McGeorge Law Review

Volume 4 | Issue 2 Article 20

7-1-1973

The Landmark Abortion Decisions: Justifiable Termination or Miscarriage of Justice?--Proposals for Legislative Response

Arthur G. Scotland
University of the Pacific; McGeorge School of Law

The Landmark Abortion Decisions: Justifiable Termination Or Miscarriage Of Justice?— Proposals For Legislative Response

In 1967 the California Legislature enacted the Therapeutic Abortion Act. Although the Act was considered a liberalization of prior law, it retained significant limitations on the circumstances under which abortion was permitted. Recent United States and California Supreme Court decisions have invalidated major provisions of the Act and have specified guidelines for permissible restrictions on the abortion procedure. The author presents a comprehensive analysis of the current status of California abortion law and proposes legislation which conforms to the guidelines set forth in the aforementioned opinions.

On January 22, 1973, the United States Supreme Court issued two landmark opinions striking down current state abortion statutes,[1] thereby climaxing more than a decade of legal, philosophical, religious, and moral controversies. Few decisions, including those prohibiting segregation and capital punishment, have evoked the intensity of emotion that will surely follow these rulings. New York's Terrence Cardinal Cooke has called the opinions "a tragic utilitarian judgment" and added that "judicial decisions are not necessarily sound moral decisions."[2] Representatives in the United States Congress have initiated a proposal for amendment of the United States Constitution to guarantee the right of life to the unborn.[3] A Virginia group of Catholic laymen have urged a "symbolic gesture" in the excommunication of Justice Brennan, the Supreme Court's only Catholic and a party to the majority opinion.[4] On the other hand, the decision has brought cheers throughout the country from those in favor of abortion.

1. Roe v. Wade, 93 S. Ct. 705 (1973); Doe v. Bolton, 93 S. Ct. 739 (1973).
2. *A Stunning Approval for Abortion*, TIME, Feb. 5, 1973, at 50.
3. The relevant portion of the proposed amendment is as follows: Section 1. Neither the United States nor any State shall deprive any human being, from conception, of life without due process of law; nor deny to any human being, from conception, within its jurisdiction, the equal protection of the laws. H.J. Res. 281, §1, 93rd Cong., 1st Sess. (1973).
4. *A Stunning Approval for Abortion*, TIME, Feb. 5, 1973, at 50.

In a related development at the state level, the California Supreme Court, two months prior to the aforementioned decisions, rendered the California Therapeutic Abortion Act a nullity, for all intents and purposes, by declaring substantial portions of the Act unconstitutionally vague.[5]

The purpose of this Comment is not to examine the social, religious, or moral aspects of the Supreme Court opinions, but to provide a comprehensive analysis of their effect upon present and future California abortion legislation. This analysis will encompass an historical survey of the evolution of California abortion statutes; a review of the constitutional challenges to abortion legislation raised in the aforementioned opinions; an analysis of their practical effect on the California Therapeutic Abortion Act; and suggestions for responsive legislation to fill the resulting void in California abortion legislation.

EVOLUTION OF CALIFORNIA ABORTION LEGISLATION

The first important study on abortion in the United States was published in 1936,[6] but only within the past decade has there been any concerted effort to revise abortion laws in this country. Prior to the enactment of the California Therapeutic Abortion Act in 1967,[7] California's anti-abortion law remained substantially unchanged since 1861.[8] In essence, the California law prohibited abortion (induced miscarriage) unless the same was necessary to preserve the life of the pregnant woman.[9] Prior to 1959, a literal interpretation of the phrase "necessary to preserve . . . life" was never questioned by California courts. However, in application of this exception to the proscription of abortion, several evidentiary principles evolved. The weight of authority placed the burden on the prosecution to show that the abortion was not necessary to preserve the woman's life.[10] At the same time, however, it was decided that the fact that an operation was not necessary to preserve life may be shown by evidence that the woman was in good health before the operation, and her testimony as to her physical condition was sufficient on this issue.[11] The non-ne-

5. People v. Barksdale, 8 Cal. 3d 320, 503 P.2d 257, 105 Cal. Rptr. 1 (1972).
6. TAUSSIG, ABORTION, SPONTANEOUS AND INDUCED (1936).
7. CAL. HEALTH AND SAFETY CODE §§25950-25955.5.
8. CAL. PEN. CODE §§274-275, *enacted* 1872, *based on* the Crimes and Punishment Act, CAL. STATS. 1850, c. 99, §45, at 233, *as amended*, CAL. STATS. 1861, c. 521, §1, at 588. See also CAL. PEN. CODE §276, *enacted*, CAL. STATS. 1957, c. 270, §1, at 921; CAL. BUS. & PROF. CODE §§601, 2361(a), 2377, 2761(c), 2878(c).
9. CAL. PEN. CODE §274, *as amended*, CAL. STATS. 1935, c. 528, §1, at 1605.
10. People v. Gallardo, 41 Cal. 2d 57, 62, 257 P.2d 29, 32 (1953).
11. However, the defendant charged with abortion could not be convicted upon the testimony of the woman upon whom the offense was committed unless corroborated by other evidence. Corroboration was sufficient if it tended to connect the defendant

cessity of the operation could also be shown by circumstantial evidence.[12]

The first meaningful interpretation which departed from a strict application of the exception in the abortion statute was set forth in *People v. Ballard.*[13] The court concluded that the statute did not require imminent peril to life. It was sufficient that the dangerous condition "be potentially present, even though its full development might be delayed to a greater or less extent." Furthermore, it was not essential that the doctor (abortionist) believe that the death of the patient would be *certain* in order to justify his affording relief through abortion. The burden was therefore upon the State to introduce evidence to establish that the diagnosis of the doctor was not correct.[14]

It is interesting to note that the court in *Ballard* observed that the defendant was a doctor with expertise in the field of gynecology. The court cited an Illinois case for the proposition that there is a presumption of necessity in the case of an abortion *by a licensed physician* which cannot be overturned by a mere showing of prior good health.[15] Thus it appeared for the first time that courts were, in a sense, bending over backwards in the face of substantial incriminating evidence to create a more liberal interpretation of California's anti-abortion statute as applied to licensed physicians.

Ballard was the first in a series of judicial challenges to the rigidity of California abortion legislation. In the decade which followed the *Ballard* decision, abortion reform became one of the most highly contested issues before the California Legislature. Spurred on by recommendations of the American Law Institute in its Model Penal Code[16] and vigorous support by the legal and medical communities, a study of the abortion problem commenced on November 30, 1960, with a hearing before the California Senate Interim Committee on the Judiciary.[17] Influenced by a published survey of California hospitals which revealed that the standards of California's anti-abortion legislation were not being strictly complied with, that a substantial body of medical judgment supported termination of pregnancy even in cases which

with the commission of the crime in such a way as may reasonably satisfy the jury that the woman was telling the truth. *Id.* at 62, 257 P.2d at 32.

12. People v. Karman, 145 Cal. App. 2d 801, 805, 303 P.2d 71, 73 (1956); People v. Allen, 104 Cal. App. 2d 402, 412, 231 P.2d 896, 903 (1951).

13. 167 Cal. App. 2d 803, 335 P.2d 204 (1959).

14. *Id.* at 814-15, 335 P.2d at 212.

15. People v. Davis, 362 Ill. 417, 200 N.E. 334, 336 (1936).

16. MODEL PENAL CODE §207.11 (Tent. Draft No. 9, 1959), §230.3(2) (Proposed Official Draft 1962).

17. Leavy & Charles, *California's New Therapeutic Abortion Act: An Analysis and Guide to Medical and Legal Procedure*, 15 U.C.L.A. L. REV. 1 n.3 (1967) [hereinafter cited as *Leavy & Charles*].

plainly did not present a justification under the current legal norm, that therapeutic abortions which could not be said to be "necessary to preserve life" were being authorized for performance in reputable hospitals, and that the anti-abortion statute was not being enforced as literally written,[18] legislation was introduced in 1961 to enact a therapeutic abortion act which would have permitted abortions to be performed if the continuance of pregnancy involved substantial risk that the mother would suffer grave and irremedial impairment of physical or mental health or if the pregnancy resulted from rape or incest.[19]

This historic proposal to relax California's abortion statutes commenced seven years of intensive study. Legislative committee hearings accumulated hundreds of pages of public testimony in support of and opposition to therapeutic abortion.[20] Tens of thousands of letters reached legislators from throughout California. Support for the Therapeutic Abortion Act was overwhelming from the medical and legal professions,[21] other professional groups, public organizations, and the news media.[22]

The 1961 Therapeutic Abortion Act, A.B. 2614, was sent to the Assembly Committee on Criminal Procedure for interim study. In December 1962 a two-day public hearing was held for the purpose of eliciting public testimony and medical and legal opinions in relation to abortion legislation; however, the committee took no action.[23] The Act was reintroduced in 1963 and again sent to committee for study. Additional public hearings were held but no action was taken.[24] In 1965, the Act was introduced once again and emerged from committee with a "do pass" recommendation only to be

18. Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417, 447, 449 (1959). See *Abortion Hearing, A.B. 2614 before the California Assembly Interim Committee on Criminal Procedure*, Dec. 17-18, 1962, at 46-48, 56, 62, 68; Leavy & Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 So. CAL. L. REV. 123, 126 (1962).

19. A.B. 2614, 1961 Regular Session.

20. For an amusing illustration of the intensity of public reaction to the issue of abortion, see *Abortion Hearing, A.B. 2614, before the California Assembly Interim Committee on Criminal Procedure*, Dec. 17-18, 1962, at 75-84.

21. For example, Beilenson, *The Therapeutic Abortion Act: A Small Measure of Humanity*, 41 L.A. BAR BULL. 316 (1966); Sands, *The Therapeutic Abortion Act: An Answer to the Opposition*, 13 U.C.L.A. L. REV. 285 (1966); Symposium, *Abortion and the Law*, 17 WEST. RES. L. REV. 366 (1965); Leavy & Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 So. CAL. L. REV. 123 (1962). But see Bryne, *A Critical Look at Legalized Abortion*, 41 L.A. BAR BULL. 320 (1966); Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 173, 395 (1960-61).

22. *Leavy & Charles* at 1 n.2.

23. *Abortion Hearing, A.B. 2614, before the California Assembly Interim Committee on Criminal Procedure*, Dec. 17-18, 1962.

24. *The Humane Abortion Act (A.B. 2310), California Assembly Interim Committee on Criminal Procedure*, July 20, 1964, Sept. 29, 1964.

killed in the Assembly Ways and Means Committee.[25]

The controversy reached its peak in 1967 with the introduction of S.B. 462, the Therapeutic Abortion Act, authored by Senator Anthony C. Beilenson.[26] The Act authorizes licensed physicians and surgeons to perform or assist in the performance of an abortion if the abortion takes place in a hospital accredited by the Joint Commission on Accreditation of Hospitals (J.C.A.H.) and the abortion is approved in advance by a committee of the hospital's medical staff, which committee is established and maintained in accordance with standards promulgated by the J.C.A.H.[27] To approve an abortion, the committee must find that "there is a substantial risk that continuation of pregnancy would gravely impair the physical or mental health of the mother"[28] or that "the pregnancy resulted from rape or incest."[29] Under circumstances where the pregnancy has resulted from rape or incest, the Act provides a detailed procedure whereby an application must be submitted to the district attorney attesting to facts establishing the alleged rape or incest. The district attorney shall evaluate the information to determine the existence of probable cause to believe that the pregnancy resulted from rape or incest. If the district attorney determines that no probable cause exists the committee shall not approve the abortion. However, additional procedures are provided for court review of any adverse determination by the district attorney.[30] In no event may the termination of pregnancy be approved after the twentieth week of pregnancy.[31]

After an all-night hearing on April 27-28, the bill was reported out of committee with a "do pass" recommendation.[32] The proposed Act, as reported from committee, also permitted induced abortion when there was substantial risk that "the child would be born with grave physical or mental defects."[33] However, just prior to the Act coming to vote in the 1967 Regular Session, Governor Ronald Reagan publicly announced that he would oppose the bill if it allowed abortion for fetal deformity.[34] Therefore, Senator Beilenson, the bill's author, caused that portion to be deleted by amendment in order to ob-

25. Sands, *The Therapeutic Abortion Act: An Answer to the Opposition,* 13 U.C.L.A. L. REV. 285, 287 (1966).
26. Subsequently contained in CAL. HEALTH AND SAFETY CODE §§25950-25955.5.
27. CAL. HEALTH AND SAFETY CODE §25951.
28. CAL. HEALTH AND SAFETY CODE §25951(c)(1).
29. CAL. HEALTH AND SAFETY CODE §25951(c)(2).
30. CAL. HEALTH AND SAFETY CODE §25952.
31. CAL. HEALTH AND SAFETY CODE §25953.
32. *Leavy & Charles* at 1 n.3.
33. S.B. 462, 1967 Regular Session.
34. Transcript of Governor Reagan's News Conference, May 23, 1967, at 11-12.

tain the Governor's signature.[35] On June 6, 1967, the Act was passed by the Senate by a vote of 21 to 17. The Assembly passed the bill on June 13, 1967, by a vote of 48 to 30, and it was signed by Governor Reagan on June 15, 1967.[36]

In 1969, the California Supreme Court, in *People v. Belous*,[37] held in a 4 to 3 decision that Section 274 of the Penal Code, which permitted abortion only when "necessary to preserve the life" of the pregnant woman, was unconstitutionally vague in the context of current medical practice, thus rendering the pre-1967 California statute invalid.[38] Although the decision was based primarily upon the issue of vagueness, the significance of *Belous* is in its dicta which developed guidelines for future determinations of the constitutionality of abortion legislation. *Belous* has been repeatedly cited as precedent for challenges based upon vagueness, unconstitutional delegation of legislative power, overbreadth, and lack of compelling state interest in the regulation of a woman's fundamental right of privacy to determine whether or not to terminate her pregnancy.[39] Furthermore, the rationale of *Belous* was instrumental in the California Supreme Court's decision in *People v. Barksdale*,[40] invalidating substantial portions of the Therapeutic Abortion Act, and in the United States Supreme Court's opinion striking down all current abortion legislation.

PEOPLE V. BARKSDALE: THE UNCONSTITUTIONALITY OF CALIFORNIA'S THERAPEUTIC ABORTION ACT

On November 22, 1972, five and one-half years after the enactment of the Therapeutic Abortion Act, the California Supreme Court, in *People v. Barksdale*, rendered substantial portions of the Act invalid under both the United States and California Constitutions. The court did not attempt to resolve the question of whether or not a state should or must allow abortion, but adhered to the pattern of analysis adopted in *Belous* and declared the Act unconstitutionally vague.

> "The requirement of a reasonable degree of certainty in legislation, especially in criminal law, is a well established element of the guarantee of due process of law. 'No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State

35. *Leavy & Charles* at 3, 4 n.15.
36. CAL. STATS. 1967, c. 327, §1, at 1521; *Leavy & Charles* at 1 n.3.
37. 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).
38. See generally Leavy, *Current Developments in the Law of Abortion, 1969—A Landmark Year*, 45 L.A. BAR BULL. 11 (1969).
39. See generally Comment, *California's 1967 Therapeutic Abortion Act: Abridging A Fundamental Right to Abortion*, 2 PAC. L.J. 186 (1971).
40. 8 Cal. 3d 320, 503 P.2d 257, 105 Cal. Rptr. 1 (1972).

> commands or forbids . . . "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." ' "[41]

In attacking the requisite certainty of the legislation, the court considered two elements of the statutory requirement that an abortion may not be performed unless there is a substantial risk that the continuation of pregnancy will gravely impair the physical and mental health of the mother. The initial problem is whether such language is sufficiently certain to provide fair notice as to the degree of impairment to health necessary to justify a therapeutic abortion. The court noted two possible degrees of impairment which a pregnant woman might suffer by carrying a pregnancy to term. First, a pregnant woman's health would certainly be "gravely impaired" if death were to result from pregnancy. Statistics verify that there is a significant death rate associated with childbirth. On the other hand, during the early stages of pregnancy, a hospital abortion is four to six times safer for the woman than carrying the pregnancy to term.[42] Secondly, a pregnancy with only normal demands on a woman's body would be deemed by many persons of common intelligence to impose a grave impairment upon the woman's health.[43] The court took judicial notice that a woman not desiring to continue a pregnancy is subject, for psychological reasons, to greater impairment of health than a happy pregnant woman.[44] Is such psychological impairment of health the requisite increased impairment contemplated by the legislature, or is the statute intended to require some further, undefined mathematical measure of diminished health?

The court determined that whatever the nature of impairment intended by the legislature, the degree thereof which renders it "grave" must be resolved in light of the fact that the statute deals with a woman's health. In view of the numerous variables which might affect a woman's health during pregnancy and the fact that persons of common intelligence will agree that the slightest impairment of health is of grave concern while others of like intelligence may demand

41. People v. Belous, 71 Cal. 2d at 960, 458 P.2d at 197, 80 Cal. Rptr. at 357, *citing from* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1938); Connally v. General Const. Co., 269 U.S. 385, 391 (1925); People v. McCaughan, 49 Cal. 2d 409, 414, 317 P.2d 974, 977 (1957).

42. CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, FOURTH ANNUAL REPORT ON THE IMPLEMENTATION OF THE CALIFORNIA THERAPEUTIC ABORTION ACT at 3 (1971); see also People v. Belous, 71 Cal. 2d at 965, 458 P.2d at 200-01, 80 Cal. Rptr. at 360-61.

43. People v. Barksdale, 8 Cal. 3d at 329, 503 P.2d at 263, 105 Cal. Rptr. at 7.

44. *Id.*

considerably more, the court concluded that it was unable to ascertain within the meaning of the statute either the nature of the diminished health required or that degree of diminution which renders health gravely impaired. Thus, on its face, the requirement was deemed to be impermissibly vague.[45]

The court then considered the claim that the term "mental health," as employed in the statute, creates impermissible ambiguities. As defined by the Act, mental health means "mental illness to the extent that the woman is dangerous to herself or to the person or property of others, or is in need of supervision or restraint."[46] The court was concerned with the obvious error in defining mental health as its own antithesis.

> When Section 25954 is read with the appropriate portions of Section 25951, one discovers that abortions may be approved if there is a substantial risk that continuance of the pregnancy would gravely impair the mental illness of the woman to the extent that she is dangerous to herself or to the person or property of others or is in need of supervision or restraint. The clear dictate of this provision is that the woman must already be dangerous or in need of supervision or restraint, and in danger of further aggravation of her condition. Such a construction, however, is probably not consistent with the legislative intent. It is more likely that the Legislature did not intend to require any preexisting derangement, but the wording of the provision clearly states that it is mental illness, not mental health, which must be worsened.[47]

The court concluded that, unquestionably, men of both common and uncommon intelligence are forced to speculate as to the meaning of this provision. In support of this conclusion, the court produced evidence that the language establishing the permissible medical indications for abortion is so vague that the medical profession has made widespread complaints regarding the statute's uncertainty.[48] Furthermore, 98.2 percent of the 63,872 abortions approved in 1970 were approved for reasons of mental health.[49] Serious doubt must exist that such a considerable number of pregnant women could have been committed to a mental institution. The court remarked that "either pregnancy carries risks to mental health beyond those ever imagined, or legal writers and members of therapeutic abortion com-

45. *Id.* at 329-30, 503 P.2d at 264, 105 Cal. Rptr. at 8.
46. CAL. HEALTH AND SAFETY CODE §25954.
47. 8 Cal. 3d at 330, 503 P.2d at 264, 105 Cal. Rptr. at 8.
48. *Id.* at 331, 503 P.2d at 265, 105 Cal. Rptr. at 9, *citing from* Final Report of the Ad Hoc Committee on Therapeutic Abortions of the California Medical Association House of Delegates, at 5 (1970).
49. 8 Cal. 3d at 331, 503 P.2d at 265, 105 Cal. Rptr. at 9.

mittees, two groups we assume to be of at least common intelligence, have been forced to guess at the meaning of this provision and have reached radically different interpretations."[50] Based upon these facts, coupled with statistics which show that the medical criteria of the Act have been construed and applied differently in various regions of the state, the court concluded that the language establishing the medical criteria upon which abortions may be approved is not sufficiently certain to meet minimal standards of due process guaranteed by the United States and California Constitutions.[51]

Having concluded that the medical criteria for abortion approval was impermissibly vague, the court was faced with holding the entire Act invalid or preserving it in part by excising the invalid portions. The test of severability is whether the invalid parts of the statute can be severed from the otherwise valid parts without destroying the statutory scheme or the utility of the remaining provisions.[52] The court noted that the manifest legislative intent embodied in the Act was to provide for abortions under an array of circumstances when they afford an appropriate medical remedy. To invalidate the whole Act or only that portion which specifies the medical criteria, and thereby authorize abortions only when pregnancy resulted from rape or incest, would clearly thwart the fundamental legislative purpose. Therefore, the court invalidated both the medical criteria and factual criteria (that the pregnancy resulted from rape or incest) upon which to justify approval of an abortion.[53]

Having struck down all medical and factual criteria, the court concluded that the provisions of the Act establishing hospital medical committees and procedures regarding district attorney involvement in cases concerning rape and incest must fail. Such provisions have no function independent of the criteria which the court invalidated. Therefore, without valid criteria for approval, the statutory scheme requiring a mechanism for such approval is destroyed and the procedures lose their viability.[54]

In evaluating the remaining sections of the Act, the court concluded that the provisions proscribing the performance of abortions after the twentieth week of pregnancy and requiring that abortions be per-

50. *Id.*
51. *Id.* at 332, 503 P.2d at 266, 105 Cal. Rptr. at 10.
52. *Id.* at 333, 503 P.2d at 267, 105 Cal. Rptr. at 11, *citing from* Dillon v. Municipal Court, 4 Cal. 3d 860, 872, 484 P.2d 945, 953, 94 Cal. Rptr. 777, 785 (1971); Blumenthal v. Board of Medical Examiners, 57 Cal. 2d 228, 238, 368 P.2d 101, 106, 18 Cal. Rptr. 501, 506 (1962).
53. 8 Cal. 3d at 333-34, 503 P.2d at 267, 105 Cal. Rptr. at 11.
54. *Id.*

formed by licensed physicians and surgeons in hospitals accredited by the Joint Commission on Accreditation of Hospitals were distinct from the invalid approval standards and severable therefrom. Such regulations were deemed to have a valid basis for state regulation. The court recognized that the legislature has the power to determine the point at which a fetus becomes viable, and thus the twenty-week limitation was considered a proper exercise of legislative power.[55] The requirement that abortions be performed only by licensed physicians and surgeons is consistent with the State policy of excluding unlicensed persons from the practice of medicine.[56] The provision regarding hospital accreditation by the J.C.A.H. was deemed to be reliance upon the standards of a professional accrediting body, and not an unconstitutional delegation of governmental power, since it is neither arbitrary, unreasonable, nor discriminatory. Furthermore, the requirement serves a valid state interest in guaranteeing (through risk of loss of accreditation) that a hospital will not allow its facilities for the performance of abortions to deteriorate. Contentions that the J.C.A.H. requirement has produced economic and geographic discrimination were dismissed due to lack of supporting evidence.[57]

The court's discussion of vagueness in the Therapeutic Abortion Act demonstrates the difficulty presented to physicians seeking to provide the highest standards of medical care while remaining within the letter of the law. However, the dissenting opinion in *Barksdale* fairly points out weaknesses in the majority's legal analysis. Justice Burke, writing for the dissent, noted a cardinal principal of law: "[A] statute is presumed to be constitutional unless its unconstitutionality clearly and unmistakably appears; all intendments favor its validity and mere doubt is not a sufficient reason to declare it invalid."[58] The United States and California Constitutions do not require impossible standards of statutory certainty. All that is required is that the language conveys sufficiently definite warning as to proscribed conduct when measured by common understanding and practices.[59] Although the majority concluded that the words "gravely impair" are impermissibly vague, furnishing an inadequate standard to guide those who must interpret and follow the Act's provisions, that same majority in *People*

55. *Id.* at 334-35, 503 P.2d at 267-68, 105 Cal. Rptr. at 11-12.
56. *Id.*
57. *Id.* at 335-38, 503 P.2d at 268-70, 105 Cal. Rptr. at 12-14.
58. *In re* Ricky H., 2 Cal. 3d 513, 519, 468 P.2d 204, 206, 86 Cal. Rptr. 76, 78 (1970); *In re* Dennis M., 70 Cal. 2d 444, 453, 450 P.2d 296, 301, 75 Cal. Rptr. 1, 6 (1969).
59. Roth v. United States, 354 U.S. 476, 491 (1957); United States v. Petrillo, 332 U.S. 1, 7-8 (1946).

v. Belous acknowledged the validity of the Act in this regard: "The further criteria for determining whether an abortion is permissible is the pregnant woman's physical and mental health. Thus, *the test is a medical one*, whether the pregnant woman's physical and mental health would be furthered by abortion or by bearing the child to term, and *the assessment does not involve considerations beyond medical competence.*"[60] A determination whether or not to approve termination of pregnancy, based upon a physician's best medical judgment, would be no different than the routine analysis which every physician must make in deciding whether or not a particular risk justifies a contemplated operative procedure.[61]

Standards are not impermissibly vague provided their meaning can be objectively ascertained by reference to the common experience of mankind.[62] A statute cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.[63] Justice Burke argued that under a reasonable, common sense construction of the statutory language, the Therapeutic Abortion Act could be interpreted as requiring an actual (not imaginary or conjectural) medical risk of serious harm over and above the risk ordinarily associated with childbirth. Otherwise, an abortion could be permitted in every case, and the Act's provisions would be rendered superfluous.[64] The dissent's rationale appears to be supported by the United States Supreme Court which, in *United States v. Vuitch*,[65] held that a similar statute prohibiting abortion "unless done as necessary for the preservation of the mother's life or health" was not unconstitutionally vague. Stating that the word "health" was not so imprecise and did not have so uncertain a meaning as to fail to inform the defendant of the charge against him, the Court construed the statutory language to include both physical and mental health of the patient. The statute presented no problem of vagueness since whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are called upon to make routinely whenever surgery is considered.[66] On the other hand, there have been numerous opinions which have agreed with the *Barksdale* rationale in declaring restrictive

60. 71 Cal. 2d at 971, 458 P.2d at 205, 80 Cal. Rptr. at 365 (emphasis added).
61. People v. Barksdale, 8 Cal. 3d at 342, 503 P.2d at 273, 105 Cal. Rptr. at 17 (Burke, J., dissenting).
62. People v. Daniels, 71 Cal. 2d 1119, 1129, 459 P.2d 225, 231, 80 Cal. Rptr. 897, 903 (1969). See also, People v. Victor, 62 Cal. 2d 280, 298-300, 398 P.2d 391, 402-03, 42 Cal. Rptr. 199, 210-11 (1965).
63. People v. Howard, 70 Cal. 2d 618, 624, 451 P.2d 401, 404, 75 Cal. Rptr. 761, 764 (1969).
64. 8 Cal. 3d at 342, 503 P.2d at 273, 105 Cal. Rptr. at 17 (Burke, J., dissenting).
65. 402 U.S. 62 (1971).
66. *Id.* at 71-73.

abortion statutes void for vagueness.[67]

Regarding the majority's alternative vagueness theory (the treatment of the Act's definition of mental health as mental illness), Justice Burke notes that "it is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend."[68] In its opinion the majority conceded that "[i]t is more likely that the Legislature did not intend to require any preexisting derangement . . . ."[69] Furthermore, the majority recognized that it "appears that rather than defining 'mental health' the language purports to define what is deemed to consitute *impaired* mental health."[70] The above interpretation appears to be a reasonable construction of the California Legislature's intent in enacting the Therapeutic Abortion Act. Justice Burke remarked:

> There is nothing in the Therapeutic Abortion Act . . . suggesting that therapeutic abortions should be available only to mentally ill mothers. The entire thrust of the Act is to *prevent* mental and physical illness which threatens to arise from continued pregnancy. The evident purpose of Health and Safety Code Section 25954 was, as the majority themselves acknowledge, to define more precisely the type of risk which would justify an abortion, namely, the risk that the woman might become, through continued pregnancy, dangerous to herself or others or in need of supervision or restraint.
>
> As stated in one of the articles cited by the majority, "In one sense, this qualifying section [25954] may just restate the grounds for a mental health abortion, i.e., that there be a substantial risk of grave impairment of mental health. It may have been the legislature's way of saying 'and we really mean it' . . . . [I]t is incumbent on the doctors to recognize that the legislature intended to restrict abortions for mental health to serious cases."[71]

Thus the dissent concluded that the language of the Act is not unconstitutionally vague and would have upheld the Act in its entirety.[72]

The practical effect of the majority's opinion in *Barksdale* is to strike down the major protective devices of the Act. Having been ju-

---

67. See Roe v. Wade, 314 F. Supp. 1217, 1223 (N.D. Tex. 1970); Doe v. Scott, 321 F. Supp. 1385, 1388 (N.D. Ill. 1971).

68. 8 Cal. 3d at 343, 503 P.2d at 274, 105 Cal. Rptr. at 18 (Burke, J., dissenting), *citing from* Bruce v. Gregory, 65 Cal. 2d 666, 673, 423 P.2d 193, 198, 56 Cal. Rptr. 265, 270 (1967). See also *In re* Haines, 195 Cal. 605, 613, 234 P. 883, 886 (1925).

69. 8 Cal. 3d at 330, 503 P.2d at 264, 105 Cal. Rptr. at 8.

70. *Id.* at 326, 503 P.2d at 261, 105 Cal. Rptr. at 5 (emphasis added).

71. *Id.* at 343-44, 503 P.2d at 274, 105 Cal. Rptr. at 18 (Burke, J., dissenting), *citing from Leavy & Charles* at 8.

72. *Id.* at 346, 503 P.2d at 276, 105 Cal. Rptr. at 20 (Burke, J., dissenting).

dicially restructured, the Therapeutic Abortion Act now provides that a licensed physician or surgeon may perform an abortion if (1) the abortion takes place in a hospital accredited by the J.C.A.H. and (2) the woman has not exceeded the twentieth week of pregnancy. In essence, California's abortion legislation permits abortion virtually on demand. No established medical criteria need be satisfied, and no secondary approval need be obtained. Justice Burke, in his dissent, suggests that by invalidating the major portions of the Act the majority has adopted for California a policy of abortion at the will of the mother, a concept expressly rejected by the legislature.[73]

ROE V. WADE AND DOE V. BOLTON: THE DEMISE OF RESTRICTIVE ABORTION LEGISLATION

Had the California Supreme Court, in *Barksdale*, in fact adopted a policy contrary to legislative intent, such a result was capable of being remedied by a careful redrafting of the Therapeutic Abortion Act to comply with the constitutional requirement of due process. However, exactly two months after the *Barksdale* decision, and prior to any legislative action, the United States Supreme Court, in a 7-2 decision, rendered two opinions which in effect strike down all current state abortion statutes. If the California Legislature had intended to redraft its abortion legislation to preclude abortions on demand, the problem is now more acute. The United States Supreme Court chose to void current abortion legislation not on account of vagueness, but upon the basis of unconstitutional infringement upon a woman's right to privacy. Thus the legislature is now faced not only with satisfying the California Supreme Court's interpretation of statutory vagueness, but with establishing a sufficiently compelling state interest to justify infringement upon a woman's right to privacy in matters of terminating her pregnancy.

A. Roe v. Wade

The case of *Roe v. Wade*[74] presented a constitutional challenge to Texas' restrictive abortion statute, which, in essence, prohibited abortions except those "procured or attempted by medical advice for the purpose of saving the life of the mother."[75] Such statutory language

73. *Id.*
74. 93 S. Ct. 705 (1973).
75. TEX. PENAL CODE arts. 1191-1194, 1196 (1961). Note the similarity of Texas' statutes to California's pre-1967 abortion statute, CAL. PEN. CODE §274, invalidated by *People v. Belous*, discussed *supra*.

is representative of abortion legislation in existence in a majority of the states.

After an analysis of standing and an extensive historical survey of abortion, the Court reached the merits of the case.

1. Woman's Right of Privacy

The principal thrust of Roe's (a pseudonym) attack was that the Texas abortion statute improperly invades a right, possessed by a pregnant woman, to choose to terminate her pregnancy. Although the United States Constitution does not explicitly mention a right of privacy, there can be no doubt after *Griswold v. Connecticut*[76] that the United States Supreme Court recognizes a constitutionally protected zone of privacy in matters of family and sex, founded on either the ninth amendment,[77] the "penumbras" of the first, third, fourth, fifth, and ninth amendments as incorporated by the fourteenth amendment,[78] or the concept of liberty protected by the fourteenth amendment alone.[79] The Court cited a substantial list of additional cases which have recognized that a right of personal privacy does exist under the Constitution.[80] Noting the many forms of detriment (physical, mental, and social) imposed upon a pregnant woman by denying her the choice to obtain an abortion, the Court concluded that this right of privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[81]

Counsel and *Amici* for Roe argued that this right of a woman's privacy is absolute and, therefore, she is entitled to terminate her pregnancy at whatever time, in whatever manner, and for whatever reason she alone chooses. On the other hand, Texas argued that the legislature's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest to justify

76. 381 U.S 479 (1965).
77. *Id.* at 486-99 (Goldberg, J., concurring).
78. *Id.* at 484.
79. *Id.* at 499-502 (Harlan, J., concurring).
80. For example, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969); N.A.A.C.P. v. Alabama, 357 U.S. 449, 462 (1958).
81. Roe v. Wade, 93 S. Ct. at 727. *People v. Belous*, discussed *supra*, was the first in a series of cases which held that the concept of personal liberty is broad enough to include the abortion decision. See also Abele v. Markle, 342 F. Supp. 800, 801 (D. Conn. 1972); Roe v. Wade, 314 F. Supp. 1217, 1221-22 (N.D. Tex. 1970); Babbitz v. McCann, 310 F. Supp. 293, 298-302 (E.D. Wisc. 1970). Several courts have disagreed under the rationale that "the legal conclusion in *Griswold* as to the right of individuals to determine . . . whether or not to enter into the processes of procreation cannot be extended to cover those situations where, voluntarily or involuntarily, the preliminaries have ended and new life has begun." Steinberg v. Brown, 321 F. Supp. 741, 746 (N.D. Ohio 1970). See also Corkey v. Edwards, 322 F. Supp. 1248, 1251 (W.D. N.C. 1971); Rosen v. Louisiana State Board of Medical Examiners, 318 F. Supp. 1217, 1222-23 (E.D. La. 1970).

infringement on that right. The Court was unable to fully agree with either formulation.

The Court noted that a pregnant woman is not isolated in her privacy in that she carries an embryo and later in development a fetus. This situation is inherently different from other recognized matters of privacy such as marital intimacy, possession of obscene material, interracial marriage, and matters of sex, because any right she possesses must be measured against rights held by the unborn child. Thus the Court concluded that the right of privacy includes the ability to make a decision to have an abortion, but that such right is not absolute and must be considered against important state interests in regulation of abortion.[82] The Court then discussed the type and degree of state interests required before state regulation could occur.

2. *State Interests in Restricting Abortion*

a. *Protection of a Woman's Morals*

It is argued that restrictive abortion legislation serves an interest of protecting women's morals. This justification apparently proceeds from the premise that if abortion is prohibited, the threat of having to bear a child will deter a woman from sexual intercourse. Such an interest would appear to be in opposition to the *Griswold* premise that a state may not invade a woman's right to privacy in matters of family and sex.[83] The Court in *Roe v. Wade* noted that Texas did not advance this justification and that no court appears to have taken the argument seriously.[84]

b. *Protection of a Woman's Life and Health*

A state may have a compelling interest in the protection of the life and health of pregnant women from the hazardous risks of the abortion procedure. In light of medical and surgical science in the mid-nineteenth century, when abortion statutes were first adopted, the direct interference with a woman's constitutional rights was warranted by considerations of the woman's health. However, with the advent of modern medical techniques it is now recognized that it is safer for a woman to have a hospital therapeutic abortion during the first trimester of pregnancy than to carry a child for term.[85] Further-

82. 93 S. Ct. at 727.
83. Abele v. Markle, 342 F. Supp. 800, 809 (D. Conn. 1972) (Newman, J., concurring).
84. 93 S. Ct. at 724.
85. *Id.* at 725; People v. Belous, 71 Cal. 2d 954, 965, 458 P.2d 194, 200-01, 80 Cal. Rptr. 354, 360-61 (1969).

more, it appears that the inevitable effect of restrictive abortion legislation has been directly contrary to the purpose of protection of life and health. While abortion properly performed during early pregnancy presents minimal danger to women, those women who have resorted to criminal abortion due to lack of a legal medical alternative have subjected themselves to grave risks of harm. Criminal abortions have been cited as the most common cause of maternal deaths in California.[86] The validity of a law when enacted does not resolve the issue of its validity today.[87] Therefore, although protecting a woman's life and health may well have provided a compelling state interest in the nineteenth century, such protection will not support a compelling interest today, when a woman's life is exposed to less risk by abortion than by childbirth (at least when the abortion is performed in the first trimester of pregnancy).[88]

The United States Supreme Court concluded that, although a state may have no compelling interest in the protection of a woman's health during *early* abortions, important state interests in the area of health and medical standards do remain. A state has a legitimate interest in requiring that abortion, like any other medical procedure, be performed under circumstances that assure maximum safety for the patient. The prevalence of high mortality rates at illegal "abortion mills" strengthens a state's interest in regulating the condition under which abortions may be performed. Also, a state retains a definite interest in protecting a woman's health and safety when an abortion is proposed at a late stage of pregnancy since the risk to a woman's health increases as pregnancy approaches term.[89]

With respect to a state interest in protection of health, the Court concluded that the "compelling point," in light of present medical knowledge, is at approximately the end of the first trimester.[90] From and after this point, a state may regulate the abortion procedure to the extent that the regulation reasonably relates to "preservation and protection of maternal health."[91] For the period of pregnancy prior to

86. Fox, *Abortion Deaths in California*, 98 Am. J. Obst. & Gynec. 645, 650 (1967); Ziff, *Recent Abortion Law Reforms (Or Much Ado About Nothing)*, 60 J. Crim. L.C. & P.S. 3, 6 (1969).

87. People v. Belous, 71 Cal. 2d at 967, 458 P.2d at 202, 80 Cal. Rptr. at 362.

88. Abele v. Markle, 342 F. Supp. 800, 809 (D. Conn. 1972) (Newman, J., concurring).

89. 93 S. Ct. at 725.

90. The Court's conclusion was based upon substantial medical evidence that until the end of the first trimester of pregnancy mortality in abortion is less than mortality in normal childbirth. *Id.* at 732.

91. Examples of permissible state regulation in the protection of maternal health are requirements as to the qualifications of the person who is to perform the abortion, the licensure of that person, qualifications of the facility in which the procedure is to be performed—whether it must be a hospital or may be a clinic or other place of less-than-hospital status, and the licensure of that facility. *Id.*

this compelling point, the attending physician, in consultation with his patient, is free to determine, without regulation by a state, that in his medical judgment the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the state.[92]

c. Protection of the Unborn Child

The third, and most significant, state interest is the protection of the life of an unborn child. This interest may be broken down into two categories. First, it is contended that a fetus is a "person" within the meaning of the fourteenth amendment of the United States Constitution. If such "personhood" were established, a fetus would be subject to equal protection of the law, and the fetus' right to life would be specifically guaranteed by the Constitution.[93] Second, it is urged that, apart from the fourteenth amendment, a state has a compelling interest in the protection of prenatal life, from and after conception. Justice Blackmun, in authoring the Court's opinion, presented a very limited analysis of the theories justifying the recognition of rights in the unborn fetus. For the purposes of this Comment, an in depth analysis would appear to be appropriate.

It is argued that statutes and case law have equated the embryo or fetus with a living child. The rights of a fetus, at various stages of development, have been recognized in property, tort, and criminal law.[94] At common law, the law of property recognized the rights of the unborn child from the moment of conception for all purposes which affected the property rights of that "child." As early as 1795, an English court interpreted the ordinary meaning of "children" in a will to include an unborn child.[95] Furthermore, courts have recognized that an unborn child may be an actual income recipient[96] and a tenant in common with his mother.[97] The unborn child has been considered an existing person at the time of his father's death and a beneficiary entitled to participate in any damages recovered in an action for the wrongful death of his father.[98] California has codified

92. 93 S. Ct. at 732.
93. *Id.* at 728.
94. For an extensive analysis of the rights of an unborn child see Byrne, *The Legal Rights of the Unborn Child*, 41 L.A. BAR. BULL. 24 (1965); Louisell, *Abortion, The Practice of Medicine and the Due Process of Law*, 16 U.C.L.A. L. REV. 233 (1969); Noonan, *The Constitutionality of the Regulation of Abortion*, 21 HAST. L.J. 51 (1969); Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349 (1971).
95. Doe v. Clarke, 126 Eng. Rep. 617, 618 (C.P. 1795).
96. Industrial Trust Co. v. Wilson, 61 R.I. 169, 200 A. 467, 475-76 (1938).
97. Biggs v. McCarty, 86 Ind. 352, 363, 367 (1882).
98. Herndon v. St. Louis & S.F. R. Co., 37 Okla. 256, 128 P. 727, 729-30 (1912).

the common law rule that an unborn child is recognized as a living heir for the purposes of taking an estate, whether by devise or by the statutes of descent. Section 123 of the Probate Code states that "a child conceived before but born after testator's death, or any other period when a disposition to a class vests in right or in possesssion, takes if answering to the description of the class." Section 250 of the Probate Code provides that "a posthumous child is considered as living at the death of the parent." Section 255 of the Probate Code states that "every illegitimate child, whether born or conceived but unborn, . . . is an heir of his mother." It should be noted, however, that such rules are normally invoked only in behalf of a child who is born alive and thus is capable of possessing the property himself.

Developments in the law of torts have also extended protection to the unborn child. At common law, an unborn child was considered a part of its mother and therefore could not recover for prenatal injury since the mother was the only person considered to have been injured.[99] However, California Civil Code Section 29 provides that a child conceived, but not yet born, is deemed an existing person, so far as may be necessary for protection of its interests in the event of its subsequent birth. In *Scott v. McPheeters*, the court determined that Section 29 was based upon the conclusion that an unborn child is a human being separate and distinct from its mother; such conclusion being based not upon a fiction of law but upon an established fact recognized by science and anyone of understanding. Thus the court permitted a cause of action brought by the mother as guardian *ad litem* for injuries sustained by the child prior to its birth.[100] Since 1946, the law of torts has generally allowed recovery for prenatal injury and wrongful death as a consequence of prenatal injuries. Many of these cases have held by way of dictum that recovery is limited to cases in which the fetus was viable at the time of injury; however, when actually faced with the issue, almost all jurisdictions have allowed recovery even though the injury occurred during the early weeks of pregnancy when the child was neither viable nor quick.[101]

In the area of parental support for children, the California Penal Code recognizes rights of the unborn child. Section 270 specifies liability of a father for the support of his children. The section provides that "a child conceived but not yet born is to be deemed an ex-

99. Dietrich v. Northampton, 138 Mass. 14, 17 (1884).
100. 33 Cal. App. 2d 629, 634, 92 P.2d 678, 681 (1939).
101. W. PROSSER, THE LAW OF TORTS 337 (4th ed. 1971); see also Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696, 698 (1953); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497, 504 (1960); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93, 96 (1960). See generally Annot., 15 A.L.R.3d 992 (1967).

isting person" for purposes of this section. In *People v. Yates,* the court allowed a cause of action on behalf of a fetus, five months in gestation, to obtain support in the form of prenatal care for the mother.[102] Furthermore, in *Kyne v. Kyne,* the court held that Section 196a of the Civil Code, which specifies liability for support of an illegitimate child, read together with Section 29 of the Civil Code, confers a right on an unborn child through a guardian *ad litem* to compel the right to support conferred by the code.[103]

In matters of criminal law, courts have also recognized the existence of the unborn child. In *People v. Chavez,* the court held that a child in the process of being born is a human being within the meaning of Penal Code Section 187, California's murder statute.[104] The court further suggested that a viable unborn child could be the subject of homicide. The court explained that there is no sound reason why an unborn child should not be considered a human being when it has reached the stage of development where it is capable of living an independent life as a separate being and where in the natural course of events it will so live if given normal and reasonable care.[105] However, in *Keeler v. Superior Court,* the California Supreme Court in a review of common law precedents concluded that an infant could not be the subject of homicide unless it had first been born alive. Therefore, the court declined to interpret Section 187 of the Penal Code to include a fetus in the category of human beings.[106] In reaction to the *Keeler* decision, the California Legislature amended Section 187 to provide that murder is the unlawful killing of a human being *or* a fetus, except where the act which results in the death of the fetus complies with the Therapeutic Abortion Act.[107] Sections 3705 and 3706 of the Penal Code, which provide for suspension of the execution of a pregnant woman, also appear to reflect an interest in the unborn child by delaying execution of judgment until the woman is no longer pregnant.

Additional cases may be cited for the proposition that where the life of a fetus is in balance with some lesser interest of the parent, the rights of the fetus have been preferred. In *Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson,*[108] a pregnant woman, 32 weeks in gestation, asserted her constitutional right to religious beliefs in an effort to avoid

102. 114 Cal. App. 782, 787-88, 298 P. 961, 963 (1931).
103. 38 Cal. App. 2d 122, 126-28, 100 P.2d 806, 809 (1940).
104. 77 Cal. App. 2d 621, 176 P.2d 92 (1947).
105. *Id.* at 626, 176 P.2d at 94.
106. 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970).
107. CAL. STATS. 1970, c. 1311, §1, at 2440. See generally Comment, *Is the Intentional Killing of an Unborn Child Homicide? California's Law to Punish the Willful Killing of a Fetus,* 2 PAC. L.J. 170 (1971).
108. 42 N.J. 421, 201 A.2d 537 (1964).

blood transfusions necessary to save the life of her unborn child. If a fetus' rights are subordinate to those of its parents, one might have expected the court to conclude that the mother's fundamental right to practice her religion outweighed the fetus' right to life. The court determined, however, that the unborn child was entitled to the law's protection and allowed the hospital to force the mother to receive blood in order to save the life of the unborn child.[109] Cases involving actions in behalf of an unborn fetus to compel a father to provide support through prenatal care of the mother have presented courts with the issue of balancing the interests of the fetus and the civil rights of its parents. Support statutes have been interpreted to confer a right on an unborn child, through a guardian *ad litem*, to compel support and have imposed criminal penalties for failure to so provide.[110] Thus it has been argued that it would be inconsistent for a fetus to have rights to support from its parents, enforceable by a guardian and sanctioned by criminal law, and yet have no right to protection from an abortion. In addition, it would be incongruous that a fetus should be protected by the state from willful harm by a parent when injury would be inflicted indirectly, by refusal to permit blood transfusions, but not when death is inflicted directly by abortion.[111]

In view of the preceding statutes and cases which have recognized rights of a fetus, it has been argued that, although a fetus is not expressly a "person" within the United States Contitution, the fetus has in essence been granted rights of personhood and therefore is entitled to equal protection of the law and the right to life guaranteed by the Constitution. In *Steinberg v. Brown*, a federal district court concluded that there is authority for the proposition that human life commences at the moment of conception. The court noted that new life having commenced, the constitutional protections found in the fourteenth amendment require the state to safeguard it.[112] Furthermore, at least one state, Ohio, has recognized the fetus as a person within the meaning of its constitution.[113]

---

109. 201 A.2d at 538; see also Application of President and Directors of Georgetown College, 331 F.2d 1000, 1008 (D.C. Cir. 1964).

110. See text accompanying notes 102-03 *supra*.

111. Noonan, *The Constitutionality of the Regulation of Abortion*, 21 HAST. L.J. 51, 58 (1969).

112. 321 F. Supp. 741, 746, 747 (N.D. Ohio 1970).

113. Article I, Section 16 of the Ohio Constitution requires that "all courts be open, and every person, for an injury done him in his land, goods, person, or reputation, have a remedy by due course of law, and have justice administered without denial or delay." The Supreme Court of Ohio held that an unborn viable fetus, capable of existence independent of its mother, is a person within the meaning of Article I, Section 16 and subsequent to his birth may maintain an action to recover damages for prenatal injury. Williams v. Marion Rapid Transit, 152 Ohio St. 114, 87 N.E.2d 334 (1949).

Notwithstanding such challenges, the Court, in *Roe v. Wade*, concluded that the word "person" as used in the fourteenth amendment does not include the unborn.[114] If the state argues that a fetus is entitled to protection, it faces a dilemma. In no state are all abortions prohibited. Despite broad proscriptions, all jurisdictions recognize the exception that the pregnant woman's right to life takes precedent over the interest of the unborn child. If the fetus is a person who is not to be deprived of life without due process of law, such exceptions would appear to be contrary to the command of the fourteenth amendment. Noting that the Constitution does not actually define "person," the Court examined its various applications within the Constitution. In nearly all instances, the use of the word is such that it has application only postnatally. These observations, in conjunction with a consideration of common law concepts of abortion, were sufficient to persuade the Court that a fetus is not a person within the meaning of the fourteenth amendment and therefore is not specifically guaranteed the right to life.[115]

It is urged that, apart from the fourteenth amendment, the aforementioned statutes and case law recognize a compelling state interest in the protection of life of an unborn fetus based upon the theory that human life begins at conception or becomes present at some point during pregnancy. The Court noted, however, that perfection of the interests recognized in the above instances are generally contingent upon live birth or actually reflect the interests of the parents.[116] Thus in property law the rights of an unborn child are a mere expectancy contingent upon the child's birth and capacity to hold property. Such rights also appear to reflect an interest in protecting the expectations of a donor. Cases which equate a fetus with a live person for purposes of tort recovery arguably have no connection with the fetus' right to life, but merely recognize a right of recovery (provided the child is born alive) as compensation for disabilities caused by the acts of another. In jurisdictions which recognize a parents' cause of action for the loss of an unborn child, it is generally the parents' interest which the law recognizes.[117] In support cases, where the fetus has been allowed to assert rights before birth, it is the prospective mother or the parents who are bringing the action. Thus it appears to be their interest that the law protects. At most, such statutes and cases represent only the *potentiality* of life and have never recognized the

114. Roe v. Wade, 93 S. Ct. 705, 729 (1973).
115. *Id.*
116. *Id.* at 731.
117. *Id.*; People v. Belous, 71 Cal. 2d 954, 968 n.12, 458 P.2d 194, 203 n.12, 80 Cal. Rptr. 354, 363 n.12 (1969).

unborn as a person in the whole sense.[118]

Notwithstanding its characterization of the fetus as mere "potential human life," the Court reiterated its conclusion that a woman's right of privacy encompassing the abortion decision is not absolute and that at some point a state may have a compelling interest in protecting such potential life, an interest substantial enough to justify an infringement upon the woman's right of privacy. Prior decisions disagreed as to when such interest becomes compelling. In *Rosen v. Louisiana State Board of Medical Examiners*, a federal district court determined that the policy of the State of Louisiana was that prenatal life must be afforded the opportunity to develop from conception to natural birth. Therefore, the court concluded that the State had a compelling interest in insisting upon the maintenance of embryonic life from conception, and regardless of what interest the pregnant woman might have in ending the life of the fetus (with the exception of protecting her life), the Louisiana abortion statute resulted in the subordination of such interests to the State's interest of preserving potential life.[119] On the other hand, a federal district court in *Babbitz v. McCann* balanced the relevant interests of the woman and fetus and concluded that when measured against the claimed "rights" of an embryo of four months or less the woman's right to terminate pregnancy transcends the rights of the embryo.[120]

In *Roe v. Wade*, the Supreme Court, noting this wide divergence of beliefs as to when life begins, remarked:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosphy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[121]

In view of this controversy, the Court determined that a state, by adopting a theory that life begins at conception, could not override the rights of the pregnant woman.[122] The Court concluded that a state's interest in protection of potential life grows in substantiality as the pregnancy approaches term and at some point during pregnancy becomes compelling. This point was deemed to be "viability," meaning that stage of fetal development at which the fetus presumably has

118. 93 S. Ct. at 731.
119. 318 F. Supp. 1217, 1223, 1225-26, 1232 (E.D. La. 1970); see also Steinberg v. Brown, 321 F. Supp. 741, 746 (N.D. Ohio 1970); Cheaney v. State of Indiana, 285 N.E.2d 265, 270 (1972).
120. 310 F. Supp. 293, 301 (E.D. Wis. 1970); see also Roe v. Wade, 314 F. Supp. 1217, 1223 (N.D. Tex. 1970).
121. 93 S. Ct. at 730.
122. *Id.*

the capacity of meaningful life outside the mother's womb.[123]

3. *The Court's Conclusions in Roe v. Wade*

In summarizing, the Court divided a woman's pregnancy into three stages, each with corresponding rights and interests.

(1) During the first trimester, a state has no compelling interest in regulating abortion. The abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(2) From the end of the first trimester, a state in promoting its compelling interest in protecting the health of the mother may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(3) From the stage subsequent to viability, a state in promoting its compelling interest in the protection of potential human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. The Court noted that viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.

Finally, the Court provided that a state may define "physician" as used above to mean only a physician currently licensed by such state and may proscribe any abortion by a person who is not a physician as so defined.[124]

B. *Doe v. Bolton*

The case of *Doe v. Bolton*[125] presented a constitutional challenge to Georgia's therapeutic abortion statute, patterned after the American Law Institute's Model Penal Code and similar to California's Therapeutic Abortion Act. The Georgia legislation was attacked on several grounds: undue restriction of the right to personal and marital privacy, vagueness, deprivation of substantive and procedural due process, improper residency requirements, and denial of equal protection. The significance of the Court's opinion involves three of these challenges: vagueness, due process, and equal protection.

1. *Vagueness*

Georgia's therapeutic abortion statute authorizes abortions performed by a licensed physician when "based upon his best clinical judg-

123. *Id.* at 731-32.
124. *Id.* at 732-33.
125. 93 S. Ct. 739 (1973).

ment . . . an abortion is necessary because: (1) a continuation of pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or (2) the fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or (3) the pregnancy resulted from forceable or statutory rape."[126] A federal district court struck down these three alternative requirements under the theory that by limiting the number of reasons for which an abortion may be sought, the State had unduly restricted women's right to privacy. Then, the district court restructured the statute to authorize abortions by a licensed physician when based upon his best clinical judgment an abortion is necessary.[127]

Counsel and *Amici* attacked this statutory language on the grounds that it was vague and insufficient to warn the physician of what conduct was proscribed, that the statute was wholly without objective standards and was subject to diverse interpretation. The Supreme Court concluded that the vagueness argument was without merit due to the Court's prior decision in *United States v. Vuitch.*[128] In *Vuitch,* the Court concluded that a statute proscribing abortions unless "necessary for the preservation of the mother's life or health" presented no problem of vagueness. The Court remarked that "whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered."[129] This conclusion was accepted by the Court in *Doe v. Bolton* which concluded that the medical judgment required in the Georgia statute may be exercised in light of all factors —physical, emotional, psychological, familial, and the woman's age —relevant to the well-being of the patient. All these factors relate to health and allow the physician the room he needs to make his best medical judgment. Furthermore, the Court noted that such a construction operates for the benefit, not the disadvantage, of the pregnant woman.[130] It should be noted that this conclusion is diametrically opposed to the California Supreme Court determination in *People v. Barksdale* which held the California Therapeutic Abortion Act, similar to the Georgia statute, unconstitutionally vague.

2. *Deprivation of Substantive and Procedural Due Process*

Counsel next attacked the three procedural demands of the Georgia

126. GA. CODE ANN. §§26-1201, 26-1202(a) (1972).
127. Doe v. Bolton, 319 F. Supp. 1048, 1056 (N.D. Ga. 1970).
128. 402 U.S. 62 (1971).
129. *Id.* at 72.
130. 93 S. Ct. at 747.

statute: (1) That the abortion be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals;[131] (2) That the procedure be approved by a hospital staff abortion committee;[132] and (3) That the performing physician's judgment be confirmed by the independent examinations of the patient by two other licensed physicians.[133]

a. J.C.A.H. Accreditation

The J.C.A.H. is a private organization formed for the purpose of establishing standards and conducting accreditation programs to afford quality medical care.[134] The Court did not question the integrity or purpose of the organization, yet noted that its accreditation process has to do with hospital standards generally and has no particularized concern with abortion as a medical or surgical procedure. In Georgia, there is no restriction of non-abortion surgery in hospitals not accredited by the J.C.A.H., provided the hospitals have met general State licensing requirements.[135] The Court concluded that the J.C.A.H. accreditation requirement does not withstand constitutional scrutiny because it does not relate to the particular medical problems and dangers of the abortion operation. Citing *Morey v. Doud*,[136] the Court stated that the requirement is not "based on differences that are reasonably related to the purposes of the Act in which it is found."[137] Furthermore, the accreditation requirement is invalid because it fails to exclude the first trimester of pregnancy as required by *Roe v. Wade*.[138]

b. Committee Approval

Counsel attacked the required committee approval procedure on grounds that it refuses a woman access to the committee, thus denying her due process, and that it leaves too much discretion to the committee. The Court dismissed these challenges as being unsubstantiated by evidence and lacking in merit. However, the Court concluded that there is no constitutionally justifiable pertinence in the requirement of ad-

131. GA. CODE ANN. §26-1202(b)(4) (1972).
132. GA. CODE ANN. §26-1202(b)(5) (1972).
133. GA. CODE ANN. §26-1202(b)(3) (1972).
134. Doe v. Bolton, 93 S. Ct. 739, 748 n.12 (1973).
135. *Id.* at 748. But see CAL. ADMIN. CODE tit. 22, §§51207(a)(3), 51207(b), which require J.C.A.H. accreditation as a prerequisite for hospital participation in California's Medi-Cal program, CAL. ADMIN. CODE tit. 22, §50001 *et seq.*
136. 354 U.S. 457, 465 (1957).
137. 93 S. Ct. at 749. But see 50 OPS. ATT'Y GEN. 114 (1967), which concluded that J.C.A.H. accreditation is reasonably related to the objectives of the Therapeutic Abortion Act to maintain high professional standards and guarantee the level of care considered necessary by the statute.
138. Doe v. Bolton, 93 S. Ct. 739, 749 (1973).

vance approval by an abortion committee. The medical judgment as to the necessity for the abortion is already completed by the woman's physician prior to the committee stage and review by a committee once removed from diagnosis is redundant. Furthermore, no other surgical procedure is made subject to committee approval as a matter of Georgia criminal law.[139] The hospital is fully protected by statute and is free not to admit a patient for abortion.[140] A physician or other hospital employee has the right to refrain for moral or religious reasons from participating in the abortion procedure.[141] Thus the Court concluded that the interposition of the hospital abortion committee serves no purpose to either the patient, hospital, or state and must fail as unduly restrictive of the patient's rights and needs already medically delineated by her personal physician.[142]

c. Two-Doctor Concurrence

The Georgia statute required confirmation by two licensed physicians in addition to the recommendation of the pregnant woman's own physician.[143] The Court concluded that such required acquiescence by co-practitioners must fail for two reasons. There is no rational connection between the confirmation and a patient's needs and such a requirement constitutes undue infringement on a physician's right to practice. No other voluntary medical or surgical procedure in Georgia requires confirmation by other physicians. Georgia's statute is expressly based upon the attending physician's "best clinical judgment that abortion is necessary." In licensing a physician a state recognizes that he is capable of exercising acceptable clinical judgment. If he fails, professional censure or deprivation of license are available remedies. Thus the two-doctor concurrence failed as being insufficient to support a compelling state interest.[144]

3. Denial of Equal Protection

Counsel further contended that the Georgia therapeutic abortion statute was violative of equal protection because the J.C.A.H. accreditation requirement produced geographical discrimination in that most of Georgia's counties have no accredited hospitals. The Court concluded that having set aside the J.C.A.H. accreditation, committee ap-

139. *Id.* at 750.
140. GA. CODE ANN. §26-1202(e) (1972).
141. *Id.*; compare CAL. HEALTH AND SAFETY CODE §25955.
142. 93 S. Ct. at 750.
143. GA. CODE ANN. §26-1202(3) (1972).
144. 93 S. Ct. at 750-51.

proval, and two-doctor concurrence requirements, the discrimination argument collapsed and was without merit.[145]

Although not specifically raised by Counsel in *Doe v. Bolton*, the argument has been made that although abortion statutes are non-discriminatory on their face the inevitable effect[146] of restrictive abortion legislation violates the equal protection clause of the fourteenth amendment by economic and geographic discrimination. Proponents of such an attack claim that indigent patients, as contrasted with financially able patients, are victims of irregularities in the administration of hospital abortion procedures. Such a tendency for discrimination was noted in Justice White's concurring opinion in *Griswold v. Connecticut*. In discussing Connecticut's anti-contraceptive statutes, Justice White remarked that "the clear effect of these statutes, as enforced, is to deny disadvantaged citizens . . . without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information . . . ."[147] Although the effect of restrictive abortion statutes may be compared with that of Connecticut's anti-contraceptive statute, attacks based upon denial of equal protection have been dismissed as lacking in merit.[148] For instance, in *Steinberg v. Brown* contentions were made that wealthy persons could shop for more complaisant physicians or travel to remote places where abortion was legal, while poor people could not. The federal district court concluded that, although these contentions had a sound basis in fact, the equal protection clause was not designed to prevent that form of inequality often found in life and in nature, nor could any law be framed to do so. Inequality was not inherent in the language of the statute; it was not caused, nor could it be cured, by either action or inaction on the part of either the state or federal government.[149] Where abortions may be obtained only from licensed physicians and surgeons after psychiatric consultation, the mere fact that physicians and psychiatrists are more accessible to rich people than to poor people, making abortions more available to the wealthy than the indigent, is not a violation of the equal protection clause of the

145. *Id.* at 752.

146. In *Gomillion v. Lightfoot*, the United States Supreme Court held that although an Alabama statue redefining boundaries of the City of Tuskegee was not discriminatory on its face, the "inevitable effect" of the statute in depriving Negro residents of their right to vote in municipal elections was sufficient to raise a cause of action for discrimination in violation of the equal protection clause of the fourteenth amendment. 364 U.S. 339, 341 (1960).

147. 381 U.S. 479, 503 (1965) (White, J., concurring).

148. Steinberg v. Brown, 321 F. Supp. 741, 748 (N.D. Ohio 1970); Doe v. Bolton, 319 F. Supp. 1048, 1056 (N.D. Ga. 1970); Rosen v. Louisiana State Board of Medical Examiners, 318 F. Supp. 1217, 1232 n.19 (E.D. La. 1970).

149. 321 F. Supp. at 748.

fourteenth amendment.[150]

REMNANTS OF THE CALIFORNIA THERAPEUTIC ABORTION ACT

As previously noted, the California Supreme Court in *People v. Barksdale* judicially restructured California's Therapeutic Abortion Act to provide that a licensed physician or surgeon may perform an abortion if (1) the abortion takes place in a hospital which is accredited by the J.C.A.H. and (2) the woman has not exceeded the twentieth week of pregnancy. With the advent of the United States Supreme Court's opinions in *Roe v. Wade* and *Doe v. Bolton,* the Act as restructured appears to have several failings. No longer does the State have an interest in requiring J.C.A.H. hospital accreditation; and, if one is to accept the Court's acknowledgment that viability occurs between twenty-four and twenty-eight weeks, California's restriction of abortion to twenty weeks also appears to fail. It is even questionable, in light of ambiguity[151] in Justice Blackmun's majority opinion, whether California may require that an abortion be performed by a licensed physician or surgeon. Arguably, California may have no criminal sanctions against the unlicensed (criminal) abortionist other than a misdemeanor sanction for practicing medicine without a license.[152]

The California Legislature, by adopting the protective devices of the Therapeutic Abortion Act, appears to have rejected abortion at the will of the pregnant woman. Thus the invalidation of these devices by the United States and California Supreme Courts appears to have created a concept of abortion expressly rejected by the California Legislature. What legal parameters exist for responsive legislation to fill the resulting voids in the Act?

LEGISLATIVE ALTERNATIVES IN RESPONSE TO BARKSDALE, WADE, AND BOLTON

In summarizing the Court's opinion in *Roe v. Wade,* Justice Blackmun set forth a three-stage guideline illustrating the permissible scope of restrictive abortion legislation.[153] The extent to which the California Legislature might respond to the Supreme Court's opinions depends on the flexibility of these guidelines.

A. First Trimester of Pregnancy

The Court determined that the compelling point with respect to a state's interest in protecting the health of the pregnant woman is at

150. 319 F. Supp. at 1056; 318 F. Supp. at 1232 n.19.
151. See text accompanying notes 154-61 *infra.*
152. CAL. BUS. & PROF. CODE §2141.
153. Roe v. Wade, 93 S. Ct. 705, 732 (1973).

approximately the end of the first trimester. For the period prior to this point, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. Only after this point may a state regulate the abortion procedure in matters relating to the protection of maternal health.[154]

Has the Court, in limiting regulations relating to maternal health (including requirements as to the qualifications and licensure of the performer of the abortion) to that period after the end of the first trimester, precluded such regulations prior to that point? The Court expressly stated that, prior to the approximate end of the first trimester, if the decision to terminate pregnancy is reached by the attending physician, *"the judgment may be effectuated by an abortion free of interference by the State."*[155] Such language suggests that during the first trimester a state may impose no requirements as to licensure and qualifications of the person performing the abortion, and thus could have no sanctions against the "criminal" abortionist.

Later in the opinion, however, the Court provides that a state may define "physician," as used in summarizing the opinion, to mean only a physician currently licensed by the state and *"may proscribe any abortion by a person who is not a physician as so defined."*[156] In light of the prior conflicting language of the opinion, did the Court intend that this provision be applicable to all periods of pregnancy or merely to that period after a state's interest in protecting the woman's health becomes compelling? This ambiguity is intensified by an earlier portion of the opinion which examined the historical justifications for continued existence of criminal abortion statutes. In determining that a state has an interest in the performance of abortions under circumstances that insure maximum safety for the patient (including regulations regarding the performing physician and his staff), the Court noted that the prevalance of high mortality rates at illegal "abortion mills" strengthens, rather than weakens, a state's interest in regulating the conditions under which abortions are performed. However, the Court then concluded, "[T]he State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed *at a late stage of pregnancy.*"[157] Does this suggest that in the early stages of pregnancy a state may not specify qualification and licensure requirements of the person performing the abortion?

Clarification of this ambiguity may be obtained by reference to the concurring opinions in *Roe v. Wade.* Justice Stewart stated that the

154. *Id.* at 731-32.
155. *Id.* at 732 (emphasis added).
156. *Id.* at 732-33 (emphasis added).
157. *Id.* at 725 (emphasis added).

interest in protecting the health and safety of the pregnant woman is "amply sufficient to permit a State to regulate abortions as it does others surgical procedures . . . ."[158] Justice Douglas concluded, "There is no doubt that the State may require abortions to be performed by qualified medical personnel. The legitimate objective of preserving the mother's health clearly supports such laws."[159] Yet it may be argued that Justices Stewart and Douglas' apparent support for limiting abortions to those performed by physicians is based upon the interest of protecting maternal health, an interest which the Court concludes does not become compelling until after the end of the first trimester. Thus arguably a state may not proscribe criminal abortions during the first trimester.

It would appear that to so construe the Court's opinion would result in absurd consequences which the Court did not intend. The lack of compelling state interest in the protection of maternal health during the first trimester is based upon the observation that, with the advent of modern *medical* techniques and procedures, abortion during early pregnancy is relatively safe. In contrast, the Court noted the tremendous hazards and high mortality rates of criminal abortions.[160] It appears unlikely that the Court intended to sanction such criminal abortions. Furthermore, the impact upon a woman's privacy, by requiring the performance of abortions by licensed physicians, would appear to be minimal and, therefore, a proper "infringement" on that right.[161] The California Supreme Court in *People v. Barksdale* upheld such a requirement as consistent with California's policy of excluding unlicensed persons from the practice of medicine.[162]

Thus a legislative requirement that all abortions be performed by a licensed physician or surgeon would not appear to be inconsistent with the United States Supreme Court's guidelines in *Wade*. Any other regulations of the abortion procedure during the first trimester, however, seem expressly precluded by the Court's opinion.

B. Regulations After the First Trimester of Pregnancy

In drafting regulations as to abortion after the first trimester of pregnancy, the California Legislature must satisfy the constitutional mandates of both the United States and California Supreme Courts. In determining that a state may regulate the abortion procedure to protect maternal health from and after the *approximate* end of the first trimes-

158. *Id.* at 735 (Stewart, J., concurring).
159. *Id.* at 760 (Douglas, J., concurring).
160. 93 S. Ct. at 725.
161. *See id.* at 760 (Douglas, J., concurring).
162. 8 Cal. 3d at 335, 503 P.2d at 268, 105 Cal. Rptr. at 12.

ter, the United States Supreme Court has not specified the exact time at which this interest becomes compelling.[163] Presumably, this decision has been left to the legislature provided it does not infringe upon constitutional guarantees as set forth in the Court's guidelines.[164] The legislature must, however, be specific in drafting an abortion statute in response to the Court's decision. The vagueness disdained by the California Supreme Court in *Barksdale* must be avoided. It is imperative that the legislature determine an exact point at which the State's interest prevails.

The first trimester is that period of pregnancy from the first day of the last normal menstrual period through the completion of fourteen weeks of gestation.[165] The approximate end of the first trimester corresponds to the beginning of the fifteenth week of pregnancy. In light of the opinion's uncertainty as to the compelling point in protecting health, might a state regulate the abortion procedure prior to the start of the fifteenth week? As stated by the Court, the risk to a woman increases as her pregnancy continues.[166] Thus the compelling point appears to be relative to the risks in the abortion procedure utilized. In the early stages of pregnancy, the most common abortion operations are known as the dilation and curettage (D & C), in which the physician dilates and scrapes the uterine cavity, and the vacuum aspiration method, whereby the uteral contents are evacuated by suction.[167] Both procedures, when properly performed, are relatively safe. After the third lunar month of pregnancy, abortions usually require an abdominal hysterotomy, a caesarian incision of the uterus through the abdominal wall. As compared to the D & C and vacuum aspiration methods, the abdominal hysterotomy involves a greater risk to health and creates a need for specialized equipment and facilities to cope with the procedure itself and possible complications arising therefrom.[168]

It would appear that a logical point at which to impose regulations to insure the maximum safety of the patient would be at the beginning of the thirteenth week of gestation (the fourth lunar month of pregnancy). At this point it is probable that abortion will be procured by procedures inherently more dangerous than those utilized in early pregnancy. The determination that the thirteenth week of gestation is the point at which the state's interest becomes dominant appears to fall

163. Roe v. Wade, 93 S. Ct. 705, 725 (1973).
164. Any other conclusion would appear, as Justice Rehnquist in his dissent suggests, to be judicial legislation. 93 S. Ct. at 737.
165. E. HUGHES, OBSTETRIC—GYNECOLOGIC TERMINOLOGY 334 (1972).
166. 93 S. Ct. at 725.
167. Ziff, *Recent Abortion Law Reforms (Or Much Ado About Nothing)*, 60 J. CRIM. L.C. & P.S. 3, 7-8 (1969).
168. F. FALLS & C. HOLT, ATLAS OF OBSTETRIC COMPLICATIONS 385 (1961).

within the Court's guidelines, is based upon substantial medical evidence, and would not appear to infringe upon the woman's constitutional guarantees of privacy.

Pursuant to *Roe v. Wade,* examples of permissible state regulation subsequent to the thirteenth week of pregnancy would seem to include qualifications as to the facilities in which the procedure is to be performed (whether it must be a hospital or may be a clinic or some other place of less-than-hospital status) and the licensing of that facility.[169] However, in light of the Court's opinion in *Doe v. Bolton,* the question arises as to whether or not California may limit abortions to those performed in licensed hospitals. Counsel and *Amici* in *Bolton,* contended that the relationship between a hospital requirement and the state objective of protecting health is lacking when other facilities, such as clinics, possess sufficient staff and services necessary to perform safe abortions. To substantiate their claim, counsel presented a mass of data purporting to demonstrate that facilities other than hospitals are entirely adequate to perform abortions. On the other hand, Georgia presented no persuasive evidence to show that only hospital abortions insure quality operations and full protection of the patient. The Court concluded that in order for a state to restrict abortion to licensed hospitals it must show sufficient evidence to justify the restriction.[170]

In view of modern medical techniques, low mortality rates from induced abortions, the marked increase in abortions (116,749 in 1971 as compared to 65,369 in 1970),[171] and rising medical costs, there appears to be little justification for restricting abortions to hospitals when California, through appropriate licensing and inspection procedures, may insure maximum safety for patients in facilities other than hospitals. Chapter 1 of Division 2 of the California Health and Safety Code (commencing with Section 1200) specifies requirements regarding licensure, rules and regulations, inspection, and reporting of clinics and dispensaries. Section 1203 limits such clinics and dispensaries to community non-profit clinics, teaching and research clinics affiliated with educational institutions, and employer-employee clinics. By amending Section 1203 to include "abortion clinics," such clinics would fall within the purview of the State's regulatory power as set forth in Sections 1213, 1222, and 1224 of the Health and Safety Code. Pursuant to these sections, the State could prescribe minimum standards of adequacy, safety, and sanitation of the physical plant and equipment of the "abortion clinic" and minimum standards for assur-

169. 93 S. Ct. at 732.
170. 93 S. Ct. 739, 749 (1973).
171. CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, HUMAN RELATIONS AGENCY, FIFTH ANNUAL REPORT ON THE IMPLEMENTATION OF THE CALIFORNIA THERAPEUTIC ABORTION ACT at 7 (1972).

ance of attendance and services of duly qualified practitioners. Furthermore, the State could periodically inspect the clinics to insure compliance with standards and require an annual report of the operation of the clinic including the number of patients aborted.[172] Thus California could adequately protect its interest in insuring the safety of women undergoing the abortion procedure.[173]

The United States Supreme Court in *Doe v. Bolton* concluded that the requirement of J.C.A.H. accreditation of hospitals in which abortions may legally be performed is invalid. In California the legislature has specified J.C.A.H. accreditation requirements not only for the performance of abortions but also as a prerequisite for hospital participation in the California Medi-Cal program.[174] The Attorney General of California has concluded that J.C.A.H. accreditation is reasonably related to the objectives of the Therapeutic Abortion Act, because accredited hospitals must maintain high professional standards and possess the facilities and staffing to guarantee the level of care demanded by the statute.[175]

It is possible that the legislature might conclude that the Court's analysis in *Bolton* is inapplicable to California's licensing procedures. Such a legislative conclusion, however, does not seem to overcome the Court's premise that a J.C.A.H. accreditation requirement does not relate to the particular medical problems and dangers of abortion operations and must fail as an overbroad infringement on a woman's fundamental rights.[176] General state licensing requirements should be sufficient to guarantee the proper protection of maternal health. Furthermore, since the J.C.A.H. will not accredit facilities with less than twenty-five beds,[177] such a requirement might be incompatible with the maintenance of small abortion clinics. Therefore, it appears that, as specified in *Doe v. Bolton*, additional procedures such as committee approval and licensing requirements other than those generally imposed may not be required by a state.

C. *Regulations Subsequent to Viability*

Despite emphasis in *Roe v. Wade* on the pregnant woman's right

172. This would correspond to the legislative intent specified in CAL. HEALTH AND SAFETY CODE §25955.5, whereby a system of reporting of therapeutic abortions has been established to determine the demographic effects of abortion and the legal and medical standards pertaining to abortion practices.

173. It should be noted that the New York Legislature has specified no hospitalization requirement in its abortion legislation. N.Y. PENAL LAW §125.05 (1967).

174. CAL. ADMIN. CODE tit. 22, §§51207(a)(3), 51207(b).

175. 50 OPS. ATT'Y GEN. 114, 117 (1967).

176. 93 S. Ct. at 748.

177. 50 OPS. ATT'Y GEN. 114, 115 (1967).

of privacy, the state retains a significant interest in the protection of potential life. Thus the Court held that from viability to birth the state may, if it chooses, regulate and even proscribe abortion. However, the Court recognized that the interests in the woman's life and health supersede the interests of the unborn child. Therefore, the state must permit abortion where, in appropriate medical judgment, it is necessary for the preservation of life or health of the mother.[178]

Since the state interest in the protection of potential life arises at viability, determination of when viability occurs is critical. The Court noted that viability is usually placed at about twenty-eight weeks but may occur earlier, even at twenty-four weeks.[179] Does this acknowledgment negate the California Legislature's determination to proscribe abortions after the twentieth week of pregnancy?[180]

Courts have recognized that the judgment on the issue of whether a fetus is to be considered "life" entitled to legal safeguards is a matter for legislative determination.[181] It is up to the legislature, not the courts, to decide on the wisdom and utility of legislation.[182] Unless the legislation is based on evidence which is palpably false, courts will not weigh evidence on the issue of substantive due process to determine whether a regulation is sound and appropriate.[183]

There is ample medical evidence to establish viability at twenty weeks of pregnancy. Interpretations of the word "viability" have varied between fetal weights of 400 grams (at about twenty weeks of gestation) and 1000 grams (at about twenty-eight weeks of gestation). Although an infant born below 1000 grams has very little chance of survival, medical records show live birth and survival as early as 397 grams.[184] Therefore, an infant weighing 400 grams (at twenty weeks of gestation) or more may be regarded as capable of living. Expert neonatal care has permitted survival of increasingly small infants.[185] In *People v. Barksdale*, the California Supreme Court remarked: "We find support . . . from the evidence before the Legislature that after 20 weeks there is a possibility that the fetus is viable . . . . [T]he present record in no way undermines the legislative determination that

178. Roe v. Wade, 93 S. Ct. 705, 732 (1973).
179. *Id.*
180. CAL. HEALTH AND SAFETY CODE §25953.
181. See for example, Abele v. Markle, 342 F. Supp. 800, 810 (D. Conn. 1972) (Newman, J., concurring).
182. Ferguson v. Skupra, 372 U.S. 726, 731 (1963).
183. Railway Express Agency v. New York, 336 U.S. 106, 109 (1949).
184. L. HELLMAN & J. PRITCHARD, OBSTETRICS 199, 493 (14th ed. 1971); see also E. HUGHES, OBSTETRICS—GYNECOLOGIC TERMINOLOGY 332, 335, 375, 452 (1972); E. POTTER, PATHOLOGY OF THE FETUS AND INFANT 51 (1962).
185. L. HELLMAN & J. PRITCHARD, OBSTETRICS 199, 493 (14th ed. 1971).

20 weeks is an appropriate time" for a changed legal relationship in respect to the fetus.[186] Although the California Legislature's determination of viability conflicts with that acknowledged by the Court, it would appear unlikely that the Court, in view of substantial medical evidence in support of the legislature's finding, would strike down such a determination under the doctrine of substantive due process. The determination is neither arbitrary nor capricious and does not appear to infringe upon the constitutional guarantee of a woman's right of privacy.

Under the Therapeutic Abortion Act, the statutory scheme constitutes a complete and absolute proscription of abortions after the twentieth week of pregnancy. No provision is made for medical emergencies, however dire.[187] The Court in summarizing its opinion in *Wade*, specifies that although a state's interest in protecting potential life arises at viability the state may not absolutely proscribe abortion. Exceptions must be made where it is "necessary for the preservation of the life or health of the mother."[188] In drafting legislation to conform to this guideline, the legislature is faced with the problem of overcoming the California Supreme Court's interpretation of vagueness. Twice this court has struck down California abortion statutes as being unconstitutionally vague. In *People v. Belous* and *People v. Barksdale*, the court invalidated statutory language similar to that suggested above by the United States Supreme Court. In both opinions, the court noted that mathematical certainty in criminal statutes is not required and that it is inevitable that there will be "some matter of degree" involved in most penal statutes.[189] However, in analyzing the statutes in question, the court applied strict tests of certainty, appearing to require almost impossible precision to satisfy its concept of statutory vagueness. The key to the court's analysis was its concern with the statutory infringement upon a woman's fundamental right of privacy including the decision to have an abortion. In each case the court noted that stricter standards of permissible statutory vagueness may be applied to statutes having a potential inhibiting effect on fundamental rights.[190] Thus in acknowledging this right of privacy and the corresponding infringement by restrictive abortion statutes upon this right, yet basing its deter-

186. 8 Cal. 3d at 335, 503 P.2d at 268, 105 Cal. Rptr. at 12.
187. CAL. HEALTH AND SAFETY CODE §25953.
188. 93 S. Ct. at 732.
189. People v. Barksdale, 8 Cal. 3d 320, 327, 503 P.2d 257, 262, 105 Cal. Rptr. 1, 6 (1972); People v. Belous, 71 Cal. 2d 954, 960, 458 P.2d 194, 198, 80 Cal. Rptr. 354, 358 (1969).
190. 8 Cal. 3d at 327, 503 P.2d at 262, 105 Cal. Rptr. at 6; 71 Cal. 2d at 960, 458 P.2d at 198, 80 Cal. Rptr. at 358.

mination primarily upon vagueness, the court applied stringent standards to avoid invalid abridgment of the woman's constitutional rights.

It is probable that in reviewing a statute proscribing abortion after viability of the fetus, except when necessary to preserve the woman's life or health, the California Supreme Court will not demand the rigid degree of certainty required in *Belous* and *Barksdale*. After viability, a woman is no longer isolated in her pregnancy. The State has acquired an interest in protecting potential life, and the woman's right of privacy must be measured accordingly. Therefore, such a statute would not inherently infringe upon a woman's constitutional rights and a less strict standard of vagueness would be applicable. As a practical matter, with the death of Justice Peters (and prior to the appointment of Justice Clarke) the California Supreme Court stood three to three on the abortion issue. Justices Burke, Sullivan, and McComb have consistently ruled in favor of restrictive abortion legislation while Justices Wright, Tobriner, and Mosk have invalidated California abortion statutes. It is unknown what effect Justice Clarke's appointment will have upon the alignment of the court in regard to the abortion issue. It is conceivable that the scales may tip away from the trend of invalidating legislation to the legal theory and analysis evidenced by Justice Burke in his dissents in *Belous* and *Barksdale* upholding such legislation.[191]

To insure the requisite certainty in abortion legislation, the legislature in drafting a responsive statute might consider the tests suggested in *Belous*, *Barksdale*, and *Doe v. Bolton*. In *Belous* and *Barksdale*, the California Supreme Court stated that the correct interpretation as to the necessity of abortion should be based upon a medical test (*e.g.*, whether the pregnant woman's physical and mental health will be furthered by abortion or by bearing the child to term).[192] In *Doe v. Bolton*, the United State Supreme Court dismissed an allegation of vagueness where Georgia permitted abortion based on the best clinical judgment of the attending physician as to the necessity of the abortion.[193] As stated in *United States v. Vuitch*, whether the abortion operation is necessary for the patient's physical or mental health would be a medical judgment that physicians are called upon to make routinely whenever surgery is considered.[194] Thus a physician or surgeon would not be limited to specific standards, subject to diverse interpretations, but

191. See generally 8 Cal. 3d at 339-46, 503 P.2d at 271-76, 105 Cal. Rptr. at 15-20 (Burke, J., dissenting); 71 Cal. 2d at 974-80, 458 P.2d at 206-10, 80 Cal. Rptr. at 366-70 (Burke, J., dissenting).

192. 8 Cal. 3d at 329, 503 P.2d at 263-64, 105 Cal. Rptr. at 7-8; 71 Cal. 2d at 971, 458 P.2d at 205, 80 Cal. Rptr. at 365.

193. 93 S. Ct. at 747.

194. 402 U.S. 62, 72 (1971).

would be permitted to exercise his own medical judgment based upon all factors relevant to the well-being of the patient in consideration of the operation involved.

Such a statutory construction would appear to withstand constitutional scrutiny with regard to certainty. Within the framework of *Roe v. Wade*, a woman's right of privacy is virtually unrestricted until viability. Subsequent thereto, the state has a justifiable interest in infringing upon that right. Therefore, a reasonable standard of statutory construction would apply, and the legislation would be presumed constitutional unless clearly and unmistakably vague. With proper drafting, the legislature can insure ascertainable guidelines to direct a physician's judgment in determining the necessity of abortion. A suggested statutory construction is set forth in the conclusion of this Comment.

Conclusion

The impact of the United States and California Supreme Courts' decisions upon the Therapeutic Abortion Act has left California with no meaningful restrictions upon the performance of the abortion procedure. Notwithstanding recognized state interests in the protection of maternal health and the preservation of potential life of the fetus after viability, the Courts in striking down overbroad portions of the Act have, in effect, rendered it a nullity.

In response to this judicial reconstruction, the California Legislature has two basic alternatives. It is possible that the legislature may take a "hands-off" attitude toward the abortion issue, content in allowing the courts to have taken the burden off its shoulders. It is axiomatic that politicians tend to shy away from controversial social, religious, and moral issues with political ramifications. Indeed, it took the legislature six years to enact the Therapeutic Abortion Act. If such be the case, the legislature should at least clean up those statutory provisions rendered invalid in the aforementioned opinions by repealing those portions of the Act.

As a second alternative, the legislature might draft responsive legislation. The United States Supreme Court's limitations on abortion legislation, as set forth in this Comment, appear to have resulted in a policy of abortion virtually at the will of the pregnant woman. Whether or not this result conforms to the California Legislature's philosophy on the abortion issue is immaterial. Restrictive anti-abortion statutes are invalid as undue infringements on this right of privacy. Thus the legislature may not absolutely proscribe abortion but can, at most, en-

act legislation to protect against abuses of this newly found right. The limits for legislative determination appear to be fairly clear cut. The right to abortion has reached the status of a fundamental right guaranteed by the United States Constitution. Meaningful state interests in restricting this right do not arise until the later stages of pregnancy; and the most significant interest, the protection of potential life, is qualified and must bend to the interests of the life and health of the pregnant woman. Thus the legislature is free to enact those regulations it deems appropriate provided they fall within the United States Supreme Court guidelines as set forth in *Roe v. Wade* and *Doe v. Bolton*. Yet, responsive legislation need not be a mere codification of these guidelines, as the opinions are flexible enough to allow the legislature leeway to protect the State's interests without infringing upon the woman's constitutional rights. If the legislature so desires, it might stretch these guidelines to their limits to enact the most restrictive abortion legislation permissible within the scope of the Court's opinions. Exercise of such an option appears to be justified in light of the recognized state interests in the protection of a woman's life and health, and preservation of the potential life of the fetus. In stretching the guidelines the legislature is not creating a material infringement upon the woman's right of privacy, but is guaranteeing protection of bona fide interests at those stages where it is probable that such interests have arisen and are in need of protection.

The following proposal is offered as an example of the apparent limits to which the California Legislature might resort in enacting responsive abortion legislation to fill the voids in the California Therapeutic Abortion Act.

The people of the State of California do enact as follows:

SECTION 1. Section 1203 of the Health and Safety Code is amended to read:

1203. No clinics are eligible for licensure under this chapter, except the classes as defined in the following:

(a)-(d) (No change)

(e) An abortion clinic operated and maintained as a charitable clinic or privately owned nonprofit or profit-making clinic for the diagnosis, treatment, approval of, and performance of abortions pursuant to the Therapeutic Abortion Act (commencing with Section 25951 of the Health and Safety Code).

SECTION 2. Section 25951 of the Health and Safety Code is amended to read:

25951. The Legislature hereby finds and declares that:

(a) Nonmedical abortions performed by persons other than qualified physicians and surgeons present grave risks to the life and health of women undergoing such operations, and are a major cause of maternal death in this State. It is the policy of this State to protect the health, safety, and welfare of its citizens by excluding unlicensed persons from the practice of medicine, including the performance of the abortion procedure.

(b) Abortions performed from and after the fourth lunar month of pregnancy require specialized operational procedures inherently more dangerous than those utilized to terminate early pregnancy. Such specialized procedures necessitate the performance of abortions in hospitals or abortion clinics to insure the maximum safety of the patient.

(c) From and after the sixth lunar month of pregnancy, an unborn fetus is viable, capable of existence independent of the pregnant woman carrying the fetus. Unregulated abortion from and after this point of pregnancy interferes with the policy of this State, as declared and established in this Act, that such potential life having commenced imposes a duty upon this state to protect that life. The State recognizes that a pregnant woman's right to life and health takes precedent over the State's interest in protection of the viable fetus. Therefore, it is the policy of this State to proscribe all abortions from and after this point of viability unless necessary to protect the life and health of the pregnant woman.

SECTION 3. Section 25952 of the Health and Safety Code is amended to read:

25952. A holder of the physician's and surgeon's certificate, as defined in the Business and Professions Code, is authorized to perform an abortion or aid or assist or attempt an abortion subject to the following requirements:

(a) From and after the first day of the thirteenth week of gestation, the abortion must be performed in a hospital licensed pursuant to Chapter 2 (commencing with Section 1400) of Division 2 of the Health and Safety Code, or an abortion clinic licensed pursuant to Chapter 1 (commencing with Section 1200) of Division 2 of the Health and Safety Code.

(b) From and after the first day of the twentieth week of gestation, no abortion may be authorized or performed unless, based upon the best clinical judgment of the attending physician or surgeon, an abortion is necessary for the protection of the life or physical or mental health or the pregnant woman.

SECTION 4. Section 25953 of the Health and Safety Code is amended to read:

(a) The term "necessary for the protection of the life . . . of the pregnant woman" as used in Section 25952(b) means that, in the best clinical judgment of the attending physician or surgeon, the continuance of pregnancy to term creates a greater peril to life than termination of pregnancy by abortion.

(b) The term "necessary for the protection of the . . . physical or mental health of the pregnant woman" as used in Section 25952(b) means that, in the best clinical judgment of the attending physician or surgeon, the continuance of pregnancy creates greater peril to the physical or mental health of the pregnant woman than termination of pregnancy by abortion.

(c) The fact that the fetus is likely to be born with grave, permanent, and irremedial mental or physical defects is sufficient to justify termination of pregnancy for the protection of the physical or mental health of the pregnant woman.

SECTION 5. Section 25954 of the Health and Safety Code is repealed.

SECTION 6. Section 25955 of the Health and Safety Code is amended and renumbered as section 25954.

SECTION 7. Section 25955.5 of the Health and Safety Code is amended and renumbered as Section 25955.

Arthur G. Scotland