Abortion Reform

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Since the authors of this article are men and since a central contention in the controversy over abortion is that the resolution of these issues remains in the control of men, the Review *has invited four women involved in the abortion reform movement to participate in a symposium. In the fall issue, we will present a transcription of their discussion on this article and on abortion reform in general.*

The Editors

All societies have faced the problem of unwanted pregnancy. A recipe for inducing an abortion has been attributed to the Chinese Emperor Shen Nung, who reigned in the 27th century B.C. Egyptian papyri containing information both on birth control and abortion have been found. Views on abortion, however, have varied both between cultures and within the same culture. The Hippocratic oath, which states, "I will not give to a woman an abortive remedy," did not reflect contemporary Greek attitudes, but was derived from the views of Pythagoreans, a minority within the Greek culture. Plato suggested abortion as a method for maintaining the stability of population in his ideal state, and Aristotle felt that abortion "before she felt life" was the solution when a woman "had the prescribed number of children."

Other writers saw that abortion involved something more than an unwanted pregnancy and recognized certain rights of the fetus, but these were not rights which overrode a woman's health. Sonarus (A. D. 98-138), an early Greek expert on

obstetrics and a biographer of Hippocrates, wrote that "[t]he fruit of conception is not to be destroyed at will because of adultery or of care of beauty, but it is to be destroyed to avert danger appending to birth. . . ." A 5th century Latin grammarian analogized abortion to "removing dry twigs to save a living tree, or jettisoning cargo to save a storm threatened ship."

Legislative Regulation of Abortion

There was no common law crime of abortion. Blackstone's Commentaries states that "life begins in contemplation of law as soon as the infant is able to stir in the mother's womb." The first statute prohibiting abortion before quickening was not passed in England until 1803. Connecticut passed an abortion statute in 1821, permitting abortion after quickening only when necessary to preserve the life of the woman. New York adopted a statute in 1828 prohibiting all abortions except where necessary to protect the life of the woman. Until recently, restrictive statutes like these remained in force in most states.

Early court decisions and other evidence indicate that the original policy consideration in adopting anti-abortion legislation was concern for maternal health.[1] All internal surgery was highly dangerous at the time, since Joseph Lister's findings on antiseptic surgery were not printed until 1867, over 40 years after the first states began passing anti-abortion statutes. Abortions, even in hospitals, were much more dangerous than bearing a child, and the law sought to compel a woman to bear a child rather than to risk the dangers of abortion.

Today, however, modern medicine gives us different policy considerations. According to figures of Dr. Christopher Tietze of the Population Council, it is six to ten times more dangerous in the United States to complete pregnancy than to have a hospital abortion.[2] Hungary reports 0.6 deaths per 100,000 hospital abortions, and Czechoslovakia had 140,000 abortions in 1964, with no deaths. By contrast, estimates of the number of deaths resulting from illegal abortion range from 1,000 a year upward. The Los Angeles County General Hospital reports an average of 10 cases a day, or 3,500 cases a year, of women suffering from poorly performed illegal abortions. In New York City almost half of all deaths associated with childbearing are related to illegal abortion.

There was nothing on the horizon in the 1960's, when abortion reform began in the United States, to show that the availability of legal hospital abortions was improving or that the health hazards posed by illegal abor- were diminishing. Lader, in his book *Abortion,* states that the number of hospital abortions declined from 30,000 to 8,000 between 1941 and 1966. These figures are in sharp contrast to the estimated 1,000,000 illegal abortions performed each year in the United States. Kinsey shows that one out of five pregnancies in the United States is terminated by illegal abortion.

Reform was spurred in the 1960 s by a shift in general public opinion toward acceptance of liberalized abortion statutes.[3] The change was reflected in 1962 when the Model Penal Code proposed by the American Law Institute included a provision permitting abortion if three physicians certified that continuation of pregnancy was (A) likely to result in the death of the woman, the serious impairment of her physical or mental health, or the birth of a child with grave and permanent physical deformity or mental retardation; or (B) if the pregnancy was the result of rape (including statutory rape) or incest. In 1967, Colorado became the first state to adopt a statute patterned generally after the 1962 Model Penal Code. The reform in Colorado received national publicity and generated similar efforts in a number of other states. California, Delaware, Georgia, Maryland, New Mexico, North Carolina, South Carolina, Oregon and Virginia followed Colorado and passed similar reform statutes based upon the Model Penal Code.

Since 1967, the debate with respect to liberalized abortion has moved from reform to repeal. In many states, yesterday's controversies are today's settled policies. Governor Rockefeller of New York has announced he would veto any legislation that seeks to amend restrictively the 1970 New York repeal statute. Hawaii, Washington and Alaska have joined New York in passing laws which permit women to receive abortions without regard to indications. Even the usually conservative National Conference of Commissioners of Uniform State Laws has recently appointed a subcommittee on abortion, and the subcommittee's first draft is tantamount to a call for repeal.

In a number of states, however, the time for liberalized abortion has not arrived. Iowa has defeated a reform statute, Maryland has refused to adopt a repeal statute to replace its 1968 reform statute and the Connecticut House of Representatives has overwhelmingly defeated a proposal to liberalize the state's restrictive abortion statute.

The ultimate disposition of these restrictive statutes may come from litigation establishing the constitutional right of women to seek abortions without restriction by the state. Attempts to obtain legislative reform have been paralleled by litigation challenging the constitutionality of both restrictive and reform statutes. There have been numerous lower court decisions with respect to the constitutionality of state abortion statutes, and there are approximately 70 suits challenging state abortion statutes awaiting decision in state and federal courts.

Judicial Reform

People v. Belous[4] is the pioneering decision in the continuing effort to overturn restrictive abortion legislation. In an ambiguous decision resting on several grounds, the court held that California's 1850 abortion statute, which prohibited abortion except to save the woman's life, was unconstitutional because it was so uncertain of meaning as to violate due process and because it violated a woman's right to life and to choose whether to bear children. The court stated that the state could not forbid a woman to

procure an abortion where death from childbirth, although not medically certain, would be substantially certain or more likely than not.

Since *Belous,* courts have declared similar Michigan,[5] Texas,[6] South Dakota,[7] Illinois,[8] Wisconsin[9] and Pennsylvania[10] statutes unconstitutional. Courts have also held that the California reform statute[11] and the Georgia reform statute[12] are unconstitutional.

The constitutional grounds upon which these courts struck down statutes include violation of a woman's right to privacy in matters of family, sex and marriage; violation of the right of women to choose whether to bear children; violation of the right of a woman to control her own body, and violation of the right of privacy in the physician-patient relationship. These courts have required that the state show a compelling state purpose[13] to justify limiting a woman's right to seek an abortion, and have rejected preserving the life of the fetus, protecting the life and safety of the woman, and discouraging pre-marital sexual intercourse as compelling purposes.

Opposing these cases are decisions by three-judge federal district courts upholding the restrictive Louisiana[14] and Ohio[15] abortion statutes and the North Carolina reform statute.[16] These decisions have reflected the argument that abortion statutes infringe the rights of women and have held that states can restrict the availability of abortion to protect the life of the fetus. In so doing, they have upheld the power of the state to limit the indications for which women may seek abortions.

Suits challenging the constitutionality of abortion statutes basically involve a conflict between the "right" of a woman to seek an abortion without restrictions imposed by the state and the "right" of the fetus to be born. The Supreme Court will eventually have to decide whether a woman has a constitutional right to seek an abortion without state restrictions. If the Court holds that a woman has such a right, it still will have to decide whether there are compelling state purposes which justify limiting abortions to certain indications. Preserving of the life of the fetus probably will receive the most serious consideration as a compelling state interest.

This article will consider whether a woman has a constitutional right to seek an abortion without state interference, and whether, if such a right exists, there is a compelling state purpose justifying restrictions upon its exercise. It also will examine issues concerning restrictions on who can perform abortions and where abortions can be performed; requirements that a woman consult with others before being permitted to seek an abortion; requirement of the consent of the woman's husband or guardians to her abortion; and provision of abortions for the poor.

The Right of Married Women to Seek Abortion

In recognizing a right to privacy in matters of marital sex and family planning, the landmark case *Griswold v. Connecticut*[17] laid a firm basis for establishing the constitutional right of married women to seek abortions. *Griswold* overturned the conviction of a physician and the Executive Director of the Planned Parenthood League for aiding and counseling in the use of contraceptive devices. There were several opinions acknowledging this right to privacy, but there was some disagreement as to the source of the right.

In the opinion of the Court, Justice Douglas indicated that it was a penumbral constitutional right emanating from five amendments of the United States Constitution. He held that the statute had a "maximum destructive impact" upon the marital sexual relationship. But the only such impace that he specifically mentioned was the possibility that enforcement of the statute might include searches "of marital bedrooms for telltale signs of the use of contraceptives."

Justice Goldberg, on the other hand, found this right to exist under the Ninth Amendment. According to him, the statute infringed the right of married persons to control the size of their family by "voluntary birth control" and could not be upheld on the grounds that it discouraged extra-marital relationships, since the state could exercise its power to prohibit extra-marital sexual relationships, without infringing marital rights of privacy. In separate opinions, Justices White and Harlan each saw this right to privacy as part of the Fourteenth Amendment.

Some approximation of the scope of the *Griswold* right can be reached by putting the opinions together and deciding what it does not include. For example, if the only infringement of the right was that enforcement of the statute might involve searches of the marital bedroom, the Court could have stated that the statute could not be enforced by such searches. It would have affirmed, however, since the conviction in *Griswold* did not result from such a search.

If the right was solely to choose whether to bear children, the Court also could have affirmed, holding that a married couple had the right to engage in sexual intercourse when they desired to conceive a child but that no such right existed when they did not want a child.

Finally, if the Court had believed that a married couple was constitutionally protected in choosing to control the size of their family but not in choosing the method of doing so, it could have affirmed, stating that a married couple could practice abstinence, coitus interruptus or the rhythm method, but that the state could prevent the use of contraceptives.

Consequently, *Griswold* includes the right of a married couple to select the means to regulate the size of their family and to have intercourse to express their love and to achieve emotional and psychological gratification.

For purposes of invoking *Griswold,* there seems to be little difference between abortion and contraception as methods of birth control. Both are voluntary methods to prevent an unwanted birth. Contraception usually prevents an egg from being fertilized, while abortion destroys the fertilized egg. But the intrauterine device (IUD) and the so-called "morning after" pill are considered abortifacients because they seem to destroy the fertilized egg by preventing its implantation in the wall of the uterus.[18] If there are reasons why these bio-medical differences should have legal significance, however, they should be considered

against a standard which protects the right to select birth control methods.

Restrictive abortion statutes infringe the right of choice to the extent of driving a woman to use methods which may be harmful to her or which involve a substantial risk of unwanted pregnancy. The pill has numerous unpleasant side effects, including depression,[19] excessive fluid retention, and possibly the tendency to cause blood clotting. Moreover, no contraceptive is 100% effective: the pill is approximately 99% effective, the IUD approximately 97%, the diaphragm approximately 95% and the condom approximately 85%. A failure rate in contraceptives as low as 1% would produce over 250,000 unwanted pregnancies each year in the United States.[20] Thus, contraception as a method of birth control is only a first line of defense. Abortion is a necessary method of voluntary birth control where contraception has failed or was not used.

Using *Griswold* to establish the right to abortion may raise problems involving the husband's consent, for *Griswold* is premised on a right to marital privacy which includes both husband and wife. But a doctrine of consent would permit the state to intervene on a spouse's side in a private dispute about one of marriage's most intimate and important questions. Nothing in *Griswold* suggests that marital disagreements in such matters are less private than agreements.

The Right of Unmarried Women to Seek Abortion

As mentioned above, the *Griswold* right is limited to married couples. The cases[21] relied upon by Justices Douglas and Goldberg were concerned primarily with the rights of marriage and raising children as part of a marital relationship, and the implication is that only sexual relationships between husband and wife are of such a fundamental character as to be protected by the Constitution. Justice Goldberg's opinion adds dictum that the state has the power to prohibit adultery, homosecuality and extramarital sexual relationships.

Establishing a right to abortion that encompasses both married and unmarried women can proceed along one of two lines. The first involves recognizing the unspoken Ninth Amendment right to seek one's own physical and emotional welfare. The second picks up the *Baird v. Eisenstadt*[22] clue that regulating sexual conduct by forcing women to bear unwanted children constitutes cruel and unusual punishment under the Eighth Amendment.

The Ninth Amendment, in which three Justices found the *Griswold* right to marital privacy, guarantees that the enumeration of certain constitutional rights "shall not be construed to deny or disparage others retained by the people." It protects those rights "so basic and important that it would be inconceivable that they are not protected from unwarranted interference" or "that would be. . .natural [s]ubject of constitutional protection."[23]

The right to care for one's physical and mental health has been recognized as a right included within Ninth Amendment protection.[24] When the state does intrude in health matters – as with drug laws; vaccination requirements; proscriptions against self-mutilation and the sale of liquor to minors; physician licensing requirements and even involuntary blood transfusions–it does so with an eye to the well-being of its citizens. Yet factual information tells us that restrictive abortion laws have the effect of creating health hazards.

Today, abortion is safer for a woman than carrying pregnancy to term and bearing a child; a restrictive abortion statute may force a woman to take on an unwanted health risk. While most such statutes allow abortions when the mother's life or health is in danger, they require a medical certainty greater than that reflected in common statistics–otherwise, of course, the statutes would be interpreted as allowing an abortion to any woman who wanted one. Moreover, when abortions are unavailable or severely restricted, a woman is pressured to use contraceptives which may pose a health risk to her. Finally, it is indisputable that a sizable number of women are driven each year to illegal abortion with all its attendant health hazards, despite the supposed deterrent effect of restrictive abortion statutes. Thus, no public health rationale supports nonrecognition of a woman's right to protect her physical and mental health by seeking abortion.

Restrictive statutes also interfere with the closely related right to receive the full benefit of treatment from one's physician.[25] Because many statutes narrowly limit the indications for abortion, a physician is not always able to prescribe an abortion when he feels it is beneficial. Often, he must watch helplessly while his patient risks her health and life at the hands of an unqualified abortionist.

These restrictions on the doctor-patient relationship are of the same class as those involved in *United States v. Freund*,[26] where the court invalidated a Prohibition era statute which restricted the amount of alcohol which a physician could prescribe. The court went on to state,

"It is an extravagant and unreasonable attempt to subordinate the judgment of the attending physician to that of Congress, in respect to matters with which the former alone is competent to deal, and infringes upon the duty of the physician to prescribe in accord with his honest judgment, and upon the right of the patient to receive the benefit of the judgment, and upon the right of the patient to receive the benefit of the judgment of the physician of his choice."

In *United States v. One Package*,[27] Judge Augustus N. Hand considered a provision of the Comstock Act prohibiting the mailing of any item for "the prevention of conception or for causing abortion." He held that the provision could not be applied to a licensed physician acting within the accepted medical practices of the day and pointed out that it would be unreasonable to prevent the suppression of articles, "the use of which in many cases is advocated by such a weight of authority in the medical world."[28] The same reasoning would limit the application of restrictive abortion statutes to unlicensed abortionists or would invalidate a statute clearly intended to apply to doctors.

A second approach toward securing protected access to abortions proceeds by way of the cruel and unusual punishment clause of the Eighth Amendment. It focuses upon the

penalties of unwanted pregnancy and birth that restrictive statutes impose upon women when contraception fails or has not been used. In striking down an anti-contraceptive statute, *Baird v. Eisenstadt*[29] seems to have relied on these grounds; applying the court's reasoning to restrictive abortion statutes suggests they are likewise invalid.

Baird overturned the conviction of a birth control advocate for violating a Massachusetts law which prohibited exhibiting, selling, giving or lending birth control devices to unmarried persons. The statute had been amended by the Massachusetts legislature in an attempt to comply as narrowly as possible with *Griswold.* The court held it to be in conflict with fundamental human rights–though it did not specify which ones–and outside the powers of the state. Although it found that the legislature could prohibit and punish premarital sex, the *Baird* court ruled that it could not do so by making a "personally and socially undesired pregnancy" and "a possible obligation of support" the penalties. Though not stated, the underlying constitutional theory seems to be that such penalties would be cruel and unusual within the meaning of the Eighth Amendment.

A woman who is denied an abortion is faced with an unwanted pregnancy and the threat of bearing an unwanted child, or in the alternative, a choice between an illegal abortion with its attendant hazards and a legal abortion in another jurisdiction with all its expenses and inconveniences. A woman in such a situation has "a fate of ever-increasing fear and distress."[30] This argument is not met by saying, as did the court in *Steinberg v. Brown,*[31] that an unwanted pregnancy is not cruel if it can be avoided by abstinence and is not unusual if the country is full of them; this ignores the fact that an unwanted pregnancy is cruel and unusual *as a punishment. Baird* recognized that unwanted pregnancies and children are no longer acceptable penalties for conduct considered deviant by the legislature. This judgment incorporates an established notion.

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . [T]he words of the Amendment are not precise, and their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[32]

Status of The Fetus

Once the constitutional right to abortions has been established, it can be infringed only if the state can show a compelling interest or purpose. Protecting the health and safety of the woman is not a compelling state purpose because an abortion is safer than continuance of pregnancy and birth. Preventing pre-marital intercourse and furthering public morality have already been rejected as compelling interests. Fetal rights remain as the most likely possibility to receive serious consideration.

Proponents of abortion reform argue that statutes should continue to respect the creative process inherent in fetal life but not at the expense of forcing motherhood upon dissenting women. They are concerned with the effect an unwanted pregnancy has on the quality of the mother's and the child's lives. On the whole, they tend to stress the quality of life after birth rather than the mere existence of life, while their opponents argue for the "transcendence of any life, born or unborn, over the health or happiness of an older or more powerful life."[33]

Courts which have upheld restrictive abortion statutes while overturning laws prohibiting the use of contraceptives have generally relied on the fact that abortion always involves destroying the fetus while contraception usually does not. Thus, the majority in *Rosen v. Louisiana State Board of Medical Examiners*[34] justified different treatment on the ground that

". . .the basic distinction between a decision whether to bear children and one which is made after conception is that the first contemplates the creation of a new human organism, but the latter contemplates the destruction of such an organism already created."[35]

The court characterized the basic question as whether the state could, under the Fourteenth Amendment, "assign to the human organism in its early prenatal development as embryo and fetus a right to be born unless the condition of pregnancy directly and proximately threatens the mother's life." It held that the legislature could and found the Louisiana statute reasonably directed toward that aim.

The *Rosen* court refused to recognize any constitutional right to abortion and consequently did not decide whether protecting the fetus was a compelling state purpose that would justify overriding that right. Similar reasoning was used with the same results in *Corkey v. Edwards*[36] and *Steinberg v. Brown,*[37] although the *Corkey* court contradicted itself in simultaneously acknowledging that fundamental issues of privacy were at stake and refusing to apply the compelling state purpose test. All three decisions can be criticized on the ground that by not recognizing the woman's right to abortion, they mischaracterize the question of the state's power to regulate and thus skew the balance between maternal and fetal rights.

In any case, the law's decision as to where life begins is somewhat arbitrary from both a religious and a scientific point of view. Some proponents of liberalized abortion argue that the exact nature of the fetus is a matter of spiritual supposition and that "life" is a continuum–there being life in the sperm and the ova even before fertilization. According to them, calling the fetus an "unborn child" begs the question, for one might as easily call each sperm an "unconceived child."

Others dispute the significance of fertilization as a scientific matter.

"When a fetus is destroyed, has something valuable been destroyed? The fetus has the potentiality of becoming a human being. A human being is valuable. Therefore is not the fetus of equal value? This question must be answered.

"It can be answered, but not briefly. What does the embryo receive from its parents that might be of value? There are only three possibilities: substance, energy and information. As for the substance, it is not

remarkable: merely the sort of thing one might find in any piece of meat, human or animal, and there is very little of it—only one and half micrograms, which is about a half of a billionth of an ounce. The energy content of this tiny amount of material is likewise negligible. As the zygote developes into an embryo, both its substance and energy content increase (at the expense of the mother); but this is not a very important matter—even an adult from this standpoint is only a hundred and fifty pounds of meat.

"Clearly, the humanly significant thing that is contributed to the zygote by the parents is the information that 'tells' the fertilized egg how to develop into a human called 'DNA.' . . .The DNA constitutes the information needed to produce a valuable human being. The question is: is this information precious? I have argued elsewhere that it is not. . . .

"People who worry about the moral danger of abortion do so because they think of the fetus as a human being, hence equate feticide with murder. Whether the fetus is or is not a human being is a matter of definition, not fact, and we can define it any way we wish."[38]

There is no consensus or majority viewpoint among public health professionals as to when human life begins.[39] But even if there were agreement in scientific circles as to where the line should be drawn, courts' inquiry would not be at an end.

As Judge Cassibry pointed out in his dissent in *Rosen*, the "meaning of the term 'human life' is a relative one which depends on the purpose for which the term is being defined."[40] Consequently, he continued, even if science recognized that the union of sperm and egg results in a "human being," that would not necessarily settle the right of a woman to seek an abortion. The courts must make their own assessment of the status of the fetus for purposes of balancing its rights against that of the expectant mother. And a survey of the relevant case law shows that so far, it has not been accorded any legal rights as fetus.

Many pregnancies are interrupted naturally (spontaneously aborted, miscarried or stillborn);[41] stillborn fetuses are viewed as dead human tissue and disposed of without legal interference. A fetus that has died in the early months of pregnancy is considered by no state or nation to be a dead person. A charge of homicide will lie against a person who performs an abortion only where it is proved that the fetus was alive outside the mother's womb after abortion;[42] no state imposes penalties for illegal abortion greater than those exacted for most misdemeanors. In addition, the majority of cases deny damages against a physician for performance of an illegal abortion where the patient consented.[43] Finally, there is no case law whatsoever to show that zygotes, blastulas or embroyos are "persons" under the protection of the Fourteenth Amendment.[44]

Under English common law, abortion of an unquickened fetus was not a crime,[45] and this view was absorbed into American common law by the vast majority of the courts which considered the question. Moreover, the English common law considered abortion to be murder only if the fetus was quickened, born alive, lived for a brief period and then died.[46] Execution of a pregnant woman was delayed for her to give birth to a child only if the fetus had quickened.[47]

Opponents of reform and repeal legislation rely upon other areas of the law where they claim the fetus has been accorded rights.[48] *Steinberg* v. *Brown*[49] argues that since the law accords property rights to the fetus at conception, the state should protect the life of the fetus from that moment. The fetus, however, must be born alive to take property; it has no fetal rights to property.[50] Similarly, if a fetus is not born alive it cannot transmit an inheritance by intestacy to others.[51]

Civil cases involving claims for prenatal injuries are also irrelevant for determining the status and rights of the fetus with regard to abortion. A child must be born alive in order to recover damages for prenatal injuries; the right of recovery is a right that attaches to the living child, not to the embryo or fetus.[52] The policy underlying this rule is that a child who is born and lives should be compensated for post-natal loss caused by a prenatal act. This policy says nothing about the rights of the fetus qua fetus.[53] Where damages are awarded for the death of a fetus as a result of pre-natal injury, the recovery is for the "distressing wrong in the loss of a child"[54] and not for any injuries suffered by the fetus.

In short, examining cases cited by opponents of abortion reform shows that the rights claimed on behalf of the fetus are actually rights which can only be exercised by the child after birth, or rights of the potential mother or father. The law's appropriate recognition that pre-birth events may affect the legal status and rights of a child when born alive does not establish a state interest in the fetus as such. Neither does it demonstrate a state interest in forcing the mother to gestate the fetus and produce a live child.[55]

Moreover, attempts to protect the fetus through restrictive abortion statutes have largely failed. While they may prevent the vacillating woman from seeking an abortion, countless women still seek illegal abortions, often under the most frightening conditions, to avoid giving birth to an unwanted child. In balancing fetal and maternal interests, then, it should be kept in mind that the status of the fetus as "life" is largely a matter of religious and scientific speculation, that public policy has never led the courts to accord the fetus rights as a fetus and that attempts to protect the fetus through restrictive abortion statutes have led a remarkable lack of success, only driving women to the hazards of illegal abortion.

Who, Where and When

According to *Doe v. Bolton,*[56] the state can limit abortions only to the extent that health and safety require it. This involves regulating who can perform abortions and where, and ensuring the quality of the woman's decision to seek an abortion. Courts should continue to uphold this power, and legislatures should exercise it.

As to the first two areas, the conservative and easy approach is to allow only physicians to perform them and only in fully equipped hospitals. But such an approach has several draw-

backs. First, it drives the cost of abortions up and thus discriminates against the poor. The cost of an abortion in a clinic can be as low as $80, while the average cost of abortions is $300 to $575 in private New York hospitals and $160 to $270 in New York municipal hospitals.[57] Statistics indicate that there is now a wide disparity between availability of abortions for poor and wealthy women.[58] Reform statutes should be aimed at eliminating this discrimination as much as possible.

Second, allowing only doctors to perform abortions and only in hospitals may place an excessive demand on already overburdened facilities. Already, many states are including residency requirements in their reform statutes in order to avoid becoming "abortion meccas" and further straining their hospitals. Such requirements have been held unconstitutional as infringing the right to travel.[59] The problem they seek to address can be eliminated by easing the limitations on who can perform abortions and where.

More imaginative legislation would allow abortions to be performed by state-certified and trained paraprofessionals under the supervision of a physician competent to handle emergencies. It would also permit abortions to be performed in doctor's offices or medical clinics which have emergency facilities for providing transfusions and anaesthesia or are in close proximity to hospitals with such facilities. Limiting the performance of abortions to hospitals accredited by the Joint Commission of Accreditation of Hospitals, as is done under several reform and repeal statutes, is grossly inefficient because many of the requirements for accreditation (e.g., dietary and radiology facilities and facilities for emergency care for mass casualties) are useless in ensuring safe abortions.

State legislatures should be concerned with making funds available to the poor to pay for abortions–either under Medicaid[60] or other programs–since even an $80 clinic abortion may be too expensive for many women. Requiring health and hospital insurance policies to pay the cost of abortions may also go part way in solving the problem. State legislatures should also pressure or require state and local hospitals to perform abortions and to perform them humanely. Some hospitals deliberately attempt to discourage abortions by placing women seeking them in the obstetrics ward while awaiting the operation, and following the operation, where they wake up surrounded by mothers and new babies. For a while, Bellevue Hospital in New York City conducted fetal heartbeat monitoring while women were undergoing abortion–placing electrocardiograms next to them so that they saw and heard the fetus die.[61] Congress should consider requiring hospitals receiving Federal funds under the Hill-Burton Act[62] hospital construction program to perform abortions and to perform them humanely.

As to the third area of state regulation–ensuring the quality of the woman's decision–*Doe v. Bolton* held that because the fetus has a *"potential* of independent human existence," a woman should give serious and careful consideration to all relevant factors in reaching her decision to have an abortion. These factors include emotional, economic, psychological, familial and medical considerations, and the state may require her to consult with licensed ministers, secular guidance counselors or licensed physicians other than the physician who will perform the abortion. If a woman is required to hear the views of both proponents and opponents of abortion, the interests of the fetus will be preserved sufficiently and the applicant will retain her freedom of choice. The function of the consultants is to expose the woman to both sides of the issue–not to veto her decision. Thus, the use of such requirements to restrict the indications for which abortion is made available would be unconstitutional.[63]

The work of the courts and the legislative process is being accelerated by the growing feeling that America and the world are undergoing drastic changes in their attitudes toward reproduction. The policy reasons for making an unwilling woman bear an unwanted child are gone, and have been replaced with a widespread felling that unwanted children are community burdens. People are increasingly demanding control over their own reproductive activities and are either going to change the laws in the legislature, or attack them through the courts, or ignore the laws as do the thousands of women who each year get illegal abortions.

1. See *State v. Murphy,* 27 N. J. L. 112 (Sup. Ct. 1858); Means, "The Law of New York Concerning Abortion and Status of the Fetus, 1664-1968" 14 *N. Y. L.For.* 411 (1968). But see Comment, "To Be or Not to Be: The Constitutional Question of the California Abortion Law," 118 *U.Pa.L.Rev.* 643, 654 (1970), arguing that the early statutes were designed to protect the fetus and to regulate morality.

2. Tietze, "Mortality with Contraception and Induced Abortion," 45 *Stud. Fam. Plan.* 6 (1969).

3. See Blake, "Abortion and Public Opinion, the 1960-70 Decade," 171 *Science* 540(1971).

4. 80 Cal. Rprt. 354, 458 p. 2d 194 (1969), *cert. den.* 397 U.S. 915 (1970).

5. *People v. Ketchum* (Mich. D. C., March 30, 1970).

6. *Roe v. Wade,* 314 F.Supp. 1217 (N.D. Tex. 1970), appeal docketed 39 U.S.L.W. 3229 (U.S. Oct. 10, 1970) (No. 808).

7. *State v. Munson* (S.D. Cir. Ct., Pennington Cnty. Apr. 6, 1970).

8. Both federal and state courts have held the Ill. statute to be unconstitutional. See *People v. Anast*, No. 69-3429 (Ill. C.C., Cook Cnty., 1970); *Doe v. Scott*, 321 F.Supp. 1385 (N.D. Ill. 1971).

9. *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970), *appeal dismissed* 39 U.S.L.W. 3144 (U.S. Oct. 12, 1970) (No. 297), *appeal docketed* 39 U.S.L.W. 3362 (U.S. Feb. 16, 1971) (No. 1353).

10. *Commonwealth v. Page*, No. 1968-353 (Pa. Common Pleas, Centre Cnty., July 23, 1970).

11. *People v. Robb*, Nos. 149005, 159061 (Ca. Mun. Ct., Cen. Orange Cnty., Jan. 9, 1970); *People v. Barksdale* (Cal. Mun. Ct., Alameda Cnty., March 24, 1970); *People v. Gwynne*, No. 173309 (Ca.. Mun. Ct., Cen. Orange Cnty., June 16, 1970).

12. *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970), *appeal docketed* 39 U.S.L.W. 3227 (U.S. Dec. 14, 1970) (No. 971).

13. The exercise of constitutional rights cannot be infringed by the state unless it shows that a compelling state interest is promoted by doing so. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

14. *Rosen v. Louisiana State Board of Medical Examiners*, 318 F. Supp. 1217 (E.D. La. 1970), *appeal docketed* 39 U.S.L.W. 3302 (U.S. Dec. 27, 1970) (No. 1010).

15. *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio 1970).

16. *Corkey v. Edwards*, 322 F. Supp. 1248 (W.D.N.C. 1971).

17. 381 U.S. 479 (1965).

18. See Brodie, "New Biology and the Prenatal Child," 9 *J. Family L.* 391, 400 (1969).

19. Lewis & Hoghugi, "An Evaluation of Depression as a Side Effect of Oral Contraceptives," 115 *Br. J. Psych.* 697 (1969).

20. Lader, *Abortion* 58 (1966).

21. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Skinner v. Oklahoma*, 316 U.S. 535 (1942). See also *Loving v. Virginia*, 388 U.S. 1 (1967).

22. 429 F. 2d 1398 (1 Cir. 1970), *cert. granted* 39 U.S.L.W. 3367 (U.S. March 1, 1971) (No. 804).

23. *United States v. Laub Baking Co.*, 283 F. Supp. 217 (N.D. Ohio 1968). See *Colorado Anti-Discrimination Commission v. Case*, 151 Colo. 235, 380 p. 2d 34, 40 (1962); *State v. Abellano*, 441 p. 2d 33, 336 (Ha. 1968) (Levinson, J., concurring); Patterson, "The Forgotten Ninth Amendment" (1955); Kutner, "The Neglected Ninth Amendment;" The "Other Rights" Retained by the People 51 *Marq. L. Rev.* 121 (1967); Ritz, "The Original Purpose and Present Utility of the Ninth Amendment," 25 *Wash. & Lee L. Rev.* 1 (1968).

24. See *Environmental Defense Fund v. Hoerner Waldorf Corp.* 1 Envir. Rptr. 1640 (D. Mont., 1970). See also *Union Pacific Railroad v. Botsford*, 141 U.S. 250,251 (1891), where the Court stated,

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

25. *People v. Ketchum* (Mich. D.C., March 30, 1970). In *United States v. Vwitich*, 39 U.S.L.W. 4464 (U.S. April 27, 1971) (No. 84), the United States Supreme Court, though holding that the District of Columbia abortion statute, permitting abortion only where "necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine," was not unconstitutionally vague, interpreted the statute as permitting abortion for reasons of both physical and mental health, even if a woman seeking an abortion on grounds of mental health has had no previous history of mental defects. In holding that the burden of proof was on the prosecution to prove that an abortion was "not necessary for the preservation of the mother's life or health," the court emphasized that "doctors are encouraged by society's expectations, by the strictures of malpractice law and by their own professional standards to give their patients such treatment as is necessary to preserve their health." The court, as emphasized by Justice Douglas in dissent, thus placed considerable weight on a physician's subjective judgment as to whether an abortion is necessary for the preservation of the physical or mental health of a particular patient.

26. 290 F. 411 (D. Mont. 1923).

27. 86 F. 2d 737 (2 Cir. 1936).

28. 86 F. 2d at 739-740. See also *United States v. Nicholas*, 97 F. 2d 510 (2 Cir. 1938); *Davis v. United States*, 62 F. 2d 473 (6 Cir. 1933); *Youngs Rubber Co. v. C. I. Lee & Co.*, 45 F. 2d 103 (2 Cir. 1930); *Bours v. United States*, 229 F. 1960 (7 Cir. 1915).

29. 429 F. 2d 1398 (1 Cir. 1970), *cert granted* 39 U.S.L.W. 3367 (U.S. March 1, 1971) (No. 804).

30. *Trop v. Dulles*, 356 U.S. 86, 102 (1958). See Note, 84 *Harv. L. Rev.* 456 (1970).

31. 321 F. Supp. 741, 748 (N.D. Ohio 1970).

32. *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958).

33. *Rosen v. Louisiana State Board of Medical Examiners*, 318 F. Supp. 1217, 1229 (E. D. La. 1970), *appeal docketed* 39 U.S.L.W. 3302 (U.S. Dec. 27, 1970) (No. 1010).

34. *Id.*

35. *Id.*, at 1223. See also *Gleitman v. Cosgrove*, 49 N. J. 22, 227 A. 2d 689 (1967).

36. 322 F. Supp. 1248 (W.D.N.C. 1971).

37. 321 F. Supp. 741 (N.D. Ohio 1970).

38. Hardin, "Abortion or Compulsory Pregnancy?" 30 *J. Mar. & Fam.* No. 2 (May, 1968).

39. Knutson, "When Does a Human Life Begin: Viewpoint of Public Health Professionals," 57 *J. Pub. Hlth.*, No. 12 (Dec. 1967). See statement of Dr. Harold Rosen, in "Symposium-Law, Morality, and Abortion," 22 *Rut. L. Rev.* 415, 426 (1968), quoted in *Rosen v. Louisiana State Board of Medical Examiners*, 318 F. Supp. 1217, 1223 note 1 (E. D. La. 1970), *appeal docketed* 39 U.S.L.W. 3302 (U.S. Dec. 27, 1970) (No. 1010).

40. 318 F. Supp. at 1232.

41. 10 to 50 per cent of all fertilized ova abort spontaneously from a woman's body. Tietze & Martin, "Foetal Deaths, Spontaneous and Induced, in the Urban White Population of the U.S.", 11 *Pop. Stud.* 170 (1957); Erhardt, "Pregnancy Losses in New York City, 1960," 53 *Am J. Pub. Hlth.* 1337 (1963); Warburton & Fraser, "Spontaneous Abortion Risks in Man", 16 *Am. J. Human Genet.* 1 (1964).

42. See Keeler v. Superior Ct., 2 Cal. 3d 619, 470 P. 2d 617, 87 Cal. Rptr. 481 (1970).

43. See Smith, "Civil Liability for Non-Therapeutic Sterilizations," 14 *Rocky Mt. L. Rev.* 276 (1942).

44. Section 1 of the Fourteenth Amendment of the United States Constitution refers to "All persons *born* or naturalized in the United States. . ."(emphasis added). There is no case law whatsoever to show that zygotes, blastulas, or embryos are protected by the Fourteenth Amendment. See *Commonwealth v. Page*, No. 1968-353 (Pa. Common Pleas, Centre Cnty., July 23, 1970). Cf. *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio 1970); *People v. Ketchum* (Mich. D.C. March 30, 1970).

45. Means, *supra* note 1, at 420.

46. *Id.*

47. *Id*, at 421.

48. See Byrne, "The Legal Rights of the Unborn Child," 41 *L.A. Bar Bull.* 24 (1965).

49. 321 F. Supp. 741, 747 (N.D. Ohio 1970).

50. *Carroll v. Skloff*, 202 A. 2d 9, 11 (Pa. 1964); *Tomlin v. Laws*, 301 Ill. 616, 134 N.E. 24, 25 (1922).

51. *Carroll v. Skloff*, 202 A. 2d 9, 11 (Pa. 1964); *Tomlin v. Laws*, 301 Ill. 616, 134 N.E. 24 (1922); *Marsellis v. Thalhimer*, 2 Paige 35 (N.Y. 1835).

52. See *People v. Belous*, 80 Cal. Rptr. 354, 458 P. 2d 194, 203 note 12 (1969), *cert den.* 397 U.S. 915 (1970).

53. See *Carroll v. Skloff*, 202 A. 2d 9, 11 (Pa. 1964).

54. See *People v. Belous*, 80 Cal. Rptr. 354, 458 P. 2d 194, 203 12 (1969), *cert. den.* 397 U.S. 915 (1970).

55. "Moreover, a statute which forces the birth of every fetus, no matter how defective or how intensely unwanted by its parents, displays no legitimately compelling state interest in fetal life, especially when viewed with regard for the countervailing rights of pregnant women. We do not believe that the state has a compelling interest in preserving all fetal life which justifies the gross intrusion on a woman's privacy which is involved in forcing her to bear an unwanted child.

Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971).

56. 319 F. Supp. 1048 (N.D. Ga. 1970), *appeal docketed* 39 U.S.L.W. 3227 (U.S. Dec. 14, 1970) (No. 971).

57. Edmiston, "A Report on the Abortion Capital of the Country," N. Y. Times, Apr. 11, 1971, at 10 (magazine).

58. There is an apparent disparity between ethnic groups and socio-economic levels and the availability of abortion. A survey of 60 hospitals in the United States in 1963 showed that proprietary hospitals had a ratio of therapeutic abortions to live births of 1/256, while municipal hospitals had a ratio of 1/10,000. The therapeutic abortion rate for white patients was 2.9 per 1,000 live births, while that of non-white patients was 1 per 13,000 live births. Sloane Hospital in New York City had a ratio for private patients of 1 abortion per 55 deliveries, while ward patients had a ratio of 1 abortion for every 224 deliveries. Both in 1968, under the old restrictive New York statute, and under the 1970 New York repeal statute, there has been a ratio of five abortions per 1000 live births for ward patients, and a ratio of 9 abortions per 1000 live births for private patients. Edmiston, *supra* n. 57, at 47. From Jan. to June 1970, the ratio of abortions obtained by white women to those of black women, as measured by a comparison of the ratios of the race-specific abortions per 1000 race-specific live births, was 1.1 in Ala.; 1.3 in Calif.; 3.0 in Ga.; and 5.0 in S. Car. *Abortion Surveillance Report;* Hospital Abortions; Jan.-June 1970 (U.S. Dept. H.E.W. 1970).

Abortion Surveillance Report; Hospital Abortions; Jan.-June 1970 (U.S. Dept. H.E.W. 1970).

Though these statistics from Alabama and California do not indicate significant differences in abortions performed as a function of race, the statistics from Georgia and South Carolina do indicate such discrimination. Lader, in his book *Abortion*, states that the rate of abortions for private patients was almost four times greater than for ward patients. These statistics indicate that an affluent woman is much more likely to successfully obtain a hospital than is an indigent woman, and that whites are more successful in obtaining hospital abortions than are non-whites.

59. *Corkey v. Edwards*, 322 F. Supp. 1248 (W.D.N.C. 1971). See *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Board of Supervisors, Pima County v. Robinson*, 457 P. 2d 951 (Ariz. 1969).

60. Until Apr. 8, 1971, N. Y.'s Medicaid Program paid for abortions. On that date, the N.Y. Commissioner of Social Services issued an order limiting the state's Medicaid coverage to abortions performed for medical necessity. Approx. 10,000 of 23,500 abortions in N.Y. City municipal hospitals from July 1, 1970, until Apr. 1971, involved women eligible for Medicaid. During the same period, 6,160 of the 28,000 abortions performed in nonprofit, private hospitals involved women eligible for Medicaid. 1,850 abortions performed in upstate N.Y. state from July 1, 1970, until Feb. 1, 1971, involved women covered by the Medicaid program. See *N.Y. Times*, Apr. 13, 1971.

61. Edmiston, *supra* 57, at 36-37.

62. 42 U.S.C. 291-291o (1964). Cf. *Simkins v. Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4 Cir. 1963), *cert. den.* 376 U.S. 938 (1964); *Smith v. Hampton Training School for Nurses*, 360 F. 2d 577 (4 Cir. 1966); *Sams v. Ohio Valley General Hospital Association*, 413 F. 2d 826 (4 Cir. 1969); *Citta v. Delaware Valley Hospital*, 313 F. Supp. 301 (E.D. Pa. 1970).

63. *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970), appeal docketed, 39 U.S.L.W. 3227 (U.S. Dec. 14, 1970) (No. 971).