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Medicaid Assistance for Elective Abortions: The Statutory and Constitutional Issues

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MEDICAID ASSISTANCE FOR ELECTIVE ABORTIONS: THE STATUTORY AND CONSTITUTIONAL ISSUES

INTRODUCTION

In *Roe v. Wade*,[1] the Supreme Court held that women have the right[2] to an abortion free from any state interference[3] during the first trimester of pregnancy, but that from the commencement of the second trimester, the state may impose such regulations as are reasonably related to maternal health.[4] The ramifications of this landmark decision[5] are not yet completely clear. One issue which has been the subject of much litigation since *Wade* is the validity of

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[1] 410 U.S. 113 (1973). For a general discussion of the Supreme Court's opinion and its implications, see Note, *Implications of the Abortion Decisions: Post* Roe *and* Doe *Litigation and Legislation*, 74 COLUM. L. REV. 237 (1974); Comment, Roe v. Wade—*The Abortion Decision—An Analysis and Its Implications*, 10 SAN DIEGO L. REV. 844 (1973). Constitutional analyses of the *Wade* decision may be found in Note, *The Right to Abortion: Expansion of the Right of Privacy Through the Fourteenth Amendment*, 19 CATH. LAW. 36 (1973); Note, *A New Constitutional Right to an Abortion*, 51 N.C.L. REV. 1573 (1973).

[2] The Court determined that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions on state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. Nonetheless, this "right" is less than absolute. As the Court declared,

> a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute.

Id. at 154.

[3] The *Wade* Court noted that "[w]here certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest'. . . ." *Id.* at 155 (citation omitted). The Court concluded that during the first trimester of pregnancy there can be no "compelling state interest" to justify any state regulation of the abortion decision; hence, during that period a woman has the right to have an abortion free from any state interference. *Id.* at 163.

[4] *Id.* The Court held, moreover, that once the point of viability is reached, the state may, if it so chooses, completely proscribe the performance of abortions, except where necessary to protect maternal health. The Court reasoned that once the fetus becomes viable the state has a compelling interest in protecting the potentiality of human life. *Id.* at 163-64. According to the Court, viability usually occurs "at about seven months (28 weeks) but may occur earlier, even at 24 weeks." *Id.* at 160 (footnote omitted). For another interpretation of when viability occurs, see Horan, *Viability, Values, and the Vast Cosmos*, 22 CATH. LAW. 1 (1976).

[5] The Supreme Court also decided a companion abortion case the same day, Doe v. Bolton, 410 U.S. 179 (1973), in which it discussed some of the regulations which a state may or may not constitutionally impose during the second trimester of pregnancy. Together, these decisions constitute what is generally known as the Supreme Court's "landmark" abortion decision. For a discussion of the possible ramifications of the Supreme Court's abortion decision in the context of Medicaid reimbursements for nontherapeutic abortions, see Schulte, *Tax-Supported Abortions: The Legal Issues*, 21 CATH. LAW. 1 (1975).

a claim to Medicaid assistance pursuant to Title XIX of the Social Security Act[6] by an indigent mother who chooses to undergo an "elective abortion," *i.e.*, an abortion not necessitated by danger to her life or health.[7] Absent assistance from the state, the indigent mother usually does not have the means to pay for the abortion herself. Thus, if the state cannot, or will not, absorb the costs of the abortion, the woman has little choice but to bear the child.

In order to qualify and retain eligibility to receive federal funds for its Medicaid program, a state must adhere to certain stringent federal guidelines.[8] May a state, consonant with the rigid federal strictures imposed upon it, properly reimburse a woman for an elective abortion? Does Title XIX require the state to provide such medical assistance? Since the guidelines of Title XIX govern state Medicaid disbursements, and consequently, dictate whether a state is permitted or required to provide medical assistance for elective abortions, these issues must necessarily be decided on a statutory basis. Assuming, *arguendo,* that a state policy restricting Medicaid reimbursement to therapeutic abortions is consistent with Title XIX, may a state *constitutionally* deny medical assistance for elective abortions while at the same time providing such assistance for therapeutic abortions and childbirth?

The purpose of this Comment is to consider both the statutory and constitutional issues presented by a state's denial of Medicaid assistance for nontherapeutic abortions. A recent case, *Roe v. Norton,*[9] provides a vehicle for the exploration of these novel, yet

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[6] 42 U.S.C. §§ 1396 *et seq.* (1970), *as amended,* (Supp. IV, 1974).

[7] The elective abortion is commonly known as the "nontherapeutic" abortion. *Webster's* defines "therapeutic abortion" as an "abortion induced when pregnancy constitutes a threat to the mother's life." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2372 (1966). The Court of Appeals for the Second Circuit has stated that a therapeutic abortion is one "necessary for the health of the patient as distinguished from elective abortions requested by a woman after consultation with her physician merely because, for whatever reasons, she does not wish to bear the child." Roe v. Norton, 522 F.2d 928, 932 (2d Cir. 1975). The court's definition, which encompasses abortions necessitated by dangers to the mother's health as well as dangers to her life, is the more common definition. Most state statutes and regulations also characterize a therapeutic abortion as one necessitated by dangers to either the mother's life or health. *See, e.g.,* 3 Conn. Welfare Dep't, Public Assistance Program Manual, ch. III, § 275, *as appearing in* Roe v. Norton, 522 F.2d 928, 930 n.1 (2d Cir. 1975). *See also* Doe v. Beal, 523 F.2d 611, 613-14 (3d Cir. 1975), *cert. granted,* 44 U.S.L.W. 3761 (U.S. July 6, 1976) (No. 75-554).

[8] 42 U.S.C. §§ 1396 *et seq.* (1970), *as amended,* (Supp. IV, 1974). In general, the federal guidelines provide that in order to receive federal funds for its Medicaid program, a state must provide, at a minimum, certain specified medical services to certain specified groups of individuals who qualify for medical assistance under the program. *See* notes 12-20 and accompanying text *infra.*

[9] 522 F.2d 928 (2d Cir. 1975), *rev'g and remanding* 380 F. Supp. 726 (D. Conn. 1974) (mem.), *on remand,* 408 F. Supp. 660 (D. Conn. 1975) (mem.) (three-judge court), *prob. juris. noted sub nom.* Maher v. Roe, 44 U.S.L.W. 3761 (U.S. July 6, 1976) (No. 75-1440).

potentially explosive issues. One caveat must be noted. As the Supreme Court observed in *Wade,* the abortion question is a "sensitive and emotional" controversy, rife with "deep and seemingly absolute convictions" on the part of the proponents of each position.[10] Nonetheless, the objective of this analysis is "to resolve the issue by [statutory or] constitutional measurement, free of emotion and of predilection."[11] Thus, it is imperative, for purposes of this Comment, to accept the doctrine enunciated by the *Wade* Court as a "given." The often emotional question of whether abortion is socially or morally acceptable will not be discussed herein.

THE STATUTORY ISSUES

The Medicaid program, as established in Title XIX of the Social Security Act,[12] provides "a comprehensive scheme of federal financial assistance"[13] to states that elect to participate[14] in furnishing medical assistance to indigent families with dependent children, or to persons who are elderly, blind, or disabled.[15] Such programs are funded jointly by federal grants-in-aid and the participating states,[16] and although these programs are administered by the states,[17] they must comply, at a minimum, with the federal guidelines contained in Title XIX. To be eligible for federal aid under the Medicaid program, a state must provide certain mini-

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[10] 410 U.S. at 116.

[11] *Id.*

[12] 42 U.S.C. §§ 1396 *et seq.* (1970), *as amended,* (Supp. IV, 1974).

[13] Roe v. Norton, 522 F.2d 928, 932 (2d Cir. 1975). *See* 42 U.S.C. § 1396 (Supp. IV, 1974), *amending* 42 U.S.C. § 1396 (1970) (authorizing appropriations "to carry out the purposes" of Title XIX).

[14] 42 U.S.C. § 1396 (Supp. IV, 1974), *amending* 42 U.S.C. § 1396 (1970), provides, in part, that "[t]he sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary of Health, Education, and Welfare, State plans for medical assistance." State participation in the Medicaid program is optional.

[15] As a condition to receipt of federal funds under Title XIX, a state must agree to provide Medicaid assistance to persons receiving aid or assistance under state plans that are approved under either Title I, 42 U.S.C. §§ 301 *et seq.* (1970), *as amended,* (Supp. IV, 1974) (assistance for the aged); Title IV, part A, 42 U.S.C. §§ 601 *et seq.* (1970), *as amended,* (Supp. IV, 1974) (aid to families with dependent children); Title X, 42 U.S.C. §§ 1201 *et seq.* (1970), *as amended,* (Supp. IV, 1974) (assistance for the blind); or Title XIV, 42 U.S.C. §§ 1351 *et seq.* (1970), *as amended,* (Supp. IV, 1974) (assistance for the disabled). 42 U.S.C. § 1396a(a)(10)(A) (Supp. IV, 1974), *amending* 42 U.S.C. § 1396a(a)(10) (1970). These persons are classified as "categorically needy." The state may also, at its option, agree to provide Medicaid assistance for the "medically needy," *i.e.,* individuals who do not meet the eligibility criteria of § 1396a(a)(10)(A), but "who would, except for income and resources, be eligible for aid or assistance under any such State plan" and "who have insufficient . . . income and resources to meet the costs of necessary medical and remedial care and services . . . ." 42 U.S.C. § 1396a(a)(10)(C)(i) (Supp. IV, 1974), *amending* 42 U.S.C. § 1396a(a)(10)(B) (1970).

[16] 42 U.S.C. § 1396a(a)(2) (1970).

[17] 42 U.S.C. § 1396a(a)(5) (Supp. IV, 1974), *amending* 42 U.S.C. § 1396(a)(5) (1970).

mum medical services.[18] It may, however, also provide "medical care, or any other type of remedial care recognized under State law, furnished by licensed practitioners within the scope of their practice as defined by State law"[19] and "any other medical care, and any other type of remedial care recognized under State law, specified by the Secretary."[20] Despite the statute's apparently all-inclusive coverage, controversy exists concerning reimbursement for nontherapeutic abortions under the Medicaid program.[21]

In *Roe v. Norton*,[22] the United States Court of Appeals for the Second Circuit was asked to invalidate section 275 of the Connecticut Welfare Department regulations, which denied reimbursement under Medicaid for elective abortions.[23] The court held that while Title XIX does not preclude a participating state from providing assistance for a nontherapeutic abortion,[24] neither does it require that a state provide such medical assistance.[25]

In *Roe v. Norton*, two women, otherwise eligible for Medicaid assistance,[26] brought suit attacking the Connecticut regulation as

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[18] These required services include: (1) inpatient hospital services; (2) outpatient hospital services; (3) other laboratory and x-ray services; (4) skilled nursing facility services, screening and diagnosis of individuals under 21, and family planning services and supplies furnished to individuals of child-bearing age; and (5) physician's services. 42 U.S.C. §§ 1396d(a)(1)-(5) (Supp. IV, 1974), *amending* 42 U.S.C. §§ 1396d(a)(1)-(5) (1970). These services must be provided to the categorically needy, *see* note 16 *supra*, in order for the state to qualify under Title XIX. Additionally, the state may provide certain optional services to the categorically needy. *See* 42 U.S.C. §§ 1396d(a)(6)-(17) (Supp. IV, 1974), *amending* 42 U.S.C. §§ 1396d(a)(6)-(15) (1970). If the state opts to include assistance to the medically needy, *see* note 15 *supra*, it must provide either the five required services, or any combination of seven of the optional and required services. 42 U.S.C. § 1396a(a)(13)(B)-(C) (Supp. IV, 1974), *amending* 42 U.S.C. § 1396a(a)(13)(B)-(C) (1970).

[19] 42 U.S.C. § 1396d(a)(6) (1970).

[20] 42 U.S.C. § 1396d(a)(17) (Supp. IV, 1974), *amending* 42 U.S.C. § 1396d(a)(15) (1970).

[21] *See, e.g.*, Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974); Doe v. Wohlgemuth, 376 F. Supp. 173, 183-84 (W.D. Pa. 1974) (three-judge court), *modified and remanded sub nom.* Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *cert. granted*, 44 U.S.L.W. 3761 (U.S. July 6, 1976) (No. 75-554).

[22] 522 F.2d 928 (2d Cir. 1975), *rev'g and remanding* 380 F. Supp. 726 (D. Conn. 1974) (mem.), *on remand*, 408 F. Supp. 660 (D. Conn. 1975) (mem.) (three-judge court), *prob. juris. noted sub nom.* Maher v. Roe, 44 U.S.L.W. 3761 (U.S. July 6, 1976) (No. 75-1440).

[23] As the Court noted:

> The challenged regulation . . . required that as a pre-condition to coverage of abortion services for women in Connecticut eligible for Medicaid, the abortion must be a therapeutic one, recommended by the attending physician and the Chief of Obstetrics and Gynecology in the accredited hospital as "medically or psychiatrically necessary."

522 F.2d at 929 (citation omitted).

[24] *Id.* at 932.

[25] *Id.* at 935.

[26] The women qualified for Medicaid pursuant to 42 U.S.C. § 1396a(a)(10)(A) (Supp. IV, 1974), *amending* 42 U.S.C. § 1396a(a)(10) (1970), since they were receiving Aid for Families with Dependent Children (AFDC) under Title IV, Part A of the Social Security Act, 42 U.S.C. § 601 *et seq.* (1970), *as amended*, (Supp. IV, 1974). Roe v. Norton, 380 F. Supp. 726, 728 (D. Conn. 1974).

both inconsistent with Title XIX and violative of the equal protection and due process clauses of the Constitution.[27] Plaintiff Roe was "the unmarried mother of three small children" and was, at the institution of the suit, 7 weeks pregnant.[28] Desiring to "avoid further family burdens and complications,"[29] she planned to undergo an abortion which her physician had agreed to perform.[30] Since she was unable, however, to obtain certification that the abortion was medically necessary, she was not entitled to Medicaid assistance due to the operation of section 275.[31] Plaintiff Poe had already had an elective abortion and had been denied reimbursement pursuant to section 275.[32] As a result of their failure to obtain reimbursement, plaintiffs brought this action challenging the validity of the state regulation.[33]

Plaintiffs, seeking a declaration that section 275 is unconstitutional, moved both to convene a three-judge court[34] and for summary judgment. The district court denied plaintiffs' motion to convene a three-judge court on the ground that, while the constitutional claim was substantial enough to invoke the jurisdiction of a federal court, the pendent statutory claim could be adjudicated by the district court without the necessity of convening a three-judge court.[35] The court did, however, grant plaintiffs' motion for sum-

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[27] 522 F.2d at 930.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *See* note 23 *supra.*

[32] 522 F.2d at 930.

[33] The action was brought pursuant to 42 U.S.C. § 1983 (1970), which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

Plaintiffs also sought a class action determination pursuant to FED. R. CIV. P. 23. Plaintiff Roe sought to represent a class of pregnant women, eligible for Medicaid, who were unable to present certification as to the medical necessity of the requested abortion. 522 F.2d at 930. Plaintiff Poe sought to represent a class of women, eligible for Medicaid, who had undergone elective abortions and had been denied reimbursement due to the lack of certification. *Id.* The district court granted plaintiffs' motion for a class action determination pursuant to FED. R. CIV. P. 23(b)(2). 380 F. Supp. at 730.

[34] 522 F.2d at 930. *See* 28 U.S.C. § 2281 (1970), which provides, in part:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless . . . heard and determined by a district court of three judges . . . .

[35] 380 F. Supp. at 728. The court's reasoning followed the Supreme Court's ruling in Hagans v. Lavine, 415 U.S. 528, 543-45 (1974). There, the Court held that where a claim involving statutory construction is pendent to a substantial constitutional claim sufficient to require the convening of a three-judge district court, the statutory issue should be decided

mary judgment, concluding that section 275 is inconsistent with Title XIX of the Social Security Act.[36] In reaching this decision, the court held that Title XIX not only does not preclude Medicaid payments for elective abortions, but rather it prohibits any state regulation which restricts such reimbursement to therapeutic abortions. The district court declared that "to avoid doubts as to [its] constitutionality" Title XIX must be construed to prohibit state regulations that deny medical assistance for elective abortions.[37]

The court of appeals had "little difficulty" agreeing with the district court that nothing in Title XIX serves to preclude payments for elective abortions.[38] In an opinion authored by District Judge Bryan, sitting by designation, the court noted that Title XIX makes no specific reference to medical assistance for abortions.[39] Acknowledging that "the states have wide latitude to determine the scope of coverage and to institute wide-ranging and comprehensive medical programs under their medical assistance plans,"[40] the court concluded that payments for both therapeutic and nonther-

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initially by a single-judge district court, thereby possibly obviating the need for a three-judge court to be empaneled to consider the constitutional question. *See* Westby v. Doe, 420 U.S. 968 (1975), *vacating and remanding in light of* Hagans v. Lavine, 383 F. Supp. 1143 (D.S.D. 1974) (mem.) (three-judge court), where the Court vacated and remanded the judgment of a three-judge court convened to consider the constitutional question prior to a single judge's determination of the pendent statutory claim.

[36] 380 F. Supp. at 730. The court of appeals remarked that there were three differing view points regarding "the meaning and effect of Title XIX as to coverage for abortion services . . . ." 522 F.2d at 931. Plaintiffs took the position that Title XIX prohibits states from denying reimbursement for elective abortions. The State of Connecticut, on the other hand, contended that Title XIX not only does not require a state to provide coverage for nontherapeutic abortions, but actually prohibits such coverage. The Department of Health, Education, and Welfare, submitting an amicus curiae brief, occupied the middle ground, maintaining that although Title XIX does not *preclude* a state from providing medical assistance for elective abortions, neither does it *require* a state to provide such assistance. *Id.* at 931-32. By accepting the plaintiffs' position, and therefore concluding that the Connecticut regulation was inconsistent with Title XIX, the district court avoided a determination of the constitutional issue.

[37] 380 F. Supp. at 729-31. The "doubts as to constitutionality" referred to by the court arose from the Supreme Court's decision in Roe v. Wade, 410 U.S. 113 (1973), which held that a woman has a constitutional right, at least during the first trimester of pregnancy, to undergo an abortion upon demand. *See* notes 1-4 and accompanying text *supra*. The district court feared that if Title XIX did not prohibit the Connecticut regulation, its effect would be to sanction impermissible state interference in a decision which, in the first trimester, belongs to the mother and her physician.

[38] 522 F.2d at 932.

[39] *Id.* at 933.

[40] *Id.* In its brief, the Department of Health, Education, and Welfare noted that "Medicaid programs are characterized by a high degree of diversity from state to state, reflecting each state's own determination of its medical and social priorities." Memorandum for the United States as Amicus Curiae at 4, Roe v. Norton, 522 F.2d 928 (2d Cir. 1975). As the district court stated, "[t]he views of the agency administering the statute have weight in determining its proper construction." 380 F. Supp. at 730, *citing* Lewis v. Martin, 397 U.S. 552, 559 (1970).

apeutic abortions are within the scope of medical assistance authorized under Title XIX.[41]

In determining whether Title XIX allows reimbursement for nontherapeutic abortions, the court of appeals adopted a two-step analysis: First, whether coverage under Medicaid is limited to "necessary medical services"; and second, if it is so limited, whether an elective abortion is a necessary medical service.[42] The court resolved the first question in the negative.[43] According to the Second Circuit, the term "medically necessary services," as contained in Title XIX, is used as a limitation only to describe the "*persons* eligible for Medicaid payments."[44] It is those persons "whose income and resources are insufficient to meet the costs of necessary medical services"[45] who are eligible for medical assistance pursuant to the statute. The applicant fulfills the eligibility criteria by showing he is unable to meet the costs of necessary medical services; he is not, however, required to show the necessity of the medical service for which reimbursement is sought. In contrast to the eligibility requirement, wherever the statute describes the services reimbursable under Medicaid, it refers merely to "medical assistance" without the limiting adjective "necessary."[46] Thus, it was the court's opinion that services reimbursable under Title XIX "do not include a 'medical necessity' requirement."[47]

Judge Mulligan, concurring in part and dissenting in part, contended that Medicaid reimbursement should be provided only for those services which are medically necessary. The Medicare program under Title XVIII, which is related to the Medicaid program, contains a stringent "medical necessity" requirement.[48] Contending that the "medical necessity" requirement of Title XVIII should be superimposed upon the services covered under

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[41] 522 F.2d at 933.

[42] *Id.* at 933-34.

[43] *Id.* at 933.

[44] *Id.* (emphasis in original), *quoting* 380 F. Supp. at 728.

[45] 42 U.S.C. § 1396 (Supp. IV, 1974), *amending* 42 U.S.C. § 1396 (1970). Similar language is found elsewhere in Title XIX. *See, e.g.*, 42 U.S.C. § 1396a(a)(10)(C)(i) (Supp. IV, 1974), *amending* 42 U.S.C. § 1396a(a)(10)(B)(i) (1970).

[46] 522 F.2d at 933, *quoting* 380 F. Supp. at 728-29; *see, e.g.*, 42 U.S.C. § 1396 (Supp. IV, 1974), *amending* 42 U.S.C. § 1396 (1970).

[47] 522 F.2d at 933.

[48] *See* 42 U.S.C. §§ 1395 *et seq.* (1970), *as amended,* (Supp. IV, 1974). The Medicare program, which provides for health insurance for the aged, imposes a stricter requirement of medical necessity. *See* 42 U.S.C. § 1395y(a)(1)(1970), which provides, in part, that "no payment may be made . . . for any . . . services . . . which are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member . . . ."

Title XIX,[49] Judge Mulligan disagreed with the construction of the majority, which, he reasoned, would compel coverage for purely elective and unnecessary services such as cosmetic surgery.[50] He concluded, therefore, that it is doubtful that Congress had intended to provide payments for such treatment.[51]

It is submitted that the argument advanced by that portion of the dissent is less than persuasive. The legislative histories of Titles XVIII and XIX do not clearly indicate that the necessity requirement contained in Medicare is applicable to Medicaid as well.[52] Furthermore, although the court's construction of Title XIX could make cosmetic surgery reimbursable, it would not compel the states to provide such coverage.[53] The great latitude retained by the

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[49] Judge Mulligan declared that the legislative histories of Title XVIII and Title XIX indicate that "a common interpretation is to be given both titles." 522 F.2d at 940 (Mulligan, J., concurring in part and dissenting in part) (footnote omitted). *See* S. REP. No. 404, 89th Cong., 1st Sess. 2 (1965), which notes that the purpose of both programs is "to provide a coordinated approach for health insurance and medical care for the aged" and the needy. Judge Newman, who authored the district court opinion, discussed this view, noting that if Title XVIII's strong necessity requirement were not applicable to Title XIX, then Medicaid would offer wider benefits than Medicare. This result would be anomalous, for "it is not likely that Congress intended to provide broader benefits to the indigent [under Medicaid] than to those who were purchasing coverage under Medicare." 380 F. Supp. at 729. Judge Newman, however, held that even if this were to be accepted, a nontherapeutic abortion would constitute a medically necessary service. *Id.* at 729-30.

[50] 522 F.2d at 940 (Mulligan, J., concurring in part and dissenting in part).

[51] *Id.* at 939-40. As Judge Mulligan stated, "[t]he whole tenor of Title XIX indicates the intent to place some limit on medical assistance." *Id.* at 939 (footnote omitted).

[52] As the Second Circuit noted, "the Senate Report concerning Titles XVIII and XIX reveals significant differences between these programs." *Id.* at 933 n.5. Indeed, in discussing Medicare, the Senate Report states that "the bill would require that payment could be made only if a physician certifies to the medical necessity of the services furnished." S. REP. No. 404, 89th Cong., 1st Sess. 46 (1965). Yet, with regard to Title XIX, the same Report notes that despite the fact that some types of medical services are required to be provided by the states, "[c]overage of other items of medical service would be optional with the States." *Id.* at 9. The differences in coverage under Titles XVIII and XIX may be attributed to the fact that Medicare (Title XVIII) is administered by the federal government, while Medicaid (Title XIX) is administered by the states, albeit with partial federal funding. Thus, a state, after providing the basic required Medicaid services, is given broad discretion as to additional coverage it may provide. This tends to refute the argument advanced in the lower court, *see* note 49 *supra*, that if the medical necessity requirement of Title XVIII is not applicable to Title XIX, then Medicaid would provide broader coverage than Medicare. Clearly, the *required* coverage under Medicaid is not broader than that provided under Medicare. It is only the *optional* coverage, which may be provided by the state, that may result in broader coverage under Medicaid.

[53] Stating that the absence of a medical necessity requirement would, according to the majority's construction of Title XIX, mandate that a state provide medical assistance for elective cosmetic surgery, Judge Mulligan seemingly ignored the fact that the court was addressing the question of which services fall within the ambit of the Medicaid Act. The majority simply observed that Title XIX contains no medical necessity requirement. Thus, both nontherapeutic abortions and elective cosmetic surgery are reimbursable under Title XIX if the state elected to so provide. Nowhere does the majority remotely suggest that the states are compelled to provide reimbursement for these services simply because Title XIX permits such coverage. As the court noted, "[o]ur holding does not compel Medicaid

states permits them to make their own determinations concerning optional services reimbursable under Title XIX. While states may decide to provide such coverage, they need not do so.[54]

Assuming, *arguendo,* that there exists in Title XIX a requirement of medical necessity, the court noted that an elective abortion could be deemed a "medical necessity,"[55] since "[p]regnancy is plainly a physical condition which requires medical attention."[56] A woman with such a "condition" may either carry her pregnancy to term, culminating in childbirth and necessitating medical services including prenatal, obstetrical, and postpartum care, or elect to undergo an abortion, which also involves certain "necessary medical services," including the cost of the abortion and subsequent care.[57] The majority refused to view the costs of an abortion as less "necessary" than the costs that would have resulted had the woman elected to carry her pregnancy to term.[58]

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assistance for any particular medical service. Coverage which is not required by the statute is optional with the states." 522 F.2d at 934 n.5.

[54] *Id.* at 933-34 n.5. *See* note 36 *supra.*

[55] 522 F.2d at 934.

[56] *Id.*

[57] *Id.*

[58] *Id.; accord,* Klein v. Nassau County Medical Center, 347 F. Supp. 496 (E.D.N.Y. 1972) (per curiam) (three-judge court), *vacated and remanded in light of* Roe v. Wade *and* Doe v. Bolton, 412 U.S. 925 (1973), *on remand,* 409 F. Supp. 731 (E.D.N.Y. 1976) (per curiam) (three-judge court), *appeal docketed sub nom.* Toia v. Klein, 44 U.S.L.W. 3704 (U.S. June 2, 1976) (No. 75-1749). In *Klein,* the original three-judge court remarked that

> [p]regnancy is a condition which in today's society is universally treated as requiring medical care, prenatal, obstetrical, and post-partum care, and undeniably it is provided under the Medicaid program as "necessary" medical assistance although pregnancy is not an abnormal condition, nor does the medical assistance in childbirth "cure" it. Medical assistance for abortion is not less "necessary" because an election to bear the child would obviate that medical assistance and require instead other, more extensive and more expensive medical assistance.

347 F. Supp. at 500.

For a discussion of the viability of *Klein* in light of the remand, see Note, *Implications of the Abortion Decisions: Post* Roe *and* Doe *Litigation and Legislation,* 74 COLUM. L. REV. 237, 250 (1974) [hereinafter cited as *Implications*]. Some of the abortion cases cited in this Note were eventually vacated and remanded by the Supreme Court for consideration in light of Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973), thereby creating a question as to their viability. *See, e.g.,* Doe v. Rampton, 366 F. Supp. 189 (D. Utah) (three-judge court), *vacated and remanded in light of* Roe v. Wade, 410 U.S. 950 (1973). It is interesting to note that the Supreme Court has vacated and remanded, or denied certiorari to many other abortion cases dealing with subject matter far beyond the scope of this article. *See, e.g.,* Rosen v. Louisiana St. Bd. of Medical Examiners, 412 U.S. 902 (1973), *vacating and remanding in light of* Roe v. Wade *and* Doe v. Bolton, 318 F. Supp. 1217 (E.D. La. 1970) (three-judge court). Possibly the Court simply did not wish to decide other abortion cases that year. A more plausible explanation is that the Court wanted the lower courts to phrase their decisions "within the fundamental right/compelling state interest analysis utilized in Roe [v. Wade] and Doe [v. Bolton]." *Implications, supra,* at 250 (footnote omitted). In Roe v. Norton, 522 F.2d at 936-37, the court of appeals cited some of these cases, indicating that, in the court's opinion, these cases do maintain viability. In Doe v. Rose, 499 F.2d 1112, 1116 n.3 (10th Cir. 1974), the Court of Appeals for the Tenth Circuit, in referring to such a case,

Judge Mulligan disagreed with this reasoning, stating that the court cannot

> equate abortion and childbearing as two comparable solutions to pregnancy under Title XIX. The pregnancy of the mother, absent miscarriage, inevitably and biologically terminates in the birth of the child, a process which today at least requires medical attention and assistance. Abortion, on the other hand, requires medical services only because the mother has made a voluntary decision which may or may not be dictated by medical necessity.[59]

By apparently seeking to equate an elective abortion with elective cosmetic surgery, in that both result from a purely voluntary decision on the part of the patient,[60] Judge Mulligan seemingly ignores a critical distinction. An abortion is predicated upon the fact that the woman is pregnant, a "condition" for which the state will allow reimbursement should the mother choose to "cure" her "condition" by childbirth. A condition leading to elective cosmetic surgery, on the other hand, has never been determined by the state to be a "condition" warranting Medicaid assistance. By arguing that the costs of an abortion are less necessary than the costs of childbirth, Judge Mulligan would deny reimbursement for elective abortions because the mother has made a disfavored choice with regard to the treatment of her "condition."[61]

Although the Second Circuit held that Title XIX does not prohibit a state from including elective abortions in its Medicaid coverage, it disagreed with the district court's opinion that the statute mandates such coverage.[62] The court reasoned that since nontherapeutic abortions were illegal in most states when Title XIX was enacted,[63] Congress could not have intended that Title

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noted that "we are also of the opinion that the remand does not affect the viability of the language here quoted . . . ."

[59] 522 F.2d at 941 (Mulligan, J., concurring in part and dissenting in part).

[60] *Id.* at 940-41.

[61] A similar argument has been rejected in the past. *See* note 58 *supra*. In Doe v. Beal, 523 F.2d 611 (3rd Cir. 1975), *cert. granted*, 44 U.S.L.W. 3761 (U.S. July 6, 1976) (No. 75-554), the Court of Appeals for the Third Circuit, in declaring a Pennsylvania regulation similar to that under consideration in *Roe v. Norton* to be inconsistent with Title XIX, noted that since the state

> pays for full-term deliveries and also for therapeutic abortions, it is plain that the state has determined, in its discretion, that pregnancy is a condition for which medical treatment is "necessary" within the meaning of Title XIX. The next question is whether some justification can be found in the statute for preventing an attending physician from choosing non-therapeutic abortions as the method for treating a pregnancy. We can find none.

523 F.2d at 621-22 (footnote omitted).

[62] 522 F.2d at 935.

[63] *Id.*, *citing* Roe v. Wade, 410 U.S. 113, 118 n.2 (1973).

XIX require states to provide assistance for elective abortions.[64] Consequently, Title XIX could not have been intended to prohibit state regulations denying payment for elective abortions. Judge Mulligan agreed with this conclusion, but insisted on going one step further.[65] He argued that since elective abortions were generally unlawful when Title XIX was enacted, the intent of Congress must have been to preclude a state from reimbursing a patient for a nontherapeutic abortion.[66]

Despite the persuasiveness of Judge Mulligan's reasoning, the holding of the majority appears correct. In enacting Title XIX, Congress provided the states with wide discretion to determine "the content of their Medicaid programs."[67] While the fact that elective abortions were illegal in most states strongly supports the belief that Title XIX does not require states to provide reimbursement for such abortions, the added fact that the states were free at any time to revise their legislation to legalize the performance of nontherapeutic abortions[68] may indicate that Congress did not intend to prohibit reimbursement for such abortions. More consistent with the omission of any reference to abortion in Title XIX, is the view that Congress left the decision to state determination.[69] While congressional silence should not be interpreted as requiring the states to pay for elective abortions, neither should that same silence be construed as prohibiting the states from paying for nontherapeutic abortions.

The Court of Appeals for the Second Circuit does not stand alone in its construction of Title XIX. In *Roe v. Ferguson,*[70] the Court of Ap-

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[64] In construing Title XIX, the court concluded that

> [i]n the light of the circumstances and conditions at the time the statute was enacted, the absence of any language in the statute regarding the subject, and the lack of legislative history indicating a contrary position, it cannot be supposed that Congress, in 1965, intended to or did impose a requirement that states must provide coverage for elective abortions when the criminal statutes of the majority of the states forbade the performance of such abortions.

522 F.2d at 935.

[65] *Id.* at 939 (Mulligan, J., concurring in part and dissenting in part).

[66] *See id.*

[67] Memorandum for the Department of Health, Education, and Welfare as Amicus Curiae at 4, Roe v. Norton, 522 F.2d 928. *See* note 36 *supra.*

[68] *See, e.g.,* N.Y. PENAL LAW § 125.05 (McKinney 1975) which, prior to *Wade,* permitted elective abortions within the first 24 weeks of pregnancy. *See* notes 1-4 and accompanying text *supra.*

[69] *See* Roe v. Ferguson, 515 F.2d 279, 283 (6th Cir. 1975), wherein the Court of Appeals for the Sixth Circuit commented that where Congress wanted to preclude a statute's applicability to elective abortions, it had *specifically* excluded them. *See, e.g.,* 42 U.S.C. § 300a-6 (1970); 42 U.S.C. § 2996f(b)(8) (Supp. IV, 1974). It can be inferred from the specificity exhibited in other statutes that where Congress omitted any specific exclusion with regard to elective abortions, as in Title XIX, there was no intent to require or preclude coverage.

[70] 515 F.2d 279 (6th Cir. 1975). In *Ferguson,* an Ohio statute, similar in effect to the

peals for the Sixth Circuit also construed Title XIX as authorizing, but not requiring, reimbursement under Medicaid for nontherapeutic abortions.[71] Similarly, the Court of Appeals for the Tenth Circuit, in *Doe v. Rose*,[72] indicated that nothing in Title XIX would bar a policy of nonreimbursement for elective abortions.[73] The Court of Appeals for the Third Circuit, however, in *Doe v. Beal*,[74] held that a Pennsylvania regulation limiting Medicaid assistance to therapeutic abortions was inconsistent with Title XIX.[75] The *Beal* court ruled that the Medicaid Act mandates that alternative forms of treatment for a medical condition, in this case pregnancy, are to be determined solely by the physician and patient without state intervention or coercion.[76]

THE CONSTITUTIONAL ISSUE

In addition to their statutory claim, the *Roe v. Norton* plaintiffs also contended that section 275 violated the equal protection and due process clauses of the Constitution. The court of appeals refused to discuss the constitutional questions, instead remanding for consideration by a three-judge court.[77] The court agreed with the district court's determination that the constitutional issue was sufficiently substantial to invoke federal jurisdiction, and hence, had to

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Connecticut regulation denying medical assistance for nontherapeutic abortions, was held to be consistent with Title XIX.

[71] *Id.* at 283. The court stated that in "the absence of a legislative history indicating a contrary position . . . we cannot say that the statute itself prohibits such an exclusion." *Id.*

[72] 499 F.2d 1112 (10th Cir. 1974). At issue in *Rose* was an unwritten informal policy followed by the executive director of the Utah State Department of Social Services, which denied Medicaid reimbursement for abortions unless they were certified by him as therapeutic. *Id.* at 1113. As the *Ferguson* court noted, *Rose* involved an informal policy, thereby obviating the need for a three-judge court to determine the constitutional issue. 515 F.2d at 282 n.11.

[73] 499 F.2d at 1114. The court did, however, hold that such a policy was violative of the equal protection clause of the fourteenth amendment. *Id.* at 1117.

[74] 523 F.2d 611 (3d Cir. 1975), *cert. granted*, 44 U.S.L.W. 3761 (U.S. July 6, 1976) (No. 75-554), *modifying and remanding sub nom.* Doe v. Wohlgemuth, 376 F. Supp. 173 (W.D. Pa. 1974) (three-judge court).

[75] 523 F.2d at 621-22.

[76] The *Beal* court indicated that although states enjoy much discretion in determining the content of their Medicaid programs, they must comply with the objectives of Title XIX. One such objective, according to the court, is the placement of the primary authority to determine the appropriate treatment for a patient "in the hands of the attending physician." *Id.* at 618. Thus, once the state has determined that pregnancy is a condition that requires medical treatment, alternative methods of treatment, including elective abortion, are to be determined by the physician. *Id.* at 620-21; *accord*, Doe v. Westby, 402 F. Supp. 140 (D.S.D.) (three-judge court), *petition for cert. filed*, 44 U.S.L.W. 3360 (U.S. Dec. 8, 1975) (No. 75-813).

[77] 522 F.2d at 937-39. The trial court, consisting of a single judge, could decide only the statutory issue. Constitutional considerations must be determined by a three-judge district court. Since the district court could not decide the constitutional question, the Second Circuit was similarly precluded. *See* note 35 *supra*.

be decided by a three-judge court.[78] In making this determination, the Second Circuit was in disagreement with the Court of Appeals for the Eighth Circuit, which, finding a Missouri statute limiting Title XIX reimbursement to therapeutic abortions to be patently unconstitutional, held that it was unnecessary to convene a three-judge court.[79] Despite this procedural conflict among the circuits, all federal courts which have considered the constitutionality of a state statute or regulation barring Medicaid payments for elective abortions have declared it violative of the equal protection clause of the fourteenth amendment.[80] Indeed, when *Roe v. Norton* was heard on remand, the three-judge court declared the Connecticut regulation to be in contravention of the fourteenth amendment's equal protection clause.[81]

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[78] 522 F.2d at 937-38.

[79] Wulff v. Singleton, 508 F.2d 1211 (8th Cir. 1974), *rev'd on other grounds*, 44 U.S.L.W. 5213 (U.S. July 1, 1976). The statute in question restricted Title XIX reimbursement to therapeutic abortions. A three-judge district court had dismissed the suit for lack of standing. 508 F.2d at 1212. Nevertheless, the court of appeals decided that since the unconstitutionality of the statute was "obvious and patent," a three-judge court was not needed. *Id.* at 1215. Under the rule enunciated by the Supreme Court in Hagans v. Lavine, 415 U.S. 528 (1974), patent unconstitutionality is equivalent to constitutional insubstantiality. *Id.* at 537. A claim is considered insubstantial "only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' " *Id.* at 538, *quoting* Goosby v. Osser, 409 U.S. 512, 518 (1973). The Court of Appeals for the Second Circuit in *Roe v. Norton* did not consider § 275 to be patently unconstitutional, nor did it consider a claim of constitutionality to be insubstantial. 522 F.2d at 937-38. The *Roe v. Norton* court thus specifically disagreed with the ruling of the *Wulff* court. *Id.* at 938 n.15. Similarly, the Court of Appeals for the Sixth Circuit, in Roe v. Ferguson, 515 F.2d 279 (6th Cir. 1975), also took issue with the *Wulff* court on this question.

It is submitted that the *Roe v. Norton* conclusion is the better one. The Supreme Court in Roe v. Wade, 410 U.S. 113 (1973), decided only that certain state statutes rendering the performance of abortions criminal were unconstitutional. It never decided that a restriction on Medicaid payments for abortions was similarly unconstitutional. The unconstitutionality of the state Medicaid statutes is not foreclosed by *Wade*, nor by any other Supreme Court decision, and, therefore, the necessity of convening a three-judge court is not obviated. *See* 522 F.2d at 938.

[80] Wulff v. Singleton, 508 F.2d 1211, 1215-16 (8th Cir. 1974), *rev'd on other grounds*, 44 U.S.L.W. 5213 (U.S. July 1, 1976); Doe v. Rose, 499 F.2d 1112, 1117 (10th Cir. 1974); Doe v. Westby, 383 F. Supp. 1143, 1147 (D.S.D. 1974) (three-judge court), *vacated and remanded in light of* Hagans v. Lavine, 420 U.S. 968, *on remand*, 402 F. Supp. 140, 144 (D.S.D. 1975) (mem.) (three-judge court), *petition for cert. filed*, 44 U.S.L.W. 3360 (U.S. Dec. 8, 1975) (No. 75-813); Doe v. Wohlgemuth, 376 F. Supp. 173, 186-92 (W.D. Pa. 1974) (three-judge court), *modified and remanded sub nom.* Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *cert. granted*, 44 U.S.L.W. 3761 (U.S. July 6, 1976) (No. 75-554); Doe v. Rampton, 366 F. Supp. 189, 193 (D. Utah) (three-judge court), *vacated and remanded in light of* Roe v. Wade, 410 U.S. 950 (1973); Klein v. Nassau County Medical Center, 347 F. Supp. 496, 500 (E.D.N.Y. 1972) (per curiam) (three-judge court), *vacated and remanded in light of* Roe v. Wade *and* Doe v. Bolton, 412 U.S. 925 (1973), *on remand*, 409 F. Supp. 731 (E.D.N.Y. 1976) (per curiam) (three-judge court), *appeal docketed sub nom.* Toia v. Klein, 44 U.S.L.W. 3704 (U.S. June 2, 1976) (No. 75-1749).

[81] 408 F. Supp. 660, 663-64 (D. Conn. 1975) (mem.) (three-judge court), *prob. juris. noted sub nom.* Maher v. Roe, 44 U.S.L.W. 3761 (U.S. July 6, 1976) (No. 75-1440), *on remand from* 522 F.2d 928 (2d Cir. 1975), *rev'g and remanding* 380 F. Supp. 726 (D. Conn. 1974) (mem.).

In holding the Connecticut regulation unconstitutional, Judge Newman, speaking for a unanimous court,[82] premised his constitutional analysis upon the Supreme Court's decision in *Wade*.[83] There, the Court indicated that a woman has a fundamental right to choose an abortion,[84] and that while this right is not absolute,[85] any "regulation limiting [this right] may be justified only by a 'compelling state interest' . . . ."[86] The *Wade* Court concluded that during the first trimester of pregnancy there is no compelling state interest to justify interference with the abortion decision.[87] After the first trimester, "a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."[88] Once the point of viability[89] is reached, however, the state's interest in protecting "the potentiality of human life"[90] becomes compelling and allows the state to proscribe abortion completely, except where abortion is necessary to preserve the "life or health of the mother."[91] Thus, during the first trimester a woman may choose an abortion free from any state interference, and from the beginning of the second trimester until viability a woman's fundamental right to an abortion may only be regulated by the state to the extent that it "reasonably relates to the preservation and protection of maternal health."[92]

Pursuant to traditional equal protection analysis,[93] a classification established by a state will be upheld if it is rationally based and bears a reasonable relationship to the purpose of the statute.[94] If,

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[82] District Judge Newman, who had also written the earlier single-judge district court decision in *Roe v. Norton*, was joined in this opinion by Circuit Judge Timbers and District Judge Zampano.

[83] 408 F. Supp. at 663.

[84] 410 U.S. at 153; *see* note 2 *supra*. Presumably this right is fundamental since the Court had previously stated that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in this guarantee of personal privacy." 410 U.S. at 152, *quoting* Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled on other grounds*, Benton v. Maryland, 395 U.S. 784, 794 (1969).

[85] 410 U.S. at 154; *see* note 2 *supra*.

[86] 410 U.S. at 155; *see* note 3 *supra*.

[87] 410 U.S. at 163.

[88] *Id.*

[89] *See* note 4 *supra*.

[90] 410 U.S. at 164.

[91] *Id.* at 163-64.

[92] *Id.*

[93] For discussions of the various theories of equal protection, see Gunther, *The Supreme Court, 1971 Term — Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) [hereinafter cited as Gunther]; Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949) [hereinafter cited as *Equal Protection*]; *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065 (1969).

[94] In Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), the Court stated: "A classification having some reasonable basis does not offend . . . [the equal protection clause] merely because it is not made with mathematical nicety, or because in practice it results in

however, a "fundamental right" or a "suspect classification" is involved, the classification will be strictly scrutinized and, unless a compelling state interest is found to justify the classification, will be found constitutionally impermissible.[95] Had the *Roe v. Norton* plaintiffs decided to carry their pregnancies to term, the state would have provided reimbursement. When they decided, instead, to excercise their fundamental constitutional right[96] to choose an elective abortion rather than bear a child, reimbursement was denied. It would appear that Connecticut's infringement of plaintiffs' right to an elective abortion denied plaintiffs equal protection of the laws.[97]

As the three-judge *Roe v. Norton* court correctly noted, however, the fact that there is a constitutional right to *choose* an abortion does not necessarily mean there is "a constitutional right to a *free* abortion, with the state obligated to absorb the cost of the medical procedure."[98] While the receipt of medical assistance or welfare benefits may be a right, it is by no means a "fundamental" right, and hence, a compelling state interest need not be advanced to justify such a classification.[99] While this is undoubtedly true, it

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some inequality." *Id.* at 78; *accord,* Dandridge v. Williams, 397 U.S. 471, 485 (1970). *See also Equal Protection, supra* note 93, at 345.

[95] *See, e.g.,* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966) (right to vote); Carrington v. Rash, 380 U.S. 89, 96 (1965) (right to vote); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (right to avoid nonconsensual sterilization). With regard to "suspect classifications," the *Harper* Court noted that "[l]ines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored." 383 U.S. at 668 (dictum) (citation omitted). Despite this language, "wealth" has not specifically been declared by the Court to be a "suspect classification." *See* Gunther, *supra* note 93, at 9-10.

[96] While it is true that the *Wade* Court found a "fundamental right" only in the context of due process, many courts, in determining whether a state regulation or statute violated the equal protection clause, have used the fundamental right, as declared by the *Wade* Court, to trigger strict scrutiny, thereby necessitating a showing of a compelling state interest to justify the classification. *See, e.g.,* Doe v. Rose, 499 F.2d 1112, 1115-17 (10th Cir. 1974); Doe v. Wohlgemuth, 376 F. Supp. 173, 189-90, 191-92 (W.D. Pa. 1974) (three-judge court), *modified and remanded sub nom.* Doe v. Beal, 523 F.2d 611 (3rd Cir. 1975), *cert. granted,* 44 U.S.L.W. 3761 (U.S. July 6, 1976) (No. 75-554).

[97] Plaintiffs suggested a number of classifications which worked to deny them equal protection. First, plaintiffs were denied their right to have an abortion "solely because of their indigency." Other women, more affluent, who can afford to pay for their own abortion, have no such restriction. Second, plaintiffs who have made a "disfavored choice" are denied medical assistance, while women who choose to carry their pregnancies to term are reimbursed under Title XIX. Finally, plaintiffs have to "undergo the burdensome and time-consuming procedure of obtaining prior approval of a service authorized by their physicians," while "approval is not required for any other hospital procedure . . . ." Brief for Plaintiffs at 22, Roe v. Norton, 408 F. Supp. 660 (D. Conn. 1975) (mem.) (three-judge court) (on remand). A possible fourth classification, not presented by the plaintiffs, is the distinction between an indigent woman seeking a therapeutic abortion and an indigent mother seeking an elective abortion.

[98] 408 F. Supp. at 663; *accord,* 380 F. Supp. at 730.

[99] 408 F. Supp. at 663, *citing* Dandridge v. Williams, 397 U.S. 471 (1970). In *Dandridge,* the Supreme Court used the traditional standard of equal protection with regard to welfare

does not sufficiently refute plaintiffs' argument. As the three-judge court stated, although a state need not provide any medical assistance whatsoever, when it does elect to fund therapeutic abortions and childbirth and yet, refuses to pay for nontherapeutic abortions, the state "weights the choice of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion."[100] The three-judge court held that the coercive effect of such a regulation infringing upon fundamental rights is sufficient to trigger strict scrutiny of the state's classification and thus require the assertion of a compelling state interest to justify the intrusion.[101]

In *Shapiro v. Thompson,*[102] the Supreme Court, in declaring the right to interstate travel to be a "fundamental right" which was improperly impeded by a state regulation imposing a 1-year waiting period to qualify for welfare benefits,[103] noted that "any

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benefits, thereby implying that the receipt of welfare by an indigent is not a "fundamental right" requiring strict scrutiny. The Court noted that

> the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. . . . It is enough that the State's action be *rationally based* and free from invidious discrimination.

Id. at 486-87 (emphasis added); *cf.* Jefferson v. Hackney, 406 U.S. 535 (1972). For a more extensive discussion of aid to the indigent in the context of equal protection, see Dienes, *To Feed the Hungry: Judicial Retrenchment in Welfare Adjudication,* 58 CALIF. L. REV. 555 (1970); Harvith, *Federal Equal Protection and Welfare Assistance,* 31 ALBANY L. REV. 210 (1967). *See generally* Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7 (1969).

[100] 408 F. Supp. at 663. Judge Newman noted:

> The Constitution does not require the state to pay for any medical services at all. Nevertheless, once a state chooses to establish a program for reimbursing the medical expenses of the indigent, and adopts as part of that program a provision that requires state funding for medical expenses arising from pregnancy, a serious equal protection issue arises if the state refuses to reimburse expenses incurred in procuring an abortion.

Id. (footnote omitted). *See also id.* n.3.

[101] *Id.* at 664. The court distinguished *Dandridge,* stating that the state law in that case did not impinge "upon the exercise of a constitutionally protected right." *Id.* at 663; *accord,* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 262 n.21 (1974). Thus, where the classification only involves an allocation of welfare benefits and does not impinge upon fundamental rights, the courts will uphold the classification if it is rationally based. On the other hand, where the allocation infringes upon fundamental rights, as in the instant case, a compelling state interest must be asserted or the classification will fail as constitutionally defective. *See* Graham v. Richardson, 403 U.S. 365, 376 (1971).

[102] 394 U.S. 618 (1969).

[103] In *Shapiro,* a statute had been promulgated denying welfare assistance to applicants who resided in the state for a period of less than 1 year. *Id.* at 622. The Court noted that

> [w]e do not doubt that the one-year waiting-period device is well suited to discourage the influx of poor families in need of assistance . . . . But the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible.

Id. at 629. With respect to interstate travel being a fundamental right, the Court stated that " '[t]he constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.' " *Id.* at 630, *quoting* United States v. Guest, 383 U.S. 745, 757 (1966).

classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."[104] In denying medical assistance to an indigent mother who elects an abortion while providing assistance to those who choose to carry their pregnancies to term, Connecticut is clearly not depriving women of a fundamental right, as there is no fundamental right to a *free* abortion. Nevertheless, as the court indicated, the practical effect of such a regulation is to impinge upon the fundamental right to choose an abortion.

In *Shapiro,* the Court, in dicta, seemed to limit its holding to a denial of welfare benefits which affect "the ability . . . to obtain the very means to subsist — food, shelter, and other necessities of life."[105] Additionally, the Court emphasized the fact that the durational residency requirement served to penalize the exercise of the fundamental right to interstate travel.[106] Thus, not all restrictions upon the exercise of a fundamental right constitute penalties.[107] Subsequently, in *Memorial Hospital v. Maricopa County,*[108] the Court reiterated this position. Justice Marshall, speaking for the Court, specifically stated that *Shapiro* is not operative unless a classification serves to penalize the exercise of a fundamental right.[109] Moreover, the *Maricopa* Court intimated that the "parameters of the *Shapiro* penalty analysis" depend upon whether the classification would operate to deprive an individual of the basic necessities of life.[110] The Court noted that "governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements."[111] Viewed in this light, it appears that *Shapiro* mandates the presence of two factors in order to apply a strict scrutiny test within the context of state welfare entitlement. The classification must act to penalize the exercise of a fundamental right and the penalty must affect the basic necessities of life.[112]

Thus, the Court in *Shapiro* determined that although there is no "fundamental right" to receive welfare benefits, the restriction of such benefits by the use of a 1-year residency requirement placed a "chill" upon, and served to penalize, the exercise of the fundamental right to interstate travel. This was sufficient, in the Court's view, to trigger strict scrutiny of the state's law.

[104] 394 U.S. at 634 (emphasis in original) (citations omitted).

[105] *Id.* at 627.

[106] *Id.* at 634.

[107] *See id.* at 638 n.21, where the Court noted that not all waiting periods are penalties. *Accord,* Dunn v. Blumstein, 405 U.S. 330 (1972).

[108] 415 U.S. 250 (1974).

[109] *Id.* at 256-62.

[110] *Id.* at 259.

[111] *Id.*

[112] *Compare* Shapiro v. Thompson, 394 U.S. 618 (1969) (welfare payments constitute necessities of life), *and* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (emergency

The facts of *Roe v. Norton* fulfill *Shapiro's* dual requirement. By denying reimbursement of the abortion costs to indigent women, the state is virtually forcing them to have an unwanted child. Indigent mothers and their families, already straining to shelter, clothe, and feed themselves with whatever governmental entitlements they can obtain, might indeed be taxed beyond the breaking point. Clearly then, the denial of Medicaid reimbursement to the indigent mother for a nontherapeutic abortion and the resultant coercive effect of this denial involve the basic necessities of life necessary to trigger a *Shapiro* penalty analysis. And, since the Connecticut regulation directly hinders the mother's choice to undergo an elective abortion, it acts as a penalty to the exercise of her fundamental right, thereby satisfying the other requirement of *Shapiro* and requiring a compelling state interest to justify it.

Moreover, as the Court of Appeals for the First Circuit has stated in the context of a public hospital refusing to perform voluntary sterilizations, "once the state has undertaken to provide general short-term hospital care . . . it may not constitutionally draw the line at medically indistinguishable surgical procedures that impinge on fundamental rights."[113] Clearly, the facilities and procedures required for both therapeutic and nontherapeutic abortions are medically indistinguishable. In fact, it would seem that a therapeutic abortion would place greater strain upon the hospital's facilities and the state's resources, since the mother's life

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medical care constitutes necessities of life), *with* Sosna v. Iowa, 419 U.S. 393 (1975) (durational residency requirement to obtain a divorce distinguishable in that divorce does not constitute a necessity of life), *and* Vlandis v. Kline, 412 U.S. 441 (1973) (durational residency requirement for reduced tuition at the state university distinguishable in that attending a university is not a necessity of life). Of course, where the statute, as written, imposes a classification directly involving a fundamental right, there is no need to resort to a *Shapiro* penalty analysis. *See* Dunn v. Blumstein, 405 U.S. 330 (1972). The regulation in *Roe v. Norton,* however, does not, as written, directly involve a fundamental right, since its purpose is only to regulate Medicaid disbursements. Nonetheless, in application it tends to affect the fundamental right to choose an abortion. As such, a *Shapiro* penalty analysis is required to determine whether strict scrutiny is appropriate. Dandridge v. Williams, 397 U.S. 471 (1970), wherein the Court refused to strictly scrutinize a state's denial of welfare benefits, *see* note 99 *supra,* must be distinguished in that no fundamental right was involved. Hence, a *Shapiro* penalty analysis, in that case, was inappropriate. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 262 n.21 (1974).

[113] Hathaway v. Worcester City Hosp., 475 F.2d 701, 706 (1st Cir.), *application for stay denied,* 411 U.S. 929 (1973) (citations omitted). In *Hathaway,* the plaintiff, who already had "twelve pregnancies resulting in eight live offspring," requested a voluntary sterilization to be performed in the defendant's facilities. 475 F.2d at 702-03. The hospital's policy, however, prohibited the utilization of its facilities in connection with a sterilization procedure. *Id.* at 703. The court, relying, *inter alia,* upon *Shapiro,* noted that "any infringement of a fundamental interest, including the simple denial of a benefit must be carefully scrutinized." *Id.* at 705 n.2. The court subsequently reaffirmed this position in Doe v. Hale Hosp., 500 F.2d 144 (1st Cir. 1974), *cert. denied,* 420 U.S. 907 (1975).

or health are in jeopardy. Thus, even though a state may have no obligation to provide any medical assistance for indigent mothers who are pregnant, once the state does determine to give such medical assistance, it cannot invidiously discriminate between indistinguishable medical procedures that impinge upon fundamental rights, and must provide assistance for both therapeutic and nontherapeutic abortions alike.

The *Roe v. Norton* three-judge court determined that there was no state interest sufficiently compelling to justify the state's infringement upon the indigent mother's fundamental rights.[114] Connecticut had asserted its "fiscal interest" in denying medical assistance for nontherapeutic abortions.[115] The court replied that "[t]his interest is wholly chimerical because abortion is the least expensive medical response to a pregnancy."[116] Moreover, as the *Shapiro* Court declared, although the state has a legitimate interest in preserving its fiscal integrity, "the saving of welfare costs cannot justify an otherwise invidious classification."[117] Thus, Connecticut's assertion of a fiscal motive as the compelling governmental interest necessary to justify its infringement is both "contrary to undisputed facts"[118] and unwarranted in law.

In *Wade,* the Court stated that there can be no compelling state interest to justify interference with the abortion decision, at least during the first trimester of pregnancy.[119] Thus, it is submitted that as a matter of law there is no state interest sufficiently compelling to justify any interference with the abortion decision during the first trimester. Any other interpretation would allow a state to dilute the *Wade* mandate by permitting indirect state interference

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[114] 408 F. Supp. at 664.

[115] Prior to the Second Circuit's remand, Connecticut's position had been that Title XIX precluded it from reimbursing nontherapeutic abortions under the Medicaid program. 380 F. Supp. at 728 & n.2; 522 F.2d at 931. In holding that Title XIX does not require states to deny medical assistance for elective abortions, the Second Circuit opened the door for Connecticut to demonstrate its good faith and eliminate § 275. Connecticut did not, however, rescind the regulations, but sought to justify its position on the basis of "fiscal interest." 408 F. Supp. at 664.

[116] 408 F. Supp. at 664.

[117] 394 U.S. at 633 (footnote omitted).

[118] 408 F. Supp. at 664. The court also commented that the state could not justify such a classification on the basis that it finds the expenditure of public funds for nontherapeutic abortions "morally objectionable." *Id.* As the court stated:

> To sanction such a justification would be to permit discrimination against those seeking to exercise a constitutional right on the basis that the state simply does not approve of the exercise of that right. . . . The state's unarticulated position on the morality of abortion cannot be considered a compelling state interest that will justify the weighting of a choice against the exercise of a constitutional right.

Id. (citation omitted).

[119] *See* text accompanying notes 84-92 *supra.*

with a constitutional right — a constitutional right which must be free from both subtle and overt state interference and coercion.

CONCLUSION

The recent profusion of state regulations denying Medicaid assistance for nontherapeutic abortions,[120] the unanimity among the federal courts as to their unconstitutionality,[121] and the conflict among the circuits as to the construction of Title XIX[122] demand the attention of the nation's highest court. If the principles announced in the Supreme Court's landmark decision of *Roe v. Wade* are to continue as the law of the land, it would appear that no state may constitutionally deny medical assistance to an indigent woman seeking a nontherapeutic abortion. Hopefully, the Supreme Court's recent decision to review *Roe v. Norton*[123] will put an end to the exhaustive litigation in this area.*

Zave M. Unger

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[120] *See, e.g.,* Roe v. Norton, 522 F.2d 928 (2d Cir. 1975), *rev'g and remanding* 380 F. Supp. 726 (D. Conn. 1974) (mem.), *on remand,* 408 F. Supp. 660 (D. Conn. 1975) (mem.) (three-judge court), *prob. juris. noted sub nom.* Maher v. Roe, 44 U.S.L.W. 3761 (U.S. July 6, 1976) (No. 75-1440) (Connecticut regulation); Roe v. Ferguson, 515 F.2d 279 (6th Cir. 1975) (Ohio statute); Wulff v. Singleton, 508 F.2d 1211 (8th Cir. 1974), *rev'd on other grounds,* 44 U.S.L.W. 5213 (U.S. July 1, 1976) (Missouri statute); Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974) (Utah "informal policy"); Doe v. Westby, 383 F. Supp. 1143 (D.S.D. 1974) (three-judge court), *vacated and remanded in light of* Hagans v. Lavine, 420 U.S. 968, *on remand,* 402 F. Supp. 140 (D.S.D. 1975) (mem.) (three-judge court), *petition for cert. filed,* 44 U.S.L.W. 3360 (U.S. Dec. 8, 1975) (No. 75-813) (South Dakota regulation); Doe v. Wohlgemuth, 376 F. Supp. 173 (W.D. Pa. 1974) (three-judge court), *modified and remanded sub nom.* Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *cert. granted,* 44 U.S.L.W. 3761 (U.S. July 6, 1976) (No. 75-554) (Pennsylvania regulation); Doe v. Rampton, 366 F. Supp. 189 (D. Utah) (three-judge court), *vacated and remanded in light of* Roe v. Wade, 410 U.S. 950 (1973) (Utah statute); Klein v. Nassau County Medical Center, 347 F. Supp. 496 (E.D.N.Y. 1972) (per curiam) (three-judge court), *vacated and remanded in light of* Roe v. Wade *and* Doe v. Bolton, 412 U.S. 925 (1973), *on remand,* 409 F. Supp. 731 (E.D.N.Y.) (per curiam) (three-judge court), *appeal docketed sub nom.* Toia v. Klein, 44 U.S.L.W. 3704 (U.S. June 2, 1976) (No. 75-1749) (New York "administrative letter").

[121] *See* cases cited in note 80 *supra.*

[122] *See* notes 70-76 and accompanying text *supra.*

[123] Roe v. Norton, *prob. juris. noted sub nom.* Maher v. Roe, 44 U.S.L.W. 3761 (U.S. July 6, 1976) (No. 75-1440). At the same time, the Supreme Court granted certiorari to Doe v. Beal, 44 U.S.L.W. 3761 (U.S. July 6, 1976) (No. 75-554). The former case will present the Court with the constitutional question, while the *Beal* case concerns the statutory issues.

* *Editor's Note:* As this Comment was being printed, Congress enacted Public Law 94-439, the Departments of Labor, Health Education and Welfare Appropriations Act of 1977, which includes an amendment of Title XIX specifically barring Medicaid reimbursement for nontherapeutic abortions. On October 22, 1976, however, United States District Judge Dooling declared the amendment unconstitutional and enjoined its enforcement, ordering HEW to continue its policy of granting medical assistance for elective abortions. McRae v. Mathews, No. 76-C-1804 (E.D.N.Y. October 22, 1976). Subsequently, the United States Supreme Court declined to stay the injunctive order pending appeal. Buckley v. McRae, 45 U.S.L.W. 3344 (No. A-346) (U.S. Nov. 8, 1976).