IN THE

Supreme Court of the United States

No. 70-18

JANE ROE, *et al., Appellants,*

v.

HENRY WADE, *Appellee.*

On Appeal from the United States District Court
for the Northern District of Texas

No. 70-40

MARY DOE, *et al., Appellants,*

v.

ARTHUR K. BOLTON, *et al., Appellees.*

On Appeal from the United States District Court
for the Northern District of Georgia

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

JUAN J. RYAN
1351 Springfield Avenue
New Providence, New Jersey 07974

JOSEPH V. GARTLAN, JR.
815 Connecticut Avenue
Washington, D.C. 20006

ALFRED L. SCANLAN
MARTIN J. FLYNN
734 Fifteenth Street, N.W.
Washington, D.C. 20005

ROBERT M. BYRN
140 West 62nd Street
Lincoln Center
New York, New York 10023

Attorneys for The National Right to Life Committee, Amicus Curiae

OF COUNSEL:
Shea & Gardner
734 Fifteenth Street, N.W.
Washington, D.C. 20005

October 8, 1971.

Washington, D C THIEL PRESS 202 393-0625

IN THE

Supreme Court of the United States

No. 70-18

JANE ROE, *et al., Appellants,*

v.

HENRY WADE, *Appellee.*

On Appeal from the United States District Court
for the Northern District of Texas

No. 70-40

MARY DOE, *et al., Appellants,*

v.

ARTHUR K. BOLTON, *et al., Appellees.*

On Appeal from the United States District Court
for the Northern District of Georgia

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

PURPOSE OF THE MOTION

The opposing parties in No. 70-18 (the Texas case) have given their written consent for The National Right to Life Committee[1] to file an *amicus curiae* brief. The appellants in No. 70-40 (the Georgia case) have also given written consent to the filing of such a brief.[2] While declining to give written consent to the filing of an *amicus curiae* brief by

[1] Hereinafter usually referred to as "NRLC".

[2] These consents have been filed with the Clerk.

NRLC, the appellees in the Georgia case have stated in writing that they do not object to this motion.[3]

INTEREST OF THE AMICUS CURIAE

1. *Identification of the Amicus.* The National Right to Life Committee is a non-sectarian, interdisciplinary organization that is committed to informing and educating the general public on questions related to the sanctity of human life. Protecting the right to life of the unborn child is of central concern for NRLC. The Committee believes that proposals for total repeal or relaxation of present abortion laws represent a regressive approach to serious human problems. NRLC is in favor of a legal system that protects the life of the unborn child, while recognizing the dignity of the child's mother, the rights of its father, and the responsibility of society to provide support and assistance to both the mother and child.

NRLC opposes the repeal of existing laws preventing or restricting an abortion, whether this be achieved by legislation or through court order. It is for this reason that NRLC seeks the Court's permission to participate in these two cases. In both, the appellants raised in the lower court, and again attempt to argue in this Court, grave constitutional questions concerning the power of state legislatures to enact laws which restrict the taking of life through the destruction of a live fetus. Candidly, NRLC has reservations concerning the Georgia statute which permits abortion in several situations beyond that when abortion is necessary to save the life of a mother. Nevertheless, NRLC believes that neither the Texas nor the Georgia statute should be held unconstitutional on any basis urged by the appellants in the two cases at bar.

2. *The Legal Position of NRLC in These Cases.* As indicated, if the question before this Court were the most desir-

[3] A copy of their letter to that effect has been filed with the Clerk.

able form of abortion legislation, only the Texas statute would come close to the ethical and political position of NRLC;[4] the Georgia statute would fall substantially short of that position.[5] In these cases, however, NRLC is not concerned with the most desirable legislative resolution of opposing concepts of public morality and welfare, but with fundamental issues of constitutional power and policy. Accordingly, while not endorsing either the Texas or especially the Georgia statute as the ideal abortion law, NRLC, if granted leave by the Court to submit this brief, will argue that neither statute should be declared unconstitutional on any grounds raised by the appellants in the courts below and reiterated by them in this Court. In view of the Fifth and Fourteenth Amendments, there can be no doubt that protection of human life against destruction without due process of law is one of the most fundamental values in American constitutional policy. To the extent that Texas and Georgia have acted to protect the unborn child against arbitrary destruction by private individuals, including doctors and mothers, Texas and Georgia have acted well within their constitutional power.

3. *Justification for Participation as Amicus Curiae.* On the basis of the motions filed in response to the jurisdictional statements filed in these two cases, it appears that in neither do the appellees intend to address themselves to several of the important constitutional issues which appellants have sought to raise. These issues are of major concern to this *amicus.* If considered and decided by this Court, their resolution will have a national impact, affecting the laws of

---

[4]The Texas statute permits abortion *only* "for the purpose of saving the life of the mother."

[5]The Georgia statute permits abortion in a case where "(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or (2) The fetus would be very likely born with a grave, permanent, and irremediable mental or physical defect; or (3) The pregnancy resulted from forcible or statutory rape."

many states and going far in determining what are to be acceptable public mores.

Under these circumstances NRLC believes that both the spirit and the text of Rule 42(3) sanction its appearance as *amicus curiae* in these two cases for the purpose of arguing, *inter alia,* that the two statutes challenged were within the constitutional competence of Texas and Georgia to enact, since those states have a compelling interest in protecting human life, in the form of a living fetus, from destruction by abortion.

CONCLUSION

For the reasons stated herein, and as more fully expanded in the accompanying brief, NRLC respectfully requests that the Court grant its motion and accept for filing the *amicus curiae* brief submitted herewith.

Respectfully submitted,

ALFRED L. SCANLAN
MARTIN J. FLYNN
734 Fifteenth Street, N.W.
Washington, D.C. 20005

ROBERT M. BYRN
140 West 62nd Street
Lincoln Center
New York, New York 10023

JUAN J. RYAN
1351 Springfield Avenue
New Providence,
New Jersey 07974

JOSEPH V. GARTLAN, JR.
815 Connecticut Avenue
Washington, D.C. 20006

Attorneys for The National Right to Life Committee, Amicus Curiae

OF COUNSEL:

Shea & Gardner
734 Fifteenth Street, N.W.
Washington, D.C. 20005

October 8, 1971.

BRIEF

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

CONSTITUTIONAL AND STATUTORY PROVISIONS:

IN THE

Supreme Court of the United States

No. 70-18

JANE ROE, *et al., Appellants,*

v.

HENRY WADE, *Appellee.*

On Appeal from the United States District Court
for the Northern District of Texas

No. 70-40

MARY DOE, *et al., Appellants,*

v.

ARTHUR K. BOLTON, *et al., Appellees.*

On Appeal from the United States District Court
for the Northern District of Georgia

**BRIEF AMICUS CURIAE OF
THE NATIONAL RIGHT TO LIFE COMMITTEE**

INTRODUCTORY STATEMENT

The interests and identification of the *amicus curiae* are stated in the motion which NRLC has filed. The facts of record, the pertinent provisions of the Texas and Georgia statutes, the provisions of the United States Constitution involved and the opinions of the courts below are found either in the printed appendices or in the briefs filed by the appellants and appellees. This *amicus* accepts them for purposes of its own brief.

QUESTIONS PRESENTED

A. These cases raise issues both of jurisdiction and of constitutionality. The basic jurisdictional question appears to this *amicus* to be whether the two lower courts should have abstained from exercising jurisdiction and granting declaratory judgments.

B. Should the Court conclude that the courts below properly exercised jurisdiction and that jurisdiction on appeal also exists in this Court, then it would be confronted with the following substantive issues:

1. Did either the Texas or Georgia court abuse discretion in refusing to issue the injunction sought by the respective appellants?[1]

2. Do the Georgia and Texas abortion statutes invade any alleged constitutional right of privacy on the part of a woman to abort an unborn child?

3. Are the statutes unconstitutionally vague?

4. Do the statutes impair First Amendment or Due Process rights of doctors to practice their profession?

5. Do the statutes deny equal protection of the laws to poorer citizens?

SUMMARY OF ARGUMENT

I.

A. The Texas three-judge federal court should have abstained from granting declaratory relief. At the time the suit was instituted, state court criminal proceedings were pending against the doctor-plaintiff charging him with violations of the Texas abortion statute. In such a case, as this Court recently ruled, "relief by way of declaratory judgment

---

[1]This issue has been adequately briefed by the appellees in both cases. NRLC supports those arguments and therefore will not speak further to that particular question.

should have been denied without consideration of the merits." *Samuels v. Mackell,* 401 U.S. 66, 73 (1971).

B. The Georgia case presents the fact situation to which this Court referred but left undecided in *Younger v. Harris*, 401 U.S. 37 (1971); *i.e.,* no criminal prosecution was "pending in state courts at the time the federal proceeding . . . [was] begun." 401 U.S., at 41. The principles laid down in the *Mackell, Younger* and related cases decided by the Court at the last Term should also apply in this case. The state statute has never been construed by the Georgia courts, and those courts are available to provide both declaratory and injunctive relief in an appropriate case. Therefore, traditional principles of equity, federalism, comity and sound judicial administration support the proposition that the Georgia three-judge federal court should have denied declaratory relief without reaching the merits of the constitutional issues raised by the appellants.

II.

A. Whatever the metaphysical view, the legal concepts as to the nature and rights of an unborn child have drastically changed, based on expanding medical knowledge over the last 2,500 years. As recently as 1921, a respected state court could maintain that the child in the womb is part of his mother. The findings of medical science have destroyed that myth. The leading doctors and scientists in the field now agree that life begins at conception. They further agree that a developing fetus is alive, not only in the sense that he is composed of living tissue, but also in the sense that he is a living, striving human being, from the very beginning. Very early in the pregnancy the fetus manifests a working heart and brain different from his mother. There is absolutely no question but that his existence as an individual begins no later than the stage at which the cells which make up the fetus separate from those cells which later become the placenta. Thus, the state's interest in the preservation of human life in the womb rests upon the undisputed medical evidence.

B. From Bracton's day abortion was regarded at common law as a serious evil or wrong which should be prevented in order to curtail or stop the unnecessary destruction of human life. For a brief period difficulties of proving that an abortion had in fact caused the termination of an "unquick" child prevented application of the serious sanctions of the criminal law to some cases. However, when medical science eliminated those difficulties of factual proof, there was no longer any question but that one of the prime purposes of the abortion statutes was to prevent the destruction of the unborn fetus at all stages of gestation. Therefore, the compelling interest which Texas and Georgia have in prohibiting and regulating unjustifiable abortions is not one newly discovered or advanced as an afterthought argument.

C. The law has recognized the rights of an unborn child in other important areas. For example, the property rights of an unborn child, at all stages of fetal development, were recognized by English law before the end of the eighteenth century. The same recognition was afforded the property rights of an unborn child by American courts. In property law there was no requirement that the fetus must be "quick," *i.e.*, that his presence within her body be felt or recognized by the mother. The rules protecting property rights of an unborn child have been applied even where their application benefited some third party rather than the child, and even where the child himself suffered disadvantage because of such application. We believe it would be an ironic and inexplicable perversion of both human and constitutional values if it were to be the law that a state has an interest in protecting the property rights of an unborn child but has no compelling, constitutionally justifiable interest in regulating the circumstances and conditions under which he may be destroyed.

D. In the field of tort law there has been a dramatic development and complete change in the law in response to expanding scientific knowledge and medical facts that formerly were unavailable. Until well into the twentieth cen-

tury most American decisions denied recovery in tort to the human offspring harmed in the womb, primarily on the ground that the defendant owed no duty to a person who was not in existence at the time of the tort. The premise here, of course, was the now repudiated notion that the unborn child was a part of his mother. Almost every jurisdiction which has considered the issue in the last 30 years has upheld the right of an infant to sue for injuries sustained prior to birth, including the right to sue under a wrongful death statute, whether or not the injury occurred at the time the unborn child was viable or not. If the state may protect the unborn child by a court action awarding damages for a tort, *a fortiori* it cannot be impotent to protect the same living being by criminal sanctions which prohibit his arbitrary destruction.

E. It is also now established that the law will recognize an unborn child's right to support by his parents. If a state has sufficient justification to require a father to support an unborn child which he may not want, can it be fairly maintained that the same state has no justifiable interest in protecting from destruction as a living being a child which his mother may not want? This Court has firmly settled that the free exercise of religion rights guaranteed by the First Amendment are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. Nevertheless, the right of an unborn child to live has served to permit the state's abridgement of or interference with a mother's religious convictions when necessary to save the life of an unborn child. These are cases where the court has to override the religious convictions of a mother and order a blood transfusion in order to save an unborn child within the womb. Either expressly or impliedly such judicial results are based on the findings of modern medical science concerning the nature of the fetus and constitute recognition of the right of the child in the womb to the protection of the law.

F. The *amicus* believes that in any balancing of constitutional values or rights, life must be preserved over alleged privacy. Even if there is a certain right of privacy on the part of a woman arising from the marital relationship, with which the state cannot unjustifiably interfere, there is another right involved here, and the most fundamental of the personal liberties protected by the Due Process Clause, *i.e.*, the unborn child's right not to "be deprived of life," in the very words of that constitutional provision. Thus, the Court is not confronted with a balancing between a right of personal liberty on the one hand and some lesser competing state interest on the other. The choice here is between a nebulous and undefined right of privacy on the part of a woman with respect to the use of her body and the personal right to life of an unborn child, with a concomitant right on the part of a state to prevent its unjustifiable destruction.

The state's interest in regulating abortion is not bottomed exclusively on its concern for the health of the mother. The state interest which justifies what the Congress had done rests on concern for the preservation of human life, even though that life be within the womb. There are no decisions of this Court which suggest the existence of an unrestricted right of bodily integrity on the part of a woman sufficient to permit her alone to decide, for whatever reason, whether to terminate a pregnancy. Nor does a married couple's right to plan a family and to space their offspring encompass the right to intentionally destroy an unborn, but living, fetus any more than it would justify infanticide. Moreover, to sustain the attack on the statute which the appellants make in urging that it offends against an alleged right of privacy would require this Court's unabashed return to the long-repudiated concept of substantive due process which plagued its decisions for several generations.

Public and medical opinion with respect to relaxation of the abortion laws is divided. However, the predilections of the populace, much less the individual preferences of judges, cannot serve as a basis to strike down legislation within the

competence of a state to enact, especially when such legislation is aimed at protecting the most fundamental of the personal liberties protected by the Due Process Clause, that is, the right not to "be deprived of life."

G. All the cases cited by the appellants in support of the claim that a right of privacy is constitutionally guaranteed are clearly distinguishable on their facts. The only one that even superficially might be regarded as an analogy to support appellee's position here is *Griswold v. Connecticut,* 381 U.S. 479 (1965). *Griswold* stands only for the proposition that a law outlawing the use of contraceptives, enforcement of which would require invasion of the marital bedroom, transgressed on the intimacies of and the right of privacy inherent in the marital relationship, including the sexual relationship. The Texas and Georgia abortion statutes do not affect the sexual relationships of husband and wife. Moreover, in *Griswold* the Court was not called upon to choose between the right to privacy and the right to life, the choice it must make in this case. Nor can it seriously be argued that abortion, a crime at common law, is a fundamental, albeit "penumbral," liberty reserved by the Ninth Amendment.

III.

This Court's decision in *United States v. Vuitch,* 402 U.S. 62 (1971) is dispositive of the appellants' claims that the Texas and Georgia statutes are unconstitutionally vague. Doctors are neither in doubt nor in fear as to where abortions permitted by those statutes end and where those barred by them begin.

IV.

A. In both cases appellants urge that the particular statute "chills and deters plaintiffs from practicing their profession as medical practitioners and thus offends rights guaranteed by the First and Fourteenth Amendments." However, neither statute proscribes speech or medical advice but

merely prohibits the commission of the criminal acts specified. If the acts outlawed by the statutes are within the constitutional competency of Texas and Georgia to proscribe as criminal conduct, then the argument is closed. Criminal acts do not fall within the freedom of speech which the First Amendment protects. The same rationale also answers appellants' claims that the freedom to pursue the profession of medicine guaranteed by the Due Process Clause is offended by the statutes involved in these cases.

B. Nor does the statute effect any invidious discrimination between rich and poor, as contended by the appellants. It applies to all persons committing the acts condemned by it and there is no suggestion that it seeks to discriminate on any invidious basis, including that of income. Even if it is true that the rich are in a better position to go to a jurisdiction where abortions are legal or to engage the services of more sympathetic physicians, the answer would be no different. There is no requirement of equal protection that all evils of the same genus be eradicated, or none at all. If the law in this instance, as in so many others, bears more oppressively on the less financially fortunate, the remedy lies in the elimination of the causes of poverty and the reform of the administration of criminal justice, not by the selective invalidation of otherwise lawfully enacted statutes.

C. Appellants also argue that the common welfare would be better served by more relaxed abortion laws. They profess concern about the unsafe conditions which surround criminal abortions and also claim to be moved by the problem of world overpopulation. Whatever the efficacy of such arguments, it is to the Congress, not to this Court, that they should be directed. Apart from that, however, the *amicus* questions their persuasiveness. The evidence is that liberalization of abortion laws has effected no substantive reduction in the rate of illegal abortions in other countries, so all that is done is to increase the total number of abortions. Finally, so far as the problem of overpopulation is concerned, an abortion, whether on the free demand of a woman or pur-

suant to the intimidating command of the state, appears to us as a singularly ineffective, and indeed extremely dangerous, way to attempt to solve the population problem, at least in the context of the humanistic values traditional to Western Civilization. In any event, this Court is not the forum, and these cases are not the occasion, to debate whether unrestricted abortion would best serve the general welfare of the people of Texas and Georgia.

ARGUMENT

I.

BOTH COURTS SHOULD HAVE ABSTAINED FROM GRANTING DECLARATORY RELIEF

This *amicus* is primarily concerned about the ultimate disposition of the important constitutional issues which the appellants have attempted to raise in the two cases. Nevertheless, NRLC is also concerned that these issues not be determined either prematurely or disparately and in the context of litigation where federal jurisdiction, if not absent, rests on an uncertain or disputed basis. *Parker v. County of Los Angeles,* 338 U.S. 327, 333 (1949). This Court has postponed the question of jurisdiction in both cases. 402 U.S. 941 (1971). NRLC respectfully suggests, for the reasons set out below, that this Court should either: (1) note probable jurisdiction and vacate the orders entered by the courts below on the ground that they should have abstained from granting declaratory as well as injunctive relief, *Samuels v. Mackell,* 401 U.S. 66, 72 (1971); or (2) dismiss both cases for want of a substantial federal question, in that the judgments entered below do not constitute final determinations of federal constitutional rights. *Public Service Commission v. Wycoff Co.,* 344 U.S. 237, 247 (1952).

A. *The Texas Three-Judge Federal Court Should Have Abstained from Granting Declaratory Relief.* One of the plaintiffs in the Texas case was a doctor who was permitted to intervene on the ground that he had been charged with violating the Texas abortion statute in two cases "now

pending in the Criminal District Court of Dallas County, Texas. . . ." (App. 22).[2] Last Term, this Court held that federal courts should not exercise jurisdiction to enjoin pending state criminal prosecutions except under extraordinary circumstances where the danger of irreparable loss is both great and immediate in that there is a threat to the plaintiff's federally protected rights which cannot be eliminated by his defense of a criminal prosecution brought against him. *Younger v. Harris,* 401 U.S. 37 (1971). Speaking for a majority of the Court, Mr. Justice Black pointed out that the ancient doctrine of equitable abstention which grew up in the British judicial system "is equally important under our Constitution, in order to prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted."[3]

Continuing, he said:

> ". . . This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept

---

[2] *State of Texas v. James H. Hallford,* No. C-69-5307-IH, and *State of Texas v. James H. Hallford,* No. C-69-2524-H. References to the printed appendices in the two cases are designated herein as "(App. _____)".

[3] *Id.,* at 44.

> does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."[4]

The *Younger* case is square authority in support of the refusal of the Texas three-judge federal court to grant the injunction requested by the appellants. In this case, as in *Younger,* criminal prosecutions were pending involving one of the plaintiffs. Moreover, in both cases, there is no showing that a situation exists "in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights." *Dombrowski v. Pfister,* 380 U.S. 479, 485-86 (1965). However, the three-judge federal court in the Texas case, despite its refusal to issue an injunction, did grant a declaratory judgment striking down the Texas abortion statute as unconstitutional under the Ninth and Fourteenth Amendments and on grounds of vagueness under the Due Process Clause of the Fourteenth Amendment. 314 F. Supp., at 1225. Here, the court below erred; it should have abstained from the grant of such relief.

On the same day that this Court decided *Younger v. Harris,* it handed down its opinion in *Samuels v. Mackell,* 401 U.S. 66 (1971). There, the Court held that the same principles which govern the propriety of issuing federal injunctions against state court criminal proceedings also apply to the granting of federal declaratory judgments. In

---

[4] *Ibid.*

Samuels, the appellants had been indicted under New York's Criminal Anarchy Law. They brought an action seeking declaratory as well as injunctive relief against their prosecutions on the ground that the statute violated the First and Fourteenth Amendments of the Constitution of the United States. A three-judge district court upheld the law and dismissed the complaints on the merits. After sustaining the lower court's refusal to grant injunctive relief, this Court held that the decision below should be affirmed *but* on the ground that "relief by way of declaratory judgment should have been denied without consideration of the merits." 401 U.S., at 73. Speaking for the Court, Mr. Justice Black said that:

> ". . . in cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well."[5]

A majority of the Court thus discerned no difference between the propriety of issuing declaratory relief as opposed to injunctive relief where a "criminal proceeding was begun prior to the federal civil suit . . . ." In both situations, "deeply rooted and long settled principles of equity have narrowly restricted the scope for federal intervention, and ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long standing policy limiting injunctions was designed to avoid." 401 U.S., at 72.

The efficacy of a policy which restricts the grant of federal declaratory relief as well as the issuance of an injunction when criminal proceedings are threatened or, as in the Texas case, in existence at the time a civil suit is filed is further

---

[5] *Id.,* at 73.

demonstrated when we consider the inequity and procedural awkwardness of the situation facing the State of Texas, which lost on the merits in the court below. It is settled that neither the grant nor the refusal of a declaratory judgment, without more, will support a direct appeal to this Court under 28 U.S.C. 1253. *Mitchell v. Donovan,* 398 U.S. 427 (1970); *Gunn v. University Committee,* 399 U.S. 383 (1970). The State of Texas, therefore, has only one avenue through which to appeal directly the declaratory judgment voiding its abortion statute and that is to the Fifth Circuit and, if unsuccessful there, by attempting to invoke the *certiorari* jurisdiction of this Court.[6] Rarely has this Court tolerated the unnecessary bifurcation of constitutional litigation. Yet, should the Court hold in this case that the three-judge court properly granted declaratory relief but improperly denied injunctive relief, it then might be faced at least indirectly, as we now show, with consideration and decision of the same constitutional issues that are being directly raised by the appellees in the Court of Appeals for the Fifth Circuit.

As stated, Texas is foreclosed from any direct appeal to this Court of the decision of the three-judge court in declaring its abortion statute unconstitutional. However, if this Court finds that the lower court acted properly in taking jurisdiction and deciding the case on the merits, then Texas presumably would argue that the court below did not err in refusing to grant injunctive relief. Under the rule that permits an appellee, even though he has not cross-appealed, to urge in support of the judgment under review any grounds which were fairly presented but ignored or rejected by the trial court, Texas could maintain that the three-judge court acted properly since the statute in question did not trespass upon any fundamental constitutional rights. *Helvering v.*

---

[6]The Texas defendants have appealed to the U. S. Court of Appeals for the Fifth Circuit (App. 135). On October 29, 1970 a panel of the Fifth Circuit granted plaintiffs' motion holding the defendants' appeal in that court in abeyance pending the decision of this Court in the case at bar (App. 140).

Lerner Stores Co., 314 U.S. 463, 467 (1941); *United States v. American Ry. Exp. Co.*, 265 U.S. 425, 435 (1924). Yet, there would appear to be definite limits on the ability of the Texas appellee to argue the constitutional validity of the statute in contending that injunctive relief was properly withheld. Compare *Penfield Co. v. S.E.C.*, 330 U.S. 585, 594 (1947), with *Lukas v. Alexander*, 279 U.S. 573 (1928). Texas' position must be that the three-judge court did not err in declining to issue an injunction, but that it declined to do so for the wrong reasons. That is, the court below correctly refused an injunction because the Texas statute did not violate the constitutional rights of any of the appellants, even though the same lower court had held, by way of declaratory judgment, that the statute did violate such constitutional rights! The fact that the Texas litigation, and the Georgia case as well, if permitted to go forward in this Court, might evolve to the posture just described, where the state is forced to argue that the lower court was right but for the wrong reasons, seriously suggests that the important substantive constitutional issues which inhere in this litigation first should be subjected to consideration and determination either by (1) the courts of Georgia, or (2) the Court of Appeals for the Fifth Circuit, and should not be considered, even indirectly, by this Court, at this time and on this appeal.

For these additional reasons, we contend that the holding in *Samuels v. Mackell, supra,* is applicable here and that the court below should have abstained from exercising jurisdiction or, in the alternative, should have stayed further proceedings pending the outcome of the criminal prosecutions already under way in the Texas courts.

B. *The Georgia Three-Judge Federal Court Also Should Have Abstained from Granting Declaratory Relief.* While the general principles of abstention that, in our view, should be controlling in the Texas case also should be applicable in the Georgia case, there is a factual difference between the two. So far as the record in the Georgia case shows, no criminal prosecutions were pending at the time appellants' civil action

was brought, although, according to the complaint filed in the Georgia case, the doctor-plaintiffs alleged a "threat of . . . prosecution" under the statute which deterred them "from exercising their rights of free speech . . . " (App. 14). Does this factual distinction between the two cases argue for a different jurisdictional result in the Georgia litigation? For the reasons stated, we think not.

In the *Younger* case, the majority opinion said: "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun."[7] In our view, the Georgia case appears to raise the precise issue that this Court deliberately left unresolved in *Younger.*

There are several situations in which a three-judge federal court should have the duty to act against a state criminal statute, whether or not criminal proceedings are pending. One of these is where the statute on its face will have the inevitable effect of "chilling" or deterring the exercise of fundamental constitutional rights guaranteed by the First Amendment, as made applicable to the States through the Fourteenth Amendment. *Dombrowski v. Pfister,* 380 U.S. 479, 489-90 (1965). Another area where federal courts should be free to act, whether or not state court criminal proceedings are pending, is where a defendant's federal rights "will inevitably be denied by the very act of bringing the defendant to trial in the state court." *City of Greenwood v. Peacock,* 384 U.S. 808, 828 (1968). Neither circumstance exists here. As the three-judge court said in the Texas case: "We do not believe that plaintiffs can seriously argue that the . . . Abortion Laws are vulnerable 'on their face as abridging free expression'." 314 F.Supp., at 1224. Nor is there any suggestion in this record that the mere initiation of a criminal prosecution by the State of Georgia under its statute, by itself, would "inevitably" deny any rights of those made defendants in such a proceeding. In addition, as we have

---

[7] 401 U.S., at 41.

argued earlier in this brief, should this Court sustain the propriety of the three-judge federal court's grant of declaratory judgment, while at the same time leaving the state to pursue its appeal through the Fifth Circuit, there again would be presented the cumbersome and, we believe, undesirable procedural situation where the same substantive constitutional issues were being litigated in two separate federal forums, albeit directly in one and indirectly in the other. Even apart from principles of equity, federalism and comity, sound judicial administration also argues against this Court's toleration of such instances of disparate adjudication of constitutional questions.

There is also the additional fact that the Georgia statute, which was only passed in 1968, has never been construed by the Georgia courts. One of the plaintiff's complaints was that the statute is unconstitutional because there is no "formal administrative procedure or body for establishing rules, regulations *or official interpretation*[8] of the provisions of said statute" (App. 14). If this Court must ultimately decide the validity of the Georgia statute under the Ninth and Fourteenth Amendments to the Constitution of the United States, it will undoubtedly be faced with the difficult duty of balancing any alleged rights of privacy possessed by pregnant women as opposed to the right to life possessed by an unborn child. That delicate task might be made easier if this Court had the benefit of an interpretation by the Supreme Court of Georgia as to the scope of the exception which the Georgia statute permits for aborting a pregnancy which "would seriously and permanently injure [the mother's] . . . health; . . . " Thus, an "underlying issue of state law" bears very pertinently on the alleged constitutional right which appellants claim a pregnant woman has to determine whether or not she wishes to carry an unborn baby to full term. *McNeese v. Board of Education,* 373 U.S. 668, 674 (1963).

---

[8]Emphasis supplied throughout this brief.

NRLC raises one final point in arguing that the proper course for the three-judge federal court would have been to abstain from the grant of declaratory, as well as injunctive, relief. That concerns the effect of the declaratory judgment that has been rendered in this case. If the provisions of the statute struck down in the declaratory judgment are now null and void, the same considerations which prompted this Court to uphold the abstention rule in the *Younger* and *Samuels* cases, *supra,* should apply. On the other hand, if the decision below is not determinative, if the state can institute criminal proceedings under the statute, despite its emasculation by the court below, and if a state court can take evidence and decide the matter afresh, then "the federal judgment serves no useful purpose as a final determination of [federal] rights." *Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 247 (1952); *Samuels v. Mackell,* 401 U.S. 66, 72 (1971); see also *Great Lakes Co. v. Huffman,* 319 U.S. 392 (1953).

Moreover, there has been no showing that the courts of Georgia are not open to the plaintiffs for testing their claim of deprivation of federal constitutional rights. This Court has recognized, and we do not dispute, that "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." *Zwikler v. Koota,* 389 U.S. 241, 248 (1967). Nor are we arguing that the Georgia three-judge federal court should have abstained "simply to give state courts the first opportunity to vindicate the federal claim" of the appellants. *McNeese v. Board of Education,* 373 U.S. 668, 672 (1963). We do maintain, however, that the "special circumstances"[9] surrounding the challenge to the constitutionality of the Georgia abortion statute should have led the three-judge federal court to abstain until the Georgia courts had had some reasonable opportunity to construe the statute,

---

[9] *Baggett v. Bullitt,* 377 U.S. 360, 375-79 (1964).

especially the exception for preserving the health of the mother which the Georgia law provides. Since the Georgia courts were available to the appellants for the vindication of constitutional rights which they attempt to bring to this Court for a final determination at this time, they would suffer no inequity, hardship or denial of fundamental constitutional rights by being required first to seek relief in such a forum. At the same time, requiring plaintiffs first to proceed in the Georgia courts would serve the principles of equitable abstention and federal comity on which this Court relied in its decisions in the *Younger* and *Samuels* cases, *supra.*

On May 17, 1971, this Court affirmed a three-judge federal court ruling that a physician who had performed an abortion but who had not been prosecuted under a Minnesota abortion law is not entitled to a federal court declaration against its enforcement when there was available a state statute under which declaratory relief could be obtained. *Hodgson v. Randall,* 314 F.Supp. 32 (D. Minn., 1970), aff'd, 402 U.S. 967 (1971). Again, on January 11, 1971, a three-judge federal district court in Arizona reached a similar result in dismissing an attack on Arizona statutes prohibiting criminal abortions. *Planned Parenthood Association, et al. v. Nelson, et al.,* 327 F.Supp. 1290 (D. Ariz., 1971). In dismissing the suit, the Arizona court said:

> "Weighing the legitimate state and national interests involved in this case, and considering particularly the abstract nature of plaintiffs' complaint and the ready availability of state remedies, we find that the plaintiffs' need for a federal forum is not sufficiently great to override the interests of comity and justify federal interference with state activities."

The cases cited further support the *amicus* in urging that this Court vacate the decision of the Georgia three-judge federal court with directions to it that it either dismiss the complaint without prejudice or retain jurisdiction in the case pending a reasonable time for the plaintiffs to pursue their rights in a state court of appropriate jurisdiction. *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 415-17 (1964).

Moreover, there is really no justification for a three-judge federal court to void a state criminal statute, under which no criminal prosecutions have yet been instituted, and at the same time to refuse to enjoin state officials from future enforcement of such a statute. It should be made clear that unconstitutional criminal statutes are also unenforceable. Therefore, the instant cases, we believe, present an opportunity for the Court to clarify some of the jurisdictional and procedural complexities which frequently arise when a three-judge federal court is permitted to grant declaratory relief, while eschewing the issuance of injunctive relief. NRLC respectfully urges that the Court use this opportunity to lay down rules or guidelines for observation by three-judge federal courts which, while protecting federal constitutional rights, will follow traditional principles of equitable abstention, serve the cause of federalism and comity and accord with sound principles of judicial administration when those principles must be applied to the adjudication of federal constitutional questions.

II.

NEITHER THE NINTH NOR THE FOURTEENTH AMENDMENT PROHIBITS A STATE FROM PROTECTING AGAINST THE DESTRUCTION OR ABORTION OF HUMAN LIFE

Assuming that this Court concludes that the courts below were correct in exercising jurisdiction in the pending cases and that these appeals, in their present posture, present substantial federal questions, it then must take up the appellants' claim that the lower courts erred in refusing to issue injunctive relief, after having granted declaratory judgments which, in one case, struck down the Texas statute and, in the other, voided the essential provisions of the Georgia act. NRLC further assumes that in resolving this claim the constitutionality of the two statutes must almost of necessity be resolved on their merits in the instant litigation. It is to these consti-

tutional issues that the *amicus* now speaks in the remaining sections of its brief.

The primary or basic constitutional contention of the appellants is that both the Texas and Georgia statutes violate alleged rights of privacy guaranteed a woman by the Ninth and Fourteenth Amendments to abort a live fetus for any reason she asserts and in which her physician concurs. It is the position of the NRLC that any right to privacy which a woman possesses does not include the right to abort a live fetus. NRLC further argues that a state has a compelling interest to protect human life from unjustified destruction by abortion. In short, a state's important and compelling interest in protecting human life, in the form of a live fetus, justifies it in prohibiting abortions that destroy such a life without demonstration of the strongest justification, such as abortion for the purpose of preserving another human life, *i.e.*, that of the mother. We show in the immediately following sections of this brief the precise and compelling nature of a state's interest in prohibiting abortions except in circumstances where the mother's life would be endangered.

A. *A State's Interest in Protecting the Rights of a Live Fetus Rests on a Now Indisputable Medical Basis.* The compelling evidence of modern medical science which supports this proposition is set out in considerable length in the brief filed in these cases by the State of Texas. We believe that those findings are both clearly stated and irrefutable. Accordingly, we will resist the temptation to repeat them at any length in this brief. We would like to emphasize, however, that modern medicine has proved that life exists within the womb in the very earliest stages of pregnancy and that its findings to that effect should be of persuasive import in the resolution of the constitutional issues with which the Court is confronted, including any attempted balancing of alleged rights of privacy possessed by the mother on the one hand against the right to life possessed by a living fetus on the other. Thus, while avoiding any detailed repetition of Texas' thorough presentation to this

Court, we now summarize the relevant evidence supplied by modern medical science.

Whatever might be the metaphysical view, it is beyond argument that legal concepts as to the nature and rights of an unborn child have drastically changed, based on expanding medical knowledge, over the last 2500 years. In the ancient world, a child in the womb was considered as part of his mother.[10] And up to the 17th Century it was prevailing doctrine, based upon Aristotle's notion, that 40 to 80 days after conception the fetus underwent a transformation that placed him in the human class. This notion was successfully demonstrated to be medical nonsense as early as 1621.[11] Thereafter, the medical profession gradually accepted the view that no valid line could be drawn within the womb. The law followed, but dragged considerably behind, the medical lead. For example, as recently as 1921, the Court of Appeals of New York, with Judge Cardozo dissenting, could hold that when "justice or convenience requires, the child in the womb is dealt with as a human being although physiologically it is part of the mother, . . ." *Drobner v. Peters,* 232 N.Y. 220, 133 N.E. 567, 568 (1921).

At this point in time, however, there is simply no respectable medical opinion supporting the ancient notion that a fetus is "part" of his mother. The unassailable medical evidence to the contrary has now been convincingly confirmed by the findings of the new science of fetology, which has received widespread recognition by virtue of Liley's work on blood transfusions in the fetus.[12] Some of

[10]This view was expressly incorporated in Roman law. Justinian, Digest 25.4.1.1.

[11]Zacchia, Quaestiones Medico-Legales 9.1 (1621).

[12]Liley's pioneering work not only has opened new avenues in the treatment of erythroblastosis fetalis, but has inspired the whole new sub-specialty of 'fetology' and created a need for fetological surgeons and fetological medical specialists for the future." Montagu, *Hemolytic Disease of the Fetus,* Intra-Uterine Development 443, 455 (A. Barnes ed. 1968).

the observations and opinions on the question held by the most eminent of doctors specializing in the field may be of interest to this Court, although, as stated, a much more comprehensive discussion of the medical evidence is to be found in the brief filed by the Texas appellants.

Professor Ashley Montagu of Columbia University has stated it very concisely:

> "The basic fact is simple: Life begins, not at birth, but at conception.
>
> "This means that a developing child is alive, not only in the sense that he is composed of living tissue, but also in the sense that from the moment of conception, things happen to him, even though he may be only two weeks old, and he looks more like a creature from another world than a human being—he reacts. In spite of his newness and his appearance, he is a living, striving human being from the very beginning."[13]

It is now undisputed, for example, that the new fetus possesses at the moment of conception a genetic code of its own which is the transmitter of all the potentialities that make men human, something that is not present in either the spermatozoon or ovum. Gottleib, Developmental Genetics 17 (1966). When conception takes place, scientists now generally agree "a new life begins—silent, secret, unknown."[14] Moreover,

> "The child may be parasitic and dependent, but it is a functioning unit, an independent life. A child is not, in the words of Mr. Justice Holmes, 'a part of its mother.' However visceral may be its temporary residence, however dependent it may be before birth—and for some years after birth—it is a living being, with its separate growth and development,

---

[13]Montagu, Life Before Birth 2 (1964).

[14]Coniff, *The World of the Unborn,* New York Times Magazine, January 8, 1967, p. 41.

> with its separate nervous system and blood circulation, with its own skeleton and musculature, its brain and heart and vital organs."[15]

A most vivid description of the fetus within the womb is found in the report of Dr. Liley and his wife, both pioneers of the new science of fetology. In 1967 they said:

> "Because the fetus is benignly protected, warmed and nourished within the womb, it was long thought that the unborn must have the nature of a plant, static in habit and growing only in size. Recently through modern techniques of diagnosing and treating the unborn baby, we have discovered that little could be further from the truth.
>
> "The fluid that surrounds the human fetus at 3, 4, 5 and 6 months is essential to both its growth and its grace. The unborn's structure at this early stage is highly liquid, and although his organs have developed, he does not have the same relative bodily proportions that a newborn baby has. The head, housing the miraculous brain, is quite large in proportion to the remainder of the body and the limbs are still relatively small. Within his watery world, however (where we have been able to observe him in his natural state by closed circuit x-ray television set), he is quite beautiful and perfect in his fashion, active and graceful. He is neither an acquiescent vegetable nor a witless tadpole as some have conceived him to be in the past, but rather a tiny human being as independent as though he were lying in a crib with a blanket wrapped around him instead of his mother."[16]

These proven medical facts explain why the great majority of doctors, practicing their profession in good faith, treat the

---

[15]Granfield, The Abortion Decision 25 (1969).

[16]Liley, Modern Motherhood 26-27 (1967). Moreover, the modern technique of fertilizing human eggs in test tubes further establishes that life begins at conception.

fetus or unborn child as a second *patient*, different from the mother. This is acceptable medical practice and is almost universally observed in the field of obstetrics. It may be the only area of medical practice where a doctor treats two patients at the same time, taking that unique fact into account in his treatment of both patients. This practice has been favorably noted in at least one reported decision. In *Jones v. Jones,* 208 Misc. 721, 144 N.Y. Supp.2d 820 (Sup. Ct., 1955), the court found that the unborn child:

> ". . . became a patient of the mother's obstetrician, as well as the mother herself. In so holding I can think of the infant as a third party beneficiary of the mother-doctor contract or perhaps a principal for whom the mother acted as agent."[17]

And it has been held that a child may recover damages for a prenatal injury suffered as the result of the negligence of his doctor. *Sylvia v. Gobeille,* 101 R.I. 76, 220 A.2d 222 (1966); *Seattle-First National Bank v. Rankin,* 59 Wash.2d 288, 367 P.2d 835 (1962).

However, NRLC sees no point in belaboring the scientifically obvious. Life begins at conception and for practical medical purposes can be scientifically verified within 14 days. Within three weeks, at a point much before "quickening" can be felt by the mother, the fetus manifests a working heart, a nerve system, and a brain different from and independent of the mother in whose womb he resides; the unborn fetus is now a living human being. It is universally agreed that life has begun by the time the mother realizes she is pregnant and asks her doctor to perform an abortion.

B. *In Anglo-Saxon Law the State Has Always Had a Compelling Interest in Preventing the Destruction of Unborn Children.* The appellants, and those allied with them as *amici curiae* in this case, are hard put to deny that a state has a grave and important interest in preventing the destruction of human life through unjustifiable abortion. However,

---

[17] 144 N.Y. Supp.2d, at 826.

they argue that even assuming such an interest, the abortion laws do not reflect that interest since, they claim, such laws were passed for another purpose, *i.e.*, to protect the life and health of pregnant women who submit to illegal, and what once were highly dangerous, operations. Their position here crumbles before the thrust of the history of Anglo-Saxon law both in England and in this Country. That history shows conclusively that the protection of the life of the unborn child was always a major purpose, if not the paramount purpose, surrounding the enactment of the abortion laws in both England and the United States.

In Roman law the unborn child was deemed a part of his mother, and a parent had absolute dominion over his offspring. Fox, *Abortion, a Question of Right or Wrong,* 57 A.B.A. J. 667, 671 (1971). Due initially to the influence of ecclesiastical law and precedents, the Anglo-Saxon law of abortion developed in the other direction. The first reference to abortion in the English criminal law occurs in the writings of Bracton. He transposed the canon, *Sicut ex,* to England by saying that aborting a woman by blow or poison is homicide if the fetus were "formed and especially if it were ensouled."[18] Early in the 17th Century, Lord Coke repeats what Bracton said in a passage which begins: "If a woman be quick with child . . . this is a great misprision and so murder."[19] Coke's authority on this point has been questioned. If the word "ensouled" is translated as "alive", it could be argued that Coke may have mistranslated Bracton and as a result erroneously imposed the requirement that to constitute a felony a woman must be "quick" with child.[20] "Quickening", of course, is "the first motion of the fetus in the womb felt by the mother",

---

[18]Bracton, De Legibus et Consuetudinibus Angliae, 3.2.4 (London, 1640).

[19]Coke, The Third Part of the Institutes of England, Section 50 (London, 1797).

[20]Quay, *Justifiable Abortion,* 40 Georgetown L.J. 173, 430-31 (1961).

and a "quick" child is defined as a child "that has developed so that it moves within the mother's womb."[21] However, Lord Coke more likely was taking into realistic account the practical difficulties, in view of the state of 17th Century medical knowledge, of proving that the act of an accused abortionist was the cause of a death of a live fetus. At that time, unless a child was born alive after an induced abortion, it would have been virtually impossible to prove that the abortional act caused his death since the fetus might have died in the womb from some other cause concurrent in time with the abortion. At English common law, for example, if a victim of an assault died after a year and a day following the assault, his assailant could not be convicted of homicide. Proof of causality between the assault and the death was precluded by the passage of time. Perkins, Criminal Law 28-29 (2d Ed., 1969). Under the circumstances, at this point in the development of the criminal law, it was understandable that the abortionist, as a defendant, should enjoy the benefit of doubt as to (a) whether the fetus was alive or dead, or even in existence, at the time of the alleged act, and (b) whether the abortional act, in fact, killed the fetus. On the other hand, when a pregnant woman was sentenced to be executed, the law held that she could not be executed for the crime until after birth, even though the child had not yet quickened. *Regina v. Wycherly,* 8 Car. & P. 262, 264, 173 Eng. Rep. 486-87 (*Nisi Prius,* 1838).[22] In the case of the pregnant woman scheduled for execution, the fetus as a possible innocent victim of the execution was entitled to the benefit of the doubt as to whether he was present and alive in the womb even though he had not manifested life by perceptible movement.

The first statutory regulation of abortion in England became effective in 1803. The statute made it a felony punishable by death to administer poison "to cause and

[21] Black's Law Dictionary 1415 (4th Ed., 1968).

[22] I Blackstone's Commentaries 456.

procure the miscarriage of any woman then quick with child" and a felony punishable by fine, imprisonment, pillory, whipping or transportation to attempt by drug or instrument to procure the miscarriage of any woman "not being or not being proved to be quick with child."[23] Thus, in this first abortion statute, Parliament did away with any distinction in law, except for the punishment prescribed, between abortions occurring before quickening and those committed after quickening. The preamble to the 1803 Act explains the reason, saying that "no adequate means have hitherto been provided for the prevention and punishment of such *offenses.*"[24]

At the time Lord Coke wrote, "quickening" of the child furnished the only positive proof to 17th Century men that it was alive within the womb. However, when Parliament turned to the regulation of abortion in the early 19th Century, medical science was able to supply proof of the existence of an animated fetus prior to the movement of the child within the womb first felt by the mother. At last, Parliament was able to make criminal that which was always regarded as an offense, evil or wrong but one incapable of being proved.[25]

In 19th Century America, the requirement of "quickening" hung on in some of the statutes, but a tendency soon was manifest for courts to interpret abortion statutes as applicable to any stage of the pregnancy.[26] Medical writers in this Country were critical of the retention of a distinction between abortions based on the presence or absence of quickening. In 1887, a distinguished doctor wrote:

---

[23]Miscarriage of Woman Act, 43 Geo. 3c 58 (1803).

[24]Means, *The Law of New York Concerning Abortion and the Status of the Fetus 1664-1968: A Case of Cessation of Constitutionality,* 14 N.Y. Law Forum 411, 439, n. 64 (1968).

[25]Fox, *supra,* at 671.

[26]Bishop, Commentaries on the Law of Statutory Crimes, Section 746 (2d Ed., 1883).

> "This fallacious idea that there is no life until quickening takes place has been the foundation of, and formed the basis of, and has been the excuse to ease or appease the guilty conscience which had led to the destruction of *thousands of human lives.*"[27]

During the course of the 19th Century, the House of Delegates of the American Medical Association several times called on the states to reform their laws to prevent abortion.[28] In 1859, a Committee on Criminal Abortion of the American Medical Association obtained unanimous adoption of a resolution which condemned abortion at every period of gestation except as necessary for preserving the life of either the mother or child. The reason for the resolution was stated to be the increasing frequency "of such unwarrantable destruction of human life."[29]

In summary, from Bracton's day abortion was regarded at common law as a serious evil or wrong which should be prevented in order to curtail or prevent the unnecessary destruction of human life. For a brief period, difficulties of proving that abortion had in fact caused the termination of an "unquick" child prevented application of the serious sanctions of the criminal law to some cases. When medical science eliminated those difficulties of factual proof, there was no longer any question but that one of the prime purposes of the abortion statutes then on the books, or subsequently enacted, was to prevent the destruction of the unborn fetus at all stages of gestation. Therefore, the compelling interest which the States of Texas and Georgia both have in prohibiting and regulating unjustifiable abortions is not one newly discovered, or advanced as an afterthought argument. It is true that the findings of modern fetology

---

[27]Quimby, *Introduction to Medical Jurisprudence*, 9 Journal of the American Medical Association 164 (1887); see also Markham, *Foeticide and Its Prevention, Id.*, at 805 (1888).

[28]Noonan, The Morality of Abortion 224 (Harvard U. Press, 1970).

[29]American Medical Association, Minutes of the Annual Meeting 1859, Tenth Annual Medical Gazette 409 (1859).

help demonstrate the cruel and distasteful nature of the abortion of a human fetus more vividly than previously had been known. Nevertheless, the state's legitimate interest in preventing the infliction of such carnage on unborn children has never been open to serious debate.

However, even if it were true that the compelling state interest in preventing or regulating abortion is an interest arising only recently as a result of the findings and research of modern medicine, no different legal conclusions should result. The fact that a statute or law may originally have been enacted to serve one purpose does not serve to condemn it when the same statute, with the passage of time, serves another equally valid public purpose, such as preventing the destruction of the life of an unborn child.[30] Both Texas and Georgia still could claim that their respective statutes serve a compelling state interest than of which there are few higher, *i.e.*, outlawing the unjustifiable taking of human life.

In the next several sections of this brief, the *amicus* shows that during the same period in which the criminal law of abortion developed, other areas of the law also manifested concomitant concerns for important subsidiary rights of unborn children derivative from their right to life. These are their rights of contract, tort and parental support.

C. *The Law's Recognition of the Property Rights of an Unborn Child.* The first area where the rights of the unborn child, at all stages of fetal existence, were recognized by the law was in the realm of property law. In *Doe v. Clarke*, 2 H. Bl. 399, 126 Eng. Rep. 617 (1795), the court interpreted the ordinary meaning of "children" in a will to include a child in the womb: "An infant *en ventre sa mere,* who by the course and order of nature is then living, comes clearly within the description of 'children living at the time of his

[30] *McGowan v. Maryland,* 366 U.S. 420, 429-30 (1961), upholding, as having a valid, non-religious basis under the state's police powers, Sunday Closing statutes which at their inception served religious purposes.

decease'." In *Thelluson v. Woodford,* 4 Ves. 227, 31 Eng. Rep. 117 (1798), the court rejected the contention that this was a mere rule of construction invoked for the benefit of the child: "Why should not children *en ventre sa mere* be considered generally as in existence. They are entitled to all the privileges of other persons." *Id.,* at 323. To the argument that such a child was a nonentity it replied:

> "Let us see, what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the statute of distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian." *Id.,* at 322.

When the English property rules were adopted by American courts, the same approach was taken. In *Hall v. Hancock,* 15 Pick. 255 (Mass., 1834), the issue was whether a bequest to grandchildren "living at my decease" was valid, and the court was asked to say that "*in esse*" was not the same as "living" and that for a child to be "living," the mother must be at least "quick".[31] Chief Justice Shaw held that a *conceived child* fell within the meaning of the language and quoted with approval Lord Hardwicke in *Wallis v. Hodson,* 2 Atk. 117: "The principal reason I go upon is, that a child *en ventre sa mere* is a person in *rerum natura,* so that, both by the rules of the civil and common law, he is to all intents and purposes a child, as much as if born in the father's lifetime."

In *In Re Well's Will,* 221 N.Y.S. 417 (1927), a trust fund originating from the estate of the deceased was to be divided into "as many parts as I have grandchildren living at the date of my decease." The decedent died on May 22, 1922;

---

[31] "Quickening" of the child means only that his presence in the womb is felt by the mother for the first time. Black's Law Dictionary, *supra,* at 1415. "Quickening" served to prove the existence of life to common law men. Modern medicine now can prove the same existence long before it can be seen by the eye or felt by the mother.

a granddaughter of the decedent was conceived on May 1, 1922. The granddaughter was held to be entitled to a share in the trust estate. See also *Swain v. Bowers,* 91 Ind. 307, 158 N.E. 598 (1927).[32]

In the case of *La Blue v. Specker,* 358 Mich. 558, 100 N.W.2d 445 (1960), an unborn illegitimate child was held to be a child or "other person" having standing to bring suit under a dram shop act, for the death of his father, which had occurred before the child's birth. Quoting from *Ide v. Scott Drilling Co., Inc.,* 341 Mich. 164, 67 N.W.2d 133 at 135, the court in the *La Blue* case stated:

> "For certain purposes, indeed for all beneficial purposes, a child *en ventre sa mere* is to be considered as born . . . . It is regarded as *in esse* for all purposes beneficial to itself, but not to another. . . . Formerly, this rule would not be applied if the child's interests would be injured . . . thereby, but for purposes of the rule against perpetuities such a child is now considered a life in being, even though it is prejudiced by being considered born . . . . *Its civil rights are protected at every period of gestation.*"[33]

The foregoing approach has not been a sentimental concession to the supposed benefit of some forgotten posthumous child. The rule has been applied even where its application benefited some third party, *Barnett v. Pinkston,* 238 Ala. 327, 191 So. 371 (1939), and also in cases where the child himself has been injured by the rule, *In re Sankey's Estate,* 199 Cal. 391, 249 P. 517 (1926), in which a child conceived but not born was held bound by a decree entered against the living heirs.

---

[32]The English and American common law doctrine under which an unborn child is considered as a "child" or as "in existence" for purposes of inheritance and trusts also has long been followed in the District of Columbia. *Craig v. Rowland,* 10 App. D.C. 402 (1897). The rule was recently applied in *Riggs National Bank v. Summerlin, et al.,* C.A. 187-69, Memo. Opinion (D. D.C., 1969).

[33]100 N.W.2d, at 449.

This *amicus* believes that it would be an ironic and an inexplicable perversion of both human and constitutional values if it were to be the law that the state has an interest in protecting the property rights of an unborn child, but has no constitutionally justifiable interest in regulating the circumstances and conditions under which such a child may be destroyed, *i.e.*, put out of existence and denied further life as a human being. Nor is it any answer to reply that the property rights of a fetus which are protected by the state are merely contingent and depend upon his having been born. It is only the *remedy,* not *the right,* which is contingent. Existence as an unborn child is the basis of the state's interest in granting and protecting the property rights of an unborn child. The fact that the child may not survive to enjoy those rights does not denigrate the state's interest or deny its authority to implement that interest by law. We should assume that the proposition would have special applicability when the state's interests and action are directed at insuring that the existence of life of the unborn child, and all such contingently enforceable property rights as he may possess, are not exterminated by his deliberate destruction, at least short of an overwhelming countervailing interest such as the protection of the life of another human being—the mother.

D. *Evolving Rights Afforded an Unborn Child in the Law of Torts.* Perhaps even more demonstrably so than in the case of purely property rights, including rights of inheritance, it is in the law of torts where we witness a dramatic development, indeed, an abrupt change, of the law in response to expanding scientific knowledge and medical facts formerly unavailable.

Well into the 20th Century most American decisions denied recovery in tort to the human offspring harmed in the womb. The denial was based in part on the danger of fraudulent claims, in part on the difficulty of proving causation, but principally on the ground that "the defendant could owe no duty of conduct to a person who was not in existence at the time of his action," Prosser on Torts,

Sec. 56 (1964). The theory followed was that succinctly expressed by Justice Holmes in *Dietrich v. Northhampton*, 138 Mass. 14, 17 (1884): "The unborn child was a part of the mother at the time of the injury."

There is no doubt of the sweeping nature of the reversal of the *Dietrich* doctrine that the unborn child is a part of the mother and therefore cannot sue for pre-natal injuries. Almost every jurisdiction which has considered the issue in the last 30 years has upheld the right of an infant to sue for injuries sustained prior to his birth. Prosser on Torts, Sec. 56; Gordon, *The Unborn Plaintiff*, 63 Mich. L.R. 579, 627 (1965). Moreover, it appears that a majority of jurisdictions now recognize that a wrongful death action may be brought for negligently inflicted injury to the unborn child resulting in its death, whether or not it was viable at the time of the injury, and whether born alive or still born. *Torigian v. Watertown News Co.*, 352 Mass. 446, 225 N.E.2d 926, 927 (1967); Harper and James, Torts, Sec. 18.3 (1956).

Many of the early cases required that the unborn child have reached the stage of viability (*i.e.*, capable of living outside of the mother's uterus) at the time the injuries were inflicted in order to maintain an action.[34] The modern trend, and more in accord with the medical facts, however, has been to reject any distinction based on viability and to allow recovery whenever the injury was received, provided that the elements of causation are properly established.[35]

---

[34]*Bonbrest v. Kotz*, 65 F.Supp. 138 (D. D.C., 1946); *Scott v. McPheeters*, 33 Cal. App.2d 629, 92 P.2d 678 (1939); *Tursi v. New England Windsor Co.*, 19 Conn. Supp. 242, 111 A.2d 14 (1955); *Damasiewicz v. Gorsuch*, 197 Md. 417, 79 A.2d 550 (1951); *Keyes v. Constr. Serv., Inc.*, 340 Mass. 633, 165 N.E.2d 912 (1960); *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio 144, 87 N.E.2d 334 (1949); *Mallison v. Pomeroy*, 205 Ore. 690, 291 P.2d 225 (1955); *Seattle-First Nat'l Bank v. Rankin*, 59 Wash. 2d 288, 367 P.2d 835 (1962).

[35]*Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504, 93 S.E.2d 727 (1956); *Daley v. Meier*, 33 Ill. App.2d 218, 178 N.E.2d 691 (1961); *Bennett v. Hymers*, 101 N.H. 483, 147 A.2d 108 (1958); *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960); *Kelly v. Gregory*, 282 App.Div. 542, 125 N.Y.S.2d 696 (1953); *Sinkler v. Kneale*, 401

The District of Columbia 25 years ago repudiated the notion that an unborn child must be considered as part of his mother and unable to sue for prenatal injuries in *Bonbrest v. Kotz,* 65 F. Supp. 138 (D. D.C., 1946). The court pointed out in that case that under the civil law and the common law of real property a child *en ventre sa mere* is regarded "as a human being . . . from the moment of conception—which it is in fact." Referring to the state of medical knowledge in 1946 and noting the resilient, unstatic features of the common law of torts, it found no difficulty in upholding the right of an unborn child to sue for damages in tort. 65 F. Supp., at 142.[36]

Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696, contains language which summarizes precisely the basis of the rejection on the part of modern tort law of the antiquated notion of the common law that an unborn child is merely part of his mother's body:

> "We ought to be safe in this respect in saying that legal separability should begin where there is biological separability. We know something more than the actual process of conception and foetal development now than when some of the common law cases were decided; and *what we know makes it possible to demonstrate clearly that separability begins at conception.*
>
> "The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so

Pa. 267, 164 A.2d 93 (1960); *Sylvia v. Gobeille,* 101 R.I. 76, 220 A.2d 222, 223-24 (1966). "Viability" of a fetus is not a constant but depends on the anatomical and functional development of the particular baby. J. Morison, Foetal and Neonatal Pathology 99-100 (1963). The weight and length of the fetus are better guides than age to the state of fetal development, and weight and length vary with the individual. Gruenwald, *Growth of the Human Fetus,* 94 Am. J. Obstetrics and Gynecology 1112 (1966).

[36] "The battle in jurisprudence is almost over. Development of the infant's right of action has illustrated the inherent capacity of legal systems to adjust to new situations." Gordon, *supra,* at 627.

> throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe the conditions under which life will not continue."[37]

Very recent demonstrations of the adaptability of the common law to the findings of modern medicine are furnished by two cases decided by the Supreme Court of Michigan. On June 1, 1971, that court repudiated the doctrine of *stare decisis* to hold, despite earlier precedents to the contrary, that a surviving child could recover for prenatal brain injuries suffered in an automobile accident occurring during the fourth month of pregnancy.[38] Little more than a month later, the Michigan Supreme Court, again departing from *stare decisis* and affirming the "wisdom of [a] public policy [which] regards unborn persons as being entitled to the protection of the law", held that the administrator of the estate of an unborn child is entitled to sue under the Michigan wrongful death statute for injuries which caused the death of an unborn 8-month infant *en ventre sa mere.*[39] In deciding the case, the Michigan Supreme Court noted rhetorically, but perceptively:

> "If property interests of unborn persons are protected by the law, how much more solicitous should the law be of the first unalienable right of man—the right to life itself?"[40]

At the present time the right to recover for prenatal injuries has been recognized by 30 states and the District of Columbia.[41] Compensation for prenatal injuries has also

---

[37] 125 N.Y.S.2d, at 697.

[38] *Womack v. Buchhorn,* ___ Mich. ___, 187 N.W.2d 218 (1971).

[39] *O'Neill v. Morse, et al.,* ___ Mich. ___, 188 N.W.2d 785 (1971).

[40] 188 N.W.2d, at 788.

[41] Maledon, *The Law and the Unborn Child: The Legal and Logical Inconsistencies,* 46 N.D. Lawyer 349, 356-57 (1971).

been allowed under the Federal Tort Claims Act in an action against the United States. *Sox v. United States*, 187 F. Supp. 465 (E.D. S.C., 1960). Finally, an Ohio court has held an unborn child in the 24th week of gestation is a "person" within the meaning of a family compensation clause of an automobile liability insurance policy. *Peterson v. Nationwide Mutual Insurance Co.*, 26 Ohio App.2d 246, 197 N.E.2d 194 (1964). Is it possible for a human life to be both legally insurable and, as the appellants would have it, legally destructible at the same moment in time?

The emergence of the rights in tort of unborn children is referred to as a prime example of the effect of scientific development on law in the instructive book of Professor Patterson–Law In a Scientific Age (1963). He concludes: "that the meaning and scope of even such a basic term as 'legal person' can be modified by reason of changes in scientific facts–the unborn child has been recognized as a legal person, even in the law of torts."[42]

The revolution in tort law has thus, by the majority rule, recognized rights in the fetus at every stage of life and has refused to condition recovery on survivorship. The dean of authorities on tort law notes that all writers on the subject have maintained "that the unborn child in the path of an automobile is as much a person in the street as the mother." Prosser on Torts, Sec. 56. Can such a child become less a person when, instead of an automobile, another agency is directed to his destruction? If the state may protect this person by court action awarding damages for tort, *a fortiori* the state cannot be impotent to protect the same living being by criminal sanctions.

E. *Equity and the Unborn Child.* The emerging rights of unborn children to recover in tort have been matched by developing concern for their rights in equity. Decisions in this area bear not only on his right to parental support but on the fetus' right to life itself.

---

[42]Patterson, *supra*, at 5.

1. The Right to Parental Support

It is now established that the law will recognize an unborn child's right to support by his parents. *Kyne v. Kyne,* 38 Cal. App.2d 122, 100 P.2d 806 (1940), involved a suit brought by the guardian *ad litem* of a fetus against the natural father. At the time the suit was instituted, the unborn child was less than six months old. The court held that both the father and mother of such a child owed him the duty of support. See also *People v. Yates,* 114 Cal. App. Supp. 782, 298 P. 961 (1931), and *People v. Estergard,* ___ Colo. ___, 457 P.2d, at 698, 699 (1969). If the law holds that a state has sufficient justification to require a father to support an unborn child which he may not want, it cannot be true that the state has no justifiable interest in protecting that child from extinction as a living being where his mother may not want him.

2. The Right to Life

Since this Court's decision in *Board of Education v. Barnette,* 319 U.S. 624 (1943), it has been firmly settled that the Free Exercise of Religion rights guaranteed by the First Amendment (as incorporated in the Fourteenth Amendment) are "susceptible of restriction only to prevent grave and immediate danger *to interests which the state may lawfully protect.*" 319 U.S., at 639. Nevertheless, the right of an unborn child to life has served in several recent instances to permit the state's abridgement of or interference with a mother's religious convictions, when necessary to save the life of an unborn child. One case touching upon, but not deciding, the point was decided in the District of Columbia. In *Application of the President and Directors of Georgetown College, Inc.,* 331 F.2d 1000 (C.A. D.C., 1964), *cert. den.,* 377 U.S. 978 (1964), the Court of Appeals upheld an order of the District Court authorizing a hospital to administer a blood transfusion to a woman patient who, on religious grounds, was unwilling to consent to the transfusion and where the husband also was unwilling to consent,

where the transfusion was necessary to save her life. The adamant mother had a seven-month-old child at the time the terrible dilemma arose. In resolving this Hobson's choice, Judge Wright said:

> "The child cases point up another consideration. The patient, 25 years old, was the mother of a seven-month-old child. The state, as *parens patriae,* will not allow a parent to abandon a child, and so it should not allow this most ultimate of voluntary abandonment. The patient had a responsibility to the community to care for her infant. Thus the people had an interest in preserving the life of this mother."[43]

Other crucial decisions bearing directly on the unborn child's right to life have been handed down during the past decade. In one such case, where there was a possibility that a child might be born with a possibly fatal blood condition, a New Jersey juvenile court held that the state, in the interests of the child's welfare, had a right to authorize the hospital to give life-saving transfusions, even though the parents objected on religious grounds.[44] The court made it clear that the state, pursuant to its *parens patriae* jurisdiction, not only had a right but also a duty to protect children within its jurisdiction—including an unborn child—notwithstanding the wishes of his parents.

More precisely in point is *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson,* 42 N.J. 421, 201 A.2d 537 (1964), *cert. den.,* 377 U.S. 985 (1964). There, a court was asked to decide whether the rights of a child in the mother's womb were violated by her refusal, on religious grounds, to submit to a blood transfusion necessary to preserve the lives of both. The New Jersey court found it unnecessary to decide whether an adult may be compelled to submit to medical treatment necessary to save his own life. However, the court had no difficulty, after finding a parity of rights possessed by both unborn and after born

[43] 331 F.2d, at 1008.

[44] *Hoener v. Bertinato,* 67 N.J.S. 517, 171 A.2d 140 (1961).

children, in deciding that the unborn child was entitled to the law's protection and ordering the transfusion. In sustaining the unborn child's right to life, even over his mother's right to practice her religion, the court said:

> "In State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1963), we held that the State's concern for the welfare of an infant justified blood transfusions notwithstanding the objection of its parents who were also Jehovah's Witnesses, and in Smith v. Brennan, 31 N.J. 533, 157 A.2d 497 (1960), we held that a child could sue for injuries inflicted upon it prior to birth. We are satisfied that the *unborn child is entitled to the law's protection* and that an appropriate order should be made to insure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge at the time." (201 A.2d, at 538)[45]

Also worthy of note in the context of a claim of a mother's right to freedom over the use of her body is *Gleitman v. Cosgrove,* 49 N.J. 22, 227 A.2d 689 (1967). In that case, the plaintiffs sought damages against doctors who had attended the mother during pregnancy. They alleged their child had been born with birth defects and that the defendants had negligently failed to warn the child's mother and father that an attack of German measles which she suffered during pregnancy might result in such defects. The failure to give the warning, it was alleged, deprived the parties of the opportunity of terminating the pregnancy. In affirming the trial court's dismissal of the

---

[45] An Illinois court recently followed the rationale of the *Raleigh Fitkin* case in ordering that doctors may give an emergency blood transfusion to a pregnant Chicago mother who had refused such treatment on religious grounds. *Chicago Sun-Times,* May 6, 1971, p. 12. This Court too has had no trouble in sustaining as superior a state's interest in, and authority with respect to, children over their parents' free exercise of religion rights, noting that the "right to practice religion freely does not include liberty to expose . . . the child . . . to ill health or death." *Prince v. Massachusetts,* 321 U.S. 158, 166-67 (1943).

complaint, the majority of the New Jersey Supreme Court emphasized the child's right not to be aborted, saying:

> "The right to life is inalienable in our society . . . . We are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of the single human life is the decisive factor in this suit in tort. Eugenic considerations are not controlling. We are not talking here about the breeding of prize cattle. *It may have been easier for the mother and less expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of a single human life to support a remedy in tort.* Cf. Jonathan Swift, 'A Modest Proposal' in Gulliver's Travels and Other Writings, 488-496 (Modern Library ed. 1958).
>
> "Though we sympathize with the unfortunate situation in which these parents find themselves, we firmly believe the right of their child to live is greater than and precludes their right not to endure emotional and financial injury."[46]

The line of cases discussed in this section of the *amicus'* brief, all of which are based either impliedly or expressly on the findings of modern medical science concerning the nature of the fetus, is a recognition of the right of a child in the womb to the protection of the law. From this, a learned commentator has gone on to reason that:

> ". . . it seems established by analogy that to remove the protection of the criminal law from the child in the womb would be itself an unconstitutional act. The civil rights cases have established that for the Government to fail to protect a class is itself an unconstitutional denial of civil rights."[47]

In point of fact, if the issue had been raised in these cases, this *amicus* would be arguing that *both* due process

---

[46] 227 A.2d, at 693.

[47] Noonan, *Amendment to the Abortion Law: Relevant Data and Judicial Opinion,* 15 The Catholic Lawyer, No. 2 (Spring 1969).

and equal protection of law should prevent a state from permitting the abortion of a live fetus, except when necessary to save the life of the mother.[48] "Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it." *Steinberg v. Rhodes, et al.*, 321 F. Supp. 741 (N.D. Ohio, 1970). At the minimum, NRLC would contend, as suggested by several scholars in the field, that the unborn child is entitled to the traditional protections of due process, including representation by counsel at some type of adversarial hearing, before he is doomed to death either at his mother's whim or upon her physician's unreviewable moral-medical judgment that his life is less important than his mother's state of mind.[49] Some doctors might balk at that suggestion because of the technicalities and delays which observance of due process of law sometimes entails. The same argument is often made by prosecutors faced with claims of Fourth, Fifth or Sixth Amendment rights, but in neither case is the position a valid one. The legitimacy of an abortion operation is more than merely a medical decision; it involves legal, moral, ethical, philosophical, theological, sociological and psychological considerations. These realities cannot be brushed aside merely by calling the problem "medical". Moreover, the primary training and function of physicians is to diagnose and heal, not to adjudicate.[50] And if war is too important to be entrusted solely to the generals, the ultimate issues of life and death are too important to be entrusted solely to the surgeons. Both logic and experience warrant the presumption that the unborn child would want his chance at life.[51] Surely, the ingenuity of Ameri-

[48]Under this analysis the Texas, but not the Georgia, statute would be constitutional.

[49]Noonan, *supra* n. 28, at 254-57.

[50]Hellegers, *Law and the Common Good,* 86 Commonweal 418 (1967).

[51]As Artur Rubenstein put it: "My mother did not want a seventh child, so she decided to get rid of me before I was born. Then a marvelous thing happened. My aunt dissuaded her, and so I was permitted to

can law for fashioning procedural protections when constitutional rights are threatened justifies optimism that our legal system could be utilized to provide such protections for the unborn child faced with destruction, but who, at the present time, has no voice to plead his case and no forum in which to make it.

However, as we have said, the due process argument need not be pressed in the instant litigation since the issue has not been raised by any of the parties. Nevertheless, the point has relevancy. It serves to emphasize that in evaluating the legitimacy of any alleged right to privacy on the part of a pregnant woman to destroy her unborn child the Court must take into countervailing account the fundamental right of that child to be protected by the State from arbitrary and capricious destruction of its existence merely because it is unwanted.

F. *Life Should Take Constitutional Precedence over Privacy.* In this section of its brief, the *amicus* discusses the judicial balancing which necessarily is involved in weighing competing claims of an unborn child's right to life and the alleged right of privacy which appellants and their allies in these cases assert is possessed by all pregnant women. In deciding the relative priority which the Constitution should afford, on the one hand, to a woman's right to destroy her unborn child and, on the other, to the right of that child to live, certain relevant facts are beyond argument. First, the medical evidence is unchallengeable—life begins at conception, and from that point on the fetus has a living existence, including a heart and a brain, separate and independent from his mother. Secondly, as NRLC previously has shown, the common law has not been impervious to the findings of modern science in changing and adjusting its concepts and rules regarding the legal rights possessed by a child in the womb. *Supra,* pp. 32-36.

---

be born. Think of it! It was a miracle! Time Magazine, Feb. 25, 1960, p. 86.

We might also add at this point that the approach taken by American law in recognizing important legal rights of an unborn child is not some national aberration explained, perhaps, by some latent puritanical instincts in American society alone. For example, in 1959 the United Nations adopted a "Declaration of the Rights of the Child" which supplemented the United Nations' statement entitled the "Universal Declaration of Human Rights". One reason for this supplementary declaration, as stated in its Preamble, was because, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." General Assembly of the United Nations, "Declaration of the Rights of the Child", adopted unanimously in the plenary meeting of November 20, 1959, *Official Records of the General Assembly,* 14th Session, pp. 19-20. Thus, the representatives of most of the civilized nations of the world recognized that the being before birth deserved recognition as a "child". They further recognized that a child, so defined, needed special legal protection. The committee report on this declaration noted that "representatives of the most diametrically-opposed social systems find common ideals in discussing the privileges of childhood". *Report of the Third Committee of the General Assembly, Official Records,* 14th Session, p. 593. The committee thus underlined that the rights asserted by the United Nations as applicable to the fetus represented a commitment which had commended itself to all of the various social systems represented within that worldwide body.

If, then, an unborn child can inherit by will and by intestacy, be the beneficiary of a trust, be tortiously injured, be represented by a guardian seeking present support from the parent, be preferred to the religious liberties of his parents, be protected by the criminal statutes on parental neglect, and enjoy the specific concern of the United Nations' General Assembly, are there not interests here which the State may guard from intentional extinction? If not, then all of these rights are meaningless, capable of being destroyed through the exercise of an unrestrictable right simply to destroy their possessor—the unborn fetus.

Let us then address ourselves specifically to the question of balancing the two rights which may appear to be in conflict in these cases. That question must be: To what extent can the State protect the right of an unborn infant to continue its existence as a living being in the face of a claim of right of privacy on the part of a woman to decide whether or not she wishes to remain with child?

This Court has decided that the Constitution protects certain rights of privacy on the part of a woman arising from the marital relationship which cannot be unjustifiably interferred with by the State. NRLC believes that the genesis of such rights, to the extent such rights may exist, must be found among the "penumbral" personal liberties protected by the Due Process Clause of the Fifth Amendment. Yet equally unchallengeable is the proposition that an unborn child's right not to "be deprived of life", to quote the words of the the Due Process Clause itself, is also a fundamental personal right or liberty protected by that same amendment and entitled to the traditional searching judicial scrutiny and review afforded when basic personal liberties are threatened by state action, whether legislative or judicial in character. Therefore, it is very clear that this case is not one, as the appellants would portray it, which involves merely the balancing of a right of personal liberty (i.e., a married woman's privacy) against some competing, generalized state interest of lower priority or concern in an enlightened scheme of constitutional values, such as the state's police power.[52] Here, the Court must choose between a nebulous and undefined legal "right" of privacy on the part of a woman with respect to the use of her body and the State's right to prevent the destruction of a human life. That election involves the determination as to whether the State's judgment that human life is to be preferred is a prohibited exercise of legislative power.

---

[52]Even in this area the Court, by closely divided vote, has held that a "dependent child's needs are paramount" and rarely are to be placed in "a position secondary to what the mother claims as her rights". *Wyman v. James,* 400 U.S. 309, 318 (1971).

There would be no question of the answer, of course, if the choice were between a woman's "right to privacy" and the destruction of an unwanted *after* born child. Yet abortion is distinguishable from infanticide only by the event of birth. The recent findings of medical science now suggest that any distinction, at least from a medical if not a legal point of view, disappears very early in a woman's pregnancy and in the life of the unborn child within the womb. Contrary to the appellants' assumption in these cases, a state's interest in regulating abortion is not bottomed exclusively on concern for the health of the mother, a concern which admittedly would be of less than persuasive effect, since it cannot be successfully established that abortions during the early period of pregnancy performed by competent physicians in hospital surroundings represent a substantially high medical risk to the life and health of the mother.[53] The state interest which justifies what Texas and Georgia have done rests on a concern for human life, even though that life be within the womb of the mother. Such an interest on the part of the State has existed since the common law of England. Now the separate, early and independent existence of fetal life has been conclusively proven by medical science. While it may be impossible for the State to insist on maintaining such a life under all circumstances, can it seriously be maintained that the Government is powerless to insist on protecting it from intentional destruction, absent danger to the mother's life.

Under the analysis set out above, the appellant's argument in support of a woman's "sovereignty . . . over the use of her

[53]The *amicus* has one reservation here, however. Evolving research into the complications that may follow abortion indicates a 2% sterility rate with an approximate 10% rate of moderate or severe psychic sequelae. Hellegers, *Abortion, the Law, and the Common Good,* 3 Medical Opinion and Review, No. 5 (May 1967). Indeed, respectable studies raise the question of whether the guilt complex evoked by an abortion may itself constitute a more severe psychiatric problem than any pre-existing mental health problem serving to justify the abortion in the first instance. Rosen, Therapeutic Abortion, Medical, Psychiatric, Anthropological and Legal Considerations (1954).

body" cannot stand. Either (1) the argument means that she has a "private right" or personal freedom which permits her to decide, for any reason whatsoever, whether to sustain and support, or whether to eliminate, a life which she alone may decide is unwanted; or (2) it means that she has some kind of right to bodily integrity which permits her and her alone to decide under all circumstances whether to retain, or permit to be destroyed, a human life contained within her own body.

In all fairness we doubt that the first is the correct understanding of the basis of the "private right of personal freedom" for which the appellants contend. For, were that principle ever to be accepted as the law, there would have crept into the Constitution a potentially terrifying principle that, with very little more logic than the appellants have relied upon to sustain their position in these cases, would equally justify infanticide and euthanasia, at least if the victims were those in a relationship of dependence with the person or persons who wished to destroy them. Nor would the laws which forbid abandonment, failure of support and child neglect be immune from attack.

If the appellants and their supporting *amici* are maintaining that a woman has a right to the integrity of her body sufficient to permit her alone to decide, for whatever reason, whether to terminate a pregnancy, the proposition cannot prevail.[54] If a woman has sovereignty over her body of the degree suggested by the appellants, how could the States ban prostitution, outlaw suicide or prohibit the use of harmful drugs?

However, in the *amicus* brief filed by the American Association of University Women and other women's organizations, the "sovereignty of the body" argument is made in a disguised and superficially more plausible form. These *amici* assert a woman's right of "reproductive autonomy". This they define as the "personal, constitutional right of a woman

[54]See also the *Georgetown College* and *Raleigh Fitkin* cases discussed *supra*, pp. 37-39; *cf. Babbitz v. McCann*, 306 F. Supp. 400 (E.D. Wisc., 1969), *app. dism.*, 400 U.S. 1 (1970).

to determine the number and spacing of her children, and thus to determine whether to bear a particular child . . . ." Such a right, those *amici* argue, evolves inevitably from the recognition which this Court has afforded to those human interests "which relate to marriage, sex, the family and the raising of children". It is true that the Court has upheld the right of a married couple to plan their offspring prior to contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965), a case which, as we show in the next section of this brief, has no applicability to the issues presented in these cases. Parents may have a constitutional right to plan for the number and spacing of children. Still, that right cannot be extended to permit the destruction of a living human being absent a threat to the life of the mother carrying the unborn baby. Family planning, including the contraceptive relationship, is a matter between a man and a woman alone. The abortion relationship, on the other hand, is between the parents and the unborn child. "This additional party changes the whole structure of the situation. The freedom of the parents is limited by the rights of the child." Granfield, The Abortion Decision 184-85 (1969); see also *Gleitman v. Cosgrove, supra*, at 30-31. Thus, while a man and woman may have the right to plan their family free from interference by the State, which the Court upheld in *Griswold,* surely such a right cannot be projected, indeed distorted and debased, to serve as justification for the destruction of a third party, the unborn but living child. The right to plan a family no more encompasses the right to intentionally destroy a 2, 3, 4, 5, 6, 7 or 8 month unborn child than it would encompass the right to destroy a one-day-old baby. We do not believe, therefore, that it can successfully be maintained that the Texas and Georgia abortion statutes, and the balancing between any alleged constitutional right to plan a family and the right of an unborn child to life which they attempt to effect, should be struck down as unconstitutional.[55] To reach the contrary result

[55]We show in the next subsection of this brief that the one decision on which appellants might rely, at least by attenuated analogy, to support a claim of the unfettered right of a married woman to termi-

would require this Court's unabashed return to the long-repudiated concept of substantive due process which plagued its decisions for several generations, albeit in another context, *i.e.*, economic and social legislation. The fact that a law might not impress the judiciary as a good law, or might appear to them as futile or unworkable, no longer can serve as a basis for its invalidation.[56] Moreover, even though many doctors, representatives of women's organizations and well known public figures may claim that these abortion statutes are illiberal, outmoded and restrictive of women's rights, this is not the general viewpoint of the American people. A recent careful analysis of abortion and public opinion by demographer Judith Blake indicates that 78% of the population disapproved legalization of abortion when the parents desired no more children.[57] In any event, at this stage of American constitutional development there is no need to remind the Court that the predilections of the populace, much less the individual preferences of judges, cannot serve as a basis to strike down legislation within the competence of the state to enact, especially where the laws so challenged are aimed at protecting the most fundamental of personal liberties protected by the Due Process Clause, *i.e.*, the right not to "be deprived of life".

G. *The Right to Life Has Not Been Undermined by Judicial Decision.* The *amicus* has demonstrated the persuasive medical basis supporting the compelling substantial state interests which justify the Texas and Georgia abortion laws. Beyond that, and contrary to the contentions of the appellants and the *amici* who have filed briefs in their support,

---

nate a pregnancy does not support the proposition in behalf of which it is summoned.

[56]Compare *Lochner v. New York,* 198 U.S. 45 (1905), with *Ferguson v. Skrupa,* 372 U.S. 726, 730 (1963).

[57]Blake, *Abortion and Public Opinion: The 1960-1970 Decade,* 171 Science 540, 544 (1971). The same study shows that there are wide disparities in American attitudes toward abortions. Women, for example, disapprove of it more than men. *Ibid.*

NRLC disputes the assertion that a woman enjoys any right of privacy, as yet undefined in American law, which vests in her alone the absolute authority to terminate a pregnancy for any reason whatsoever. No precedents of this Court have gone so far. Nevertheless, the proponents of abortion on demand always advance three or four decisions of the Court from which they argue that the Court has impliedly recognized a startling and dangerous extension of a right of privacy that they now ask the Court to enunciate expressly in the cases at bar. We discuss those alleged analogies in this section of our brief. None of them, we believe, can serve as analogy, much less precedent, for the grave proposition of constitutional law which the appellants seek to establish in this litigation.

A case usually cited by those challenging state abortion laws is *Loving v. Virginia,* 388 U.S. 1 (1967). There, this Court held that a state anti-miscegenous marriage statute violated the Equal Protection Clause of the Fourteenth Amendment. 388 U.S., at 12. As a supporting ground for its decision, the Court also found that such statutes deny due process, since "the freedom of choice to marry [can] not be restricted by invidious racial discrimination." *Ibid. Loving,* therefore, is no precedent in support of the appellants' notion of the extreme scope of a woman's constitutional right of privacy. It is purely an invidious racial discrimination holding.

Other cases on which the appellants rely must similarly fail in their role as alleged analogies for their position. *Skinner v. Oklahoma,* 316 U.S. 535 (1942), decided that the compulsory sterilization of some types of habitual criminals and not others represented an invidious discrimination condemned by the Fourteenth Amendment. Thus, *Skinner* is most accurately read as a case prohibiting the imposition of unreasonable impediments on the right to procreate and, in any event, cannot logically be stretched to serve as an analogy for the unrestricted right to abort. Likewise missing the mark as a supporting precedent is *Pierce v. Society of*

Sisters, 268 U.S. 510 (1925). This was the Court's landmark decision upholding, over the requirements of a state's compulsory school attendance law, the freedom of parents, guaranteed by the Due Process Clause of the Fourteenth Amendment, "to direct the upbringing and education of [their] children . . . " 268 U.S., at 534. Once more, the liberty which was protected in the *Pierce* case was not a "right of privacy" and again the legislation which was struck down had "no reasonable relation to some purpose within the competency of the State." 268 U.S., at 535.

When the obviously unanalogous authorities tendered by the appellants are put aside, they are left only with *Griswold v. Connecticut,* 381 U.S. 479 (1965), as the one slim reed of alleged precedent to which they cling in arguing for the awesome right of privacy which they would have the Court enunciate in this case. That decision, too, is insufficient to carry such a heavy burden. The *Griswold* case produced a number of opinions by the Justices of this Court, concurring and dissenting. The actual holding in the case, however, was that a statute which forbade the use of contraceptives by married couples violated a "penumbral" right of marital privacy, older than the Bill of Rights and one falling within a "zone of privacy created by several constitutional guarantees." 381 U.S., at 485. Three of the Justices who decided that case, two dissenting and one concurring, refused to recognize any constitutionally protected right of privacy whatsoever. The remaining six Justices agreed only that a law, the enforcement of which would require the invasion of the marital bedroom, transgressed on the intimacies of, and the right of privacy inherent in, the marital relationship.

The particular aspect of the marital relation with which the Connecticut statute at issue in *Griswold* interfered was the sexual relationship. The state made it criminal for a married couple to have sexual intercourse using contraceptives. Enforcement of the statute would have required actual invasion of the marital bedchamber. The Connecticut law challenged was more stringent and sweeping than any statute,

civil or ecclesiastical, in the history of social efforts to control contraception. Noonan, Contraception 491 (1965). In contrast, the Texas and Georgia statutes do not affect the sexual relations of husband and wife. Pregnancy does not interfere with these relations except under some circumstances at limited times. Guttmacher, Pregnancy and Birth 86 (1960).

Further, it is a distortion of both the "penumbral" and Ninth Amendment approaches relied on by the majority in *Griswold* to assert them as a basis for challenging state regulation of abortion as unconstitutional. Centuries of judicial and legislative history refute the argument that the unrestricted right to abort is an "emanation" of any specific guarantees of the Bill of Rights necessary to give them "life and substance". 381 U.S., at 484. Where, for example, after considering the "traditions and [collective] conscience of our people", will this Court find the right to unrestricted abortion a principle "so rooted [there] . . . as to be ranked as fundamental"? 381 U.S., at 493 (Goldberg, J. *concurring*). Rather, in the words of a state court on the subject, the tradition has been that: "Unnecessary interruption of pregnancy is universally regarded as highly offensive to public interest." *Miller v. Bennett,* 190 Va. 162, 169, 56 S.E.2d 217 (1949).

In relying on the *Griswold* case, the appellants have not considered that in this case, as opposed to that decision, there is another important interest at stake, the life of an unborn child. If, despite all the medical evidence and legal history on the point, the unborn child is not to be considered a person within contemplation of the law with legally protectable interests, then *Griswold* possibly might be stretched to serve as a precedent for the result that the appellants urge this Court to reach. On the other hand, if terminating pregnancy is something different from preventing it, if abortion is different from cosmetic surgery, if the fetus is not in the same class as the wart, and if we are dealing with something other than an inhuman organism, then *Griswold* is totally

inapposite. As medical knowledge of prenatal life has expanded, the rights of the unborn child have been enlarged. And even if it could still be argued that the fetus is not fully the equal of the adult, the law, through centuries of judicial decision and legislation, and following the lead supplied by medical science, has raised the equivalency of that life to such a status that the unborn child may not be deprived of it, absent the demonstrated necessity of protecting a reasonably equivalent interest on the part of the mother. *Griswold,* of course, presented no such conflict and therefore is not controlling in this case.

Finally, as we have previously argued;[58] abortion was always condemned at common law. In Blackstone's words, it was regarded as a "heinous misdemeanor".[59] American law gave it the same hostile reception. Therefore, any argument that by virtue of the passage of the Ninth Amendment there was reserved to pregnant women a "penumbral" constitutional right of privacy entitling her to abort for any reason and that such a "right" was one of the fundamental liberties of American citizens recognized before the Bill of Rights and retained by them thereafter is completely without support in either British or American constitutional history. There was no "right" to abort at common law. Rather, abortion—in contrast to contraception—was considered a serious criminal act.

Thus, on any fair analysis, the appellants' alleged precedents, including *Griswold,* furnish no support for their claim that there is a constitutional basis on which to claim that a woman has a right to abort, for any reason, an unborn child which she does not want.

---

[58] *Supra,* pp. 24-29.

[59] Blackstone, *supra* n. 22, at 129-30.

III.

THE STATUTES ARE NOT UNCONSTITUTIONALLY VAGUE

In both cases, the appellants attacked the statutes in the courts below on the additional ground that they were unconstitutionally vague. The Texas three-judge federal court agreed. 314 F.Supp., at 1223. The Georgia three-judge court impliedly rejected the argument, but struck the statute down on other constitutional grounds. 319 F.Supp., at 1055. The appellants again raise the vagueness issue in their briefs which they have filed in this Court.

Neither of the courts below had the advantage of this Court's decision in *United States v. Vuitch*, 402 U.S. 62 (1971), at the time they handed down their decisions. In that case, this Court reversed the decision of a district court judge who had found that the District of Columbia abortion law was unconstitutionally vague.[60] The District of Columbia statute outlawed abortions except when "necessary for the preservation of the mother's life or health."[61] This Court's holding in *Vuitch* should be dispositive of the vagueness issue in these cases. The exception clause which this Court upheld in *Vuitch* is no more or less certain of meaning than the exception found in the Texas statute, *i.e.*, "for the purpose of saving the life of the mother". Likewise, the exceptions permitted under the Georgia statute are stated in language free of any inhibiting unconstitutional vagueness or ambiguity.

Doctors are neither in doubt nor in fear as to where abortions permitted by the Texas and Georgia statutes end and where those barred by them begin. For example, a recent study in California, whose abortion statute at the time had an exception limited solely to cases where termination of

---

[60] 305 F.Supp. 1032 (D. D.C., 1969).

[61] 22 D.C. Code 201.

the pregnancy is necessary to preserve the life of the mother,[62] shows that there has never been a prosecution for an abortion performed in a hospital by a physician licensed to practice medicine in that state. Packer & Gamspell, *Therapeutic Abortion, A Problem in Law and Medicine,* 11 Stanford L.R. 418, 444 (1959). Other recent studies show the same has been true in New York and in Maryland. Hellegers, *Abortion, the Law, and the Common Good,* 3 Medical Opinion and Review, No. 5 (May 1967), p. 84. The *amicus* is confident that the same experience holds for Texas and Georgia and that in those jurisdictions, as in others, "the law has not gone out of its way to make things difficult for the physician, . . ."[63]

The words of Mr. Justice Holmes, as in so many other areas of constitutional law, supply the answer to any claim of the alleged vagueness of these two statutes. Speaking for the Court in *United States v. Wurzbach,* 280 U.S. 396, 399 (1930), he said:

> "Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to to make him take the risk."[64]

Accordingly, we urge the Court to adhere to its decision in *Vuitch* and reject any contention that these two statutes are

---

[62]Cal. Penal Code § 274.

[63]Hellegers, *supra,* at 84. Indeed, a recent decision of the Court of Appeals for the District of Columbia Circuit suggests, should appellants prevail on this appeal, that any "doctor's dilemma" will not be whether he will be punished if he performs an abortion but whether he will be punished if he does not. *Mary Doe, et al. v. General Hospital of the District of Columbia, et al.,* C. A. No. 24,011. For a recent case showing this is not an illusory concern see *Gleitman v. Cosgrove,* 49 N.J. 22, 227 A.2d 689 (1967).

[64]See also, *State v. Moretti,* 52 N. J. 182, 244 A.2d 499 (1968), *cert. den.,* 393 U.S. 952 (1968).

unconstitutionally vague in prescribing what is criminal conduct on the part of doctors and what is not.

IV.

THE REMAINING CONSTITUTIONAL ARGUMENTS ADVANCED BY THE APPELLANTS AND THE AMICI CURIAE SUPPORTING THEM ARE WITHOUT MERIT

In addition to their primary claim that the Texas and Georgia statutes violate rights of privacy guaranteed by the Ninth and the Fourteenth Amendments, the appellants in these cases, or the *amici curiae* who filed briefs in support of the appellants, attempt to raise several other constitutional issues. For instance, the doctor-appellants argue that the statutes in question transgress First and Fourteenth Amendment rights which guarantee them the right to pursue their chosen profession. Additionally, the appellants claim that the statutes under challenge in this litigation violate equal protection of the laws, so far as poorer citizens are concerned. These contentions are meritless.

A. *The Statutes Do Not Abridge Either First or Fourteenth Amendment Rights of Doctors.* In both cases, the doctor-appellants alleged that the particular statute in question "chills and defers plaintiffs from practicing their profession as medical practitioners" and thus offends rights guaranteed by the First and Fourteenth Amendments.[65] The dispositive answer to these contentions is that neither statute proscribes speech or medical advice but prohibits the commission of the criminal *acts* specified in the statute. If, as this *amicus* maintains, the acts outlawed by the statutes are within the constitutional competency of Texas and Georgia to proscribe as criminal conduct, then the argument is closed. Criminal acts do not fall within the "freedom of speech" which the First Amendment protects. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). On the other

[65] App. 19 in No. 70-18 and App. 14 in No. 70-40.

hand, if we are wrong and these statutes do represent unconstitutional invasions of a woman's right to privacy, then the free speech argument advanced by the doctor-appellants becomes superfluous. Apart from that, however, we do not believe that the appellants can seriously argue that these abortion statutes are vulnerable on their face as abridging a doctor's or anyone else's right of free expression.

The identical rationale also answers appellants' claims that any freedom to pursue the profession of medicine guaranteed by the Due Process Clause of the Fourteenth Amendment is offended by the statutes involved in these cases. *Cf., e.g., Konigsberg v. State Bar of Calif.,* 366 U.S. 35, 44 (1961), with *Willner v. Committee on Character and Fitness,* 373 U.S. 96, 102-03 (1963). And it legitimately could be asked whether the deliberate destruction of the unborn child, absent a threat to a mother's life or a serious menace to her health, is really the practice of the "healing art" of medicine. Frankl, The Doctor and the Soul 37 (1969).

B. *Nor Do the Statutes Draw Invidious and Unconstitutional Discriminations Between the More Affluent and the Poor.* As so often happens in such cases, the parties attacking abortion statutes argue that they discriminate against the economically deprived. Specifically, appellants contend that there is an advantage to the class which is able to obtain abortions and that this advantage is enjoyed only by the more affluent people of Texas, Georgia and the rest of the United States. We doubt that this contention rises to the level of a constitutional argument which must be dealt with in these cases. If it were necessary, NRLC would point out that the statutes on their face apply to all persons committing the acts condemned and that there is no suggestion that they seek to discriminate on any invidious basis, including that of income.

Of course, departing from the facts of the two cases, it might be argued abstractly that (1) a poor woman finds it more difficult than a rich woman to leave Texas or Georgia in order to get an abortion in a jurisdiction where that might

be legal, and (2) she cannot afford treatment by a private physician who, some might say, would be more inclined to find a legal reason for the abortion. Hence, the two statutes bear unequally upon the poor. However, the same theoretical argument could be made of many types of conduct proscribed by the criminal laws of Texas and Georgia. There are jurisdictions to which wealthy persons may travel in order to indulge in the doubtful pleasures of gambling at will, using narcotics without restraint, and enjoying a plurality of wives. Could these doubtful "advantages" on the part of the rich be relied on as any basis to set aside the criminal statutes of Texas or Georgia proscribing such activities within those jurisdictions?

And even if it were assumed to be true that the rich are more likely than the poor to secure the services of a sympathetic physician for purposes of terminating an unwanted pregnancy, such a result, unintended by the statute, would not rise to the level of a constitutional infirmity. "It is no requirement of equal protection that all evils of the same genus be eradicated or none at all." *Railway Express Agency v. New York,* 336 U.S. 106, 110 (1949). If the statute is to fail, it must be shown that on its face it takes away a right guaranteed to the poor by the Constitution. *Fisch v. General Motors Corp.,* 169 F.2d 266, 270 (C. A. 6, 1948). No such showing is possible in these cases.

Unfortunately, Anatole France's sardonic comment about the "majestic equality" of the law much too often has proved to be true. Many criminal laws in actual practice do bear with unequal severity upon the poor. It is they who are more likely than the rich to be caught, to be unable to post bail bond, to be prosecuted, to be unskillfully defended, to be convicted and to be punished. However, the remedy for these injustices of society lies in the elimination or mitigation of the conditions and causes of poverty and in the reform of the administration of criminal justice, not by the selective invalidation of otherwise lawfully enacted criminal statutes.

V.

APPELLANTS' PUBLIC POLICY ARGUMENTS ARE MISPLACED

In addition to their arguments of unconstitutionality, the appellants, and their supporting *amici,* dwell at some length on what they believe is the poor public policy inherent in the Texas and Georgia abortion statutes in particular and in abortion laws generally. Attention is called to the fact that the presence of strict abortion statutes requires women often to go to non-medical practitioners for the performance of illegal abortions conducted under poor hygienic conditions. The problem of world overpopulation is also touched upon in the appellants' marshalling of their reasons why they think abortion laws are a bad thing. Finally, in the brief of at least one of the *amici,* there is the suggestion that abortion laws stand in the way of women's liberation and represent a stamp of servility imposed by men upon the women of America.

In our opinion, the validity of all of these arguments is very questionable. In any case, their assertion, directly or indirectly, in this litigation is misplaced. They should be directed to the legislatures of Texas and Georgia, not to this Court. Moreover, we point out that in recent years it has not been impossible to convince state legislatures that their abortion statutes should be revised.[66] Even if the appellants' public policy arguments were addressed to a legislative body, NRLC would dispute their validity. For example, Sweden, a country not unlike ours, and the nation which has had the longest experience with state-regulated abortions in Western Europe, has produced no evidence that criminal abortions, estimated at 20,000 a year when the law was passed in 1938, have been substantially reduced since that time. Uhrus,

---

[66]New York has enacted an abortion statute which permits abortion for any reason within 24 weeks from the commencement of pregnancy. That act became effective on July 1, 1970. *New York Times,* July 2, 1970, p. 1. Laws almost, but not quite, as unrestrictive as the New York statute have recently been approved in Alaska, Hawaii and Washington State.

Some Aspects of the Swedish Law Governing Termination of Pregnancy, the Lancet 1292 (1964). Other studies confirm the belief that liberalization of abortion laws effect no reduction in the rate of criminal abortions and all that is done is to increase the total number of abortions. "Thus it is not unlikely that liberalization may increase rather than decrease maternal mortality." Cavanagh, *Reforming the Abortion Laws: A Doctor Looks at the Case,* America, April 18, 1970, p. 408.

So far as any alleged problem of overpopulation is concerned, abortion, whether on the free demand of a woman or on the intimidating command of the State, appears as a completely ineffective and extremely dangerous way to deal with such a problem, if it exists.[67] For instance, one side effect of the repeal of abortion statutes and the fostering of abortion through state auspices is that no group will be more likely to feel the sting more bitingly than the mothers of illegitimate children. Already, laws making the birth of illegitimate children a crime suggest the squeeze to which the poor mother might be subjected in an age of unrestricted, and state-sponsored, abortion.[68]

Finally, the suggestion that laws against abortion were enacted by men to constrain the behavior of women has nothing to support it except the historical accident that most of the criminal statutes, including abortion laws, were enacted by male legislators in the 19th Century when women were unable to vote. It is not evident how this general condition of political freedom influenced abortion laws more than it influenced other developments in the criminal law. Moreover, more women than men currently disapprove of elective,

---

[67]In point of fact, recent statistics indicate that the population of the United States is approaching a zero growth rate. *Washington Post,* September 7, 1971, page A-1.

[68]*E.g.,* La. Rev. Stat. Ann. § 14.79.2; see Noonan, *Freedom To Reproduce: Cautionary History, Present Invasions, Future Assurance,* Biennial Conference on the "Control of One's Own Body", New York University, New York (1970).

or unrestricted, abortion.[69] The suggestion that abortion laws are peculiarly the product of a male-dominated government is especially inapposite in the case of Georgia, which enacted the abortion statute involved in this litigation in 1968. This *amicus* applauds the continuing process by which illegal discriminations against women have been removed. However, the claim that a woman should be free to destroy a human being whom she has conceived by voluntarily having sexual intercourse can only make sense if that human being be regarded as part of herself, a part which she may discard for her own good. However, at this point, the evolution of social doctrine favoring freedom for women collides squarely with modern scientific knowledge and with the medical and judicial recognition that the fetus in the womb is a living person. A woman should be left free to practice contraception; she should not be left free to commit feticide.

CONCLUSION

NRLC has stated its doubts that the lower courts should have exercised jurisdiction in these cases and urges that the decisions below be vacated on those grounds. However, if the Court does note probable jurisdiction in these two case, we respectfully ask, for the reasons stated in this brief,

---

[69] *Supra* note 57.

that it affirm those portions of the judgments below which denied injunctive relief and reverse those portions which awarded declaratory relief.

Respectfully submitted,

JUAN J. RYAN
1351 Springfield Avenue
New Providence, N. J. 07974

ALFRED L. SCANLAN
MARTIN J. FLYNN
734 Fifteenth Street, N. W.
Washington, D. C. 20005

JOSEPH V. GARTLAN, JR.
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

ROBERT M. BYRN
140 West 62nd Street
Lincoln Center
New York, New York 10023

Attorneys for The National Right to Life Committee, Amicus Curiae

OF COUNSEL:

Shea & Gardner
734 Fifteenth Street, N. W.
Washington, D. C. 20005

October 8, 1971.