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Supreme Court, New York County Declares State Medical Funding Program which Funds Childbirth, but Not Medically Necessary Abortions, Unconstitutional

Christopher Vincent Albanese

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patient relationship in the belief that the most efficacious medical care will be obtained when the attending physician remains on a case from onset to cure."[49] The reasoning employed by the *Nykorchuck* majority, however, seemingly requires Diane Nykorchuck to distrust and question her doctor and to make separate appointments with him for the sole purpose of examining her breasts, instead of requesting the breast examinations while visiting him for the treatment of endometriosis, to establish continuous treatment as to her breast condition.[50] Thus, negligence committed by a physician in the form of an omission to act or failure to undertake a proper course of medical treatment may now be shielded from a plaintiff's invocation of the continuous treatment doctrine even if the physician is aware of the medical problem, assures the patient that the condition will be monitored, yet fails to take further steps to ensure that the patient receives proper care for that condition.

Richard J. Hoffman

Supreme Court, New York County declares state medical funding program which funds childbirth, but not medically necessary abortions, unconstitutional

In 1973, the United States Supreme Court in *Roe v. Wade*[1]

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[49] *See* McDermott v. Torre, 56 N.Y.2d 399, 408, 437 N.E.2d 1108, 1112, 452 N.Y.S.2d 351, 355 (1982) (citing Borgia v. City of New York, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319, (1962)).

[50] *Cf.* CPLR 214-a commentary at 29-30 (McKinney Supp. 1992). In his commentary to CPLR 214-a, Professor Vincent C. Alexander notes that Jorge v. New York City of Health & Hosps. Corp., 164 A.D.2d 650, 563 N.Y.S.2d 411 (1st Dep't 1991), an Appellate Division, First Department case addressing the issue of continuous treatment seven months before *Nykorchuck*, is now questionable authority after the Court of Appeal's decision. *Id.* at 29. In an attempt to distinguish *Jorge* from *Nykorchuck*, however, Professor Alexander asserts,

> There may be a closer medical relationship between prenatal counseling and genetic testing [*Jorge*] than between endometriosis and breast cancer [*Nykorchuck*], so that "treatment" for one is essentially treatment for the other. Another distinguishing fact is that the *Jorge* plaintiff, unlike the *Nykorchuck* plaintiff, continued to express concern to her doctor about the condition that gave rise to the original act of malpractice, *i.e.*, her genetic make-up and that of the child's father. If she indicated lack of confidence in the accuracy of the original test results, arguably she was continuing to seek corrective treatment.

Id. at 30.

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[1] 410 U.S. 113 (1973). In *Roe v. Wade*, a pregnant woman brought a class action chal-

held that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"[2] and that women therefore have the right to an abortion "free of *interference* by the State"[3] during the first trimester. Subsequent to *Roe v. Wade*, medical funding programs allocating funds to needy women for childbirth, but excluding assistance for abortions, were challenged under the theory that the government was interfering with a woman's fundamental right to an abortion.[4] The Supreme Court in *Maher v. Roe*[5] and *Harris v. McRae*[6] concluded that it is not unconstitutional for states to fund childbirth while refusing to fund abortions because "[t]here is a basic difference between direct *state interference* with a protected activity and *state encouragement* of an alternative activity consonant with legislative policy."[7]

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lenging the constitutionality of a Texas statute that criminalized all abortions except those required to save the life of the mother. *Id.* at 117-18.

[2] *Id.* at 153. The Court stated that although the "Constitution does not explicitly mention any right of privacy . . .[,] the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Id.* at 152 (citing, inter alia, Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965)). The Court concluded that this right encompassed the abortion issue because

> [t]he detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases . . . the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

Id. at 153.

[3] *Id.* at 163 (emphasis added). The Court held that the State cannot regulate abortions during the first trimester of pregnancy. *Id.* at 164. During the second trimester, the State cannot proscribe abortion but can "regulate the abortion procedure in ways that are reasonably related to maternal health." *Id.* During the third trimester, a state may proscribe abortion to promote the state's legitimate interest in the potentiality of human life, except where an abortion is needed to preserve the life or health of the mother. *Id.* at 164-65.

[4] *See infra* notes 5-7 and accompanying text.

[5] 432 U.S. 464 (1977).

[6] 448 U.S. 297 (1980).

[7] *Maher*, 432 U.S. at 475 (emphasis added); *accord McRae*, 448 U.S. at 315, 326; Williams v. Zbaraz, 448 U.S. 358, 368-69 (1980).

In *Maher*, the plaintiffs were two indigent women who challenged a Connecticut Welfare Department regulation that limited Medicaid benefits for abortion to first trimester abortions that were medically necessary. *Maher*, 432 U.S. at 466-67. The Court stated that

In response to these cases, several state courts, deeming federal protections of the right to choose an abortion insufficient, have interpreted their own constitutions more expansively than the Federal Constitution; thus, to fund childbirth while refusing to fund medically necessary abortions may be prohibited under a state constitution.[8] Recently, in *Hope v. Perales*[9] the New York County Supreme Court held that New York's Prenatal Care Assistance

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the right to an abortion "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." *Id.* at 473-74. The Court added that the Connecticut regulation "places no obstacles—absolute or otherwise—in the pregnant woman's path to [a nontherapeutic] abortion." *Id.* at 474. As a result, the Court concluded "that the Connecticut regulation does not impinge upon the fundamental right recognized in *Roe*. *Id.*

In *McRae*, title XIX of the Social Security Act ("Medicaid Act") provided federal financial aid to states that reimbursed certain medical costs for needy persons. *McRae*, 448 U.S. at 300-01. The 1980 "Hyde Amendment" to title XIX prohibited the use of federal funds for abortions "except where the *life* of the mother would be endangered if the fetus were carried to term." *Id.* at 302 (quoting Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979)) (emphasis added). Therefore, funds were denied for abortions in situations where the mother's health, as opposed to her life, was in danger. *Id.* at 302-03. The *McRae* Court stated that "[t]he Hyde Amendment, like the Connecticut welfare regulation at issue in *Maher*, places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest." *Id.* at 315. The Court concluded that "[a]lthough the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Id.* at 317-18.

In *Zbaraz*, the plaintiffs argued that an Illinois statute, which funded abortions only if deemed necessary to save the life of the mother, was unconstitutional. *Zbaraz*, 448 U.S. at 360-61. This case was decided on the same day as *McRae*, and the Court held that *McRae* had foreclosed the issues relating to state funding of abortions. *Id.* at 369.

[8] *See, e.g.*, Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 799 (Cal. 1981) (holding Budget Act, which restricted circumstances in which State would fund nontherapeutic abortions for eligible recipients, "invalid under the California Constitution"); Doe v. Maher, 515 A.2d 134, 157 (Conn. Super. Ct. 1986) (holding that prohibition of funding for "medically necessary abortions under the medicaid program except if the *life* of the woman is endangered" violates Connecticut Constitution's Due Process Clause) (emphasis added); Doe v. Director of Dep't of Social Servs., 468 N.W.2d 862, 880 (Mich. Ct. App.) ("[E]xclusion from the Medicaid program of indigent pregnant woman who elect 'medically necessary' abortions in lieu of carrying the pregnancy to term is a denial of equal protection of the law guaranteed by [the state constitution]."), *appeal granted*, 472 N.W.2d 638 (Mich. 1991); Right to Choose v. Byrne, 450 A.2d 925, 937 (N.J. 1982) ("[E]xcluding medically necessary abortions from a system providing all other medically necessary care for the indigent. . . . violates the New Jersey Constitution.").

[9] 571 N.Y.S.2d 972 (Sup. Ct. N.Y. County 1991).

Program ("PCAP")[10] violates the New York State Constitution in that it excludes all abortions, even those deemed medically necessary, from its coverage.[11]

PCAP is a medical assistance program that provides prenatal and postpartum services to women with incomes between 100% and 185% of the federal poverty line.[12] However, PCAP will not fund abortions, even if an abortion is necessary to preserve the life or health of the pregnant woman.[13]

The plaintiffs in *Perales* brought an action against the New York State Departments of Health and Social Services,[14] contending that PCAP is unconstitutional because it " 'burdens the exercise of the right of reproductive choice' and improperly pressures . . . women toward childbirth."[15] The defendants responded that the New York Constitution does not require the program to be all

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[10] N.Y. PUB. HEALTH LAW §§ 2520-2522, 2529 (McKinney Supp. 1992).

[11] *Perales*, 571 N.Y.S.2d at 980-82.

[12] *Id.* at 974-75.

[13] *Id.* at 976. It should be noted that under its basic Medicaid program, N.Y. State provides funding for abortions to women at or below 100% of the federal poverty line. *Id.* at 977.

PCAP specifically enumerates the services that will be funded under the program, and abortions are not included. N.Y. PUB. HEALTH LAW § 2522 (McKinney Supp. 1992). Section 2522(1) states the following:

> Comprehensive prenatal care services available under the prenatal care assistance program include:
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> (a) prenatal risk assessment; (b) prenatal care visits; (c) laboratory services; (d) health education for both parents regarding prenatal nutrition and other aspects of prenatal care, alcohol and tobacco use, substance abuse, use of medication, labor and delivery, family planning to prevent future unintended pregnancies, breast feeding, infant care and parenting; (e) referral for pediatric care; (f) referral for nutrition services including screening, education, counseling, follow-up and provision of services under the women, infants and children's program and the supplemental nutrition assistance program; (g) mental health and related social services including screening and counseling; (h) transportation services for prenatal care services; (i) labor and delivery services; (j) post-partum services including family planning services; (k) inpatient care, specialty physician and clinic services which are necessary to assure a healthy delivery and recovery; (l) dental services; (m) emergency room services; (n) home care; and (o) pharmaceuticals.

Id.

[14] *Perales*, 571 N.Y.S.2d at 974. Two of the plaintiffs, Jane Hope and Jane Moe, had incomes between 100% and 185% of the federal poverty line and were in need of therapeutic abortions. *Id.* at 973-74. The remaining plaintiffs comprised four physicians in practice as obstetricians and gynecologists, one nurse-midwife affiliated with a New York City hospital, seven health care clinics serving women in this income bracket, four advocacy organizations whose memberships include women in this income category, and two members of the clergy who offer guidance to women in the stated income category. *Id.*

[15] *Id.* at 974.

encompassing and that women are not deprived of their right to obtain an abortion simply because the state is not supplying the funds.[16]

Judge Ciparick concluded that PCAP violates the Equal Protection Clause of the New York State Constitution because eligible women requiring financial assistance for childbirth are accommodated while those in need of funds for a medically necessary abortion are denied them.[17] The court also concluded that PCAP was, in effect, an "affirmative act by the State blocking a woman without means from obtaining an abortion,"[18] and therefore held that "[a]s PCAP presently stands it violates the due process rights of an eligible pregnant woman for whom an abortion is medically necessary by leaving her with no real choice in the decision of whether to 'bear or beget a child.' "[19] Finally, the court held that PCAP violates the New York State Constitution, Article XVII, Section 1, which pledges aid, care, and support to the needy, and Article XVII, Section 3, which pledges protection and promotion of the health of state residents.[20]

It is submitted that the court correctly concluded that PCAP is invalid on equal protection grounds. Specifically, PCAP contravenes the New York Constitution's Equal Protection Clause because, at least with respect to medically prescribed abortions, no compelling justification exists for directing funds to encourage childbirth over abortion.[21] Although the United States Supreme Court allows states to provide financial assistance for childbirth

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[16] *Id.* at 975.

[17] *Id.* at 981-82. The New York Equal Protection Clause states that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof." N.Y. CONST. art. I, § 11. The court determined that PCAP is underinclusive because it "exempts eligible women for whom an abortion is medically prescribed from receiving state assistance on the ground that PCAP is intended to promote healthier babies and reduce the incidence of infant mortality." *Perales*, 571 N.Y.S.2d at 982.

[18] *Perales*, 571 N.Y.S.2d at 979.

[19] *Id.* at 980 (quoting Carey v. Population Servs. Int'l., 431 U.S. 678, 685 (1977)).

[20] *Id.* at 980-81. Article XVII, § 1 "imposes an affirmative duty on the State to aid the needy." *Id.* at 980. The Legislature may determine whom to classify as needy and the amount of aid to distribute. *Id.* (citing Matter of Bernstein v. Toia, 43 N.Y.2d 437, 373 N.E.2d 238, 402 N.Y.S.2d 342 (1977)). However, once it has categorized a group as needy, it may not deny aid to this group based on criteria that is unrelated to need. *Id.* at 980-81 (citing Tucker v. Toia, 43 N.Y.2d 1, 371 N.E.2d 449, 400 N.Y.S.2d 728 (1977)). PCAP violates this principle because although all women for whom PCAP might be available are in equal need of medical care, only those women who choose childbirth actually receive financial assistance. *Id.* at 979, 981.

[21] *See id.* at 981-82.

while refusing to pay for abortions,[22] it is suggested that the New York Court of Appeals, given its expansive reading of the New York Constitution,[23] would hold that this course of conduct impermissibly burdens a woman's fundamental interest in making reproductive decisions free from state interference.

Equal protection is denied when a state, acting without sufficient cause, grants benefits or imposes burdens unequally upon persons similarly situated.[24] In two cases which were not discussed

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[22] *See supra* note 7 and accompanying text.

[23] *See* People v. P.J. Video, 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986), *cert. denied*, 479 U.S. 1091 (1987). The Court of Appeals stated that "[i]n the past we have frequently applied the State Constitution, in both civil and criminal matters, to define a broader scope of protection than that accorded by the Federal Constitution in cases concerning individual rights and liberties." *Id.* at 303, 501 N.E.2d at 561, 508 N.Y.S.2d at 912 (citations omitted); *see also* People v. Harris, 77 N.Y.2d 434, 437, 570 N.E.2d 1051, 1053, 568 N.Y.S.2d 702, 704 (1991) (state courts are "bound to apply their own Constitutions notwithstanding the holdings of the United States Supreme Court"); People v. Isaacson, 44 N.Y.2d 511, 519, 378 N.E.2d 78, 82, 406 N.Y.S.2d 714, 718 (1978) ("[U]nder our own State due process clause (N.Y. State Const. art. I, § 6), this court may impose higher standards than those held to be necessary by the Supreme Court under the corresponding Federal constitutional provision."). *See generally* Vito J. Titone, *State Constitutional Interpretation: The Search for an Anchor in a Rough Sea*, 61 ST. JOHN'S L. REV. 431, 437, 459-60, 466 (1987) (New York Constitution affords greater protection than Federal Constitution).

[24] *See* Abrams v. Bronstein, 33 N.Y.2d 488, 492, 310 N.E.2d 528, 530, 354 N.Y.S.2d 926, 929-30 (1974). "Of course, not every difference in treatment violates the equal protection guarantee." *Id.* at 492, 310 N.E.2d at 530, 354 N.Y.S.2d at 930.

When addressing an equal protection argument, the court must decide what standard of review should be applied. Montgomery v. Daniels, 38 N.Y.2d 41, 59, 340 N.E.2d 444, 455, 378 N.Y.S.2d 1, 16 (1975). If the "statute affects a 'fundamental interest' or employs a 'suspect' classification, the strict scrutiny test" applies, Alevy v. Downstate Medical Ctr., 39 N.Y.2d 326, 332, 348 N.E.2d 537, 543, 384 N.Y.S.2d 82, 86 (1976), and the discrimination can only be sustained if it is necessary for "the advancement of a compelling state interest and additionally only if it can then be shown there are no less restrictive means by which the advancement of such an interest could be achieved." *Montgomery*, 38 N.Y.2d at 59, 340 N.E.2d at 455, 378 N.Y.S.2d at 16. If neither a fundamental right nor a suspect classification is involved, the challenged discrimination is valid if it "bears a reasonable relationship to some legitimate legislative objective." *Alevy*, 39 N.Y.2d at 332, 348 N.E.2d at 542, 384 N.Y.S.2d at 86.

A woman's right to obtain an abortion is considered fundamental, and strict scrutiny should therefore be applied if the State restricts this right. *See* Roe v. Wade, 410 U.S. 113, 152-55 (1973). The *Perales* court applied the strict scrutiny test, stating that the State failed to demonstrate a "compelling justification for that medical assistance program which in practice endangers the health and lives of eligible women for whom an abortion is medically necessary." *Perales*, 571 N.Y.S.2d at 982. However, in *McRae*, the Supreme Court "did not measure the restrictions at issue against a compelling interest test." Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 796 (Cal. 1981). "Rather, the Supreme Court assumed that a discriminatory withholding of government benefits, because it imposes no new obstacle to abortion, required only minimal justification." *Id.*

by the *Perales* court, *East Meadow Ass'n v. Board of Education*[25] and *Phillips v. Maurer*,[26] the New York Court of Appeals held that in constitutionally protected areas such as freedom of speech and the right to vote, states must remain neutral in the absence of a compelling reason to discriminate.[27] In *East Meadow Ass'n*, for instance, the Court of Appeals held that the defendant violated the state constitution by allowing public gatherings in school buildings but denying use to the plaintiff because he was a "highly controversial figure" who sang songs "critical of American policy in Viet Nam."[28] The court determined that this was "an unlawful restriction of the constitutional right of free speech and expression"[29] under the Equal Protection Clause of the New York Constitution because the government was granting and denying benefits in a discriminatory manner.[30]

As was the case in *Perales*, the State in *East Meadow Ass'n* did not create an absolute bar to the plaintiff's exercise of his constitutional rights, because he remained free to speak in nongovernmental facilities. Nonetheless, the court deemed the State's selective distribution of benefits to be a governmental interference with the plaintiff's right of expression.[31] Similarly, in *Phillips*, the Court of Appeals struck down the Board of Education's use of school district funds to place a newspaper advertisement urging voters to approve the Board's budget and bond proposal.[32] The court stated that while the State is permitted to spend money to educate voters on the issues and to encourage them to go to the polls, it is unconstitutional to spend state funds to encourage voting in a particular way.[33] Thus, in the constitutionally protected areas of free speech

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[25] 18 N.Y.2d 129, 219 N.E.2d 172, 272 N.Y.S.2d 341 (1966).

[26] 67 N.Y.2d 672, 490 N.E.2d 542, 499 N.Y.S.2d 675 (1986).

[27] *See infra* notes 28-35 and accompanying text.

[28] *East Meadow Ass'n*, 18 N.Y.2d at 132, 219 N.E.2d at 173-74, 272 N.Y.S.2d at 343-44.

[29] *Id.* at 134, 219 N.E.2d at 175, 272 N.Y.S.2d at 345.

[30] *Id.* The court stated that

> [t]he State is not under a duty to make school buildings available for public gatherings but, if it elects to do so, it is required, by constitutional provision (U.S. Const., 14th Amdt.; N.Y. Const., art. I, § 11), to grant the use of such facilities "in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all."

Id. at 133, 219 N.E.2d at 174, 272 N.Y.S.2d at 344, (quoting Brown v. Louisiana, 383 U.S. 131, 143 (1966)).

[31] *Id.* at 134, 219 N.E.2d at 175, 272 N.Y.S.2d at 345.

[32] *Phillips*, 67 N.Y.2d at 674, 490 N.E.2d at 543, 499 N.Y.S.2d at 676.

[33] *Id.* The court declared that "[t]o educate, to inform, to advocate or to promote voting on any issue may be undertaken, provided it is not to persuade nor to convey favoritism,

and the right to vote, the State must demonstrate a compelling reason, such as public safety and welfare,[34] to justify any discriminatory actions.[35]

When New York established PCAP, it entered the constitutionally protected area of the right to an abortion. A number of state courts have held that a state choosing to fund in this area must "act impartially,"[36] and not confer benefits on a "selective basis."[37] On appeal, the New York Court of Appeals should heed *East Meadow Ass'n* and *Phillips* and adopt the view of other state courts by holding that, in the absence of a compelling reason, it is

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partisanship, partiality, approval or disapproval by a State agency of any issue, worthy as it may be." *Id.* (quoting Stern v. Kramarsky, 84 Misc. 2d 447, 452, 375 N.Y.S.2d 235, 293 (Sup. Ct. N.Y. County 1975)).

[34] *See East Meadow Ass'n*, 18 N.Y.2d at 134, 219 N.E.2d at 175, 272 N.Y.S.2d at 345. The court stated that the State could not forbid the plaintiff from using the school building for his performance "unless it is demonstrable on a record that such expression will immediately and irreparably create injury to the public weal." *Id.* (citations omitted).

[35] *See* Hempstead Democratic Club v. Village of Hempstead, 112 A.D.2d 428, 492 N.Y.S.2d 89 (2d Dep't 1985). In *Hempstead Democratic Club*, the defendant, Village of Hempstead, prohibited the plaintiff from using an auditorium in a park owned and operated by the village. *Id.* at 429, 492 N.Y.S.2d at 90. The court held that the prohibition was improper partly because the auditorium had been available to all types of groups and organizations. *Id.* at 430, 492 N.Y.S.2d at 91. The court stated that "[a]ll persons and groups have a 'constitutional right of access [to such public forums] and the State must demonstrate compelling reasons for restricting access.' " *Id.* (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

[36] Right to Choose v. Byrne, 450 A.2d 925, 935 n.5 (N.J. 1982). The New Jersey Supreme Court stated that

> [t]he right to choose whether to have an abortion . . . is a fundamental right of all pregnant women, including those entitled to Medicaid reimbursement for necessary medical treatment. As to that group of women, the challenged statute discriminates between those for whom medical care is necessary for childbirth and those for whom an abortion is medically necessary. Under *N.J.S.A.* 30:4D-6.1, those needing abortions receive funds only when their lives are at stake. By granting funds when life is at risk, but withholding them when health is endangered, the statute denies equal protection to those women entitled to necessary medical services under Medicaid.

Id. at 934.

In Doe v. Maher, 515 A.2d 134 (Conn. Super. Ct. 1986), the Connecticut Superior Court noted that "[t]he Connecticut equal protection clauses require the state when extending benefits to keep them 'free of unreasoned distinctions that can only impede [the] open and equal' exercise of fundamental rights." *Id.* at 158 (citations omitted). The court added that the regulation at issue "[c]learly . . . discriminate[d] by funding all medically necessary procedures and services except therapeutic abortions." *Id.* at 159; *see also* Moe v. Secretary of Admin. & Fin., 417 N.E.2d 387, 401 (Mass. 1981) ("While the State retains wide latitude to decide the manner in which it will allocate benefits, it may not use criteria which discriminatorily burden the exercise of a fundamental right.").

[37] Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 786 (Cal. 1981).

unconstitutional for the State to encourage childbirth over abortions by paying only for the former. Because the State's interest in protecting potential life cannot outweigh its interest in protecting the life and health of the mother, no compelling reason for promoting childbirth exists when a woman's life or health is endangered by her pregnancy.[38] The New York Court of Appeals should thus uphold the state supreme court's decision and prevent the State from discriminating against underprivileged women who require an abortion to protect their lives or health.

Christopher Vincent Albanese

CIVIL PRACTICE LAW AND RULES

CPLR 3101(d)(2): Appellate Division, Third Department holds that surveillance videotapes may not be discovered unless party seeking discovery has a "substantial need" and cannot obtain "substantial equivalent" without "undue hardship"

New York's liberal standard of discovery, embodied in CPLR 3101(a), seeks to ensure full disclosure prior to trial of all information that is "material and necessary."[1] This rule promotes the

[38] *See* Roe v. Wade, 410 U.S. at 163-64. A state may proscribe abortion in the third trimester to further its interest in protecting fetal life "except when [an abortion] is necessary to preserve the life or health of the mother." *Id.* In *Roe v. Wade*, the Supreme Court acknowledged that the state interest in protecting potential life can never outweigh the superior state interest of protecting the life and health of the mother. *See id.*

The New York State Legislature contends that PCAP is constitutional because the State has a compelling objective in promoting potential life and PCAP is set up only to achieve that objective. *Perales*, 571 N.Y.S.2d at 975. This rationale, however, treats the pregnant woman as a mere incubator whose sole purpose is to produce a healthy baby even if the results are fatal to the woman. Thus, the Legislature is ignoring the State's obligation to promote the health of the pregnant woman. *See id.* at 981. As the *Perales* court stated, "there can be no compelling justification for that medical assistance program which in practice endangers the health and lives of eligible women for whom an abortion is medically necessary, women whom the Legislature has expressly identified as needy in regard to medical care." *Id.* at 982.

[1] *See* CPLR 3101(a) (McKinney 1991). "There shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . . ." *Id.* In order to promote full disclosure, courts read the phrase "material and necessary" liberally to include "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." *See* Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 406, 235 N.E.2d 430, 432, 288 N.Y.S.2d 449,