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The Abortion Controversy: The Law's Response

Lyle B. Haskin

NOTES AND COMMENTS

THE ABORTION CONTROVERSY: THE LAW'S RESPONSE

I. INTRODUCTION

Abortion laws appear to provide a classic example of the law's role in following social trends, rather than in leading social advancements. The law has changed from providing for no punishment where a pregnancy is intentionally aborted before "quickening,"[1] to charging a felony for inducing abortion, certain exceptions notwithstanding. As a result, the law stands today in a vulnerable position. When courts strike down anti-abortion statutes, a certain segment of the population sees the result as a further decline of traditional morality. When, on the other hand, courts find such statutes constitutional, they are met with a barrage of criticism from those favoring liberalized abortion statutes. The main criticism is that archaic ideas permeate the law and are inflexibly followed despite changed social requirements.

No certain figures exist on the number of legal and illegal abortions performed each year in the United States, but estimates usually run from 200,000 to 1,500,000 per year for illegal abortions and approximately 8,000 legal (therapeutic) abortions per year.[1a] A 1965 public opinion poll conducted by the National Fertility Study showed that a majority of those interviewed favored legalization of abortions to protect the health of the mother, while only eight per cent favored abortion for any woman who wanted it; that is, abortion on demand.[2] In 1967, a Gallup poll revealed twenty-one per cent of those interviewed favored abortion on demand.[3] A 1969 Gallup poll reported that forty per cent of the persons questioned said they believed abortion is a private matter between physician and patient.[4]

The following survey of recent court decisions will demonstrate the manner in which courts are beginning to respond to changed social attitudes. A short summary of medical facts will provide the necessary frame of reference in which to examine the recent cases.

II. MEDICAL BACKGROUND

Abortions have been performed on women for thousands of years. In 2600 B.C., China's Emperor Shen Nung recited a formula for an abortifacient consisting primarily of mercury. No lesser persons than Hippocrates, Aristotle

1 Quickening is the term applied to the pregnant woman's awareness of the movements of the baby *in utero*.

1a Schulder and Kennedy (eds.), Abortion Rap ix (1971).

2 Tietze and Lewit, *Abortion*, 220 Scientific American 23 (1969).

3 *Id.*

4 *Abortion and the Changing Law*, 75 Newsweek 15 at 54 (1970).

and Plato advocated abortion as a method of population control.[5] To the medically sophisticated and unsophisticated alike, many methods of attempting to induce a criminal abortion are known; among them are: packing the uterus with gauze and waiting for expulsion of fetus and placenta; inserting into the uterus rubber tubes, knitting needles, small tree branches, crochet hooks, coat hangers or any other object long and sharp enough to penetrate the amniotic sac; ingesting drugs ranging from herb broth to white phosphorus, copper sulphate and potassium permanganate; injecting soap-water or salt-water solutions into the distended uterus; and engaging in other miscellaneous activities, such as taking hot showers, doing deep-knee bends and sit-ups, riding a galloping horse, running and physically beating on the pregnant woman's swollen belly. Some of these methods succeed in inducing uterine contractions and eventual abortion of the pregnancy. Concommitantly these methods may also produce the following: (1) infection with resulting sterility, hysterectomy, hemorrhage, laceration or perforation of the walls of the vagina, uterus or intestines, (2) burns resulting from skin contact with a strong chemical agent, (3) death.

Acceptable medical procedures exist for aborting a pregnancy. They include D. and C.,[6] chemical abortifacients[7] and suction.[8] As with any medical procedure there are dangers to the patient: a bad result of a D. and C. could be perforation of vaginal, uterine or intestinal walls; a chemical abortifacient could result in illness from a side-effect. The suction method[9] seems the least likely to cause a bad result, although a danger of hemorrhage exists caused by the abrupt and traumatic separation of the placenta from the uterine wall. The compensating safety factor for a patient is that she is in a clinical or hospital environment usually equipped to handle such emergencies. These medically-approved methods are generally so successful that statistically a woman may undergo an abortion more safely than carry a baby to term.[10]

Anatomically, pregnancy occurs when a spermatozoon penetrates an ovum. Cell division commences shortly thereafter. The time span from fertilization to uterine implantation is believed to be approximately fifteen days.[11] Much is known about embryonic and fetal growth. Seven weeks into the first trimester of

[5] *Supra* n.2.

[6] A "D & C" is a rather common surgical procedure. The initials are for dilation and curettage. The neck of the uterus is stretched or dilated to allow insertion of a curet, a longhandled scoop used to scrape the uterine lining to remove foreign matter. D & C. may be performed for a number of reasons, but one of the most common is to remove remnants of an incomplete spontaneous abortion. The operation is performed under a general anesthetic.

[7] Urgate derivatives are commonly used but may be obtained only by prescription.

[8] The suction method employs a small pump that operates on the same principle as a household vacuum cleaner. A plastic tube is inserted into the uterus, the pump is activated and the machine removes placenta and fetus. The procedure is said to involve only minimal pain which lasts about thirty seconds. The abortion is completed in less than three minutes. *Supra* n.4 at 55.

[9] *Id.*

[10] *Supra* n.2.

[11] Doe v. Scott, 321 F. Supp. 1385, 1393 (N.D. Ill. 1971).

pregnancy, a well proportioned, miniature baby exists *in utero*.[12] It looks like a baby, and its internal organs are distinctly human. By the end of the eighth week, the fetus is reported to be irreversibly a human being.[13]

Professor Byrn quotes a New York physician's observations after he handled a two-month-old fetus still in the amniotic sac:

> Eleven years ago while giving an anesthetic for a ruptured ectopic pregnancy (at two months gestation) I was handed what I believe was the smallest living human being ever seen. The embryo sac was intact and transparent. Within the sac was a tiny (approx. 1 cm.) human male swimming extremely vigorously in the amniotic fluid, while attached to the wall by the umbilical cord. This tiny human was perfectly developed, with long tapering fingers, feet and toes. It was almost transparent, as regards the skin, and the delicate arteries and veins were prominent to the ends of the fingers.
>
> The baby was extremely alive and swam about the sac approximately one time per second, with a natural swimmers stroke. This tiny human did not look at all like the photos and drawings and models of "embryos" which I have seen, nor did it look like a few embryos I have been able to observe since then, obviously because this one was alive! . . .
>
> When the sac was opened, the tiny human immediately lost its life and took on the appearance of an embryo at this age (blunt extremities, etc.). . . .[14]

This stage of gestation is especially significant because abortion is rarely induced after the first three months unless the pregnant woman's life is in imminent danger.[15]

If the pregnancy were to end naturally within the first trimester, a physician would describe the event as a "spontaneous abortion." This reflects three conditions: (a) the pregnancy has terminated; (b) the mother's body has rejected the fetus because of some defect in either the placental attachment or in the respective blood factors of mother and baby or some other mechanical aspect of pregnancy; and (c) the event has transpired during the first fifteen weeks of gestation. The same event occuring between the sixteenth and twenty-eighth weeks is termed by physicians a "miscarriage." Thereafter and until or very near the mother's projected "due date," birth of the baby will be called "premature contractions" or "premature labor."

Courts and attorneys, however, refer to traumatic loss of the baby as a "miscarriage," regardless of when during gestation the pregnancy terminates. Courts generally use "miscarriage" and "abortion" synonymously except when

[12] This statement and other similar statements hereafter are based on the assumption of a medically normal pregnancy.

[13] Byrn, *Abortion-On-Demand: Whose Morality?*, 46 N. Dak. L. Rev. 5 (1970).

[14] *Id.* at 8-9.

[15] *Supra* n.2 at 22.

"abortion" is used to refer specifically to an intentional act by a person other than the mother to prematurely and traumatically terminate the pregnancy.[16]

During the second three months of gestation, the fetus is distinctly human. It grows from three inches in length to approximately fourteen inches and from one ounce to approximately two and one-quarter pounds. Sometime during the last half of this second trimester, the mother will become aware that her baby is moving in the uterus.[17] Although a baby born during this trimester has a *slight* chance of survival, ninety per cent of premature births at this time result in the death of the baby.

In the third trimester, the fetus prepares for the most traumatic event of its life—birth. A normal fetus grows during this period to its birth size. All its internal functions become more sophisticated; physiologically it is obviously a human child. No medical question exists that the baby is now psychologically an individual. Dr. Arnold Gesell has described the results of his experiments by saying:

> Our own repeated observation of a large group of fetal infants (an individual born and living at any time prior to forty weeks gestation) left us with no doubt that psychologically they were individuals. Just as no two looked alike, so no two behaved precisely alike. One was impassive when another was alert. Even among the youngest there were discernible differences in vividness, reactivity and responsiveness. There were genuine individual differences, already prophetic of the diversity which distinguishes the human family.[18]

III. Induced Abortion and the Law

A. *Historical Perspective*

The general consensus of opinion is that prior to an 1803 statute, English common law did not punish induced abortion before "quickening."[19] Inducing an abortion did not become a criminal offense in the United States until about 1830.[20] Dr. Robert W. Fox, however, has concluded that inducing an abortion was an offense at common law in some jurisdictions.[21] His conclusion is based upon the common law rules of Massachusetts, New Jersey and Pennsylvaina and

16 Am. Jur. 2d Abortion, § 1(1962).

17 This phenomenon is referred to in law as "quickening."

18 Gesell, The Embryology of Behavior 172 (1945).

19 U.S. v. Vuitch, 305 F. Supp. 1032, 1034 (D.D.C. 1969); People v. Belous, 80 Cal. Rptr. 354, 358, 458 P.2d 194, 198 (1969); Perkins, Criminal Law 101 (1957); Stern, *Abortion: Reform and the Law*, 59 J. Crim. L.C. & P.S. 84, 85 (1968). Quickening is the term applied to the pregnant woman's awareness of the movements of the baby *in utero*. Quickening was a good test of pregnancy prior to the twentieth century since no adequate medical tests for pregnancy existed at the inception of the English common law rule. The only way a woman could be certain she was pregnant was to detect the baby's movements in her uterus. As noted earlier, these movements are readily detectable between the fifth and sixth months.

20 *Id.*

21 Fox, *Abortion: A Question of Right or Wrong?*, 57 A.B.A.J. 668 (1971).

upon two early American cases, one of which stated, "It is a flagrant crime at common law to attempt to procure the miscarriage or abortion of the woman."[22] The other case upon which Dr. Fox relies is *New Jersey v. Cooper*,[23] wherein the court said:

> It was anciently holden that the causing of an abortion by giving a potion to, or striking a woman big with child, was murder; but at this day it is said to be a great misprision only, and not murder, unless the child be born alive, and die thereof. . . . If a woman be quick with child, and by a potion or otherwise killeth it in her womb, or if anyone beat her whereby the child dieth in her body, and she is delivered of a dead child, this, though not murder, was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offence in quite so atrocious a light, but merely as a heinous misdemeanor. . . .[23a]

The Illinois statute prohibiting a third person from inducing an abortion was enacted in 1827.[24] The present Illinois statute[25] was enacted in 1961; the elements of the offense require neither proof that the woman was pregnant nor that a "miscarriage" actually resulted.[26] Illinois and a majority of other states[27] prohibit recovery for injury or death where a woman consents to having an illegal abortion performed on herself.[28] The rationale is basically equitable: the court will not aid a plaintiff whose claim is based upon her own illegal or immoral act. This rationale may be subject to attack in a state which has no statutory offense for inducing an abortion.

Prior to the late 1960's when state and federal courts began holding anti-abortion statutes unconstitutional, a survey of statutes[29] revealed that forty-one states permitted a therapeutic abortion if its purpose was to save the pregnant woman's life. Twenty-five of those states expressly exempted any criminal culpability, while nine others exempted criminal penalties where an abortion was performed by a physician to save the life of the baby or the mother and the baby. The Illinois statute, which is within this category, is found in Ill. Rev. Stat. chap. 38, par. 23-1 (1969):

> (a) A person commits abortion when he uses any instrument, medicine, drug or other substance whatever, with the intent to procure a miscarriage of any woman. It shall not be necessary in order to commit

22 U.S. v. Vuitch, 305 F. Supp. 1032, 1034 (D.D.C. 1969); People v. Belous, 80 Cal. Rptr. 354, 358, 458 P. 20 194, 198 (1969); Perkins, Criminal Law 101 (1957); Stern, *Abortion: Reform and the Law*, 59 J. Crim. L.C. & P.S. 84, 85 (1968).

23 22 N.J.L. 52 (1849). The court cites 1 Bl. Comm. 129.

23a *Id.*

24 Hall, *Abortions Laws: A Call for Reform*, 18 DePaul L. Rev. 584 (1969).

25 Ill. Rev. Stat. ch. 38, § 23-1 (1969).

26 The statute was declared unconstitutional in Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971), but is still being enforced during appeal. The Doe case and similar cases are discussed *infra*.

27 *See, Right of Action for Injury or Death of Consenting Woman*, 36 A.L.R.3d 630 (1971).

28 Castronovo v. Murawsky, 3 Ill. App. 2d 168, 120 N.E.2d 871 (1954).

29 Whalen, Therapeutic Abortion: A Survey of Existing Legislation 1-3 (A.M.A.).

> abortion that such woman be pregnant or, if pregnant, that a miscarriage be in fact accomplished. . . .
>
> (b) It shall be an affirmative defense to abortion that the abortion was performed by a physician licensed to practice medicine and surgery in all its branches and in a licensed hospital or other licensed medical facility because necessary to the preservation of the woman's life.

This statute was declared to be unconstitutional in *Doe v. Scott.*[29a] A temporary injunction issued by the trial court to enjoin enforcement of the statute was subsequently stayed pending appeal.

B. *The Arguments—Pro and Con*

The arguments for and against legalizing all abortions are well known. Those who believe abortion should not be legalized generally postulate their argument on the premise that life begins when the ovum is fertilized. Thus, they argue, the zygote can be nothing other than human life. It may live only a few hours *in utero* or it may live eighty years after birth. This argument is sometimes extended to the conclusion that liberalized abortion laws will open the door to euthanasia, infanticide or destruction of any "non-productive" life. The argument against abortion on demand holds that legalizing all induced abortions will encourage sexual promiscuity; some physicians are said to believe that frequent induced abortions will cause "sterility, menstrual disorders, ectopic pregnancy . . . , abnormal delivery or guilt feelings that may lead to neurotic or even psychotic symptoms."[30]

Those persons who wish to have anti-abortion legislation abolished generally begin their argument by stating that the embryo does not become a human life until some time between three months gestation and the time of quickening —approximately five or six months. Thus, they argue that an induced abortion does not take the life of a human being. In addition, those who favor liberalization or termination of anti-abortion statutes maintain that the pregnant woman's rights are superior to the fetus' rights. Among women's "rights" are: (1) the mother's health (physical and mental); (2) the mother's desire to have a physically and mentally healthy baby, regardless of whether the cause of the suspected deformity be genetic, immunoligical (e.g. rubella) or chemical (e.g. ingestion of thalidomide); (3) the mother's desire not to bear a child resulting from rape or incest; (4) the mother's ultimate right not to bear a child she does not want; (5) the child's right to be loved;[31] (6) the rights of all persons

[29a] 321 F. Supp. 1385 (N.D. Ill. 1971). Doe is discussed *infra.*

[30] *Supra* n.2, n.4, n.21, An ectopic pregnancy is one in which gestation commences somewhere other than the uterus, usually in one of the fallopian tubes.

[31] This point seems to raise the spectre of the battered baby. Some people have argued that unwanted babies are the babies who are ultimately grossly abused physically. The explanation which is more convincing comes from Dr. Ray E. Helfer, Chariman, Department of Pediatrics, Catholic Medical Center of Brooklyn and Queens, N.Y., co-editor of The Battered Child and author of Helping the Battered Child and Its Family. He is quoted in Abortion Rap, *supra* n.1 at 127:

to be free from debasement resulting from overpopulation.[32] Advocates of abolishing anti-abortion laws also argue that criminal abortions result in back-alley butchery. To abate the physical and emotional abuses of women who seek a criminal abortion, the abolitionists argue that if anti-abortion statutes did not exist, the criminal abortionist would be out of business and women would be saved from brutal physical injuries.

Into the abortion controversy come several new developments: (1) A tremendous decline in the birth rate has occured in the United States; the 1970 census revealed the smallest under-five-years-old population in the 120 years the statistics have been kept.[33] (2) Frozen sperm banks now exist in which men may deposit semen for future artificial insemination; more than 300 babies have been born after their mothers were impregnated with sperm that had been stored in such a bank. [34] (3) Anti-abortion laws in countries having approximately one-third of the world's population, have been generally relaxed. The countries include: Britain, Bulgaria, China, Czechoslovakia, Denmark, Hungary, Japan, Poland, Romania, Sweden and U.S.S.R. The statutes requiring medical approval of abortions in those countries vary. Some require a panel of physicians to approve the abortion and record the medical reasons, while others permit abortions "on demand" after requiring physicians to instruct the women on the dangers of terminating a pregnancy and on the desirability of carrying the baby to term.[35]

C. *The State of the Law*

Superimposed upon the arguments for and against anti-abortion statutes and upon world developments in regard to abortion, are recent court rulings plus an attempt in Congress to enact legislation providing for abortion on demand anytime prior to 140 days' gestation.[36] The recent decisions rely heavily upon the holdings of the Supreme Court of the United States regarding the right of privacy, notwithstanding the fact that some of the abortion cases uphold the statutes involved. A California case,[37] for example, held that the fundamental right of a woman to choose whether to bear children proceeds from: (1) *Griswold v. Connecticut*[38] which held that the state could not legislate against

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Now, regarding the unwanted pregnancy, if the [psychological] potential [to physically abuse a child] is there—and the crisis could be the pregnancy—. . . and then the baby happens to be a bad baby (. . . just hard-to-care-for baby)—then all these things built together are enough to cause the physical abuse. However, without the potential, the unwanted pregnancy, per se, is not enough to cause physical injuries to children. . . . So although unwanted pregnancy is part of the system of child abuse it has to be fit into that complicated puzzle as the crisis and it cannot produce the potential, if the potential wasn't there in the first place.

32 *Id.*

33 Chicago Sun Times, September 7, 1971 at 1 col. 1.

34 Chicago Sun Times, September 5, 1971, Parade mag. at 8 col. 1.

35 *Supra* n.1, n.2.

36 117 Cong. Rec. S6056-58 (daily ed. May 3, 1971), comments of Sen. Packwood.

37 People v. Belous, 80 Cal. Rptr. 354, 458 P.2d 194 (1969).

38 381 U.S. 479, 485, 486, 500 (1965).

the use of contraceptives; (2) *Loving v. Virginia*[39] which held a statute proscribing miscegenation violated the due process clause; (3) *Skinner v. Oklahoma ex rel. Williamson*[40] which dealt with sterilization laws and the "basic right" to marry and have children; (4) *Pierce v. Society of Sisters*[41] wherein the Court struck down state action prohibiting non-public schools and consequently forcing parents to send their children to public schools; and (5) *Meyer v. Nebraska*[42] which held unconstitutional a statute proscribing teaching the German language to children.

The United States Supreme Court also has examined questions such as whether the state has a compelling interest in the regulation of the subject matter of a statute,[43] whether the proscription is in concert with accomplishing a state policy that is constitutionally permitted to the state[44] and whether such legislation is not overbroad or vague.[45] The Court has also held that, under the ninth amendment, rights asserted by the parties do not depend for vitality upon having been enumerated in the Constitution.[46]

1. *The Cases for Abolition of Anti-Abortion Statutes*

(a) *People v. Belous*[47]

The defendant was convicted of having violated the anti-abortion statute after he had referred an unmarried woman to another physician who performed abortions. The woman had threatened to go to Mexico for a criminal abortion, or in the alternative, to induce contractions herself if the defendant did not help her. Dr. Belous testified that he feared for the woman's life if she took either of those courses of action. The statute under which Dr. Belous was convicted proscribed abortion, "unless the same is necessary to preserve her life. . . ."[48] The California Supreme Court held the statute unconstitutional for the following reasons: (1) the statute was vague; (2) the pregnant woman has a right to choose whether to bear children, and state interference is tantamount to state destruction of her right of privacy; (3) the case is directly analogous to the *Griswold* case; (4) the state has no overriding, compelling interest in legislating against abortions.

Noting that criminal statutes must meet the test of clarity so that " 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes,' "[49] the court held that the phrase "necessary to

[39] 388 U.S. 1, 12 (1967).
[40] 316 U.S. 535, 536, 541 (1942).
[41] 268 U.S. 510, 534-35 (1925).
[42] 262 U.S. 390, 399-400 (1923).
[43] Shapiro v. Thompson, 394 U.S. 618 (1969).
[44] McLaughlin v. Florida, 379 U.S. 184, 196 (1964); N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1960).
[45] Shelton v. Tucker, 364 U.S. 479, 490 (1960).
[46] Aptheker v. Secretary of State, 378 U.S. 500, 505-06 (1964).
[47] 80 Cal. Rptr. 354, 458 P.2d 194 (1969).
[48] *Id.* at 357, 458 P.2d at 197.
[49] *Id.*

preserve her life" is so vague that no one knows whether "necessity" exists where a patient threatens suicide, manifests potential neurotic or psychotic tendencies, or is in imminent or remote physical danger. Such vagueness, the court held, is unconstitutional. The court also observed that the rule in California is that "necessary to preserve" does not require a finding of certainty or imminence of death. The court further observed that common law definitions of "necessary to preserve . . . life" are unreliable because abortion was not a common law offense.[50]

Having held the statute was unconstitutionally vague, the court addressed itself to fundamental constitutional rights. The right of privacy, said the court, is the basis of "the woman's right to life and to choose whether to bear children. The woman's right to life is involved because childbirth involves risks of death."[51] Citing *Griswold*, the California Supreme Court analogized an extension of the fundamental right to privacy. The court held that the right to privacy extends from preventing pregnancy, under *Griswold*, to terminating pregnancy.

The threshhold issue, the court said, was "whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state."[52] Medical and sociological research showing criminal abortions to be the most common single cause of death among pregnant women was examined by the court in light of the historical fact that the original California anti-abortion statute had been enacted in 1850 to save pregnant women from the dangers of death resulting from medicine's inability at that time to prevent post-operative fatal infection. The court agreed with amicus curiae for Dr. Belous:

> "These recorded facts bring one face-to-face with the hard, shocking —almost brutal—reality that our statute designed in 1850 to protect women from serious risks to life and health has in modern times become a scourge."[53]

The appellee had argued that the state had a compelling historical interest in protecting the fetus which would be aborted in the absence of an anti-abortion statute. The court, however, was unconvinced. Noting that the abortion statute in question permitted an exception to criminal culpability where the mother's life was endangered, the court concluded that even the anti-abortion statute regarded the mother's right to life superior to that of the fetus.

(b) *United States v. Vuitch*[54]

The defendant in this case was a physician convicted of abortion in Washington, D.C. The relevant statute excused criminal culpability, if the abortion was performed to preserve the life or health of the mother, except

50 *Id.* at 358, 458 P.2d at 198.
51 *Id.* at 359, 458 P.2d at 199.
52 *Id.* at 360, 458 P.2d at 200.
53 *Id.* at 361, 458 P.2d at 201.
54 305 F. Supp. 1032 (D.D.C. 1969).

that the statute also directed that such abortions could be performed only at the direction of a competent, licensed physician. The constitutional attack upon the statute was the same here as in *Belous*. The court held that the statute was unconstitutionally vague.[55] The court disagreed with *Belous*, however, in holding that Congress had the authority to legislate against abortions not performed by a competent, licensed physician. In reaching this conclusion, the court held the statute was severable; that is, the unconstitutionally vague condition precedent to an abortion ("necessary for the preservation of the mother's life or health . . .") could be struck down without also striking out that part of the statute that Congress constitutionally included ("under the direction of a competent, licensed practitioner of medicine.")[56] In other respect, *Vuitch* followed *Belous*.

(c) *Babbitz v. McCann*[57]

The plaintiff, a Wisconsin physician, filed a class action to have the statute declared unconstitutional. The Wisconsin statute is substantially similar to California's and the District of Columbia's in that it provides for a therapeutic abortion which:

(a) Is performed by a physician; and

(b) Is necessary, or is advised by two other physicians as necessary, to save the life of the mother; and

(c) Unless an emergency prevents, is performed in a licensed maternity hospital. . . .[58]

The major argument asserted by plaintiff was that the statute was unconstitutionally vague in using the word "necessary" and the phrase "to save the life of the mother." The federal court held the statute did not violate fourteenth amendment due process:

> The United States Supreme Court has ruled that a criminal statute must be definite enough to acquaint those who are subject to it with the conduct which will render them liable to its penalties. . . .
>
> We believe that [the statute] sets forth with reasonable clarity and sufficient particularity the kind of conduct which will constitute a violation. . . .[59]

The court then specifically disagreed in this regard with both *Belous* and *Vuitch*. The court also rejected the plaintiff's equal protection argument. Plaintiff argued that indigent women were not receiving equal protection because they could not obtain an abortion in Wisconsin and could not travel to a country or state where such abortions were permitted, whereas wealthy women could

[55] *Id.* at 1034.
[56] *Id.* at 1035.
[57] 310 F. Supp. 293 (E.D. Wis. 1970).
[58] *Id.* at 294.
[59] *Id.* at 297.

afford to go there. Although the court found the situation reprehensible, it held that the fourteenth amendment did not contemplate such a definition of equal protection.[60]

The court, however, did hold the statute unconstitutional. Citing *Griswold*, *Belous* and *Vuitch*, the court held that women have an absolute prerogative to terminate a pregnancy prior to quickening, under the right of privacy. The court further held (1) that the state had no compelling interest in proscribing abortions prior to quickening, and (2) that judicially restricting the state's proscription to a time after quickening was merely a return to the common law rule.[61] Concurring, *sub silentio*, with *Vuitch*, the court concluded its opinion by stating:

> Under its police power, the state can regulate certain aspects of abortion. Thus, it is permissible for the state to require that abortions be conducted by qualified physicians. The police power of the state does not, however, entitle it to deny to a woman the basic right reserved to her under the ninth amendment to decide whether she should carry or reject an embryo which has not yet quickened.[62]

(d) *Roe v. Wade*[63]

The next statute to fall was in Texas. The statute flatly prohibited all abortions except "for the purpose of saving the life of the mother."[64] The court relied upon the ninth amendment in holding that women had a fundamental right to decide whether to terminate a pregnancy.[65] The decision also noted that the scope of the state's compelling interest was very narrow. The court reasoned that the statute was not within that scope:

> These include . . . seeing to it that abortions are performed by competent persons and in adequate surroundings. Concern over abortion of the 'quickened' fetus may well rank as another such interest. The difficulty with the Texas Abortion Law is that, even if they promote these interests, they far outstrip these justifications in their impact by prohibiting *all* abortions except those performed 'for the purpose of saving the life of the mother.' . . . [T]he Texas statutes, in their monolithic interdiction, sweep far beyond any areas of compelling state interest . . . [T]he Texas Abortion Laws . . . are also unconstitutionally vague.[66]

(e) *Doe v. Bolton*[67]

The nominal plaintiff's application for a therapeutic abortion was denied by the hospital abortion committee, which was authorized by state statutes to

60 *Id.* at 298.
61 *Id.* at 300-01.
62 *Id.* at 302.
63 314 F. Supp. 1217 (N.D. Tex. 1970).
64 *Id.* at 1219, n.2.
65 *Id.* at 1221-22.
66 *Id.* at 1223.
67 319 F. Supp. 1048 (N.D. Ga. 1970).

rule on each application. Relying upon *Griswold*, the other cases cited in this section and upon the first and ninth amendments, the court held that a state may enact legislation controlling the medical quality of an abortion but not the medical reasons for a therapeutic abortion:

> Rather than regulating merely the quality of the decision to have an abortion, and the manner of its performance, the Georgia statute also limits the number of reasons for which an abortion may be sought. This the State may not do, because such action unduly restricts a decision sheltered by the Constitutional right to privacy. . . . The question becomes a matter of statutory overbreadth.[68]

(e) *Doe v. Scott*[69]

This class action attacked the Illinois anti-abortion statute on the ground of denial of due process. The statute, as noted above, prohibited all abortions except those "performed by a physician licensed to practice . . . because necessary for the preservation of the woman's life."[70] As in most of the preceding cases, this language was held to be unconstitutionally vague. Cognizant of the holding in *Griswold*, the court further held:

> A woman's interest in privacy and in control over her body is just as seriously interfered with by a law which prohibits abortions as it is by a law which prohibits the use of contraceptives. . . . We do not believe that the state has a compelling interest in preserving all fetal life which justifies the gross intrusion on a woman's privacy which is involved in forcing her to bear an unwanted child.[71]

Clearly by the time this case was decided, a pattern had been established by the federal district courts reviewing abortion statutes: (1) Generally, language obviating criminal culpability where a therapeutic abortion was performed for the purpose or necessity of saving the woman's life was held to be violative of due process because of vagueness or overbreadth; (2) women have a fundamental right to choose to terminate a pregnancy before quickening under the first, ninth and fourteenth amendments; (3) the state does not have a compelling interest in regulating the reasons for abortions, although it may have a sufficient interest in regulating the medical or clinical surroundings in which abortions are performed; (4) the woman's right to life predominates over her baby's putative right to life, especially prior to quickening; (5) the state does not have a compelling interest in protecting all fetal life.

2. *The Cases against Abolition of Anti-Abortion Statutes*

(a) *Steinberg v. Brown*[72]

This case chronologically preceded *Scott*. The statute attacked provided that induced abortions were a criminal offense unless "such miscarriage is neces-

[68] *Id.* at 1056.
[69] 321 F. Supp. 1385 (N.D. Ill. 1971).
[70] Ill. Rev. Stat. ch. 38, § 23-1 (1969).
[71] 321 F. Supp. 1385, 1390 (N.D. Ill. 1971).
[72] 321 F. Supp. 741 (N.D. Ohio 1970).

sary to preserve [the woman's] life. . . ."[73] Plaintiff argued that this phrase was unconstitutionally vague and cited the cases already surveyed as support. The federal district court in Ohio disagreed:

> It appears to us that the vagueness which disturbs the plaintiffs herein results from their own strained construction of the language used. . . . The words of the Ohio statute, taken in their ordinary meaning, have over a long period of years proved entirely adequate to inform the public . . . of what is forbidden. The problem of the plaintiffs is not that they do not understand, but that basically they do not accept, its proscription.[74]

The plaintiff's second argument to the court was that *Griswold* recognized a penumbral marital right of privacy in relation to the use of contraceptives and that the right had logically and properly been extended in subsequent cases to include the right to terminate a pregnancy. The court, however, distinguished *Griswold* on the facts and expressed the belief that the contraception issue in *Griswold* had been erroneously analogized to abortion cases. The court stated:

> Thus contraception . . . is concerned with preventing the creation of a new and independent life . . . It seems clear . . . that the legal conclusions in *Griswold* as to the rights of individuals to determine without governmental interference whether or not to enter into the processes of procreation cannot be extended to cover those situations wherein, voluntarily or involuntarily, the preliminaries have ended, and a new life has begun. Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it.[75]

In dictum the court offered an alternative solution to women who are pregnant with unwanted babies. Noting that plaintiffs equated "the necessity of giving birth . . . with the necessity of rearing the child," the court suggested that women who do not wish to rear their children surrender them for adoption.[76] The court also disposed of plaintiff's arguments based upon the equal protection clause and the eighth amendment's proscription of cruel and unusual punishment, the latter being described as "pay[ing] the piper"[77] rather than as punishment.

(b) *Corkey v. Edwards*[78]

This case is somewhat anomalous. The statute under attack prohibited induced abortions except where a physician reasonably established that (a) a substantial risk to the life or health of the woman was present, or (b) a substantial risk of physical or mental defect in the child was present, or (c) the pregnancy resulted from rape or incest.[79] The statute also required, *inter alia*, that the woman have resided in the state "at least four months immediately

[73] *Id.* at 748-49.
[74] *Id.* at 745.
[75] *Id.* at 746-47.
[76] *Id.* at 748.
[77] *Id.* at 749.
[78] 322 F. Supp. 1248 (W.D. N.C. 1971).
[79] *Id.* at 1249, n.1.

preceding the operation being performed. . . ."[80] The court held the residency requirement was overbroad and, therefore, unconstitutional.[81] The balance of the statute, however, was upheld. The court agreed that women have a fundamental right to decide whether to become pregnant but disagreed that such a right extends to a prerogative to terminate a pregnancy:

> Exercise of the right to an abortion on request is not essential to an effective exercise of the right not to bear a child, if a child for whatever reason is not wanted . . . Before the "moment" of conception has occured, . . . the choice whether or not to bear children is made in circumstances quite different from those in which such a choice might be made after conception . . . Genetically, the adult man was from such a beginning all that he essentially has become in every cell and human attribute. . . . Thus the root problem in the controversy over abortion is the one of assigning value to embryonic and fetal life. . . .[82]

The court explained its reluctance to strike the entire statute as being based upon a refusal to make a "value judgment" about whether North Carolina's statute should be changed to permit abortion on demand prior to quickening. "The legislature," the court held, "is the proper arena for the resolution of 'fundamentally differing views.' "[83]

3. *Summary of the Case Law*

None of the cases previously discussed have been decided by the United States Supreme Court at this writing. The arguments on both sides are reasonably strong. On the one hand, those favoring abortion statutes argue they are necessary to preserve the fetus' life which commenced upon conception. On the other hand, abolitionists describe the fetus' rights to life as subordinate to the mother's right to life. Intermingled in these arguments, the courts discuss the nature of the state's "compelling interest" regarding the right of privacy. The distinction drawn between the right of privacy, which supersedes the state's interest in banning the use of contraceptives, as it is developed in *Griswold*, and the right of privacy which supersedes the state's interest in prohibiting abortions seems justified. As the *Steinberg* court noted, the former permits two adults to choose not to enter the procreational process, while the latter permits them to terminate a pregnancy that they participated in creating. Equating the two ideas seems to strain logic. Nonetheless, the case for abolition of abortion statutes may be the stronger of the two arguments; but the more forthright judicial approach appears to be to seek legislative guidance on the policy question of whether a fetus is a human life.

80 *Id.*
81 *Id.* at 1254.
82 *Id.* at 1251-52.
83 *Id.* at 1254.

IV. The Father's Rights

One of the peripheral but potentially significant questions left unanswered by the current debate, the statutes, and the case law is whether the father of the fetus has standing to enjoin the mother's induced abortion where the two parents are married and where no compelling issue of the mother's or fetus' health is present.[84]

In *Flast v. Cohen*,[85] the Supreme Court stated the requirements for standing:

> [I]n ruling on standing it is both appropriate and necessary to look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated.[86]

In the hypothetical situation presented, the husband would be asserting his right as father to enjoin the destruction of a child which is genetically one-half his. The assertion of such a right would cause a direct confrontation between the rights of the mother recognized in the previous cases, and the father's asserted rights. The logical connection between the status asserted by the father and the claim sought to be adjudicated (the termination or continuation of the fetus' life) seems too clear to belabor with an extended discussion.[87]

The law, of course, provides for either parent to sue as next friend of his minor child. Tradition and the common law have viewed fathers as the heads of their families, sociological research notwithstanding. Certainly, enough legal support for the concept of fetal life having protectable rights exists to give credence to the father in the hypothetical situation suing for himself and as next friend of the fetus:

> [M]edical authority has recognized long since that the child is in existence from the moment of conception, and for many purposes its existence is recognized by the law. The criminal law regards it as a separate entity, and the law of property considers it in being for all purposes which are to its benefit, such as taking by will or descent. . . . All writers who have discussed the problem have joined . . . in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother.[88]

Thus, one might expect to find several cases where the father of a fetus has sought to enjoin the lawful abortion sought by his wife. The contrary, however, is true. This writer has found only one case where a similar right was asserted:

[84] The putative father of an illegitimate child has no rights in Illinois as to the child. Ill. Rev. Stat. ch. 106 3/4, § 51 *et seq.* (1969); Ill. Rev. Stat. ch. 4, § 9.1-8 (1969).

[85] 392 U.S. 83 (1968).

[86] *Id.* at 102.

[87] One may look at the father's common law and statutory duties to support and care for his family as giving rise to some assertable right to control or direct the destiny of the family unit.

[88] Louisell, *Abortion, The Practice of Medicine, and the Due Process of Law*, 16 U.C.L.A. L. Rev. 233, 234-44 (1969).

> In 1967, a Catholic husband, in the process of divorcing his wife, sought to have the court rule unconstitutional the law permitting his wife's prospective hospital abortion on the grounds that it deprived the potential offspring and himself of due process. The court held that the issue was medical rather than legal, that the wife's rights superseded the husband's, and that in simultaneously seeking to divorce his wife the husband had indeed forfeited his 'normal family rights.'[89]

Several observations about this case seem in order: (1) the California statute which the plaintiff challenged was subsequently declared unconstitutional in *Belous;* (2) the father forfeited his "normal family rights" by seeking divorce; the implication, of course, is that the father had rights to enforce against the wife and might have had standing had he not simultaneously filed for divorce; (3) some of the cases surveyed in the previous sections agree that the mother's rights supersede the fetus' rights. This final point seems to be the really dispositive holding. Inferring from the cases, one might establish priorities of rights with the mother's rights above the baby's and father's, and with the baby's rights superior to the father's.

Since the general view is that the mother's rights are superior, and because the woman is the one who must bear the child and is the one most likely to have custody of any children from the marriage should it end in divorce or separation, the courts might reasonably be expected to consider the mother's decision to have an abortion more significant than the father's refusal to consent to it. If, on the other hand, the United States Supreme Court holds that fetal life is constitutionally equivalent to life outside the uterus, the father clearly will be in a stronger position to argue against an abortion. He then could assert his traditional common law position as protector of the family rights.

V. Conclusion

Ultimately the resolution of the issues presented and the discrepancies found in the cases surveyed herein will be resolved by the United States Supreme Court. The Court will again be confronted with balancing legal rights: the right of privacy, as found in the first and ninth amendments, against the police power of the states to control the clinical conditions and the reasons for abortion. The legal issues, however, appear to be no more than a reflection of societal attitudes. If the public opinion polls are correct, the majority of people for whom the legislative and judicial processes were created want, at the very least, reform of abortion laws and, at most, abolition of those statutes. Viewing the cases surveyed against the societal attitudes, the courts are beginning to respond to a substantial demand that the state relinquish control of privacy.

If the United States Supreme Court holds that the states may properly regulate both the clinical circumstances and the medical reasons for abortion,

[89] Hall, *Abortions Laws: A Call for Reform*, 18 De Paul L. Rev. Rev. 584, 591 (1969), wherein is cited O'Beirne v. Superior Court, 1 Civ. 25174 (California Sup. Ct., Dec. 6, 1967).

fewer women will suffer and die because of criminal abortions. If, on the other hand, the United States Supreme Court holds that the states have a compelling interest in legislating the reasons for abortion, the back-alley butchers will continue to flourish. One thing is certain, however; if the Supreme Court does hold for the states in the matter of marital privacy, individuals will continue to procure criminal abortions, possibly at a progressively increased rate. Thus, the Court seems to be faced with not only the legal argument over the rights of the fetus as a human life, but also with the pressing issue regarding human rights generally—society's tendency to enforce its own definition and application of constitutional rights regardless of the Court's rulings.

LYLE B. HASKIN