenting).

O'Connor has made clear her preference for the "unduly burdensome test." Under this test, "judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes such as the advancement of these compelling interests, with heightened scrutiny reserved for instances in which the State has imposed an 'undue burden' on the abortion decision."<sup>73</sup> Yet Justice O'Connor also believes that the state has a compelling interest in potential life throughout pregnancy. It is difficult to understand how any law serving the state's compelling interest in potential life by prohibiting first and second trimester abortions will not constitute an undue burden on a woman's abortion decision under Justice O'Connor's test. The concepts of the state's compelling interest in potential life and the prohibition of first and second trimester abortions as an undue burden are irreconcilable unless the "compelling" state interest is being used differently than in the past: that the state's interest will not be enough to outweigh the woman's choice to abort. In substantive due process cases not only must a state have a compelling interest to regulate in the protected area, but the regulation chosen must also be narrowly tailored to serve the interest. Perhaps in Justice O'Connor's views, while the state may have a compelling interest in the potential life throughout pregnancy, criminalization of first and second trimester abortions may be overly broad as a means of serving that interest.

It is hoped that Justice O'Connor will elucidate her position in the coming abortion decisions.<sup>74</sup> For now, states wishing to restrict abortion will have to legislate based on educated guesses.

## II. LOUISIANA'S ABORTION LAWS: THE EFFECT OF *Webster*

An attempt will be made in this section to use *Webster* and previous cases to judge the validity of Louisiana's abortion laws in the same

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73. 476 U.S. 747, 828, 106 S. Ct. 2169, 2214 (O'Connor, J., dissenting).

74. Three abortion cases have been argued before the Supreme Court this term. The decisions are expected some time during the Summer of 1990. They are *Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988), cert. granted, 109 S. Ct. 3239 (U.S. July 3, 1989) (No. 88-790) (concerning licensing requirements of abortion clinics); *Hodgson v. Minnesota*, 853 F.2d 1452 (8th Cir. 1988), cert. granted, 109 S. Ct. 3240 (U.S. July 3, 1989) (Nos. 88-1125, 88-1309) (concerning parental notice requirements); and *Akron Center for Reprod. Health v. Slany*, 854 F.2d 852 (6th Cir. 1988), cert. granted 109 S. Ct. 3239 (U.S. July 3, 1989) (No. 88-805) (also concerning parental notice requirements). Of the three, *Ragsdale v. Turnock* has the greatest potential for affecting abortions during the first two trimesters because the regulation in question there holds abortion clinics to standards similar to hospitals. If such a regulation were upheld the cost of abortion could rise making it difficult for many women to receive them.

areas discussed above.<sup>75</sup> Suggestions for amendments and additions will also be made.

### 1. Criminalization

Louisiana has a statute that makes any abortion criminal.<sup>76</sup> An injunction was placed on the enforcement of this statute following *Roe v. Wade*. Recently, in *Weeks v. Connick*,<sup>77</sup> the District Attorney of New Orleans attempted to dissolve the injunction to enforce the statute, arguing that *Webster* significantly changed the law upon which the injunction was based. The court, however, did not reach the issue, deciding instead that Louisiana had implicitly repealed the criminal statute by enacting later legislation that regulated the abortion procedure.

Nevertheless, a statute making all abortions illegal would probably not survive constitutional muster under *Webster*. Justice O'Connor, in describing her undue burden test, has stated that heightened scrutiny should be reserved for those situations where an absolute obstacle is placed on the abortion decision. A statute making all abortions a crime would seem to be such a situation.<sup>78</sup>

### 2. Prohibition of Public Funds, Employees, and Hospitals for the Performance of Abortions

Louisiana has several statutes that are relevant to the issues of prohibition of public funds, employees, and hospitals. Louisiana Revised Statutes 40:1299.31A<sup>79</sup> provides that no person may be discriminated against for refusing to participate in an abortion. Section 1299.32<sup>80</sup> disallows prejudicial treatment of any institution that refuses to allow the performance of abortion. Finally, Section 1299.33C<sup>81</sup> reiterates Section 1299.32 and adds that such institution shall never be denied governmental assistance for refusing to perform abortions. There have never been any cases interpreting or ruling on these statutes, but an opinion of the Attorney General has said that while "physicians and supportive

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75. The analysis of Louisiana's abortion laws will proceed under a federal analysis, that is, as if Louisiana's Constitution were the same as the Federal Constitution. There has been some debate over whether the Louisiana Constitution grants greater privacy rights to its citizens than does the Federal Constitution. That issue is still under debate. Support can be found that it does not afford greater rights in *Hondroulis v. Schumacher*, 546 So. 2d 466, 472-73 (La. 1989). The question will not be an issue in this article.

76. La. R.S. 14:87 (1986).

77. 733 F. Supp. 1036 (E.D. La. 1990). Professor John Baker of the L.S.U. Law Center represented the District Attorney, Harry Connick.

78. See *supra* text accompanying note 73.

79. La. R.S. 40:1299.31 (Supp. 1990).

80. La. R.S. 40:1299.32 (Supp. 1990).

81. La. R.S. 40:1299.33C (Supp. 1990).

medical personnel who are unwilling to participate in the elective abortion procedure because of moral or religious convictions cannot be required to do so,"<sup>82</sup> public hospitals are required to open their facilities to physicians that want to perform them.<sup>83</sup> The first finding states a basic and accepted principle that no person opposed to abortions can be required to perform them. The second finding is clearly erroneous after *Webster*. Should Louisiana enact a statute prohibiting public hospitals from performing abortions except when the life of the mother is in danger, it would be constitutional. It would leave the pregnant woman with the same range of choices as if Louisiana had chosen to operate no public hospitals at all.<sup>84</sup>

But should Louisiana decide to prohibit public hospitals and employees from performing abortions, they should do so explicitly. The statutes cited above do not carry out this task. The prohibition against public hospitals and employees performing abortions is a constitutionally protected way of encouraging childbirth over abortion and, in a state where there is strong anti-abortion sentiment, such a prohibition would make clear that, while the pregnant woman still may choose to abort, the taxpayers would not be funding it through their hospitals and employees.

According to Louisiana Revised Statutes 40:1299.34.5,<sup>85</sup> the use of public funds is prohibited "to assist in, or to provide facilities for an abortion, except when the abortion is medically necessary to prevent the death of the mother." Without the public facilities proviso, this statute was clearly constitutional under prior decisions.<sup>86</sup> As noted above, because of *Webster*, the prohibition against the use of public facilities is constitutional as well.

### 3. Parental and Spousal Consent or Notification

The Louisiana statute<sup>87</sup> concerning abortions performed on minors has been held to be constitutional<sup>88</sup> because it conforms to the standards set by previous Supreme Court decisions.<sup>89</sup> That is, a minor is required to obtain the consent of a parent, legal guardian, or tutor or obtain judicial consent. It is unclear whether a statute requiring parental consent

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82. Op. Att'y Gen. No. 75-835 (1976).

83. Id.

84. See *supra* text accompanying note 46.

85. La. R.S. 40:1299.34.5 (Supp. 1990).

86. See *Maier v. Roe*, 432 U.S. 464, 97 S. Ct. 2376 (1977) and *Harris v. McRae*, 448 U.S. 297, 100 S. Ct. 2671 (1980).

87. See La. R.S. 40:1299.35.5 (Supp. 1990).

88. *Margaret S. v. Treen*, 597 F. Supp. 636 (E.D. La. 1984).

89. See *Belotti v. Baird*, 443 U.S. 662, 99 S. Ct. 3035 (1979) and *H.L. v. Matheson*, 450 U.S. 398, 101 S. Ct. 1164 (1981).

without the option of judicial consent would be constitutional. Under Justice O'Connor's undue burden test such a requirement might impermissibly burden the abortion decision because the parent is given the absolute right to veto the decision.

But there are valid reasons for enacting such a statute. Minors are treated differently under law than are adults. For example, minors may not marry below a certain age, may not make enforceable bargains, and may not view adult movies.<sup>90</sup> And although it may be argued that the abortion decision is more important than any of the above activities, that reasoning actually supports parental involvement. The judicial review procedure involves a judge determining whether the minor is mature or whether the abortion is in her best interest. But the Court has never defined exactly what constitutes her level of maturity or her best interest. Consequently, "a judge must rely on her subjective beliefs in reaching a decision."<sup>91</sup> If the decision is going to be subjective, the logical choice is to have the parent make it rather than a person who will have spent only one afternoon with the minor.<sup>92</sup> Should Louisiana decide not to enact a parental consent statute or should such a statute be held unconstitutional, it should enact a parental notification statute. Louisiana had such a statute<sup>93</sup> but it was held unconstitutional.<sup>94</sup> However, such a statute if reenacted would be constitutional, at least as applied to immature, unemancipated minors, because of recent Supreme Court jurisprudence on that issue.<sup>95</sup> Such a statute is worthy of reenactment. It does not involve an undue burden upon the abortion decision as the parent is not afforded the opportunity to veto the decision. Such a statute would not only provide the minor with guidance over an important decision but would also notify the parent of his or her daughter's sexual activity, of which they might have been unaware, thus, perhaps giving the parent the opportunity to discuss contraceptive methods to lessen the likelihood of another pregnancy.

Louisiana does not have a provision that requires spousal consent or notification. Like a parental consent statute, it is possible that a spousal consent statute would constitute an undue burden on the abortion decision because the husband would be given a unilateral veto. However, as has been recognized, "the husband has an interest of his own in the

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90. *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 95 n.2, 96 S. Ct. 2831, 2853 n.2 (1976) (White, J., concurring in part and dissenting in part).

91. Comment, *The Viability of Parental Abortion Notification and Consent Statutes: Assessing Fact and Fiction*, 38 Am. U.L. Rev. 881, 897 (1989).

92. On the other hand, perhaps a judge would be less emotional about the decision than a parent.

93. La. R.S. 40:1299.35.5(A)(1) (Supp. 1990).

94. *Margaret S. v. Edwards*, 488 F. Supp. 181 (E.D. La. 1980).

95. See *H.L. v. Matheson*, 450 U.S. 398, 101 S. Ct. 1164 (1981).



life of the fetus which should not be extinguished by the unilateral decision of the wife."<sup>96</sup> There is Supreme Court jurisprudence recognizing the rights of fathers in other circumstances.<sup>97</sup> For example, in *Caban v. Mohammed*,<sup>98</sup> the Court struck down a law giving a mother but not a father of an illegitimate child the right to block the child's adoption. The father had lived with the mother and the children for a number of years. Such a situation is analogous to a spouse being deprived of the choice to have a child without his consent. Of course, the important distinction is that in *Caban* the father had lived with the children. But such a distinction should not be dispositive. It is exactly because of the mother's unilateral decision to abort that the husband is deprived of the opportunity to live with the child as a family.

A spousal notification requirement would have a greater chance of success than a spousal consent statute. A notification requirement would probably not pose an undue burden because the father is not given the opportunity to unilaterally veto the abortion decision.<sup>99</sup> Such a statute would provide the father with the opportunity to at least plead his case, so to speak, if he wants the mother to carry the child to term.

#### 4. *Viability Determinations and Post-Viability Abortions*

Before proceeding into an examination of Louisiana's laws on this subject, it should be noted that the viability distinction may soon become obsolete. This is so because five Justices agree that the trimester approach should be abandoned and that states have an interest in potential life throughout pregnancy.<sup>100</sup> Thus, states that have had to be content in protecting the potential life only at viability may soon have the opportunity to protect it earlier.

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96. *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 93, 96 S. Ct. 2831, 2852 (1976) (White, J., concurring in part and dissenting in part).

97. Of course, not every father of a fetus is the spouse of the mother. This note concentrates on a spouse who is the father of the fetus. States might want to make exceptions where the spouse was not the father. The state might also want to mandate that the father of the fetus, though not the spouse of the mother, be notified. These circumstances present special problem.

98. 441 U.S. 380, 99 S. Ct. 1760 (1979).

99. In *Planned Parenthood of R.I. v. Bd. of Medical Rev.*, 598 F. Supp. 625 (D. R.I. 1984), the court found that a spousal notification requirement did constitute an undue burden either inherently or as applied. Of course, such a finding is not binding on the Supreme Court. Also, as the case was decided before *Webster* the court did not take into account the compelling interests in the potential life. Thus, the Supreme Court might decide that the state has its own interest in the potential life or it has a compelling interest in protecting the interests of the father.

100. Justices Kennedy, O'Connor, Rehnquist, Scalia, and White.

Louisiana Revised Statutes 40:1299.35.2B<sup>101</sup> provides that a physician who performs an abortion must perform an ultra-sound examination.<sup>102</sup> This statute requires that this examination be performed at any time during pregnancy. This provision was held unconstitutional in *Margaret S. v. Treen*<sup>103</sup> because it was an unacceptable burden on a woman's fundamental right to have an abortion and the state had no compelling interest.

It is very difficult to determine whether this provision would now be constitutional. An argument can be made that it would be constitutional because Justice O'Connor, the swing vote, believes that increased costs are not an undue burden on the abortion decision.<sup>104</sup> And as the new standard of review for abortion regulation might be whether the regulation furthers a state's compelling interest in potential life, then it is possible that any additional costs would be allowable.

An argument can be made that such an approach should not be taken. The court in *Treen* found that the tests were not necessary to determine the correct method of abortion, and that they were over inclusive as a means of determining life-threatening conditions—reasons that the state had used to justify the tests.<sup>105</sup> Imposing costs for costs sake alone may seem to some to be an unacceptable method for limiting the number of abortions performed.

On the other hand, as a purpose of the ultra-sound examination is to determine the gestational age of the fetus there may be a valid purpose for the tests. If the pregnant woman can be constitutionally required to know the anatomical and physiological development of the fetus before she has an abortion,<sup>106</sup> the tests would serve the function of aiding the physician in obtaining that information.

Louisiana also has a statute<sup>107</sup> that provides that no abortion may be performed after viability; that the physician shall certify the reasons for an abortion after viability; that the physician with a choice of methods must use the one to save the fetus unless it would affect the life or health of the mother; that a second physician is required to be in attendance for an abortion performed after viability; and that the

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101. La. R.S. 40:1299.35.2(B) (Supp. 1990).

102. Stedman's Medical Dictionary 1511 (24th ed. 1982), defines ultrasonography as the "location, measurement, or delineation of deep structures by measuring the reflection or transmission of high frequency or ultrasonic waves."

103. 597 F. Supp. 636 (E.D. La. 1984).

104. At least she believes that costs as high as second trimester hospitalization does not constitute an undue burden. See *Akron v. Akron Center for Reprod. Health*, 462 U.S. 416, 466, 103 S. Ct. 2481, 2512 (1983) (O'Connor, J., dissenting). Costs for ultra-sound tests would be substantially less.

105. *Margaret S. v. Treen*, 597 F. Supp. 636, 648-50 (E.D. La. 1984).

106. See *infra* text accompanying notes 116-18.

107. La. R.S. 40:1299.35.4 (Supp. 1990).

physicians in attendance shall take reasonable steps to preserve the life and health of the child while the primary objective is to protect the life and health of the mother. Although this statute has not been addressed by our courts, it would probably be unconstitutional, at least in part, because the second physician requirement does not provide an exception for emergencies.<sup>108</sup>

Louisiana may now amend this statute to create a presumption of viability at twenty weeks of pregnancy that a physician must rebut with tests to indicate that the fetus is not viable. Because five Justices agree that the state has an interest in potential life throughout pregnancy, Louisiana might forbid abortion at a point before viability, although when that point becomes an undue burden remains unclear.<sup>109</sup>

Louisiana might also wish to enact a law that mandates that the abortion method chosen for abortions after viability must be the one that affords the best opportunity for the fetus to survive, unless it involves a significantly greater health risk to the mother. This requirement has been held unconstitutional because it "require[s] a 'trade-off' between the woman's health and fetal survival."<sup>110</sup> This type of statute should be constitutional after *Webster* as preserving the state's compelling interest in potential life. There is no reason that a method such as saline amniocentesis, a method where there is little chance of fetal survival,<sup>111</sup> should be used in a post-viability abortion when another method could be used that would not cause any appreciable risk to the mother. Of course, the pregnant woman should not be required to undergo an abortion procedure that would be life-threatening or involve the threat of serious injury to save the life of the child; but even *Roe* holds that the state's interest in the fetus after viability is compelling. Thus, the physician should be required to use a method to preserve the life of the fetus if that method involves only minor health complications to the mother.

### 5. *Informed Consent*

Louisiana has tried several versions of informed consent provisions. The state may require the pregnant woman be informed that public and private agencies are available to assist her should she decide to keep

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108. See *supra* text accompanying note 27.

109. See *supra* text accompanying notes 66-68.

110. *Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747, 768, 106 S. Ct. 2169, 2183 (1986). See *supra* text accompanying note 26.

111. See *Margaret S. v. Edwards*, 488 F. Supp. 181, 199 n.59 (E.D. La. 1980).

the child or place him for adoption,<sup>112</sup> to be informed that public mental health agencies are available if and when post-partum psychological damage requires professional attention,<sup>113</sup> to be informed of the abortion method to be employed and the risks associated with the procedure, and to be given instructions to follow subsequent to the abortion.<sup>114</sup> Also held constitutional was a requirement that the physician provide the pregnant woman with a copy of the form.<sup>115</sup>

The court held that a requirement that the pregnant woman be informed of the anatomical and physiological development of the fetus at the time the abortion is performed was unconstitutional.<sup>116</sup> It is unclear whether this provision would now be constitutional. The provision was found invalid because, among other reasons, it is difficult to determine the age of the fetus during the early stages of pregnancy. The solution is to require ultra-sound tests to determine the age,<sup>117</sup> and if that is not possible,<sup>118</sup> to require the physician to estimate and give the characteristics for ages surrounding that estimate or to require the disclosure only when fetal age is certain. Another reason this provision was declared invalid was that the information is irrelevant to a woman's decision and it "impermissibly burdens the outcome of the abortion decision."<sup>119</sup>

That such a requirement was held unconstitutional is an enigma. It is a strange notion that the Constitution requires that women not know this information. In the first place, if a woman received information that her fetus was at a certain stage of development and decided to carry the child, that information has become relevant. Secondly, an abortion is not like removing a tooth or tumor. It involves cutting off a potential life. That alone justifies some structuring of the dialogue between the physician and the pregnant woman.<sup>120</sup> Of course it may be argued that the requirement of such disclosure would increase the guilt

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112. *Id.* at 211-12. However, a later U.S. Supreme Court decision held a similar requirement invalid. See *Akron v. Akron Center for Reprod. Health*, 462 U.S. 416, 103 S. Ct. 2481 (1983). Such a provision would probably be constitutional after *Webster*. It does not constitute an undue burden and it facilitates the state's purpose of informing the pregnant woman that options, other than abortion, exist.

113. 488 F. Supp. at 211.

114. *Id.* at 205-12.

115. *Id.*

116. *Margaret S. v. Treen*, 597 F. Supp. 636, 661-65 (E.D. La. 1984).

117. See *supra* text accompanying note 102.

118. Either because requiring an ultra-sound test is found unconstitutional or because the test cannot determine the age.

119. 597 F. Supp. at 662.

120. One reason given for the unconstitutionality of such a disclosure requirement was that it was an unacceptable attempt to structure the dialogue between the pregnant woman and her physician. See *Akron v. Akron Center for Reprod. Health*, 462 U.S. 416, 103 S. Ct. 2481 (1983).

of the pregnant woman should she decide to undergo the abortion. It may be that while the state has an interest in making sure the woman knows the enormity<sup>121</sup> of her decision by requiring the disclosure, such disclosure would constitute an undue burden on the woman by increasing the guilt she may feel after the abortion.

Because such a blanket requirement might face constitutional difficulties, Louisiana might want to adopt a requirement that the pregnant woman be informed of the physiological and anatomical characteristics of the fetus should she so choose. Such a requirement would not place an undue burden on the abortion decision and would serve the state's interest in potential life.

Louisiana might also want to enact a provision that requires the pregnant woman be informed of Louisiana laws regarding child support, that is, that the father of the child is legally responsible for support. This may be relevant to a woman who is choosing an abortion solely because she has little or no means of support. While it may be true that "a victim of rape should not have to hear gratuitous advice that an unidentified perpetrator is liable for support if she continues the pregnancy to term,"<sup>122</sup> the solution is to make an exception for those cases.<sup>123</sup> With the current make-up of the Court, such a provision would likely be valid.

#### 6. *Regulation of the Place Where the Abortion is Performed*

A statute<sup>124</sup> requiring all abortions be performed in a hospital after the first trimester was held unconstitutional in *Margaret S. v. Treen*.<sup>125</sup> Such a law would probably now be constitutional.<sup>126</sup> It might be argued that Louisiana should not require that all second trimester abortions be performed in a hospital. Such requirements have been held unconstitutional because the dilation and evacuation method of abortion can be performed safely in an outpatient setting during the early weeks of the

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121. That is the real purpose of such a disclosure requirement. They are designed to make the woman think twice about such an important decision. It is hoped that by making the woman aware of the development of the fetus, she will be sensitized to the fact that the fetus is actually a developing human being.

122. *Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747, 763, 106 S. Ct. 2169, 2180 (1986).

123. Pregnancies that result from rape should never be used as the sole reason for invalidating an abortion statute, because, of the number of abortions performed, very few of the pregnancies were the result of rape.

124. La. R.S. 40:1299.35.3 (Supp. 1990).

125. 597 F. Supp. 636 (E.D. La. 1984).

126. Justice O'Connor, the swing vote, dissented from the case that found such a requirement unconstitutional. See *Akron v. Akron Center for Reprod. Health*, 462 U.S. 416, 452, 103 S. Ct. 2481, 2504 (1983) (O'Connor, J., dissenting).

second trimester, thus the Court has held all second trimesters may not be required to be performed in hospitals.<sup>127</sup> Such reasoning does not support the abolition of the trimester approach, that is, disallowing state regulation during part of a trimester when it would be protective of the mother because during the other part of the trimester, it is not. But by the same token, it may be illogical to require hospitalization when it does not serve to protect the mother, especially because there is no chance of fetal survival during the early stages of the second trimester. On the other hand, such a requirement might decrease the number of abortions because the cost of hospitalization for many women would be prohibitive. Because of the Court's refusal to reexamine whether abortion is a fundamental right in *Webster*, states like Louisiana, which might prohibit all abortions if constitutionally permitted, have been left to take whatever scraps they can get. Decreasing the number of abortions by raising the costs seems to be the way the Court is going to allow states to limit abortions.

### III. CONCLUSION

An attempt has been made in this article to show what Louisiana could do to restrict abortion should the legislators and the citizens decide that it is in their interest to restrict the laws to the extent allowed by *Webster*. As indicated above, there have been more issues left unresolved than answered in the decision. The decision has left Louisiana and other states in doubt as to the extent to which they may restrict abortions. It is unclear what sort of abortion regulation will be required for the Court to reexamine *Roe*. It may be, as Justice Scalia states, that they "will not reconsider [*Roe*], even if most of the Justices think it is wrong, unless we have before us a statute that in fact contradicts it—and even then . . . only minor problematical aspects of *Roe* will be reconsidered, unless one expects State legislators to adopt provisions whose compliance with *Roe* cannot even be argued with a straight face."<sup>128</sup> And it may be, again in the words of Justice Scalia, that "*Roe v. Wade* must be disassembled door-jamb by door-jamb, and never entirely brought down, no matter how wrong it may be."<sup>129</sup>

Although *Webster* did not reach the issue of the validity of the abortion right as described in *Roe*, there are now three decisions pending before the Supreme Court that concern abortion regulation.<sup>130</sup> It is to be hoped that the Justices will elucidate their views on the standard to

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127. 462 U.S. 416, 103 S. Ct. 2481 (1983).

128. *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3066-67 (1989) (Scalia, J., concurring in part and concurring in the judgment).

129. *Id.* at 3067 (Scalia, J., concurring in part and concurring in the judgment).

130. See *supra* note 74.

be applied for abortion regulations and the extent of the state's allowable interest in the potential life.

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