State Legislatures versus the Supreme Court: Abortion Legislation in the 1980's

B. J. George Jr.

Follow this and additional works at: https://digitalcommons.pepperdine.edu/plr

Part of the Constitutional Law Commons

Recommended Citation
B. J. George Jr. State Legislatures versus the Supreme Court: Abortion Legislation in the 1980's, 12 Pepp. L. Rev. Iss. 2 (1985)
Available at: https://digitalcommons.pepperdine.edu/plr/vol12/iss2/3

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact Katrina.Gallardo@pepperdine.edu, anna.speth@pepperdine.edu, linhgavin.do@pepperdine.edu.
State Legislatures *versus* the Supreme Court: Abortion Legislation in the 1980’s†

B.J. GEORGE, JR.*

This article provides a broad overview of the continuity and changes in abortion legislation and cases in a variety of topic areas throughout the United States and abroad. The author concludes that further abortion law reform may be unnecessary.

Abortion regulation was a matter exclusively for state legislatures until 1973, when the United States Supreme Court brought medically indicated abortions within the protection of the fourteenth amendment in *Roe v. Wade*¹ and *Doe v. Bolton.*² As will be surveyed in Parts I and II of this article, some liberalization in the scope of lawful abortions was evident in several legislatures before 1973,** but few statutes approached the breadth of the privacy right decreed by the Court in *Roe* and *Doe.*

Since 1973, a majority of legislatures have tried to impose functional limitations on the availability of abortions both before and after viability. Many of these efforts have been invalidated by subsequent decisions by the Court, but in many instances the legislatures have left their statutes unrevised. Thus, the onus is on the courts to squelch efforts to invoke unconstitutional laws against pregnant women and their physicians. Unconstitutional laws still exist because, in many states, a majority of legislators are hostile to freely

† This article will comprise a portion of *Abortion, Medicine and the Law,* ed. D. Walbert, J. Butler, to be published by Facts on File (mid-1985). Published by permission.
* B.A., 1949, J.D., 1951, University of Michigan; Professor of Law, New York Law School.
** In Parts II and III of this article, only the names of the states and not specific statutory citations appear. For more information, see *infra* note 25.
available abortions, whereas in others they appear to be cowed by threats of reprisals at the polls from the so-called "right-to-life" movement.

A pragmatic understanding of the causes of unsatisfactory legislative coverage of abortion law does not change the fact that state statutes in too many jurisdictions provide no guidance to, or protection for, pregnant women and their medical advisors. Consequently, a legislative limbo occurs in which one of two phenomena is likely to appear.

The first possibility is that medical abortion becomes an out-of-view dimension of hospital administration governed by local or state public health regulations. This alternative may prove a practical accommodation acceptable to both legislators and physicians. Legislators are not called on to take action visible to their constituents which the latter will view as approving abortions, and the medical profession can treat abortion like any other dimension of medical practice. The second possibility is official disapproval of therapeutic abortions that will force pregnant women, their physicians, and the administrators of clinics to turn to the judiciary for redress.

Whether this state of affairs will change within the next decade or so is debatable. If it does, it will be because state legislatures accept as immutable the constitutional doctrines espoused by the Supreme Court; that the Court has not retreated from its earlier interpretation of the Constitution is evidenced by its reaffirmation of Roe v. Wade principles in its 1983 decision in City of Akron v. Akron Center for Reproductive Health, Inc. In the following pages, a brief review of the conflicting interests recognized in or affected by abortion legislation is provided. Next, the basic constitutional principles set forth by the Court in 1973 and thereafter are discussed. Finally, the compatibility of state legislation in 1984 with the federal Constitution is evaluated.

3. See infra notes 136-49 and accompanying text. Abortion proved a matter of virulent political controversy during the 1984 presidential election campaign. The Republican Party supported constitutional amendments to recognize fetal life as fundamental. Republican Party Platform Text of 1984, 42 Cong. Q. 2096, 2110 (Aug. 25, 1984), and called for appointment of judges at all levels "who respect traditional family values and the sanctity of human life." Id. at 2110-11. The Democratic Party supported the 1973 Supreme Court decisions and opposed constitutional amendments to restrict or overturn them; it stressed "reproductive freedom as a fundamental human right." Democratic Party Platform Text of 1984, 42 Cong. Q. 1747, 1767 (July 21, 1984).

4. 103 S. Ct. 2481 (1983). Justice Powell's opinion stated:

These cases come to us a decade after we held in Roe v. Wade that the right to privacy grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy. Legislative responses to the Court's decision have required us on several occasions . . . to define the limits of a State's authority to regulate the performance of abortions. We . . . reaffirm Roe v. Wade.

Id. at 2487 (citations omitted).
I. CONFLICTING INTERESTS AFFECTED BY ABORTION LEGISLATION

Discussions of the desirability or illicitness of abortion revolve about four foci: the fetus; the pregnant woman; the family into which a child will be born if a pregnancy goes to term; and the surrounding community.

As to the first focus, there clearly is a semantic issue. A choice from among an array of terms—conceptus, zygote, embryo, fertilized ovum, fetus or prenatal infant—advertises the thinking of the speaker and not a scientifically impeccable choice of terms. Regardless of which term is selected, concern about fetuses typically reflects two contradictory schools of thought.

According to one of these schools, inviolate life comes into being from the time an ovum is fertilized. The strongest adherence to this view has been found within the Roman Catholic faith, which has condemned abortion under all circumstances. There is, however, also Protestant support for the idea. The second view is that the possible fate of a full-term fetus should be taken into account. If a child would be born deformed, mentally defective or otherwise incapable


Mainline Protestant denominations generally take a contrary position. For example, The United Methodist Church at its 1984 quadrennial general conference supported the doctrines espoused in United States Supreme Court precedent, see infra notes 110-31 and accompanying text, and asserted that continuance of pregnancies which endanger the life of women or the life, health or mental capacity of children is
of living a normal life, or born into a highly detrimental environment for which it could not be adequately compensated, it may be preferable to terminate its incipient life. This premise is likely to be an argument incident to advocacy of liberalized abortion based on social necessity. Adoption of the first view of fetal life impels rejection of all abortion. Yet to adopt the second is usually to favor abortion in a relatively wider array of instances.

The second focus is on pregnant women. Most women concerned...
with their legal position favor a free choice on their part. Indeed, this is a strong dimension of the Supreme Court's constitutional analysis. One exception is the contention that intercourse producing pregnancy is licit only if done within marriage and for procreation. Hence, an unwanted pregnancy is unfortunate, but the fulfillment of divine mandate. Therefore, a woman must carry a fetus to term, whatever the consequences. This school of thought aside, most state-
ments of policy are sympathetic toward pregnant women. This is based on the importance of health concerns rather than the complete favoring of free choice.14

A third focus is on the family unit to which the pregnant woman belongs and into which the baby will be born. Some schools of thought stress concern for the freedom of sexual partners to decide whether they will have children.15 Others emphasize the economic well-being of the whole family. The family unit may be adversely affected if limited resources must be stretched to care for another member, or the emotional deprivation experienced by siblings if parental care is diluted by yet another child.16 Concentration on factors like these almost always leads to support of liberal abortion.

A final focus is on the needs of the community. Any of the concerns already listed, of course, can be restated in terms of social interests (e.g., protection of the life of the fetus, protection of maternal health, or protection of the health of a viable family unit). But within the community dimension there are at least two additional concerns. One is the factor of population control. Abortion clearly can be a means of birth control, albeit a much less satisfactory form than mechanical or chemical contraceptive methods.17 In the past,


16. See Krimmel & Foley, supra note 8, at 792-96. Only Japan appears to embody this specifically in its statute. Eugenic Protection Law (Yu—seihooho) (Law No. 156 of 1948, as amended), art. 3(5) permits abortion “if there are several children and the mother’s health will be seriously impaired if she again delivers.” Art. 14 permits a doctor authorized by a district medical association to terminate a pregnancy at his or her discretion, with consent of both husband and wife, for several reasons, including the likelihood of substantial injury to the mother’s health for either physical or economic reasons if the pregnancy continues to term (author’s translation and paraphrase). Some Scandinavian legislation extends about as broadly. Clemmesen, State of Legal Abortion in Denmark, 112 AM. J. PSYCH. 562 (1956); Klintskog, Survey of Legislation on Legal Abortion in Europe and North America, 21 MEDICO-LEGAL J. 79 (1953).

The English Abortion Act, 1967, c. 87, § 1(2), permits medical practitioners to take account of “the pregnant woman’s actual or reasonably foreseeable environment” in deciding whether, under § 1(1)(a), there is risk of “injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated.” Id. at § 1(1)(a). See G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 256 (1978) [hereinafter cited as G. WILLIAMS, CRIMINAL LAW]; Simms, Abortion Law Reform: How the Controversy Changed, 1970 CRIM. L. REV. 567, 568-71. India’s Medical Termination of Pregnancy Act, 1971, § 3(2) embodies similar considerations. See supra note 11.

17. The dividing line between abortion, on the one hand, and contraceptive devices or pharmaceuticals preventing the implantation on the uterine wall of a fertilized ovum, on the other, is not intrinsically clear. See Roe v. Wade, 410 U.S. at 160-61; Brahams, Postcoital Pill and Intrauterine Device: Contraceptive or Abortifacient?, 1983 LANCET, vol. 1, no. 8332, p. 1039 (May 7, 1983); Tunkel, Modern Anti-Pregnancy
the population control use of abortion has been evident in some cultures. With improved contraceptive methods, reliance on abortion for that purpose has become less necessary. Some writers have suggested that legalized abortion as a means of population control manifests an impermissible exercise of state power, or have ex-

_Techniques and the Criminal Law, 1974 CRIM. L. REV. 461._ On amniocentesis and other sex-determining and sex-selecting techniques, see Nolan-Haley, _Amniocentesis and the Apotheosis of Human Quality Control, 2 J. LEGAL MED. 347 (1981); Warren, _Law of Human Reproduction: An Overview, 3 J. LEGAL MED. 1, 49-51 (1982) [hereinafter cited as Warren]; Note, _Genetic Screening, Eugenic Abortion, and Roe v. Wade: How Viable is Roe's Viability Standard?, 50 BROOKLYN L. REV. 113, 125-30 (1983);_ Note, _See Selection Abortion: A Constitutional Analysis of the Abortion Liberty and a Person's Right to Know, 56 IND. L.J. 281, 284-88 (1981)._ On other socio-economic concerns, see Menon, supra note 11, at 317-18. 18. See Roemer, _Abortion Law Reform and Repeal: Legislative and Judicial Developments, 61 AM. J. PUB. HEALTH 500, 505-06 (1971) [hereinafter cited as Roemer], describing such a reliance on abortion in several Pacific Basin nations. India's Medical Termination of Pregnancy Act, 1971, seems strongly aimed at population control. See Kelkar, _Impact of the Medical Termination of Pregnancy Act, 1971: A Case Study, 16 INDIAN L. INST. J. 603, 693 (1974) [hereinafter cited as Kelkar]. Traditional Japanese attitudes encouraged large families and therefore viewed the use of contraceptives as improper, even by married couples, see R. BEARDSLEY, J. HALL & R. WARD, _VILLAGE JAPAN_ 335-36 (1959), but that view has weakened substantially, particularly in urban areas where nuclear families have replaced the extended family units typical of rural Japan. See R. DORE, _CITY LIFE IN JAPAN_ 205 n.196 (1958). Kelkar, supra, at 619 records advice by Japan's former Premier Sato to Indian authorities not to rely heavily on abortion as a means of population control, based on Japanese experience. 19. See H. THIELICKE, _supra_ note 7, at 215-25; Krimmel & Foley, _supra_ note 8, at 796-97. _Cf._ Planned Parenthood Ass'n of Kansas City v. Ashcroft, 655 F.2d 848, 868-69 (8th Cir. 1981), _aff'd on other grounds,_ 462 U.S. 476 (1983) (requirement that woman be told approximate length of pregnancy unconstitutional because it would eliminate use of menstrual extraction and similar techniques, which under the state law would be an abortion); Margaret S. v. Edwards, 488 F. Supp. 181, 190-91 (E.D. La. 1980) (definition of abortion was not impermissibly vague even though it might have included IUD's and morning-after pills [two forms of birth control], since no other statutory formulation would be more precise, and abortion does not include contraceptive measures). _N.M. STAT. ANN._ § 30-5-1(A) (1984) defines pregnancy as implantation of an embryo in the uterus, which excludes morning-after pills from the scope of abortion provisions. _OKLA. STAT. ANN._ tit. 63, § 1-730(8) (West 1984) excludes from the definition of abortion birth control devices or medications. _18 PA. CONS. STAT. ANN._ § 3203 (1983) excludes from the statutory definition of abortion the use of IUD's or birth control pills "to inhibit or prevent ovulation, fertilization or the implantation of a fertilized ovum within the uterus." _W. VA. CODE_ § 16-2B-2 (1979) states that abortion is not considered an approved method of family planning and is excluded from state-supported family planning programs, and _Wis. STAT. ANN._ § 146.80(1) (West Supp. 1983) prohibits family planning services from promoting, encouraging or performing voluntary terminations of pregnancy. On contraception as a desirable alternative to abortion, see Sneideman, _Abortion: A Public Health and Social Policy Perspective, 7 N.Y.U. REV. L. & SOC. CHANGE 187, 206-12 (1978) [hereinafter cited as Sneideman]. The matter of _in vitro_ fertilization is also addressed in some legislation, _e.g._, _ILL._
pressed fear that it will result in too stark a decline in population levels to permit the state to survive.\textsuperscript{20} In reality, however, abortion produces only incidental population control consequences,\textsuperscript{21} and so poses no serious threat either to population levels or citizens' liberties.\textsuperscript{22}

A second social factor addresses the freedom of the medical profession to approach termination of pregnancies on the same basis as other medical problems, free from arbitrary controls. This, too, has found strong support in the United States Supreme Court's constitutional jurisprudence.\textsuperscript{23}

These concerns, although not necessarily comprehensive, demonstrate the principal policy interests implicated by abortion legislation and constitutional precedents governing it. In most American jurisdictions to 1967, abortions were allowed only to save the lives of pregnant women.\textsuperscript{24} Activists within the self-proclaimed "right-to-life" movement believe the United States Constitution should be amended to prohibit all abortions, or at a minimum, to allow only those necessary to save maternal life. In contrast, the Supreme Court's current constitutional analysis recognizes a woman's freedom of choice. Any

\textsuperscript{20} That may have underlain the rescission in 1956 of the USSR law allowing easy abortion. See G. Williams, The Sanctity of Life and the Criminal Law 219-20 (1957) [hereinafter cited as G. Williams, Sanctity]. That rescission in turn, however, is reported to have been modified. P. Gebhard, W. Pomeroy, C. Martin & C. Christenson, Pregnancy, Birth and Abortion 208-11 (1958). So was a similar change in Bulgarian law. Roemer, supra note 11, at 504.


\textsuperscript{22} Indeed, Dr. Thielicke's concerns (see supra note 17 and accompanying text) find no home in American constitutional jurisprudence, which stresses the right of married and unmarried persons to have information about contraception and access to contraceptives. See Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875 (1983) (holding federal statute prohibiting mailing of unsolicited advertisements for contraceptives unconstitutional); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972) (legislation allowing distribution of contraceptives to married couples, but not to single persons, violated the equal protection clause); Griswold v. Connecticut, 381 U.S. 479 (1965) (overturning state law banning use of contraceptives).

\textsuperscript{23} See Roe v. Wade, 410 U.S. 113, 156 (1973); see also infra notes 110-31 and accompanying text.

\textsuperscript{24} See infra notes 28-33 and accompanying text.
woman early in pregnancy may, in consultation with a willing physician, choose to have an abortion. As pregnancy advances, medical considerations become more significant but can never be eclipsed by a desire solely to preserve fetal life.

Accordingly, the tension in the 1980's is between abortion as a dimension of medical practice and prohibition of abortion as unwarranted termination of human fetal life. Abortion for purposes of population control, eugenics or preservation of family strength and harmony is not within the ambit of the Supreme Court's constitutional concerns, and finds no home in today's legislative chambers. For now, concerns of this nature are for moral, ethical and theological debate, not litigation or the legislative process.

II. LEGAL REGULATION OF ABORTION BEFORE 1967

A. Criminal Statutes

1. Statutes Penalizing Abortion

Criminal statutes outlawing abortion date from 1821. Common law precedent was so scant that it played an insignificant role in evaluating the legality of abortions. Statutes were roughly classifiable into those which prohibited all abortions and those which allowed some abortions under carefully limited circumstances. The laws of four states provided no exceptions to a general prohibition against abortion, although judicial interpretations softened the harsh impact

---

25. In Parts II and III of this article, only the names of the states and not specific statutory citations appear. This is because almost all the legislation in force through 1973 has been replaced. Persons wishing then-contemporary citations may find them in George, The Evolving Law of Abortion, 23 CASE W. RES. 708 (1972) passim.


27. Most common law cases covered only conduct that caused miscarriages after fetuses had quickened. See R. PERKINS & R. BOYCE, CRIMINAL LAW 186-88 (3d ed. 1982).


28. La., Mass., N.J., Pa. In New Hampshire, the attempted abortion statute allowed no exceptions, while a companion provision penalizing completed abortions justified acts necessary to save maternal life.
of the legislation. In the remaining states and the District of Columbia, abortions were permissible to preserve maternal life.

Even during that era, a few states went beyond saving the lives of pregnant women. Some permitted abortions to preserve the life of an unborn child, a qualification with little or no effect other than to exempt induced labor at or near term from the scope of abortion law. Two states allowed abortions necessary to forestall serious and permanent bodily injury, while two other jurisdictions recognized any maternal health considerations.

A number of difficult legal problems arose in administering restrictive legislation. The first had to do with classes of persons authorized to perform abortions in instances of exigency. Twenty-six states appeared to allow anyone to perform an abortion, while the rest required that abortions be done by physicians or surgeons.

The second turned on whether necessity was to be determined on an objective or strict liability basis, or whether a good faith belief in the existence of justifying medical grounds would suffice. Many statutes seemingly defined necessity as an objective element, although some courts embraced a good faith professional belief that necessity existed, despite the rather plain statutory language to the contrary.

This usual language was ameliorated to some extent where the bur-

29. Commonwealth v. Brunelle, 341 Mass. 675, 677, 171 N.E.2d 850, 852 (1961) (physicians who acted in an honest belief that abortions were necessary to avoid great peril to maternal life or health did not violate the statute, if their judgments corresponded with the average judgment of doctors in the communities where they practiced); State v. Brandenburg, 137 N.J.L. 124, 126-28, 58 A.2d 709, 710-11 (1948) (abortions necessary to save life, but not health).


31. This is dealt with today in statutory definitions of abortion. See infra notes 150-59 and accompanying text.

32. Colo., N.M.


34. Ala., Ariz., Conn., Idaho, Ind., Iowa, Ky., Me., Mich., Minn., Mont., Nev., N.D., Ohio, Okla., R.I., S.D., Tenn., Tex., Utah, Vt., W. Va., Wyo. Missouri legislation appeared to favor unlicensed abortionists. Abortion was proscribed unless necessary to preserve the life of a woman or her unborn child, but if the person performing an abortion was not a licensed physician, it was a defense that the performance had been advised by a duly licensed physician to be necessary for the purpose. Thus, a licensed physician was held to a standard of objective necessity while an unlicensed person could rely on medical advice whether or not the abortion was objectively necessary. The statute probably was intended to protect registered nurses and other hospital and medical staff personnel, but was not so limited.


36. Honnard v. People, 77 Ill. 481 (1875); State v. Dunklebarger, 206 Iowa 971, 221 N.W. 592 (1928).
den of proving want of medical necessity was placed on the prosecution.\textsuperscript{37} Legislation in three states\textsuperscript{38} and the District of Columbia was specific in stating that belief or motivation, and not objective necessity, governed the statutory exception from coverage.

The common law requirement that a fetus be quick before there could be a criminal abortion\textsuperscript{39} had disappeared from statutory law: twenty-three states\textsuperscript{40} referred only to pregnancy while four other states used "whether quick or not."\textsuperscript{41} In a handful of states, duration of pregnancy had begun to reemerge as a legal element of abortion which had begun to expand the scope of noncriminal abortion.\textsuperscript{42} Therapeutic abortions were limited in three states to the period of nonviability.\textsuperscript{43}

Another array of legal problems arose when, despite efforts to abort a fetus, no miscarriage occurred. This might have resulted from an interrupted or incompletely performed abortion or from the fact the woman was not pregnant. Some thirty-two states\textsuperscript{44} and the District of Columbia eliminated the first problem by penalizing the administration of drugs, use of an instrument or any other means intended to produce an abortion. If a woman was not pregnant, however, it might have been argued under common law concepts that the crime was "impossible" to attempt.\textsuperscript{45} Such a defense was unavailable under abortion statutes which prohibited abortion activity affecting


\textsuperscript{38} Tenn., Tex., W. Va. Several statutes enacted after 1967 in Ark., Fla., Ga., N.Y., N.C., Or., and S.C. set a standard of "reasonable belief." That was a compromise position between strict liability and criminality turning on exclusively subjective considerations, but it achieved criminality based on criminal negligence. That standard of culpability seems inappropriate in the context of abortion, although perhaps recognizable in manslaughter prosecutions if a woman dies from the effects of a bungled abortion.


\textsuperscript{41} Ark., Ky., Me., Tenn. Statutes punishing attempted abortion also reduced the practical significance of pregnancy as an element of the crime of abortion. See infra notes 45-50 and accompanying text.

\textsuperscript{42} Cal., Colo., Del., N.Y., Or., Wash.

\textsuperscript{43} Alaska, Hawai'i, Wash.


\textsuperscript{45} See generally W. LaFave & A. Scott, Criminal Law 438-46 (1972); R. Perkins & R. Boyce, Criminal Law 627-35 (3d ed. 1983). The doctrine of impossibility is
“any woman,” a woman “whether pregnant or not,” or a woman believed by a defendant to be pregnant. Several courts relied on such language to affirm convictions for abortion even though the affected women were not pregnant.

2. Statutes Prohibiting Killing an Unborn Quick Child

Six states made it a separate offense to willfully kill an unborn quick child under circumstances in which, had the mother and not the fetus been killed, the crime would have been murder or manslaughter. The aim of these statutes was not entirely evident from either language or interpreting precedent, but their targets probably were those who intended to cause pregnant women to miscarry without their consent and who used physical violence against them for that purpose.

3. Statutes Penalizing Death of Pregnant Women Resulting from Abortion

Under classical theory, should a pregnant woman die as a result of a criminal abortion, the abortionist should be guilty of either second-degree murder based on felony murder in the commission of a felony not enumerated under traditional first-degree murder statutes, the intentional infliction of grave bodily injury, or the reckless performance of activity with known dangerous consequences, or guilty of manslaughter based on criminal negligence. Several states confronted such cases directly by providing augmented punishment for performing an abortion should a woman die as a result, or by characterizing the death as either murder or manslaughter.


47. Ill.
51. Such statutes clearly accorded independent personality to fetuses since the crime was called manslaughter and usually placed with other homicide offenses (where abortion legislation did not usually appear).
4. Statutes Penalizing Women Who Seek Abortions

In default of special legislation, women who sought or submitted to abortions were generally not viewed as accomplices to the crime. Rhode Island and Vermont preserved that doctrine by statute. In several states, however, legislatures decreed that women who solicited or submitted to abortions that were not necessary to preserve their lives were criminals. These statutes had two significant legal consequences and one practical result as well.

One consequence was that accompanying statutes sometimes required corroboration of a woman's testimony, or were interpreted in that way. A second was that women who underwent abortions, as putative criminal defendants, could claim privilege against self-incrimination when summoned to testify for the prosecution against an abortionist. Because, however, that testimony frequently is critical to establishing guilt, some legislatures either purported to abolish

56. See, e.g., Heath v. State, 249 Ark. 217, 219, 459 S.W.2d 420, 422 (1970), cert. denied, 404 U.S. 910 (1971); Commonwealth v. Follansbee, 155 Mass. 274, 277, 29 N.E. 471, 471 (1892); In re Vickers, 371 Mich. 114, 118-19, 123 N.W.2d 253, 254-55 (1963) (woman could not be held for commission of abortion on herself, and thus was not an aider or abettor thereof); In re Vince, 2 N.J. 443, 450, 67 A.2d 141, 144 (1949) (interpreted statute failing to denounce participation in abortion by pregnant woman as evidencing legislative policy to leave woman involved unpunished); State v. Shaft, 166 N.C. 407, 409, 81 S.E. 932, 933 (1914); Smartt v. State, 112 Tenn. 539, 553, 80 S.W. 586, 589 (1904); Willingham v. State, 33 Tex. Crim. 96, 99, 25 S.W. 424, 424 (1894). Compare State v. Clifford, 133 Iowa 475, 480, 110 N.W. 921, 922 (1907) (victim could not be charged because she had died as a result of the abortion, but court characterized her as a conspirator so that her statements were admissible against the abortionist as a declaration promoting the common criminal enterprise), with Snyder Appeal (Commonwealth v. Fisher), 398 Pa. 437, 447, 157 A.2d 207, 212 (1960) (woman is a victim and cannot be a conspirator). Contra Steed v. State, 27 Ala. App. 263, 170 So. 489, 170 So. 490 (1936); State v. McCoy, 52 Ohio St. 157, 160, 39 N.E. 316, 316 (1894).

57. Revisers' comments to Louisiana statute indicated an intent to preserve earlier case law to the same effect.

58. Ariz., Cal., Conn., Idaho, Ind., Minn., N.Y., N.D., Okla., S.C., Utah, Wash., Wis., Wyo. State courts did not always apply the literal language of these statutes outside their specific coverage, and thus held that women were not accomplices under the primary abortion statutes. See State v. Burlingame, 47 S.D. 332, 198 N.W. 824 (1924); State v. Cragnon, 85 Utah 149, 38 P.2d 1071 (1934).

59. Cal., Idaho, Mont., N.D., S.C.

60. People v. Peyser, 380 Ill. 404, 44 N.E.2d 58 (1942); State v. McCoy, 52 Ohio St. 157, 160, 39 N.E. 316 (1894).

privilege in such cases, or conferred immunity against prosecution for complicity in abortion on women who testified. That brought the matter around full circle to where it would have been had participating women not been denominated criminals in the first place. However, legislation penalizing abortion patients may have conferred a practical advantage on prosecutors by allowing them to threaten prosecution if a woman did not cooperate and to promise her immunity from prosecution if she did.

5. Statutes Penalizing Activity Facilitating Performance of Abortions

Physicians performing abortions use instruments which are part of the ordinary equipment of gynecologists and obstetricians. It is unrealistic for law enforcement officials to attempt to control the use of such instruments; in any event, the very nature of physician and hospital supply channels makes it unlikely that laypersons could procure them. In the decades before Roe v. Wade, however, self-induced abortions were a major public health problem, and the devices and chemical substances used were clearly identifiable and devoid of legitimate modern uses. Since they were controllable without adverse impact on legitimate medical practice, legislatures consistently tried to control their availability.

The advertising of abortifacients was penalized in twenty-three states. In nineteen of them, a special statute covered abortifacients either alone or in the context of medicines preventing conception, curing venereal disease and the like, while in others the prohibition appeared in the context of obscenity regulation. The unconstitutionality of this form of legislation was recognized only recently. State legislatures also sought to regulate commerce in abortifacients by prohibiting their manufacture, distribution, furnishing, keep-
ing or exposing for sale,\textsuperscript{73} giving away,\textsuperscript{74} or lending.\textsuperscript{75} Two states required all sales to be under registerable prescriptions.\textsuperscript{76} Oregon penalized those who furnished premises knowing that nontherapeutic abortions would be performed there. Most of this legislation, too, is incompatible with modern first amendment notions.\textsuperscript{77}

III. ACCELERATING TRENDS TOWARD LEGALIZED THERAPEUTIC ABORTION: 1968-1973

A. Coverage of Revised Abortion Legislation

1. Grounds for Therapeutic Abortions

The Model Penal Code,\textsuperscript{78} promulgated by the American Law Institute in 1962, asserted a strong and perhaps paramount influence on a legislative expansion of the grounds for legal abortion during the period 1968-1973. The Code posited the lawfulness of abortions necessary to safeguard the physical and mental health of pregnant women; thirteen states had recognized this ground by 1973.\textsuperscript{79} A second ground for abortion, accepted in twelve states, allowed pregnancies to be terminated on eugenic grounds, i.e., because a fetus if born would be seriously mentally or physically handicapped.\textsuperscript{80} A third, based on humanitarian considerations, permitted victims of rape\textsuperscript{81} or incest\textsuperscript{82} to have their pregnancies terminated. Three states, however, went

\begin{itemize}
\item \textsuperscript{73} Colo., Del., Ill., Iowa, Md., Mass., Mich., Minn., Miss., Mo., Nev., R.I., Vt., Wash.
\item \textsuperscript{74} Colo., Del., Iowa, Mass., Minn., Miss., Mo., Nev., Vt., Wash.
\item \textsuperscript{75} Colo., Mass., Mich.
\item \textsuperscript{76} Colo., Mich.
\item \textsuperscript{77} See infra note 454 and accompanying text. On the English law, see 11 HALSBURY'S LAWS OF ENGLAND § 1193 (4th ed. 1976); G. WILLIAMS, CRIMINAL LAW, \textit{supra} note 16, at 264-65.
\item \textsuperscript{78} \textit{MODEL PENAL CODE} § 230.3 (Official Draft & Revised Comments 1980).
\item \textsuperscript{80} Ark., Colo., Del., Fla., Ga., Kan., Md., N.M., N.C., Or., S.C., Va. The English Abortion Act contains similar coverage. English Abortion Act, 1967, c. 87, § 1(1)(b) ("substantial risk" of "such physical abnormalities as to be seriously handicapped"). See G. WILLIAMS, CRIMINAL LAW, \textit{supra} note 16, at 256-57. Similar legislation is found in Singapore (Singapore Abortion Act, 1969), and South Australia. See Roemer, \textit{supra} note 18.
\item \textsuperscript{81} Ark., Cal., Colo., Del., Fla., Ga., Kan., Md., Miss., N.M., N.C., Or., S.C., Va. Whether statutory as well as forcible rape was included had to be determined in each state in light of statutory cross-references.
\item \textsuperscript{82} Ark., Cal., Colo., Del., Fla., Kan., N.M., N.C., Or., S.C., Va.
\end{itemize}
far beyond the Model Penal Code pattern to eliminate all restrictions on medically indicated abortions. Consequently, only those jurisdictions were relatively free of impact from the 1973 Supreme Court decisions in Roe and Doe, as far as grounds for justifiable abortion were concerned.

2. Length of Pregnancy

As mentioned earlier, length of pregnancy often bore on the lawfulness of therapeutic abortions. Thus, even the three most liberal states before 1973 found this dimension of their statutes invalidated.

3. Residency Requirements

As some legislatures expanded the permissible scope of therapeutic abortions, they manifested a fear that their states would become abortion havens for residents of other jurisdictions with restrictive laws. Therefore, a number required periods of residency before an abortion could be performed. Such legislation usually placed the burden on pregnant women to assert residency, not on physicians to ascertain the truth of claims of residency; only the Georgia and Virginia statutes attached perjury consequences to declarations of residency. These statutes fell under Doe v. Bolton.

4. Preliminary Approval by Medical Peers

Even before the abortion law revision movement a number of states required or permitted, as an alternative to an operating physician's personal professional judgment, the advice of other independent physicians. Later legislation generally mandated preliminary consultation with or approval by medical colleagues before abortions could be performed. Approval could be gained through certification by medical practitioners other than a physician wishing to terminate a pregnancy, by a hospital review committee, or by both. Because peer concurrence took time, several states legislated an emer-

83. Alaska, Hawaii, Wash. The English Abortion Act, 1967, c. 87, §§ 1(1)(a), (2), reaches about the same result by permitting medical practitioners to consider the actual or reasonably foreseeable environment of pregnant women in deciding whether their physical or mental health may be injured by pregnancy, as well as the risk to siblings if an additional child is born. See also supra note 16.

84. See supra notes 39-44 and accompanying text.

85. Alaska, Ark., Del., Ga., Hawaii, N.C., Or., S.C., Va., Wash.

86. See infra notes 298-300 and accompanying text.

87. La., Miss.

88. Fla. (repealed 1972), Neb., N.H., Ohio, Wis. Missouri provided for advice by one duly licensed physician if an abortion was performed by one who was not a duly licensed physician. On this anomaly, see supra note 34.

89. Ark., Del., Ga., Kan., N.C., Or., S.C. Concurring physicians generally could not be relatives of or associated in medical practice with a doctor who wished to perform an abortion. The English Abortion Act, 1967, c. 7, § 1(1), requires the good faith opin-
ergency exception for situations in which a woman's life would be put in jeopardy unless an abortion were performed immediately. A rati-
fication of medical necessity then had to be obtained swiftly after an abortion.\textsuperscript{92} The degree to which such requirements have survived the Court's 1973 abortion decisions is discussed below.\textsuperscript{93}

5. Special Approval in Rape and Incest Cases

Statutes which allowed abortion in rape and incest cases on hu-
manitarian grounds\textsuperscript{94} generally required some form of substantiation. A woman's claim of violation was not an automatic reason because medical grounds did not necessarily justify abortion in all instances of sexual assaults. Sometimes some form of complaint or affidavit by a victim sufficed,\textsuperscript{95} but more commonly approval or certification by prosecuting authorities was needed.\textsuperscript{96}

6. Persons Authorized to Perform Abortions

Revised statutes before 1973 required terminations of pregnancy to be performed by physicians licensed in the jurisdiction.\textsuperscript{97} The stat-
utes did not touch on the legal status of nurses and medical paraprofessionals who performed or participated in lawful therapeu-
tic abortions, but one may assume that prosecuting authorities were unenthusiastic about prosecuting persons acting in such a capacity. At any rate, no precedent on the matter emerged.

7. Place of Performance of Abortions

Statutes which restricted the grounds for lawful abortion to health,
eugenic or humanitarian concerns almost always required abortions to be performed in accredited hospitals.\textsuperscript{98} Two states, however, allowed abortions to be performed in approved clinics away from full-service hospitals.\textsuperscript{99} The unconstitutionality of some situs restrictions is discussed below.\textsuperscript{100}

8. Required Records and Reports

As legislatures began to recognize the licitness of medically indicated abortions, they also instituted record keeping and reporting requirements. Sometimes, applications or certificates needed only to be retained in medical office or hospital patient files,\textsuperscript{101} but periodic reports to state agencies increasingly came to be mandated.\textsuperscript{102} Requirements were imposed that the identity of abortion patients be kept confidential. The constitutionality of much broader contemporary reporting legislation is commented on below.\textsuperscript{103}


Many doctors, nurses and hospital employees have strong religious or moral scruples against abortion, and many private, particularly church-affiliated, hospitals will not tolerate the performance of abortions on their premises. As therapeutic abortion came increasingly to be recognized, the question arose whether individuals or hospitals could refrain legally from participation. Many states had legislated to allow a freedom of conscience exemption.\textsuperscript{104} The number of such statutes has markedly increased since Roe and Doe were decided.\textsuperscript{105}

B. Resort to Litigation: The New Frontier

The wave or, perhaps more accurately, ripple of legislative reform probably had peaked by 1973. In any event, advocacy increased rap-
idly for constitutional invalidation of legislative restrictions on therapeutic abortion. The principal grounds advanced were the following: vagueness and indefiniteness in abortion legislation denying due process of law; infringement of equal protection, through either an arbitrary legislative classification of eligibility and ineligibility for abortion or financial discrimination against indigents; or invasion of a constitutionally protected right of privacy. What might have evolved from a long process of constitutional litigation is unknowable, because the Supreme Court in 1973 asserted its primacy in the constitutional regulation of abortion legislation.

IV. BASIC CONSTITUTIONAL DOCTRINE

As matters eventuated, the Court built its doctrinal framework on the constitutional right to privacy, which it thought "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." This analysis has been followed in subsequent cases, most recently in City of Akron v. Akron Center for Reproductive Health. In selecting the "right to privacy" rationale, the Court specifically repudiated the claim that fetuses are "persons" within the


For a retrospective view, see Moore, Moral Sentiment in Judicial Opinions on Abortion, 15 SANTA CLARA L. REV. 591 (1975).


110. See the contraceptive cases cited supra note 22; Stanley v. Georgia, 394 U.S. 557 (1969) (private possession of pornography).


113. 103 S. Ct. 2481, 2487 (1983) (Roe is entitled to stare decisis recognition).
meaning of the fourteenth amendment: “[T]he unborn have never been recognized in the law as persons in the whole sense.” Thus, a human being entitled to direct constitutional protection emerges at live birth, not conception. This premise has since been reaffirmed by the Court.

The Court’s basic constitutional premise is also attested to by the Court’s rulings on standing to attack abortion legislation. A woman who is pregnant at the time legal action commences has standing.

---

115. Id. at 161-62.

[The ordinance] requires the physician to inform his patient that ‘the unborn child is a human life from the moment of conception,’ a requirement inconsistent with the Court’s holding in Roe v. Wade that a State may not adopt one theory of when life begins to justify its regulation of abortions.

_id_. (citation omitted).


On the constitutional amendment, see Destro, supra note 27, at 1319-51. A survey of constitutional provisions in other nations may be found in Mukerjee, World Constitutions and Population: A Preliminary Survey of World Constitutions, 16 Indian L. Inst. J. 675, 679-87 (1974).

The right to life controversy manifests itself in other ways. See, e.g., Federal Election Comm’n v. Massachusetts Citizens for Life, 589 F. Supp. 646 (D. Mass. 1984) (FEC could not invoke 2 U.S.C. § 441b (1982) to prevent antiabortion group from expending funds for a special election issue of its prolife publication, distributed at the time of an election for federal office. Congress did not intend to include such activities as regulated support for political candidates, since it would have violated the first amendment had it done so.); Fausto v. Diamond, 589 F. Supp. 451 (D.R.I. 1984) (city sponsorship of fountain as memorial to “The Unborn Child,” with plaque quoting Deut. 30:19, “Choose life, then, that you and your descendants may live,” did not amount to establishment of religion; plaintiffs pointed out Roman Catholic sponsorship of the memorial had a declared objective of including aborted fetuses).

117. In Roe v. Wade, 410 U.S. at 124-25, the Court rejected the appellee’s contention that the case had been mooted because Roe’s pregnancy long since had been terminated by birth or abortion. Pregnancies will come to term before usual appellate processes can be completed, but “[p]regnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us.”
because her right of privacy is directly affected by legal prohibitions against abortion.\textsuperscript{118} On the other hand, married women (with their husbands) who assert that they might become pregnant in the future and require termination of pregnancy for health reasons do not have standing.\textsuperscript{119} Doctors who may be prosecuted or otherwise interfered with in their practice also are directly affected,\textsuperscript{120} as are clinics and facilities providing abortion services.\textsuperscript{121}

Having recognized that women's claims to abortion find support in a constitutional right to privacy, the Court nevertheless rejected the contention that such a right is absolute, allowing a woman “to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses.”\textsuperscript{122} A “pregnant woman cannot be isolated in her privacy,” for she “carries an embryo and, later, a fetus . . . .”\textsuperscript{123} Accordingly, abortion is never completely free from state regulation, although the scope of state powers grows slowly with a pregnancy and has ceiling limitations far lower than those recognized in state legislation before 1973.

During approximately the first trimester of pregnancy\textsuperscript{124} "the abortion decision and its effectuation must be left to the medical

\textsuperscript{118} Id. (quoting Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)).
\textsuperscript{119} Id. at 153.
\textsuperscript{120} Doe v. Bolton, 410 U.S. 179, 188-89 (1973). See also Colautti v. Franklin, 439 U.S. 379 (1979). In Roe v. Wade, 410 U.S. at 124-27, a medical doctor, a defendant in a pending criminal prosecution, was not allowed to appeal. This was not because of a want of standing; but because the Court's doctrine of preclusion, set forth in Samuels v. Mackell, 401 U.S. 66 (1971), and Younger v. Harris, 401 U.S. 37 (1971), prohibits federal courts from intervening in matters pending in state courts; potential prosecutions are not within the doctrine. In Doe v. Bolton, 410 U.S. at 189, the Court thought it unnecessary to decide whether nurses, clergy, social workers and counseling services had standing because it resolved all the issues affecting them in connection with the physicians' attack on the state statute.

In Harris v. McRae, 448 U.S. 297, 318 n.21 (1980), discussed \textit{infra} in notes 470-74 and accompanying text, the Court found that the constitutional entitlement of a physician advising financially unable Medicaid recipients was no greater than the entitlement of the patient; therefore, he or she had no greater due process protections.

\textsuperscript{121} Abortion clinics were allowed to litigate constitutional issues in Planned Parenthood v. Danforth, 428 U.S. 52 (1976), and City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983). See also Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328 (5th Cir. 1981) (abortion clinic had standing to assert privacy rights of women who might be unable to obtain abortions if municipality denied occupational license to clinic on basis of zoning ordinance).

\textsuperscript{122} Roe v. Wade, 410 U.S. at 153.
\textsuperscript{123} Id. at 159.
\textsuperscript{124} The Court's definition of “trimester” is discussed \textit{infra} in notes 177-78 and accompanying text.
judgment of the pregnant woman's attending physician,' without inter-
ference from the State."125 "The participation by the attending 
physician in the abortion decision, and his responsibility in that deci-
sion"126 underlie the standing accorded to physicians to litigate abor-
tion decisions.127 Throughout early pregnancy, minor regulations can 
be imposed if they further "important health-related State concerns," 
but only if they do not "interfere with the physician-patient consulta-
tion or with the woman's choice between abortion and childbirth."128

After the first stage, states may choose to impose reasonable re-
strictions relating to the preservation and protection of maternal 
health,129 but state regulation cannot "depart from accepted medical 
practice" or increase the costs and limit the availability of abortions 
"without promoting important health benefits."130 After viability,131 
a state "may regulate an abortion to protect the life of the fetus and 
even may proscribe abortion except where it is necessary, in appro-
priate medical judgment, for the preservation of the life or health of 
the mother."132

These, then, are the basics of the Court's regulation of abortion, 
the constitutional structure for most of its decisions on specific as-
pects of abortion law. This does not mean, however, that no other 
constitutional rationale will be invoked. For example, the Court has 
relied on the vagueness and indefiniteness concept under the due 
process clause133 to strike down penal statutes invoked against physi-
cians.134 Equal protection, in contrast, has not had significant impact 
on abortion law.135

at 164).
126. Id.
127. See supra note 120 and accompanying text.
128. City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. at 2493 
(footnote omitted).
130. City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. at 
2493. On the minimal risk of medically-administered abortion, see Sneideman, supra 
note 19, at 194-97.
131. "[A] point purposefully left flexible for professional determination, and depen-
dent upon developing medical skill and technical ability . . . ." Planned Parenthood v. 
Danforth, 428 U.S. at 61 (footnote omitted). See also infra notes 179-82 and accompa-
nying text.
132. Planned Parenthood v. Danforth, 428 U.S. at 61 (paraphrasing Roe v. Wade, 
410 U.S. at 163-65).
133. See cases cited supra note 107.
134. City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. at 
2503-04 (ordinance making it a misdemeanor not to dispose of remains of unborn chil-
dren in "a humane and sanitary manner," held vague and indefinite); Colautti v. 
Franklin, 439 U.S. at 390-401 (viability determination and standard of care provisions 
in felony statute voided for vagueness).
135. See infra notes 462-65, 473-74 and accompanying text. Efforts to claim a right 
to abortion based on free exercise of religion under the first amendment likewise have
Abortion Legislation in the 1980's
PEPPERDINE LAW REVIEW

V. SCOPE AND CONSTITUTIONALITY OF CURRENT ABORTION LEGISLATION

A. Legislative Responses to the 1973 Decisions

The initial impact of Roe and Doe was manifested by state high court decisions invalidating traditional abortion legislation.136 On occasion, legislatures have apparently decided to do nothing. The recent New Jersey criminal code contains no abortion provisions.137 Likewise, the text of the Texas provisions no longer appears; they have been replaced by a compiler's notation of "unconstitutional."138 Most legislatures, however, revamped their statutes in response to or anticipation of judicial invalidation of pre-1973 legislation.

A handful of states retained139 or adopted140 a policy of leaving

been rejected. Harris v. McRae, 448 U.S. 297, 318-21 (1980); Women's Servs. v. Thone, 636 F.2d 206, 209 (8th Cir. 1980).


137. The matter was left to a legislative study commission. New Jersey Criminal Law Revision Comm'n Final Report, Commentary 259 (1971). A comprehensive abortion regulation statute was approved by the New Jersey Legislature, Assembly Bill No. 1285, but was vetoed by Governor Brendan Byrne on Jan. 3, 1980.

Illegal abortions could be prosecuted under simple assault provisions, N.J. STAT. ANN. § 2C:12-1(a)(1) (West 1982), since consent to acts causing more than trifling inconvenience is legally irrelevant to criminality. Id. § 2C:2-10(b); MODEL PENAL CODE § 2.11(2) (P.O.D. 1962).

138. TEX. REV. CIV. STAT. ANN. arts. 4512.1-4512.4, 4512.6 (Vernon 1976). Criminal abortions could be prosecuted as assault under TEX. PENAL CODE ANN. §§ 22.02(a)(1), 22.02(a)(1) (Vernon 1974), however, and consent is valid only if a victim knows the injury to be a risk of "recognized medical treatment." Id. § 22.06(2)(B).


140. E.g., NEV. REV. STAT. § 442.260(1) (1981) (although § 442.250 (1983) tracks the Roe grounds for lawful abortion); OHIO REV. CODE ANN. § 3701.341(A) (Page 1980) (although the provision lists only some matters for regulation without an ejusdem generis clause). Failure to comply with procedures in an administrative procedure act governing promulgation of regulations can invalidate regulations. See, e.g., McKee v. Likins, 261 N.W.2d 566 (Minn. 1977) (regulation restricting use of public funds for therapeutic abortion invalidated for failure to comply with APA notice requirements).
regulation of therapeutic abortion to administrative agencies. Most have accomplished substantial revisions with the Supreme Court’s reversal of its constitutional principles as their guide.141

Several legislatures, however, voiced their restiveness or outright opposition to the Court’s doctrine. Some stated a preference for normal childbirth over abortion,142 and others affirmed the state’s obligation to protect human life whether unborn or not.143 Nebraska objected to Supreme Court “intrusion” and “deplored” the destruction of unborn human lives which would result,144 while Montana announced its intent to restrict abortions to the extent it could do so constitutionally.145 Illinois146 and Kentucky147 declared their intent to prohibit abortions should the Supreme Court reverse its constitutional stance or should the Constitution be amended to permit them to do so. Idaho has gone the furthest in that regard. It has standby provisions148 to come into force through gubernatorial proclamation

---

141. Cf. Mo. Ann. Stat. § 188.010 (Vernon 1983) (“It is the intention of the [legislature] to reasonably regulate abortion in conformance with the decisions of the supreme court of the United States”); 18 Pa. Cons. Stat. Ann. § 3202(c) (Purdon 1983) (“In every relevant civil or criminal proceeding in which it is possible to do so without violating the Federal Constitution, the common and statutory law of Pennsylvania shall be construed so as to extend to the unborn the equal protection of the laws and to further the public policy of this Commonwealth encouraging childbirth over abortion.”).

Articles on current abortion legislation from the standpoint of theology and ethics include Eidsmoe, A Biblical View of Abortion, 1983 J. CHRIST. JURIS. 17; Fletcher, Abortion and the True Believer, 91 CHRISTIAN CENTURY 1126 (Nov. 27, 1974); Fromer, supra note 5, at 239-40; Nelson, The Churches and Abortion Law Reform, 1983 J. CHRIST. JURIS. 29; Orloski, Abortion: Legal Questions and Legislative Alternatives, 131 AMERICA 50 (Aug. 10, 1974).


should the constitutional picture change.\textsuperscript{149} Obviously, legislative resonations of this nature, while therapeutic for anti-abortion legislators and their constituents, have no legal force and must be ignored by state judges.

States vary in the placement of therapeutic abortion provisions within the body of statutes. Some have continued the tradition of penal code regulation supported by ancillary provisions elsewhere, but a great many have chosen the context of laws governing the healing professions with residual or ancillary criminal provisions. The statutory analysis which follows looks first at civil or civil-oriented legislation, then at criminal law provisions, and finally at restrictions affecting publicly funded abortion services.

B. Noncriminal Regulation of Therapeutic Abortion

1. Definitions

a. “Abortion.”

The new focus on abortion as a medical technique has brought about modernized legal definitions, usually of the term abortion, but sometimes of “miscarriage”\textsuperscript{150} or “feticide.”\textsuperscript{151} A few states content themselves with defining abortion as termination of pregnancy,\textsuperscript{152} while others specify methods in a comprehensive way.\textsuperscript{153}

Abortion implies intent or purpose, but statutes frequently spell it out anyway, either generally\textsuperscript{154} or in terms of intent to produce fetal

\textsuperscript{149} Id. § 18-613.
\textsuperscript{150} ME. REV. STAT. ANN. tit. 22, § 1596(1)(B) (1980).
\textsuperscript{151} IOWA CODE ANN. § 707.7 (West 1979). This may well reflect a legislative bias against abortion. See supra notes 5, 142-49 and accompanying text.
\textsuperscript{154} E.g., IDAHO CODE § 18-604(1) (1979) (intentional); IOWA CODE ANN. § 707.7 (West 1979) (intentional); KAN. STAT. ANN. § 21-3407(1) (1981) (purposeful); ME. REV. STAT. ANN. tit. 22, §§ 1596(1)(A), 1598(2)(A) (1980) (intentional); MASS. GEN. LAWS ANN. ch. 112, § 12K (West 1983) (knowing destruction or intentional expulsion or removal); MICH. COMP. LAWS ANN. § 333.2833(1) (West 1969) (purposeful); MO. ANN. STAT. § 188.015(1) (Vernon 1983) (intentional); NEB. REV. STAT. § 28-326(1) (Supp. 1984) (intent); N.Y. PENAL LAW § 125.05(2) (McKinney 1975) (intent); OKLA. STAT.
death.\textsuperscript{155} More frequently, the intent element is stated inversely, i.e., a purpose other than to induce live birth\textsuperscript{156} or to remove a dead fetus.\textsuperscript{157} Only rarely does a definition of abortion include references to viability\textsuperscript{158} or period of gestation;\textsuperscript{159} such matters usually are dealt with in substantive provisions.

b. “Conception.”

A definition of conception probably is functionally unnecessary to delineate the scope of therapeutic abortion. Nevertheless, some states have specifically provided one in neutral terms such as “fecundation of the ovum by the spermatozoa.”\textsuperscript{160} Sometimes the definition relates to some other term like “pregnancy,” while at other times it is synonymous with “fetus” or “unborn child.” These terms are of doubtful constitutionality if invoked to limit therapeutic abortions.\textsuperscript{161}

c. “Pregnancy.”

The term “pregnancy” is defined variously as implantation of an embryo in the uterus,\textsuperscript{162} or as the condition of a woman carrying a fetus or embryo within her body as a result of conception.\textsuperscript{163}
first definition is another legislative means of exempting contraceptive techniques which prevent implantation ("morning-after pills") from the coverage of abortion statutes, while the second definition usually is tied to legislative descriptions of fetuses or unborn children.

d. "Fetus" and related definitions.

Those state legislatures which have defined "fetus" have not been motivated by a desire to assure medical personnel that medical terminology is recognized in the law. Instead, they seem to have used such definitions as another way of sniping at the Supreme Court. For example, Illinois states that "fetus" and "unborn child" each means a human being from fertilization until birth. Kentucky defines "fetus" the same way. Other states use the term "unborn child" to the same effect. To the extent that these provisions serve to vent legislative steam and soothe right-to-life constituents, no harm is done. If, however, they are intended to limit the availability of medically indicated abortions, they are a nullity under the Supreme Court's constitutional doctrine.

e. "Trimester."

A few statutes contain definitions of trimesters, perhaps because that is significant under Roe v. Wade. Idaho defines the first trimester as the initial thirteen weeks of pregnancy, the second trimester as the portion of gestation between the fourteenth week and viability, and the third as the segment after viability. Penn-

sylvania uses a period of twelve weeks for the first trimester. Illinois delineates the first trimester as twelve weeks from ovulation rather than computed on the basis of menstrual cycle, whereas South Carolina computes it from conception. Indiana divides each pregnancy into three equal parts of three months each.

In 1983, the Supreme Court selected the beginning of the last menstrual period experienced by a woman before impregnation as the means to define trimester. The Court adhered to this trimester analysis as “a reasonable legal framework for limiting a State’s authority to regulate abortions.” To the extent that state legislatures use a variant definition to limit the availability of abortions which the federal constitution guarantees, they invite invalidation of the offending provisions.

f. “Viability.”

The point of viability is important under the Supreme Court’s delineation of constitutionally protected abortion. The Court defined viability as the point in a pregnancy at which “the fetus is ‘potentially able to live outside the mother’s womb, albeit with artificial aid.’” Presumably the fetus is capable of ‘meaningful life outside the"

in favor of licensed physicians that the second trimester does not end before the beginning of the 25th week of pregnancy. Id. § 18-604(6). 
175. S.C. CODE ANN. § 44-41-10(i) (Law. Co-op. 1977) (through 12th week); conception is defined id. § 44-41-10(g). The second trimester extends from the 13th through the 24th week, id. § 44-41-10(j), and the third trimester from the 25th week through termination of pregnancy. Id. § 44-41-10(k).
179. A declaration of unconstitutionality is even more likely if criminal penalties turn on ascertaining the stage of pregnancy. IND. CODE ANN. § 35-1-58.5-3 (Burns 1979 & Supp. 1984) requires a physician to determine viability and certify which trimester of pregnancy the patient is in. Section 35-1-58.5-4 makes noncompliance a class C felony. If such a standard functions as an impediment to free implementation of a pregnant woman’s constitutional claim to a therapeutic abortion, it will be struck down. See City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. at 2493.
mother’s womb,’ ... [which] ‘is usually placed’ at about seven months or 28 weeks, but may occur earlier.” Quite a number of states have utilized that language or a near variant of it. This is obviously the only safe course, because the Court has made it clear that viability cannot be determined arbitrarily in terms of life, but must rest on each woman’s pregnancy.

g. “Live born.”

Four statutes contain definitions of live birth and live born. These do not impact directly on abortion, but are relevant in connect-


183. Planned Parenthood v. Danforth, 428 U.S. at 64-65. There is latent difficulty in, e.g., MINN. STAT. ANN. § 145.411(2) (West Supp. 1984) (“[d]uring the second half of its gestation period a fetus shall be considered potentially ‘viable’ ”), if that is intended to extend the limitations on post-viability abortions to women whose fetuses are not yet viable. South Carolina establishes a presumption of viability no sooner than the 24th week of pregnancy. S.C. CODE ANN. § 44-4110(1) (Law. Co-op. 1977). This is acceptable if a woman with a viable fetus can obtain an abortion based on medical considerations not related to her life and health (assuming that does not infringe the constitutional status of the fetus, an implication of its Roe v. Wade analysis the Court has not yet explored), but unacceptable if invoked to deny an otherwise proper abortion to a woman who has not experienced fetal life by the 24th week of pregnancy.

Viability constitutionally may be defined in terms of a reasonable likelihood that a fetus is capable of sustained survival outside the uterus. Charles v. Carey, 579 F. Supp. 464, 468-69 (N.D. Ill. 1983).

184. ILL. ANN. STAT. ch. 38, § 81-26(2) (Smith-Hurd Supp. 1984-1985) (“[i]t shall not be construed to imply that any human being aborted is not an individual under the Criminal Code of 1961.”); ME. REV. STAT. ANN. tit. 22, § 1595 (1980); N.D. CENT. CODE § 14-02.1-02(4) (1981); 18 PA. CONS. STAT. ANN. § 3203 (Purdon 1983) (“human being was completely expelled or extracted from her or his mother and after such separation breathed or showed evidence of any of the following: beating of the heart, pulsation of
tion with legal responsibility to safeguard the lives of viable fetuses born alive during or as a consequence of an abortion. 185

2. Persons Performing Abortions

*Roe v. Wade* was explicit that abortion is a medical matter and that illicit abortions must be performed by professionally qualified persons. 186 Accordingly, therapeutic abortion laws are uniform in restricting the performance of abortions to licensed physicians. 187 The

the umbilical cord, definite movement of voluntary muscles or any brain-wave activity*').

185. See infra notes 347-51, 437-39 and accompanying text. In Constitutional Right to Life Comm. v. Cannon, 117 R.I. 52, 363 A.2d 215 (1976), the court held that states are bound by the chronological approach of the Supreme Court to accommodate the conflicting private and public interests.

186. 410 U.S. at 165. Abortion may be inferred to be a medical matter from the wording (i.e., the first trimester decision is left to the "medical judgment of the pregnant woman's physician"). *Id.*

187. *E.g.,* ALASKA STAT. § 18.16.010 (1981); CAL. HEALTH & SAFETY CODE § 25951 (West 1984); COLO. REV. STAT. § 18-6-101(1) (1978); CONN. GEN. STAT. ANN. § 53-31a(c) (West Supp. 1984); DEL. CODE ANN. tit. 24, § 1790(a) (1981); FLA. STAT. ANN. § 390.001(1)(a), (3) (West Supp. 1984); GA. CODE ANN. § 16-12-140(a) (1982); IDAHO CODE §§ 18-604(2), 18-608, 18-609 (1979), and 18-606(2) (hospital, nurse or other health care personnel do not commit a crime if in good faith they provide abortion-related services in reliance on the directions of a physician or pursuant to a hospital admission authorized by a physician); ILL. ANN. STAT. ch. 38, §§ 81-22(3), 81-23.1 (Smith-Hurd Supp. 1984-1985); IND. CODE ANN. §§ 35-1-58.5-1(d), 35-1-58.5-2(1)(A) (Burns 1979 & Supp. 1984); IOWA CODE ANN. § 707.7 (West 1979); KAN. STAT. ANN. § 21-3407(2) (1981); KY. REV. STAT. §§ 311.720(7), 311.750 (1983); LA. REV. STAT. ANN. § 37:1285(8.1), (9) (West Supp. 1984) (unless physician lacks training and experience to perform the procedure); ME. REV. STAT. ANN. tit. 22, § 1598(1), (3)(A) (1980); MD. PUB. HEALTH CODE ANN. §§ 20-207, 20-208(a) (Supp. 1983); MASS. GEN. LAWS ANN. ch. 112, §§ 12L, 12M (West 1983); MINN. STAT. ANN. § 145.412(1)(1) (West Supp. 1984) (or physician in training under supervision of licensed physician); MO. ANN. STAT. § 188.020 (Vernon 1983); MONT. CODE ANN. § 50-20-109(1)(a) (1983); NEB. REV. STAT § 28-335 (1979) (abortion by other than a licensed physician a felony); NEV. REV. STAT. § 442.250(1)(a) (1983) (including physician in federal employment); N.H. REV. CODE ANN. § 39-4-201(c) (1982) (including qualified physician in federal employment); N.H. REV. CODE ANN. § 9.02.070 (1977); WYO. STAT. §§ 35-6-101(a)(v), 35-6-103, 35-6-111 (1977) (statutory references are to physicians performing abortions, and abortion by other than a physician is punishable as a felony).

V.I. CODE ANN. tit. 14, § 151(b)(1) (Supp. 1983), refers to licensed physicians during the first 12 weeks of pregnancy, but subsections (2) and (3) limit abortions thereafter to those performed by licensed surgeons or gynecologists. If there is no supportable medical basis for that limitation, and it serves to make otherwise lawful abortions less readily available than would normally be the case, the latter limitation is unconstitutional under City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. at 2509-12.

If a state legislature does not legitimize therapeutic abortions performed by licensed
converse of this is that persons other than physicians who perform abortions can be punished. Perhaps a potential area of litigation lurks concerning whether nurses or medical paraprofessionals can be prosecuted under such statutes. Often these individuals, who are supervised by licensed physicians and who follow accepted medical techniques in performing therapeutic abortions, appear to be covered by criminal statute, because they are not licensed physicians. One may assume that if a restriction of lawful abortion to licensed physicians is not consonant with accepted medical practice, and a consequence is the impediment of pregnant women in their quest for lawful abortions, the restriction is constitutionally unacceptable.

3. Physician-Patient Consultation

The Supreme Court has spoken of abortion as something based on physician-patient consultation, because consent by the patient is a condition to lawful abortion. Counseling is reflected in different ways in legislation. It may be sanctioned for minors, or posited as an appropriate subject of administrative regulation. As a form of consumer protection law, institutions announcing the availability of counseling services must have qualified staff members to provide them. Illinois and Pennsylvania specifically require it as a condition for a determination that an abortion is necessary.

Some legislation, however, clearly states that it is ancillary to more elaborate statutory requirements concerning information which physicians, a court must read in that exemption from penal law coverage. See, e.g., People v. Bricker, 389 Mich. 524, 208 N.W.2d 172 (1973). 188. Connecticut v. Menillo, 423 U.S. 9 (1975) (per curiam). See infra notes 412-15 and accompanying text.


190. See id. at 2493.


192. E.g., V.I. CODE ANN. tit. 19, § 291(a) (1977) (public or private hospitals, institutions and personnel may counsel minors concerning pregnancy, including abortion).


195. E.g., ILL. ANN. STAT. ch. 38, § 81-23.1(B)(1)(a) (Smith-Hurd Supp. 1984-1985) (administrative regulations must provide for, this); 18 PA. CONS. STAT. ANN. § 3204(b) (Purdon 1983).

196. OKLA. STAT. ANN. tit. 63, § 1-736 (West 1984); S.D. CODIFIED LAWS ANN. § 34-23A-10 (1977) (physicians must make available to patients at request information about
must be communicated to pregnant women before they can consent to abortion. If the informational process functions to deter or impede decisions to have abortions, it is unconstitutional, and associated counseling requirements will fall with it.

4. Information to Patients

An informed consent is a prerequisite to a lawful therapeutic abortion. A patient must be given information about "just what would be done and . . . its consequences," and state legislation may ensure that the abortion decision is made "in the light of all attendant circumstances—psychological and emotional as well as physical—that might be relevant to the well-being of the patient." In the case of immature minors, state concerns to protect pregnant girls and to promote family integrity justify special measures to ensure that "the abortion decision is made with understanding and after careful deliberation." A sizeable number of states have picked up on this dimension of the Court's jurisprudence, in some instances to implement its intent, but at other times with an obvious purpose of scaring patients away from decisions to seek abortions. The latter form of legislation has produced a new level of constitutional intervention by the Court.

Statutes call for communicating information that, in a physician's best professional judgment, a woman is pregnant and the length of the pregnancy to the time of consultation. They require informa-
tion about the abortion procedure to be used,\textsuperscript{205} and the effects\textsuperscript{206} and risks\textsuperscript{207} associated with abortion. Three states call for patients to be provided with the name of the physician who will perform the abortion.\textsuperscript{208} Several authorize communication of any other information a counselor believes significant to an informed consent.\textsuperscript{209} With


\textsuperscript{209} E.g., Ill. Ann. Stat. ch. 38, § 81-23.5(3) (Smith-Hurd Supp. 1984-1985) (physician or persons associated with them can express personal views concerning the validity or importance of information required to be communicated); Ky. Rev. Stat. 459
the possible exception of certain language in the Missouri, Nevada and North Dakota statutes bearing on the consequences of abortion, which may or may not be supportable by current medical knowledge, the information required to be given is compatible with the Supreme Court's expectations. This probably cannot be said, however, of requirements that pregnant women be told about the use of anaesthesia or analgesics to prevent fetal pain, or information that abortion is a major surgical technique.

A common legislative requirement is that a pregnant woman be told about alternatives to abortion including the availability of

§ 311.726(4) (1983) (same); MO. ANN. STAT. § 188.039(3) (Vernon 1983); NEV. REV. STAT. § 442.253(1)(b) (1983); N.D. CENT. CODE § 14-02.1-02(5) (1981) (any other explanation of information which in the exercise of the physician's best medical judgment is reasonably necessary to allow the woman to give an informed consent with full knowledge of the nature and consequences of abortion); R.I. GEN. LAWS § 23-4.7-3(d) (Supp. 1984) (same); UTAH CODE ANN. § 76-7-305(2) (1978) (other factors deemed necessary to a voluntary and informed consent).

At least four states, Illinois, ILL. ANN. STAT. ch. 38, § 81-23.5 (Smith-Hurd Supp. 1984-1985), Nevada, NEV. REV. STAT. § 442.253(l) (1983), Pennsylvania, 18 PA. CONS. STAT. ANN. § 3208(a) (Purdy 1983), and Rhode Island, R.I. GEN. LAWS § 23-4.7-5(c) (Supp. 1984), require women to receive printed information in a language they can understand, with a notation whether an interpreter has been used during counseling. Statutes in Rhode Island, id. § 23-4.7-5 (d), and South Dakota, S.D. CODIFIED LAWS ANN. § 34-23A-10.1 (Supp. 1984), allow for a copy to the patient at her request.

To the extent there is no significantly greater risk of premature births, tubal pregnancies and stillbirths following induced abortion in comparison to spontaneous miscarriages and normal childbirth, based on current medical experience, the statutory language probably provides the "parade of horribles" which leads to constitutional invalidation. See City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. at 2500. See also infra notes 220-22 and accompanying text.

This pattern of legislation is constitutional, from indications in City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. at 2501, sustaining ordinance language similar to most of the cited statutes.

ILL. ANN. STAT. ch. 38, § 81-26(6) (Smith-Hurd Supp. 1984-1985) (class B misdemeanor to fail to inform). This seems unconstitutional in light of Supreme Court comments in City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. at 2500 ("a dubious statement"); trial court expert evidence supported a conclusion that it is a minor surgical procedure. Id. at 2500 n.35.

TENN. CODE ANN. § 39-4-202(b)(4) (1982) (abortion in a considerable number of cases constitutes a major surgical procedure). Such a warning was invalidated in City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. at 2500 ("a dubious statement"); trial court expert evidence supported a conclusion that it is a minor surgical procedure. Id. at 2500 n.35.

services and financial aid, adoption and counseling. In several states, public agencies supply forms and other information concerning public and private agencies available to help women if they request. One state provides that a woman cannot be denied public assistance if she refuses to consent to an abortion.

With some hesitancy, one can assume that these requirements, standing alone, may be imposed constitutionally. The Court noted that "a State is not always foreclosed from asserting an interest in whether pregnancies end in abortion or childbirth," and information about alternatives and support services appears to be as necessary for an informed selection among alternatives as information about the medical dimensions of abortion and childbirth.

The same cannot be said, however, of statutory requirements that patients be told the specifics of fetal development and characteristics. Utah has gone the farthest in this regard, but several other states require similar information. The Supreme Court voided language...
typical of these statutes because it "would involve at best speculation by the physician." Therefore, one may doubt that a physician or counselor constitutionally could be prosecuted for a failure to comply with legislative requirements which seem on their face to be intended to discourage free choice of abortion, and not to provide neutral information relevant to a woman's decision.

In sum, although some of the specific information required under several state laws cannot constitutionally be required of physicians, most of the individual requirements are probably valid. Nevertheless, if one stands apart and surveys the totality of information mandated in some jurisdictions, particularly Illinois, Kentucky, Missouri, Nevada, North Dakota, Pennsylvania, Tennessee and Utah, the legislative purpose seems clear—to discourage consents to abortion, a governmental motive which the Supreme Court has declared unconstitutional.

There is one other dimension of unconstitutionality in many information statutes. Some do not specify who must impart the information, or allow for alternative sources to physicians. A number of


223. City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. at 2500 (footnote omitted). See also Planned Parenthood Ass'n v. Ashcroft, 655 F.2d 848, 867-68 (8th Cir. 1981), aff'd on other grounds, 103 S. Ct. 2517 (1983) (plurality opinion) (woman's decision was burdened insofar as anxiety and tension involved in such a decision are increased without medical justification); Planned Parenthood League v. Bellotti, 641 F.2d 1006, 1021-22 (1st Cir. 1981) (information not directly related to any medically relevant fact, would cause many women "emotional distress, anxiety, guilt, and in some cases increased physical pain"). There is no impediment to state regulations requiring patient counseling without specifying the content. Birth Control Centers, Inc. v. Reizen, 743 F.2d 352, 362-63 (6th Cir. 1984).

224. City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. at 2501: "By insisting upon recitation of a lengthy and inflexible list of information, Akron unreasonably has placed 'obstacles in the path of the doctor upon whom [a woman is] entitled to rely for advice in connection with her decision.'" Id. (quoting Whalen v. Roe, 429 U.S. 589, 604 n.33 (1977)).


states, however, require physicians, often on threat of criminal penalties, to communicate the information personally. The Supreme Court invalidated that approach in City of Akron v. Akron Center for Reproductive Health, although it confirmed that a physician cannot abdicate his or her ultimate responsibility for the medical aspects of abortion. Therefore, states can require physicians to verify that adequate counseling has been provided by qualified persons and that a patient’s consent is informed.

One may also note in passing that only one state requires information to be given to spouses. Presently no state requires parents’ or guardians’ consent. The legitimacy of these mandates turns on the constitutionality of requiring spousal or parental consent.

5. Consent

a. General requirements.

As noted, medically indicated abortions must be consented to. This means a free choice on a woman’s part—freedom from any coercion. It is common to include the requirement of consent in legis-

FIED LAWS ANN. § 34-23A-10 (1977) (triggered only by a patient’s request for information about counseling service agencies).


228. 103 S. Ct. at 2501-03. The Court reasoned that consent of a woman can still be informed even though the physician has allowed another “qualified individual” to counsel her. Id. at 2502.


230. A similar Missouri provision was held invalid in Planned Parenthood Ass’n v. Ashcroft, 655 F.2d 848, 866 (8th Cir. 1981), aff’d on other grounds, 103 S. Ct. 2517 (1983) (plurality opinion).

231. See infra notes 252-56 and accompanying text (spousal consent); infra notes 243-51 and accompanying text (parental consent).


233. That norm appears occasionally in legislation. See, e.g., IOWA CODE ANN. § 707.8(3) (West Supp. 1984-1985) (procuring consent through force or intimidation a felony); 18 PA. CONS. STAT. ANN. § 3206(g) (Purdon 1983) (coercion of minor or mental incompetent); TENN. CODE ANN. § 39-4-201(b)(3) (1982) (obtain or procure abortion); UTAH CODE ANN. § 76-7-312 (1978) (coercion to obtain abortion).

The issue arises indirectly from time to time. See, e.g., People v. Pointer, 151 Cal. App. 3d 1128, 199 Cal. Rptr. 357 (1984) (court could not require as a condition of probation following conviction of child endangerment that the defendant not conceive again; this might force an abortion when there were other methods of forestalling future abortion).
child endangerment); Planned Parenthood Ass'n v. Department of Human Resources, 297 Or. 562, 687 P.2d 785 (1984) (court invoked state constitutional provisions to invalidate administrative regulation limiting number of elective abortions a woman could have under public funding). Cf. Sanchez v. Sirmons, 121 Misc. 2d 249, 467 N.Y.S.2d 757 (Sup. Ct. 1983) (arbitration clause in a medical consent form was not binding in malpractice suit based on bungled abortion unless defendant physician established that the woman knew she was waiving the right to a jury trial; the circumstances of an abortion decision made such awareness unlikely).

A refusal to undergo an abortion cannot be asserted as a defense in a "wrongful birth" action (see infra note 383) based on a claim that a plaintiff had brought about the damages through her own choice. Morris v. Frudenfeld, 135 Cal. App. 3d 23, 185 Cal. Rptr. 76 (1982); Rivera v. State, 94 Misc. 2d 157, 163, 404 N.Y.S.2d 950, 954 (Ct. Cl. 1978) (any interpretation of traditional doctrine which would require an abortion would be "an invasion of privacy of the grossest and most pernicious kind"). Nor is a plaintiff required to mitigate damages by undergoing a second abortion after a bungled one by a physician defendant. Delaney v. Krafte, 98 A.D.2d 128, 470 N.Y.S.2d 936 (1984).

A constitutional issue is inherent in statutory provisions, e.g., ILL. ANN. STAT. ch. 38, §§ 81-27, -28 (Smith-Hurd Supp. 1984-1985) (physician and hospital must notify juvenile court that infant has been born and juvenile court must determine whether it has been abandoned); IND. CODE ANN. § 35-1-58.5-7(c), (d) (Burns Supp. 1984); MO. ANN. STAT. § 188.040 (Vernon 1983); MONT. CODE ANN. § 50-20-108(2) (1983); N.D. CENT. CODE § 14-02.1-03 (1981); S.D. CODIFIED LAWS ANN. § 34-23A-18 (1977) (all facts and circumstances involving birth and abortion are relevant and material evidence in parental rights termination, dependency or neglect proceedings; state department of social services may commence proceedings); TENN. CODE ANN. § 39-4-207 (1982); TEX. FAM. CODE ANN. § 15.022 (Vernon Supp. 1984) (action to terminate parental rights may be based on abortion other than to save woman's life), that after a consent has been filed and a live birth results, the child is deemed abandoned and a ward of the state unless the consent is retracted before birth occurs.

The constitutionality of such provisions appears suspect. Cf. Freiman v. Ashcroft, 584 F.2d 247 (8th Cir. 1978), aff'd, 440 U.S. 941 (1979) (court invalidated statutory requirement that physician inform patient of that consequence). The Supreme Court in Planned Parenthood v. Danforth, 428 U.S. at 62 n.2, found that the physician plaintiffs lacked standing to attack this portion of the Missouri statute. See also Parness & Pritchard, supra note 110, at 293-95.

In instances of termination of the rights of a mother, one should consider Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981), in which the Court acknowledged that "a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)). Hence, a state which terminates that interest "will have worked a unique kind of deprivation." Id. "A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one." Id. Consequently, a hearing meeting the administrative due process requirements established in Mathews v. Eldridge, 424 U.S. 319 (1976), is a prerequisite to termination of parental rights. An automatic termination by statute, or based on presumptions of neglect resting on consents to lawful postviability abortions, does not meet that constitutional standard. Cf. Smith v. Organization of Foster Families, 431 U.S. 816, 847-56 (1977) (foster parents had a limited liberty interest in termination of custodial status, but state procedures amply recognized Mathews v. Eldridge concerns). A husband presumably would have equivalent claims.

As to putative fathers (fathers of children born outside marriage), the Court has indicated that they must be given an opportunity to develop a relationship with their children. Lehr v. Robertson, 103 S. Ct. 2985, 2994 (1983). Only if they do not avail themselves of such an opportunity can their claims to parental status be terminated summarily through adoption proceedings. Id. See also Quilloin v. Walcott, 434 U.S. 246 (1978). Otherwise, they have procedural protections, Stanley v. Illinois, 405 U.S. 645.
lation,\textsuperscript{234} quite frequently with the additional mandate that a consent be in writing\textsuperscript{235} or certified.\textsuperscript{236} Consent may be dispensed with only in cases of immediate threat to a woman's life\textsuperscript{227} or health.\textsuperscript{238} Otherwise, criminal\textsuperscript{239} or civil\textsuperscript{240} sanctions may be pursued against those


who perform abortions.

b. Consent by minor.

A pregnant minor must consent to an abortion like her elders. This is noted specifically in some statutes,\textsuperscript{241} subject to an emergency exception.\textsuperscript{242} The bulk of litigation, however, has been generated by requirements of consent by parents or legal guardians.\textsuperscript{243}

c. Consent by parent or guardian.

It has been common to require consent by both parents,\textsuperscript{244} one parent\textsuperscript{245} or a guardian\textsuperscript{246} before an unmarried, unemancipated minor

\begin{footnotesize}
\begin{enumerate}
\item Ann. § 34-23A-10.2 (Supp. 1984) (and matter reported to professional disciplinary authority); Utah Code Ann. § 76-7-314(2) (Supp. 1983).
\end{enumerate}
\end{footnotesize}
can have an abortion. A guardian may be given the exclusive power to decide whether someone judicially determined to be mentally incompetent may have an abortion.247

The constitutionality of these provisions has been the object of considerable decisional law. During the first trimester of pregnancy, a state cannot impose a blanket requirement that every pregnant minor obtain the consent of a parent or guardian.248 A pregnant minor’s consent controls if she is capable of giving it.249 If a minor is

§ 311.732(2) (Supp. 1984) (or person in loco parentis if no parent or guardian); MASS. GEN. LAWS ANN. ch. 112, § 125 (West 1983); MINN. STAT. ANN. § 144.543(4)(b) (West Supp. 1984) (if guardian authorizes abortion in advance, physician need not comply with parental notice requirement); MO. ANN. STAT. § 188.026(1)(1) (Vernon 1983); N.M. STAT. ANN. § 30-5-1(C) (1984); N.D. CENT. CODE §§ 14-02.1-03.1(b), 14-02.1-03.1(a) (1981); OKLA. STAT. ANN. tit. 65, § 1-738(2) (West 1984) (reporting form must indicate whether guardian signed consent); R.I. GEN. LAWS § 23-4-7-6 (Supp. 1984); S.C. CODE ANN. § 44-41-30(b) (Law. Co-op. 1977); WASH. REV. CODE ANN. § 9.02.070(a) (1977).


Danforth suggests the legal legitimacy of requiring parental consents to abortions (or denials of consent) for minor mental incompetents. 428 U.S. at 75. See also Matter of Barbara C., 101 A.D.2d 137, 474 N.Y.S.2d 799 (1984) (hospitalized mentally-ill minor could receive abortion when parent consented; no requirement of independent judicial review).

Analogies for resolving the constitutionality and lawfulness of a guardian’s or parent’s decision concerning abortion probably must be drawn from the jurisprudence relating to sterilization of mental retardates. See, e.g., Buck v. Bell, 274 U.S. 200 (1927) (Court sustained constitutionality of sterilization statute invokable against “feebleminded” persons); In re C.D.M., 627 P.2d 607, 612-13 (Alaska 1981) (court approved use of the same conditions as those established in In re Grady, 85 N.J. 235, 264-65, 426 A.2d 467, 482-83 (1981)); In re Guardianship of Tulley, 83 Cal. App. 3d 698, 146 Cal. Rptr. 266 (1978), cert. denied sub nom. Tulley v. Tulley, 440 U.S. 967 (1979) (father of a mentally-retarded woman has no statutory authority to request a sterilization order); In re A.W., 637 P.2d 366 (Colo. 1981) (general parental consent statute did not allow parents to approve sterilization of a mentally-retarded child); P.S. v. Harbin v. W.S., 452 N.E.2d 969 (Ind. 1983) (juvenile court had power to order sterilization of mentally-retarded son with parental consent without specific enabling statute); Wentzel v. Montgomery General Hosp., 293 Md. 685, 447 A.2d 1244 (1982), cert. denied, 459 U.S. 1147 (1985) (court has inherent parens patriae authority to entertain parental application for sterilization of incompetents); In re M.K.R., 515 S.W.2d 467 (Mo. 1974) (juvenile court has no authority to order sterilization of minor female at parents’ request); In re Grady, 85 N.J. 235, 426 A.2d 467 (1981) (court has inherent parens patriae jurisdiction to allow sterilization of noninstitutionalized female, at parental request, but
unmarried and unemancipated, and there is doubt whether the minor can make an informed consent to an abortion, the Court has indicated that either parental\textsuperscript{250} or judicial\textsuperscript{251} consent may be required.

If state statutes recognize complete discretion on the part of emancipated (or married) minors to select abortion as the mode of terminating their pregnancies, and provide expeditious judicial proceedings to determine whether unemancipated minors are capable of choice, they are constitutional. Many states, however, have not revised their legislation to reflect the refinements expected by the Supreme Court.

d. Spousal consent.

The Supreme Court invalidated all requirements of spousal consent,\textsuperscript{252} which has shifted legislative attention in most jurisdictions to spousal notification as a condition to abortion.\textsuperscript{253} Nevertheless, a few states continue to retain a requirement of spousal consent.\textsuperscript{254} This probably reflects a disinclination to recognize Supreme Court doc-

---

must find, among other things, that minor cannot understand nature and significance of sterilization, incompetency is probably permanent, incompetent person is fertile and capable of procreation); \textit{In re Moore}, 289 N.C. 95, 221 S.E.2d 307 (1976) (court approved sterilization order for mental retardate at parents' request); \textit{In re Guardianship of Hayes}, 93 Wash. 2d 228, 608 P.2d 635 (1980) (court has inherent power to order sterilization of mentally-incompetent person at parental request, but should not do so unless substantial medical evidence has been adduced establishing that sterilization is in the best interests of the retardee; court established a presumption against sterilization which proponents must overcome by clear, cogent and convincing evidence); \textit{In re Guardianship of Eberhardy}, 102 Wis. 2d 539, 307 N.W.2d 881 (1981) (established public policy to allow sterilization of 22-year-old woman, incapable of consent, at insistence of parents should be matter for legislation).

250. City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. at 2497-98 (explaining the Court's ruling in \textit{Bellotti}). \textit{See also} Planned Parenthood League v. Bellotti, 414 F.2d 1006, 1011-13 (1st Cir. 1981) (court rejected due process and equal protection attacks on Massachusetts statute which required either parental consent or judicial determination that minor was competent to consent).

251. \textit{See infra} notes 257-61 and accompanying text.


A corollary is that the father of a child cannot defeat his duty to provide financial support for his child on the basis that he had not been given an opportunity to decide whether a fetus should be aborted, or that he had offered to pay for a first-trimester abortion. \textit{See} People ex rel. S.P.B., 651 P.2d 1213 (Colo. 1982) (citing authorities).

253. \textit{See infra} notes 263-70 and accompanying text.

254. \textit{E.g.,} \textit{COLO. REV. STAT.} \S\ 18-6-101(1) (Supp. 1984) (abortion must be at request of woman and husband); \textit{FLA. STAT. ANN.} \S\ 390.001(4)(b) (West Supp. 1984) (written spousal consent to indicate notice and opportunity to consult; predecessor provision held unconstitutional in Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975), \textit{aff'd}, 428 U.S. 901 (1976)).
trine, but serves only to impel judicial nullification. If statutes refer to spousal consent for minor married women and mental incompetents, issues of constitutionality should be resolved on the basis of parental consent in such instances.

e. Judicial approval for abortions.

The Court has required that if a minor is not emancipated, a state may require either parental consent or a judicial determination in lieu of it. If there is no specific legislation, a parental consent requirement will be ruled unconstitutional. Several states have provided for such a judicial avenue.

If the procedures are clear and expeditious, such legislation will be sustained as a legitimate alternative to parental consent for minors incapable of giving it. However, if a court concludes that a minor is competent to give an informed consent, it can only certify that fact, allowing the minor to exercise her Roe v. Wade rights. The state cannot forbid an abortion because it believes a woman should not have one. The latter determination is to be made only if the minor is not capable of consenting; denial of an abortion then must rest on a showing that abortion is inimical to her best interests.

6. Notice to Parents and Spouses

When most legislation requiring parental or spousal consent to

---


256. See supra notes 248-51 and accompanying text.

257. See supra note 250.


260. See generally Scheinberg v. Smith, 659 F.2d 476, 480-82 (5th Cir. 1981); Zbaraz v. Hartigan, 584 F. Supp. 1452, 1460-62 (N.D. Ill. 1984) (procedures inadequate because there was no expedited judicial review and minor's anonymity was not protected; prefiling assistance is not required).

261. See City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. at 2498-99; on a requirement of good cause, see Planned Parenthood Ass'n v. Ashcroft, 103 S. Ct. at 2526 (plurality opinion).
abortion fell before the Court's constitutional axe, a number of states substituted requirements that parents\textsuperscript{262} or spouses\textsuperscript{263} be given notice\textsuperscript{264} before an abortion is performed.\textsuperscript{265} Sometimes the same litany of information required to be given a patient\textsuperscript{266} must be given along with the basic notice.\textsuperscript{267}

The Supreme Court has not yet ruled directly in a majority opinion on the constitutionality of such notice statutes. Statutes that require information to be given to parents or spouses which, if communicated to pregnant women, would place an obstacle in the way of free choice may be unconstitutional, because they are designed to increase pressures from family members against abortions.

If notice is restricted to the fact of abortion, but goes to one whose consent cannot be required constitutionally, one may ask what function it is to play. Language in some of the opinions in \textit{H.L. v. Matheson}\textsuperscript{268} suggests that if a pregnant minor is not emancipated, but still a part of a family unit, a parental notice requirement promotes familial

\textsuperscript{262} E.g., ARIZ. REV. STAT. ANN. \textsection 36-2152(A) (Supp. 1984); ME. REV. STAT. ANN. tit. 22, \textsection 1597(2) (1980); MD. PUB. HEALTH CODE ANN. \textsection 20-103 (1982) (notice not required if minor does not live with parent or guardian and a reasonable effort to give notice is unsuccessful or if notice may lead to physical or emotional abuse of minor; physician is not civilly or criminally liable for decision not to give notice on latter basis); MINN. STAT. ANN. \textsection 144.343(4)(c) (West 1984) (not required if minor declares she is a victim of sexual abuse as defined in \textsection 626.556); MONT. CODE ANN. \textsection 50-20-107(1)(b) (1983); NEB. REV. STAT. \textsection 28-347(1) (Supp. 1984); NEV. REV. STAT. \textsection 442.255 (1981) (if possible to notify); TENN. CODE ANN. \textsection 39-4-202(f) (1982) (if parents cannot be located, then to agent or other individual to whom the minor's custody has been transferred).

\textsuperscript{263} E.g., ILL. ANN. STAT. ch. 38, \textsection 81-23.4(A) (Smith-Hurd Supp. 1984-1985); KY. REV. STAT. \textsection 311.735 (1983) (within 30 days after abortion if reasonably possible); MONT. CODE ANN. \textsection 50-20-107(1)(a) (1983) (unless husband is voluntarily separated); NEV. REV. STAT. \textsection 442.254 (1981) (unless woman is legally separated from husband or has obtained a judicial declaration of paternity stating that a man other than the husband is father of the unborn child); R.I. GEN. LAWS \textsection 23-4.8-3 (Supp. 1984) (if notice is reasonably possible), 23-4.8-2 (Supp. 1984) (if notice is unnecessary if woman furnishes written statement that she has given notice to her husband, that the fetus was not fathered by the husband, that the woman is separated from her husband, or that she has filed for divorce; or husband gives physician written notice that he has been notified); UTAH CODE ANN. \textsection 76-7-304(2) (1978).

\textsuperscript{264} See Note, Spousal Notification; An Unconstitutional Limitation on a Woman's Right to Privacy in the Abortion Decision, 12 HOFSTRA L. REV. 531 (1984).

\textsuperscript{265} Some statutes provide for notice by certified or registered mail if notice is not communicated orally. See, e.g., ME. REV. STAT. tit. 22, \textsection 1597(2) (1980) (if cannot notify orally or by mail, must notify state department of health services in writing of inability to give notice and of intention to perform abortion); MD. PUB. HEALTH CODE ANN. \textsection 20-103(d) (Supp. 1983) (proof of mailing is conclusive evidence of notice); NEB. REV. STAT. \textsection 28-347 (Supp. 1984); N.D. CENT. CODE \textsection 14-02-1-03(1) (1981).

\textsuperscript{266} Notice statutes frequently require a 24 or 48 hour waiting period after notice before an abortion can be performed. The constitutionality of waiting periods generally is discussed infra notes 326-36 and accompanying text.

\textsuperscript{267} See supra notes 203-23 and accompanying text.


\textsuperscript{269} 450 U.S. 398 (1981).
harmony and an ability on the part of parents to help a daughter make an informed choice. Alternatively, if a minor is emancipated or alienated from her parent, a requirement of parental notice would appear to impose a burden on the minor’s free choice and thus be unconstitutional.\(^\text{269}\) If a spousal consent requirement is unconstitutional, and notice is a preliminary to an exercise of a power to consent, one may doubt the constitutionality of a duty to inform imposed on physicians. Conversely, if the maintenance of interspousal harmony is promoted by a notice requirement, and that goal is not outweighed by its impact on a woman’s free exercise of discretion under \textit{Roe v. Wade}, there is at least an arguable basis for sustaining a spousal notice requirement.\(^\text{270}\)

7. Grounds for Abortion

a. Incest.

Several states have continued their pre-\textit{Wade} coverage of incest as a humanitarian basis for abortion\(^\text{271}\) in current statutes.\(^\text{272}\) Laws of this nature should be unconstitutional if they are invoked to prevent abortions otherwise medically justified under \textit{Roe v. Wade},\(^\text{273}\) but if

\footnotesize{\begin{itemize}
\item 269. Planned Parenthood Ass’n v. Ashcroft, 655 F.2d 948, 858-59 (8th Cir. 1981), \textit{aff’d on other grounds}, 103 S. Ct. 2517 (1983)(plurality opinion). \textit{Cf.} Planned Parenthood Ass’n v. Matheson, 582 F. Supp. 1001 (D. Utah 1983) (requirement that notice be given minor’s parents concerning provision of contraceptives invalidated as contrary to federal statutory policy and invasive of minor’s privacy); Note, \textit{The “Squeal Rule” and a Minor’s Right to Privacy}, 12 HOFSTRA L. REV. 497 (1984) (discussion of federal Department of Health and Human Services proposed “squeal rule” requiring federally-funded family planning agencies to notify parents that their minor children have obtained prescription contraceptives).

\item 270. \textit{See} Scheinberg v. Smith, 659 F.2d 476, 482-87 (5th Cir. 1981) (remanding for a district court determination whether a husband’s concern for a more than de minimis decrease in his wife’s procreative potential following an abortion, outweighed the influence of a spousal notice requirement on the wife’s abortion decision). \textit{Cf.} Hagerstown Reproductive Health Servs. v. Fritz, 295 Md. 268, 454 A.2d 846, \textit{cert. denied}, 103 S. Ct. 3538 (1983) (court vacated as moot an appeal against a lower court’s issuance of an injunction of an abortion, at a husband’s request, because abortion had already been performed).

\item 271. \textit{See supra} note 81 and accompanying text.


\item 273. Because they are not reported or are not within time limitations, for example. ARK. STAT. ANN. § 41-2554 (1977) (must be reported within 7 days); COLO. REV. STAT.
they legitimate abortions not based strictly on medical consideration (assuming pregnancies from such causes do not cause sufficient emotional trauma to constitute a medical ground), they probably are constitutional.\textsuperscript{274}

b. Rape.

Rape as a humanitarian ground for abortion, recognized before 1973,\textsuperscript{275} continues to be acknowledged in some legislation.\textsuperscript{276} In some instances, the individual is subject to reporting or confirmation requirements.\textsuperscript{277} The constitutionality of such provisions turns on the same considerations mentioned in the context of incest as a ground for abortion.\textsuperscript{278}

c. Physical or mental defect in child if born alive.

Abortion based on eugenic considerations was acknowledged in some states before Roe v. Wade,\textsuperscript{279} and continues today.\textsuperscript{280} The con-
stitutionality of this form of legislation turns on whether, in an obverse application of *Roe v. Wade* principles, the potentiality of human life in a fetus precludes abortions on this basis if not otherwise medically indicated from the standpoint of maternal life or health.

d. Maternal life.

As discussed earlier, for many years, in almost every jurisdiction, abortions could be performed only to save the life of a pregnant woman. Some states have continued this as the sole basis for lawful abortions; in some instances only in later stages of gestation. There may be no constitutional barrier to recognizing this as an exception to an aggravating factor under penal statutes when abortions are performed other than by licensed physicians in later stages of pregnancies (even granted the rarity of cases in which a layperson could properly manage abortions), or in limiting availability of public funds for abortions unless preservation of maternal life is involved. But limiting legislation of this sort is unconstitutional if invoked to prevent a woman and her physician from reaching an abortion decision within the parameters of *Roe v. Wade*. Perpetuation of such statutes can be attributed only to legislative inertia or re-

---


282. See supra note 29 and accompanying text.


286. E.g., MINN. STAT. ANN. § 256B.02(8)(13)(a) (West 1982) (public employee health insurance plans may include abortions in which woman's life would be endangered by carrying pregnancy to term). Constitutional aspects of withholding public funding are discussed infra notes 462-74 and accompanying text.
e. Maternal life or health.

Several states have continued a requirement that all abortions be based on considerations of maternal life or health frequently restricted by a qualifying phrase such as “gravely impair.” This form of legislation, however, is unconstitutional under Roe v. Wade, which makes “medical judgment” the criterion during the first trimester of pregnancy, and regulation of abortion procedures “reasonably related to maternal health” the standard during the period before viability. Only after viability does the criterion of “preservation of life or health of the mother” become valid. Many states, therefore, have legislated the “life or health” standard only for abortions following viability or after a stated number of weeks of gestation.

The difficulty with the latter standard, however, is that, although there may have been a basis in Roe v. Wade for use of a time standard as an alternative to viability, the Supreme Court has rejected it in the setting of the place of performance of abortions. Viability is

---

287. See supra notes 137-50 and accompanying text.
290. 410 U.S. at 164.
the sole acceptable criterion in that context. Hence, application of the "life or health" standard before actual viability in each pregnancy risks a declaration of unconstitutionality if physicians are prosecuted, sued or disciplined for performing medically indicated abortions in the period between the beginning of the statutorily prescribed period and viability.

f. General medical grounds.

Roe v. Wade legitimates the constitutional right of pregnant women to abortions before viability if medically indicated. Some states acknowledge the constitutional norm only indirectly by legislating specific standards following viability. Several others, however, have enacted the Supreme Court standard or an equivalent. Such legislation has no observable constitutional defect, but is superfluous.

8. Residency Requirements

A small number of states retain a residency requirement limiting...
iting the availability of abortions. These statutes are unconstitu-
tional.300 Hence, their continued presence in statute
books reflects legislative inertia or unwillingness to acknowledge constitutional
docline.

9. Place of Performance

A few states retain requirements that all abortions be performed in
hospitals licensed by the state,301 accredited by outside agencies,302 or
both.303 Invoked as a limitation on performance of first-trimester
abortions, such restrictions violate the constitutional rights of preg-
nant women and their physicians.304 Language in Doe v. Bolton,
however, approved a prohibition against abortions performed after
the first trimester other than in a hospital. Accordingly, a lengthy
roster of states has legislated an in-hospital requirement.305

In hindsight, reliance on Supreme Court dicta proved unfortunate,
because, in 1983, the Court invalidated all statutes requiring perform-

(1981) (120 days; inapplicable if woman or spouse is employed in state, if woman is a
patient of a Delaware physician, or if there is a life-threatening emergency); TENN.
CODE ANN. § 39-4-201(d) (1982) (woman must prove bona fide residency; hospital
records must retain supporting documentation); WASH. REV. CODE ANN. § 9.02.070(b)
(1977) (90 days).

299. See supra notes 85-86 and accompanying text.

Ark. 1980). Residency requirements affecting access to nonemergency hospitalization
or medical care at public expense constitute an invidious classification violating equal
protection and the constitutional right of interstate travel. Memorial Hosp. v. Mari-

301. See, e.g., ALASKA STAT. § 18.16.010(a)(1) (1981) (or hospital operated by federal
government or agency); COLO. REV. STAT. § 18-6-101(1) (1978) (held unconstitutional in
People v. Norton, 181 Colo. 47, 507 P.2d 862 (1973)); CONN. GEN. STAT. ANN. § 53-31a(c)
(West Supp. 1984); WIS. STAT. ANN. § 940.04(5)(c) (West 1982) (unless emergency
prevents).

302. E.g., CAL. HEALTH & SAFETY CODE § 25951(a) (West 1984) (accredited by Joint
Commission on Accreditation of Hospitals [JCAH]); DEL. CODE ANN. tit. 24, § 1790(a)
(1981) (accredited by nationally-recognized medical or hospital accreditation authority);

303. E.g., ARK. STAT. ANN. § 41-2557 (1977) (licensed by state and accredited by
JCAH); KAN. STAT. ANN. § 21-3407(2)(a) (1981) (certificate of necessity for abortion to
be filed in hospital licensed by state and accredited by JCAH); MD. PUB. HEALTH CODE
ANN. § 20-208(a) (Supp. 1983) (state licensed and JCAH-accredited).


305. E.g., IDAHO CODE § 18-608(2)-(3) (1979) (second and third trimesters); ILL.
trimester); KY. REV. STAT. § 311.760(2) (1983) (after first trimester, unless emergency
to protect woman's life or health); LA. REV. STAT. ANN. § 37:1285(8.1) (West Supp.
1984) (after first trimester; unprofessional conduct); MASS. GEN. LAWS ANN. ch. 112,
§ 12Q (West 1983) (13th week or after); MO. ANN. STAT. § 188.025 (Vernon 1983) (after
first 12 weeks of pregnancy); MONT. CODE ANN. § 50-20-109(1)(b) (1983) (after first
three months of pregnancy); N.Y. PUB. HEALTH LAW § 4164(1) (McKinney 1977) (after
12th week, on hospital inpatient basis); N.C. GEN. STAT. § 14-45.1(b) (1981) (after 20th
week); N.D. CENT. CODE § 14-02.1-04(2), (3) (1981) (after first 12 weeks of pregnancy);
OKLA. STAT. ANN. tit. 63, § 1-731(B) (West 1984) (subsequent to first trimester); 18 PA.
CONS. STAT. ANN. § 3209 (Purdon 1983) (after first trimester); S.C. CODE ANN. § 44-41-
ance of abortions in general hospitals from the beginning of the second trimester of pregnancy through viability.\(^ {306} \) A state must allow abortions during that time to be performed in clinics and outpatient facilities as well as hospitals. Statutes so providing are constitutional.\(^ {307} \) Several states have had such legislation in place for many years.\(^ {308} \)

A few states have provided specifically for the licensing and regulation of abortion clinics.\(^ {309} \) Although the limited authority is not unanimous, licensing is constitutional as long as its attendant requirements promote maternal health and do not impose unacceptable barriers against a woman’s free exercise of the right to choose abortion.\(^ {310} \) Requirements that designated personnel be in attend-

\(^ {306} \) Planned Parenthood Ass’n v. Ashcroft, 103 S. Ct. at 2520; City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. at 2495-97. The requirement imposed a significant burden on women wishing abortions, in terms of costs and restricted availability of abortion services in full-service general hospitals. Medical data recognized by the Court also established that abortions can be performed safely in clinics or outpatient facilities during the second trimester to the time of viability.

\(^ {307} \) In Simopoulos v. Virginia, 103 S. Ct. 2532, 2537-40 (1983), the Court sustained the constitutionality of a state requirement that second trimester abortions be performed in a hospital, defined to include clinics and outpatient facilities; the legislation comport with good medical practice. Simopoulos had used the saline injection system in his office and allowed the pregnant minor to go to a motel where she aborted; his criminal conviction was held valid. \( Id. \) at 2534-35. See also Birth Control Centers, Inc. v. Reizen, 743 F.2d 352, 366 (6th Cir. 1984) (invalidating state requirement that second-trimester abortions be performed at a clinic’s parent hospital). \( Birth Control Centers \) rejected, however, an equal protection attack on a regulatory statute applicable to clinics but not to private doctor’s offices where abortions might be performed; no selective enforcement was established. \( Id. \) at 359.


\(^ {310} \) Baird v. Department of Pub. Health of Mass., 599 F.2d 1098 (1st Cir. 1979);
One may assume a similar vulnerability in statutes prohibiting fees or compensation for abortion referrals or abortion referrals for profit. Administrative search provisions may also infringe patients' rights to privacy. However, if regulations are otherwise con-


312. Florida Women’s Medical Clinic v. Smith, 536 F. Supp. at 1056. See also Birth Control Centers, Inc. v. Reizen, 743 F.2d 352, 366 (6th Cir. 1984); Florida Women’s Medical Clinic v. Reizen, 743 F.2d 352, 366 (6th Cir. 1984) (invalidating a requirement that clinic corridors be 6 feet wide, as not reasonably related to the purposes of clinic regulation).

313. Women’s Medical Center of Providence v. Cannon, 463 F. Supp. 531, 537-38 (D.R.I. 1978) (invalidating requirement that physician performing first-trimester abortions had to have unsupervised privileges at an accessible hospital).

314. E.g., Ky. Rev. Stat. § 311.820 (1983) (although some of the terms like “kickbacks” are probably not objectionable as long as the practice is condemned in every context; if only abortion is singled out, there is an equal protection problem); 18 Pa. Cons. Stat. Ann. § 3213(b) (Purdon 1983) (at least unless all other physicians and clinics are under a similar disability).


stitutional, there should be no infirmity in legislation allowing nuisance abatement proceedings against places where abortions are performed in violation of law.\textsuperscript{317}

10. Peer Approval

A few states have retained statutes requiring that all abortions be concurred in by other physicians,\textsuperscript{318} hospital review committees\textsuperscript{319} or both.\textsuperscript{320} The Supreme Court invalidated both requirements, at least as they pertain to first-trimester abortions.\textsuperscript{321} Accordingly, legislation was approved in some jurisdictions requiring such approval in the third trimester\textsuperscript{322} or after viability.\textsuperscript{323} Mandates of this sort are probably constitutional if applied after viability, because the Court by its judgment approved a requirement that a second physician be in attendance at the time of an abortion after viability.\textsuperscript{324} Between the beginning of the second trimester and viability, however, limitations of this sort are likely to be viewed as barriers to women’s free choice, unless similar requirements govern other medical and surgical techniques of approximately the same seriousness. There should be no impediment to requirements that, if a consulting physician refers the case to another physician for performance of an abortion, full medi-

\textsuperscript{317} See OR. REV. STAT. § 465.110 (1983).
\textsuperscript{318} E.g., ARK. STAT. ANN. § 41-2558 (1977) (three physicians); KAN. STAT. ANN. § 21-3407(2)(a) (1981) (three physicians); MISS. CODE ANN. § 97-3-3(2) (1972) (two reputable licensed physicians); WIS. STAT. § 940.04(5)(b) (West 1982) (two physicians).
\textsuperscript{319} E.g., CAL. HEALTH & SAFETY CODE § 25951(b) (West 1984) (unanimous approval if no more than three licensed physicians and surgeons on staff committee); CLO. REV. STAT. § 18-6-101(1), (4) (1978) (ruled unconstitutional in People v. Norton, 181 Colo. 47, 507 P.2d 862 (1973)); MD. PUB. HEALTH CODE ANN. § 20-208(b)(2) (Supp. 1983) (hospital abortion review authority); N.M. STAT. ANN. § 30-5-1(C), (D) (1984) (same).
\textsuperscript{320} E.g., DEL. CODE ANN. tit. 24, § 1790(a), (b) (1981) (abortion review committee plus two licensed physicians certifying necessity).
\textsuperscript{322} E.g., FLA. STAT. ANN. § 390.001(2)(a)-(b) (West Supp. 1984) (two physicians); GA. CODE ANN. § 16-12-141(c) (1982); IDAHO CODE § 18-608(3) (1979) (one physician; corroborated by consulting physician); S.C. CODE ANN. § 44-41-20(c) (Law, Co-op. 1976) (one other physician); VA. CODE § 18.2-74(b) (1982) (two consulting physicians).
\textsuperscript{324} This was the result in Planned Parenthood Ass’n v. Ashcroft, 103 S. Ct. 2517, 2532 (1983)(plurality opinion), although there was no majority opinion. The provision related to protection of live-born fetuses. See infra notes 347-51, 457-39 and accompanying text.
11. Waiting Periods

One technique for delaying abortions is to impose waiting periods between receipt of information required to be imparted to a woman, her spouse or parent and performance of an abortion, perhaps subject to an emergency exception if an abortion must be performed to protect maternal life or, in some instances, health. Such requirements at times have been augmented by an ensuing waiting period between a woman's submission of a signed consent form and performance of an abortion, again subject to an emergency exception.

The Supreme Court has invalidated the latter form of waiting period as an arbitrary, inflexible limitation without a medical basis, and a costly imposition which could require two separate trips to an

326. See supra notes 203-28 and accompanying text.
327. See supra note 229 and accompanying text.
328. See supra note 230 and accompanying text.
abortion facility. Although the Court did not have before it a mandated waiting period between receipt of information and submission of a consent, its rationale in Akron Center seems germane, particularly in light of the Court’s invalidation of several items of information intended to discourage decisions to undergo an abortion. Legislatures are best advised to eliminate all time-delay requirements in light of the Court’s flexible, medically-oriented approach to counseling and consent.

12. Abortion Techniques

a. General standard of care.

The Supreme Court’s constitutional focus is on maternal health as the sole concern after the first trimester of pregnancy, based on contemporary medical standards. Hence, no legislative statement is required to establish positive medical standards for abortions; general licensing requirements suffice. Nevertheless, there is no constitutional defect in reaffirming, in the setting of therapeutic abortion legislation, the applicability of usual standards of professional care.

334. The Kentucky imposition of a two-hour period might or might not run afoul of such criteria. The Nevada and North Carolina fixing of a 30-day maximum period during which consents are effective should prove valid, at least in the absence of an indication that other medical consent forms are not subject to equivalent time limitations. If only abortion consent forms are so limited, there would appear to be an invidious classification violative of equal protection.

335. See supra notes 221-24 and accompanying text. A 24-hour waiting time for purposes of notifying a minor’s parents that a therapeutic abortion was to be performed was invalidated in Zbaraz v. Hartigan, 584 F. Supp. 1452, 1458-59 (N.D. Ill. 1984).

336. See, e.g., COLO. REV. STAT. § 18-6-101(1) (1978) (licensed physician using accepted medical procedures); WYO. STAT. § 35-6-112 (1977); Dellapena, supra note 27, at 361-65, 411-14. To the extent, however, that more severe penalties are visited on those otherwise allowed to perform abortions who use substandard abortion techniques,
Constitutional problems arise only when statutes purport to restrict accepted medical practice.

b. Precluded techniques.

At least two states continue to forbid the use of saline amniocentesis as an abortion technique after the first trimester of pregnancy, absent a special justification. The objective is to compel use of other techniques which increase the possibility that a viable fetus might be born alive. The Supreme Court has invalidated such prohibitions as not reasonably related to maternal health, because they proscribe techniques which pose less of a risk to maternal health than those which would have to be used as an alternative. Continuation of these statutes can only be attributed to a legislative unwillingness to bow to Supreme Court mandate. Essentially, they are dead letters as to enforceability.

There appears to be no constitutional objection to a legislative restatement of the Court's doctrine requiring medical personnel to use all reasonable medical procedures to enhance the chance of a live birth of a viable fetus if they are consistent with maternal health. Only if maternal health were relegated to a subordinate status would there be a constitutional problem.

c. Testing requirements.

Two states require blood typing and Rho- testing before an abortion
may be performed.\textsuperscript{344} To the extent such a requirement applies to second-trimester abortions before viability (and perhaps the stage of viability), when survival after live birth is medically impossible, it is probably unconstitutional under the Supreme Court's doctrine that all limitations on abortion be supported by current medical practice standards and paramount concerns for maternal health. If, in contrast, such legislation is interpreted to govern only those stages of pregnancy when live fetal birth is a medical possibility, there is probably no impermissible barrier to an unfettered abortion decision and its effectuation.

d. Attending physician.

Statutes occasionally require a second physician to be present when a viable fetus is aborted.\textsuperscript{345} The Supreme Court has sustained such a legislative condition to abortion.\textsuperscript{346} Its rationale, as far as can be gleaned from the judgmental majority's serial opinions, was that such a requirement reasonably relates to preservation of the life or health of a live-born fetus, without detrimental consequences to maternal health.

13. Status of Infants, Fetuses and Fetal Tissue

a. Live-born infants.

There is no need for special statutes confirming that viable fetuses born alive are persons entitled to the full protection of civil and criminal law. Those who terminate human life, whether neonate or of greater duration, whether intentionally, recklessly, or with criminal negligence, may be prosecuted for murder or manslaughter, and incur wrongful death liability. Nevertheless, some statutes confirm long-established general legal principles in the setting of abortion legislation by providing a definition of human life\textsuperscript{347} or confirming a


\textsuperscript{346} Planned Parenthood Ass'n v. Ashcroft, 103 S. Ct. 2517, 2521-22, 2532 (1983) (five Justices concurring in separate opinions).

\textsuperscript{347} See supra notes 184-85 and accompanying text. Tex. Fam. Code Ann. § 12.05(b) (Vernon Supp. 1984) provides alternative medical standards by which live birth is to be determined.
duty, usually enforced by criminal penalties, to care for fetuses born alive. Other provisions, perhaps reflecting difficult proof problems in establishing beyond a reasonable doubt the independent human existence of a fetus/child, mandate a special obligation to safeguard fetal life during abortion processes. These are seemingly constitutional as long as, expressly or through judicial interpretation, the protection of maternal life or health takes priority over the preservation of fetal life.

b. Experimentation involving fetuses.

Quite a number of states have prohibited experimentation with, and research on, embryos and fetuses before and after abortion. See infra notes 437-39 and accompanying text.

348. See infra notes 437-39 and accompanying text.


350. E.g., IDAHO CODE § 18-608(3) (1979); ILL. REV. STAT. ch. 38, §§ 81-24 (Smith-Hurd Supp. 1984-1985) (measures for life support for fetus must be available and utilized if there is clearly visible evidence of viability), 81-26(3) (1984); IOWA CODE § 707.7 (1979); KY. REV. STAT. § 311.780 (1983); LA. REV. STAT. ANN. § 14:87.1 (West 1974); MASS. GEN. LAWS ANN. ch. 112, § 12P (West 1983) (must have life-support equipment, as defined by state department of public health, in room where abortion is performed); NEB. REV. STAT. § 28-325(3) (1979); OKLA. STAT. ANN. tit. 63, § 1-734(C) (West 1974) (all reasonable measures to preserve life of child alive when partially or totally removed from uterus as long as such measures do not create a significant danger to woman's life or health); TENN. CODE ANN. § 39-4-206(a) (1982) (however, extraneous life support measures need not be attempted if it can be determined through amniocentesis or medical observation that a fetus is severely malformed); TEX. REV. CIV. STAT. ANN. art. 4512.5 (Vernon 1976) (during parturition, destroying vitality or life if child would have been born alive); UTAH CODE ANN. § 76-7-308 (1981); VA. CODE § 18.2-74(c)(1982); WYO. STAT. § 35-6-103 (1977).

The Tennessee exception is obviously based on eugenic considerations. See supra notes 8-9, 80 and accompanying text.

See also the discussion of requirements that attending physicians be present during abortions during viability, supra notes 345-46 and accompanying text.

351. See supra notes 338-44 and accompanying text.

352. E.g., ARIZ. REV. STAT. ANN. § 36-2302(A) (Supp. 1984); FLA. STAT. ANN. § 390.001(6) (West Supp. 1984); ILL. REV. STAT. ch. 38, § 81-26(3) (Smith-Hurd Supp. 1984-1985); LA. REV. STAT. ANN. § 14:87.2 (West 1974); ME. REV. STAT. ANN. tit. 22, § 1593 (1980); OKLA. STAT. ANN. tit. 63, § 1-735(B) (West 1984); 18 PA. CONS. STAT. ANN. § 3216(a) (Purdun 1983); UTAH CODE ANN. § 76-7-310 (1978); WYO. STAT. § 35-6-115 (persons consenting to, aiding or abetting traffic in viable aborted children commit a felony).

353. E.g., ARIZ. REV. STAT. ANN. § 36-2302(A) (Supp. 1984); CAL. HEALTH & SAFETY
tions, and on stillborn\(^3\) and live-born\(^5\) infants. Exceptions, however, are provided to cover acts done to advance fetal\(^6\) or maternal\(^7\) health, and for pathological examinations.\(^8\) Traffickers in fetal or neonate tissue for such purposes may be penalized.\(^9\)

Limited authority sustains the constitutionality of such provisions.\(^1\)

c. Tissue analysis.

Several states require that pathological examinations be performed on dead fetuses and on removed fetal tissue,\(^2\) or at least contem-


\(^{356}\) E.g., FLA. STAT. ANN. § 390.001(6) (West Supp. 1984) (protection of life or health); ILL. REV. STAT. ch. 38, § 81-26 (Smith-Hurd Supp. 1984-1985) (protection of life or health); LA. REV. STAT. ANN. § 14:87.2 (West 1974) (life and health of live-born child; preserve life or improve health of embryo or fetus); MINN. STAT. ANN. § 145.422 (West Supp. 1984) (protect life or health); MO. ANN. STAT. § 188.037 (Vernon 1983) (same); MONT. CODE ANN. § 50-20-108(3) (1983) (same); NEB. REV. STAT. § 28-346 (1979) (same); OKLA. STAT. ANN. tit. 63, § 1-735(A) (West 1984) (unless therapeutic to child or unborn child); 18 PA. CONS. STAT. ANN. § 3216(a) (Purdon 1983) (life or health of child); UTAH CODE ANN. § 76-7-310 (1978) (allowed when, in a physician's best medical judgment, a technique should be used to test for genetic defects).

\(^{357}\) E.g., ARIZ. REV. STAT. ANN. § 36-2302(A) (Supp. 1984) (strictly necessary to diagnose disease or condition in mother, if abortion was performed because of that disease or condition).

\(^{358}\) E.g., MASS. GEN. LAWS ANN. ch. 112, § 12J(a)(II) (West 1983); MICH. COMP. LAWS ANN. § 333.2688(1) (West 1980); N.D. CENT. CODE § 14-02.2-02(1) (1981); OKLA. STAT. ANN. tit. 63, § 1-735(B) (West 1984). See infra note 441.

\(^{359}\) E.g., IND. CODE § 35-1-58.5-6 (1979) (transporting fetus out-of-state); MI. REV. STAT. ANN. tit. 22, § 1593 (1980); NEB. REV. STAT. § 28-342 (1979); N.D. CENT. CODE § 14-02.2-02 (1981).


\(^{361}\) E.g., ILL. REV. STAT. ch. 38, § 83-32 (1977); MO. ANN. STAT. § 188.047 (Vernon 1983); 18 PA. CONS. STAT. ANN. § 3214(c) (Purdon 1983); S.D. CODIFIED LAWS ANN.
plate that such examinations may properly be conducted. The Supreme Court has sustained the constitutionality of such a requirement, apparently because tissue examinations are an incident to surgical techniques, and do not impose a special economic hardship on women desiring abortions.

d. Disposition of fetal remains.

Some states have legislated with reference to the disposition of fetal remains, sometimes through specific criminal legislation, and sometimes by recognizing the need for administrative regulations on the matter. The Supreme Court invalidated a criminal statute requiring physicians to ensure that fetal remains be "disposed of in a humane and sanitary manner," on grounds of vagueness and indefiniteness. Arguably, a purely administrative law approach is not vulnerable as long as residual criminal penalties are not provided.

14. Records and Reports

With the recognition of therapeutic abortions came a concern for documentation of the fact of and medical grounds for abortion. Since 1973, such requirements have become the norm. Physician and hospital records may have to reflect consents and information § 34-23A-19(3) (1977) (if facility is equipped to complete pathology reports); UTAH CODE ANN. §§ 76-7-309 (1978), 76-7-313(8) (1978 & Supp. 1983).

362. E.g., IND. CODE ANN. § 35-1-58.5-5(8) (Burns 1979) (physician's report to include results of pathological examination, if performed); OHIO REV. CODE ANN. § 3701.341(3) (Page 1980) (public health council to adopt rules concerning pathological reports following abortions).

363. Planned Parenthood Ass'n v. Ashcroft, 103 S. Ct. at 2522-25, 2532. There was no majority opinion.


365. E.g., FLA. STAT. ANN. §§ 390.001(7), 390.012(1)(e) (West Supp. 1984); ILL. REV. STAT. ch. 38, § 81-32 (Smith-Hurd Supp. 1984-1985) (no exploitation of aborted fetus or tissue); MINN. STAT. ANN. § 145.423(3) (West Supp. 1984) (child born alive and dying after birth to be disposed of according to general statutes governing human burials); N.Y. PUB. HEALTH LAW § 4164(4) (McKinney 1977) (similar); OHIO REV. CODE ANN. § 3701.341(4) (Page 1980) (public health council to adopt rules relating to humane disposition of products of human conception); WYO. STAT. § 35-6-109 (1977) (state board of health to prescribe rules and regulations for disposal of bodies, tissues, organs and parts of unborn child, human fetus or aborted human embryo).


367. See supra notes 100-02 and accompanying text.

368. E.g., IDAHO CODE § 18-611 (1979) (discretionary); IND. CODE § 35-1-58.5-2(d) (Burns Supp. 1984); NEV. REV. STAT. § 442.252 (1983) (as well as marital status and age); R.I. GEN. LAWS §§ 23-4.7-5, 23-4.8-3(d) (1984); UTAH CODE ANN. § 76-7-313 (1978).
given to patients,\textsuperscript{369} as well as data of purely medical significance.\textsuperscript{370} In addition, physicians and institutions are expected to submit statistical information\textsuperscript{371} or detailed information about each abortion.\textsuperscript{372} The contents of reports may be left for determination through administrative regulation or provision of state reporting forms.\textsuperscript{373} Most legislation reflects the Supreme Court's concern\textsuperscript{374} over patient pri-


\textsuperscript{374} Planned Parenthood v. Danforth, 428 U.S. at 80: reporting and record-keeping requirements are constitutional as long as they "properly respect a patient's confidentiality and privacy." Despite the latter reservation, some courts have held that the names of patients and physicians reported to government offices become public records accessible under freedom of information laws. See, e.g., State ex rel. Stephan v. Harder, 230 Kan. 573, 641 P.2d 366 (1982); Minnesota Medical Ass'n v. State, 274
vacy by requiring the names of patients\textsuperscript{375} and at times physicians\textsuperscript{376} to be kept confidential, subject perhaps to a possibility of disclosure through court order.\textsuperscript{377} Hospitals also may be required to report to authorities cases of complications apparently flowing from abortions.\textsuperscript{378}

Reporting and record-maintenance requirements are constitutional as long as they are not abused or overdone to the point where they accomplish an unacceptable burden on exercise of constitutional right to abortion.\textsuperscript{379} For the most part, state laws appear to respect that qualification. However, Illinois, Nevada, Oklahoma, Pennsylvania and Utah, for example, decree such detailed requirements or tie report contents to matters of consent and information (some of which are unconstitutional in isolation), that one may doubt they are consonant with the Supreme Court’s concerns.

15. Sanctions

Many of the details regarding therapeutic abortion practice are found outside criminal codes. Nevertheless, supplementary criminal penalties may well be provided,\textsuperscript{380} in addition to criminal penalties

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{378} Planned Parenthood v. Danforth, 428 U.S. at 79-81.
\item \textsuperscript{379} E.g., Alaska Stat. § 18.16.010(b) (1981); Ill. Ann. Stat. ch. 38, § 81-31a
\end{itemize}
\end{footnotesize}
attached to nontherapeutic abortions.\textsuperscript{381} In general, the former are directed at medical personnel who fail to conform to statutory requirements, while the latter have laypersons as their targets. In addition, participation in criminal abortions is usually a basis for professional discipline.\textsuperscript{382} Wrongful death liability also may be confirmed specifically in abortion legislation.\textsuperscript{383}

\textsuperscript{381} See infra notes 411-18 and accompanying text.


If abortion is not specified, convicted abortionists can be disciplined on the basis of their criminal record. \textit{See, e.g.}, MICH. COMP. LAWS ANN. § 333.16221(b)(v) (West 1980); N.H. REV. STAT. ANN. § 329:17(VI)(d), (j) (Supp. 1983); P.R. LAWS ANN. tit. 26, § 52(b) (Supp. 1984); VT. STAT. ANN. tit. 26, § 1354(3) (Supp. 1984). On constitutional requirements of administrative due process governing professional discipline, see Withrow v. Larkin, 421 U.S. 35 (1975).

\textsuperscript{383} This usually is aimed at failure to preserve the lives of live-born fetuses. \textit{See, e.g.}, ILL. ANN. STAT. ch. 70, § 2.2 (Smith-Hurd Supp. 1984-1985); IND. CODE ANN. § 35-1-58.5-7(c) (Burns Supp. 1984); ME. REV. STAT. ANN. tit. 22, § 1584 (1980); NEV. REV. STAT. § 442.270(2) (1981); TENN. CODE ANN. § 39-4-206(c) (1982); UTAH CODE ANN. § 76-7-314 (1978); WASH. REV. CODE ANN. § 9.02.070 (1977); WYO. STAT. § 35-6-110 (1977).

On the traditional refusal to consider a fetus a human being with a consonant right to sue for prenatal injuries persevering after live birth, see Roe v. Wade, 410 U.S. at 161-62. \textit{Cf.} MONT. CODE ANN. § 41-1-103 (1983) (“A child conceived but not yet born is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth.”). Precedent conflicts as to whether a wrongful death action may be maintained for injuries after viability which result in a stillbirth, although a majority of jurisdictions appear to allow such litigation. \textit{See, e.g.}, Shirley v.
16. Conscience Exception

The legalization of medically indicated abortions, which had begun to emerge before 1973 in some states, necessitated protective legisla-

Bacon, 154 Ga. App. 203, 267 S.E.2d 809 (1980); Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); O'Neil v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971); Ryan v. Beth Israel Hosp., 96 Misc. 2d 816, 409 N.Y.S.2d 681 (N.Y. Sup. Ct. 1978) (guardian ad litem not allowed to maintain action which was an effort to attack a lawful abortion); Libbee v. Permanente Clinic, 286 Or. 258, 518 P.2d 636 (1974) (summarizing authorities to date of opinion). If the fetus is not viable, such an action seems not to be allowed. See, e.g., Toth v. Goree, 65 Mich. App. 296, 237 N.W.2d 297 (1975). If a viable fetus is born alive and expires after even a short existence, a wrongful death action will be allowed. See, e.g., Group Health Ass'n v. Blumenthal, 295 Md. 104, 453 A.2d 1198 (1983); Weiler & Catton, supra note 168, at 651-55; Special Project, supra note 27, at 152-55.

A now-repealed statute allowing the parents of a fetus aborted in noncompliance with abortion statutes to maintain a wrongful death action against a physician who performed the abortion was held unconstitutional as an unacceptable burden on the woman's and physician's abortion decision. Doe v. Rampton, 366 F. Supp. 189, 193 (D. Utah 1973) (three-judge court).

Courts generally rule out homicide criminality based on acts causing stillbirths. See, e.g., People v. Greer, 79 Ill. 2d 103, 402 N.E.2d 203 (1980); Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983); State v. Brown, 378 So. 2d 916 (La. 1979); People v. Guthrie, 97 Mich. App. 226, 293 N.W.2d 775 (1980); appeal denied, 417 Mich. 1006, 334 N.W.2d 616 (1983); State v. Amaro, 448 A.2d 1257 (R.I. 1982). The same result is decreed if a crime of assault is charged based on injury to a fetus in a woman's uterus. Love v. State, 450 So. 2d 1191 (Fla. Dist. Ct. App. 1984) (prosecution charged "aggravated assault of fetus"); court ruled that "person" in statute does not include a fetus). If a fetus is born alive and then dies, however, a contrary conclusion is appropriate. See, e.g., People v. Bolar, 109 Ill. App. 3d 384, 440 N.E.2d 639 (1982) (defendant properly convicted of reckless homicide as drunken driver of car which struck car in which pregnant woman was riding, necessitating a caesarean section).


tion for institutions and medical professionals whose religious, ethical or moral beliefs foreclosed their participation in abortion practice.\textsuperscript{384}\ These statutes are nearly universal today. A number of states allow all hospitals,\textsuperscript{385} including publicly operated facilities,\textsuperscript{386} to refuse to


\textsuperscript{385} E.g., ALASKA STAT. § 18.16.010(a) (1981); ARIZ. REV. STAT. ANN. § 36-2151 (Supp. 1984); ARK. STAT. ANN. § 41-2560(b) (1977); COLO. REV. STAT. § 18-6-104 (1978); DEL. CODE ANN. tit. 24, § 1791(b) (1981); FLA. STAT. ANN. § 390.001(8) (West Supp. 1984); GA. CODE ANN. § 16-12-142 (1982); IDAHO CODE § 18-612 (1979); ILL. ANN. STAT. ch. 111 1/2, § 87-9 (Smith-Hurd 1977); IND. CODE ANN. § 16-10-1.5-8 (Burns 1983); KAN. STAT. ANN. § 65-444 (1981); ME. REV. STAT. ANN. tit. 22, § 1591 (1980); MD. PUB. HEALTH CODE ANN. § 20-214(b) (1982); MASS. GEN. LAWS ANN. ch. 112, § 12(f) (West 1983), ch. 272, § 21B (West Supp. 1984) (private hospitals and facilities); MINN. STAT.
allow abortions or admit patients for the purpose of abortion. There is no constitutional infirmity in granting a conscience exception to public facilities. A few states, however, limit the conscience exemption to private or religious institutions. Hospitals cannot be held civilly liable or denied public subsidies because of refusals.


The European Court of Justice has recognized that medical facilities in one member state can refuse abortions for visiting workers, authorized by another member state, if abortion is prohibited in the competent institution's own nation. Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland v. G. Pierele (Case 182/78), [1979] E.C.R. 1977, 1990.


to allow abortions, although they may be required to notify patients beforehand of their policies.391

The private right of conscience is usually delineated in terms of religious, moral, ethical or professional scruples,392 but may be left unrestricted.393 Most frequently, conscientious objectors are required to file a written statement of objection.394 In some jurisdictions that burden is not specifically imposed.395

Laws may be drafted simply to allow the conscience exception to any person,396 or may designate physicians,397 nurses,398 or other


392. E.g., ARIZ. REV. STAT. ANN. § 36-2151 (1974); CAL. HEALTH & SAFETY CODE § 25955(a) (West 1984); COLO. REV. STAT. § 18-6-104 (1978); FLA. STAT. ANN. § 390.001(8) (West Supp. 1983); GA. CODE ANN. § 16-12-142 (1982); IDAHO CODE § 18-612 (1979); IND. CODE ANN. § 16-10-3-2 (Burns 1983); KY. REV. STAT. § 311.800(4) (1983); MASS. GEN. LAWS ANN. ch. 112, § 12 (West 1983); MO. ANN. STAT. § 197.032 (Vernon 1983); MONT. CODE ANN. § 50-20-111(2) (1983); NEV. REV. STAT. § 632.475(1) (1979); N.M. STAT. ANN. § 30-5-2 (1984); N.Y. CIV. RIGHTS LAW § 79i (McKinney 1976); N.C. GEN. STAT. § 14-45.1(e) (1981); 18 PA. CONS. STAT. ANN. § 3203 (Purdon 1983); R.I. GEN. LAWS § 23-17-11 (1979); UTAH CODE ANN. § 76-7-306(1) (1978); VA. CODE § 18.2-75 (1982); WIS. STAT. ANN. § 140.42(1) (West 1974).


The conscience exemption may not be invoked in emergency situations. See, e.g., FLA. STAT. ANN. § 390.001(9) (West Supp. 1984) (induced labor); IOWA CODE ANN. § 146.1 (West Supp. 1984); NEV. REV. STAT. § 632.475(3) (1979); OKLA. STAT. ANN. tit. 63, § 1-741(C) (West 1984).


396. E.g., ARK. STAT. ANN. § 41-2560(a) (1977); COLO. REV. STAT. § 18-6-104 (1978); DEL. CODE ANN. tit. 24, § 1791(a) (1981); FLA. STAT. ANN. § 390.001(8) (West Supp. 1984); GA. CODE § 16-12-142 (1982); IOWA CODE ANN. § 146.1 (West Supp. 1984-1985);
hospital, clinical or medical office personnel.\textsuperscript{399} Those who invoke their personal conscience rights cannot be held criminally\textsuperscript{400} or civilly\textsuperscript{401} liable, or subjected to administrative penalties,\textsuperscript{402} or to disci-
plenary\textsuperscript{403} or recriminatory\textsuperscript{404} action. Statutes also proscribe discrimination against those relying on their statutory rights,\textsuperscript{405} particularly in connection with employment\textsuperscript{406} or educational\textsuperscript{407} opportunities.

On occasion, sanctions are supplied for violations of the conscience


exception in the form of criminal penalties,\textsuperscript{408} and civil injunctive\textsuperscript{409} and damage\textsuperscript{410} remedies.

C. Criminal Statutory Provisions Affecting Abortions

1. General Principles

In the immediate aftermath of \textit{Roe v. Wade}, a few states voided their abortion legislation entirely, eliminating criminality for non-physician abortionists, as well as for medical practitioners performing therapeutic abortions.\textsuperscript{411} This was judicial overkill. In \textit{Connecticut v. Menillo},\textsuperscript{412} the Court confirmed that its 1973 \textit{Roe} and \textit{Bolton} decisions were not intended to provide a constitutional exemption from criminal law coverage for nonphysician abortionists.\textsuperscript{413} State decisions are now uniform in recognizing the state's power to prosecute nonphysician abortionists.\textsuperscript{414} This power extends, as well, to physi-

\begin{itemize}
\item \textsuperscript{411} See State v. Hodgson, 295 Minn. 294, 204 N.W.2d 199 (1973) (per curiam) (physician who performed abortion within first trimester secondary to the contraction of rubella by his pregnant patient not criminally convicted); Commonwealth v. Jackson, 454 Pa. 429, 312 A.2d 13 (1973) (per curiam) (nonphysician's conviction of committing an unlawful abortion was used).
\item \textsuperscript{412} 423 U.S. 9 (1975) (per curiam).
\item \textsuperscript{413} The Court noted that it was concerned with maternal health, and had only legitimated an "abortion . . . performed by medically competent personnel under conditions insuring maximum safety for the woman." \textit{Id.} at 11. Hence, prosecutions of nonphysicians for first-trimester abortions "infringe upon no realm of personal privacy secured by the Constitution against state interference." \textit{Id.} "The ever-increasing state interest in maternal health provides additional justification for such prosecutions." \textit{Id.}
\item \textsuperscript{414} See, e.g., State v. Orsini, 187 Conn. 264, 264 N.W.2d 199 (1973) (per curiam) (physician who performed abortion within first trimester secondary to the contraction of rubella by his pregnant patient not criminally convicted); Commonwealth v. Jackson, 454 Pa. 429, 312 A.2d 13 (1973) (per curiam) (nonphysician's conviction of committing an unlawful abortion was used).
\end{itemize}
cians who violate constitutionally acceptable regulations of therapeutic abortions.415

When prosecutions of the latter sort are initiated, however, federal constitutional principles require that the underlying legislation be sufficiently precise to give warning of the prohibited and acceptable activities. If the statute is vague and indefinite, it will be invalidated.416 Beyond that, consistent with the Court's general approach to strict liability criminal legislation,417 abortion statutes imposing felony or serious misdemeanor penalties must include a scienter (intent or knowledge) component, or they will be invalidated.418 There is no constitutional barrier to a statutory requirement that proof of a medical justification be advanced by a physician defendant as an affirmative defense.419

2. Persons Covered

As noted above, criminal statutes can only be invoked constitutionally against nonphysicians in general or against physicians who depart from acceptable medical practices.420 This is express in some statutes;421 if not, courts must apply this meaning to the general


415. See Simopoulos v. Virginia, 462 U.S. 506 (1983) (requirement that second trimester abortions be performed in licensed clinics is not an unreasonable means of furthering state's compelling interest in protecting the woman's own health and safety).

416. See City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. at 2503-04 (invalidating criminal statute requiring disposal of fetal remains "in a humane and sanitary manner" because it failed to give physicians fair notice that the contemplated conduct is forbidden); Colautti v. Franklin, 439 U.S. 379 (1979) (statutes turning on whether fetus is "viable" void for vagueness); Planned Parenthood v. Danforth, 428 U.S. at 81-84 (statute imposing criminal penalties for failure to exercise degree of professional skill, care and diligence necessary to preserve life and health of fetus held invalid).


418. Colautti v. Franklin, 439 U.S. at 395 ("[b]ecause of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the statute is little more than 'a trap for those who act in good faith.' ").

419. Simopoulos, 103 S. Ct. at 2535 (placing burden on a defendant of going forward with evidence on an affirmative defense generally is permissible).

420. See, e.g., People v. Franklin, 683 P.2d 775 (Colo. 1984) (osteopath could be convicted for performing a nontherapeutic abortion even though criminal statute unconstitutionally outlawed certain therapeutic abortions by licensed medical practitioners). See also supra notes 186-89 and accompanying text.

421. See, e.g., ALASKA STAT. § 18.16.010 (1981); ARK. STAT. ANN. § 41-2551 (1977); COLO. REV. STAT. § 18-6-101 (Supp. 1983); DEL. CODE ANN. tit. 24, § 1790(a) (1881); D.C. 497
term, “any person,” if constitutional problems are to be avoided.422

3. Actus Reus

The objective acts embodied in traditional abortion legislation, still in force in some jurisdictions, are administering drugs or substances423 or using instruments or other means424 to terminate pregnancy. A majority of states, particularly those which have modernized their criminal legislation, require that the woman be pregnant,425 while a minority do not include that specific require-


424. The statutes cited supra in note 423 contain this alternative with the following exceptions and additions: COLO. REV. STAT. § 18-6-102(1) (1978); DEL. CODE ANN. tit. 11, §§ 651, 654 (1979); KY. REV. STAT. § 311.720(1) (1983); NEV. REV. STAT. § 201.120(2) (1979); WASH. REV. CODE ANN. § 9.02.020 (1977).

Some statutes continue to embody distinctions based on the stage of a pregnancy, in terms of time or viability. These cannot be invoked against physicians practicing within the constitutional bounds established by the Supreme Court. They are, however, appropriately applied to laypersons as a means of grading punishments. The further into the pregnancies that illicit abortions are performed, the greater the danger to maternal life and health, and the greater the justification for augmented penalties. If, however, the statutes restrict the coverage of criminal abortion legislation as applied to nonphysicians, they are unwise, because there should be no lawful scope for such abortions.

4. Scienter

Traditional statutes are clear that abortions must be done with intent to produce an abortion or miscarriage. Thus, they create no constitutional infirmities as far as scienter requirements are concerned. That seems to be a problem exclusively generated by recent therapeutic abortion statutes supported by residual criminal penalty provisions.

5. Weight

The overwhelming majority of abortion statutes carry felony-level punishments, with few offenses punishable as misdemeanors. It


432. See Connecticut v. Menillo, 423 U.S. at 11. See also supra note 413 and accompanying text. For illustrations of legislation apparently so limited, see IOWA CODE ANN. § 707.7 (West 1979); WYO. STAT. § 35-6-101 (1977).

433. See supra notes 417-18 and accompanying text. See also Harris v. McRae, 448 U.S. 297, 311 n.17 (1980) (Hyde Amendment criminal sanctions were valid because they contained "a clear scienter requirement under which good-faith errors are not penalized").

434. See the statutes cited supra in notes 423-31, all of which, except as listed infra in note 435, carry felony penalties.

435. E.g., ALA. CODE § 13A-13-7 (1982) (fined not less than $100 nor more than $1,000 and imprisonment for not more than 12 months); ILL. ANN. STAT. ch. 38, § 81-31(a)-(e) (Smith-Hurd Supp. 1984-1985) (remaining provisions are punishable as felonies); ME. REV. STAT. ANN. tit. 11, § 1598(4) (1980) (abortion by a physician after viability is a class D crime, all other abortions are class C crimes); N.H. REV. STAT. ANN.
is possible that this field of penal law will prove susceptible to restriction under the eighth amendment prohibition against disproportionate punishments.436

6. Criminality Based on Neonatal Death

Statutory provisions governing care of neonates and fetuses during abortion and birth processes have been noted.437 Specific criminal penalties usually are set forth governing what in most instances is a form of medical malpractice.438 The chief deficiencies observable in

§ 585:12 (1974) (imprisoned not more than one year, or fined not more than $1,000, or both); N.D. CENT. CODE § 14-02-1-04(4) (1981) (class A misdemeanor if physician violates regulations); WASH. REV. CODE ANN. § 9.02.070 (1977) (gross misdemeanor, if physician performs the abortion without consent or if the woman has not resided in the state for 90 days or if the abortion is performed in other than an accredited hospital or medical facility).

436. See Solem v. Helm, 103 S. Ct. 3001 (1983) (eighth amendment barred life sentence of imprisonment without possibility of parole against fourth offender for writing a check of $100).

437. See supra notes 347-51 and accompanying text.

438. E.g., DEL. CODE ANN. tit. 24, § 1795(b) (Supp. 1982) (knowing and reckless conduct detrimental to life or health of live-born infant after abortion a class A misdemeanor); FLA. STAT. ANN. § 782.09 (West 1976) (killing unborn child by injury to mother deemed manslaughter); ILL. REV. STAT. ch. 38, §§ 91-24, 81-26(1) (Smith-Hurd Supp. 1984-1985) (class 2 felonies); IND. CODE ANN. § 35-1-18.5-7(c) (Burns Supp. 1984) (subject to homicide and manslaughter criminality); IOWA CODE ANN. §§ 707.9 (intentional killing of live-born fetus a class B felony), 707.10 (West 1979) (failure to preserve life and health of viable fetus a serious misdemeanor); LA. REV. STAT. ANN. §§ 14:87.1 (West 1974) (killing child during delivery punishable by life imprisonment), 14:87.5 (West Supp. 1984) (intentional failure to sustain life and health of live-born viable infant punishable by up to 21 years imprisonment); MASS. GEN. LAWS ANN. ch. 112, § 12T (West 1983) (failure to take reasonable steps to protect life and health of live-born child a misdemeanor, together with any other criminal liability); Mich. COMP. LAWS ANN. § 750.322 (1968) (wilful killing of unborn quick child by injury to mother is manslaughter), § 750.323 (1981) (successful efforts to kill unborn quick child is manslaughter); MONT. CODE ANN. § 50-20-106(1) (1983) (purposely, knowingly or negligently to cause death of premature viable infant born alive is criminal homicide); NEB. REV. STAT. § 28-332 (Supp. 1984) (class IV felony to fail to take reasonable steps to preserve life of live-born infant); NEV. REV. STAT. § 442.270(2) (1931) (failure to preserve life and health of live-born person subjects person to general criminal statutes); N.D. CENT. CODE §§ 14-02-1-05, 14-02-1-08 (1981) (class C felony to fail to preserve life and health of unborn child); OKLA. STAT. ANN. tit. 63, § 1-734(J) (West 1984) (persons killing neonate or failing to take reasonable measures to preserve life of infant are guilty of homicide); 18 PA. CONS. STAT. ANN. § 3210(b) (Purdon 1983) (third degree felony to fail to protect life of unborn viable child); R.I. GEN LAWS § 11-9-18 (Supp. 1984) (knowingly and intentionally failing to provide reasonable medical care and treatment, causing death of live-born infant is manslaughter); S.D. CODIFIED LAWS ANN. § 22-17-6 (1978) (intentional killing of human fetus by causing injury to mother, other than during therapeutic abortion, a class 4 felony); TENN. CODE ANN. § 39-4-206(b) (1982) (felony to fail to use good medical skill to preserve life and health of live-born infant); TEX. REV. CIV. STAT. ANN. art. 4512.5 (Vernon 1976) (destroying life during parturition
some of these statutes are lack of a clear scienter requirement, vagueness problems in statement of the standard of duty, and disproportionality of punishments.

7. Criminality Based on Maternal Death

There is no need for special legislation governing the death of a woman in the course of an unlawful abortion or manifesting criminal negligence in the setting of a therapeutic abortion. Nevertheless, several states specially address that form of homicide.

8. Liability for Seeking Criminal Abortion

Some jurisdictions penalized women before 1973 for seeking abortions. Some continue such penal law coverage as far as nontherapeutic abortions are concerned. Perpetuation of that form of

if child would have been born alive is a felony punishable by a minimum 5 years' imprisonment to life; UTAH CODE ANN. § 76-7-314(2) (1978) (third-degree felony to fail to use medical skills to preserve life of unborn child); WASH. REV. CODE ANN. § 9A.32.060(b) (1977) (intentionally killing unborn quick child by injuring mother is first-degree manslaughter); WYO. STAT. § 35-6-110 (1977) (felony intentionally to terminate viability of unborn infant or to fail to use accepted means of preserving live-born fetus).

See State v. Lewis, 429 N.E.2d 1110 (Ind. 1981), cert. denied sub nom. Lewis v. Indiana, 457 U.S. 1118 (1982) (doctor could be retried for unlawful postviability abortion performed at clinic rather than hospital; viability demonstrated by fact fetus had been born alive and had survived 2 hours).

439. See materials cited supra at note 416. See also Commonwealth v. Edelin, 371 Mass. 497, 359 N.E.2d 4 (1976) (insufficient evidence that physician's conduct was negligent or reckless, so that verdict of acquittal should have been directed; court divided equally as to whether death of fetus could be manslaughter); Special Project, supra note 27, at 156-59; Note, Criminal Liability of Physicians: An Encroachment on the Abortion Right?, 18 AM. CRIM. L. REV. 591, 609-15 (1981); Note, Current Technology Affecting Supreme Court Abortion Jurisprudence, 27 N.Y.L. SCH. L. REV. 1221, 1249-55 (1982).

440. See supra notes 53-56 and accompanying text.

441. E.g., COLO. REV. STAT. § 18-6-102(2) (1978) (class 2 felony); D.C. CODE ANN. § 22-201 (1981) (second-degree murder); MASS. GEN. LAWS ANN. ch. 272, § 19 (West 1970) (felony punishable by five to 20 years' imprisonment); MISS. CODE ANN. § 97-3-3(1) (1972) (murder); N.H. REV. STAT. ANN. § 585:14 (1974) (second-degree murder); N.M. STAT. ANN. § 30-5-3 (1984) (second-degree felony); N.Y. PENAL LAW § 125.15(2) (McKinney 1975) (second-degree manslaughter); VT. STAT. ANN. tit. 13, § 101 (1974) (felony punishable by five to 20 years' imprisonment); WIS. STAT. ANN. § 940.04(2) (West 1982) (felony punishable by not more than 15 years' imprisonment).

Several statutes require coroners or medical examiners to inquire into deaths apparently resulting from criminal abortions. See, e.g., FLA. STAT. ANN. § 406.11(1)(a)(9) (West Supp. 1984); LA. REV. STAT. ANN. § 33:1561 (West Supp. 1984); MASS. GEN. LAWS ANN. ch. 38, § 6 (West Supp. 1984); MISS. CODE ANN. § 41-61-9 (1972).

On wrongful death civil liability, see supra note 383 and accompanying text.

442. See supra notes 56-64 and accompanying text.

criminality, however, is as unwise today as it was before 1973, because of the difficulties it creates in criminal justice administration.444

9. Advertising Abortifacients

Criminal statutes penalizing the advertising of abortions and abortifacients have been evident for generations.445 A number of such provisions continue to exist in unmodified form.446 They are unconstitutional because they do not exempt dissemination of information about lawful therapeutic abortions which constitute a form of commercial speech protected by the first amendment.447 Therefore, several statutes have been amended to conform with Bigelow v.
10. Soliciting Abortions

Some traditional statutes have penalized the act of soliciting women for abortions. To the extent they fall within the advertising cases discussed immediately above, they are subject to equivalent constitutional attack. However, even if such statutes apply only to personal contacts, they seem clearly unconstitutional under Roe v. Wade because they impede access by women to lawful therapeutic abortions. Recent legislation reflects such concerns.

11. Trafficking in Abortifacients

Criminal regulation of abortifacients, like restrictions on advertising and solicitation, came onto statute books in the nineteenth century. Many such laws have been continued in force without change. However, to the extent they burden the availability of lawful therapeutic abortions, they are unconstitutional.

accommodated at those rates, violated the Coalition's first and fourteenth amendment rights).

448. 421 U.S. 809 (1975). E.g., CONN. GEN. STAT. §§ 53-31 (1960), 53-31a (Supp. 1984); IDAHO CODE § 18-604 (1979) (physicians and licensed health care providers), § 18-607 (1979) (except to physicians or druggists or distributors to others, or in trade or professional channels unlikely to reach the general public); MD. PUB. HEALTH CODE ANN. § 20-210(a)(2) (Supp. 1983) (other than by physicians in licensed and accredited hospitals [probably too limited an exception to meet Bigelow requirements]); VA. CODE § 18.2-76.1 (1982) (amended after Bigelow); WIS. STAT. ANN. § 450.11(2) (West Supp. 1984).

449. Cf. Baird v. La Follette, 72 Wis. 2d 1, 239 N.W.2d 536 (1976) (statute construed not to cover educational and informational exhibits in the context of free public lectures; could not ban even in a commercial setting good faith educational presentation of general information regarding contraception). See generally Warren, supra note 17, at 45-47. A telephone company acted properly in refusing to delete abortion clinic advertising in a classified directory, ordered by state public utilities commission based on the commission's ruling that the advertising was "deceptive." Neary v. Pennsylvania Public Utility Comm'n, 78 Pa. Commw. 636, 468 A.2d 520 (1983).

450. E.g., CONN. GEN. STAT. §§ 53-29 (1960), 53-31a (Supp. 1984); IDAHO CODE § 18-606(1) (1979); MASS. GEN. LAWS ANN. ch. 272, § 20 (West 1970); MONT. CODE ANN. § 50-20-109(4) (1983) (by physician, hospital or other person or agency); NEV. REV. STAT. § 442.270(1) (1981) (person or organization not to advertise directly or indirectly abortion costs or conditions); N.D. CENT. CODE § 14-02.1-06 (1981); V.I. CODE ANN. tit. 14, § 153 (Supp. 1984) (no public or private organization or society is to be created for purpose of soliciting candidates for abortion).


452. See supra notes 69-75 and accompanying text.


[T]he same test must be applied to state regulations that burden an individual's right to . . . terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit
quentely, most contemporary statutes either exempt therapeutic abortions \textsuperscript{455} or limit their coverage to unlawful abortions. \textsuperscript{456}


A few statutes require that a woman's testimony concerning a criminal abortion be corroborated. \textsuperscript{457} Vermont’s abortion statute allows a woman’s statements in evidence as a dying declaration if she dies following an abortion. \textsuperscript{458} Two jurisdictions immunize a woman’s testimony against incriminating use so that she may be called as a prosecution witness. \textsuperscript{459} Legislation of this sort is probably residual from earlier times and deserves repeal.

Rhode Island legislation states that it is unnecessary for the prosecution to prove that an abortion was not legally justified. \textsuperscript{460} Current constitutional doctrine legitimates placement of a burden of going forward with evidence on the defendant; however, the legality of im-

\textsuperscript{455} E.g., \textbf{CAL. PENAL CODE} § 274 (West Supp. 1984); \textbf{COLO. REV. STAT.} § 18-6-105 (1978) (other than licensed physician); \textbf{CONN. GEN. STAT.} § 53-31a(b) (West Supp. 1984) (exempts licensed physician or hospital); \textbf{DEL. CODE ANN.} tit. 24, § 1792(1) (1981) (exempting for purposes of lawful abortion under § 1790); \textbf{IDAHO CODE} § 18-807 (1979) (except to physician or druggist or distributor, or on prescription or order of physician, or possession with intent to supply to lawful recipient); \textbf{ILL. ANN. STAT.} ch. 38, § 81-31(d) (Smith-Hurd Supp. 1984-1985) (without prescription); \textbf{IOWA CODE ANN.} § 205.1 (West 1969) (exempting supplying on prescription), § 205.2 (West 1969) (exempts those supplying physicians, etc., for use in the practice of their profession); \textbf{MICH. COMP. LAWS ANN.} § 750.15 (1968) (except on prescription [probably too narrow under Carey]); \textbf{S.C. CODE ANN.} § 44-41-80(a) (Law. Co-op. 1976) (except in connection with therapeutic abortions; women on whom abortions performed are not within criminal provisions); \textbf{WIS. STAT. ANN.} § 450.11(2) (West Supp. 1984) (except to licensed physicians or medical services).

\textsuperscript{456} E.g., \textbf{MASS. GEN. LAWS ANN.} ch. 272, § 21 (West 1970); \textbf{N.Y. PENAL LAW} § 125.60 (McKinney 1975); \textbf{WASH. REV. CODE ANN.} § 9.02.030(1977).

\textsuperscript{457} E.g., \textbf{IDAHO CODE} § 19-2115 (1979); \textbf{NEV. REV. STAT.} § 175.301 (1981) (unless the person on whom the offense was committed was at the time a police officer or deputy sheriff (legitimating use of policewomen decoys)). \textit{See also supra} notes 58-59 and accompanying text.

\textsuperscript{458} \textbf{VT. STAT. ANN.} tit. 13, § 102 (1974).

\textsuperscript{459} \textbf{NEV. REV. STAT.} § 201.140 (1979) (abortion, attempted abortion or selling abortifacients); \textbf{WASH. REV. CODE ANN.} § 9.020.040 (1977) (no person can claim a privilege against self-incrimination in prosecutions for abortion, attempted abortion or selling drugs, but is immunized under \textbf{WASH. REV. CODE ANN.} § 10.52.090 (1980)). \textit{See also supra} notes 59-63 and accompanying text.

\textsuperscript{460} \textbf{R.I. GEN. LAWS} § 11-23-5 (1981) (unnecessary to save woman’s life, this basic provision is unconstitutional under \textit{Roe v. Wade} if applied to physicians, and superfluous in actuality in instances of criminal abortion).
posing the burden of persuasion on the defendant is unclear. The volatile and controversial context of abortion is probably not the most appropriate one to test such issues.

D. Economic Aspects of Therapeutic Abortions

1. Public Funding of Abortions

A logical corollary of the Supreme Court's holding in Roe v. Wade seemingly would have been that states and the federal government should be required to provide the same financial support for therapeutic abortions as they offer for other medical services to financially unable citizens. Otherwise, government would burden the free exercise of women's rights to have abortions and create invidious distinctions among classes of patients based on financial considerations. However, logic lost as the issue came before the Supreme Court.

In Maher v. Roe, welfare recipients attacked a state exclusion of Medicaid payments to patients receiving therapeutic abortions; a federal district court found the preclusion to deny equal protection. The Supreme Court disagreed. Although it did not depart from its Roe v. Wade principle that the Constitution protects women from unduly burdensome interference with the freedom to terminate pregnancies, it held that there is no constitutional barrier to a state's making "a value judgment favoring childbirth over abortion and . . . implement[ing] that judgment by the allocation of public funds." Financially unable patients not wishing to take advantage of state-supported childbirth must depend on private sources:

The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the [state] regulation.

In short, the Court perceived a basic difference between direct state interference with a protected activity and


463. 432 U.S. at 474.

464. Id.
state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.465

Two other decisions during the same term documented the Court's theme. In Beal v. Doe,466 the Court applied an identical analysis to title XIX of the Social Security Act,467 which it construed not to require state funding of nontherapeutic abortions, but not to preclude such funding either.468 In Poelker v. Doe,469 it ruled that publicly-owned and operated hospitals did not have to offer free hospital abortion services even though they provided free childbirth facilities. The rationale was that of Maher v. Roe.

While Beal v. Doe was awaiting final resolution, Congress had begun enacting an annual prohibition470 which in varying forms banned the use of federal Medicaid funding for nontherapeutic abortions or therapeutic abortions other than for certain restricted reasons.471 Constitutional attacks on it were launched immediately, since Beal v. Doe had dealt only with construction of Medicaid provisions not bearing the Hyde Amendment limitation. In Harris v. McRae,472 the

465. Id. at 475-76 (footnote omitted).
469. 432 U.S. 519 (1977). Poelker was distinguished by the Eighth Circuit Court of Appeals, however, when it enjoined a city hospital commission from refusing to allow staff at the only hospital in the community, publicly owned, to perform lawful abortions for paying patients. Nyberg v. City of Virginia, 667 F.2d 754, 757-58 (8th Cir. 1982), appeal dismissed, cert. dismissed, 103 S. Ct. 3102 (1983).

The Republican Party Platform of 1984 opposed the use of public revenues for abortion and called for elimination of funding for organizations advocating or supporting abortion. 42 Cong. Q. 2110 (Aug. 25, 1984). The Democratic Party Platform approached the question somewhat more elliptically: it opposed "government interference which denies poor Americans their right to privacy by funding or advocating one or a limited number of reproductive choices only." 42 Cong. Q. 1767 (July 21, 1984).

471. The 1977 version acknowledged only danger to maternal life, while the 1979 language recognized "severe and long-lasting physical health damage"; the 1980 version included rape or incest if reported promptly to a law enforcement agency or public health service. See Harris v. McRae, 448 U.S. at 302-03. The fiscal year 1984 version covers only instances "where the life of the mother would be endangered if the fetus were carried to term." Departments of Labor, Health and Human Services, and Education Appropriations Act. Pub. L. No. 98-139, § 204, 97 Stat. 871, 887 (1983).
472. 448 U.S. 297 (1980). Later the same term, in Williams v. Zbaraz, 448 U.S. 358 (1980), the Court held that a state participating in the Medicaid program is not obligated to underwrite medically indicated abortions for which federal reimbursement is unavailable under the Hyde Amendment; the Court confirmed that state funding re-
Court reiterated its *Maher v. Roe* premise that legislative bodies, including Congress, can refuse to underwrite therapeutic abortions and, "by means of unequal subsidization of abortion and other medical services, encourage alternative activity deemed in the public interest."\(^7\) Moreover, it rejected a contention that the Hyde Amendment, by embodying Roman Catholic doctrines rejecting abortion, violated the establishment clause dimension of the first amendment.\(^4\) The Court thought, as well, that the legislation embodied no invidious discrimination violating equal protection as guaranteed in the fifth and fourteenth amendments. Congress could authorize federal reimbursement for medically necessary services generally, but need not do so for medically indicated abortions: "Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life."\(^5\)

The Court's 1977 and 1980 rulings have served to legitimate legislation in about one-quarter of American jurisdictions limiting the use of state, local\(^7\) and on occasion federal pass-through\(^7\) funding restrictions patterned on the Hyde Amendment do not violate fourteenth amendment equal protection. See generally Appleton, supra note 463; Isaacs, supra note 11, at 71-75; Jones, supra note 11, at 600-05; Yarbrough, *The Abortion-Funding Issue: A Study in Mixed Constitutional Cues*, 59 N.C.L. REV. 611 (1981).

\(^4\) Harris v. McRae, 448 U.S. at 315.

\(^7\) Id. at 318-20. The Court also found that the plaintiffs lacked standing to litigate whether the Hyde Amendment interfered with their "free exercise" rights under the amendment. *Id.* See also Note, *Abortion Laws, Religious Beliefs and the First Amendment*, 14 VAL. U.L. REV. 487 (1980); Comment, *The Establishment Clause and Religious Influences on Legislation*, 75 NW. U.L. REV. 944 (1980).


\(^5\) Harris v. McRae, 448 U.S. at 325.

\(^7\) Following enactment of the Hyde Amendment, federal courts required interim funding for therapeutic abortions until welfare recipients could be notified about reductions in Medicaid benefits, Pennsylvania v. Department of Health and Human Services, 723 F.2d 1114 (3d Cir. 1983) (based on more general federal legislation creating the Medicaid system), and continued reimbursement to states for abortions performed pursuant to federal court order. Georgia Dep't of Medical Assistance v. Heckler, 583 F. Supp. 1377 (N.D. Ga. 1984) (based on federal legislation and implementing administrative regulations).


for purposes of abortion. Similar restrictions may govern public employee or other health insurance plans, family planning services and miscellaneous benefits. Exceptions may be indicated, however, to cover abortions necessary to preserve maternal life, or used to terminate pregnancies resulting from rape or incest.

02.3-01, 14-02.3-05 (1981) (violation a class B misdemeanor); 18 PA. CONS. STAT. ANN. § 3215(c) (Purdon 1983); PA. STAT. ANN. tit. 62, § 453 (Purdon Supp. 1984-1985); UTAH CODE ANN. § 26-18-10(7) (Supp. 1983); W. VA. CODE § 16-2B-2 (1979) (state funds not to be used for abortion as a means of family planning); Wis. STAT. ANN. § 20.927(1) (West Supp. 1984).


481. Including prohibitions against providing hospital or nursing care services, e.g., ILL. ANN. STAT. ch. 23, § 7-1 (Smith-Hurd Supp. 1984-1985); N.D. CENT. CODE § 14-02.3-04 (1981); 18 PA. CONS. STAT. ANN. § 3215(a), (b) (Purdon 1983) (except for treatment of post-abortion complications or when no other facility performing abortions is available within a radius of 20 miles), disability benefits, e.g., ILL. ANN. STAT. ch. 23, § 6-1 (Smith-Hurd Supp. 1984-1985), or burial benefits. Id. § 7-1.

482. E.g., ARIZ. REV. STAT. ANN. § 35-196.02 (Supp. 1984); ILL. ANN. STAT. ch. 23, §§ 6-1, 7-1 (Smith-Hurd Supp. 1984-1985); IND. CODE § 16-10-3-3 (1983); KY. REV. STAT. §§ 205.560(6), 311.715 (1983); MINN. STAT. ANN. § 256B.02(8)(13)(a) (West 1982); N.J. STAT. ANN. § 30:4D-6-1 (West 1981); N.D. CENT. CODE § 14-02.3-01 (1981); 18 PA. CONS. STAT. ANN. § 3215(c)(2) (Purdon Supp. 1983); PA. STAT. ANN. tit. 62, § 453 (Purdon Supp. 1984); UTAH CODE ANN. § 26-18-4(3) (Supp. 1983); WIS. STAT. ANN. § 20.927(2)(a) (West Supp. 1984). In addition, ILL. ANN. STAT. ch. 23, §§ 6-1, 7-1 (Smith-Hurd Supp. 1984-1985), exempts abortions necessary to the health of either mother or unborn viable child, while WIS. STAT. ANN. § 20.927(2)(b) (West Supp. 1984) exempts cases in which a preexisting condition will cause grave, long-lasting physical health damage to a woman if she is not given an abortion. The health of an unborn viable child may be recognized under ILL. ANN. STAT. ch. 23, §§ 6-1, 7-1 (Smith-Hurd Supp. 1984-1985), and VA. CODE § 32.1-92.2 (Supp. 1984) recognizes the eugenic ground of a physician’s certification that a fetus will be born with a gross and totally incapacitating physical deformity or mental deficiency.

483. E.g., MINN. STAT. ANN. § 256B.02(13)(b) (West 1982); 18 PA. CONS. STAT. ANN.
Moreover, a few state appellate courts have invalidated or limited the impact of restrictive legislation on state legal grounds. 485

2. Protecting Women Electing Abortions

It would be a clear violation of Roe v. Wade standards for state officials in any way to coerce women to have or to decline abortions. A few states specifically prohibit the former. 486 Beyond that, legislation may bar discrimination or loss of privileges 487 or denial of public benefits 488 to women who refuse to have abortions 489 or, on occasion,


485. E.g., Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981) (budget act excluding funds to underwrite therapeutic abortions was declared in violation of the state constitution); Committee to Defend Reproductive Rights, Inc. v. Rank, 151 Cal. App. 3d 83, 198 Cal. Rptr. 630 (1984) (budget act restricting use of public funds for abortions found in conflict with basic Medi-Cal statute authorizing funds for therapeutic abortions); Kindley v. Governor of Md., 289 Md. 620, 426 A.2d 908 (1981) (court construed state legislation to cover all abortions determined by physicians in the patients’ best interest, but noted the lack of a legal obligation to fund abortions); Bayne v. Secretary of State, 283 Md. 560, 392 A.2d 67 (1978) (budget appropriation for public funding of abortions was not subject to state constitutional provision for popular referendum, which specifically excluded budgetary legislation); Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982) (state constitution required invalidation of state legislation tracking Hyde Amendment; public funding must extend to all abortions necessary to maternal health); Stain v. Hunt, 66 N.C. App. 116, 310 S.E.2d 623 (1984) (rejecting citizen attack on state funding for therapeutic abortions based on claim that $1 million appropriation for purpose had been exhausted; legislature had appropriated additional funds).

In Reina v. Landescreditbank Baden-Württemberg, 1982 C.J. Comm. E. Rec. 33, 40, the European Court of Justice held that special interest-free loans to residents upon childbirth were a “social advantage” which could not be denied workers from another member state under art. 7(1) of the EEC Treaty and art. 7(2) of Council Regulation (EEC) No. 1612/68 (the anti-discrimination regulation). The court rejected a justification advanced by Baden-Württemberg that childbirth loans were intended to encourage larger families among residents; demographic objectives of countering falling birth rates among a member state’s nationals cannot be pursued in a way which discriminates against nationals of other member states.


487. E.g., ARK. STAT. ANN. § 41-2560(c) (1977); CAL. HEALTH & SAFETY CODE § 25955.3 (West 1984); DEL. CODE ANN. tit. 24, § 1791(c) (1981); KY. REV. STAT. § 311.810 (1983); MINN. STAT. ANN. § 145.414 (West Supp. 1984); MO. ANN. STAT. § 197.032(2) (Vernon 1983).

488. E.g., ARK. STAT. ANN. § 41-2560(c) (1977); CAL. HEALTH & SAFETY CODE § 25955.3 (West 1984); DEL. CODE ANN. tit. 24, § 1791(c) (1981); KY. REV. STAT. § 311.810 (1983); ME. REV. STAT. ANN. tit. 22, § 1591 (1980); MD. PUB. HEALTH CODE ANN. § 20-214(c)(2) (1982); MASS. GEN. LAWS ANN. ch. 112, § 125 (West 1983) (patients are to be informed that refusal to undergo abortion is not a ground for denial of public assistance); MO. ANN. STAT. § 197.032(2) (Vernon 1983); OR. REV. STAT. § 435.435 (1983); 18 PA. CONS. STAT. ANN. § 3215(g) (Purdon 1983).

489. E.g., ARK. STAT. ANN. § 41-2560(c) (1977); CAL. HEALTH & SAFETY CODE 510
consent. The latter, of course, is a preferably neutral statement, but neutrality is not an evident objective of most such legislation.

VI. CONCLUSIONS AND RECOMMENDATION: A SUNSET LAW ANALOGY FOR ABORTION LEGISLATION?

Unless a right-to-life amendment to the United States Constitution is ratified, the right of women to elect medically indicated abortions is protected. On the other hand, it is unlikely the Court will depart from its position in *Harris v. McRae* that the Constitution does not require that therapeutic abortions be underwritten for financially unable women because of the possible ripple effect a contrary interpretation would have on allocation of public funds in other sensitive areas. The want of public funding may in time impel women to resort to clandestine abortionists and thus recreate a public health problem manifest before 1973.

State legislatures hostile to the Court's doctrines no doubt will stand pat with their present legislation, because they are unwilling to reopen the volatile issue of abortion reform. If other legislatures in good faith track the details of each Supreme Court decision, they


491. Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution. It cannot be that because government may not prohibit the use of contraceptives or prevent parents from sending their child to a private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools. To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result.

*Harris v. McRae*, 448 U.S. at 317-18 (citations omitted).

492. Clandestine abortion was viewed as a public health problem before 1973, see, e.g., Calderone, *Illegal Abortion as a Public Health Problem*, 50 Am. J. Pub. Health 948 (1960), and has that potential today if the availability of lawful therapeutic abortion is restricted. *Sneideman*, supra note 19, at 192-94.

493. See supra notes 139-49 and accompanying text.
may find themselves out of step with the next sequence of constitutional precedent, with defective or inadequate legislation productive of new litigation. Legislating the details of rights to privacy is as futile and unproductive as endeavoring to duplicate through statute the myriad of refined points to doctrine adjudicated under the fourth amendment.

Therefore, as we find ourselves in the mid-1980's, one may wonder whether abortion legislation of any sort is any longer needed. Civil, administrative and disciplinary proceedings can be brought against medical providers who make professionally unsound decisions to abort, and hospitals and clinics can be required to provide appropriate personnel and equipment to safeguard maternal and fetal health and life. Laypersons who offer medically unsupervised abortion services can be prosecuted for unlawful practice of medicine, just as if they had purported to offer any other form of surgical or pharmaceutical treatment. Abortion regulation adds nothing not already achievable through existing general legislation and administrative regulations.

Nor is there a need for special criminal abortion statutes aimed at clandestine or nonmedically indicated abortions, even though they are constitutional. If a pregnant woman dies as a result of a criminally negligent abortion or bungled aftercare, or if a viable fetus born alive dies for similar reasons, the coverage of manslaughter or criminally negligent homicides statutes is clear. If a neonate's life is intentionally snuffed out, murder or manslaughter provisions are fully available.

If an unqualified person performs an abortion, or a medically qualified person departs the bounds of proper abortion techniques without causing maternal or neonatal death, criminality is clear under modern assault statutes. Administering a substance other than for lawful medical or therapeutic purpose can be made a form of assault, and the use of instruments almost certainly causes physical injury or serious physical injury. If an abortion is unlawful, a woman's con-

494. See supra notes 412-15 and accompanying text.
495. See, e.g., N.Y. PENAL LAW § 120.05(5) (McKinney 1975); 30 HALSBURY'S LAWS OF ENGLAND ¶ 43 (4th ed. 1980); MODEL PENAL CODE § 211.1 comment 3-4 (Official Draft & Revised Comments 1980).
496. See N.Y. PENAL LAW § 10.00(9) (McKinney 1975) (physical injury defined as impairment of physical condition or substantial pain), § 120.00(1), (2) (McKinney 1975).
497. See N.Y. PENAL LAW § 10.00(10) (serious physical injury defined as that which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ), § 120.05(1), (2), (4), § 120.10(1), (3). The crime of reckless endangerment also may be available in abortion cases not producing death or injury but substantially risking either. See, e.g., N.Y. PENAL LAW §§ 120.20, 120.25 (McKinney 1975); TEX. PENAL CODE ANN. § 22.05(a) (Vernon 1974); MODEL PENAL CODE § 211.1 (Official Draft & Revised Comments 1980).
sent to it is legally irrelevant to the criminality of the abortionist, since it does not tend to raise a reasonable doubt about the existence of the actus reus element of physical injury or serious physical injury. If there is an unclear area, it is the criminality of negligent or intentional activity which destroys fetal life during birth processes. If this is a problem, curative legislation should be addressed directly at the basic problem without regard to whether birth processes result from abortion of a viable fetus, induced labor, or spontaneous premature or near-term miscarriage.

Accordingly, just as some states have legislated the demise of a great many regulatory provisions affecting professions, occupations, businesses, industries and enterprises, which have no affirmative justification for perpetuation, so legislatures should recognize that abortion legislation is currently unnecessary and unproductive, and terminate all special legislation relating to abortions, whether lawful or unlawful.


