

11-1-1971

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Recommended Citation

Mitchell J. Sikora, Jr., *Abortion: An Environmental Convenience or a Constitutional Right?*, 1 B.C. Env'tl. Aff. L. Rev. 469 (1971), <http://lawdigitalcommons.bc.edu/ealr/vol1/iss3/2>

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ABORTION: AN ENVIRONMENTAL CONVENIENCE OR A CONSTITU- TIONAL RIGHT?

By Mitchell J. Sikora, Jr. ❖

INTRODUCTION

In short it is difficult to conceive any check to population, which does not come under the description of some species of misery and vice.¹

Anticipating global population crisis in 1798, Thomas Malthus seemed to have ample cause for his pessimism. To him policies of population control appeared limited to reliance upon the more miserable and vicious of human and natural forces. To curb the differential in growth rates between population and food, and thereby to preserve the "subsistence" standard of living, the gloomy parson was forced to repose special faith in the inexorable cycles of war, pestilence, natural disaster and famine. If these solutions seemed self-defeating, they must also have appeared exhaustive and inevitable.

The modern revival of Malthusian concern has not brought with it the same dark prospects for cure. While the parson's catalogue of "preventive" measures was confined to "restraint from marriage," the contemporary demographer contemplates positive measures of population control far more therapeutic than Malthus' sinister quartet.

The cycles of attrition have given way to methods of birth control, i.e., to contraception and abortion, although the concomitant legal and moral debate retains much of the parson's original phraseology. As a means of birth and population control the multiple forms of contraception require little explanation. However, since contraceptive development, abortion has become a far more qualified and less necessary form of birth control.

Most legal commentators do not characterize abortion as a feasible method of mass birth control in the United States.²

Still, abortion remains a significant environmental issue for a number of reasons. First, although it yields to contraception as the primary method of population control, it has become a secondary or supplementary method, often influencing the success of contraceptive policies in the first instance and ultimately the resulting birth rate. Throughout the world women intent upon smaller families turn to abortion when contraception has been unavailable or ineffective.³ And in countries with permissive abortion laws women still tend "to rely on early, safe, comparatively cheap abortions rather than undergo the trouble, expense and, to some minds, the dangers of contraceptives. . . . Aside from these women, there are those who would choose cure rather than prevention under any circumstances; they might not use the perfect contraceptive should it ever be developed."⁴ The ready availability of legal abortion, then, may actually retard the progress of contraception and promote its own use as a means of birth control.

Second, abortion remains a universal means of "personal," if not mass, population control⁵ initiated by the mother to govern the size of her family and the consequent quality of its life. Obviously it constitutes a determinant of the environment of the family choosing it. Moreover, the policy of permissive abortion laws is to recognize "socioeconomic indications" as legitimate grounds for abortion.⁶ These grounds typically involve consideration of the impact of the additional child upon the welfare of the individual family.

Third, one must respect the sheer magnitude of abortion, legal and illegal, global and national, as a massive health problem both for the mothers aborted and the medical resources available or still unavailable. Popular sources estimate that in the United States in 1969 over one million women underwent abortion, that about 350,000 of these needed hospital care when they attempted to abort themselves, and that more than 8,000 women died from self-induced abortion.⁷ Legal commentators report analogous statistics for the 1960's. Mishandled criminal abortions are estimated to have caused 10,000 deaths per year during that period.⁸ The vast majority of these women were married and already mothers.⁹ Legal hospital abortions accounted for the termination of only 8,000 to 9,000 pregnancies annually.¹⁰ Simultaneously

from 250,000 to two million annual illegal abortions were performed within the United States.¹¹

The most recent authoritative estimates place the number of annual abortions, legal and illegal, throughout the world at 30 to 35 million.¹² Estimates vary widely on figures within the United States. The generally settled figure for annual legal abortions is presently 8,000.¹³ But estimates of illegal abortion run from about 200,000 to about 1 million per year. Proponents of liberalized abortion laws typically cite the higher calculations of criminal abortion and resultant death.¹⁴ The most conservative reliable death figure has been set at about 500 per year.¹⁵ And the most reliable estimate of annual unwanted births ranges from 750,000 to one million.¹⁶ Yet even after one has allowed for the preferred uses of unverifiable estimates, he need only look to the cautious approximation of 200,000 illegal abortions, 500 resultant deaths, and 750,000 unwanted births to appreciate the gravity of illegal abortion as a national health concern.

Only in the last two years has abortion been transformed into a legal controversy of potentially constitutional magnitude. Litigants pressing for the relaxation or abolition of restrictive abortion laws have marshalled constitutional arguments on several fronts. The foremost contention is that a woman has a fundamental but unenumerated right of procreative self determination, a constitutional right to choose whether and when to give birth in order to control the size and spacing of her family. Consequently the legislature might regulate such a basic freedom for only a compelling and overriding state interest.

Additional arguments attack the operation of typical state laws. Almost all states have traditionally permitted abortion as necessary to preserve the life of the mother, and a few as necessary to preserve the life *or the health* of the mother. The common statutory language "necessary to preserve the life [or health] of the mother," or its equivalent, has been under mounting assault as an unconstitutionally vague and overboard restriction. It has been argued unsuccessfully that such a standard of criminality does not adequately guide a doctor confronted by a request for abortion and that it infringes unnecessarily upon a woman's fundamental right to abortion.

Another constitutional thrust is that restrictive abortion law is inevitably discriminatory in its impact, that it denies equal protection of the law to those, especially the poor, lacking the funds

and the information to procure a justifiable abortion. Such women must either go without an abortion or undergo the hazards of an illegal and often incompetent abortion.¹⁷

As of the beginning of the 1970 Term the United States Supreme Court had on at least eight occasions declined to review state court decisions involving restrictive abortion statutes.¹⁸ During the Term the Court with apparent finality resolved one of the major constitutional issues at hand; it held the typical statute permitting abortion only for the purpose of preserving the woman's life or health *not* to be unconstitutionally vague.¹⁹ As of the moment, however, the ultimate issue whether a woman possesses a *constitutional right* to an abortion remains unresolved. The Court currently carries on its docket three cases affording the opportunity for adjudication of this conclusive question.²⁰

I. A BRIEF HISTORY

Abortion in antiquity seems to have been a familiar medical practice but a variant legal matter.²¹ The early Hebrews were aware of abortive techniques but strongly disapproved of the practice.²² By contrast the Greek city states are supposed to have applied abortion to policies of population control.²³ Sparta, to promote numbers for its military and labor forces, imposed severe penalties, including death, for the destruction of the embryo or fetus.²⁴ The other city states pursued more flexible population policies.²⁵ Plato and Aristotle approved of abortion for a number of social and economic purposes.²⁶ Hippocrates generally discouraged the practice because of the frequent injury or death of the mother; and in cases where abortion was advisable he wanted only physicians to perform the act.²⁷

The Roman attitude was more relaxed and sanctioned abortion for population policy²⁸ and, especially in the Empire period, for social indications.²⁹ The central tenet of Roman family law, continuing from the Republic into the Empire, was the absolute power of the father, as *paterfamilias*, over his family. The father determined the fate of the fetus, which was regarded as part of the woman.³⁰

The propagation of Christian doctrine gradually discredited abortion.³¹ The immortality of the viable fetus' soul put it in peril of eternal condemnation if the fetal life were terminated before birth and baptism. In this light abortion was equated with infanticide. However early canonists did not agree that the

soul arose in the fetus at the moment of conception. The prevalent view held the soul to enter the female fetus at 80 days gestation, and the male fetus at 40 days.³² The distinction of ensoulment produced a variance in punishment. Termination of an unensouled fetus (that is, of any fetus before the fortieth day) was punished by fine only; abortion of an ensouled fetus was characterized as murder and punished accordingly.³³ This theory endured for almost a thousand years, until 1869, when Pope Pius IX erased the distinction and subjected abortion at any stage of pregnancy to the uniform punishment of excommunication. Abortion prior to ensoulment now became "anticipated homicide."³⁴ The past century has brought an unbroken line of uncompromising papal statements to the same effect.

The development of the common law rule records a distinction analogous to the canonical theory of ensoulment. At common law the abortion of a fetus before "quickening" (the time when fetal movements are first felt by the pregnant woman, usually coming about the fourth to fifth month) did not constitute a crime.³⁵ Superseding restrictive legislation came during the nineteenth century to satisfy two primary motives: the legal incorporation of the Judeo-Christian belief in the inviolability of human life even in its most problematic existence; and the preservation of the health and life of the pregnant woman endangered at the hands of incompetent abortionists and at her own hands in instances of hazardous self-induced abortion.³⁶ The legislation typically proscribed abortion at any stage of the pregnancy.

In England the first such law, Lord Ellenborough's Act, was enacted in 1803.³⁷ It gave way to the harsher Offenses Against the Person Act of 1861,³⁸ providing for a maximum penalty of life imprisonment for an abortion performed before or after quickening. The law on its face allowed for no "indications" justifying abortion. It punished both the woman and the abortionist. Unsuccessful attempts to abort were also subject to severe penalty. In practice the women themselves were seldom prosecuted and rarely subjected to maximum punishment. Prosecution was aimed at the "back-street surgeon."³⁹

A major episode in the relaxation of English law occurred with the 1939 landmark case of *Rex v. Bourne*,⁴⁰ which created a medical and psychiatric ground for abortion under the law. After the rape and resulting pregnancy of a fourteen-year-old

girl by several soldiers, Dr. Bourne, a prominent gynecologist, performed an abortion and notified the police of his action. Charged with a felony, he grounded his defense on the argument that an abortion was legally justifiable for the preservation of the mother's life and that no medically workable distinction could be drawn between the preservation of life and of mental health, the specific purpose of that abortion. The trial judge instructed the jury that it was to decide the scope of the necessity to preserve life and that the government bore the burden of proof that the Doctor had not acted in good faith. The charge resulted in an acquittal and in precedent justifying abortion for the preservation of the mother's life and acknowledging the difficulty of distinction between the preservation of life and of health by giving generous scope to the former. *Rex v. Bourne* remained effective law until cumulative efforts for reform legislation produced the British Abortion Act of 1967.⁴¹

In the United States, Illinois passed the first restrictive statute in 1827.⁴² However the most significant early law was the New York act of 1829 containing the first therapeutic⁴³ exception to absolute statutory prohibition. The New York statute permitted abortion where it was necessary to save the mother's life, and served as a model for the overwhelming number of American statutes to follow.⁴⁴ Until the modern movement for therapeutic abortion legislation gained appreciable force a decade ago, the sole statutory exception in almost every state remained the preservation of the life of the mother.

II. THE CURRENT STATE OF THE LAW

Medical and legal advocacy of liberalized abortion law reached a milestone in 1962 with the promulgation of the therapeutic abortion provision of the American Law Institute's Model Penal Code. Section 230.3(2)⁴⁵ defined the several specific grounds or "indications" for "justifiable abortion" which have since served as a model for reform recommendations in the various states.

Justifiable Abortion. A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection.

Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable.

Subsection (3) imposed procedural requirements:

No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any of [these] requirements gives rise to a presumption that the abortion was unjustified.

Beyond the Model Code provisions, "therapeutic abortion" refers more generally to any abortion performed for medical reasons and in a hospital.

Therapeutic abortion proposals and the Model Code provision in particular have generated considerable legal commentary, preponderantly favorable.⁴⁶ From 1967 through 1970 thirteen states adopted legislation acknowledging grounds proposed by the Code.⁴⁷ And during 1970 three states, New York, Alaska and Hawaii, withdrew for the most part any criminal sanctions previously applicable to physicians performing abortions in appropriate medical facilities.⁴⁸ Of the remaining jurisdictions, Alabama and Washington, D.C. permit abortion necessary to preserve the "health" as well as the life of the mother.⁴⁹ Four states, Louisiana, Massachusetts, New Jersey and Pennsylvania, make no express statutory exception to the prohibition against abortion.⁵⁰ However, the Louisiana licensing provision does not punish a physician for aborting a woman whose life was in danger.⁵¹ The Massachusetts Supreme Judicial Court has long construed the statute forbidding "unlawfully" committed abortions so as to permit abortion where a physician acts in good faith and honest belief of its necessity for the preservation of the *life or health* of the woman.⁵² The New Jersey Supreme Court has held that a physician may perform an abortion to preserve the life of the mother, but not merely to protect her health.⁵³ The Pennsylvania statute continues to proscribe "unlawfully" performed abortions, but the highest court of the state has not read any exception into that term. An invitation to act on that statute has recently arisen from a lower Pennsylvania court's decision that the statute is unconstitutionally vague and overboard and

that in the absence of a compelling state interest it constitutes a violation of the mother's constitutional right not to give birth.⁵⁴

The remaining American statutes permit abortion solely to preserve the life of the pregnant woman.⁵⁵

As an example of comparative law, American abortion legislation ranks among the most restrictive in the world.⁵⁶ Even if one considers the accelerating trend of reform in favor of the Model Act provisions, the enumerated justifications, the preservation of the life and health of the woman and the prevention of defective birth and of the product of felonious intercourse, remain comparatively narrow. The British Abortion Act includes these justifications and, most significantly, a socioeconomic indication in consideration of the prospective family environment of the mother:

(1) Subject to the provisions of this section, a person shall not be guilty of an offense under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—

(a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the *physical or mental health* of the pregnant woman or any *existing children of her family*, greater than if the pregnancy were terminated; or

(b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

(2) In determining whether the continuance of a pregnancy would involve such risk of injury to health as is mentioned in paragraph (a) of subsection (1) of this section, *account may be taken of the pregnant woman's actual or reasonably foreseeable environment.* [Emphasis added.]⁵⁷

The British Act, then, provides several open-ended socioeconomic indications concerned with the overall welfare or "environment" of the family unit, a consideration still absent from American legislation, including the Model Act. In particular the British law takes account of the "mental health" of the woman, and of "any existing children of her family," and, in an independent clause, of the woman's "actual or reasonably foreseeable environment."

To put American law in clearer perspective one might consider that despite the greatly expanded indications of the

British statute, that law can still be characterized as a relatively restrictive code on the international scale.⁵⁸ By contrast much more moderate codes are currently in force in the Scandinavian countries,⁵⁹ recognizing medical, eugenic, psychiatric and socio-economic justifications, and still more permissive codes in the Soviet Union, Eastern European nations and Japan,⁶⁰ although, with the exception of Japan, moderate and permissive codes are a relatively recent historical trend, gaining acceptance in the former countries only after 1965 and in the communist countries after 1955.

III. THE ATTACK UPON THE LAW

Cast in the wider relief of comparative legal codes, the current attack upon the American abortion statute becomes more understandable. If freer abortion is a felt environmental need of the times, it has so far been much more urgently felt and legally accepted in other parts of the world. It is a commonplace to venture that the ingrained mores of Judeo-Christian religious beliefs and of the Anglo-American legal regard for life in any form have confined legal abortion only to the most necessary instances. This view carries a strain of moral self-congratulation. Perhaps further, in the American case, the persistent belief in the capacity of an equitable distribution of its natural resources to support an unbridled population has until recently concealed birth control generally and abortion particularly as an environmental problem.

As noted earlier, the movement for the reform of traditional legislation to incorporate broader grounds, or indications, for abortion has been in progress for at least a decade and has achieved significant legislative amendment in at least 14 states since 1967. Abortion statutes in imitation of the Model Code provisions, and the withdrawal of criminal sanctions in three states, have resulted thus far.⁶¹ Now, within the past 24 months, in a remarkable burst of decisional law, the courts, federal and state, have entertained a full-blown assault on the constitutionality of even liberalized statutes. And of the 12 lower courts willing to grapple with the merits of the constitutional arguments, eight⁶² have struck down the applicable statute, and four⁶³ sustained it, on constitutional grounds. Dissents have been common and strenuous, so that at least two lines of argument and precedent have already grown available as respectable reasoning for

the decisions of courts soon to be confronted by such attacks upon abortion law. Most importantly, before many more lower federal or state courts meet the issue, the Supreme Court will have had the opportunity to pass on the merits of all the constitutional arguments. It has already sustained the typical statute against the charge of unconstitutional ambiguity,⁶⁴ and during the 1971 Term will have the opportunity to address the nature of a woman's "right" to abortion.⁶⁵

The legal contentions reflect in varying degree a battery of unarticulated arguments embedded in constitutional language. At the outset it might be well to enumerate these in bare-faced, extralegal terms since they underlay much of the dialogue in the courts.

First, the current law is assailable as largely unenforced and unenforceable. The law is rarely applied to a licensed physician and only slightly more often to the back street abortionist or quack. Successful illegal abortion is a collaborative effort. It produces no victim or complainant, and is typically concealed by all parties as a matter of course. Yet the legal prohibition inhibits the medical profession and drives the abortion-seeking woman from the reluctant qualified physician to the unskilled dangerous amateur.

Second, the law can be said, even in reformed or therapeutic provisions, to be so inherently uncertain that it continues to have an *in terrorem* effect on the medical profession and to fail to apprise the doctor of the standard of criminality which he risks when he performs an abortion.

Third, the law can be said to lag far behind medical realities as an obsolete creature intended to protect the woman from nineteenth century conditions making all surgery dangerous. Present techniques make abortion during the first trimester of pregnancy as much as seven times safer than ultimate child-birth.⁶⁶

Fourth, the law, even the reform legislation, can be said to perpetuate an inevitably *de facto* discriminatory impact, leaving safe, justifiable abortion available to the affluent, the informed and the well connected, but denying it to the poor, the uninformed and the unconnected.

And, fifth, the law can be said to reflect the general moral and religious attitudes of another era, and now at best the religious views of a distinct minority who will regulate their own conduct without legal sanction.

In defense of restrictive abortion law it can be argued that present statutes are entirely tolerable because they can be construed realistically to free the medical profession from the chill of prosecution so long as reasonable medical judgment is employed in good faith; that the standard of criminality is clearly ascertainable to the physician; that the unenforcement or unenforceability of the law does not alter the wrongfulness of its violation; that the law's discriminatory impact is as inevitable as the naturally unequal distribution of wealth and no more so than the action of the state; that the unequal accessibility to safe abortion would remain even if restrictive law were repealed; and that the law reflects a traditional cultural reverence for life in any form still embodied in the preponderant public opinion.

The legal merits offer two avenues of analysis. One course would be an examination of the common dominant legal contentions, issue by issue, cutting across the array of recent decisions. The alternative would be a consideration of the personal and societal interests involved in the abortion controversy: those of (1) the pregnant woman, (2) the embryo and fetus, (3) the performing physician, (4) the father, and (5) the state or community. The latter approach subordinates the legal arguments to the parties whom they are designed to serve. Under this arrangement of the issues, the interest of the pregnant woman is the first for discussion.

IV. THE WOMAN

The main assault of the campaign against existing abortion law is the contention that a woman possesses the fundamental constitutional right to terminate an unwanted pregnancy. As with other fundamental rights of the individual, the government may not infringe upon such a basic liberty unless it shows a compelling, overriding state interest. With some potentially significant shifts in emphasis, this right has been characterized as one of *family or marital* privacy or one of personal physical integrity and autonomy of the woman. Constitutional authority for its assertion derives from an evolutionary series of Supreme Court decisions culminating in the case of *Griswold v. Connecticut*.⁶⁷ The origin of the right has been located variously, in fundamental precepts predating the Constitution,⁶⁸ in the text of the Bill of Rights itself,⁶⁹ as a necessary incident or penumbra of specific enumerated rights,⁷⁰ as a preeminent unenumerated right intended by the ninth amendment,⁷¹ and as a form of liberty

guaranteed by the due process clause of the fourteenth amendment.⁷²

A. *Family Privacy or Autonomy*

The enunciation of a constitutional right of family privacy or family autonomy is traceable through a now familiar chain of regularly linked Supreme Court decisions. In the first of these, *Meyer v. Nebraska*,⁷³ the Court struck down a state law forbidding the use of language other than English in classroom instruction in all elementary schools in the state, public, private and parochial. The statute contravened the due process clause of the fourteenth amendment as an arbitrary interference "with the power of parents to control the education of their own."⁷⁴ The "liberty" protected by the due process clause included the right "to marry, establish a home and bring up children."⁷⁵ Several years later in *Pierce v. Society of Sisters*⁷⁶ the Court reemphasized the overriding right of parents to control the education of their children in the face of an Oregon statute compelling universal public school attendance. Citing *Meyer* as controlling authority, it invalidated the statute as an unreasonable restriction of parental liberty to direct the upbringing and education of children and added that

the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.⁷⁷

The 1942 case of *Skinner v. Oklahoma*⁷⁸ provided the Court occasion to suggest constitutional status for the individual's right to procreate. The Court voided an Oklahoma criminal law providing for the sterilization of statutorily defined "habitual criminals" as an arbitrary classification in violation of the equal protection clause of the fourteenth amendment. The Court subjected such a classification to close scrutiny because of its curtailment of the basic liberties of marriage and procreation.⁷⁹

In 1967 the Court conferred express constitutional status on the right to marry freely. *Loving v. Virginia*⁸⁰ struck down the Virginia prohibition of interracial marriage as a violation of the due process clause.

Still, the nature of such family-related rights has not been absolute. In the 1944 decision of *Prince v. Massachusetts*⁸¹ the Court upheld the provision of a Massachusetts child labor law

forbidding the sale of any kind of goods in a street or public place by a boy under the age of 12 or a girl under the age of 18, in its application to a nine-year-old Jehovah's Witness who was assisting her guardian with the distribution of religious literature. In this instance the majority held the state's interest in the health and development of children to outweigh *both* claims of religious freedom and of the right of parental control of children. While the Court remarked that the *Meyer* and *Pierce* decisions "respected the private realm of family life which the state cannot enter," the fact that the *combined* force of those two rights could not override the state's interest signified that parental or family rights were properly regulable.

B. *Personal Physical Integrity or Autonomy*

Aside from her peculiar right as a parent, the pregnant woman finds support for her claim in the traditionally recognized constitutional right of personal physical liberty or autonomy implicit in the due process clause. The most frequently cited expression of this right arose from the 1891 decision of *Union Pac. Ry. v. Botsford*.⁸²

No right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraints or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "The right to one's person may be said to be a right of complete immunity: to be let alone."

The woman carrying an unwanted pregnancy now invokes this right to control her own body and in particular her reproductive faculties both before and after conception.

Again, of course, the right of personal bodily freedom is not absolute. The Supreme Court has acknowledged overriding public health interests in the enforcement of compulsory vaccination laws⁸³ and of narrowly drawn eugenic sterilization statutes.⁸⁴

C. *The Griswold Rationale*

The 1965 *Griswold* decision with its splinter opinions offers the richest source of substantive law and constitutional methodology applicable to the adjudication of the pregnant woman's right to an abortion. The Court seems destined to address the analogies and distinctions drawn between the right to contraception and the

right to abortion. The proposed extension of the *Griswold* rationale forms the backbone of the abortion-seeking woman's argument; its proposed distinction by the government rests on respectable legal and medical grounds.

The discussion of such a multifarious⁸⁵ and overanalyzed decision should begin with a recitation of the precise holding. Invalidating a statute punishing the assisting, abetting or counseling of the *use* of contraceptive devices, the Court held that such a restriction infringed upon a basic constitutional right of marital privacy. For the Court Mr. Justice Douglas gleaned this basic right, as a species of privacy suggested by the previous cases, from the periphery or penumbra of certain specific amendments: the privacy of one's association under the first amendment; the privacy assured by the third amendment's prohibition against the quartering of troops "in any house"; the fourth amendment's guarantee of the right against unreasonable searches and seizures; the "zone of privacy" created by the fifth amendment's self-incrimination clause; and, finally, the ninth amendment's assurance that "[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage *others* retained by the people."⁸⁶

The concluding paragraph of the opinion of the Court permits little doubt that the right of "privacy" synthesized from these textual sources is peculiarly *marital*.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.⁸⁷

In a separate concurring opinion joined by Chief Justice Warren and Justice Brennan, Justice Goldberg agreed that the right of marital privacy lay well within "the protected penumbra of specific guarantees of the Bill of Rights," but placed special stress on the ninth amendment as the coordinate repository of such unenumerated but nonetheless fundamental personal rights.⁸⁸

In separate concurring opinions Justices Harlan and White also affirmed the constitutional right of marital privacy but pre-

ferred to locate it in the direct application to the states of the due process clause of the fourteenth amendment. To assure such rights, "[t]he Due Process Clause . . . stands . . . on its own bottom," said Justice Harlan.⁸⁹

Finally, two Justices, Black and Stewart, dissented from the recognition of a constitutional right of marital privacy imperceptible to them in the text of the Constitution.⁹⁰

The upshot of *Griswold*, then, is that seven Justices acknowledged the existence of such a right and differed only over its textual source; five ascribed it to an amalgamation of the first, third, fourth, fifth and ninth amendments; three of these emphasized the vitality of the ninth amendment; and two others preferred the due process clause of the fourteenth amendment.

D. *The Extension of Griswold to Abortion*

The extension of the *Griswold* holding from contraception to abortion has become the dispositive issue of the recent decisions. Similarities and distinctions are easily invoked. The central distinction, of course, is that *Griswold* recognizes a right to *prevent* conception, not a right to eliminate an existing conception or "life."

A subsidiary difference, not usually considered in the decisions, lies in the necessary manner of enforcement of respective anti-contraception and anti-abortion statutes. In *Griswold* the Court observed with repugnance that the supposed enforcement of a law against the use of contraceptives required police to invade the marital bed chamber itself.⁹¹ The enforcement of restrictive abortion law, however, requires no such necessary intrusion into the precincts of the home, but only the regulation of health facilities and personnel, public, private, or unlawful, in a more familiar exercise of a traditional police power. Instances of intrusive search can, of course, be imagined in the enforcement of abortion law. Abortions may be performed in the home or doctor's office, and the police may be drawn there. And advocates of relaxed abortion law anticipate the development of a convenient oral abortifacient kept and consumed in the home.⁹² These expectations, however, do not disprove the applicability of traditional search-and-seizure doctrine to home abortion practices.

The asserted similarities between contraception and abortion reduce to the proposition that *Griswold* bestows a fundamental

right of choice upon a woman, or upon a husband and wife, whether and when to have children. This constitutional right to control the size and spacing of one's family is claimed to encompass the right to abortion for the same end or the right to employ abortion as a cure for contraceptive failure. In an oft cited law review article, former Justice Clark, the silent member of the majority opinion in *Griswold*, encapsules the constitutional argument for the extension of that decision to abortion:

Moreover, abortion falls within that sensitive area of privacy—the marital relation. One of the basic values of this privacy is birth control, as evidenced by the *Griswold* decision. *Griswold's* act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention has failed?⁹³

A number of lower federal and state courts have already accepted the invitation to expand *Griswold* to the limits of its logic, to enlarge the woman's, or family's, right to contraception to the general right to birth control. Several others have declined the invitation.

In 1969 the Supreme Court of California became the first to acknowledge a constitutional right to abortion. In *People v. Belous*⁹⁴ it flatly declared the existence of such a "right to privacy" or "liberty in matters related to marriage, family and sex" in light of *Griswold* and of the earlier decisions of the Supreme Court. The court regarded the critical issue to be not the existence of such a right but rather the existence of a "compelling state interest in the regulation" of that right.

That same year the Federal District Court for the District of Columbia followed *Belous'* lead, but with a more cautiously phrased formulation of the woman's right to abort. In *United States v. Vuitch*,⁹⁵ the court acknowledged that "a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy."⁹⁶ Certainly the right was not absolute.

The asserted constitutional right of privacy, here the unqualified right to refuse to bear children, has limitations. Congress can undoubtedly regulate abortion practice in many ways, perhaps even establishing different standards at various phases of pregnancy, if informed legislative findings were made after a modern review of the medical, social and constitutional problems presented.⁹⁷

Vuitch, then, shows the first judicial sensitivity to the complexity of a more fully defined constitutional right of abortion. Absent legislative assistance, difficult choices lurk in the courts' delineation of the boundaries of that right. For its part the *Vuitch* court was content to say only that "[m]atters here certainly reached a point where a sound, informed interest of the state must affirmatively appear before the state infringes unduly on such rights."⁹⁸

Similarly, in *Babbitz v. McCann*,⁹⁹ a three-judge federal panel for the Eastern District of Wisconsin concurred in the recognition of a woman's "fundamental private right" to abortion but gave it a more qualified characterization as a right of "private decision whether to bear her *unquicken*ed child."¹⁰⁰ Relying on *Griswold*, that court designated the ninth amendment as the textual source of the woman's right, with ready support from the collective penumbræ of the specific amendments. Also noteworthy is that the court at one point terms it "a woman's inherently *personal* right."¹⁰¹

A three-judge panel for the Northern District of Texas soon afterwards held the Texas abortion provisions unconstitutional because they deprived "single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children."¹⁰² Thus *Roe v. Wade* also locates the origin of the right in the ninth amendment. And that decision, involving a single pregnant plaintiff as well as a married couple, expressly adds a dimension to the woman's right as one possessed by single as well as married women. Previously every relevant decision had treated the right as a peculiarly marital one.

Subsequently in *Doe v. Bolton*¹⁰³ plaintiffs, in a class action, represented pregnant women, married and single, in their attack upon the Georgia therapeutic abortion statute before a three-judge federal court. The *Bolton* court was equally amenable to a right of privacy generated from either the ninth amendment or the usual penumbral regions, but it declined an uncritical extension of the right of contraception to abortion. It formulated a far more conditional constitutional right to the latter. While "the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy," once conception has occurred and the embryo formed, the decision to abort its development "cannot be considered a purely private [right] affecting only husband

and wife, man and woman."¹⁰⁴ "A *potential* human life together with the traditional interests in the health, welfare and morals of its citizenry under the police power grant to the state a legitimate area of control short of an invasion of the personal right of initial decision."¹⁰⁵ But by police power here the court meant no more than the regulation of the medical procedure accompanying the decision and performance of abortion.

Rather than regulating merely the quality of the decision to have an abortion, and the manner of its performance, the Georgia statute also limits the number of reasons for which an abortion may be sought. This the State may not do, because such action unduly restricts a decision sheltered by the Constitutional right to privacy.¹⁰⁶

Ultimately, then, the *Bolton* court settled on a qualified, regulable but nonetheless constitutional right to abortion. But it would not accede to a facile extension of *Griswold* from contraception to abortion.

By comparison, the most recent federal court to recognize abortion as a constitutional right saw no distinction between that right and the right to use contraceptives sanctioned by the *Griswold* decision. The majority of the three-judge panel in *Doe v. Scott*¹⁰⁷ held that at least during the first trimester of pregnancy the fact of conception did not diminish a woman's interest in privacy and control over her body.

Similarly, in *Commonwealth v. Page*, a lower Pennsylvania court, voiding that state's exceptionless prohibition of abortion, has equated the right of abortion with that of contraception announced in *Griswold*.

We believe the rationale of the case of *Griswold v. Connecticut* is applicable and may be extended to abortive action after conception and that the abortion statute interferes with the individual's private right to have or not to have children. Both the Connecticut and Pennsylvania statutes are at odds with current medical practice, both invade the intimate realm of marital privacy, both interfere with a married couple's freedom to control the number and spacing of offspring, and both are in conflict with a solution to one of the world's critical problems, the population explosion.¹⁰⁸

But *Griswold* has not encouraged all courts having the opportunity to recognize a woman's constitutional right of abortion, broadly or narrowly defined. Wary of the merits, several federal district courts have withheld prospective injunctive relief, avail-

able on a showing of a substantial federal question and the threat of immediate irreparable harm, against state abortion statutes until the abortion has been performed and the prosecution of the performing physician set in motion.¹⁰⁹ The doctor, then, would have to perform the abortion at his own risk.

In the instance of *Doe (and Hodgson) v. Randall*,¹¹⁰ once the indictment was brought, the Federal District Court for the District of Minnesota invoked the resurgent policy of federal abstention to permit "unimpaired" proceedings in the state courts. Back in the state system the lower Minnesota court addressed the merits of the physician's motion to dismiss an indictment against her for having performed a therapeutic abortion in a licensed hospital at the request of a patient and her husband, where the woman had been exposed to rubella (German measles) in the early stages of pregnancy. The *Hodgson* case presented the first known felony prosecution in the United States of a qualified licensed physician for performing a therapeutic abortion in a hospital, after extensive medical consultation and for reasons widely recognized as valid by the medical profession. The lower Minnesota court rejected the motion of a constitutional right to abortion and refused to dismiss the indictment.¹¹¹ The Supreme Court of Minnesota delivered a one-sentence denial of the physician's application for a writ of prohibition to the lower court,¹¹² and the United States Supreme Court subsequently dismissed the appeal and denied *certiorari*.¹¹³

Thus far at least three federal courts have expressly denied the existence of the woman's fundamental right to terminate her pregnancy. In *Rosen v. Louisiana State Board of Medical Examiners*,¹¹⁴ the majority of the three-judge panel held firmly to a sharp distinction between the woman's right to prevent conception and her claimed right to eliminate conception.

We do not find that an equation of the generalized right of the woman to determine whether she shall bear children with the asserted right to abort an embryo or fetus is compelled by fact or logic. Exercise of the right to an abortion on request is not essential to an effective exercise of the right not to bear a child, if a child for whatever reason is not wanted. Abstinence, rhythm, contraception and sterilization are alternative means to this end.¹¹⁵

The court held that the Louisiana statute, penalizing any abortion not done to save the mother's life, embodied a permissible state policy to subordinate the interests of a pregnant woman,

short of her interest to be free from a threat to her life, to the interest of fetal development toward a natural birth. Such a policy did not offend the due process clause of the fourteenth amendment or any other constitutional guarantee.

A federal panel for the Western District of North Carolina showed similar respect for that state's therapeutic abortion statute. In *Corkey v. Edwards*¹¹⁶ the court held that, unlike contraception, abortion required a balance to be struck between the woman's right to privacy and the fetal right to life, and that such a "value judgment" was most properly a legislative determination. The court would not regard that determination, at least in the form of a therapeutic abortion statute, as an unreasonable one.

A three-judge federal court for the Northern District of Ohio has flatly distinguished contraception from abortion and refused recognition of a fundamental right to the latter. On the contrary, in *Steinberg v. Brown*,¹¹⁷ the majority found that the conception of embryonic or fetal life brings that prenatal "life" within the protection of the due process clauses of the fifth and fourteenth amendments. If novel rights are to be created, that court preferred to impute them to the fetal life in opposition to the woman.

E. *Additional Constitutional Contentions*

Several other constitutional arguments have been advanced in behalf of the pregnant woman since *Griswold*, but for the most part these have brought little attention or success in the recent decisions. Predictably, one has been that the typical abortion statute renders abortion scarcely available to classes of less affluent and knowledgeable women, and thereby deprives them of the equal protection of the law. Thus far the courts have found the equal protection clause unnecessary to their reasoning. Sympathetic courts in the *Belous*, *Vuitch* and *Wade* decisions did not discuss the issue; the *Babbitz*¹¹⁸ and *Bolton*¹¹⁹ courts rejected the contention, even though both held in favor of the woman's fundamental right to abortion; and the lower Pennsylvania court in the *Page* decision merely suggested its approval.¹²⁰ On the other side of the results, the *Rosen* majority ignored the contentions while the dissenter approved of it;¹²¹ the *Steinberg* decision found no state action involved and gave the issue short shrift,¹²² while again the dissenter was persuaded.¹²³

In a few instances the pregnant woman has argued that the legally compelled continuance of an unwanted pregnancy inflicts a cruel and unusual punishment in violation of the eighth and fourteenth amendments. This contention was summarily dismissed by the majority in *Steinberg*¹²⁴ but accepted by the dissenter in *Rosen*.¹²⁵

F. *Analysis*

Couched solely in bloodless constitutional terms, the pregnant woman's living interests tend to lose their immediacy. These actual "interests" are to be distinguished from her unsettled legal "rights" and perhaps should be recapitulated at this point. Her interest in mere physical "life" is already recognized by almost all jurisdictions, and her interest in "health" by a growing minority. Beyond these, she presses for recognition of an interest in mental or psychological health in their broadest medically defined terms, and for a quality of family life and environment achievable through the limitation of family size. These interests have been condensed under the rubric "socioeconomic indications." Perhaps the British Act¹²⁶ best captures the totality of the pregnant woman's interests in its consideration of (1) her physical and mental health, (2) that of any other children of her family, (3) that of the potential child, and (4) the woman's "actual or foreseeable environment." For such determinations the Act shows enormous deference to medical judgment. If the enumerated grounds or indications appear imprecise, they also permit latitude for the exercise of competent professional discretion incapable of codification. These indications must still be medically certifiable under established procedures.

As a matter of constitutional law, pre-*Griswold* decisions spoke of a right of family privacy or autonomy as a protectible liberty within the due process clause. *Griswold* more specifically acknowledged a constitutional right of "marital privacy" encompassing the use of contraception. And currently the lower courts are splitting sharply in their willingness to extend that constitutional right to abortion. As this last question approaches decision by the Supreme Court, the recognition of a constitutional right of abortion begins to resemble only the beginning of sophistication. The deeper difficulty remains in the more detailed definition of such a right, a process which may require some time and several decisions so long as the Court chooses, as in the recent

Vuitch decision, to say only so much as is necessary to decide the particular case before it.

Several of the more obvious definitional problems emerge from the cases. No court has characterized the right as absolute. Yet clear qualifications have not been dared probably for several reasons. First, they are usually not necessary for decision. And, second, they threaten to involve medical and biological determinations about which the courts feel a wary inexperience. The two dimensions of a constitutional right of abortion presently most conspicuous for their absence are (1) the character of that right as a peculiarly marital or intrinsically personal one, and (2) the duration of that right into pregnancy.

The first issue is whether the right to abort belongs only to a married woman, or to a married woman and her husband, or to all women, married and single, as an incident to the freedom of their person. Only two courts favoring the right have had single pregnant women before them and both have attributed that right to them in support of the latter view.¹²⁷ The characterization of the right as one of inherently personal physical liberty obviates problems of equal protection for married and single women. Arguably rational distinctions could be made between the two classes. As a matter of policy the state might be more concerned with the welfare of the married woman's going family unit; or it may be less sympathetic to the single woman's unwanted pregnancy and leave it unrelieved as an avowed deterrent of promiscuity. But such distinctions create more problems than they solve. Typically they are applied to justify classifications of legislative treatment, not the selective distribution of supposedly fundamental constitutional rights. Classification of the constitutional right to abortion would invite immediate equal protection challenge. And, of course, the living interests underlying the right are often the same for married and single women: life; health, physical and mental; the interception of the product of felonious intercourse; and, in the case of the habitually illegitimate mother, the environment and general welfare of her fatherless family.

The characterization of abortion as a personal, nonmarital right could carry additional significance. Such a right belongs to the mother alone and consequently she may exercise it *alone*, without the consent of her husband. However, so long as the right continues to be identified in the "marital privacy" language

of *Griswold*, it remains uncertain whether the right attaches to the woman only in her marital status, or to the man and wife jointly. In the latter case its exercise might require some consent by the father for its exercise. In most cases, where the husband and wife agree in the abortion decision, the distinction is academic. But in an appreciable minority of cases involving the prospect or fact of dissolution of the marriage, antagonism and disagreement may complicate the abortion decision. If the right is a jointly held marital one, the husband may seek to controvert the wife's decision and attempt to enjoin the abortion. If the right is personal to the wife, her decision will be legally incontrovertible by the husband.

The most unmanageable component of the woman's right is its uncertain duration. While the courts are competent to define the personal or marital nature of the woman's right, they may justifiably feel much less competent to prescribe a dimension of timeliness for that right. The point of time during a pregnancy, if any, at which the right to abort should diminish to a value less than that of competing interests, such as the woman's own health or the fetal right to continued life, involves difficult questions of medical judgment. The sense of the decisions is that the mother's right to abort declines, and that the fetal right to life grows, with the progress of the pregnancy. During the early stages, or the first trimester of pregnancy, abortion is a medically simple and safe operation. Beyond this stage it becomes increasingly dangerous to her life and health, and increasingly disputable as a medical decision. At the point of viability (seven months) the danger to the mother and the advanced life of the fetus weigh heavily against the right to an abortion not necessary to the woman's life or health. At the same time the fetus is becoming an increasingly "human" being amassing human physical and legal characteristics recognizable to even the most vigorous proponents of the primacy of the woman's right. Its destruction at a late stage strikes even these partisans as a regrettable, if not repugnant, act in the absence of grave needs of the woman.¹²⁸

For the Supreme Court the time dimension poses a delicate problem of degree best delegated to medical judgment. Certain discreet stages of pregnancy are available for guidance: conception, embryo (second through ninth week), fetal development to quickening (occurring about the sixteenth to twentieth week),

and viability (occurring about the seventh month). The Court will not be eager to translate close medical determinations into constitutional rights, even concededly qualified and regulable constitutional rights. During oral argument of the *Vuitch* case before the Court, counsel urged a fundamental right of at least the first three months duration.¹²⁹ Possibly the Court would eventually sanction this much absolutely and delegate further qualification to medical judgment.

It has been suggested frequently enough that the problems of definition would disappear altogether if the Court would merely declare the existence of the right to abortion and withdraw legal regulations, or at least criminal sanctions, in favor of a private resolution between the woman and her doctor.¹³⁰ But the total withdrawal of legal regulation is an abdication disguised as a solution. It would leave intact the illegal abortion industry. It would leave a supposed fundamental right to a medical service declared but unimplemented in the absence of public facilities and prescribed medical procedures compelled by law. It would be legally assailable as an abandonment of an avowedly fundamental right to the purely private and unappealable discretion of the medical profession. And, as a matter of law, the mere recognition of a constitutional right scarcely precludes its reasonable regulation in behalf of competing public and private interests.

In the end the formidable task of definition is not at all the courts' alone. Former Justice Clark suggests the simple judicial recognition of the constitutional right to abortion with further delineation of that right left to the legislature. The process would be one of declaration by the Court and consequent reasonable regulation by the legislature.

It is for the legislature to determine the proper balance, *i.e.*, that point between prevention of conception and viability of the fetus which would give the State the compelling subordinating interest so that it may regulate or prohibit abortion without violating the individual's constitutionally protected rights.¹³¹

The private and social interests in potential conflict with the right of abortion confirm the wisdom of a cautious judicial statement of that right. For example, if the Court defines the woman's fundamental right broadly as one of *choice of family size*, that right of choice extends to both the decision to have and not to have children. If the state cannot force a woman to continue an

unwanted pregnancy, neither can it compel her to discontinue a wanted pregnancy. The right of choice, then, arises in potential opposition to projected population control policies of compulsory abortion, contraception, or sterilization. And in light of its constitutionally fundamental personal nature, the state will bear the burden of proving a compelling, overriding interest for its abridgement.

Additional social interests militate for the continued legal regulation, restrictive and expeditious, of abortion. First, however, the array of involved private interests remains to be canvassed. Of these the most supposedly adverse and surely imponderable interest is that of the embryo or fetus.

V. THE UNBORN BEING

A. *Characterization*

A systematic examination of the interests and rights of the unborn embryonic or fetal being immediately confronts the problem of characterization. For those who believe that biological and legal "life" arise in their full "human" sense at conception, the issue is settled.¹³² For those who regard conception as the creation of life of less-than-human status, the controversy has merely begun. For doctors the preferred definition of the conceptus is frequently based on biological observation.

My feeling is that the fetus, particularly during its early intra-uterine life, is simply a group of specialized cells that do not differ materially from other cells.

...

And I feel that if it is going to be for the welfare of the adult individual, and for society in certain instances, we are justified in eliminating those cells.

...

If one can justify shooting a burglar who enters your room or going to war and shooting an enemy, one can certainly justify the elimination of some cells which, from my point of view, have not yet become a human being, but simply have the potentialities of life.¹³³

Another physician preeminent in the campaign for relaxation of the law offers the following views as professionally representative.

Physicians as a whole do not believe that a human being begins at conception. I know of no non-Catholic scientist who does. I know

of no scientist at all, no scientist in any field of biological science, who would say that an acorn, the second that that acorn has been fertilized, is an oak. It is a potential oak; it is not an oak. And a fertilized ovum is not a human being.¹³⁴

The lawyer is inclined to rest his preferred characterization on a simpler behavioral definition of human activity.

To say that life is present at conception is to give recognition to the potential, rather than the actual. The unfertilized egg has life, and if fertilized, it takes on human proportions. But the law deals in reality, not obscurity—the known rather than the unknown. When sperm meets egg life may eventually form, but quite often it does not. The law does not deal in speculation. The phenomenon of life takes time to develop, and until it is actually present, it cannot be destroyed. Its interruption prior to formation would hardly be homicide, and as we have seen, society does not regard it as such. The rites of Baptism are not performed and death certificates are not required when a miscarriage occurs. No prosecutor has ever returned a murder indictment charging the taking of the life of a fetus. This would not be the case if the fetus constituted human life. [Footnotes omitted.]¹³⁵

Post-*Griswold* courts have typically avoided resort to biological definitions of the fetus, and have skirted precise characterization as unnecessary to their conclusions. Biological data are given passing mention and then left as indeterminative of the right to abortion. The decisions have acknowledged an interest of the embryo or fetus in development toward birth and life, but they have circumvented a direct characterization of the fetal value taken alone. Instead they have considered it mainly in conjunction with the woman's right to abort and held that, *whatever* its character, the *early* fetal interest must usually yield to the mother's. The approach of the *Babitz* court exemplifies this aversion for simple characterization.

[T]he mother's interests are superior to that of an unquickened embryo, *whether the embryo is mere protoplasm, as the plaintiff contends, or a human being, as the Wisconsin statute declares.* [Emphasis added.]¹³⁶

The contrasting minority view of recent discussions characterizes fetal life as unqualified human life.

[T]hose decisions which strike down state abortion statutes by equat-

ing contraception and abortion pay no attention to the facts of biology.

...

... Biologically, when the spermatozoon penetrates and fertilizes the ovum the result is the creation of a new organism which conforms to the definition of life. . . .

...

... Once human life has commenced, the constitutional protection found in the Fifth and Fourteenth Amendments impose upon the state the duty of safe-guarding it.¹³⁷

B. *Common Law Analogies*

Advocates of the absolute or relative priority of fetal rights in the absence of the reasonable certainty of maternal death have drawn heavily on the respect accorded prenatal life by other branches of the law. They have argued that the common law long conferred upon the fetus substantial standing in property, tort, criminal law and equity, all in recognition of prenatal life as full human life.

The common law of real property first bestowed rights on the embryo or fetus. As early as 1795 English courts held the word "children" in a will to include a life in the womb.¹³⁸ Several years later another English court, holding an unborn child to be a life in being under the rule against perpetuities, enumerated the legal attributes of the fetal being.

He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. . . . He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian.¹³⁹

American courts followed the common law rules of the unborn's property rights. In the leading case in 1834, Massachusetts held the term "living" to encompass any life merely conceived.¹⁴⁰ It needed only to be *in esse*; it did not need even to have quickened. The general American view continued to treat the fetus *en ventre sa mere* as a living child for the benefit of its property interests.¹⁴¹ Fiction or not, the rule did work to preserve the property interests of a subsequently born child otherwise lost by his

tardy birth. It served the equitable distribution of property among children. As a practical matter, of course, the realization of such prenatal property rights turned on a successful birth.

Early tort law barred recovery to the child suffering tortious prenatal injury because of the difficulty of proving causation, the fear of fraudulent claims, and the authoritative view of Justice Holmes that "the unborn child was a part of the mother at the time of the injury. . . ." ¹⁴² The last twenty-five years, however, have brought a striking reversal of the old rule. Now a prenaturally injured child born alive is permitted an action for the consequences of that injury. ¹⁴³ Should it subsequently die as a result of the injury, a wrongful death action will lie in its behalf. ¹⁴⁴ Several qualifications remain in some jurisdictions. One is the requirement that the fetus be viable at the time of injury. ¹⁴⁵ And, significantly, the other is that the fetus be born alive. ¹⁴⁶

The criminal in his treatment of the fetus shows less concern for full human life. At common law it was not possible for the unborn child to be the object of the crime of murder, ¹⁴⁷ and no crime at all arose from abortion before quickening. Abortion after quickening was punished as a misdemeanor. ¹⁴⁸ Nineteenth century legislation eliminated the requirement of quickening and punished abortion as a felony. To the present, however, it has remained an offense less than, and independent from, murder or manslaughter.

In equity, the appointment of a guardian to protect the property or person of the unborn child has been cited as a regard for incapacitated human life before birth. ¹⁴⁹ The most compelling such case involved the appointment of a special guardian to facilitate a decree for a blood transfusion necessary to save the unborn life despite the religious objection of the mother. ¹⁵⁰

Such common law treatment does demonstrate a respect for unborn life, but it is not conclusive of the legally full human character of that life. It remains arguable that these adaptations of property and tort law and of equitable remedies have been designed out of fairness to permit a retroactive vindication of the interests of the ultimately born full human life. In property only the successfully born or his successors in interest will prosecute those interests. In tort the live-birth requirement in many jurisdictions still reflects this purpose. In equity the guardian protects fetal interests in anticipation of its birth. In criminal law abor-

tion as a crime was postponed to quickening as a misdemeanor and still has not been equated with homicide. The common law analogies invoked by proponents of restrictive abortion law seem only to reflect an instinctual ambivalence about fetal life, a respect for that life's possibilities but a reluctance to regard it as full human life, especially in its nonviable stages. These analogies are hardly dispositive of the abortion controversy where fetal life confronts increasingly valued competing rights and interests, especially those of the pregnant woman.

C. *Post-Griswold Treatment*

Weighing the early unborn interest to fetal development against the woman's claim to abortion, the recent decisions have predominantly favored the latter. However, in several cases, the fetal right has prevailed. The court in *Steinberg v. Brown* flatly held the fetal right to "life" under the due process clause to be superior to any right of the mother short of her own right to life.¹⁵¹ In *Rosen v. Louisiana State Board of Medical Examiners*,¹⁵² and *Corkey v. Edwards*,¹⁵³ the courts upheld the same legislative policy. The lower Minnesota court in *Minnesota v. Hodgson* relied on common law analogy to treat prenatal life as full human life overriding all other non-vital interests of the mother.¹⁵⁴

The decisions favoring the woman's right have necessarily assigned inferior value to fetal development. In *People v. Belous* the California Supreme Court construed the purpose of its 1850 abortion statute to have been the protection of the pregnant woman from unskilled criminal abortion. Since that purpose had lapsed with the development of safe abortion techniques and since the restrictive law was now believed to promote illegal abortion, no compelling state interest was found to justify a limitation upon the woman's fundamental right to abortion.¹⁵⁵ The court expressly rejected the equivalence of fetal life with that of a born child.¹⁵⁶ The district court's *Vuitch* decision did not discuss fetal rights except for its suggested limitation of the right to abort to early stages of pregnancy.¹⁵⁷ The *Babbitz* court held the unquickened fetal life overbalanced by the woman's right to abort.¹⁵⁸ The *Bolton* court viewed the *embryo* as a "life form with the *potential* of independent human existence."¹⁵⁹ The *Wade* court allowed that concern over the *quickened* fetus might be a legitimate state interest but not compelling enough to justify

the overbroad Texas necessary-for-life provision.¹⁶⁰ The most recent federal decision favoring the right of the woman held the unborn's interest subordinate at least through the first trimester of pregnancy.¹⁶¹ And in *Commonwealth v. Page*¹⁶² the lower Pennsylvania court concluded that *early* fetal life did not constitute a "person" within the sense of the due process clause.

If the fetal interest has been more often overridden by the woman's it has not been held an absolutely inferior value. The courts have held usually against the claim of *early* fetal life. Typically they have found offensive unconstitutionally *overbroad* statutory prohibitions of all abortion as a personal right. However obliquely, almost all decisions have preserved the opportunity for a legislative accommodation of maternal and *advanced* fetal interests under regulatory statutes more narrowly drawn and respectful of the right of the woman to terminate an early pregnancy.¹⁶³

VI. THE DOCTOR

Medical students have often asked how it is possible that reputable physicians will perform illegal abortions. The reply the author gives is that society will condone such practices for its own convenience providing that it does not have to collectively assume the moral responsibility for openly justifying them.¹⁶⁴

A. *The Affirmative Sense of Health*

Those physicians most intent upon the liberalization, if not the abolition, of the law of abortion propose the implementation of "health" in the broadest, most contemporary sense of that term.

Health in the broad sense . . . is a positive concept. Distinctions between physical and mental health are meaningless in terms of modern medical thinking. Health cannot be divorced from socio-economic factors which influence people's lives since health is a product of these conditions. In applying criteria for abortion based on maternal health, the question should be the extent to which the pregnancy threatens the general well-being of the patient. The threat must justify the sacrifice of the child. As with the threat of death, the risk will be relative and should not be subject to specific legislation for all patients.¹⁶⁵

For such physicians the attack upon the current state of the law, and even the liberalized Model Code provisions, is unremitting.

The laws which have been passed or proposed would bring medical practice up to about the year 1936. The laws presently in existence in most states . . . make third-rate medicine possible and nothing better because they go back a hundred years or so. The A.L.I. Model Laws bring us to about 1936, and make it possible for the physician to practice second-rate medicine today. Thus I feel that the only adequate law would be a law which, without any reservations whatsoever, merely withdraws all abortion statutes out of the criminal code and places them with the Medical Practice Act so that abortion becomes purely and simply a matter between woman and physician.¹⁶⁶

Not the least requirement of such expansive medical practice would be the duty to safeguard one's patient from the incompetent criminal abortionist.¹⁶⁷

The fact that criminal abortion law has fallen into desuetude in many jurisdictions does not relieve the professional frustration of the doctor. The law need not be rigorously enforced to exert an *in terrorem* impact on the profession. If he actively circumvents the law by falsification of legal indications, he deeply resents the necessity of such hypocrisy. Ethical problems will emerge in compliance with procedures requiring the certification of fellow physicians and of hospital boards holding variant views of the law. The elements of hypocrisy and risk inhibit legal circumvention and comprise a seemingly unwarranted interference with the physician's best medical judgment. The cumulative resentment of individual physicians has spurred them to confront the law directly.

B. *The Physician as Defendant*

The irony of his professional dilemma is that a doctor attacking restrictive abortion laws for the most positive professional reasons must necessarily do so from the risky posture of a criminal defendant. The doctor as criminal defendant is nonetheless the primary lawmaker in the current decisional movement. In his own professional interest he has provoked considerable substantive lawmaking, first in the recognition of his patient's right to abortion and second in the novel application of several familiar constitutional doctrines to the typical abortion statute.

Under the statutes the performing doctor and not the abortion-seeking mother is the offender. In this position he has become the beneficiary of her increasingly recognized right to

abortion. If he needed it, the *Griswold* decision conferred standing upon the physician, through his professional relationship with the woman, to challenge the constitutionality of the crime charged against him.¹⁶⁸ For this purpose the defendant physician has brought into play the doctrines of unconstitutional vagueness and overbreadth to attack the typical statute limiting abortion to preservation-of-life or preservation-of-life-or-health instances. The courts have been receptive to both arguments. However, a closer scrutiny of the decisions suggests that the courts have ignored traditional canons of statutory construction in order to invalidate, rather than preserve even in a more tolerable form, the existing law. In short, a closer analysis of the decisions holding abortion statutes void for vagueness or for unconstitutional overbreadth will disclose their serviceability to the medical profession during the past two years.

In this light the Supreme Court's decision in *United States v. Vuitch* restored the doctrine of vagueness to its proper use. The Court expressly divorced the issue of vagueness from the question of the woman's constitutional right to abort, and postponed the latter to another day.

Appellee has suggested that there are other reasons why the dismissal of the indictments should be affirmed. Essentially, these arguments are based on this Court's decision in *Griswold v. Connecticut* [citation omitted]. Although there was some reference to these arguments in the opinion of the court below, we read it as holding simply that the statute was void for vagueness because it failed in that court's language to "give that certainty which due process of law considers essential in a criminal statute" [citation omitted]. Since the question of vagueness was the only issue passed upon by the District Court it is the only issue we reach here.¹⁶⁹

And as a question of vagueness the typical abortion statute could not be held unconstitutional.

But if the result of this decision belongs to the government, its reasoning bestows a clear victory on the practical cause of the doctor. For in upholding the typical statute the Court gave expansive interpretation to the term "health" and reposed an almost insuperable burden of proof on the government. "Health" includes "psychological as well as physical well being,"¹⁷⁰ both physical and mental health reasons, "whether or not the patient [has] had a previous history of mental defects."¹⁷¹ With regard to burden of proof the Court was "unable to believe that Congress

intended that a physician be required to prove his innocence," and therefore held that [under the District of Columbia Statute] "the burden is on the prosecution to plead and prove that an abortion was not "necessary for the preservation of the mother's life or health."¹⁷²

The practical import of the *Vuitch* decision was underscored by Justice Stewart, dissenting from the majority's statutory construction and at the same time extending that interpretation to "its logical conclusion."¹⁷³

As the Court says, "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."

It follows, I think, that when a physician has exercised his judgment in favor of performing an abortion, he has, by hypothesis, not violated the statute. To put it another way, I think the question of whether the performance of an abortion is "necessary for the mother's life or health" is entrusted under the statute exclusively to those licensed to practice medicine, without the overhanging risk of incurring criminal liability at the hands of a second-guessing lay jury. I would hold, therefore, that "a competent licensed practitioner of medicine" is wholly immune from being charged with the commission of a criminal offense under this law.¹⁷⁴

C. *The Uses of Vagueness*

The Supreme Court has long found the doctrine of unconstitutional indefiniteness in criminal statutes to be a malleable shield for the protection of preferred personal liberties. One need not impugn the purpose of the doctrine or the motives of the courts to describe its uses. After an exhaustive survey of its application by the Supreme Court, one eminent commentator concluded that it has been used "almost invariably for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms."¹⁷⁵ The right of abortion presently resides in just such peripheral "freedoms," and not accidentally have receptive courts reached for the void-for-vagueness doctrine in its protection.

The doctrine has received eloquent statement over the years so that now the Supreme Court has available a supply of boiler-plate passages of definition. The one most frequently employed in the abortion decisions declares that "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. . . .”¹⁷⁶ Thus “[n]o 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 commands or forbids.”¹⁷⁷ Coming closer to the case of the doctor attempting to determine whether an abortion is “necessary to preserve the life or health of his patient,” the Court has said that “it will not do to hold an average man to the peril of an indictment for the unwise exercise of his . . . knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result.”¹⁷⁸ Analogously the doctor argues that the physician should not be held to the peril of an indictment for judgment involving as many variable factors as comprise “life” or “health,” and should not have that judgment second-guessed by a prosecutor or a jury.

Vagueness, of course, is a matter of degree. And in seemingly unconscious parallelism the Supreme Court has accumulated authority conceding certain inevitable quanta of statutory indefiniteness. It has never gainsaid Holmes’ observation of the irreducible ambiguity of language and of the inevitably objective standard of criminal liability to which a man is held.

[T]he law is full of instances where a man’s fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment . . . ; he may incur the penalty of death.¹⁷⁹

Still, the defendant should be aware that his conduct does require some judgment, correct or incorrect.

Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.¹⁸⁰

Reconciling statements of unconstitutional ambiguity, on the one hand, and unavoidable ambiguity on the other, Justice Frankfurter suggested that a criminal statute need not draw the precise line of illegality so long as it warns “one bent on obedience that

he comes near the prescribed area."¹⁸¹ A criminal statute could remain constitutionally sound, then, so long as it achieved proximity and not precision in its announcement of forbidden behavior.

Before the Supreme Court's *Vuitch* decision the dominant judgment of the lower courts was that the preservation-of-life-or-health standard did not apprise the physician of even his proximity to criminal conduct. The accompanying body of dissent and several decisions took sharp issue. A brief review of the decisions supports the view that the void-for-vagueness doctrine was not serving the purpose of adequate warning for the defendant so much as it was promoting the preferred right of the woman to her abortion.

The decisions put the concept of vagueness to three specific uses. First, they applied the original, direct due process rule that ambiguity deprives the defendant doctor of the fair warning of conduct for which he may be punished. Second, they indicated that an uncertain criminality inhibits the doctor from providing the assistance necessary to the exercise of the woman's fundamental right to an early abortion. The evil of this second form of vagueness was its curtailment of the right of the woman, not the rights of the doctor. The third function of ambiguity, said several courts, was that the enumeration of uncertain justifications for abortion directly abridged the woman's right. In short, the latter two senses of ambiguity served the interests of the woman and not the doctor. If he benefited from her assertion of a fundamental right to abortion, so did she from his assertion of statutory vagueness.

Of these three rationales, the first is the traditional application of the fair-warning doctrine, the second a reasonable corollary, and the third a judicial confusion of the rules of vagueness and overbreadth. The first and second uses are closely related in fact. Physicians forced to guess at the lawfulness of their conduct will reach widely different conclusions in similar or identical cases. The results of such ambiguity are a drastic variation in abortion practices from doctor to doctor, hospital to hospital, and even ward to ward within a hospital, all to the aggravation of uneven, or *de facto* discriminatory, treatment of abortion-seeking women.

Abortion practices vary not only from hospital to hospital but also from service to service within the same hospital. They also vary widely from doctor to doctor on the same service of the same hospi-

tal. In one of the largest teaching hospitals in the East, for example, the ratio of its staff members ranges from 1:140 to 1:11. The victim of all this confusion is, of course, the American female. Even if she has a legitimate reason for therapeutic abortion, she must find Doctor X in hospital Y with policy Z to have it done.¹⁸²

The cases have offered various examples of the physician's dilemma. In *Belous*, under the pre-1967 California necessary-to-preserve-the-mother's-life provision, the defendant doctor dealt with a patient threatening to visit the underground abortionist. He feared the possibility of "butchery in Tiajuana" and "self-mutilation." The California Supreme Court found the phrase "necessary to preserve" inherently uncertain and rejected saving constructions permitting abortion wherever it might be safer than childbirth,¹⁸³ as it would be in the usual early pregnancy. The *Belous* majority pursued the consequences of ambiguity one step further in its conclusion that statutory delegation of the abortion decision to a doctor who was necessarily inhibited by uncertain criminality amounted to an unconstitutional delegation of the abortion decision to a party interested in its nonperformance and thus the non-exercise of the woman's right.¹⁸⁴

The *Vuitch* court dealt with a provision permitting abortion "necessary for the preservation of the mother's life or health" and showed equal concern for the "particularly unconscionable" burden upon the doctor to construe "health" at his peril.¹⁸⁵ In addition, it found the provision to be a direct, overbroad restriction of the woman's right.¹⁸⁶ Similarly *Roe v. Wade* struck down the Texas save-the-life provision on the dual grounds that it denied the physician fair notice of criminal liability and unnecessarily abridged the woman's right to abortion.¹⁸⁷ And, invalidating the Illinois statute, the court in *Doe v. Scott* observed that physicians should not be held to an understanding of language on the meaning of which the courts have not been able to agree.¹⁸⁸ In *Commonwealth v. Page*, the lower Pennsylvania court invalidated the exceptionless prohibition of "unlawfully administered" abortion as a denial of fair warning to the physician and of fundamental rights to the woman.¹⁸⁹

By contrast several favorable decisions have refused to invalidate restrictive statutes as void for vagueness. *Babbitz v. McCann*, a decision emphatic in its assertion of the woman's right, found the Wisconsin save-the-life provision constitutionally clear,¹⁹⁰ but unconstitutionally overbroad in its direct restriction of a woman's right to early abortion. Similarly *Doe v. Bolton*

struck down Georgia's Model Code therapeutic abortion statute as unconstitutionally overbroad in its limitation of the grounds for abortion. The court did not find it necessary to address the charge of vagueness. Predictably, decisions upholding restrictive abortion statutes have summarily rejected the claim of unconstitutionality on vagueness.¹⁹¹

The void-for-vagueness rationale is vulnerable to criticism on several fronts.¹⁹² First, canons of construction require the courts to preserve the validity of a statute wherever a reasonable interpretation will do so.¹⁹³ In the instance of criminal provisions the courts can achieve this end through preferred narrowing construction of disputed language. For the usual abortion provision this technique would produce an expansive definition of the terms "life," "health," and "necessary." "Health" could include all the medically recognized indications for therapeutic abortion. "Life" could allow for the physician's concern for a patient threatening suicide or recourse to the underground abortion market. Burdens of proof and rules of intent also could support the statute. Dissenters from the *Belous* decision pointed out that any statutory vagueness there was cured by the requirement that the prosecution prove a *specific intent* to perform a criminal abortion.¹⁹⁴ In *Corkey v. Edwards* the court stressed its construction that the North Carolina therapeutic abortion statute left the burden of proof, including proof of intent, on the state to show an abortion outside the stated exemptions.¹⁹⁵ Similarly the Massachusetts law permits the physician a defense of good faith accompanied by reasonable medical judgment for the preservation of life or health.¹⁹⁶ The burden of proving bad intent remains with the prosecution. In short, the typical statute limiting abortion to the necessity to preserve the woman's life, or health, can be artfully construed to provide adequate safeguard to a physician's right to fair warning. The policy of some of the lower courts not to indulge such a construction and instead to invalidate the statute for indefiniteness tended to confuse the doctrine of vagueness and the defendant's right to notice, on the one hand, with the doctrine of overbreadth and the woman's right to abortion, on the other.

D. *The Propriety of Overbreadth*

Unconstitutional overbreadth invalidates a criminal statute which, either on its face or as authoritatively construed, not only reaches conduct lawfully punishable but also sweeps so broadly

as to punish constitutionally protected behavior.¹⁹⁷ Overbreadth and vagueness will frequently arise from the same statutory language. Ambiguity generates both constitutional defects: it prevents adequate warning of proscribed conduct; and, without a narrowing construction, it permits the inclusion of protected with prohibited conduct. Elements of both infirmities have occasioned the Supreme Court's warning that "it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large."¹⁹⁸

In the recent decisions several courts have tended to mingle vagueness with overbreadth. In the *Belous* decision the California Supreme Court demonstrated the tendency to straddle both doctrines.

We have concluded that the term "necessary to preserve" . . . is not susceptible of a construction . . . sufficiently certain to satisfy due process requirements without improperly infringing on fundamental constitutional rights.¹⁹⁹

Nevertheless the doctrines are distinct, despite their frequent coincidence. Statutory language may be unambiguous and nonetheless overbroad for its clear inclusion of protected activity with forbidden activity. Both doctrines are reasonably applicable to the usual preservation-of-life-or-health restriction. Of the two, however, overbreadth is a far less arbitrary rationale and one more consistent with the premise of a fundamental right to abortion. Vagueness will inevitably be a determination of degree on which courts, and judges within the same court, will differ. And, as already discussed, vagueness lends itself to two applications. First, apart from the recognition of any constitutional claim to abortion, vagueness had, prior to the *Vuitch* decision, been held to deny the defendant doctor fair notice of criminal conduct.²⁰⁰ Second, upon recognition of a fundamental right of abortion, it has been suggested that such uncertainty will inhibit the physicians from providing the assistance necessary for the woman's exercise of that right.²⁰¹

The better reasoned decisions have kept the doctrines separate and concentrated on the direct restriction of the woman's right to abortion as a matter of overbreadth, apart from the physician's uncertainty. These decisions tie their logic more tightly to the

constitutional stature of the woman's right.²⁰² They reason (1) that the basic constitutional right is a qualified and regulable one; (2) that the state may regulate it by compulsory procedures for public health purposes and, conceivably, curtail it for a compelling state interest; (3) but that the general statutory restriction of that right not limited to a demonstrable compelling interest unnecessarily abridges the constitutionally protected abortion along with the unprotected abortion. Overbreadth, then, addresses the statute's direct restriction of the woman's constitutional right. Vagueness addresses the impact of the statute on the uncertain mind and inhibited judgment of the doctor. The distinction remains significant because vagueness is curable by statutory construction while overbreadth involves the fundamental right of the woman and is typically fatal to the statute.

E. Professional Action as State Action

One final facet of the professional dilemma arises from the substitution of the doctor for the state in the regulation of abortion practices.²⁰³ In jurisdictions where the law delegates the abortion decision to hospital committees or corresponding medical bodies, those organizations stand in the stead of the state and consequently may not unnecessarily restrict the grounds for abortion any more than overbroad legislation might. Like the state, medical bodies may attach reasonable procedural regulations and limit grounds directly to the extent of a subordinating state interest. In the meantime they stand as the state in relation to a fundamental personal right. Or, in effect, the judgment of the profession at large is protected against that of any controlling segment inclined to restrict the woman's right.

Perhaps the ultimate professional dilemma in abortion is not legal so much as logistical. It remains to be seen whether the medical profession, after a victory in law, could muster the resources to implement a positive concept of health and supply safe abortion in the numbers in which it would be requested. Here again, professional action will undoubtedly take the form of state action.

VII. THE FATHER

The Chief Justice: "Have you given any thought to the right of the father?"

Mr. Dorsen (counsel for defendant physician): "I have given a

great deal of thought to that, I have come to the conclusion that it is only the woman's right."²⁰⁴

This brief colloquy during the oral argument of the *Vuitch* case before the Supreme Court aptly summarizes the legal discussion of the rights of the father. The most prominent quality of the paternal rights is their uncertainty. Commentators favoring the legal restriction of abortion typically advert to the father's rights in latent opposition to his wife's abortion.²⁰⁵ Occasionally a proponent of liberalized abortion will mention their potentiality out of reservations about abortion upon request.²⁰⁶

The cases have devoted even less attention to a legal rationalization of distinctly paternal rights. As yet the courts of record have had no adversary father before them to frame the issue of his rights. With married couples before them, the courts have treated the concurring husband and wife as a unit and located all antagonistic interests in either the fetus or the state.²⁰⁷ Consequently the husband's interest has been subsumed under the woman's fundamental right to abortion. Every major recent decision has been drawn to a consideration of *Griswold* and its characterization of basic "marital rights." Typically the courts proceed from *Griswold* to hold for or against "the woman's" right to abortion. Whether the husband's interest is discarded in the transition from the *Griswold* "marital right" to the "woman's fundamental right" of abortion is uncertain. The weight of decisional language supports the purely personal, rather than the jointly held, nature of the right to abortion. Of the seven reported decisions recognizing the basic right, only *Roe v. Wade* has involved a man-and-wife among the litigants, and it recognized the fundamental right of both "single women and married persons . . . to choose whether to have children."²⁰⁸ [Emphasis added]. The *Belous* case involved a girl unmarried at the time of her abortion. *Vuitch* does not reveal the marital status of the woman. Nor does *Babbitz*. *Bolton* involved pregnant women, married and single; *Page* an unmarried woman; and *Doe v. Scott* a single sixteen-year-old rape victim. Decisions not discussing the marital status of the woman can be assumed not to have found it necessary to their holding in favor of her fundamental *personal* right to early abortion.²⁰⁹ Those speaking to *both* single and married women have acknowledged the right without distinction, a further indication of its *personal* nature.²¹⁰ And those

addressing the abortion of unmarried women must be recognizing a personal, not marital, right.²¹¹

Nor does a father receive recognition in the decisions rejecting a constitutional right to abortion. Each of these, *Steinberg*, *Rosen* and *Hodgson*, subordinated the woman's right to the *fetal* right to life.

The upshot of the recent decisions, then, is that the fundamental right attaches personally to the woman. It would follow that a husband could not curtail that right, could not compel the preferred use of her body, any more than the state or fetal interests might. Still, whatever his rights, they have not been so much rejected as ignored.

Most likely, a spousal interest against a wife's abortion would emerge not as a constitutional right but as a procedural hurdle for the woman. State statutory schemes might require a husband's consent in the form of a reasonable regulation of the exercise of her right to abort. All approving courts have allowed for reasonable regulation or restriction commensurate with a compelling state interest. In the form of a mere procedural requirement, a husband's consent could not bar the exercise of the woman's constitutional right. It remains to be seen whether a father's dissent could embody a sufficiently compelling state interest, possibly in the collective welfare of the family unit. Cases of paternal opposition might require individual scrutiny as matters of medical judgment. The burden would lie with the father and the state to override the woman's choice and compel the birth of an unwanted child. Correlative criteria, such as the stage of fetal life and the danger to the woman, would come into play. Possibly a combination of (1) danger to the mother (2) advanced fetal life and (3) paternal dissent would produce a medical decision subordinating the woman's right of choice. In this form the father's will has become a medical criterion weighed for the reasonable restriction of his wife's fundamental right. The reasonableness of such a criterion appears supported by the obvious influence of the father's mind upon the family environment into which the child would or would not be born. In the face of a dissolution of the family, the father's influence and interest would be greatly diminished.

As a practical matter serious disagreement between husband and wife on such a basic family decision should be rare in the

ongoing marriage. Serious antagonism over the question of the child's birth bodes ill for its reception and environment, and probably constitutes a sociomedical criterion for the medical decision itself. Often the dissolution of the family will be imminent. One writer reports a 1967 lower California court case in which a husband, divorcing his wife, sought to have the court rule unconstitutional the law permitting his wife's hospital abortion on the ground that it deprived the father and the fetus of due process.²¹² The court avoided his claim on several grounds. It held (1) that the issue was one for medical rather than legal judgment; (2) that the wife's rights superseded the husband's; (3) and that, in simultaneously seeking divorce, the husband had forfeited his "normal family rights." Each of these three grounds offers a rationale to courts preferring the woman's right.

Another prominent medical writer cites cases undermining the practical value of a husband's power of veto.²¹³ His experience suggests (1) that disagreement reflects serious existing marital strain; (2) that a woman, intent upon abortion, will achieve it fraudulently or illegally if necessary; (3) and that disagreement, whatever the result, portends later disruption of the family in which the child would have been reared.

VIII. THE STATE

A. Powers

No court recognizing the woman's right to abortion has suggested that it is absolute; all have suggested that the law may restrict that right for a compelling state interest and regulate the manner of its exercise as an application of the police power.²¹⁴ Thus far no court favoring the woman has found a compelling state interest to justify the general prohibition of abortion with only prescribed exceptions for the preservation of the woman's life or life-and-health. In striking down restrictive statutes the courts have rejected a number of purported state interests as insufficient. They have found the nineteenth century statutory purpose to protect the woman from dangerous surgery no longer valid.²¹⁵ Nor has the deterrence of sexual promiscuity amounted to a satisfactory social interest.²¹⁶ The state's interest in the protection of fetal life has received the most respectful consideration. Still, that interest during the early stages of pregnancy has usually been subordinated to the woman's right of choice.²¹⁷ In

contrast, the courts sustaining restrictive statutes have affirmed an overriding state interest in the protection of fetal life as a justifiable legislative determination²¹⁸ or as a duty to protect "life" within the meaning of the due process clause of the fourteenth amendment.²¹⁹

B. Duties

The courts acknowledging the fundamental nature of the woman's right have nevertheless invariably mentioned the state's public health interest and police power to regulate the manner of the performance of abortion. Without doubt the state may impose two classes of conditions upon the exercise of the right of abortion: first, the requirement that the operation be performed in a medically safe manner, by qualified licensed physicians in a hospital or clinical facility;²²⁰ second, the requirement that the woman's decision to exercise the right be a *deliberative* one, made only after prescribed medical consultation and counsel for each case.²²¹

Thus far the courts favoring a constitutional right of abortion have confined themselves to the foregoing conclusions. The difficult implications of such a right remain unresolved. Even if it affirms such a right, the Supreme Court will necessarily leave such implications to legislative resolution. The foremost of these remain (1) the time dimension of the right of abortion during pregnancy; and (2) the equal provision of abortion facilities for the exercise of such a fundamental right.

The time dimension has troubled each court, and most have restricted their holding to a right of abortion during the early stages of pregnancy.²²² The most appropriate resolution of this question is likely to come through judicial deference for legislative judgment, and, in turn, legislative deference for medical judgment as a delegated regulation of abortion. The time dimension as a case-by-case medical decision would rest in medical discretion.

The second implication of a constitutional right to abortion will require the state to make facilities for its exercise available on an equal basis to all segments of the population. The right will be valueless without the facilities for its exercise. To obviate equal protection claims the state will be required to subsidize the poor. While the courts were largely unimpressed with equal protection arguments offered against restrictive statutes, several

were sensitive to the emergence of such a public responsibility in tandem with a right to abortion.²²³ As a matter of simple public health policy the provision of basic medical treatment would include abortion as well, once the criminal prohibitions had fallen. The social interest in the displacement of the underground abortion industry by public facilities would be incontrovertible once abortion had acquired constitutional sanction.

CONCLUSION: A LEGISLATIVE ACCOMMODATION OF INTERESTS

In less than two years the campaign against restrictive abortion law in the courts has dramatically outdistanced the more noticeable efforts in the state legislatures.²²⁴ Controversy in legislation has centered on the substitution of the Model Code provisions for the traditional preservation-of-life or preservation-of-life-and-health provisions. Meanwhile adjudication has produced a body of decisions holding abortion in the early stages of pregnancy to be a constitutional right abridgeable only to the extent of a compelling state interest. Such decisions would invalidate the Model Act itself for unconstitutional overbreadth. If the Supreme Court now sanctions this significant change in the law, the legislatures will face the prospect of thorough statutory revision to obviate potential overbreadth. The fact that the typical abortion statute is not unconstitutionally vague under the *Roe v. Wade* decision does not respond to the independent charge of overbreadth.

Like the lower courts, the Supreme Court need only decide the narrow question whether the constitutional right to abortion exists. The reasonable regulation of that right is then left to the legislatures. Such regulation must accommodate the interests of the woman and her family, the fetus, the medical profession, and the state. The state's interests have a dual character: to restrict the performance of abortion for overriding reasons; and to facilitate its exercise in proper cases, especially in order to prevent the unequal availability of abortion or to curb the underground abortion industry or to supplement contraceptive birth control programs.

The frustration of the medical profession under restrictive law has moved some of its members to call for the withdrawal of regulation in favor of a private physician-and-patient relationship and decision.²²⁵ Typically such proposals are qualified by

just such recommendation as the courts have suggested as reasonable regulation: (1) performance by registered physicians in accredited hospitals; (2) consultation for a deliberative decision; (3) a time limit coming from 12 to 20 weeks of pregnancy; (4) a massive expansion of medical facilities to absorb the request for abortion. In short, the suggested withdrawal of legal regulation is illusory.

Abortion on request or "on demand" will likewise prove an illusion. No nation has repealed all its abortion laws. Each has merely substituted regulatory for prohibitory laws. "Private acts with ascertainable public consequences" have nowhere ceased to be "a matter of legitimate concern for the public and a legitimate subject for regulation."²²⁶ The public consequences of private abortion decisions obviously include the birth rate, the practice of medicine, the allocation of health resources and the existing policies of contraceptive birth control.

The courts and the medical and legal commentators have suggested at least an outline of the major elements of a regulatory accommodation of the main interests of each party.

A. *The Woman*

In recognition of the woman's right, abortion on request might be permitted up to the point where medical danger becomes a concern, normally at about the 12-week mark. Thereafter greater justification could be required for the satisfaction of the performing doctor. Medical judgment on a case-by-case basis would prevail.

To provide for the free and intelligent exercise of the woman's right of choice, the state might require formal counseling (1) to determine the voluntariness of her decision, (2) to inform her of the nature of the operation and its medical consequences, (3) and to inform her of the feasible alternatives to abortion in her case, such as marriage and psychological counseling, housing assistance, mothers' aid, and so on. As a result of her decision, the state might offer either free abortion and post-operative care or free delivery and post-natal care. After abortion or birth the government could provide contraceptive counseling to forestall the need for repeated abortions.

The interests of the father might receive express statutory mention as a criterion, though not conclusive, for the medical decision to perform the abortion after the twelve-week point.

B. *Fetal Life*

To protect the fetal interest in continued development, the law might follow the conditional 12-week limit with an absolute 20-week deadline, overcome only by the necessity to preserve the woman's life, as judged by the performing physician.

C. *The Medical Profession*

Criminal sanctions against doctors could be removed. As foreshadowed by the *Vuitch* decision, greater deference would be allowed for medical judgment; good faith would be presumed; and malpractice standards applied to discipline doctors found in violation of the statutory scheme, especially in the promotion of doctor shopping for the performance of unjustifiably late or dangerous abortions.

Statutory provisions would give express respect to personal and professional beliefs. A conscience clause would affirm the freedom of doctors and nurses to withhold their services on moral grounds. And other provisions could enumerate, not exhaustively, the plain medical grounds on which a doctor could refuse an abortion.

D. *The State*

The state's police powers and public responsibilities are implicit in the foregoing provisions. It may require the performance of abortion by trained personnel in hospitals only, continue the criminality of unskilled abortion, and require counseling as a condition to the performances of an abortion. The looming public responsibility of the state would be the provision of adequate facilities and services for the equal availability of abortion to all segments of the population.

The legislative task would require a difficult and comprehensive effort. Some legislatures would be outstripping the popular support desired for such a program, and foot dragging would not be unlikely. The courts are neither required nor permitted to entertain these imponderable considerations in constitutional adjudication. Nonetheless the array of abortion cases on the Supreme Court's docket implicate just such massive legislative revision of the law. It remains to be seen next whether the courts have carried the day. Abortion as a matter of constitutional law and public health awaits at least one more decision of the Supreme Court.



FOOTNOTES

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¹ T. MALTHUS, *FIRST ESSAY ON POPULATION* 108 (Reprints Economic Classics, Augustus M. Kelley, New York, 1965).

² See, e.g., Sustin, *New Mexico's 1969 Criminal Abortion Law*, 10 NAT. RESOURCES J. 591 (1970); Leavy and Kummer, *Abortion and the Population Crisis; Therapeutic Abortion and the Law; Some New Approaches*, 27 Ohio St. L.J. 647 (1966); Drinan, *The Inviolability of the Right to be Born*, 17 W. RES. L. REV. 465, 467 (1965); George, *Current Abortion Laws: Proposals and Movements for Reform*, 17 W. RES. L. REV. 371, 374 (1965); Ryan, *Humane Abortion Laws and the Health Needs of Society*, 17 W. RES. L. REV. 424, 432 (1965).

³ D. CALLAHAN, *ABORTION: LAW, CHOICE AND MORALITY* 285, 289-92 (1970) (hereinafter cited as CALLAHAN). Callahan's work is by far the most comprehensive and intellectually neutral general contemporary treatment of abortion. The author undertakes a coordinated medical, legal and moral analysis of his topic. Especially valuable for legal purposes is his survey of comparative national experiences under restrictive, moderate and permissive abortion codes.

⁴ *Id.* at 290.

⁵ Leavy and Kummer, *supra* note 2, at 647.

⁶ E.g., the British Abortion Act discussed *infra* at 476.

⁷ LIFE MAGAZINE, February 27, 1970.

⁸ J. BATES & E. ZAWADSKI, *CRIMINAL ABORTION* 3-4 (1964); L. LADER, *ABORTION* 3 (1966) (hereinafter cited as LADER).

⁹ Lader estimates that 80 to 90 per cent of abortion seeking American women are married. LADER 58-59.

¹⁰ D. LOWE, *ABORTION AND THE LAW* ix (1966); LADER 24.

¹¹ LADER 2. *THERAPEUTIC ABORTION* 3, 6 (H. Rosen ed. 1954).

¹² CALLAHAN 285.

¹³ *Id.* at 129.

¹⁴ See, e.g., LADER 2; Guttmacher, *Abortion—Yesterday, Today and Tomorrow* in *THE CASE FOR LEGALIZED ABORTION NOW* 8 (A. Guttmacher, ed. Berkeley 1967) (estimate 800,000); Leavy and Kummer, *supra* note 2, at 647-48 (estimate one million or one illegal abortion every four to five pregnancies), and *Criminal Abortion, Human Hardship and Unyielding Laws*, 35 So. CAL. L. REV. 123, 124 n.5 (1962); Rosen, *Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy*, 17 W. RES. L. REV. 435, 436 (estimate over one million); Rossi, *Public Views on Abortion* at 27 in *THE CASE FOR LEGALIZED ABORTION NOW*.

Secret induced abortions are inherently difficult to quantify. Never-

theless authorities have long offered estimates. See, *e.g.*, M. CALDERONE (ed.), *ABORTION IN THE UNITED STATES* 180 (1958); P. GEBHARD et al., *PREGNANCY, BIRTH AND ABORTION* 136-37 (1958); F. TAUSSIG, *ABORTION: SPONTANEOUS AND INDUCED* 25 (1936) (hereinafter cited as TAUSSIG); Fisher, *Criminal Abortion* in *ABORTION IN AMERICA* 3-6 (H. Rosen ed. 1967).

¹⁵ CALLAHAN 134, citing Dr. Christopher Tietze, Statement made at Harvard Divinity School—Kennedy Foundation International Conference on Abortion, Washington, D.C., September, 1967. Callahan attributes special significance to Dr. Tietze's conservative figures because of the latter's status as a demographic statistician and his known advocacy of abortion on request.

¹⁶ N.Y. Times, Oct. 29, 1969, at 25, col. 3.

¹⁷ An additional but less impressive contention is that the typical restrictive abortion statute constitutes an enactment of religious convictions and therefore violates the establishment clause of the first amendment applied to the states through the fourteenth amendment.

¹⁸ The eight denials: *Mucie v. Missouri*, 398 U.S. 938 (June 1, 1970), *denying cert. to* 448 S.W.2d 879 (Mo. 1970) (manslaughter abortion conviction where patient died); *California v. Belous*, 397 U.S. 915 (Feb. 24, 1970), *denying cert. to* 71 Cal.2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) (statute repealed after prosecution commenced); *Molinario v. New Jersey*, 396 U.S. 365 (Jan. 19, 1970) (per curiam), *dismissing appeal from* 54 N.J. 246, 254 A.2d 792 (1969) (defendant jumped bail after appeal filed); *Morin v. Garra*, 395 U.S. 935 (June 2, 1969), *denying cert. to* 53 N.J. 82 (1968) (federal question not properly raised and preserved); *Knight v. Louisiana Bd. of Medical Examiners*, 395 U.S. 933 (June 2, 1969), *denying cert. to* 252 La. 889, 214 So.2d 716 (1968) (per curiam) (federal question not properly raised and preserved); *Moretti v. New Jersey*, 393 U.S. 952 (Nov. 18, 1968), *denying cert. to* 52 N.J. 182, 244 A.2d 499 (1968) (conspiracy conviction, abortion to have been performed by non-physician); *Fulton v. Illinois*, 390 U.S. 953 (March 4, 1968), *denying cert. to* 84 Ill. App.2d 280, 228 N.E.2d 203 (1967); *Carter v. Florida*, 376 U.S. 648 (March 30, 1964), *dismissing appeal from* 155 So.2d 787 (Fla. 1963).

¹⁹ 402 U.S. 62 (1971).

²⁰ *Roe v. Wade*, *appeal docketed* 39 U.S.L.W. 3151 (Oct. 6, 1970) (No. 808); *Hanrahan v. Doe*, *appeal docketed* 39 U.S.L.W. 3490, (Mar. 29, 1971) (Nos. 1522, 1523); *Rosen v. Louisiana State Board of Medical Examiners*, *appeal docketed* 39 U.S.L.W. 3247 (Nov. 27, 1970) (No. 1010).

²¹ See generally TAUSSIG 31; and Devereux, *A Typological Study of Abortion in 350 Primitive, Ancient and Pre-Industrial Societies*, in *THERAPEUTIC ABORTION* 97 (H. Rosen ed. 1954).

²² Niswander, *Medical Abortion Practices in the United States*, 17 W. RES. L. REV. 403, 404 (1965).

²³ Leavy and Kummer, *supra* note 2, at 649 and *Criminal Abortion: A Failure of Law*, 50 A.B.A.J. 52, 53 (1964).

²⁴ Leavy and Kummer, *supra* note 2, at 649.

²⁵ LADER 76.

²⁶ Niswander, *supra* note 22, at 406.

²⁷ *Id.* at 405, 406.

²⁸ Leavy and Kummer, *supra* note 2, at 649.

²⁹ Niswander, *supra* note 22, at 406.

³⁰ Noonan, *The Constitutionality of the Regulation of Abortion*, 21 HASTINGS L.J. 51, 63 (1969). By contrast the paternal interests in abortion are conspicuous by their omission from current American law. See *infra*, pp. 507-10.

³¹ CALLAHAN 410-16.

³² Niswander, *supra* note 22, at 405.

³³ *Id.*

³⁴ See generally G. WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* (1957) (hereinafter cited as WILLIAMS).

³⁵ See generally PERKINS, *CRIMINAL LAW* 101 (1957); 3 J. STEPHEN, *HISTORY OF CRIMINAL LAW* 32 (1883). Early American decisions adopting the common law rule include *Commonwealth v. Bangs*, 9 Mass. 386, 387 (1812); *Commonwealth v. Parker*, 50 Mass. 263 (1845); *Mitchell v. Commonwealth*, 78 Ky. 204 (1879); *Smith v. Gaffard*, 31 Ala. 45 (1857) (dictum); and *State v. Murphy*, 27 N.J.L. 112 (1858) (dictum).

³⁶ CALLAHAN 126; WILLIAMS 152-56; Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 395, 431-38 (1961).

³⁷ 43 Geo. 3, c. 58 (1803).

³⁸ 24 & 25 Vict., c. 100 (1861).

³⁹ WILLIAMS, 144-51 (1958).

⁴⁰ 1 K.B. 687 (1939).

⁴¹ 15 & 16 Eliz., c. 87 (1967). See pp. 476-77, *infra*.

⁴² Ill. Rev. Code §46, at 131 (1827).

⁴³ N.Y. Rev. Stat. pt. IV, ch. I, tit. II, §§8, 9 at 550; N.Y. Rev. Stat. pt. IV, ch. I, tit. VI, §21 at 578 (1828-1835).

⁴⁴ See Harper, *Abortion Laws in the United States*, in *ABORTION IN THE UNITED STATES* 187-92 (M. Calderone ed. 1958).

⁴⁵ Proposed Official Draft, 1962. See as an antecedent provision MODEL PENAL CODE sec. 207.11 & Comment (Tent. Draft No. 9, 1959).

⁴⁶ See generally Barnard, *An Analysis and Criticism of the Model Penal Code Provisions on the Law of Abortion*, 18 W. RES. L. REV. 540 (1967); George, *Current Abortion Laws: Proposals and Movements for Reform*, 17 W. RES. L. REV. 371 (1965); Kummer and Leavy, *Thera-*

peutic Abortion Law Confusion, 195 J. AM. MED. ASSOC. 96 (1966); Packer and Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417 (1959); and Sands, *The Therapeutic Abortion Act: An Answer to the Opposition*, 13 U.C.L.A. L. REV. 285 (1966).

⁴⁷ ARK. STAT. ANN. §41-304 (Supp. 1969); CAL. CODES ANN., Health and Safety §§25950-25954 (Supp. 1971) (the legislature removed the fetal defect justification at the threat of the Governor's veto); COL. REV. STATS. §§40-2-23, -50 (Supp. 1970); DEL. CODE ANN. §11-301 (Supp. 1970-71); CODE OF GA. ANN. §26-1202 (Supp. 1970); KAN. STAT. ANN. §§65443-65445 (Supp. 1970); MD. ANN. CODE art. 43 §137-139 (1970); N. MEX. STAT. ANN. §40A-5-1 (Supp. 1969); N.Y. PEN. LAW §125.05 (1970); GEN. STAT. N.C. §14-45.1 (Supp. 1969); ORE. REV. STAT. §§435.405-435.435; CODE OF LAWS OF S.C. §§16-87 (Supp. 1970); VA. CODE ANN. §18.1 (Supp. 1970).

⁴⁸ ALASKA STAT. §11.15.060 (1970); HAWAII REV. STATS. §768-6 (1970); and N.Y. PENAL LAW §125.05(3), at 79 (McKinney Supp. 1970-71).

⁴⁹ ALA. CODE tit. 14, §9 (1958); D.C.C.E. §22-201 (1967).

⁵⁰ LA. REV. STAT. §14:87 (Supp. 1970); MASS. GEN. LAWS ANN. ch. 272, §19 (1970); N.J. STAT. ANN. §2A: 87-1 (1969); PA. STAT. ANN. tit. 18, §4718 (1963).

⁵¹ LA. REV. STAT. §37: 1285 (1964).

⁵² *Kudish v. Board of Registration in Medicine*, 1969 Mass. Adv. Sh. 883, 248 N.E. 2d 264; *Commonwealth v. Brunelle*, 341 Mass. 675, 171 N.E.2d 850 (1961); *Commonwealth v. Wheeler*, 315 Mass. 394, 53 N.E.2d 4 (1944); *Commonwealth v. Nason*, 252 Mass. 545, 148 N.E. 110 (1925); *Commonwealth v. Brown*, 121 Mass. 69 (1876); *Commonwealth v. Sholes*, 95 Mass. (13 Allen) 554 (1866). *Nason* and the subsequent *Wheeler* and *Brunelle* decisions have required the doctor's good faith belief to meet "with the average judgment of the doctor in the community in which he practices."

⁵³ *State v. Siciliano*, 21 N.J. 249, 121 A.2d 490 (1956); *State v. Brandenburg*, 137 N.J.L. 124, 58 A.2d 709 (1948). See also *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967).

⁵⁴ *Commonwealth v. Page*, Centre City Pa. Com. Pleas Ct., Nov. 27, 1970, reported in 8 Cr. L. 2222 (December 30, 1970).

⁵⁵ ARIZ. REV. STAT. ANN. §13-211 (1956); CONN. GEN. STAT. ANN. §53-29 (1960); FLA. STAT. ANN. §§782.10, 797.01 (1965); IDAHO CODE ANN. §18-601 (1948); ILL. ANN. STAT. Ch. 38, §23-1 (Smith-Hurd 1964); IOWA CODE ANN. §701.1 (1950); KY. REV. STAT. §436.020 (1969); ME. REV. STAT. ANN. tit. 17, §51 (1965); MICH. STAT. ANN. §28.204 (1962); MINN. STAT. ANN. §617.18 (1964); MISS. CODE ANN. §2223 (also permits abortion in cases of rape) (Supp. 1970); MO. ANN. STAT. §559.100 (1953); MONT. REV. CODES ANN. §94-401 (1969);

NEB. REV. STAT. §28-404, -405 (1965); NEV. REV. STAT. §201.120 (1967); N.H. REV. STAT. ANN. §585:13 (permits the abortion of a quickened fetus necessary to preserve the life of the mother, and does not forbid the termination of an unquickened fetus) (1955); N.D. CENT. CODE §12-25-01 (1960); OHIO REV. CODE ANN. §2901.16 (1964); OKLA. STAT. ANN. tit. 21, §861 (Supp. 1970-71); R.I. GEN. LAWS ANN. §11-3-1 (1969); S.D. CODE §13.3101 (1939); TENN. CODE ANN. §39-301 (1955); TEX. PEN. CODE ANN. arts 1191, 1196 (1961); UTAH CODE ANN. §76-2-1 (1955); VT. STAT. ANN. tit. 13, §101 (1959); WASH. REV. CODE §9.02.010 (1961) (Laws 2d Ex. Sess. 1970, Ch. 3, §1 exempts a licensed physician's termination "of the pregnancy of a woman not quick with child.") W. VA. CODE ANN. §61-2-8 (1966); WIS. STAT. §940.04 (1958); WYO. STAT. ANN. §6-77 (1959).

⁵⁶ See CALLAHAN 132-42.

⁵⁷ 15 & 16 Eliz., c. 87 (1967).

⁵⁸ CALLAHAN 142-58. The author lists the American, British, Indian and Latin American codes as the world's most restrictive.

⁵⁹ *Id.* 184-217. See also Skalts and Norgaard, *Abortion Legislation in Denmark*, 17 W. RES. L. REV. 498 (1965).

⁶⁰ CALLAHAN 218-83. The main reasons for relaxation of the law in the Soviet Union were to allow the woman freedom of choice and to protect her from illegal abortion. In some Eastern European countries legal abortion is expedited as a supplementary means of birth control. *Id.* 220-53.

⁶¹ See notes 47 and 48, *supra*.

⁶² *People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970); *United States v. Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969), *rev'd*, 402 U.S. 62 (1971); *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970), *appeal dismissed*, 400 U.S. 1 (No. 297), *judgment vacated and remanded on appeal*, 402 U.S. 903 (No. 1353); *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), *appeal docketed*, 39 U.S.L.W. 3151 (U.S. Oct. 6, 1970) (No. 808); *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970), *appeal dismissed sub. nom. Bolton v. Doe*, 39 U.S.L.W. 3478 (U.S. May 4, 1971) (No. 973); *Doe v. Scott*, reported in 8 CrL 2406 (N.D. Ill. Jan. 29, 1971); *Commonwealth v. Page*, reported in 8 CrL 2222 (Centre City Pa. Com. Pleas Ct., Nov. 27, 1970); *State v. Munson* (South Dakota Circuit Court, Pennington County, April 6, 1970) (unreported except for excerpt appended to dissenting opinion, *Rosen v. Louisiana State Board of Medical Examiners*, 318 F. Supp. 1217, 1245 (E.D. La. 1970).

⁶³ *Rosen v. Louisiana State Board of Medical Examiners*, 318 F. Supp. 1217 (E.D. La. 1970), *appeal docketed*, 39 U.S.L.W. 3247 (U.S. Nov. 27, 1970) (No. 1010); *Steinberg v. Brown*, reported in 8 CrL 2255 (N.D. Ohio, Dec. 18, 1970); *Corkey v. Edwards*, reported in 8 CrL 2405 (W.D. N.C., Feb. 1, 1971); *Minnesota v. Hodgson* (Minnesota Dis-

trict Court, Second Judicial District, County of Ramsey, June 29, 1970) (unreported), *aff'd*, Minn. (1970), *appeal dismissed, cert. denied*, 39 U.S.L.W. 3505 (U.S. May 18, 1971) (No. 729).

⁶⁴ *United States v. Vuitch*, 402 U.S. 62 (1971).

⁶⁵ See note 20, *supra*.

⁶⁶ Tietze, *Mortality with Contraception and Induced Abortion*, 45 *Studies in Family Planning* 6 (1969), Appendix "C," p. 1.

⁶⁷ 381 U.S. 479 (1965).

⁶⁸ *Id.* at 486.

⁶⁹ *Id.* at 483-85.

⁷⁰ *Id.* at 484-85.

⁷¹ *Id.* at 486-99 (concurring opinion of Justice Goldberg).

⁷² *Id.* at 499-502 (concurring opinion of Justice Harlan).

⁷³ 262 U.S. 390 (1923).

⁷⁴ *Id.* at 401. Emphasis supplied.

⁷⁵ *Id.* at 399.

⁷⁶ 268 U.S. 510 (1925).

⁷⁷ *Id.* at 535.

⁷⁸ 316 U.S. 535 (1942).

⁷⁹ *Id.* at 536, 541.

⁸⁰ 388 U.S. 1, 12.

⁸¹ 321 U.S. 158 (1944).

⁸² 141 U.S. 250, 251 (1891)

⁸³ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

⁸⁴ *Buck v. Bell*, 274 U.S. 200 (1927).

⁸⁵ Justice Douglas delivered the opinion of the Court joined silently by Justice Clark and expressly by Justices Goldberg, Chief Justice Warren and Justice Brennan, the three who joined also in a separate concurring opinion written by Justice Goldberg and offering *additional*, not *different*, grounds for their concurrence. Justices Harlan and White each contributed a separate concurring opinion. Justices Black and Stewart each dissented.

⁸⁶ 381 U.S. at 484. Emphasis supplied.

⁸⁷ *Id.* at 486.

⁸⁸ *Id.* at 486-99.

⁸⁹ *Id.* at 500.

⁹⁰ *Id.* at 507, 527.

⁹¹ *Id.* at 485.

⁹² Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. REV. 730, 762-63 (1968).

⁹³ Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOYOLA (Los Angeles) L. REV. 1, 9 (1969).

⁹⁴ 71 Cal. 2d 954, 458 P.2d 194, 8 Cal. Rptr. 354, *cert. denied*, 387 U.S. 915 (1970).

⁹⁵ 305 F. Supp. 1032 (D.D.C. 1969).

⁹⁶ *Id.* at 1035. Emphasis supplied. In the oral argument of the *Vuitch* case before the Supreme Court, counsel for the woman argued for a right of abortion extending through at least the first three months of pregnancy. 39 U.S.L.W. at 3306, 8 CrL at 4121.

⁹⁷ 305 F. Supp. at 1035.

⁹⁸ *Id.*

⁹⁹ 310 F. Supp. 293 (E.D. Wis. 1970).

¹⁰⁰ *Id.* at 299. Emphasis supplied.

¹⁰¹ *Id.* at 301.

¹⁰² *Roe v. Wade*, 314 F. Supp. 1217, 1221 (N.D. Tex. 1970).

¹⁰³ 319 F. Supp. 1048 (N.D. Ga. 1970).

¹⁰⁴ *Id.* at 1055.

¹⁰⁵ *Id.* Emphasis Added.

¹⁰⁶ *Id.* at 1056.

¹⁰⁷ Reported in 8 CrL 2406 (N.D. Ill., Jan. 29, 1971).

¹⁰⁸ Centre City Pa. Com Pleas Ct., November 27, 1970, reported in 8 CrL 2222, 2223.

Similarly a lower South Dakota Court has declared unconstitutional that state's abortion statute. *South Dakota v. Munson*, memorandum decision, April 6, 1970, excerpt appended to dissenting opinion in *Rosen v. Louisiana Board of Medical Examiners*, 318 F. Supp. 1217, 1245 (E.D. La. 1970).

¹⁰⁹ *Doe (and Hodgson) v. Randall*, 314 F. Supp. 32 (D. Minn. 1970); *Doe v. Scott*, 310 F. Supp. 688 (N.D. Ill. 1970).

¹¹⁰ 314 F. Supp. 32.

¹¹¹ *Minnesota v. Hodgson*, Minnesota District Court, Second Judicial District, County of Ramsey (File No. 23789) (September 14, 1970) (unreported).

¹¹² Minn. (1970).

¹¹³ 39 U.S.L.W. 3505.

¹¹⁴ 318 F. Supp. 1217 (E.D. La. 1970).

¹¹⁵ *Id.* at 1223.

¹¹⁶ Reported in 8 CrL 2405 (W.D. N.C., Feb. 1, 1971).

¹¹⁷ Reported in 8 CrL 2255 (N.D. Ohio, December 18, 1970).

The majority opinion, authored by Judge Weick, is hardly a model of tempered objectivity. In an area where judges write cautiously of the respective rights of woman and fetus, Judge Weick shows a remarkable sense of certitude. In the process the following gratuities appear:

On the contention that the Ohio abortion law is unconstitutionally vague:

It appears to us that the vagueness which disturbs the plaintiffs herein results from their own strained construction of the language used, coupled with the modern notion among law review writers that anything that is not

couched in numerous paragraphs of fine-spun legal terminology is too imprecise to support a criminal conviction. 8 CrL 2255.

On the state's remedy for the unwanted child:

It is not true that having to bear an unwanted child necessarily requires raising the child, since the law can take away a child from neglectful parents—thus making it legally dead to those parents, as effectively as if it had been aborted. *Id.* at 2256.

On the contention that legal coercion of the continuance of an unwanted pregnancy imposes cruel and unusual punishment:

It may seem cruel to a hedonist society that “those who dance must pay the piper,” but it is hardly unusual. *Id.* at 2256–57.

These insights did not deter a vigorous dissent construing *Griswold* to require at least a balancing of a pregnant woman's right to abort against the rights of the embryo or fetus, the state carrying the burden to demonstrate a compelling interest in the restriction of the woman's right. *Id.* at 2256–57.

¹¹⁸ 310 F. Supp. at 298.

¹¹⁹ 319 F. Supp. at 1056.

¹²⁰ 8 CrL 2222.

¹²¹ 318 F. Supp. at 1243.

¹²² 8 CrL 2225, 2226.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ 318 F. Supp. at 1243.

¹²⁶ See pp. 476–77, *supra*.

¹²⁷ *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970) and *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970).

¹²⁸ See remarks of Dr. Alan F. Guttmacher, Symposium, *Law, Morality and Abortion*, 22 RUTGERS L. REV. 415, 441 (1968); Salzman, *Abortion: A Moral or Medical Problem?* 16 LOYOLA (New Orleans) L. REV. 295 (1970); Hall, *Abortion Laws: A Call for Reform*, 18 DE PAUL L. REV. 584, 589–90 (1969).

¹²⁹ 39 U.S.L.W. at 3306 and 8 CrL at 4121.

¹³⁰ See, e.g., Hall *supra* note 128, at 589; and remarks of Dr. Harold Rosen, Symposium, *Law, Morality and Abortion*, 22 RUTGERS L. REV. 415, 427–28 (1968).

¹³¹ Clark, *supra* note 93 at 11.

¹³² See, e.g., *Steinberg v. Brown*, 8 CrL 2225; Drinan, *The Inviolability of the Right To Be Born*, 17 W. RES. L. REV. 465 (1965); Brown, *Recent Statutes and the Crime of Abortion*, 16 LOYOLA (New Orleans) L. REV. 275 (1970); Louisell, *Abortion and Due Process*, 16 U.C.L.A. L. REV. 233 (1969). Noonan, *The Constitutionality of the Regulation of Abortion*, 21 Hastings L.J. 51 (1969).

The characterization of the fetus poses a severe test for the separation

of moral preference from intellectual honesty. Advocates of the unborn's right to life and death are only too eager to exercise those rights on "its" behalf. One judge has pointedly questioned the wisdom of those insisting on the vicarious exercise of the fetal right to life under legal compulsion. "Moreover, the statute which forces the birth of every fetus, no matter how defective or how intensely unwanted by its future parents, displays no legitimately compelling state interest in fetal life, especially when viewed with regard for the countervailing rights of pregnant women." *Doe v. Scott*, 8 CrL 2406 (N.D. Ill., Jan. 29, 1971) (Swygert, C.J.). On the other hand, those ready to extinguish the fetus at their mere convenience have available a self-serving syllogism about the fetal right to death, described by Callahan "[Y]ou have a right to die; your living will trouble me; hence, I will exercise for you your right to die." CALLAHAN 454.

While a number of the recent decisions have had to discuss the unborn right to life or the state's interest in fetal life, no court has had to address the so-called fetal right *not* to be born.

¹³³ Remarks of Dr. Alan F. Guttmacher, *Symposium, Law, Morality, and Abortion*, 22 RUTGERS L. REV. 415, 436 (1968).

¹³⁴ Remarks of Dr. Harold Rosen, *Id.* at 426.

¹³⁵ Clark, *supra* note 93, at 9-10.

¹³⁶ 310 F. Supp. at 301. Compare the same inclination of the *Corkey* court in its decision upholding the statutory superiority of fetal over maternal rights:

To determine the state interest we shall not attempt to choose between extreme positions. Whether possessing a soul from the moment of conception or mere protoplasm, the fertilized egg is, we think, "unique as a physical entity. . . ." Whatever that entity is, the state has chosen to protect its very existence. [8 CrL at 2465.]

¹³⁷ *Steinberg v. Brown*, 8 CrL at 2255-56.

¹³⁸ *Doe v. Clark*, 126 Eng. Rep. 617 (C.P. 1795).

¹³⁹ *Thellusson v. Woodford*, 31 Eng. Rep. 117, 163 (C.P. 1798).

¹⁴⁰ *Hall v. Hancock*, 32 Mass. (15 Pick) 255 at 258 (1834).

¹⁴¹ See *Louisell*, *supra* note 132, at 236-37.

¹⁴² *Dietrich v. Northampton*, 138 Mass. 14, 17 (1884). See PROSSER, LAW OF TORTS 354-57 (3d ed. 1964).

¹⁴³ The breakthrough decision came in *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946).

¹⁴⁴ PROSSER 356. See, e.g., *Torigian v. Watertown News Co.*, 352 Mass. 446, 225 N.E. 2d 926 (1967).

¹⁴⁵ PROSSER 356-57.

¹⁴⁶ PROSSER 357.

¹⁴⁷ See *Louisell*, *supra* note 132, at 238-39.

¹⁴⁸ *Id.* at 239.

¹⁴⁹ *Id.* at 243-44.

¹⁵⁰ Raleigh Fitkin—Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, *cert. denied*, 377 U.S. 985 (1964).

¹⁵¹ 8 CrL 2255–56.

¹⁵² 318 F. Supp. at 1232.

¹⁵³ 8 CrL 2405–06.

¹⁵⁴ Minnesota District Court, Second Judicial Circuit, County of Ramsey, June 29, 1970 (unreported).

¹⁵⁵ 71 Cal. 2d at 964–67, 458 P.2d at 200–02, 80 Cal. Rptr. at 360–62.

¹⁵⁶ *Id.* at 968–69, 458 P.2d at 202–03, 80 Cal. Rptr. at 363.

¹⁵⁷ 305 F. Supp. at 1035.

¹⁵⁸ 310 F. Supp. at 301.

¹⁵⁹ 319 F. Supp. at 1055. Emphasis original.

¹⁶⁰ 314 F. Supp. at 1223.

¹⁶¹ 8 CrL 2406.

¹⁶² 8 CrL 2222.

¹⁶³ See *People v. Belous*, 71 Cal. 2d at 964, 458 P.2d at 200, 80 Cal. Rptr. at 360; *United States v. Vuitch*, 305 F. Supp. at 1035–36; *Babbitz v. McCann*, 310 F. Supp. at 301; *Roe v. Wade*, 314 F. Supp. at 1223; *Doe v. Bolton*, 319 F. Supp. at 1055; and *Doe v. Scott*, 8 CrL 2406.

¹⁶⁴ Ryan, *Humane Abortion Laws and the Health Needs of Society*, 17 W. RES. L. REV. 424, 426 (1965).

¹⁶⁵ *Id.* at 431–32.

¹⁶⁶ Rosen, *supra* note 134, at 427. See also the remarks of Dr. Alan F. Guttmacher, *id.*, at 419–22; and Hall, *supra* note 128, at 589–92.

¹⁶⁷ This was the case in *People v. Belous*, where the patient threatened to seek an illegal abortion if the defendant physician did not assist her.

¹⁶⁸ 381 U.S. at 481.

¹⁶⁹ 402 U.S. at 72–73. Mr. Justice Black delivered the opinion of the Court, joined on the merits by the Chief Justice and Justices Harlan, White and Blackman. Justices Douglas and Stewart dissented on the merits. Justices Brennan and Marshall expressed no opinion or result.

¹⁷⁰ *Id.* at 71.

¹⁷¹ *Id.* at 71–72.

¹⁷² *Id.* at 71.

¹⁷³ *Id.* at 96.

¹⁷⁴ *Id.* at 96–97.

¹⁷⁵ Amsterdam, *Note, The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75 (1960).

¹⁷⁶ *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

¹⁷⁷ *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

¹⁷⁸ *Cline v. Frink Dairy Co.*, 274 U.S. 445, 465 (1927).

The crucial word in current abortion statutes is typically “necessary.” The word has been adjudicated before, and most famously discussed by Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheaton) 316 (1819). As in that case, the word in the abortion

context can be compared so that abortions can be "necessary," "more necessary," and "most necessary" to preserve life or health. By such generous construction courts might reasonably preserve the constitutionality of existing statutes, if they so preferred, and give breathing space to the doctor's medical judgment and the woman's right to abortion. As in Massachusetts, the courts might merely hold the physician to a good faith judgment of necessity consistent with the medical judgment of the community.

¹⁷⁹ *Nash v. United States*, 229 U.S. 373, 377 (1913).

¹⁸⁰ *United States v. Wurzbach*, 280 U.S. 396, 399 (1930). The objective or "external" standard of criminal behavior, no less than the objective standards imposed in other branches of the law, was a persistent observation of Holmes appearing in his writing over a period of 50 years. See *THE COMMON LAW, Lecture II, The criminal Law* (1881); and *Commonwealth v. Pierce*, 138 Mass. 165 (1884), holding a physician who had kept a patient in kerosene saturated flannels for three days to an objective standard of negligent homicide.

¹⁸¹ *Winters v. New York*, 333 U.S. 507, 539 (1948) (dissenting opinion).

The Constitution does not impose "impossible" standards, the Court has said, so long as the statutory language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947).

¹⁸² *Hall, Abortion in American Hospitals*, 57 AMERICAN J. PUB. HEALTH 1934, 1935 (1967).

¹⁸³ 71 Cal. 2d at 971-72; 458 P.2d at 205; 80 Cal. Rptr. at 364-65.

¹⁸⁴ *Id.* at 972-73, 458 P.2d at 206, 80 Cal. Rptr. at 366.

¹⁸⁵ 305 F. Supp. at 1034.

¹⁸⁶ *Id.*

¹⁸⁷ 314 F. Supp. at 1225.

¹⁸⁸ 8 CrL 2406.

¹⁸⁹ 8 CrL 2222.

¹⁹⁰ 310 F. Supp. at 298.

¹⁹¹ See *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217 at 1220; *Steinberg v. Brown*, 8 CrL 2255; and *Corkey v. Edwards*, 8 CrL at 2406 (statutory language does not shift burden of proof to defendant physician).

¹⁹² For a critical analysis of the use of vagueness doctrine by the *Belous* court, see *Note, To Be or Not To Be: The Constitutional Question of the California Abortion Law*, 118 U. PA. L. REV. 643 (1970).

¹⁹³ See, e.g., *United States v. Harriss*, 347 U.S. 612, 618 (1954).

¹⁹⁴ 71 Cal. 2d at 978-79, 458 P.2d at 210, 80 Cal. Rptr. at 369-70.

¹⁹⁵ 8 CrL 2405. This point is made also by the dissenting judge in *Doe v. Scott*, 8 CrL 2406-07.

¹⁹⁶ See note 52, *supra*.

¹⁹⁷ See, e.g., *Cox v. Louisiana*, 379 U.S. 536 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

¹⁹⁸ *United States v. Reese*, 92 U.S. 214, 221 (1875). See Amsterdam's suggested doubt about the doctrines' separability. Amsterdam, *supra* note 169, at 99 n.174.

¹⁹⁹ 71 Cal.2d at 960; 458 P.2d at 197; 80 Cal. Rptr. at 357. The lower *Vuitch* decision, in its reliance on *Belous*, also seems to blanket both rationales.

Its [the statute's life-or-health provision's] many ambiguities are particularly subject to criticism for the statute unquestionably impinges to an appreciable extent on significant constitutional rights of individuals. 305 F. Supp. at 1034.

²⁰⁰ *People v. Belous*, 71 Cal.2d at 960, 458 P.2d at 197, 80 Cal. Rptr. at 357; *United States v. Vuitch*, 305 F.Supp. at 1034; *Roe v. Wade*, 314 F.Supp. at 1225; *Doe v. Scott*, 8 CrL 2406; *Commonwealth v. Page*, 8 CrL at 2223.

²⁰¹ *People v. Belous*, 71 Cal.2d at 972-73, 458 P.2d at 206; 80 Cal. Rptr. at 366; *United States v. Vuitch*, 305 F.Supp. at 1034; *Doe v. Scott*, 8 CrL at 2406.

²⁰² *Babbitz v. McCann*, 310 F.Supp. at 302; *Roe v. Wade*, 314 F.Supp. at 1223; *Doe v. Bolton*, 319 F.Supp. at 1056; *Commonwealth v. Page*, 8 CrL at 2223. See also the dissenting opinions in *Rosen*, 318 F.Supp. at 1232, and in *Steinberg*, 8 CrL at 2256.

²⁰³ The *Bolton* court in particular was sensitive to this issue. 319 F.Supp. at 1058. The court in *Belous* less directly discusses the same possibility when it assails the statutory delegation of the abortion decision to the physician as an interested party. 71 Cal.2d at 972-73; 458 P.2d at 206; 80 Cal. Rptr. at 366.

²⁰⁴ 8 CrL 4120, 4122.

²⁰⁵ Drinan, *The Inviolability of the Right To Be Born*, 17 W. RES. L. REV. 465, 470-71 (1965); Brown, *Recent Statutes and The Crime of Abortion*, 16 LOYOLA (New Orleans) L. REV. 275, 284 (1970).

²⁰⁶ Remarks of Dr. Alan F. Guttmacher, *Symposium, Law, Morality and Abortion*, 22 RUTGERS L. REV. 415, 419-22 (1968).

²⁰⁷ E.g., *Roe v. Wade*, 314 F.Supp. 1217 (N.D. Tex. 1970) and *Minnesota v. Hodgson*, District Court, Second Judicial District, County of Ramsey, June 29, 1970 (unreported).

²⁰⁸ 314 F.Supp. at 1225. A single woman was also litigant.

²⁰⁹ E.g., the *Babbitz* and *Vuitch* decisions.

²¹⁰ E.g., the *Wade* and *Bolton* decisions.

²¹¹ E.g., the *Belous* and *Page* decisions.

²¹² Hall, *Abortion Laws: A Call for Reform*, 18 DE PAUL L. REV. 584, 591 (1969).

²¹³ Remarks of Dr. Harold Rosen, *Symposium, Law, Morality, and Abortion*, 22 RUTGERS L. REV. 415, 440 (1968).

²¹⁴ See, e.g., *People v. Belous*, 71 Cal. 2d at 964, 458 P.2d at 200, 80 Cal. Rptr. at 360; *United States v. Vuitch*, 305 F. Supp. at 1035-36; *Babbitz v. McCann*, 310 F. Supp. at 301; *Roe v. Wade*, 314 F. Supp. at 1223; *Doe v. Bolton*, 319 F. Supp. at 1055.

²¹⁵ See, e.g., *People v. Belous*, 71 Cal. 2d at 964-65, 458 P.2d at 200-01, 80 Cal. Rptr. at 360-61; *Babbitz v. McCann*, 310 F. Supp. at 301; *Commonwealth v. Page*, 8 CrL 2222.

²¹⁶ See, e.g., *Babbitz v. McCann*, 310 F. Supp. at 301 and *Commonwealth v. Page*, 8 CrL 2222.

²¹⁷ *People v. Belous*, 71 Cal. 2d at 967-69, 458 P.2d at 202-03, 80 Cal. Rptr. at 362-63; *United States v. Vuitch*, 305 F. Supp. at 1035; *Babbitz v. McCann*, 310 F. Supp. at 301; *Roe v. Wade*, 314 F. Supp. at 1223; *Doe v. Bolton*, 319 F. Supp. at 1055 n.3; *Doe v. Scott*, 8 CrL 2406; *Commonwealth v. Page*, 8 CrL 2222.

²¹⁸ *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. at 1228 and *Corkey v. Edwards*, 8 CrL 2405.

²¹⁹ *Steinberg v. Brown*, 8 CrL at 2256.

²²⁰ *United States v. Vuitch*, 305 F. Supp. at 1034; *Babbitz v. McCann*, 310 F. Supp. at 302; *Roe v. Wade*, 314 F. Supp. at 1223; and *Commonwealth v. Page*, 8 CrL at 2223.

²²¹ See *Doe v. Bolton*, 319 F. Supp. at 1055-56.

²²² *People v. Belous*, 71 Cal. 2d at 967, 458 P.2d at 202, 80 Cal. Rptr. at 362 (first trimester); *United States v. Vuitch*, 305 F. Supp. at 1035-36; *Babbitz v. McCann*, 310 F. Supp. at 302 (period limited to unquicken fetus); *Roe v. Wade*, 314 F. Supp. at 1223 (quicken fetus may embody compelling state interest); *Doe v. Scott*, 8 CrL 2406 (first trimester); *Commonwealth v. Page*, 8 CrL 2222 (first trimester). See also *Doe v. Bolton*, 319 F. Supp. at 1055, requiring more rational factors than the mere desire of the woman and her ability to find a willing physician.

²²³ *United States v. Vuitch*, 305 F. Supp. at 1035, and *Doe v. Bolton*, 319 F. Supp. at 1056.

²²⁴ Several commentators anticipated this institutional outcome as a result of legislative aversion for such a morally charged issue. See Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. REV. 730, 775-76 (1968), and Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOYOLA (Los Angeles) L. REV. 1, 7 (1969).

²²⁵ See, e.g., Hall, *supra* note 206, at 589-90; and remarks of Dr. Harold Rosen, *Symposium, Law, Morality, and Abortion*, 22 RUTGERS L. REV. 415, 427 (1968).

²²⁶ See CALLAHAN 478, and generally 468-80.