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Roy Lucas

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FEDERAL CONSTITUTIONAL LIMITATIONS ON THE ENFORCEMENT AND ADMINISTRATION OF STATE ABORTION STATUTES

ROY LUCAS*

I. INTRODUCTION

Until recently, mishandled criminal abortions¹ claimed the lives of an estimated ten thousand² American women each year. The vast majority of these individuals were married—wives and mothers.³ Legal hospital abortions,⁴ on the other hand, presently account for the termination of only eight to nine thousand pregnancies yearly.⁵ This figure contrasts sharply with the probable one-quarter to two million annual illegal abortions performed within the United States.⁶

* Assistant Professor of Law, University of Alabama School of Law.

¹ The term "abortion" in this Article means acts taken by a physician or other person to terminate a woman's pregnancy in its early stages, at least before the embryonic movement after fourteen or more weeks of pregnancy ("quickening"). When medical advances produce a reliable chemical abortifacient which can achieve results identical to those of surgery, the reasoning of this Article will apply with equal force to state restrictions upon the use of such a drug.

² J. BATES & E. ZAWADZKI, *CRIMINAL ABORTION* 3-4 (1964) [hereinafter cited as BATES & ZAWADZKI]; L. LADER, *ABORTION* 3 (1966) [hereinafter cited as LADER]; Fisher, *Criminal Abortion*, 42 J. CRIM. L..C. & P.S. 242 (1951); Leavy & Kummer, *Criminal Abortion: A Failure of Law*, 50 A.B.A.J. 52 (1964) [hereinafter cited as Leavy & Kummer]. With the advent of antibiotics, estimates in recent years have been reduced to 500-1000. Mishandled abortions are the chief cause of maternal death in the United States today. Niswander, *Medical Abortion Practices in the United States*, 17 W. RES. L. REV. 403 (1965) [hereinafter cited as Niswander].

³ LADER 58-59 states that from 80 to 90 per cent of the American women who seek to terminate a pregnancy by abortion are married. See also P. GEBHARD *et. al.*, *PREGNANCY, BIRTH & ABORTION* 96-99 (1958) [hereinafter cited as GEBHARD]; F. TAUSSIG, *ABORTION: SPONTANEOUS AND INDUCED; MEDICAL SOCIAL ASPECTS* 28 (1936) [hereinafter cited as TAUSSIG]; *THERAPEUTIC ABORTION* 3, 6 (H. Rosen ed. 1954) [hereinafter cited as Rosen].

⁴ "Therapeutic abortion" is the common term used to designate hospital abortions for medical indications.

⁵ D. LOWE, *ABORTION AND THE LAW* ix (1966) [hereinafter cited as LOWE]: "only 9,000 women a year succeed in gaining legal permission to terminate unwanted pregnancies." See also GEBHARD 196-97; LADER 24. On therapeutic abortion practices in American hospitals see generally Niswander 415-18.

⁶ Although estimates of underground activities are inherently uncertain, authorities generally use an approximate range of 200,000 to 1,500,000.

Such persistent flouting by citizens of laws written and enacted in the last century is the subject of increasing public controversy and discussion.⁷ It brings into focus sensitive issues of family planning and marital autonomy, church-state relations, subjective sexual taboos, and the mysteries of human procreation, life and death.

To date efforts at promoting or stifling⁸ abortion reform have focused on legislative action both in the United States and abroad. This article, however, examines the possibility of federal constitutional bases for invalidating state abortion restrictions. Part I summarizes the state of the law and describes the movement for reform. Part II arrays the interests at stake in the underlying controversy and places these in a constitutional framework. Part III then explores the federal constitutional claims which narrow the choices a court could face in a clear-cut challenge to any existing state abortion statute.

A. *The State of the Law*⁹

In the Anglo-American legal sphere, abortion before "quickening" was no crime under the common law of England. Early United States cases adopted this view.¹⁰ Abortion apparently raised no legal

LADER 2; ROSEN 3, 6. Three independent major studies have set the estimate at 1,000,000. GEBHARD 136-37; TAUSSIG 25; Regine, *A Study of Pregnancy Wastage*, 13, MILBANK MEMORIAL FUND QUART. No. 4, at 347-65 (1935). Actual public demand for legalized abortion is so great that "one out of every five pregnancies in the United States terminates in illegal abortion." BATES & ZAWADSKI 3.

⁷ See note 29, *infra*, for citation to recent books and periodical literature on the abortion reform controversy.

⁸ The thrust of abortion reform opposition comes from an insistence that abortion can be equated with homicide and is therefore inconsistent with the social and religious value accorded to human life. See, e.g., N. ST. JOHN-STEVAS, *THE RIGHT TO LIFE* (1964); Byne, *Abortion in Perspective*, 5 DUQ. U.L. REV. 125 (1966); Drinan, *The Inviolability of the Right to be Born*, 17 W. RES. L. REV. 465 (1965); Huser, *The Meaning of "Fetus" in Relation to the Crime of Abortion*, 8 JURIST 306 (1948); Comment, 37 U. COLO. L. REV. 283 (1965).

⁹ See generally George, *Current Abortion Laws: Proposals and Movements for Reform*, 17 W. RES. L. REV. 371, 375-90 (1966) [hereinafter cited as George]; Leavy & Kummer, *Abortion and the Population Crisis; Therapeutic Abortion and the Law; Some New Approaches*, 27 OHIO ST. L.J. 647, 653-54 (1966); Sands, *The Therapeutic Abortion Act: An Answer to the Opposition*, 13 U.C.L.A.L. REV. 285, 288-90, 310-12 (1966). For the most recent legislative activity see notes 27-29 *infra*, and accompanying text.

¹⁰ E.g. Smith v. Gaffard, 31 Ala. 45 (1857) (*dictum*); Mitchell v. Commonwealth, 78 Ky. 204 (1879); Commonwealth v. Bangs, 9 Mass. 387 (1812); State v. Murphy, 27 N.J.L. 112 (1858) (*dictum*). Few early American cases decided this question. Those which did disapproved only acts which

or moral controversy in this country until the post-Civil War period. During this era, however, a repressive ascetic ethic gave rise to the present-day framework of abortion legislation.¹¹

The later decades of the last century yielded substantial changes in the initial assumptions underlying abortion statutes. Marital choice in family planning and timing became a subordinate interest.¹² Most elevated were the interests of community elders in compelling uniform adherence to specified moral norms.¹³ These precepts generally defined human sexual activity as chiefly procreative in function and nature. Legal bans on both contraception and all abortion followed. A secondary consideration, universally held to be humane in its aim, was to protect pregnant women from the unskilled abortionist.¹⁴ Consistent with the initial goal to render marital relations procreative, however, law-makers chose to protect the woman by outlawing virtually all abortion rather than providing for therapeutic hospital abortion under safe antiseptic conditions. To the extent that extra-statutory abortion is undeterred,¹⁵ therefore, the second aim has failed. An incidental effect of the abolition of legal abortion before "quickenings" was to confer on the tiny developing fetus a legal status in many ways equivalent to that of human beings who

produced miscarriage after quickening. *George* 375; *But cf.* *Gleitman v. Cosgrove*, 49 N.J. 22, 37-38 & n.4, 227 A.2d 689, 697 & n.4 (1967) (concurring opinion). On the common law view *see generally* 3 J. STEPHEN, *HISTORY OF CRIMINAL LAW* 32, 74 (1883).

¹¹ *See* G. WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 152 (1957) [hereinafter cited as WILLIAMS]; Quay, *Justifiable Abortion—Medical and Legal Foundations* (pts. 1&2), 49 *Geo. L.J.* 173, 395 (1960).

During this period Connecticut enacted a law which prohibited the use of contraceptive devices. *CONN. GEN. STAT. ANN.* § 53-32 (1958). *Griswold v. Connecticut*, 381 U.S. 479 (1965), held that act to be unconstitutional abridgment of a fundamental constitutional right to "marital privacy."

¹² On the constitutional aspects of marital choice in family planning as a fundamental right *see* Part III.B., *infra*. *See also* Leavy & Kummer, *supra* note 9, at 672-75; Pilpel, *Birth Control and a New Birth of Freedom*, 27 *OHIO ST. L.J.* 679 (1966); *cf. generally* J. FLETCHER, *MORALS AND MEDICINE* (1954); Ryan, *Humane Abortion Laws and the Health Needs of Society*, 17 *W. RES. L. REV.* 424 (1965).

¹³ *Compare* P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1960), *with* H. HART, *LAW, LIBERTY, AND MORALITY* (1963), and Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 *YALE L.J.* 986 (1966).

¹⁴ *See, e.g.*, *State v. Murphy*, 27 N.J.L. 112, 114 (1858):

The design of the statute was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts.

¹⁵ *See* note 6 *supra*, and accompanying text.

had already developed and been born,¹⁶ and superior to that of potential children the parents may have planned for a later date.

The absolute tenor of late 19th century abortion "reform" not only took from the family and physician legal power to schedule the arrival of children, but also made no explicit and few implicit provisions for abortion in cases of rape, incest, early adolescent pregnancy, terminal cancer, rubella, Rhesus-factor complications, or other dangers to the woman's health.¹⁷ Four states—Louisiana, Massachusetts, New Jersey, and Pennsylvania—enacted no legislative exception to the general prohibition against abortion.¹⁸ The Massachusetts Supreme Judicial Court, however, engrafted an exception

¹⁶ A recent New Jersey decision took this view. A concurring opinion considered the 1849 New Jersey abortion statute "legislative recognition . . . of the principle that the child as a legal entity begins at conception. . . ." *Gleitman v. Cosgrove*, 49 N.J. 22, 36, 227 A.2d 689, 696 (1967) (opinion of Francis, J.). To use the expression "human being," however, or "child" when speaking of a developing fetus would have the dual effect of distorting ordinary language use and partially pre-determining any argument over the value which ought to be accorded the fetus when in conflict with the interests of the pregnant woman. Physically and developmentally the fetus closely approximates the unfertilized ovum or a collection of undeveloped growing cells infinitely more than it does a live infant. Certainly at the time most abortions could take place no one would confuse a fetus with anything physically human. This physical and developmental actuality of differences which brings abortion close to contraception is crucial to the evaluation of issues in the controversy. Cf. Note, 46 ORE. L. REV. 211, 218 (1967):

Destruction of a fertilized ovum before implantation is hardly distinguishable from the more common contraceptive methods in use today.

¹⁷ Due to lack of enforcement of the new statutes and deference to good faith medical practice, physicians were generally able to provide therapeutic hospital abortion for pregnant women whose health might be endangered by carrying a child to term. Lowe, for example, writes:

During the first few decades of this century, permission for therapeutic abortion was granted quite readily when the patient was known to suffer from any one of a wide variety of physical disorders. At the time it seemed advisable to induce abortion in almost all cases in which the patient showed evidence of heart disease, tuberculosis, extreme hypertension, or diabetes.

Lowe 2. More recent medical developments, however, have sharply reduced the dangers of pregnancy when accompanied by such disorders. This circumstance, along with an increased fear of religious pressure and criminal prosecution, has led to a corresponding reduction in the number of hospital abortions. See note 5 *supra*. The burden on an ill woman of bearing and raising an additional child, however, remains substantially the same.

¹⁸ LA. REV. STAT. § 14:87 (Supp. 1964); MASS. GEN. LAWS ANN. ch. 272, § 19 (1956); N.J. REV. STAT. § 2A:87-1 (1953); PA. STAT. ANN. tit. 18, § 4718 (1963). The Louisiana licensing provision, however, does not penalize a physician who aborts a woman whose life was in peril. LA. REV. STAT. § 37:1285 (1950). For a discussion of the Pennsylvania law see Trout, *Therapeutic Abortion Laws Need Therapy*, 37 TEMP. L.Q. 172, 184-86 (1964).

on its statute in favor of a physician who relied on a good faith belief that the woman's life or health was in great peril.¹⁹ The New Jersey Supreme Court agreed that a physician may act to save the life of the pregnant woman, but that court refused to protect the woman's health.²⁰ Almost all other states enumerated definite circumstances which justified legal abortion.²¹ Forty-six states²² and the District of Columbia²³ now specifically permit abortion to save the life of a pregnant woman. New Mexico specifically protects the woman from

¹⁹ The belief must coincide "with the average judgment of the doctors in the community in which he practices." *Commonwealth v. Brunelle*, 341 Mass. 675, 677, 171 N.E.2d 850, 852 (1961). See also *Commonwealth v. Wheeler*, 315 Mass. 394, 53 N.E.2d 4 (1944).

²⁰ *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). As early as the noted *Rex v. Bourne*, [1939] 1 K.B. 687, physicians have argued that the distinction between ensuring the woman's life and guarding her health is too vague to provide a useful standard for guidance. See *Davies, The Law of Abortion and Necessity*, 2 Mod. L. Rev. 126, 127 (1938).

²¹ The New Hampshire and South Carolina abortion statutes on *attempted* abortion provide no exception. N.H. REV. STAT. ANN. § 585:12 (1955); S.C. CODE § 16-82 (1962). But see *State v. Steadman*, 214 S.C. 1, 8, 51 S.C.2d 91, 93 (1948) (exception found implicit in statutory scheme).

²² ALA. CODE tit. 14, § 9 (1958); ALASKA STAT. § 11.15.060 (1962); ARIZ. REV. STAT. ANN. § 13-211 (1956); ARK. STAT. ANN. § 41-301 (1964); CAL. PEN. CODE § 274-76 (1955), as amended, Cal. Laws, ch. 327 (June 15, 1967), effective ninety-one days after adjournment of legislature; COLO. REV. STAT. ANN. §§ 40-2-23, -50 (1963), as amended, ch. 190 [1967] COLO. Sess. L. 284; CONN. GEN. STAT. ANN. § 53-29 (1958); DEL. CODE ANN. tit. 11, § 301 (1953); FLA. STAT. ANN. §§ 782.10, 797.01 (1965); GA. CODE ANN. §§ 26-1101, -1103 (1953); HAWAII REV. LAWS §§ 309-3, -4 (1955); IDAHO CODE ANN. § 18-601 (1948); ILL. ANN. STAT. ch. 38, § 23-1 (Smith-Hurd 1964); IND. ANN. STAT. § 10-105 (1956); IOWA CODE ANN. § 701.1 (1950); KAN. STAT. ANN. § 21-410 (1964) (This section is a manslaughter provision. No section specifically covers abortion. See also § 21-409.); KY. REV. STAT. § 436.020 (1962); ME. REV. STAT. ANN. tit. 17, § 51 (1965); MD. ANN. CODE art. 27, § 3 (1957); MICH. STAT. ANN. § 28.204 (1962); MINN. STAT. ANN. § 617.18 (1964); MISS. CODE ANN. § 2223 (1957), as amended, Miss. Laws, ch. 358 (1966); MO. ANN. STAT. § 559.100 (1953); MONT. REV. CODES ANN. § 94-401 (1947); NEB. REV. STAT. §§ 28-404, -405 (1965); NEV. REV. STAT. § 201.120 (1963); N.H. REV. STAT. ANN. § 585:13 (1955) (abortion of quick child); N.M. STAT. ANN. §§ 40A-5-1, -3 (1964); N.Y. PEN. LAW §§ 80-81 (1951); N.C. GEN. STAT. § 14-45.1 (Supp. 1967); N.D. CENT. CODE § 12-25-01 (1960); OHIO REV. CODE ANN. § 2901.16 (1953); OKLA. STAT. ANN. tit. 21, § 861 (1967); ORE. REV. STAT. § 163.060 (1964); R.I. GEN. LAWS ANN. § 11-3-1 (1956); S.C. CODE ANN. § 16-82 (1962); S.D. CODE § 13.3101 (1939); TENN. CODE ANN. § 39-301 (1955); TEX. PEN CODE ANN. art. 1191 (1961); UTAH CODE ANN. § 76-2-1 (1953); VT. STAT. ANN. tit. 13, § 101 (1959); VA. CODE ANN. 18.1-62 (1960); WASH. REV. CODE § 9.02.010 (1956); W. VA. CODE ANN. § 5923 (1961); WIS. STAT. § 940.04 (1963); WYO. STAT. ANN. § 6-77 (1959).

²³ D.C. CODE ANN. § 22-201 (1961).

serious and permanent bodily injury.²⁴ The statutes in Alabama and the District of Columbia further allow therapeutic abortion to protect both the woman's life and health.²⁵

Commencing in the early months of 1967²⁶ a number of states began to take action on abortion reform measures.²⁷ By the middle of June, Colorado, North Carolina, and California had passed new statutes based on the American Law Institute's provisions in the Model Penal Code.²⁸

B. The Mood for Reform

Increased public interest in the liberalization of abortion laws is evident in the currents of modern thought.²⁹ In the sphere of family

²⁴ N.M. STAT. ANN. §§ 40A-5-1, -3 (1964).

²⁵ See notes 22 and 23 *supra*, for citation to the Alabama and District of Columbia statutes. Massachusetts decisional law achieves a similar result. See note 19 *supra*, and cases cited. Whether Maryland law is in accord would depend on construction of the requirement that a physician be "satisfied . . . that no other method will secure the safety of the mother." MD. ANN. CODE art. 27, § 3 (1957). No Maryland cases illuminate this point.

²⁶ Twenty-eight state legislatures have considered bills concerning abortion in the 1967 sessions. Ass'n for the Study of Abortion Newsletter, No. 2, at 4 (Summer, 1967).

In June of 1966 the Mississippi legislature passed a limited revision of its act. The new provision permits abortion "by a duly licensed, practicing physician: . . . where pregnancy was caused by rape." MISS. CODE ANN. § 2223 (1957), as amended, Miss. Laws, ch. 358 (1966).

²⁷ For a discussion of the activity leading up to the introduction and passage of the most recent statutes see generally N.Y. Times, April 30, 1967, at 60, col. 1 (city ed.) (Colo. act); *id.*, § 4, at 6, col. 1; *id.*, April 29, 1967, at 34, col. 1 (editorial on Colo. law); *id.*, May 9, 1967, at 36, col. 4 (N.C. act); *id.*, May 6, 1967, at 25, col. 5 (N.C. act); *id.*, June 16, 1967, at 24, col. 3 (Calif. act); *id.*, June 14, 1967, at 19, col. 1 (city ed.) (Calif. act); *id.*, April 29, 1967, at 14, col. 3 (Calif. act).

²⁸ MODEL PENAL CODE § 230.3 (Proposed Official Draft, 1962); MODEL PENAL CODE § 207.11 & comment (Tent. Draft No. 9, 1959), discussed in Barnard, *An Analysis and Criticism of the Model Penal Code Provisions on the Law of Abortion*, 18 W. RES. L. REV. 540 (1967); Byrn, *Abortion in Perspective*, 5 DUQ. U.L. REV. 125, 132-34 (1966); Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 683-86 (1963).

²⁹ Recent books include: ABORTION IN THE UNITED STATES (M. CALDERONE ed. 1958) [hereinafter cited as CALDERONE]; BATES & ZAWADZKI; THE CASE FOR LEGALIZED ABORTION NOW (A. GUTTMACHER ed. 1967); B. DICKENS, ABORTION AND THE LAW (1966); FAMILY PLANNING AND POPULATION PROGRAMS: A REVIEW OF WORLD DEVELOPMENTS (B. BERELSON ed. 1966); GEBHARD; LADER; LOWE; E. SCHUR, CRIMES WITHOUT VICTIMS (1965) [hereinafter cited as SCHUR].

The number of articles on abortion reform is increasing steadily. *E.g.*, Symposium—*Abortion and the Law*, 17 W. RES. L. REV. 369-568 (1965) (nine articles); Barnard, *supra* note 28; Beilenson, *The Therapeutic Abortion Act: A Small Measure of Humanity*, 41 L.A.B. BULL. 316 (1966); Byrn, *supra* note 28; Byrne, *A Critical Look at Legalized Abortion*, 41 L.A.B.

planning, many citizens today do not believe that a particular moral norm ought to be forced on all of a society unless the sacrifice in individual liberty of choice is offset by a significant societal benefit.³⁰ This view, as applied to the abortion reform setting, necessarily further assumes that the value to be accorded to developing fetal tissue is a subjective moral choice that ought not to be dictated by the state. It is a premise widely shared, especially by those individuals whom rigid abortion laws most directly affect.

Outside of the continental United States, governmental authorities are less dictatorial in their demands on the pregnant woman. It was common knowledge that until recently abortion was available upon request in a clinical setting as near as San Juan, Puerto Rico, and in any number of towns and cities in Mexico.³¹ Japan is also becoming a center for aborting American women.³² In Japan abortion is legally available for a 15 dollar fee. Surgeons must obtain a special governmental license to perform the operation, and safe, hygienic conditions are virtually assured.³³ This contrasts markedly

BULL. 320 (1966); Leavy & Kummer, *supra* note 9; Moore, *Unrealistic Abortion Laws*, 1 CRIM. L. BULL. No. 10 at 3 (1965); Sands, *supra* note 9; Schwartz, *supra* note 28; Williams, *Euthanasia and Abortion*, 38 U. COLO. L. REV. 178, 187-201 (1966).

Literature of general consumption contains numerous recent discussions of abortion as well: E.g., Byrn, *Abortion: A Legal View*, COMMONWEAL, March, 1967, at 679; Coniff, *The World of the Unborn*, N.Y. TIMES, Jan. 8, 1967, § 6 (Magazine), at 97; Hall, *Rethinking the Abortion Problem: Medico-Legal Aspects*, CRIMINOLOGICA, Feb., 1967, at 5; Lader, *The Scandal of Abortion Laws*, N.Y. TIMES, April 25, 1965, § 6 (Magazine), at 32. See materials cited in notes 26-29 *supra* for current legislative activity.

A recent survey of 40,000 American physicians found 86.9 per cent in favor of more liberal abortion legislation. N.Y. Times, April 30, 1967, at 82, col. 6 (city ed.). Shortly thereafter the American Medical Association issued a policy statement endorsing the abortion reform recommendations of the American Law Institute. *Id.*, June 22, 1967, at 41, col. 1. At the 1967 (eighth) Conference of the International Planned Parenthood Federation, a number of reports urged more flexible abortion statutes. The Federation took no position on the issue. *Id.*, April 13, 1967, at 15, col. 1 (city ed.). And, in New York City, a large number of rabbis and ministers have formed a group called the Clergymen's Consultation Service on Abortion to assist and console women seeking to terminate their pregnancies. *Id.*, May 22, 1967, at 1, col. 2.

³⁰ See H. HART, LAW, LIBERTY AND MORALITY 25-83 (1963); Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966).

³¹ Cost of an abortion in Mexico generally amounts to 300-400 dollars exclusive of transportation and accommodations. For detailed discussion of the availability of clinical abortion outside the United States, see CALDERONE 14-32, 200-10; GEBHARD 225-47; LADER 42-75; LOWE 96-114.

³² CALDERONE 200-03; GEBHARD 218-21; LADER 57.

³³ A complete discussion of abortion reform outside the United States is

with the extra-hospital setting of illegal abortion within the United States.

Several state legislatures have passed abortion reform bills, and the American Law Institute has proposed reform legislation as a part of the Model Penal Code. The American Medical Association supports the Code. In addition, the New York Civil Liberties Union has taken the position that: "A person is guilty of abortion [only] if he is not a duly licensed physician and intentionally terminates the pregnancy of another otherwise than by a live birth."³⁴ Reform measures seek to transfer the power of family planning from the state back to the family and its physician. Further educational and reform activities have been undertaken by the California Committee for Therapeutic Abortion in San Francisco and the Association for the Study of Abortion in New York City, as well as numerous like organizations.

The chief thrust of reform urgings has been to permit citizens—pregnant women, their husbands, their physicians—to decide for themselves when pregnancy ought to be terminated and to erect no state barrier to the carrying out of conclusions which these individuals privately reach. This approach does not force a single belief concerning the propriety of abortion on others who are unwilling to accept that belief. Those who equate abortion with sin or even murder are permitted to entertain their beliefs privately and act on them in their private spheres of influence. In contrast to this attitude of reform is that of the sole major organized body opposing all abortion reform—officials of the Roman Catholic Church.³⁵ Their

beyond the purposes of this article. On European abortion reform see generally LADER 42-75; GEBHARD 221-44; *Symposium—Abortion and the Law*, 17 W. RES. L. REV. 369, 498-568 (1965).

³⁴LADER 169. The A.C.L.U. of Southern California has taken a like view. It asserts that the former California abortion law (and presumably the new legislation as well) infringes upon "the right of privacy guarantees of the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution." Calif. Comm. on Therapeutic Abortion Newsletter, November, 1966, at 3.

³⁵The National Conference of Catholic Bishops authorized a first year's budget of 50,000 dollars to finance a campaign against the proposed abortion reform bills introduced recently in many of the United States. Ass'n for the Study of Abortion Newsletter, No. 2, at 5 (Summer, 1967). See also Drinan, *Strategy on Abortion*, AMERICA, February 4, 1967, at 177. But see Letter from Richard Cardinal Cushing, Archbishop of Boston, March 19, 1963:

There is nothing in Catholic teaching which suggests that Catholics should write into civil law the prescriptions of church law, or in any way force the observance of Catholic doctrine on others.

position is ultimately detrimental to the health and well being of any woman who would choose to terminate her pregnancy. Moreover, rigid restrictions on permissible indications for abortion force physicians to refuse to treat pregnant patients according to their best medical judgment. The woman may then risk her life by resorting to an incompetent "butcher."

C. Modes of Reform

Abortion reform can take several routes. Statutory exceptions to the general prohibition are more typical of recent proposals.³⁶ Other groups advocate the converse approach of general legal permission to terminate pregnancy, provided the woman consents and a licensed physician performs the operation.³⁷ Supplementary to abortion reform are preventive measures designed better to inform large numbers of the citizenry concerning the availability of various contraceptive means. More extensive public sex education may be needed, as are greater facilities for seclusion for the unwed mother and further encouragement for adoption of unwanted children.

This article is chiefly concerned, however, with abortion reform by judicial interpretation, and the application of established constitutional concepts to the physician-patient relationship. Although interests at stake in the abortion controversy are diverse, subtle, novel, and sensitive, the case appears ultimately to fit within the classical framework of governmental interference with important interests of individual liberty and to be capable of resolution in traditional constitutional terms.³⁸

Studies apparently show that Catholic individuals, as citizens, ignore existing abortion taboos as readily as do non-Catholic citizens. *See, e.g.,* KOPP, BIRTH CONTROL IN PRACTICE 222 (1934) (26 per cent of women studied who had undergone abortion were Catholic); Hall, *Therapeutic Abortion, Sterilization and Contraception*, 91 AM. J. OBSTETRICS & GYNECOLOGY 518-32 (1965) (22 per cent of white parents studied were Catholic). In addition, a statistical analysis of abortion convictions in New York County from 1925 to 1950 found 49 per cent of the physicians convicted to be Catholic, a proportion substantially higher than the 25 per cent figure representing the proportion of the American population which is Catholic. BATES & ZAWADZKI 202.

³⁶ See notes 26-28 *supra*, and accompanying text.

³⁷ See note 34 *supra*, and accompanying text. Williams, *The Law of Abortion*, 5 CURRENT LEG. PROB. 128 (1952), also advocates that abortion authority rest solely with the woman and her physician, subject to proper medical safeguards.

³⁸ It is assumed in this article that a state has power to regulate the qualifications of surgeons and limit the class of "abortionists" to those who meet

II. ABORTION AND THE VALUES AT STAKE

A. *The Woman's Interests*

The individual whose interests are most affected by present abortion restraints is the pregnant woman.³⁹ Her rationale for seeking abortion may range from matters of convenience to those of her very existence, including her concerns for both mental and physical health. Therapeutic hospital abortion, that is, hospital abortion for medical indications, seldom endangers a woman's interests in life, health, or continued fertility.⁴⁰ Illegal abortions, however, are typically performed under imperfect, unsanitary conditions, and have killed or maimed thousands of women in the United States alone.⁴¹ The numerical inconsistency between the number of instances in which abortion is sought and received and the number of instances in which it is "legally" performed refutes any pretense that statutory prohibition of abortion achieves or can ever achieve its aim of safeguarding the prospective mother.⁴²

certain reasonable standards. It can clearly punish the incompetent criminal abortionist who is a potential danger to the society.

³⁹ An estimated 80-90 per cent of the pregnant women who seek abortion are married. See also note 3 *supra*, and accompanying text. These approximations are borne out by records in jurisdictions where abortion is not prohibited. See, e.g., LADER 120: "Over an eighteenth-month period in Finland, 85 per cent of legal abortions were performed on married women." See also LOWE 8: "If we were to give a profile of the most common situation in which a woman requests termination of pregnancy, we should describe a married woman with two or three children, at the height of child-bearing, between 28 and 40." (Quoting Dr. Edwin Gold, Director of Obstetrics and Gynecology at Brooklyn Hospital in New York City).

⁴⁰ See, e.g., LADER 17:

In Czechoslovakia, for example, not a single death was reported in 140,000 legal abortions (1963-64); in Hungary, only two deaths in 358,000 abortions (1963-64); in Yugoslavia, less than five per 100,000 (1961).

The fatality rate for legal abortions in Scandinavia is slightly higher because a slow system of committee approval and permissive laws pushes many abortions past the three-month limit imposed in Eastern Europe.

See also GEBHARD 136; Kumer, *Post-Abortion Psychiatric Illness—A Myth?* 119 AM. J. PSYCHIATRY 980 (1963). The development of adverse psychological reactions is an infrequent result of the abortion itself and is then generally thought to stem from "guilt imposed on the women by society." LADER 23.

⁴¹ LOWE 50: "[A]t the present time, almost 50 percent of . . . maternal loss in New York City is directly related to the effects of an illegal termination of pregnancy." (Quoting Dr. Gold, note 39 *supra*). See also Moore, *Antiquated Abortion Laws*, 20 WASH. & LEE L. REV. 250, 252 (1963): "[F]or every woman who dies [from poorly performed criminal abortions] several others are partially disabled or rendered sterile as a consequence."

⁴² Cf. Leavy & Kummer 52.

Virtually all states permit a pregnant woman to terminate her condition by abortion when continued pregnancy endangers her own life.⁴³ "Preservation of life," however, is not a wholly unambiguous expression; a physician cannot always be certain that his interpretation will necessarily accord with that of his conservative colleagues or a jury.⁴⁴ Moreover, the concept of "preservation of life" to a woman often cannot be clearly distinguished from her interest in maintaining general good health. Yet her desire to remain physically and mentally healthy to participate with her husband in family life and in raising children she may already have borne is not an interest she is presently permitted to assert successfully.

Only five states specifically permit abortion in the interest of preserving a woman's "health."⁴⁵ Hospitals in other jurisdictions, however, tend to permit abortion for women afflicted with some dan-

⁴³ See notes 18-23 *supra*, and accompanying text. The Roman Catholic position does not even permit of this exception. Death need not be imminent; potential danger is sufficient. *E.g.*, *State v. Dunkleberger*, 206 Iowa 971, 221 N.W. 592 (1928): "[I]t was not essential that the peril to life should be imminent. It was enough that it be potentially present though its full development might be delayed. . . ." *Id.* at 980, 221 N.W. at 596; *People v. Ballard*, 167 Cal. App. 2d 803, 335 P.2d 204 (1959): "Surely the abortion statute does not mean . . . that the peril to life be imminent." *Id.* at 814, 335 P.2d at 212.

The probability of a woman's committing suicide if she is denied an abortion is a legal ground which has raised some controversy and has placed a difficult burden on the psychiatrist. See Bolter, *The Psychiatrist's Role in Therapeutic Abortion: The Unwitting Accomplice*, 119 AM. J. PSYCHIATRY 312 (1962).

⁴⁴ See *Gleitman v. Cosgrove*, 49 N.J. 22, 42, 227 A.2d 689, 700 (1967) (concurring opinion):

At times the line of demarcation between danger to life and danger to health from the pregnancy may be a shadowy one. In such case the honest expertise of the medical profession must be relied upon, and where the credibility of the operating physician is in issue, the decision as to whether he reasonably believed the woman's life was in danger ordinarily will be left to the jury.

The medical profession in the United States appears to have over-estimated the danger of criminal abortion prosecution. This factor has contributed in an unknown degree to the incidence of dangerous illegal abortion and its effect on the women who cannot obtain a hospital termination of pregnancy. See BATES & ZAWADZKI 5. The presence of colleague opposition to abortion and the undoubted existence of religious pressure, however, are a deterrent to the doctor before criminal prosecution possibilities even come to mind.

⁴⁵ ALA. CODE tit. 14, § 9 (1958); CAL. PEN. CODE § 274-76 (1955), *as amended*, CAL. LAWS, ch. 327 (June 15, 1967), *effective* ninety-one days after adjournment of legislature; COLO. REV. STAT. §§ 40-2-23 & 50 (1963), *as amended*, ch. 190 [1967] Colo. Sess. L. 284; D.C. CODE ANN. § 22-201 (1961); N.C. GEN. STAT. 14-45.1 (Supp. 1967).

gerous conditions but not others.⁴⁶ Women ill with leukemia, lung cancer, tumors, and crippling paralysis have frequently met "the rationalization that another pregnancy . . . [would] not adversely affect the course of their disease."⁴⁷ Many hospitals, moreover, refuse to abort a woman who has been the victim of rape. Others consider the likelihood that forced birth of a child caused by rape too seriously threatens the family and the mental health of the woman to deny her request.⁴⁸

In the case of a woman who has taken thalidomide, or has contracted rubella (German measles) in the first trimester of pregnancy, the statutes do not recognize that possible birth of a seriously deformed child may impair the mother's health.⁴⁹ Yet, a fertile woman faced with such a probability usually does not wish to give birth to that particular child; she would prefer to have a more "normal" child at some later time. She is in much the same position as a pregnant woman who has no husband. Yet the same society which ostracizes a deformed child or an unwed mother still insists that *that* particular birth take place.

No statute in the United States permits a woman to terminate her tenth pregnancy by abortion because she cannot afford to support and feed a family of ten children. A pregnant woman confined to bed with polio faces the same rigid statute as does the woman whose husband recently abandoned her or who has no husband. All these cases, and others involving socio-economic factors, are

⁴⁶ GEBHARD 197; Niswander. Lader explains that:

With the exception of rubella, the physical indications for abortion have diminished in the last decade. In this shrinking list, the majority of the medical profession still recognizes:

- Cancer of the cervix
- Severe cardiac disease
- Severe hypertension
- Nephritis or kidney disease
- Breast cancer

The disagreement, arises over such indications as pulmonary tuberculosis, which many experts feel is so well controlled that pregnancy does not have to be deferred; and over such eugenic indications as conflicting Rh factors between parents, where the risk of an infant's becoming a lasting invalid is often discounted.

LADER 39-40 (Emphasis deleted). See also Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417 (1959), for a questionnaire study of abortion practices in a large number of California hospitals.

⁴⁷ LADER 6.

⁴⁸ LADER 36.

⁴⁹ See note 71 *infra*, and accompanying text, on birth defects which result from rubella.

increasingly being rejected by hospital abortion committees.⁵⁰ To the wealthy, of course, the alternative of foreign abortion provides a complete answer. Others frequently risk the danger of an illegal abortion at the hands of an unskilled criminal abortionist.⁵¹ To the poor the choice is between attempted self-induced abortion and the accompanying danger or increased poverty and powerlessness in the face of the government mandate. In these instances the state has determined that a woman and her physician have no authority over family planning unless done by preventive means. If the woman has no knowledge of contraception, or if her preventive efforts fail,⁵² her interests are immediately subordinated to the government determination that she must bear that specific child.

The fundamental issue at the core of all controversy over family planning is the assertion of many women and their physicians that no woman should, under any circumstances, be compelled to bear a child against her will. In parts of the world this is a recognized right,⁵³ and in the early years of United States history there was no norm, moral or statutory, prohibiting abortion before "quickening."⁵⁴ Yet, present abortion laws completely displace the woman's choice.

Ultimately the the abortion controversy will reach the point of facing this final and most important interest of the pregnant woman: that of choosing for herself whether to have the child. No piecemeal statutory reform can curtail criminal abortion unless it resolves this question in the woman's favor. After all, "[i]t is the situation of *not wanting a child* that covers the main rather than the exceptional abortion situation."⁵⁵

B. The Interests of the Child-to-be

The central thrust of opposition to abortion reform focuses on asserted similarities between the contingent interest of a fetus in

⁵⁰ BATES & ZAWADZKI 113-14; GEBHARD 197; ROSEN 17-20; Niswander 414-20; Ryan, *supra* note 12, at 432. BATES & ZAWADZKI, *supra*, state that "the medical indications for therapeutic abortion have shrunk to the vanishing point."

⁵¹ See generally BATES & ZAWADZKI 35-92.

⁵² A 1 per cent failure rate of a contraceptive in universal use would nonetheless produce over 250,000 unwanted pregnancies each year in the United States alone. LADER 158.

⁵³ See notes 31-33 *supra*, and accompanying text.

⁵⁴ See note 10 *supra*, and accompanying text.

⁵⁵ ROSSI, ABORTION LAWS AND THEIR VICTIMS 1 (Ass'n for the Study of Abortion reprint 1966).

continued development and the accepted human interests in the value of a life which is fully recognizable and whose existence and value are agreed upon.⁵⁶ This disregards the similarities between pre-conception and early post-conception conditions as well as the social and female interests in allowing a woman to choose for herself whether to terminate a pregnancy.

Approximately 85 per cent of all pregnancies, after firm implantation, will develop to the stage of viability.⁵⁷ Thus the fetus, without external interference, would in all probability continue to develop and be born. This factual observation forms the basis of claims that a fetus ought to be accorded a legal right to develop from the union of male and female cell and to be born against the mother's will.⁵⁸ Tinnelly has expressed the argument in another form as follows:

Direct and voluntary abortion is intrinsically wrong since it is the direct *killing* of an innocent *human being*. It is *never* justifiable because the *person* who is killed has not been guilty of any crime or unlawful aggression on account of which he could be said to have forfeited his right to live.⁵⁹

⁵⁶ The opposition to abortion reform wholly subordinates any contingent interest of a child who might have been born at a subsequent date, as is the case when a woman would like to have three more children but cannot support them because of the expense of caring for a child born seriously deformed. Moreover, the full human interests of children already in the family may be substantially affected by additional unplanned births when the state requires the woman to continue bearing all children she conceives.

⁵⁷ A. Mietus & N. Mietus, *Criminal Abortion: "A Failure of Law" or a Challenge to Society?* 51 A.B.A.J. 924, 925 (1965) [hereinafter cited as Mietus]. The human animal nonetheless remains highly dependent on the cooperation of his parents and fellow beings for his entire lifetime. After conception, but prior to implantation, an additional factor is present:

[B]iologists now know that at least one in three of all fertilized human eggs or embryos fails to develop correctly and dies in the uterus, resulting in spontaneous abortion or reabsorption. About half this wastage occurs before the fourth or fifth week.

LADER 101.

Catholics do not, however, regard "spontaneous" abortions (miscarriages) as the death of a human being. H. PILPEL, *THE ABORTION CRISIS* 4 (1966).

⁵⁸ For positions opposing abortion reform see Byrn, *The Abortion Question: A Nonsectarian Approach*, 11 CATHOLIC LAW. 316 (1965); Drinan, *The Inviolability of the Right to be Born*, 17 W. RES. L. REV. 465 (1965); Mietus; Tinnelly, *Abortion and Penal Law*, 5 CATHOLIC LAW. 187 (1959). See also authorities cited note 8, *supra*.

⁵⁹ Tinnelly, *supra* note 58, at 190 (emphasis added).

The Roman Catholic view further assumes that the union of the male and female cells at conception gives rise to a "rational soul,"⁶⁰ although it is unclear what a rational soul *is* in a fetus that has hardly begun to develop limbs and organs much less a cerebral hemisphere.

A large number of substantive objections can be made to this position.⁶¹ As applied to a fetus which has only just been conceived, the use by Tinnelly of the expressions "human being" and "person" is misleading, for it attempts to evade the substantive argument of whether those terms ought justifiably to be applied to a fetus, and, if so, what consequences follow. Their use is not unlike referring to an acorn as an oak. Factually, fetal tissue is unique as a physical entity. Yet Mietus has charged that:

Some abortionists will deny that what they destroy is human life. But if the embryo, and later the fetus be not human, what is it? Malignant or benign tumor? Stone? Vegetable? Brute animal?⁶²

This assertion overlooks the uniqueness of constituents in the procreative process. The fetus, after all, is *a fetus*, and is a potential infant and an entity only slightly removed from the separate male and female cells which joined to form it. To attempt classification with a different entity is misleading. The attributing of a "rational soul" to a fetus is a further departure from logical precision. "Soul,"

⁶⁰ Lader reports that:

In vast areas of the world, by contrast, such debate has never troubled either the public or the private conscience. Since the Shinto faith holds that a child becomes a human being only when it has "seen the light of day," no religious or ethical objections to abortion have ever been raised in Japan. In Mohammedan lands, the Islamic belief is that life begins in the fetus only after 150 days. Neither Buddhist nor Hindu theology contains any scriptural prohibitions against early abortion, treating it as a social rather than religious issue.

LADER 94.

⁶¹ For objections to the Roman Catholic argument *see generally* BATES & ZAWADZKI 139-40; LADER 94-103, 167-75; LOWE 92-96; SCHUR 51-55; Ryan, *Humane Abortion Laws and the Health Needs of Society*, 17 W. RES. L. REV. 424, 427-28 (1965); Sands, *The Therapeutic Abortion Act: An Answer to the Opposition*, 13 U.C.L.A.L. REV. 285 (1966); Trout, *Therapeutic Abortion Laws Need Therapy*, 37 TEMP. L.Q. 172 (1964); Williams, *Euthanasia and Abortion*, 38 U. COLO. L. REV. 178, 195-201 (1966) (excellent discussion); Note, *The Antiquated Abortion Laws*, 34 TEMP. L.Q. 146 (1961). *See also* MODEL PENAL CODE § 207.11, Comment (Tent. Draft. No. 9, 1959); materials cited note 29 *supra*; note 65 *infra*, and accompanying text; cf. J. FLETCHER, *MORALS AND MEDICINE* 211-25 (1954).

⁶² Mietus 924.

generally, is a western theological concept which exists only in the abstract as applied to the fetus. The statutory recognition of this concept presupposes a framework of subjective religious assumptions about the nature of man, the acceptability of a given theological system, and the meaning of life and death.⁶³

The contingent interest of being allowed to develop and be born, then, is being asserted by an entity which is not unlike the separate male spermatozoon and female ovum.⁶⁴ Recently enacted abortion reform legislation rejects the view that this entity is "human" in the ordinary use of that word. In a comment to the abortion provisions of the Model Penal Code's suggested reform, for example, the American Law Institute distinguishes abortion prior to the fourth month from destruction of a fully viable eight-month fetus and answers the charge that abortion ought to be equated with homicide:

As to the 'homicidal' aspects of abortion, the answer of those who would favor liberalization would be as follows: most abortions—those which occur naturally as well as induced abortions—occur prior to the fourth month of pregnancy, before the fetus becomes firmly implanted in the womb, before it develops many of the characteristic and recognizable features of humanity, and well before it is capable of those movements which when felt by the mother are called 'quickenings.' There seems to be an obvious difference between terminating the development of such an inchoate being, whose chance of maturing

⁶³ Cf. LADER 165:

The California legislature's committee on the Beilenson [Abortion Reform] bill states: 'Clearly the Legislature cannot pass a resolution decreeing that life begins at conception. But to base legislation solely on this premise would in reality be the same thing, and so would retaining existing legislation for that sole reason.'

Much perfectly acceptable legislation, of course, embodies subjective assumptions of a non-factual variety, *i.e.*, modes of taxation, priorities of legislation for expenditures, compulsory education, etc. However, in the abortion context, an exceptionally acute interest in individual liberty is asserted against what may appear as a relatively doubtful, subjective, and contingent basis for the legislation. The virtually arbitrary nature of the assumed legislative interest, when placed against the fundamental character of the woman's interests, is what casts doubt upon the constitutional validity and propriety of the abortion statutes.

⁶⁴ Cf. LADER 164:

The core of the problem remains the meaning of the word 'life.' If the theologian insists that the meeting of sperm and ovum produces life, the pragmatist can point out with equal validity that life already exists in both the unfertilized egg and the spermatozoa. 'What escapes most people is that life is never created. . . . It is simply passed on, or snuffed out.' [Quoting Dr. Garrett Hardin, professor of biology at the University of California at Santa Barbara].

is still somewhat problematical, and, on the other hand, destroying a fully formed viable fetus of eight months, where the offense might well become ordinary murder if the child should happen to survive for a moment after it has been expelled from the body of its mother.⁶⁵

This explanation is even more persuasive when one considers the probability that abortifacient drugs would normally be taken before the first month of pregnancy had ended.⁶⁶

Of further support to the view that abortion shortly after conception does not interfere with an interest of the magnitude of human life is the present established use of contraceptive loop and intra-uterine devices which are thought to operate after conception by preventing implantation in the uterus.⁶⁷ The 1962 Proposed Official Draft of the Model Penal Code specifically excepted these devices from any prohibition;⁶⁸ yet according to the narrow view the "loop" devices "murder" a fertilized ovum (during *each* cycle) by halting its normal course toward implantation.

It is possible to conceive of a society in which all deformed, blind, ugly, retarded, diseased, illegitimate, lame, and poverty-stricken individuals are accorded the maximum social and legal amenities which would be theirs were they otherwise in good health or endowed with financial means. Modern America has not, however, developed this degree of human understanding, and the presence of a serious physical or economic "defect" (by the society's definition of "defect") may be sufficient to render a person's life a torture of rejection and discrimination. A thalidomide child with flaps instead of arms,⁶⁹ for example, if allowed to develop, quicken,

⁶⁵ § 207.11, comment 1(6), at 149 (Tent. Draft No. 9, 1959).

⁶⁶ See Morris & Van Wagenen, *Compounds Interfering with Ovum Implantation and Development*, 96 AM. J. OBSTETRICS & GYNECOLOGY 804 (1966).

⁶⁷ On intrauterine devices and their use see generally McLoy, *Pre-Implantation Fertility Control and the Abortion Laws*, 41 CHI.-KENT L. REV. 183 (1964); Tietze, *Contraception with Intrauterine Devices*, 96 AM. J. OBSTETRICS & GYNECOLOGY 1043 (1966).

⁶⁸ MODEL PENAL CODE § 230.3(7) (Proposed Official Draft 1962), provides:

Nothing in this Section shall be deemed applicable to the prescription, administration or distribution of drugs or other substances for avoiding pregnancy, whether by preventing implantation of a fertilized ovum or by any other method that operates before, at or immediately after fertilization.

⁶⁹ See LADER 11:

Infants [whose mothers had taken thalidomide] . . . almost always

be born, and be raised may face overwhelming frustration, even parental rejection, especially if the parents would have preferred to postpone the pregnancy in order to bear another child at a later date.⁷⁰ Exposure of a woman to rubella in the first three months of pregnancy creates a 10 to 50 per cent probability that the child, if born, may face heart disease, blindness, mental retardation, or early death.⁷¹ Further cases involving similar considerations are those in which the parents are mentally defective or psychotic and cannot care for the child,⁷² or when the mother would bear an illegitimate child over her objection⁷³ and would give the infant away for improbable adoption if forced to continue her pregnancy.⁷⁴

These instances can be classified as humane causes for terminating a pregnancy when the health or well-being of a potential

had flaps instead of arms, or no arms at all. Often they were born with shortened thigh bones and twisted legs. Sometimes an ear was missing, the nose flattened, the face permanently paralyzed.

⁷⁰ The Finkbine family, for example, has borne normal children since the incident during which Mrs. Finkbine was forced to leave Arizona and travel to Sweden in order to obtain an abortion. The dislodged fetus was observed to be deformed from thalidomide effects.

⁷¹ See Members of the Rubella Study Group, *Rubella: Epidemic in Retrospect*, 2 HOSP. PRAC. 27 (1967); Roy & Deutsch, *The Congenital Rubella Syndrome—Ocular Pathogenesis and Related Embryology*, 62 AM. J. OPHTHAL. 236 (1966) (blindness defect); *Rubella Virus and the Human Fetus*, 1965 BRIT. MED. J. 1014 (hearing impairment). See also Sheridan, *Final Report of a Prospective Study of Children Whose Mothers had Rubella in Early Pregnancy*, 1964 BRIT. MED. J. 536.

⁷² CALDERONE 78. See LADER 35: "The liberal viewpoint in psychiatry . . . still considers schizophrenic and manic-depressive psychoses justifiable grounds for abortion."

A relevant case, *Williams v. State*, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966), recently refused to recognize an infant's claim for relief against a hospital which had negligently supervised its mentally defective mother. The mother had been raped by another mental patient and subsequently gave birth to the child. It had only elderly grandparents to raise it and no opportunity for a normal childhood and home life, proper parental care, or freedom from the stigma of illegitimacy.

⁷³ Cf. *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), discussed in Ploscowe, *An Action for "Wrongful Life,"* 38 N.Y.U.L. REV. 1078 (1963); Tedeschi, *On Tort Liability for "Wrongful Life,"* 1 ISRAEL L. REV. 513, 529 (1966). In *Zepeda* an illegitimate child sought to recover damages from his father. The court recognized that an intentional wrong had been perpetrated but declined to grant judicial relief on the ground that the matter was best handled by legislative action. For the argument that the illegitimacy concept itself amounts to a denial of equal protection when used as a basis for state action see Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEXAS L. REV. 829 (1966).

⁷⁴ In New York City, for example, a large number of minority group children available for adoption have proved unadoptable for lack of demand. See generally LADER 61.

child would be severely impaired and the pregnant woman would prefer to terminate this specific pregnancy in favor of a later child.

C. *The Physician's Interests*

Present abortion statutes offer little guidance to physicians faced with sensitive problems brought to them by their patients.⁷⁵ Most states offer no statutory guidelines to elucidate what constitutes a threat to the pregnant woman's life, and the distinction between a danger to health and probable danger to life is a nebulous one. In any given penumbral case the results reached by a large number of physicians may be no more than personal inclination—a poor basis for a decision of such immense importance to the woman. And, from the viewpoint of the physician, he must realize that, in every case, "[t]he issue is whether a doctor should be sent to prison for performing an operation that he believes to be best for his patient."⁷⁶

In 1959 Packer and Gampell⁷⁷ submitted eleven hypothetical abortion applications to over twenty California hospitals. Of the eleven situations, two clearly required abortion to save the life of the mother and were hence legal. Two others were penumbral,⁷⁸ and seven had been formulated as sensitive instances which were nonetheless clearly illegal.⁷⁹ The results showed that each hypothetical case would have been accepted for therapeutic abortion in

⁷⁵ Leavy & Kummer 52. See *British Policy on Therapeutic Abortion*, 199 J.A.M.A. 199 (1966):

[M]any medical men are inhibited in advising on, or carrying out termination of pregnancy for fear that they might have to face legal consequences or because their professional reputation might be endangered. A clear statement of law regarding medical termination of pregnancy would for this reason be welcome.

⁷⁶ Williams, *Euthanasia and Abortion*, 38 U. COLO. L. REV. 178, 195 (1966).

⁷⁷ Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417 (1959).

⁷⁸ *Id.* In a typical psychiatric-abortion setting the woman was thirty-eight years old and had given birth to six children within ten years. After each of the last three births she had suffered from acute depression. She was then pregnant for a seventh time. Ten of the hospitals approved the case; twelve rejected it. *Id.* at 433-34.

⁷⁹ *Id.* The case of rubella (German measles) can hardly be thought to endanger the mother's life. Yet six hospitals approved abortion in this instance. Sixteen rejected it. *Id.* at 434-35. In New York City alone 329 hospital abortions were performed for rubella during the 1964 epidemic. Hall, *Present Abortion Practices in Hospitals of New York State*, 23 N.Y. MED. 124, 125 (1967).

at least one hospital. A necessary conclusion is that physicians tend to find the present statutory rigidity unacceptable, but are confused and inconsistent in their interpretations of the statutes.⁸⁰ As Leavy and Kummer observed:

It is an accepted fact that pregnancies are terminated by reputable medical practitioners in licensed hospitals for reasons other than to preserve the life of the mother, *e.g.*, on health, humanitarian and eugenic grounds, and thus in open violation of the law.⁸¹

Nevertheless, although no reputable physician seems to have been prosecuted for performing an abortion in a reputable hospital,⁸² the threat of colleague criticism coupled with the threat of prosecution are substantial deterrents to a physician's performing an operation he believes to be best for his patient.

As a matter of professional comity courts tend to stress the inherent competence of the medical profession for setting its own standards in a given community. A Washington state court in 1929,

⁸⁰ More recently, the American Medical Association adopted a resolution supporting the A.L.I. MODEL PENAL CODE provisions. See note 29, *supra*. A survey one month before had shown that 86.9 per cent of 40,000 American physicians favored considerable improvement on present abortion laws. N.Y. Times, April 30, 1967, at 82, col. 6 (city ed.). A 1966 survey in New York State established that 84 per cent of responding physicians considered the present law too restrictive. Hall, *Present Abortion Practices in Hospitals of New York State*, 23 N.Y. MED. 124, 126 (1967). A survey of psychiatrists in the United States showed further that from 86 to 97 per cent of those replying favored considerable liberalization over present abortion indications. Crowley, *An Analysis of a Survey of the Opinions of Psychiatrists on Abortion 2* (1966), presented at the Annual Forum of the Ass'n for the Study of Abortion, New York, N. Y. The survey of psychiatrists established that they, as a group, thought that abortion problems should be handled on a case by case basis, rather than by general rules of categories, automatically applied. *Id.*

⁸¹ Leavy & Kummer 53. See also *Gleitman v. Cosgrove*, 49 N.J. 22, 52-3, 227 A.2d 689, 705 (1967) (dissenting opinion of Jacobs, J.):

[I]t is well-known that abortions have been and are being performed in good faith by highly qualified physicians in highly reputable hospitals, when necessary to preserve the life or health of the mother, or to preclude the quickening of the fetus in rubella cases and the like.

⁸² LADER 26. Disciplinary proceedings, however, have been instituted against two California physicians for having performed *committee approved* abortions on women known to have been inflicted with rubella in early pregnancy. No hearing on the substantive issues has yet been held. See *Shively v. Stewart*, 65 Cal. 2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1966) (writ of mandate sought by physicians charged with criminal abortion; court granted motion for discovery of statements made by the women and their husbands). A comprehensive amicus curiae brief has been filed by over one hundred and seventy physicians challenging the constitutionality of the proceedings.

for example, held abortion justified "if the [physician] . . . in performing the operation did something which was recognized and approved by those reasonably skilled in his profession practicing in the same community. . . ." ⁸³ The highest court of Massachusetts similarly accepts the physician's judgment if it accords with "the general opinion of competent practitioners in the community in which he practices." ⁸⁴ However, general medical opinion does not seem to exist, and if it did, the woman's rights might vary considerably from community to community depending on local taboos and the physicians' willingness to undergo a judicial test of the relationship between his attitudes and those of his brethren. The bare fact of prosecution alone, coupled with pulpit denunciations, could wholly destroy a physician's practice and career regardless of the outcome of his case before a high tribunal. In effect, then, only crystal-clear statutory language can provide the protection most physicians need. Until that language is forthcoming or until a court establishes a woman's absolute legal right to abortion, the reputable physician can only turn his patient away, possibly knowing with certainty that she will seek a criminal abortionist who operates in secrecy under conditions endangering the woman's health and perhaps even her life.

In sum, the physician's interest can be asserted for authority to treat the patient according to his best judgment, for freedom from the dangers of statutory vagueness, for greater consistency between statutory standards and individual medical opinion, and for the protection of patients from the dangers of incompetent criminal abortionists.

D. The Society's Interests

The individual interests in favor of abortion reform can be collectively characterized as interests of the society in recognizing the demands of its individual citizens for rational legislation that does not unduly impinge on individual liberty. More general social interests, however, are also present that must be examined in any complete evaluation of the interests competing for constitutional recognition.

The society's interest in promoting public health is acutely present

⁸³ *State v. Powers*, 155 Wash. 63, 67, 283 P. 439, 440 (1929).

⁸⁴ *See Commonwealth v. Wheeler*, 315 Mass. 394, 395, 53 N.E.2d 4, 5 (1944).

in any consideration of abortion legislation. That some one million American women are aborted each year points out that abortion is a major public health problem of concern to countless pregnant women, their husbands and families, their physicians and clergy.

Further, at least two economic factors have also been urged to support movements for abortion reform. Estimates indicate that as much as 350,000,000 dollars each year is expended on illegal abortion, "much of it ending up in the coffers of crime syndicates and abortion mills."⁸⁵ Illegal abortion then not only creates economic demands and physical danger for the pregnant woman, but also amounts to the third largest criminal racket in the United States.⁸⁶ A second economic consideration is concerned with using contraception and abortion to curtail the massive births in poverty areas of unwanted, unplanned for, and often unadoptable children. One estimate is that "the nationwide cost of maintaining the unwanted children born during a single year . . . could run to approximately seventeen and one-half billion dollars over the seventeen years such children can be maintained at public expense."⁸⁷ The reduction of cyclical poverty conditions in this aspect is an interest in which abortion reform becomes a desirable supplement to contraception and improved welfare plans.

Claims which might be classified as "moral interests" of the society appear in various forms in the abortion controversy. Opposing abortion reform are the assertions maintained by many officials of the Roman Catholic Church that legal abortion destroys and somehow cheapens the value of human life.⁸⁸ Distinctions between developing fetal tissue and fully established human life, however, joined with the compelling interest of a woman in regulating her own reproductive functions, appear to deprive this charge of its thrust. Moreover, the ethical value of not forcing the subjective moral assumptions of one group upon all other groups further diminishes the Roman Catholic position.⁸⁹ As H. L. A. Hart has urged,

⁸⁵ LOWE 6.

⁸⁶ SCHUR 25.

⁸⁷ Pilpel, *Outline of Talk at Columbia Presbyterian Medical Center*, 9 (1964) (paper on file in offices of American Civil Liberties Union, New York, N.Y.).

⁸⁸ See notes 8, 35 & 58, *supra*.

⁸⁹ See H. HART, *LAW, LIBERTY, AND MORALITY* 25-83 (1963); Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 *YALE L.J.* 986 (1966). Of tangential relevance are the assertions of those opposing abortion reform that liberalization of the provisions for termination of pregnancy will lead

"the unimpeded exercise by individuals of free choice may be held a value in itself with which it is *prima facie* wrong to interfere."⁹⁰ This value has been specifically recognized and upheld in the spheres of free speech and free exercise of religion.⁹¹ Where free human choice conflicts with religious assumptions, deference of the latter should be required where no substantial social interest supports the religious view.

The public knowledge that physicians and pregnant women openly disregard present abortion laws further devalues the vital social interest in promoting respect for the legal system and its institutions as the just spokesmen of a free society. When large numbers of citizens disobey a law they believe unjust or are forced to be criminals or to restrict their family planning activities because of beliefs they do not hold, an unknown amount of damage—a technical injury—befalls law in its entirety. To realign the legislative attitude toward abortion into a position consistent with the mores and attitudes of that society then becomes a social interest of the highest order.

III. THE CONSTITUTIONAL ISSUES

Existing abortion laws raise significant constitutional issues. The statutes sharply curtail a woman's freedom of choice in (1) planning her family size, (2) risking her physical or mental well-being in carrying a pregnancy to term, (3) avoiding the birth of a deformed child, and (4) bearing a child who is the product of rape or incest. Moreover, present abortion laws are (1) largely unenforced, (2) uncertain in their scope, (3) at odds with accepted medical standards, (4) discriminatory in effect, and (5) based upon the imposition by criminal sanction of subjective religious values of questionable social merit upon persons who do not subscribe to those values.⁹²

to a reckless increase in extra-marital sexual activity. This does not appear to have occurred, however, where abortion has been more freely granted. The demand for abortion comes almost exclusively from middle-aged married women. LADER 119. See also Ryan, *supra* note 81, at 432: "The fear that the availability of abortion will lead to promiscuity is sheer nonsense. . . ."

⁹⁰ HART, *supra* note 89, at 21.

⁹¹ E.g., U.S. CONST. amend. I; see T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT, *passim* (1967 ed.).

⁹² See also Leavy & Kummer, *Abortion and the Population Crisis; Therapeutic Abortion and the Law; Some New Approaches*, 27 OHIO ST. L.J. 647, 674 (1966).

The constitutional issues implicit in the enactment and application of abortion laws have received scant judicial attention. Research discloses no significant test-case or other litigation⁹³ attacking the constitutional power of a state to prohibit therapeutic abortion in circumstances not endangering the pregnant woman's life.⁹⁴ Moreover, the literature of legal commentary appears to contain no in depth examination of the constitutional issues which might be

⁹³ Brief for Dr. Anderson as Amicus Curiae at 17-36, *Shively v. Stewart*, 65 Cal. 2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1966). The California statute, as applied to physicians performing abortions for rubella indications, is vague and uncertain, and is an unconstitutional invasion of the right to marital privacy, the right of all persons to the best medical treatment available, and the personal freedom of licensed physicians to administer sound medical treatment. *Id.*

The reports show a small number of state and lower court opinions which mention miscellaneous constitutional questions unclearly and dispose of them without elaborate explanation. Almost all of these antedate the 1965 decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (statute prohibiting use of contraceptives unconstitutional; physician has standing to raise patient's rights). See, e.g., *Planned Parenthood Comm. v. Maricopa County*, 92 Ariz. 231, 375 P.2d 719 (1962); *People v. Gallardo*, — Cal. App. 2d —, 243 P.2d 532 (Ct. App. 1952); *Carter v. State*, 155 So. 2d 787 (Fla. 1963), *appeal dismissed*, 376 U.S. 648 (1964); *Hans v. State*, 147 Neb. 730, 25 N.W.2d 35 (1946); *Gleitman v. Cosgrove*, 49 N.J. 22, 55, 227 A.2d 689, 707 (1967) (Weintraub, C.J., dissenting) (4-3 decision). Cf. *People v. Baird*, 47 Misc. 2d 478, 262 N.Y.S.2d 947 (Dist. Ct. 1965).

⁹⁴ Standing to raise constitutional issues and circumstances necessitating their immediate resolution are not overwhelmingly difficult to establish in the abortion context. Forms of suit might include: (1) An affirmative tort claim by a woman damaged by the state's refusal, through its hospital, to permit the termination of her pregnancy. The hospital, however, would have had the choice of performing the abortion and facing potential criminal prosecution under a statute presumably constitutional or refusing the application and facing some form of possible liability for its part in unconstitutional state action. Cf. *Stewart v. Long Island College Hosp.*, Civil No. 15486 (Sup. Ct. Kings County, N.Y., 1965) (suit by woman against hospital which refused abortion on rubella indications). (2) A malpractice or negligence suit for damages on behalf of a deformed or defective child or its mother. See *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967) (malpractice suit against physicians who had allegedly failed to inform plaintiff that she could avoid defective birth by abortion); *Williams v. State*, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966) discussed *supra* note 72. (3) Defense to disciplinary proceedings or a criminal prosecution against a physician who performed an abortion on a woman in a case not within the statutory exceptions. *Shively v. Stewart*, 65 Cal. 2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1966) (discovery proceeding in disciplinary action against physicians who performed *committee approved* abortions on rubella indications); or (4) A declaratory judgment class action brought by gynecologists and members of hospital abortion committees seeking clarification of their legal positions in recurring types of cases, or by practitioners who open an abortion clinic and are threatened with criminal prosecution for offering to perform abortions under circumstances not permitted by the statute. See Note, *Declaratory Relief in the Criminal Law*, 80 HARV. L. REV. 1490 (1967).

raised.⁹⁵ Numerous reasons can be advanced for the absence of discussion and litigation on this point. Abortion, unlike contraception, remains a subject of intense taboo intertwined in the maze of political silence, religion, life, death, and sex. In the constitutional context it is a problem bearing few factual similarities to any decisions in the 150-year expanse of pre-*Griswold* history. And in theological circles, abortion is hardly a subject for light philosophical speculation—on the contrary, it typically evokes at the outset emotional charges of “murder” and “immorality” which generally are not conducive to a full investigation of underlying issues.⁹⁶

Public attention is more easily directed to contraception as a sociological phenomenon than to abortion. Illegal abortion presently requires surgical apparatus and active physician cooperation. Moreover, it may create serious dangers to a woman's health which do not accompany the use of contraceptives. Also, a surgeon who performs an abortion in order to provoke a constitutional test case may not yet have the organized support which time has given to family planning by contraceptive means. To prescribe contraceptives was, for the physician, a far less active step of civil disobedience than to perform a therapeutic abortion is today.

At the time of ratification of the United States Constitution, a woman's right to an abortion within the first 40 days of pregnancy was recognized at the common law. Ratification of the fourteenth amendment, moreover, served to protect the “fundamental rights” of citizens against state encroachment. Thus some foundation exists upon which a historical claim, however weak, might be built. Stronger arguments against the validity of present abortion laws may be found in current constitutional doctrines. A clear constitutional right of marital privacy has been developed recently by the Supreme

⁹⁵ Occasional mention, however, is made that, after *Griswold v. Connecticut*, 381 U.S. 479 (1965), a possible opening has appeared “for an attack upon significant aspects of the abortion laws.” Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 232 (1965). See Leavy & Kummer, *Abortion and the Population Crisis*, 27 OHIO ST. L.J. 647, 672-75 (1966), for an excellent fundamental outline of such an argument. For an argument that the present abortion laws are discriminatory and may be unconstitutionally vague see H. PILPEL, *THE ABORTION CRISIS* 6 (1966). For the view that legislation based solely on a religious morality is constitutionally suspect for that reason see Henkin, *Morals and the Constitution*, 63 COLUM. L. REV. 391 (1963). See also LADER 167-75.

⁹⁶ See notes 58-59 *supra*, and accompanying text.

Court⁹⁷ although its exact scope is as yet uncertain.⁹⁸ Also of potential applicability is the constitutional policy of protecting individual liberty from unduly restrictive state legislation. The fourteenth amendment prohibitions against discriminatory or unduly vague laws might also be employed to invalidate state abortion statutes. Within this framework, a constitutional attack can be launched.

A. Individual Immunities: Privacy and Choice

Of prime significance in any judicial challenge of abortion legislation is a convincing showing that the pregnant woman asserts an interest so fundamental and compelling that it outweighs the interest of the state in enforcing its value judgment that her pregnancy should continue to term. Time and circumstances, moreover, combine to inject unneeded emotionalism, sensitivity and taboo into the issues. If our society were half-Mohammedan, half-Shinto, or more insistent that individual citizens be fully informed and allowed to plot their own family planning destinies, the case would not be so hard (putting to one side whether bad laws make hard cases or the converse). However, sexual taboo and anxiety cloud abortion whether viewed as a constitutional, statutory, medical, or sociological phenomenon. It is all of these.

A right to abortion by consent performed by a licensed physician can be strongly asserted in at least three related forms within the Bill of Rights and fourteenth amendment framework⁹⁹—first, as a

⁹⁷ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁹⁸ See *Symposium—Comments on the Griswold Case*, 64 MICH. L. REV. 197 (1965).

⁹⁹ Several theoretically feasible but unnecessary constitutional theories are omitted from this discussion. First, whether a physician or an organization could claim a first amendment right to inform patients as to the whereabouts of competent abortionists. In Redwood City, California, for example, police arrested a woman for conducting a class in methods of self-induced abortion. The Municipal Court Judge dismissed the case on first amendment grounds. *People v. Gurner*, No. 7F-460 (Mun. Ct. San Mateo, Calif., June 1, 1967). See generally Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 222 (1965); Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 24-32 (1964). Second, whether the ninth amendment, of its own thrust, permits of a fundamental right to abortion. See B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* (1955); Franklin, *The Ninth Amendment*, 40 TUL. L. REV. 487 (1966); Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U.L. REV. 787 (1962); Rogge, *Unenumerated Rights*, 47 CALIF. L. REV. 787 (1959); Note, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814 (1966). A third applicable issue is whether procedural

fundamental right of marital privacy, human dignity, and personal autonomy reserved to the pregnant woman acting on the advice of a licensed physician;¹⁰⁰ second, as a penumbral right emanating from values embodied in the express provisions of the Bill of Rights themselves;¹⁰¹ or, third, as a necessary and altogether reasonable application of precedent, namely, *Griswold v. Connecticut*.¹⁰²

Earlier in this century the Supreme Court invoked substantive due process concepts to invalidate economic reform legislation.¹⁰³ Legislation involving non-economic aspects of individual liberty, however, does not seem to revolve around the same kinds of consideration.¹⁰⁴ Ethical relativism is not inconsistent with a stable, free, and creative society. To invalidate state acts restricting human

due process bears any other relevance than its clear applicability (along with the equal protection clause) in cases wherein a hospital abortion committee acts on a "quota" basis which summarily denies abortion to all applicants beyond a certain successful number. This latter process, being wholly capricious, is indefensible on its face. See Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957). And fourth, whether non-enforcement of abortion statutes would render their sudden revival against licensed physicians a denial of due process. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 143-56 (1962); Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389 (1964).

In all instances, moreover, it will be assumed that a physician has standing to assert the rights of his patients who stand to feel the ultimate impact of the statute's applicability. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁰⁰ Cf. *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring):

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are similar order and magnitude as the fundamental rights specifically protected.

¹⁰¹ See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (Douglas, J.): [S]pecific guarantees in the Bill of Rights have penumbras formed by emanations from those guarantees that help them life and substance.

See also *id.* at 494 (Goldberg, J. concurring):

The right of privacy is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.'

¹⁰² 381 U.S. 479 (1965).

¹⁰³ E.g., *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁰⁴ The distinction has been pointedly recognized by courts and in the literature on numerous occasions. See, e.g., Kadish, *supra* note 99; Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952); cf. Hemkin, *Morals and the Constitution*, 63 COLUM. L. REV. 391 (1963). The present court uses substantive due process sparingly in the economic sphere. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). But cf. Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

liberty is to permit an often desirable diversity in human activity without forcing one immutable moral system upon all citizens. Increasingly the Court has recognized the positive value of diversity in democratic society and has rejected majority demands for conformity in, for example, public modes of expression,¹⁰⁵ activities in association with others,¹⁰⁶ personal political beliefs,¹⁰⁷ and individual educational interests.¹⁰⁸ In increasing its protection of the individual from government compulsion the Court has repeatedly enunciated basic guidelines with which to coordinate its case-by-case process of adjudication. Thus, the justices in 1960 stated:

Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.¹⁰⁹

And, for legislation impinging on fundamental liberties, "precision of regulation must be the touchstone. . . ."¹¹⁰

Justice Stewart, for a majority of the Court in *Shelton v. Tucker*¹¹¹ also emphasized the stringent requirements a state must meet if it is to subordinate the fundamental interests of its citizens. He wrote that:

In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.¹¹²

In other language the Court has recognized the dangers of overly broad statutes and required that they be limited because, in Justice Brennan's words, "the threat of sanctions may deter . . . almost as potently as the actual application of sanction. . . ."¹¹³

Not all of the Court's decisions in defense of individual liberty have come from activities involving the freedoms of speech and

¹⁰⁵ NAACP v. Button, 371 U.S. 415 (1963).

¹⁰⁶ NAACP v. Alabama, 357 U.S. 449 (1958).

¹⁰⁷ Gibson v. Florida Leg. Invest. Comm., 372 U.S. 539 (1963).

¹⁰⁸ Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

¹⁰⁹ Bates v. Little Rock, 361 U.S. 516, 524 (1960).

¹¹⁰ NAACP v. Button, 371 U.S. 415, 438 (1963).

¹¹¹ 364 U.S. 479 (1960).

¹¹² *Id.* at 488.

¹¹³ NAACP v. Button, 371 U.S. 415, 433 (1963).

association. *Prince v. Massachusetts*,¹¹⁴ for instance, emphasized "the private realm of family life which the state cannot enter," and earlier, in *Pierce v. Society of Sisters*,¹¹⁵ the Court found unconstitutional an Oregon statute which prohibited parents from sending their children to private schools. This, the Court held, "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."¹¹⁶

Utilizing a necessarily vague "privacy" formulation the Court has carved out other areas of human activity into which government is forbidden to probe.¹¹⁷ In *Mapp v. Ohio*¹¹⁸ a majority of the justices referred to the fourth amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people," and previously the Court had recognized as a "constitutional purpose . . . to maintain inviolate large areas of personal privacy."¹¹⁹ Finally, in *Griswold v. Connecticut*,¹²⁰ the Court voided a state statute purporting to outlaw the use of contraceptives by married couples. This enactment violated a "marital right of privacy" found by Justice Douglas and a majority of the Court to be necessarily implicit in the cumulative values discernible from several more specific provisions of the Bill of Rights.¹²¹

The applicability of these principles to state abortion legislation will be at the heart of any effort by the medical profession to achieve abortion reform by challenging a state's authority to prohibit the

¹¹⁴ 321 U.S. 158, 166 (1944).

¹¹⁵ 268 U.S. 510 (1925).

¹¹⁶ *Id.* at 534-35.

¹¹⁷ See generally Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212; Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003 (1966); Yankwich, *The Right of Privacy: Its Development, Scope and Limitations*, 27 NOTRE DAME LAW. 499 (1952).

¹¹⁸ 367 U.S. 643, 656 (1961).

¹¹⁹ *Feldman v. United States*, 322 U.S. 487, 490 (1944).

¹²⁰ 381 U.S. 479 (1965).

¹²¹ See note 101 *supra*. A right of marital privacy could be articulated through at least three routes of conventional constitutional interpretation: first, as a right necessarily implied from an existing provisions of the Bill of Rights; second, as a choice authorized by the ninth amendment when values of liberty would otherwise be sacrificed to clearly unreasonable legislation; or third, as an aspect of substantive due process. See Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 220 (1965); Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy*, 64 MICH. L. REV. 197, 206-08 (1965).

termination of pregnancy when a woman so desires and her physician finds it necessary in his sound medical judgment.

From the viewpoint of many women, restrictive abortion legislation of any kind imposes a severe burden on female existence without corresponding benefit. If a woman believes that life began in the "prehistoric slime" and is not created but only passed along by conception and that a fetus in early development need not be accorded a right to continue growing within her body, she is nonetheless prohibited from acting freely on that belief even immediately after she discovers that she is pregnant. Were she living in Japan she would face no such governmental interference; in this respect, she would be considerably less at the mercy of the state in Poland, Czechoslovakia, and Hungary. Moreover, in the United States prior to the 1860-1890 period she would have had a common law right to terminate her pregnancy provided she did so before "quickening." An abortion normally takes place considerably earlier in time than this.

The right to terminate her pregnancy shortly after conception may seem to a woman to be much more fundamental and of greater day-to-day importance in her life than the right to send her children to a private school,¹²² to associate with others for the advocacy of ideas,¹²³ or to be free from racial discrimination in seeking an education.¹²⁴ To secure an abortion may seem to her an infrequent, but necessary step when the exercise of her fundamental right to contraception has not been successful. It is an anomaly that a woman has absolute control over her personal reproductive capacities so long as she can successfully utilize contraceptives but that she forfeits this right when contraception fails. Clearly no government is permitted to compel the coming together of the egg and spermatozoon. Why then should the state sanctify the two cells after they have come together and accord them, over the woman's objection, all the rights of a human being *in esse*? If the logic behind present abortion laws were rigorously followed, abortion would be treated as murder punishable by death or life imprisonment, and perhaps a clearer focus would emerge. If an aborted woman and her physician were tried for "homicidal abortion," convicted, and sentenced

¹²² *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

¹²³ *NAACP v. Alabama*, 357 U.S. 449 (1958).

¹²⁴ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

to death, few would consider the result justifiable. It is a result, however, that follows from defining the fetus as a human being. No one holds full funeral services for the products of miscarriage. Certainly no one would suggest that a woman who miscarries regularly four weeks after each conception could be required by law to seek medical treatment to prevent future miscarriages, or otherwise be sentenced to death. The definition of a fetus as a "human being," is at odds with the view that conception is only one point in the transmission of life, not the beginning of it. It disregards the physical and developmental similarities between the embryo and the constituents which come together at conception. In the end the pregnant woman and her physician are required to abide by a religious belief which severely restricts their fundamental interests. Once it is recognized that present abortion laws represent an enforcement of dogma in which the state has no legitimate interest, the woman's right to choose for herself comes into clearer focus.

At the time of ratification of the United States Constitution the states and colonial assemblies left to the individual the choice of value to be accorded the fetus before quickening. It is the assumption by the states of authority to make this value judgment and to force it upon citizens protected by the Constitution which threatens the constitutional validity of state abortion legislation. There is no basis in descriptive and physical "reality" on which to declare that a one-month fetus *is henceforth* a human being. At the time when the vast majority of abortions take place a fetus is an acorn, not an oak. To make the decision that a fetus *ought to be considered* a human being is a subjective belief of religious character, a value assumption of the kind normally left in a free society to the decision of those individuals most intimately concerned. There is no valid state interest in implementation of religious belief sufficient to serve as a basis for legislation, particularly when substantial individual rights are threatened. At the present time, moreover, there is in common use a contraceptive device known as the "Lippes loop" which apparently halts the progress toward birth after fertilization, possibly even after implantation. The mechanism is uncertain and difficult to discern experimentally. For the state to forbid these devices on the presumptive theory that they destroy a human being (each month) would, on like reasoning, fail for lack of constitutional power as would any attempt to prosecute a woman who had used

the loop twelve months on that number of counts of murder. The same line of reasoning will also apply when an oral abortifacient is developed which can dislodge a fetus from the uterus wall shortly after conception and implantation. To label this "murder" would appear outside of the state's authority and a patently unreasonable legislative act.

The values implicit in the Bill of Rights suggest that the decision to bear or not bear a child is a fundamental individual right not subject to legislative abridgement—particularly in light of *Griswold v. Connecticut*.¹²⁵ Several clauses in the first amendment suggest underlying policies which open to question the validity of abortion statutes. While the guarantees of free speech and free exercise of religion primarily protect the expression of ideas and beliefs, they provide substantial protection for the acting out of personal ideas and beliefs. *Conduct* as well as thought is protected where intimately related to the thought and no substantial state interest in prohibiting the conduct intervenes. The *Pierce* case,¹²⁶ for example, protected the parents' conduct in sending their children to private school. The Court relied on due process to protect those who act upon a belief in the values of private education. Non-violent conduct associated with picketing and peaceful assembly also comes within the first amendment although far more than thought and talk is involved.¹²⁷ In *Griswold*, the prescription and use of contraceptives involved some conduct, yet the Court relied in part on necessary implications of the first amendment which were said to protect associational conduct.

As a practical matter religion is inextricably intertwined in the abortion subject. The establishment and abridgement clauses of the first amendment are philosophically relevant although technically outside traditional constitutional doctrine as applied here.¹²⁸ If a

¹²⁵ 381 U.S. 479 (1965).

¹²⁶ 268 U.S. 510 (1925).

¹²⁷ *E.g.*, *Cox v. Louisiana*, 379 U.S. 536 (1965).

¹²⁸ The conduct involved in snake ritualizing, polygamous marriage, and commercial activities on Sunday has been refused protection from state action on the ground that it is activity which infringes a secular interest and is therefore subject to state regulation. *E.g.*, *McGowan v. Maryland*, 366 U.S. 420 (1961) (Maryland Sunday closing laws upheld over establishment clause objections). *But see Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy not a permissible religious freedom); *Hill v. State*, 38 Ala. App. 404, 88 So. 2d 880 (1956); *Harden v. State*, 188 Tenn. 17, 216 S.W.2d 708 (1948) (statutes outlawing snake handling upheld); *Barron*,

woman and her physician do not *believe* that the fact of conception brings into existence an entity which can immediately be equated in value with a human being, they may not act on that belief to protect her health, plan her family, or avoid the results of contraceptive failure. They are required to believe that the fetus equals a human being in value regardless of personal or religious or philosophical views on the matter and regardless of the lack of development of the fetus. She is thus forced to bear the child. State abortion prohibitions seemingly are the product of religious pressure and of a religious attitude which, although seemingly not immutable, and considered by many to be "immoral," must be accepted by all members of the community. To a limited extent, a case can also be made that abortion reform has thus far failed in the legislatures because of organized religious pressure.¹²⁹ To the extent that a religious purpose has entered into the retention of strict abortion laws, a technical violation of the establishment clause would appear present,¹³⁰ at the minimum this violation is a factor to be considered in the cumulative effect of constitutional policies weighing against that law.

A fourth amendment right of marital privacy, partially relied on in the *Griswold* case, also appears in the abortion controversy. If the right of the parents to plan the size and time of arrival of children is within the scope of this marital privacy, the state's threat of prosecution in cases of pregnancy terminated by abortion is an intrusion into that privacy. The parallel is best illustrated in the hypothetical case of an oral abortifacient taken after conception to prevent birth. To prove use of such an abortifacient prosecution authorities might find it necessary to invade the home and inquire as to the acts leading to and terminating the pregnancy. They might

Sunday in North America, 79 HARV. L. REV. 42 (1965). Thus when a matter of both religious and secular cognizance is at issue the religion clauses of the first amendment lose any conclusive relevance. However, a secular claim arising from a religious belief is suspect when it seriously inhibits the freedom of action of those who disavow the belief and rests solely on that belief.

¹²⁹ See LADER 94-116, for discussion of the organized religious pressure brought to bear against abortion reform legislation.

¹³⁰ U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion. . . ." On the establishment clause see generally A. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES (rev. ed. 1964); Cahn, *The "Establishment of Religion" Puzzle*, 36 N.Y.U.L. REV. 1274 (1961).

also have to invade the physician-patient relationship and search the physician's office for evidence of abortifacients or for surgical apparatus and medical records. *Griswold* took a dim view of such probing into intensely private relationships. The case suggests that abortion prohibitions exceed and violate the United States Constitution.¹³¹

Griswold ended a two decade legal struggle to void an unenforced Connecticut statute outlawing the *use* of contraceptives and punishing physicians who aided and abetted such use. Much like the abortion statutes, this anti-contraceptive measure was publicly ignored and symbolized only the timidity and election-mindedness of lawmakers. Contraceptives were available in drugstores or by prescription just as abortion is available, at an elevated cost, for those with the proper contacts. Moreover, the Connecticut statute worked a second discrimination against the poor in that it precluded the opening of birth control clinics. Further, the Connecticut prohibition forbade reliable family planning just as abortion laws preclude rapid termination of pregnancy immediately after a failure of contraception is discovered. The only factual difference between the acts forbidden by the Connecticut statute and acts forbidden by abortion laws is that ovum and spermatozoön which can be kept apart under *Griswold's* holding have come together and have begun to grow into an embryo. An oral abortifacient would halt the growth at a very early stage by releasing the implanted cells from the wall of the uterus. Surgical abortion, also, separates the fetus from the wall of the uterus, most abortions occurring substantially before the third month and before the fetus has developed to any degree. In

¹³¹ See Leavy & Kummer, *Abortion and the Population Crisis; Therapeutic Abortion and the Law; Some New Approaches*, 27 ОНЮ Ст. L.J. 647, 674 (1966):

A comparison of the Connecticut law and a typical anti-abortion statute leads to the conclusions that: (1) both statutes are at war with currently accepted standards of medical practice; (2) both statutes invade the sacred realm of marital privacy by denying married couples the right to plan the future of their family; (3) both statutes force the birth of deformed children, or leave abstinence as the alternative; (4) both statutes are largely unenforced, nevertheless prosecution hangs like a cloud over the medical profession; (5) both statutes result in discrimination against people in lower economic brackets; (6) both statutes are in conflict with one of the world's most critical problems today, the population explosion; (7) both statutes involve the imposition of a religious principle on the entire community by government sanction.

view of the substantial interests of the woman which are involved and the subjective, minimal state interest in denominating the growing cells as "human," *Griswold* appears reasonably applicable to the invalidation of abortion legislation, particularly where applied to the marital relationship and where the woman asserts her strong interest in avoiding damage to her physical or mental health, in avoiding the product of rape or incest, or where she asserts some other interest important to her. *Griswold*, on its facts, protected a general interest in planning a family without state interference; consequently it may apply with even greater force where the woman asserts additional justification for an abortion.

B. The Fetus' Claim to Due Process and Equal Protection

The fourteenth amendment to the United States Constitution requires that states accord "due process of law" and "equal protection of the laws" to *any person* within their respective jurisdictions and that "all *persons born or naturalized* in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside (emphasis added)." Whether the living male and female reproductive cells (spermatozoön and ovum) constitute a "person" within the meaning of the fourteenth amendment before fertilization would seem to be fully settled in the negative. After conception, however, the initiation of growth toward eventual human status has prompted some observers to argue that a liberalized abortion law would deprive the fetus of that due process to which they silently assume it to be entitled.¹³² This claim is not developed with any seriousness in the literature¹³³ and was not even mentioned in the extensive comments to the Model Penal Code's proposed abortion reform act.¹³⁴ It can be dismissed by pointing out that the early fetus, similar in shape and functioning to the constituents which came together to form it, bears scarcely any developed

¹³² E.g., Byrn, *Abortion in Perspective*, 5 DUQ. U.L. REV. 125, 135 (1966).

¹³³ Sands, *The Therapeutic Abortion Act: An Answer to the Opposition*, 13 U.C.L.A.L. REV. 285, 305-06 (1966), notes the absence of any serious claim that a fertilized ovum is a "person" within the reasonable application of the due process clause.

¹³⁴ See MODEL PENAL CODE § 207.11, Comment (Tent. Draft No. 9, 1959). But see Byrn, *Abortion in Perspective*, *supra* note 132, for an argument that the child-to-be must be recognized as a legal entity for fourteenth amendment purposes, and that the MODEL PENAL CODE deprives the child-to-be of due process of law and equal protection of the laws.

characteristics at the time abortion normally takes place. If life-transmission is recognized as a continuous process in which conception plays only the part of increasing and re-directing growth, contraception and abortion differ only in degree. Both are employed to prevent a birth several months in the future. Both "kill" living tissue, but only in the same sense that oral contraceptives cause the unfertilized egg to die at the end of each cycle. True, "an abortion kills something. The 'developing human organism,' which was alive and growing before the interruption of the pregnancy, is dead after it."¹³⁵ The growth, however, is unlike the growth of a living child.

The death is like the death of an unfertilized egg, not like the slaying of a newborn infant. No compulsive law can equate the two and still conform with the principle of treating like things alike. To force women and their physicians to equate them would be only a short step from holding that the use of contraceptives itself is a form of murder. While contraception does result in the "death" of millions of ova and billions of spermatozoa during the first hours and weeks of their existence no civilized society has ever proposed capital punishment as a penalty for the use of contraceptives. Furthermore, with the coming advent of an operative abortifacient drug, the fetus will then be discharged even before it becomes visible to the human eye. The basis, therefore, on which a legislature would attempt to equate fetal tissue with a "person" appears to be substantial and to raise no colorable due process question. If one concludes that a legislature has no authority on which to frustrate a pregnant woman's interests by re-defining the term "person," then no issue as to whether the fetus is deprived of due process is raised. It may be a wholly innocent fetus, but it is no more a "person" than the newly fertilized ovum or the spermatozoon which is prevented from fertilizing the ovum by contraceptive means.

C. State Police Power Over Health, Welfare, and Morals

Throughout American constitutional history state power has been considered plenary in its own sphere¹³⁶ subject only to certain constitutional limitations.¹³⁷ State authority has been constitutional-

¹³⁵ Byrn, *Abortion in Perspective*, *supra* note 132, at 126.

¹³⁶ U.S. CONST. amend. X. *See, e.g.*, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

¹³⁷ U.S. CONST. art. I, §§ 9[3], 10[1]-[3]; art. IV, §§ 1, 4; art. VI [2]; amend. XIII-XV, XXIV. *See, e.g.*, *Fay v. Noia*, 372 U.S. 391 (1963);

ly extended to prohibit polygamy,¹³⁸ forbid obscenity,¹³⁹ punish fornication,¹⁴⁰ and compel smallpox vaccination.¹⁴¹ In all cases, however, the state legislation must rest on a non-arbitrary basis and the means pursued must bear a reasonable relationship to the legitimate object sought to be achieved.¹⁴²

Several grounds can be advanced as reasonable bases on which to rest state legislation which prohibits abortion except to protect the life of the pregnant woman. First, the state can urge that abortion statutes exist in part to protect pregnant women from the dangers of criminal abortionists and "quack" abortifacient home remedies.¹⁴³ Second, a state may urge that an abortion prohibition acts as a reasonable deterrent to illicit intercourse—premarital or extramarital—by raising the stakes for such intercourse.¹⁴⁴ The third and most significant claim is that state abortion acts protect a contingent interest in being born—an interest of the fetus, after conception and implantation in the womb. The third claim appears to be the chief distinction between the assertion of a fundamental

NAACP v. Button, 371 U.S. 415 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

¹³⁸ *E.g.*, Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878).

¹³⁹ *E.g.*, Redrup v. New York, 386 U.S. 767 (1967) (*per curiam*); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Alberts v. California, 354 U.S. 476 (1957).

¹⁴⁰ *E.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964) (assumed in opinion but not argued); Pace v. Alabama, 106 U.S. 583 (1882) (assumed in opinion but not argued).

¹⁴¹ *E.g.*, Zucht v. King, 260 U.S. 174 (1922); Jacobson v. Massachusetts, 197 U.S. 11 (1905).

¹⁴² See Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957).

¹⁴³ The assertion of a desire to protect the woman's health by forbidding abortion appears both ironic and not reasonably or rationally related to health as an object of legislation. If abortion is sometimes needed to protect the woman's health, the statute acts to damage health by requiring forced birth or resort to criminal abortion. If desired on non-health grounds, therapeutic abortion in a hospital setting only rarely endangers health, and would serve to protect the woman from the dangers of criminal abortion. Yet this protection is withdrawn by the statute. Only when a market for criminal abortion exists can the statute be urged to protect the woman's health by deterring the incompetent abortionist. The state, however, by its prohibition, tends to create the very ground on which it partially attempts to base this legislation.

¹⁴⁴ The Supreme Court in Griswold v. Connecticut, 381 U.S. 479 (1965), necessarily rejected this ground as an asserted basis for legislation prohibiting the marital use of contraceptives. Like reasoning seems clearly applicable to a state's attempt to curb alleged rampant "immorality" by prohibiting abortion. See also note 89 *supra*.

right to the use of contraceptives and the right to abortion when contraception fails. The first and second grounds for abortion statutes lack sufficient constitutional merit to warrant further examination.¹⁴⁵

(1) The Vagueness Argument¹⁴⁶

State acts which prohibit abortion "without lawful justification"¹⁴⁷ and "except to save the life of the mother"¹⁴⁸ arguably can be challenged on grounds that they are so vague as to deprive a physician of that due process of law guaranteed him by the fourteenth amendment.¹⁴⁹ Medical opinion on the propriety of abortion

¹⁴⁵ See notes 143, 144 *supra*.

¹⁴⁶ On the "void for vagueness" doctrine in constitutional law see generally Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 831 (1923); Amsterdam, *The Void for Vagueness Doctrine*, 109 U. PA. L. REV. 67 (1960); Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195 (1955); Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77 (1948).

¹⁴⁷ For an argument that a statute is unconstitutionally vague which forbids abortion "without lawful justification," see the dissenting opinion of Chief Justice Weintraub in *Gleitman v. Cosgrove*, 49 N.J. 22, 55, 227 A.2d 689, 707 (1967).

¹⁴⁸ A comparable indefiniteness exists in those few states whose statutes or decisional law permit therapeutic abortion "to protect the health of the mother." A determination as to what condition during pregnancy endangers the woman's "health," in what way, and to what extent, may be highly subjective. Far more extensive and detailed clarity, moreover, is possible by a detailed enumeration of specific allowable indications coupled with a provision, for example, that the concurrence of two physicians or approval by a hospital committee shall be conclusive. Because of the intense emotional aura surrounding the socio-moral-economic issues of abortion the physician is in special need of clear guidelines. His risk is exceptionally high—his professional career—consequently the need for "breathing space" appears unquestionably dire. Cf. *NAACP v. Button*, 371 U.S. 415 (1963).

¹⁴⁹ Uncertainty and disagreement within the medical profession as to justifiable indications for abortion have only recently been examined and documented. See Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417 (1959). Lack of helpful clarity in the statutory language is known to be present, however, but in difficult to quantify. Reputable practicing physicians, moreover, have only begun to voice their objections to rigid abortion laws, and in the past criminal convictions have almost never resulted from good faith activities engaged in by physicians of good community reputation. Consequently state appellate courts have given short shrift to vagueness challenges. *People v. Rankin*, 10 Cal. 2d 198, 74 P.2d 71 (1937), for example, upheld the California abortion statute as not unduly vague, and *Commonwealth v. Wheeler*, 315 Mass. 394, 395, 53 N.E.2d 4, 5 (1944), found the Massachusetts abortion prohibition to be "sufficiently full and accurate to protect the rights of the defendants." *Ac-cord*, *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967) (by implication); *Hans v. State*, 147 Neb. 67, 22 N.W.2d 385, *vacated on other grounds*, 147 Neb. 730, 25 N.W.2d 35 (1946); cf. *Carter v. State*, 155 So. 2d 787 (Fla. 1963).

varies substantially in penumbral cases; surveys now document this disagreement and uncertainty with considerable specificity.¹⁵⁰ Disagreement is particularly sharp where an abortion is needed to protect the woman from severe damage to her physical or mental health, to avoid the products of incest or rape, or to prevent deformed births where contraception has failed. In these close cases a physician is frankly at the mercy of his colleagues and local prosecuting authorities. If the prosecutor or the clergy in his community is rampantly against any abortion, the physician may be required to reject his best judgment in a case which, in another community, would afford ample grounds for terminating a pregnancy.

In the Supreme Court "the doctrine of unconstitutional indefiniteness 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."¹⁵¹ To the extent that a woman is asserting a fundamental right of control over her reproductive organs, the void for vagueness doctrine seemingly applies to abortion laws and is worthy of consideration in that context.

On one hand the Court has stated 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 . . ."¹⁵² recognizing that "broad language may throttle protected conduct."¹⁵³ In the eyes of the Court "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."¹⁵⁴ It has, on the other hand, with minimal predictability applied Holmes' admonition that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matters of degree. If his judgment

¹⁵⁰ *E.g.*, Packer & Campell, *supra* note 149.

¹⁵¹ Amsterdam, *The Void-For-Vagueness Doctrine In The Supreme Court*, 109 U. PA. L. REV. 67 (1960).

¹⁵² *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

¹⁵³ Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195, 219 (1955).

¹⁵⁴ *United States v. Reese*, 92 U.S. 224, 221 (1875). The same point is made by Weintraub, C.J., in his dissent to *Gleitman v. Cosgrove*, 49 N.J. 22, 55, 227 A.2d 689, 707 (1967).

is wrong, not only may he incur a fine or a short imprisonment . . . he may incur the penalty of death."¹⁵⁵

At least three factors work in favor of applying the due process definiteness requirements to borderline indications for abortion: the fundamental character of the woman's claim, the documented uncertainty in opinion within the medical profession and the consequent deterrence, and the availability to the legislature of far more specific language and procedure to protect both the woman and her physician. The absence of closely relevant precedent on this point would render speculative any estimate of whether a court might take this avenue of decision.

The scope of a holding that the standard of "saving the woman's life" is too indefinite, however, presents further complexities; a state may clarify its statutory provisions, but rewrite them so strictly as still to contravene asserted fundamental liberties. In this case the liberties would only be *clearly* contravened. Apparently, therefore, a vagueness holding would resolve only half of the dilemma. A second question is *where*, if at all, the legislature may draw its line. This issue has been examined in Part III A.

(2) The Equal Protection Requirement: Nonresidence and Poverty

Not all inequities in law and society are remediable at the instance of the judiciary. The wealthy and knowledgeable undeniably have their prerogatives, at least in the spheres of private social activity, and the courts are sometimes even hailed or criticized as the guardians of special privilege. But when a "State" denies "to any person *within its jurisdiction* the equal protection of the laws"¹⁵⁶ as ultimately construed by the highest court of the nation, that person may act to relieve the inequity by a suit for injunction,¹⁵⁷ relief from prosecution,¹⁵⁸ or in many cases for civil damages.¹⁵⁹ And, "where

¹⁵⁵ Nash v. United States, 229 U.S. 373, 377 (1913).

¹⁵⁶ U.S. Consr. amend. XIV (emphasis added).

¹⁵⁷ *E.g.*, Griffin v. School Bd. 377 U.S. 218 (1964).

¹⁵⁸ Relief from prosecution may result from invalidating the state statute altogether, *e.g.*, Loving v. Commonwealth, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Brown v. Board of Education, 347 U.S. 483 (1954), or refusing to apply it in a discriminatory fashion, NAACP v. Button, 371 U.S. 415 (1963); Bates v. Little Rock, 361 U.S. 516 (1960), or, often to the same effect, permitting removal of the state prosecution from a state to a federal court under 28 U.S.C. §§ 1443, 2241 (1958), although this process is subject to substantial limitations. *See, e.g.*, City of Greenwood v. Peacock, 384 U.S. 808 (1966); Georgia v. Rachel, 384 U.S. 780 (1966).

¹⁵⁹ *See, e.g.*, 18 U.S.C. § 242 (1958), and 17 Stat. 13 (1871), 42 U.S.C.

fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.¹⁶⁰ Initially the open-ended language of the fourteenth amendment was used against state sanctioned racial discrimination. It now encompasses, however, all state created or publicly administered classifications,¹⁶¹ patent or latent, which effectively discriminate against persons in any arbitrary and irrelevant manner.¹⁶²

Of those persons unable to obtain legal hospital abortion, the following, and their physicians, appear to be the most disadvantaged by present medical and law enforcement practices: (1) the woman whose life is not endangered by carrying a pregnancy to term; (2) women who belong to poverty-level minority groups and can only make use of charity and ward facilities;¹⁶³ (3) women who are unable to use effective contraceptive means; and (4) women who are not legal residents of states with reasonable abortion laws and who are barred from treatment in other states because of legislation or coercive regulations forbidding the treatment of non-residents.¹⁶⁴

A. Discrimination Against the Poor.

Assuming, *arguendo*, that a hospital performs a "public function" subject to the fourteenth amendment in determining whether an abortion should be performed,¹⁶⁵ and that *some* abortion "regulation"

1983 (1958), which impose civil liabilities on any person who deprives another of his civil rights "under color of" state or local law or custom. *See also* Note, *Federal Civil Action Against Private Individuals for Crimes Involving Civil Rights*, 74 YALE L.J. 1462 (1965).

¹⁶⁰ Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966).

¹⁶¹ Kotch v. Pilot Comm'rs, 330 U.S. 552 (1947).

¹⁶² *See, e.g.*, Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 358 (1949):

The imposition of special burdens and the granting of special benefits, must always be justified. They can only be justified as being directed at the elimination of some social evil, the achievement of some public good.

¹⁶³ For a discussion of minority groups and their abortion practices and problems *see generally* CALDERONE 67, 76-80; GEBHARD 195; LADER 66; LOWE 55.

¹⁶⁴ At the present time only one jurisdiction has a residence requirement. N.C. GEN. STAT. § 14-45.1 (Supp. 1967). *See also* Colorado Medical Soc'y, *Abortion Guidelines* (1967) ("voluntary" refusal to treat nonresidents suggested).

¹⁶⁵ It appears unquestionable that the function of hospital committees and individual members of the medical profession in reviewing applications for the legal termination of pregnancies amounts to "state action" as that phrase is used by courts in considering challenges to the allegedly dis-

is constitutionally permissible,¹⁶⁶ a claim can be made out from documented statistical evidence that indigent ward patients, as contrasted with financially able private patients, are the victims of systematic inequalities in the administration of hospital abortion procedures.

The factual inequities between an indigent woman and her well-to-do fellow citizen permit the latter to obtain legal or illegal foreign abortion; no reasonable argument can be made that a state is required to equalize this circumstance by financing such extra-territorial expeditions. Nor can the state, by any stretch of judicial argumentation, be thought to involve itself with the expensive criminal abortionist, even though state officers have been charged with knowledge of his extra-statutory activities. At least two forms of unreasonable state classification, however, do appear to be practiced which violate the clear command of the fourteenth amendment and would form a basis for limited judicial relief.

One form of classification employed by some hospital abortion committees is to approve only a limited number of abortion applications each month, rejecting all those subsequently filed regardless of indications.¹⁶⁷ This is similar to granting only a fixed quantity

criminatory application of statutes. *See, e.g.*, *Spevack v. Klein*, 385 U.S. 511 (1967) (disciplinary proceedings of bar association are "state action"); other factors establishes "state action"); *Lombard v. Louisiana*, 373 U.S. 153 (1964) (that restaurant licensed plus 267 (1963) (public statements of city officials given same effect as ordinance requiring segregation). *See also* *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Everett v. Riverside Hose Co.*, 261 F. Supp. 463 (S.D.N.Y. 1966). *See generally* *St. Antoine, Color Blindness But Not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 MICH. L. REV. 993 (1961); *Van Alstyne & Karst, State Action*, 14 STAN. L. REV. 3 (1961).

¹⁶⁶ Although it is clear that a state may permissibly require only licensed surgeons to be eligible for terminating pregnancies, the sensitivity and uniqueness of abortion as a constitutional issue injects uncertainty into any prediction of the outcome of actual litigation over the permissibility of forbidding abortion. Consequently, collateral constitutional issues, such as unconstitutional vagueness and discrimination against minority groups, require elaboration as they too pose pressing demands for relief and at the same time raise substantial federal questions.

¹⁶⁷ Hospital over-crowding provides no justification for this practice. The number of legal abortions granted twenty-five years ago was more than three times that presently approved. Crowded hospitals, moreover, are state-created circumstances which can be alleviated. *See* LADER 24. Moreover, an abortion is a simple operation which does not require complex hospital facilities. The private physician, if he is not prevented, can perform an abortion in his own offices or in a simple clinic. *See* N.Y. Times, June 4, 1967, § 6, at 6 (city ed.), for discussion of a new abortion technique which can be

of appendectomies or tonsilectomies within a given period of time. The purpose of such a "quota" system bears no relation to the health interests asserted by a pregnant woman.¹⁶⁸ If the quota provides for only four abortions each month, and the fifth suitable applicant evinces identical indications to the fourth, she nonetheless is denied her request. This form of classification, in the equal protection context, is known as the "perfectly unreasonable."¹⁶⁹ The sole purpose, avoidance of political and religious pressure, does not justify a legal classification which denies the fundamental rights of persons situated identically, except in time, to those whose rights are accorded recognition.¹⁷⁰

As to ward and charity patients, "the mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color."¹⁷¹ Yet, "today, almost 80 per cent of all abortion deaths occur among non-white (including both Puerto Rican and Negro) women."¹⁷² And, in a recent year, of the maternal deaths from criminal abortion in the county of New York, 50 per cent were Negro, 44 per cent Puerto Rican, and only 6 per cent other.¹⁷³ Within the hospital the care of obstetrical patients may be viewed as an undertaking of public character which a hospital must perform even-handedly and with circumspect regard for the equal protection mandate.¹⁷⁴ Taken in this light a discriminatory practice of

carried out in "30 seconds." In any event, "overcrowding" is never a serious question in this context. To advocates of quotas it is an afterthought. For the limited data presently available on "quotas" see LADER 27-30; N.Y. Times, April 25, 1965, § 6 (Magazine), at 59.

¹⁶⁸ Hospitals presumably employ a quota system to avoid external criticism and pressure from religious and political groups. State residence requirements rest on an identical basis.

¹⁶⁹ Tussman & tenBroek, *supra* note 162, at 348.

¹⁷⁰ *Id.* at 358-61; *cf.* Cooper v. Aaron, 358 U.S. 1 (1958); Buchanan v. Warley, 245 U.S. 60 (1917).

¹⁷¹ Edwards v. California, 314 U.S. 160, 184 (1941) (concurring opinion).

¹⁷² LADER 66. See also H. PILPEL, THE ABORTION CRISIS 3 (1966) [hereinafter cited as PILPEL].

¹⁷³ PILPEL, *supra* note 172.

¹⁷⁴ State instrumentalities have frequently been required to take affirmative action to satisfy the requirements of equal protection. The reapportionment cases required state legislatures to redistrict. *E.g.*, Swann v. Adams, 383 U.S. 210 (1966); Burns v. Richardson, 384 U.S. 73 (1966); Fortson v. Dorsey, 379 U.S. 433 (1965); Reynolds v. Sims, 377 U.S. 533 (1964). The right to counsel cases require a state to provide defense attorneys for indigent defendants. *E.g.*, Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963). Griffin v. School Bd., 377 U.S. 218 (1964), required taxes to be levied and schools to be re-opened. Griffin v. Illinois, 351 U.S. 12 (1956), required the state to provide indigent defen-

not informing ward patients of their legal right to abortion in certain instances and of providing this service with a far greater availability to the more wealthy private patient would make out a case of unconstitutional inequality.¹⁷⁵ Clearly a hospital cannot, through inaction or otherwise, fail to inform patients of the availability of drugs, helpful surgery, or any other available facilities on the timid ground that a taboo surrounds the practice. Yet, at least one observer has documented this very state of affairs in the case of abortion, and the records of other hospitals are likely to disclose similar unfairness. Lawrence Lader writes:

The most disastrous result of the abortion-committee system has been economic and social discrimination against one group—the ward patients. In large cities the poor, particularly Negroes and Puerto Ricans, are virtually denied the same medical care as the privileged few.

Of hospital abortions performed in New York City during 1960-62 only 7 per cent were non-whites, as compared with 93 per cent whites.

In this same period, 16 ward patients in municipal hospitals, 66 in voluntary hospitals were granted abortions, compared with 792 private patients. Under pressure of the German measles epidemic in 1964, ward patients received a little better share of abortions: 32 in municipal, 64 in voluntary hospitals, as against 483 private patients.¹⁷⁶

A discriminatory effect was also apparent in the limited administration of the Connecticut birth control statute invalidated in *Griswold*. Although a majority of the Court went off on a different ground, Justice White took judicial notice of the plain fact of discrimination in his concurring opinion. He wrote:

[A]nd the clear effect of these statutes, as enforced, is to deny disadvantaged citizens . . . those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information. . . .¹⁷⁷

dants with a free transcript on appeal; cf. *Rinaldi v. Yeager*, 384 U.S. 305 (1966) (cost of transcript cannot be taken from prisoner's wages).

¹⁷⁶ A survey in 1966 of hospitals in New York state established that 3.7 more abortions per delivery were performed at proprietary hospitals than public hospitals. Hall, *Present Abortion Practices in Hospitals of New York State*, 23 N.Y. MED. 124 (1967).

¹⁷⁶ LADER 29.

¹⁷⁷ 381 U.S. at 503.

B. State Residence Requirements

To date only North Carolina has enacted an abortion reform law for the sole benefit of its residents.¹⁷⁸ The apparent purpose of such a provision is to preserve the state's reputation from the criticism that it is an "abortion mecca" for non-residents. No state, however, has general laws forbidding its physicians to treat non-residents under any other circumstances. No state prohibits physicians from prescribing contraceptives for non-residents. No state has a code of human rights applicable only to residents. No state has abolished capital punishment for the sake of convicted residents only. No state forbids its universities to enroll non-residents.¹⁷⁹ In general, states treat non-residents within their borders the same as they do residents; states have not tended to "wall" themselves off. The actual language of the fourteenth amendment seems to forbid such discrimination. It demands that a state accord equal protection of its laws to all persons "within its jurisdiction,"¹⁸⁰ and not just to "residents." Supreme Court decisions support the view that one's residence is not generally a relevant factor in determining which laws apply to him, and that the rights to travel and be accorded the same protection of the laws as accorded a resident are fundamental rights.¹⁸¹ Minor state regulations, however, which protect a valid local interest are permissible,¹⁸² but the state must establish a substantial basis for legislation which discriminates against the fundamental interests of a non-resident. A typical case would be that of a private physician who operates in a private clinic or hospital and is otherwise able to treat any patient he accepts regardless of resi-

¹⁷⁸ N.C. GEN. STAT. § 14-45.1 (Supp. 1967). See also Colorado Medical Soc'y, *Abortion Guidelines* 8 (1967) ("voluntary" refusal to treat non-residents suggested). *Quaere* the validity of a state law discriminating against residents?

¹⁷⁹ A state university presumably may impose non-resident tuition to offset the tax burden, but it must not be "unduly rigid" in interpreting its requirements for establishing residence. *Clark v. Redeker*, 259 F. Supp. 117 (S.D. Iowa 1966).

¹⁸⁰ U.S. CONST. amend. XIV.

¹⁸¹ *E.g.*, *United States v. Guest*, 383 U.S. 745, 758 (1966): "[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *Accord*, *Edwards v. California*, 314 U.S. 160 (1941) (based on commerce clause).

¹⁸² See, *e.g.*, *Schreiber v. City of Rye*, — Misc. 2d —, 278 N.Y.S.2d 527 (Westch. Cty. Ct. 1967) (municipality upheld in its refusal to permit non-residents to use local golf and swimming facilities; the court rested its conclusion on the town's stated desire to reduce overcrowding in recreation areas).

dence. State intervention would be against the will of both physician and patient and would rest solely on the fact that the patient came across state lines to seek the best medical treatment available. This form of legislation is admittedly discriminatory in the face of the fundamental interest of the patient to seek treatment and the physician to administer it. It is worth noting that the four month residence requirement imposed in North Carolina¹⁸³ might as well be ten years since abortion after three months is not medically desirable except in emergency cases.

The elimination of discriminatory administration of present abortion laws, however, affords only impartial relief or none at all for other interests and classifications. Differences which claim to warrant no distinctions are present. The woman whose health would be impaired without danger to her life by continued pregnancy can see little justification for a law which differentiates between her and other women who are presently protected. Similarly, the woman who has failed or been unable to exercise her fundamental right to contraception could argue with justification that shortly after conception she ought not to lose that authority over her reproductive organs which the woman who has successfully used contraceptives still retains.

D. Institutional Considerations

The advisability from any number of perspectives of encouraging the judiciary to protect the fundamental interests of individual citizens from unduly restrictive state action is an insoluble question of too great a complexity to be re-mooted in this Article.¹⁸⁴ To invalidate a state's abortion prohibitions may be viewed as either "passive" decision-making or raw "activism," depending upon one's view

¹⁸³ See note 178 *supra*.

¹⁸⁴ Discussion pertaining to the role of courts in protecting individual liberty has centered on free expression cases and the first amendment. For the "passivist" view see generally L. HAND, *THE BILL OF RIGHTS* (1958); R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* (1955); Bickel, *The Supreme Court, 1960 Term*, 75 *HARV. L. REV.* 40 (1961); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959).

Commentary advocating a more "active" judicial role includes C. BLACK, *THE PEOPLE AND THE COURT* (1960); MEIKLEJOHN, *POLITICAL FREEDOM* (1965); Cahn, *The Firstness of the First Amendment*, 65 *YALE L.J.* 464 (1956); McKay, *The Preference for Freedom*, 34 *N.Y.U.L. REV.* 1182 (1959); Rostow, *The Democratic Character of Judicial Review*, 66 *HARV. L. REV.* 193 (1952).

of the judicial function in American government and the persuasiveness of the constitutional case made out against the state action at issue. To the abortion reformers, a strong judicial posture in this area would strengthen human dignity and individual liberty. It could permit greater personal choice by individual women and their physicians in fundamental areas of family planning and alleviate much of the tragedy of criminal abortion. Abortion reform opponents, on the other hand, consider the 1,000,000 annual terminations of pregnancy as 1,000,000 homicides and would prefer that the number not be increased. It is difficult to pinpoint precisely what interest could oppose abortion reform other than the impermissible interest in enforcing the view that abortion is the intentional killing of a "human being," but prescribing a lesser penalty because of the widespread refusal to hold such a belief.

While legislative policy-making may be more adept at enumerating those specific instances in which a majority of legislators could be persuaded to accept legal abortion, this fact is inapposite. The Supreme Court has settled that family planning by contraception is not subject to community acquiescence or approval by vote at the town-meeting or by the state's elected law-makers. Abortion, from the standpoint of the family, raises issues too similar to those raised by contraception for a court to permit them to be put to a vote in each community. The judiciary can examine the sociological phenomenon of abortion in the quiet of stately chambers, as a complex of issues to be resolved within constitutional guidelines. A legislator must fend off organized opposition and charges of "murder" in the hurried course of the legislative process, uncertain of political climate and possibly possessing the single certainty that public lack of awareness as to the existence and seriousness of the abortion problem could ensure defeat at the next election for those who exercise an informed and sincere best judgment. A court, however, can provide a reasoned hearing for both sides.

IV. CONCLUSIONS

If the analysis offered in this article is sound, the federal constitution may provide considerable immunity for the American woman and her physician when they choose to terminate a pregnancy by therapeutic abortion. A woman's right to control her own reproductive organs is of fundamental importance to her. It is not

a right to be lightly yielded to the elected representatives of the local community. Yet the states wield coercive power over the pregnant woman from the moment she conceives—requiring that she gave birth without regard for her personal belief as to the morality of abortion. The toll of prohibitions against abortion has been great—in suffering, frustration, and not infrequently death. Respect for the legal system is not enhanced by the flagrant violation of strict abortion statutes nor by the discriminatory application of their silent exceptions. A new wave of abortion reform has begun to make headway, gradually carving out legislative exceptions to the general ascetic prohibition against the exercise of individual judgment. Yet a frontal attack on the very assumptions of abortion legislation can be made through judicial enforcement of the guarantees of human rights found in the amendments to the United States Constitution. Ultimately present abortion laws rest upon an asserted state interest in protecting the fetus after fertilization. Although some opponents of abortion reform equate the fetus in every way with a fully-developed infant, this view has prevailed in opposition circles for less than one hundred years. Abortion before “quickening” was a common law right, as it is a statutory right in many countries in the world less inclined to accept governmental ordering of private marital autonomy. This belief in the value of protecting a fetus under the rubric of “contingent life” attempts to bestow on the fetus an identity it has not acquired, and this is done at the expense of the adult woman’s interests in her physical and mental health, her physical autonomy, and marital privacy.

The state interest in regulating abortion is a subjective judgment of value based upon a belief of religious character, a belief which enacts one particular concept of “morality.” It would permit a state to outlaw use of any abortifacient tablet which might be developed to terminate pregnancy immediately after conception, and would permit the outlawing of all abortion even though the woman’s life be placed in eminent peril if she is forced to bear the child. Finally, present statutes are not only unreasonably restrictive but exceedingly vague. They contravene the standards of sound medical judgment and cause a haphazard, capricious treatment of requests for the termination of pregnancies.

The position of this article, therefore, is that the assumptions underlying state abortion restrictions fall outside the permissible

scope of state action; that abortion prohibitions violate substantive due process in contravention of values expressed in the Bill of Rights as recognized by decisions of the Supreme Court; and that the recent *Griswold* case voiding state anti-contraception legislation could be invoked by individual physicians or members of hospital abortion committees to invalidate abortion prohibitions as unconstitutional assertions of state power.*

* *Author's Note:* As this article went to press, several noteworthy events occurred, which should be mentioned to bring the background of the article up to date. Maryland and Georgia have passed abortion laws which make reforms along the lines suggested by the American Law Institute. MD. ANN. CODE art. 43, §§ 145, 149(E)-(G) (Supp. 1967), *as amended*, House Bill No. 88 (1968); GA. CODE ANN. § 26-11 (1953), *as amended*, House Bill No. 281 (1968). The Georgia act is discussed in 159 N.Y.L.J. No. 40, at 1 (Feb. 28, 1968). The American Civil Liberties Union completed its study of abortion laws and concluded that the laws of every state deprived "women of the liberty to decide whether and when their bodies are to be used for procreation . . ." N.Y. Times, Mar. 25, 1968, at 35, col. 1 (city ed.). The ACLU took the position that the decision to terminate a pregnancy should rest solely with the woman and her physician. The proceedings on an international conference on abortion held on September 6-8, 1967, sponsored by the Joseph P. Kennedy, Jr., Foundation and the Harvard Divinity School, have recently been published in *THE TERRIBLE CHOICE* (1968). A second international conference is planned by the Association for the Study of Abortion for November 17-20, 1968. The United States Supreme Court recently noted probable jurisdiction in a case in which the lower court held that a one-year welfare residence requirement violates the Constitution. *Thompson v. Shapiro*, 270 F. Supp. 331 (D. Conn. 1967), *prob. juris. noted*, 88 S. Ct. 784 (Jan. 15, 1968) (No. 813). The outcome of this case will have an important bearing upon state residency requirements for legal abortions, since both requirements are motivated by state desire to exclude non-residents from a public benefit.