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Abortion Laws: A Constitutional Right to Abortion

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COMMENT

Abortion Laws: A Constitutional Right to Abortion

Prior to 1967, a pregnant woman could not obtain an abortion in the United States except when necessary to preserve her health or to save her life.[1] The policy, purpose, and effect of the statutes that occasioned this state of affairs were questioned frequently by a concerned public.[2] Increased public opinion precipitated a re-examination of abortion statutes by several state legislatures,[3] some of which ultimately adopted new abortion laws allowing a pregnant woman to have an abortion in limited situations.[4] Recent judicial decisions, however, have cast doubt upon the effectiveness and constitutionality of such statutes.

Statutory prohibition of abortion before quickening did not exist in the United States prior to 1860.[5] At that time in our history medical science was stymied by infections that made almost any surgery fatally dangerous.[6] When abortion statutes were enacted, they were justified as necessary to protect pregnant women from the perils of surgery. In 1858, one state court commented that its state abortion law was not to prevent the procuring of abortions so much as to protect the life and health of the mother against the possibly fatal consequences of an attempted abortion.[7] Other reasons, however, have been suggested as support for the enactment of abortion laws. Some writers theorize that they were part of a general Victorian trend to legislate moral behavior.[8] The preoccupation with sin

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[1] *See, e.g.*, Hall, *Abortion Laws: A Call for Reform*, 18 DE PAUL L. REV. 584 (1969) [hereinafter cited as Hall].

[2] Leavy & Kummer, *Abortion and the Population Crisis; Therapeutic Abortion and the Law; Some New Approaches*, 27 OHIO ST. L.J. 647 [hereinafter cited as Leavy & Kummer].

[3] *E.g.*, ARK. STAT. ANN. § 41-303 (Supp. 1969); CAL. HEALTH & SAFETY CODE §§ 25950-54 (West Supp. 1970); COLO. REV. STAT. ANN. § 40-2-50 to -53 (Supp. 1967); GA. CODE ANN. § 26-1201 to -1203 (Rev. 1970); KAN. STAT. ANN. § 21-3407 (Supp. 1970); N.M. STAT. ANN. § 40A-5-1 to -3 (Supp. 1969); N.C. GEN. STAT. § 14-45.1 (1969); ORE. REV. STAT. § 465.110 (Supp. 1967).

[4] For an excellent general analysis of North Carolina's Therapeutic Abortion Act, see Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. REV. 730 (1968).

[5] L. LADER, ABORTION 86 (1966) [hereinafter cited as LADER].

[6] For a discussion of safety of a hospital abortion, see *id.* at 17-24.

[7] State v. Murphy, 27 N.J.L. 112, 114 (Sup. Ct. 1858).

[8] Note, *Abortion Reform: History, Status, and Prognosis*, 21 CASE W. RES. L. REV. 521, 528 (1970).

evident in the mid-nineteenth century demanded that an unmarried girl be punished by displaying her transgression to the world.[9] Abortion laws thus were used to instill a fear of pregnancy among unmarried girls as a means of enforcing morality.[10]

The major disadvantage of older abortion laws is that they permit abortion only in one situation—to save the life of the mother. These laws do not consider the possibility that without an abortion permanent and serious injury may be suffered. Also, by recognizing threats to the mother's life only, such statutes increase the possibility that mentally and/or physically defective children will be born. Moreover, by not allowing abortion after rape or incest, and by failing to consider the dilemma of a woman medically unable to use contraceptives, the statutes contribute to the birth of many unwanted children for already congested ghettos and overburdened orphanages and welfare agencies.[11] It has also been argued that these laws, promulgated on the theory of protecting a woman's life, in reality promote more deaths because they create a thriving illegal abortion business, preying upon desperate women who cannot meet the standards necessary for a legal abortion.[12]

In a majority of states it is a felony to procure or attempt to procure an abortion by any means, except when necessary to preserve the life of the mother.[13] There are a number of situations where especially forceful reasons exist for allowing an abortion. These include rubella or thalidomide pregnancy, and pregnancy from rape or incest. Traditional abortion statutes do not distinguish these special situations and in view of the present state of medical science, serve little purpose other than tying the hands of competent physicians.[14] In an attempt to conform abortion laws to modern medical and surgical procedure, the American Law Institute, in its Model Penal Code,[5] provided a model statute as a guideline to reform in state legislatures.[16]

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[9] LADER 89.

[10] *Id.* 90-91. See also G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 154 (1957); Quay, *Justifiable Abortion—Medical and Legal Foundations* (pts. 1 & 2), 49 GEO. L.J. 173, 395 (1960).

[11] Note, 21 CASE W. RES. L. REV., *supra* note 8.

[12] *Id.* at 529.

[13] Leavy & Kummer at 647-53.

[14] Hall at 584.

[15] MODEL PENAL CODE § 230.3 (Proposed Official Draft, 1962).

[16] The Model Penal Code provides that one who wilfully and without justification aborts a pregnant woman during the first twenty-six weeks of pregnancy commits a felony of the third degree. Beyond the twenty-sixth week, it is a felony of the second degree. This illustrates the distinction based on the time of quicken-

Beginning in 1967, public opinion stimulated several states[17] to re-examine their abortion laws in order to achieve conformity with medical and surgical advances. The resulting reform legislation, commonly referred to as Therapeutic Abortion Acts, was based primarily upon the Model Penal Code's criteria for legal abortion.[18] Generally, the Therapeutic Abortion Acts allow an abortion when necessary to protect the life or health of the mother, when there is a substantial risk that the child will be born defective, or if pregnancy resulted from rape or incest.[19] Such limited reform measures, however, have not quieted the public outcry for complete reform. It has been suggested that the abortion situation in the United States today, including the Therapeutic Abortion Acts, bears

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ing, *i.e.*, the stage of gestation at which the fetus becomes able to live outside the mother's womb.

The model statute then allows an abortion by a licensed physician under the following circumstances:

1) If the physician believes that there is a substantial risk to the mother's health or that her mental health would severely deteriorate if pregnancy were to continue; or

2) If that child would be born seriously crippled in mind or body; or

3) If the pregancy was the result of forcible rape or incest.

MODEL PENAL CODE § 230.3 (Proposed Official Draft, 1962).

[17] Lucas, *supra* note 4, at 737.

[18] North Carolina amended its law in 1967 to allow an abortion under the following circumstances:

1. When there is substantial risk that continuance of pregnancy would threaten the life or gravely impair the health of the woman; or

2. When there is substantial risk that the child would be born with grave physical or mental defect; or

3. When the pregnancy resulted from rape or incest and the rape was reported to a law enforcement agency or court official within seven days; and

4. Only after the woman has given her written consent for the abortion to be perfomed; if the woman is a minor or incompetent then only after permission is given in writing by the parents, or if married, her husband, guardian, or person in loco parentis to her; and

5. Only when the woman has resided in this state for at least four months prior to the operation except in the case of an emergency where the life of the woman is in danger; and

6. Only after three doctors, one of whom must be the person performing the abortion, have examined the woman and certified in writing the circumstances which they believe to justify the abortion; and

7. Only when the certificate has been submitted before the abortion to the hospital where it is to be performed; provided that when there is an emergency, the certificate may be submitted within twenty four hours after the abortion. N.C. GEN. STAT. § 14-45.1 (1969).

It should be noted that the residency requirement in the North Carolina statute (as expressed in number 5 above) has recently been held unconstitutional by a three-judge panel federal court. Corkey v. Edwards, — F. Supp. —, Civ. No. 2665 (W.D.N.C. Feb. 1, 1971).

[19] Leavy & Kummer at 654.

a close resemblance to Prohibition, when the anti-liquor laws simply decreased the quality and ready availability of alcohol, without abolishing it.[20] Arguably, the limited reform seen to date has only made the procurement of an abortion by a licensed physician more readily available to the wealthy, not to the poor. Those with economic means are able to fit themselves within the limited statutory categories or can afford to travel to other countries or states where abortions have been legalized.[21] Of course, abortions are also available to the poor, but rarely legally. Abortion before quickening is generally considered to be safer than childbirth when performed by a physician under hygienic hospital conditions.[22] Under the restrictive conditions imposed by most state abortion laws, however, the safety of a hospital abortion is generally not available to the poor who are unable to satisfy often arbitrary criteria.[23] Impoverished women, therefore, must either bear the unwanted child or abort it, either through self-induced means or at the hands of a back-alley abortionist, either of which may be fatally dangerous.[24] Although estimates and statistics are difficult to substantiate,[25] it is generally agreed that the death rate of illegal abortions is significantly greater than the death rate of legal abortions.[26] Of the estimated eight thousand annual legal abortions, death rarely results and ill after-effects are infrequent.[27] By comparison, an estimated 1.5 million illegal abortions annually result in five to ten thousand deaths, most occurring among the poor.[28]

While Therapeutic Abortion Act reform measures may appear to be a solution to the illegal abortion problem, they fail drastically. It has been argued that eighty per cent of the abortions in the United States are performed on married women, most of whom have several children, are pregnant by their own husbands, and simply do not *want* other children.[29]

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[20] Comment, *Abortion Law Reform at a Crossroads*, 46 CHI.-KENT L. REV. 102, 107 (1969).

[21] *See* Ziff, *Recent Abortion Law Reforms (Or Much Ado About Nothing)*, 60 J. CRIM. L.C. & P.S. 3, 11 (1969) [hereinafter cited as Ziff].

[22] *See, United States v. Vuitch*, 305 F. Supp. 1032, 1034 (D.D.C. 1969).

[23] Gold, *Therapeutic Abortion in New York City: 20-Year Review*, 20 AM. J. PUB. HEALTH 968 (1965).

[24] D. LOWE, ABORTION AND THE LAW 26-39 (1966) [hereinafter cited as LOWE].

[25] *E.g.*, Noonan, *Amendment of the Abortion Law: Relevant Data & Judicial Opinion*, 15 CATH. LAW. 124, 130-33 (1969).

[26] Roy, *Abortion: A Physician's View*, 9 WASHBURN L.J. 391 (1970).

[27] LADER 17.

[28] *See* LOWE 12-13.

[29] Ziff at 13. It has been estimated that if every married woman of childbearing age who did not want a pregnancy were using the most effective contraceptive

Imposing such requirements as having a hospital panel determine who will be permitted an abortion inevitably has the effect of continuing the favorable position of the wealthy. The poorer, less educated woman is often not sophisticated enough to manufacture the stories necessary to bring her within the statutory conditions.[30] Moreover many of the statutory requirements are unrealistic. For example, these laws require that in order to qualify for an abortion on grounds of rape, a woman must report the incident to the police within one week after it occurred. It is questionable whether many rape victims will risk the humiliation and publicity that accompany such reports before knowing whether a pregnancy has in fact occurred.[31]

The main thrust of the current reform movement is based upon the belief that a pregnant woman, in consultation with her physician, ought to be allowed to decide for herself when pregnancy should be terminated, and that a particular moral norm should not be forced upon society as a whole.[32] Legislative abortion liberalization, however, has not been entirely successful.[33] The proponents of reform, therefore, have taken their case to court in an attempt to have all restrictions upon the right to abort declared unconstitutional. As the trend toward liberal interpretation of the Constitution has gathered momentum, proponents of abortion reform supported by a wave of public sentiment, have met with increasing success in the courts.[34] The grounds for judicial attack have been vagueness,[35] overbreadth,[36] and an inviolable constitutional right to decide whether or not to bear children,[37] arising out of the marital right to privacy.[38]

VAGUENESS

Early attacks on abortion laws met with little success. The usual challenge was that the particular statute was void for vagueness. In *People*

available, there would still be two hundred and twenty thousand unplanned pregnancies each year. Roy, *supra* note 26, at 396.

[30] Ziff at 14.

[31] Hall at 588.

[32] Lucas, *supra* note 4, at 736.

[33] For a discussion of the legislative reform of New York's abortion law, see Hall, *The Abortion Revolution*, PLAYBOY, Sept. 1970, at 112.

[34] *See* Moyers, *Abortion Laws: A Study in Social Change*, 7 SAN DIEGO L. REV. 237 (1970).

[35] *E.g.*, United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969).

[36] *E.g.*, Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970).

[37] *E.g.*, Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970).

[38] Griswold v. Connecticut, 381 U.S. 479 (1965).

v. Rankin,[39] the defendant claimed that the statutory phrase "to procure the miscarriage of such woman,"[40] failed to sufficiently inform him with reasonable certainty of the act prohibited, and was therefore unconstitutionally vague. In upholding the statute, the court referred to the legal dictionaries' definitions of the procurement of a miscarriage as the criminal act of destroying a fetus before birth.[41] The court held that the statute was sufficiently clear to inform persons of common intelligence and understanding of the acts that were prohibited.[42]

Other courts found sufficient clarity in abortion laws by referring to the legislative history of the statutes.[43] Arguably by having to support the statutes' certainty by reference to extrastatutory material, these courts indirectly confirmed a certain degree of vagueness in the statutes. Reasonable men should be able to understand the statutory prohibitions upon a reading of the statute alone.[44] A statute requiring or forbidding the performance of an act "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential requirement of due process of law."[45]

Illustrative of an abortion statute that suffered from the constitutional infirmity of vagueness was the District of Columbia statute,[46] which was held unconstitutional in *United States v. Vuitch*.[47] The statute in question allowed an abortion only when "necessary for the preservation of the mother's life or health."[48] According to the court, the word "health," being undefined, was so vague in both interpretation and practice that uncertainty existed as to whether it included varying degrees of mental as well as physical health. There was no clear standard to guide the

[39] 10 Cal. 2d 198, 74 P.2d 71 (1937).
[40] CAL. PENAL CODE § 274 (West 1970).
[41] 10 Cal. 2d at 202, 74 P.2d at 73.
[42] *Id.*
[43] Carter v. State, 155 So. 2d 787 (Fla. 1963), *appeal dismissed*, 376 U.S. 648 (1963); Kudish v. Board of Registration in Medicine, — Mass. —, 248 N.E.2d 264 (1969).
[44] *See* NAACP v. Alabama, 377 U.S. 288, 307-08 (1964), and cases cited therein.
[45] Conally v. General Constr. Co., 269 U.S. 385, 391 (1926). The Supreme Court has stated that "no one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).
[46] D.C. CODE ANN. § 22-201 (1967).
[47] 305 F. Supp. 1032 (D.D.C. 1969).
[48] D.C. CODE ANN. § 22-201 (1967).

physician, the jury, or the court.[49] Thus, the phrase fails to give the certainty that due process of law demands in a criminal statute.

Other uncertainties in the phrase "as necessary for the preservation of the mother's life or health" were challenged in *People v. Belous*,[50] and *Roe v. Wade*,[51] and in each case the court held the phrase to be unconstitutionally vague. How likely must death be? Will the threat of suicide satisfy the statutory exception? Is it sufficient if having the child will shorten the life of the woman by a number of years? The court in *Wade* concluded that these questions simply cannot be answered.

The vagueness test was applied to Georgia's abortion law in *Doe v. Bolton*.[52] The Georgia Abortion Act, a therapeutic act similar to the North Carolina abortion law, was held to be unconstitutional in part, because of overbreadth. The court held that a pregnant woman had a constitutional right to decide for herself whether or not to bear children, and that although the state may regulate the procedure, the statute went too far by infringing upon that constitutional right.

In *Babbitz v. McCann*,[53] although the Wisconsin abortion statute[54] was held to be unconstitutional on other grounds, the court rejected the vagueness attack. Fully aware of the constitutional guidelines, the court concluded that the statute in question set forth with reasonable clarity and sufficient particularity the kind of conduct that will constitute a violation.[55]

The vagueness attack was also rejected in *Rosen v. Louisiana State Board of Medical Examiners*.[56] The court held the Louisiana abortion law[57] to be reasonably comprehensible in its meaning and to provide fair warning of what is prohibited.[58] The court expressly rejected the decisions of *Wade*, *Belous*, and *Vuitch*.

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[49] 305 F. Supp. at 1034.

[50] — Cal. 2d —, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

[51] 314 F. Supp. 1217 (N.D. Tex. 1970).

[52] — F. Supp. —, Civ. No. 13676 (N.D. Ga. July 31, 1970).

[53] 310 F. Supp. 293 (E.D. Wis. 1970).

[54] WIS. STAT. ANN. § 940.04 (1958). The Wisconsin Act was not a therapeutic abortion statute.

[55] 310 F. Supp. at 297.

[56] 318 F. Supp. 1217 (E.D. La. 1970).

[57] The Louisiana law allows abortion only to save the life of the mother. LA. REV. STAT. ANN. § 37:1285(6) (1950).

[58] The vagueness attack was also rejected in Corkey v. Edwards, — F. Supp. —, Civ. No. 2665 (W.D.N.C. Feb. 1, 1971).

An examination of the decisions dealing with the vagueness attack reveals that the two groups of cases cannot be distinguished in fact or law. Those cases accepting the attack appear to be concerned with the practical and social problems involved with abortion regulation, whereas those cases rejecting the vagueness argument refused to be influenced by public opinion and social problems. The wide range of judicial disagreement perhaps forewarns the reform movement to take another constitutional route.

THE RIGHT TO DECIDE WHETHER OR NOT TO BEAR CHILDREN

In *Olmstead v. United States*,[59] Justice Brandeis, dissenting, recognized that the Constitution confers upon individuals, as against the government, the right to be left alone. Indeed, this may well be "the most comprehensive of rights and the right most valued by civilized men."[60] *Stanley v. Georgia*[61] recognized that "the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy"[62] is a basic constitutional directive.

In a series of cases highlighted by *Griswold v. Connecticut*,[63] the Supreme Court has distinguished an area of fundamental human liberty in matters relating to marriage, the family, and children.[64] The protection of the fourteenth amendment includes the right to marry,[65] establish a home,[66] and the right to direct the upbringing and education of children,[67] which are among the basic civil liberties of man.[68]

Proponents of abortion reform, based upon *Griswold's* pronouncement of a constitutionally protected zone of privacy, argue that each woman has a right to decide for herself whether or not to bear children with which the state should not interfere.[69] *Griswold* held that Connecticut's birth control law unconstitutionally infringed upon the rights of Connecticut couples to practice contraception. The Court of Appeals for the

[59] 277 U.S. 438, 471 (1928).
[60] *Id.* at 478.
[61] 394 U.S. 557 (1969).
[62] *Id.* at 564.
[63] 381 U.S. 479 (1965).
[64] For an expansion of the *Griswold* opinion, *see, e.g.*, Note, *Constitutional Aspects of Present Criminal Abortion Laws*, 3 VALPARAISO U.L. REV. 102 (1968).
[65] Loving v. Virginia, 388 U.S. 1 (1966).
[66] Meyer v. Nebraska, 262 U.S. 390 (1923).
[67] Pierce v. Society of Sisters, 268 U.S. 510 (1925).
[68] *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
[69] *See, e.g.*, Hall, *supra* note 1. *Contra*, Drinan, *The Inviolability of the Right to Be Born*, 17 W. RES. L. REV. 465 (1965).

First Circuit has interpreted *Griswold* as establishing a right to use birth control methods that may not be abridged by the legislature.[70] In *Griswold,* Justice Goldberg spoke of the "marital right to bear children and raise a family."[71] The majority opinion recognized that this right to privacy, whether it is derived from the first, fourth, ninth, fourteenth amendment, or all of them, is a right "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[72]

The court in *United States v. Vuitch,*[73] holding the District of Columbia abortion law void for vagueness, also discussed the right to decide whether or not to bear children. Noting the indication in the Supreme Court's decisions that the right of privacy extends to family relations, marriage and sex matters, the court in *Vuitch* commented that the protected privacy "may well include the right to remove an unwanted child at least in the early stages of pregnancy."[74] The court then encouraged Congress to re-examine the statute in the light of current medical and legal conditions.[75] According to the court, it is legally imperative that uniform medical abortion services be provided all segments of the population, the poor as well as the rich.

In *People v. Belous,*[76] the California Supreme Court concluded that the fundamental right of a woman to choose whether or not to bear children stems from the right of privacy in matters related to marriage, family, and sex enunciated in *Griswold.* Because the right to determine whether or not to bear children is not enumerated in either the federal or state constitution does not mean that the right does not exist.[77] Several unenumerated, but recognized, fundamental rights exist under the Constitution. For example, the right to vote,[78] the right to travel,[79] the right to marry and procreate[80] are basic, undeniable rights. None, however, are specifically set forth in the Constitution.

The Wisconsin abortion statute, which allowed an abortion only to

[70] Baird v. Eisenstadt, 429 F.2d 1398 (1st Cir. 1970).
[71] 381 U.S. at 497.
[72] *Id.* at 487. For a comparison of the restrictions in Connecticut's birth control statute and the restrictions in abortion statutes, see Leavy & Kummer at 674.
[73] 305 F. Supp. 1032 (D.D.C. 1969).
[74] *Id.* at 1035.
[75] *Id.* at 1035-36.
[76] — Cal. 2d —, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).
[77] *Id.* at —, 458 P.2d at 200, 80 Cal. Rptr. at 360.
[78] Carrington v. Rash, 380 U.S. 89 (1965).
[79] Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958).
[80] Skinner v. Oklahoma, 316 U.S. 535 (1942).

protect the life of the mother, was challenged in *Babbitz v. McCann*[81] on the ground that it violated a woman's fundamental right to decide for herself whether or not to bear children. The federal court, basing its opinion upon *Griswold* and the ninth amendment, held that such a right exists and that the Wisconsin law unconstitutionally infringed upon that right. The state may not deprive a woman of her *private* choice[82] of whether or not to bear an unquickened fetus.[83] Conception and bearing children are closely interwoven with the intimacy of home and marriage.[84] Following *Griswold*, the court pointed out that the Bill of Rights contains both penumbral and specific guarantees that protect one's home and life from governmental intrusion.[85]

Georgia's Therapeutic Abortion Law,[86] similar to the North Carolina statute, was held unconstitutional in part by a federal court in *Doe v. Bolton*.[87] The right to privacy, according to the court, includes the right to terminate an unwanted pregnancy. That right, however, is not unlimited. The court held that the state may not unduly limit the reasons for which an abortion will be allowed. But it may legitimately require that the decision to terminate a pregnancy be reached only upon consideration of more factors than the desires of the woman and her ability to find a willing physician. The state, for example, may require family counseling or the consent of a physician so long as such requirements do not restrict the reasons for the initial decision, and do not violate the due process and equal protection clauses of the fourteenth amendment.[88]

The courts in *Belous, Babbitz,* and *Bolton* had little difficulty in finding a *fundamental* right to decide privately not to bear children. The court in *Roe v. Wade*[89] also recognized that freedom of choice as concerns abortions is a *fundamental* right. In determining what rights are fundamental, however, judges are not allowed to decide cases in light of their personal and private notions. Instead they must look to the traditions and collective conscience of society to determine whether the principle is so rooted

[81] 310 F. Supp. 293 (E.D. Wis. 1970).

[82] Justice Douglas, writing in *Griswold*, asserted that the principles of the right to privacy apply to "all governmental invasions 'of the sancity of a man's home and privacies of life.'" 381 U.S. at 484, *citing* Boyd v. United States, 116 U.S. 616, 630 (1886).

[83] 310 F. Supp. at 299.

[84] *Id.*

[85] *Id.* at 300.

[86] GA. CODE ANN. § 26-1201 to -1203 (Rev. 1970).

[87] — F. Supp. —, Civ. No. 13676 (N.D. Ga. July 31, 1970).

[88] — F. Supp. at —.

[89] 314 F. Supp. 1217 (N.D. Tex. 1970).

therein as to be classified as *fundamental*.[90] Other courts have concluded that the abortion problem is a question about which reasonable men disagree and therefore is not so rooted in our traditions and collective conscience so as to be classified as *fundamental*.[91]

Louisiana's abortion law[92] was expressly held to be constitutional by a federal court in *Rosen v. Louisiana State Board of Medical Examiners*.[93] The statute indirectly allows an abortion only when necessary to save the mother's life.[94] According to *Rosen*, biologically and genetically speaking, abortion involves the destruction of a form of life.[95] Generally, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.[96] The court in *Rosen* therefore concluded that there is no *fundamental* right to an abortion since such a right is not so rooted in the traditions and collective conscience of our people that it must be ranked as fundamental.[97] Such a conclusion, however, is of questionable validity. Certainly before *Griswold* there was widespread public disagreement over the practice of birth control. And the Connecticut legislature had spoken. Yet the Supreme Court found that the statute still violated a fundamental right of privacy. The reasoning of *Rosen*, therefore, is no barrier to finding the presence of a fundamental right not previously expressed by a particular court or legislature.

The court in *Rosen* also based its decision upon the principal of constitutional law that the federal courts will not strike down an otherwise constitutional statute on the basis of an alleged wrongful legislative motive.[98] Perhaps this was a judicial response to the attack that the statutory purpose of protecting the health of the mother is no longer valid due to

[90] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[91] In Doe v. Scott, — F.2d —, Civ. No. 18382 (7th Cir. March 30, 1970), the court entered a temporary restraining order enjoining Illinois from prosecuting a physician under the abortion statute if he terminates the current pregnancy of the intervening plaintiff. Other courts, however, have refused to hear abortion law challenges. A federal court employed the abstention doctrine in Rodgers v. Dansforth, — F. Supp. —, Civ. No. 18360-2 (W.D. Mo., Sept. 10, 1970), to refuse to accept jurisdiction of an attack upon Missouri's abortion law. A similar course of action was taken in Doe v. Randall, — F. Supp. —, Civ. No. 3-70-97 (D. Minn. May 19, 1970), in refusing to entertain an attack upon the Minnesota abortion law.

[92] LA. REV. STAT. ANN. § 14:87 (Supp. 1970).

[93] 318 F. Supp. 1217 (E.D. La. 1970).

[94] LA. REV. STAT. ANN. § 37:1285(6) (1950).

[95] 318 F. Supp. at 1222.

[96] Berman v. Parker, 348 U.S. 26, 32 (1954).

[97] This is the test of a fundamental right expressed by the Supreme Court in Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[98] *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968); McCray v. United States, 195 U.S. 27 (1904).

modern and safe abortion procedures. It was also held that a federal court should not void legislation, which a state had the power to enact on more than one ground, simply because the alleged dominant motive behind the statute is no longer served by its application.[99] Both of these arguments by the court, however, become relevant only after concluding that there is no constitutional right involved that demands protection. Therefore, had the court concluded that the state could not constitutionally regulate a woman's private choice of abortion, these latter two issues would be of no consequence since such principles could not save the statute from unconstitutionality.

If a *fundamental* right not to bear children exists, as an increasing number of courts have so held, the more critical issue is whether the state has a compelling interest in the regulation of a subject that falls within its police power.

The State's Interest in Regulation of Abortions

Where a statute significantly encroaches upon personal liberty, the "State may prevail only upon showing a subordinating interest which is compelling."[100] In *Shelton v. Tucker*,[101] the Supreme Court held that even though the governmental purpose be legitimate and substantial, that purpose canont be pursued by means that broadly stifle fundmental personal interests when the end can be more narrowly achieved.[102] The breadth of the legislative abridgement must be viewed in light of less drastic means for achieving the same purpose. Therefore, if the state's interest and purpose is the safety of the mother,[103] this reasoning would make an abortion lawful where it is safer than childbirth.[104]

In *Babbitz v. McCann*,[105] the defendant urged that the state had a compelling interest in protecting the fetus. The court held, however, that the woman's right to refuse to carry a fetus during the early months of pregnancy may not be invaded by the state without a more compelling state interest than protecting the fetus.[106] Of particular interest is the

[99] 318 F. Supp. at 1228.
[100] Bates v. Little Rock, 361 U.S. 516, 524 (1960).
[101] 364 U.S. 479 (1960).
[102] *See also* NAACP v. Button, 371 U.S. 516, 524 (1960).
[103] See Comment, 46 Chi.-Kent L. Rev., *supra* note 20.
[104] Such reasoning, however, would place the final decision of whether to abort solely upon the attending physician, rather than the pregnant woman.
[105] 310 F. Supp. 293 (E.D. Wis. 1970).
[106] *Id.* at 301.

fact that the court also found no compelling state interest in the need to protect the mother's life, basing its conclusion on the assertion that a medical abortion during early pregnancy is not inherently dangerous to the mother. Furthermore, the court could find no compelling state interests in using the abortion laws to discourage pre-marital sexual intercourse.[107]

The state clearly has no valid, subordinating interesting in preventing the use of birth control methods.[108] Moreover, the same policy would dictate the conclusion that the state has no legitimate interest in prohibiting therapeutic abortions. If a woman practices birth control but nevertheless becomes pregnant, should she not be allowed to use the final, and most effective, method of birth control? It is asserted that if every married woman of childbearing age who did not wish to become pregnant (an estimated twenty-two to twenty-five million) were to use the most effective contraceptive available, there would still be 220,000 unplanned pregnancies each year.[109]

The intra-uterine device (IUD) is a common method of birth control. There is at least a possibility that the IUD does not prevent fertilization of an ovum, but rather prevents a fertilized ovum from attaching to the uterine wall. If this is the case, then the practical difference between the IUD and an abortion is difficult to discern. The same argument may apply to the "morning-after" pill. Indeed, former Supreme Court Justice Clark has asserted:

> [O]ne of the basic values of [the right to] privacy is birth control, as evidenced by the *Griswold* decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention has failed?[110]

Those who oppose judicial reform of abortion laws maintain that the fetus has a constitutionally protected right to be born, or that the legislature may properly grant such a right.[111] Courts have clearly extended certain rights to the fetus: the right of inheritance,[112] and the right to

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[107] *Id.*

[108] Griswold v. Connecticut, 381 U.S. 479 (1965).

[109] Roy, *supra* note 26, at 396.

[110] Clark, *Religion, Morality, and Abortion: A Constituitonal Appraisal*, 2 LOYOLA U.L.A.L. REV. 1, 9 (1969).

[111] *See, e.g.*, Drinan, *The Inviolability of the Right to Be Born*, 17 W. RES. L. REV. 465 (1965).

[112] ATKINSON, WILLS 75 (2d ed. 1953).

compensation for tortious injury[113] sustained during the prenatal stage.[114] At least one school of thought argues that a viable fetus is a person entitled to full protection.[115] Support for this position is found in two lower court cases. In *Hatala v. Markiewicz*,[116] the Connecticut court held that life begins at conception. And an Ohio court in *Williams v. Marion Rapid Transit, Inc.*,[117] determined that a viable fetus is a person under the Ohio Constitution. Thus, the argument goes, allowing abortions for reasons other than to save the mother's life would deprive the fetus of life without due process of law.

On the other hand, it has been urged that the fetus has no constitutional right to be born.[118] This argument notes that no case has extended the fourteenth amendment to protect the rights of the unborn.[119] The point at which a fetus becomes a "person" will always be the subject of philosophical and religious discussion. However, it is interesting to note that no state requires a death certificate for the death of a fetus prior to the twentieth week of pregnancy.[120]

In *Corkey v. Edwards*,[121] a federal court upheld North Carolina's Therapeutic Abortion Act as constitutional. The court did not recognize the fetus as having a constitutional right to be born, but did hold that the state has a compelling interest in protecting the fetus and therefore the legislature may grant such a right. Other cases, *Babbitz, Bolton*, and *Belous* have held to the contrary.

Once again, the conflicting cases cannot be distinguished in fact or in law. One can only conclude that the reason for the conflicting opinions is the personal constitutional beliefs of the judges who heard the cases. The conflict, it seeems, can only be resolved by the Supreme Court.

Legislative Reform

It has been maintained that the proper forum for abortion reform is the legislature rather than the judiciary. Traditionally, however, legislative changes in abortion laws have not been substantial. Even if the

[113] Prosser, Law of Torts, 354-57 (3d ed. 1964).
[114] Even the opponents, however, disagree as to whether this asserted right extends to a non-viable, as well as a viable fetus.
[115] *See, e.g.*, Note, 3 Valparaiso U.L. Rev., *supra* note 64, at 107-09.
[116] 26 Conn. Supp. 358, 224 A.2d 406 (Sup. Ct. 1966).
[117] 152 Ohio St. 114, 87 N.E.2d 334 (1949).
[118] *See*, Note, 3 Valparaiso U.L. Rev., *supra* note 64, at 107-09.
[119] *Id.*
[120] See Note, 22 U. Fla. L. Rev. 59 (1969).
[121] — F. Supp. —, Civ. No. 2665 (W.D.N.C. Feb. 1, 1971).

asserted constitutional right not to bear children is ultimately rejected by the Supreme Court, it is necessary that state legislatures re-examine their abortion laws in light of continuing medical advancements and the call for legalized abortions by substantial segments of the population. Approximately four years ago the hue and cry for abortion reform resulted in the passage of many therapeutic abortion acts, as in North Carolina. Those liberalizations, however, have failed largely because of their restrictions, many of which are of questionable constitutional validity. Today, reform demands complete legalization of abortions performed by a physician in a hospital. Several states have brought their abortion laws in line with modern social and medical conditions. Alaska,[122] Hawaii,[123] Maryland,[124] New York,[125] and Washington[126] now allow abortions almost at will. Certainly more states will follow the lead. However, any reform effort can be expected to encounter the same objections that faced the recent New York enactment. Perhaps many of the objections to legislative reform will be overshadowed when the effect of the New York law is taken into account by any legislature contemplating reform.

A major objection offered in the New York legislature was that reform would turn the state into an "abortion mill." In the six month period from July 1970 to January 1971, an estimated 150,000 legal abortions were performed in the state of New York.[127] Of the sixty-nine thousand abortions performed in New York City during the six-month period, one-half of those women were from outside the state of New York. Undeniably, this is a substantial increase apparently strengthening the position of those who oppose reform. But such is not the case. Instead, the increase in the number of abortions legally performed dramatically illustrates that reform was needed in order to bring the law into conformity with social needs and conditions. Furthermore, the legalization of abortion has reduced the abortion death rate substantially below that experienced when women were forced to utilize illegal means.[128] Legalization, therefore, has accomplished the primary purpose that restrictive abortion laws sought to achieve, *i.e.*, protection of the life and safety of a pregnant woman.

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[122] PLAYBOY, Sept. 1970, at 150.
[123] TIME, Mar. 9, 1970, at 34.
[124] Moyers, *Abortion Laws: A Study in Social Change*, 7 SAN DIEGO L. REV. 237, 239-40 n.28 (1970).
[125] Durham Morning Herald, Jan. 17, 1971, § B, at 8, col. 2.
[126] *Id.* § B, at 8, col. 6.
[127] *Id.* at col. 3.
[128] *Id.* at col. 5.

Many state legislatures in the future will observe with interest the effects of abortion legalization in those states that have taken the lead. In the state of Washington, legalization of abortion was approved in a referendum by fifty-five per cent of those citizens voting. Perhaps other states should submit the question to the people.[129] The legislators should not allow their own religious and moral opinions, which inevitably arise in any discussion of abortion reform, to influence their obligation to examine any law that may promote the public interest.

CONCLUSION

The present controversy over abortion reform is one of the most significant issues in the United States today. The degree of discontent demonstrates that reform is necessary and is indeed inevitable. The only question remaining is the mechanism for reform—the court or the legislature. If the legislature does not recognize the problem and re-evaluate the abortion laws, then the recent increase in judicial examination of those laws can be expected to continue. Recognizing that the state has a valid and compelling interest in reasonably regulating abortion procedures, it appears that the state should not attribute to a fetus rights superior to that of the pregnant woman, thereby interfering with her fundamental right to privacy in matters relating to marriage and sex.

Reform is needed not only from a legal standpoint, but also because of social ills occasioned by a substantial number of unwanted children. An unwanted child may develop psychological problems due to lack of security and parental love. Juvenile delinquency is often a desperate attempt to gain attention not available in the home. Planned parenthood is within the best interests of society and should be a primary concern of the legislature. All the common methods of birth control, however, cannot solve the problem. Only legalized abortion will achieve the needed result.

Ultimately, the Supreme Court must hear and decide the merits of the constitutional attacks. No matter what course is followed,[130] it seems that the writing is on the wall, so to speak, and the legislatures should seize the opportunity to re-examine their laws before the courts require them to do so.

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[129] *Id.* at col. 6.

[130] A unique and interesting attack upon the abortion laws was made in Comment, *Isolating The Male Bias Against Reform of Abortion Legislation*, 10 SANTA CLARA LAW. 301 (1970).