HOUSE OF REPRESENTATIVES—*Tuesday, May 2, 1972*

The House met at 12 o'clock noon.

Rev. Roy Stewart, Metropolitan Baptist Church, Washington, D.C., offered the following prayer:

Almighty God, we acknowledge Your divine guidance in the founding of our Nation.

Your inestimable gift, the Bible, reveals: "Blessed is the Nation whose God is the Lord." Psalms 33: 12.

Lord, we know that "Righteousness exalteth a nation, but sin is a reproach." Proverbs 14: 34.

The Psalmist said: "All nations that forget God shall be turned into hell." Psalms 9: 17.

In the name of Jesus Christ, God, grant these our National Legislators, wisdom to rely on You for strength and guidance.

"Renew a right spirit within" (Psalms 51: 10) us individually and collectively as a nation under You, God.

Your Word tells us to "Draw nigh to You, God, and You will draw nigh to us." James 4: 8.

For renewal of dedication to Your sovereign will we pray.

May Your Spirit direct every deliberation.

In the name of the Prince of Peace, Jesus Christ. Amen.

THE JOURNAL

The SPEAKER. The Chair has examined the Journal of the last day's proceedings and announces to the House his approval thereof.

Without objection, the Journal stands approved.

There was no objection.

MESSAGE FROM THE PRESIDENT

A message in writing from the President of the United States was communicated to the House by Mr. Leonard, one of his secretaries, who also informed the House that on the following dates the President approved and signed bills and joint resolutions of the House of the following titles:

On April 24, 1972:

H.J. Res. 563. Joint resolution to authorize the President to proclaim the last Friday of April 1972, as "National Arbor Day"; and

H.J. Res. 687. Joint resolution to authorize the President to designate the third Sunday in June of each year as "Father's Day."

On April 26, 1972:

H.R. 9395. An act to authorize the Commissioner of the District of Columbia to enter into agreements with teachers and other employees of the Board of Education of the District of Columbia for the purchase of annuity contracts;

H.R. 9900. An act to amend section 112 of the Internal Revenue Code of 1954 to exclude from gross income the entire amount of the compensation of members of the Armed Forces of the United States and of civilian employees who are prisoners of war, missing in action, or in a detained status during the Vietnam conflict; and

H.R. 10344. An act to authorize the District of Columbia to enter into the Interstate Compact on Mental Health.

MESSAGE FROM THE SENATE

A message from the Senate by Mr. Arrington, one of its clerks, announced that the Senate had passed with amendments in which the concurrence of the House is requested, a bill of the House of the following title:

H.R. 14582. An act making supplemental appropriations for the fiscal year ending June 30, 1972, and for other purposes.

The message also announced that the Senate insists upon its amendments to the bill (H.R. 14582) entitled "An act making supplemental appropriations for the fiscal year ending June 30, 1972, and for other purposes," requests a conference with the House on the disagreeing votes of the two Houses thereon, and appoints Mr. ELLENDER, Mr. MAGNUSON, Mr. BIBLE, Mr. ROBERT C. BYRD, Mr. MCGEE, Mr. PROXMIRE, Mr. MONTOYA, Mr. INOUYE, Mr. HOLLINGS, Mr. YOUNG, Mrs. SMITH, Mr. HRUSKA, Mr. ALLOTT, Mr. COTTON, Mr. CASE, and Mr. FONG to be the conferees on the part of the Senate.

COMMUNICATION FROM THE CLERK OF THE HOUSE

The SPEAKER laid before the House the following communication from the Clerk of the House of Representatives:

WASHINGTON, D.C., *May 1, 1972.*

Hon. CARL ALBERT,
The Speaker, House of Representatives.

DEAR MR. SPEAKER: The Clerk of the U.S. House of Representatives received at 3:28 p.m. on this date from the U.S. Marshal an unattested copy of the Summons in a Civil Action together with a copy of the complaint filed by Common Cause and John W. Gardner vs. W. Patrick Jennings, Clerk, U.S. House of Representatives, in Civil Action File No. 848–72 in the United States District Court for the District of Columbia.

The complaint includes a Motion for a Restraining Order claiming that the plaintiffs are being caused irreparable injury and request the Court to enjoin the Clerk from levying certain charges for copies of campaign finance statements and from refusing to allow the plaintiffs to use their own duplicating equipment, as outlined in the complaint. It is my understanding that under Rule 65 of the Federal Rules of Civil Procedure the Court held a hearing on this matter at 3 P.M. this date and that another hearing is scheduled for 3:30 P.M. on May 2, 1972, although the summons requires an answer to the complaint within sixty days after service.

The summons and complaint in question are herewith attached, and the matter is presented for such action as the House in its wisdom may see fit to take.

Sincerely,

W. PAT JENNINGS,
Clerk, House of Representatives.

[In the U.S. District Court for the District of Columbia civil action file No. 848–72]

COMMON CAUSE, JOHN W. GARDNER, PLAINTIFF, *v.* W. PATRICK JENNINGS, DEFENDANT

[Summons]

To the above named Defendant: W. Patrick Jennings.

You are hereby summoned and required to serve upon Mitchell Rogovin, plaintiff's attorney, whose address, 1229 19th St., N.W., Washington, D.C. 20036, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JAMES F. DAVEY,
Clerk of Court.

Date: May 1, 1972.

PRIVATE CALENDAR

The SPEAKER. This is Private Calendar day.

The Clerk will call the first individual bill on the Private Calendar.

MRS. ROSE THOMAS

The Clerk called the bill (H.R. 2067) for the relief of Mrs. Rose Thomas.

Mr. GROSS. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Iowa?

There was no objection.

MARIA LUIGIA DI GIORGIO

The Clerk called the bill (H.R. 2070) for the relief of Maria Luigia Di Giorgio.

Mr. GROSS. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Iowa?

There was no objection.

MRS. ANNA MARIA BALDINI DELA ROSA

The Clerk called the bill (H.R. 3713) for the relief of Mrs. Anna Maria Baldini Dela Rosa.

Mr. HALL. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Missouri?

There was no objection.

CHARLES COLBATH

The Clerk called the bill (H.R. 4310) for the relief of Charles Colbath.

Mr. HALL. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Missouri?

There was no objection.

MRS. CARMEN PRADO

The Clerk called the bill (H.R. 6108) for the relief of Mrs. Carmen Prado.

Mr. GROSS. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Iowa?

There was no objection.

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

RENE PAULO ROHDEN-SOBRINHO

The Clerk called the bill (H.R. 5181) for the relief of Rene Paulo Rohden-Sobrinho.

Mr. HALL. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Missouri?

There was no objection.

CATHERINE E. SPELL

The Clerk called the bill (H.R. 7312) for the relief of Catherine E. Spell.

Mr. HALL. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Missouri?

There was no objection.

DONALD L. BULMER

The Clerk called the bill (H.R. 1994) for the relief of Donald L. Bulmer.

Mr. GROSS. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Iowa?

There was no objection.

MRS. MARINA MUNOZ DE WYSS (NEE LOPEZ)

The Clerk called the bill (H.R. 5579) for the relief of Mrs. Marina Munoz de Wyss (nee Lopez).

Mr. HALL. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Missouri?

There was no objection.

CARMEN MARIA PENA-GARCANO

The Clerk called the bill (H.R. 6342) for the relief of Carmen Maria Pena-Garcano.

Mr. HALL. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Missouri?

There was no objection.

WILLIAM H. NICKERSON

The Clerk called the bill (H.R. 4064) for the relief of William H. Nickerson.

Mr. BROWN of Michigan. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Michigan?

There was no objection.

ANTONIO BENAVIDES

The Clerk called the bill (H.R. 2394) for the relief of Antonio Benavides.

Mr. HALL. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Missouri?

There was no objection.

MRS. CONCEPCION GARCIA BALAURO

The Clerk called the bill (H.R. 2703) for the relief of Mrs. Concepcion Garcia Balauro.

Mr. GROSS. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Iowa?

There was no objection.

ALBINA LUCIO Z. MANLUCU

The Clerk called the bill (S. 559) for the relief of Albina Lucio Z. Manlucu.

Mr. BROWN of Michigan. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Michigan?

There was no objection.

MARGARIDA ALDORA CORREIA DOS REIS

The Clerk called the bill (H.R. 6504) for the relief of Margarida Aldora Correia dos Reis.

Mr. BROWN of Michigan. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Michigan?

There was no objection.

EMILIA RUFFOLO

The Clerk called the bill (H.R. 10142) for the relief of Emilia Ruffolo.

Mr. GROSS. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Iowa?

There was no objection.

JERRY L. CHANCELLOR

The Clerk called the bill (H.R. 7946) for the relief of Jerry L. Chancellor.

Mr. BROWN of Michigan. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Michigan?

There was no objection.

DONALD P. LARIVIERE

The Clerk called the bill (H.R. 8952) for the relief of Donald P. Lariviere.

Mr. BROWN of Michigan. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Michigan?

There was no objection.

MR. AND MRS. JOHN F. FUENTES

The Clerk called the bill (H.R. 11045) for the relief of Mr. and Mrs. John F. Fuentes.

Mr. HALL. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Missouri?

There was no objection.

ARLINE LOADER AND MAURICE LOADER

The Clerk called the bill (S. 341) for the relief of Arline Loader and Maurice Loader.

Mr. HALL. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Missouri?

There was no objection.

MARIA BADALAMENTI

The Clerk called the bill (S. 513) for the relief of Maria Badalamenti.

Mr. HALL. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Missouri?

There was no objection.

LUIS GUERRERO-CHAVEZ, GUADALUPE GUERRERO-CHAVEZ, AND ALFREDO GUERRERO-CHAVEZ

The Clerk called the bill (S. 641) for the relief of Luis Guerrero-Chavez, Guadelupe Guerrero-Chavez, and Alfredo Guerrero-Chavez.

There being no objection, the Clerk read the bill as follows:

S. 641

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, for the purposes of the Immigration and Nationality Act, Luis Guerrero-Chavez, Guadalupe Guerrero-Chavez, and Alfredo Guerrero-Chavez shall be held and considered to have been lawfully admitted to the United States for permanent residence as of May 20, 1958, and the periods of time each of them has resided in the United States since that date shall be held and considered to meet the residence and physical requirements of section 316 of such Act.

The bill was ordered to be read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table.

ROBERT REXROAT

The Clerk called the bill (S. 1089) for the relief of Robert Rexroat.

There being no objection, the Clerk read the bill as follows:

S. 1089

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, in the administration of the Immigration and Nationality Act, Robert Rexroat may be classified as a child within the meaning of section 101(b)(1)(F) of the Act, upon approval of a petition filed in his behalf by Robert Stanley Rexroat, a citizen of the United States, pursuant to section 204 of the Act: *Provided,* That the brothers or sisters of the beneficiary shall not, by virtue of such relationship, be accorded any right, privilege, or status under the Immigration and Nationality Act.

The bill was ordered to be read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table.

ANTONIO PLAMERAS

The Clerk called the bill (S. 1675) for the relief of Antonio Plameras.

There being no objection, the Clerk read the bill as follows:

S. 1675

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, in the administration of the Immigration and Nationality Act, Antonio Plameras may be classified as a child within the meaning of section 101(b)(1)(F) of such Act, upon the filing of a petition in his behalf by Dorothy Person, a citizen of the United States, pursuant to section 204 of such Act. The natural brothers or sisters of the said Antonio Plameras shall not, by virtue of such relationship, be accorded any right, privilege, or status under the Immigration and Nationality Act.

The bill was ordered to be read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table.

FREDI ROBERT DREILICH

The Clerk called the bill (H.R. 2725) for the relief of Fredi Robert Dreilich.

Mr. BROWN of Michigan. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Michigan?

There was no objection.

LOUISA DiLEONARDO

The Clerk called the bill (H.R. 3698) for the relief of Louisa DiLeonardo.

Mr. HALL. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Missouri?

There was no objection.

MRS. LATIFE HASSAN MAHMOUD

The Clerk called the bill (H.R. 4494) for the relief of Mrs. Latife Hassan Mahmoud.

There being no objection, the Clerk read the bill as follows:

H.R. 4494

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, for the purposes of the Immigration and Nationality Act, Mrs. Latife Hassan Mahmoud shall be held and considered to have been lawfully admitted to the United States for permanent residence as of the date of the enactment of this Act, upon payment of the required visa fee. Upon the granting of permanent residence to such alien as provided for in this Act, the Secretary of State shall instruct the proper officer to deduct one number from the total number of immigrant visas and conditional entries which are made available to natives of the country of the alien's birth under paragraphs (1) through (8) of section 203(a) of the Immigration and Nationality Act.

With the following committee amendment:

Strike out all after the enacting clause and insert in lieu thereof the following:

"That, in the administration of the Immigration and Nationality Act, Mrs. Latife Hassan Mahmoud, the widow of a citizen of the United States, shall be held and considered to be within the purview of section 201(b) of that Act and the provisions of section 204 of such Act shall not be applicable in this case."

The committee amendment was agreed to.

The bill was ordered to be engrossed and read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table.

LESTER L. STITELER

The Clerk called the bill (H.R. 10676) for the relief of Lester L. Stiteler.

There being no objection, the Clerk read the bill as follows:

H.R. 10676

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, on such terms as it deems just, the United States Postal Service is hereby authorized to comprise, release, or discharge in whole or in part the liability of Lester L. Stiteler, assistant superintendent of the Alcott Station Post Office, Denver, Colorado, to the United States for the loss resulting from the burglary at the Alcott Station Post Office, Denver, Colorado, on November 23, 1967.

The bill was ordered to be engrossed and read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table.

VINCENT J. SINDONE

The Clerk called the bill (H.R. 11632) for the relief of Vincent J. Sindone.

There being no objection, the Clerk read the bill as follows:

H.R. 11632

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, on such terms as he deems just, the Postmaster General is hereby authorized to compromise, release, or discharge in whole or in part, the liability of Vincent J. Sindone, postmaster of the post office at River Edge, New Jersey, to the United States for the loss resulting from burglary at the main office of the River Edge Post Office on May 20, 1967.

The bill was ordered to be engrossed and read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table.

DENNIS YIANTOS

The Clerk called the bill (S. 65) for the relief of Dennis Yiantos.

Mr. BROWN of Michigan. Mr. Speaker, I ask unanimous consent that the bill be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Michigan?

There was no objection.

HAROLD DONALD KOZA

The Clerk called the bill (S. 1923) for the relief of Harold Donald Koza.

There being no objection, the Clerk read the bill as follows:

S. 1923

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) Harold Donald Koza, lieutenant, United States Navy, retired, of Dothan, Alabama, is hereby relieved of all liability to repay the United States the sum of $4,583.28, representing overpayments of salary paid to him for services he performed as a civilian employee of the United States Army Aviation Center, Fort Rucker, Alabama, for the periods from February 24, 1964, through November 30, 1964, and April 18, 1965, through May 28, 1965, the said Harold Donald Koza having been appointed to such civilian position on February 24, 1964, in violation of section 2 of the Act of July 31, 1894 (repealed effective November 30, 1964), which prohibited the employment of certain retired military officers in a civilian position, and subsequently having been erroneously granted a step-increase and grade promotion based in part upon his illegal period employment prior to December 1, 1964. In the audit and settlement of the accounts of any certifying or disbursing officer of the United States full credit shall be given for the amount for which liability is relieved by this Act.

(b) The Secretary of the Treasury is authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to the said Harold Donald Koza the sum of any amounts received or withheld from him on account of the overpayments referred to in subsection (a) of this section.

SEC. 2. (a) For the purposes of all laws, rules, and regulations conferring rights and benefits on Federal employees, including, but not limited to, civil service status, retirement, and retention rights, the service performed by the said Harold Donald Koza from February 24, 1964, through November 30, 1964, as a civilian employee of the Department of the Army shall be held and considered to be valid and creditable Federal service.

(b) The Secretary of the Treasury is authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to the said Harold Donald Koza an amount equal to the difference between the salary received by him as a civilian employee of the United States at Fort Rucker, Alabama, for the period from May 29, 1965, to the date of enactment of this Act, and the salary he would have received for such period had he been promoted from step 2 of grade GS-7 to step 1 of grade GS-9 effective as of April 18, 1965.

SEC. 3. No part of the amounts appropriated in this Act shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with the claims referred to in this Act, and the same shall be unlawful, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon

conviction thereof shall be fined in any sum not exceeding $1,000.

The bill was ordered to be read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table.

SECOND ANNUAL REPORT ON GOVERNMENT SERVICES TO RURAL AMERICA—MESSAGE FROM THE PRESIDENT OF THE UNITED STATES (H. DOC. NO. 92-287)

The SPEAKER laid before the House the following message from the President of the United States; which was read and, together with the accompanying papers, referred to the Committee on Agriculture and ordered to be printed:

To the Congress of the United States:

Today, I am transmitting the second annual report on Government services to rural America, as required by the Agricultural Act of 1970.

RICHARD NIXON.

THE WHITE HOUSE, *May 2, 1972.*

THE LATE HONORABLE J. EDGAR HOOVER

(Mr. BOGGS asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. BOGGS. Mr. Speaker, the Nation is saddened today upon learning of the passing last evening of a great American, J. Edgar Hoover, for over half a century the Director of the Federal Bureau of Investigation.

Mr. Speaker, last year I directed some criticism at some of the policies of the Bureau with which I was in disagreement, but at no time was that criticism directed at the Director. I said it then and I say it now.

Mr. Speaker, there is no man who has served this country with greater dedication, with greater love, and with greater productivity. Mr. Hoover served eight Presidents of the United States, if my memory is correct: Presidents Coolidge, Hoover, Roosevelt, Truman, Eisenhower, Kennedy, Johnson, and Nixon.

He built a great law enforcement agency which became a model of law enforcement agencies throughout the world. He started it, literally, from scratch.

Not only did he establish the Federal Bureau of Investigation, but he coordinated the activities of that Bureau with every police and every sheriff's office in the United States. It became the epitome of success for a police officer to be summoned to Washington to train in the Bureau's school here.

He was eminently fair. He was considerate. But, most of all, I think that he loved his country.

The only job of any consequence Mr. Hoover held was in the Federal Bureau of Investigation. As a matter of fact, Mr. Hoover and the FBI were almost synonymous.

But, now, as all of us must, he has gone to his reward. He has left this earth.

He leaves a great name, he leaves a country which respects and admires the magnificent contribution that he has made to it and to all of us.

Mr. Speaker, it is very difficult to fully comprehend the passing of great men. They are with us so much in spirit and in being that we think about them as always being with us.

I remember the day that Franklin Roosevelt died. It was difficult to comprehend his passing, as it was for so many other people of similar stature. It is equally difficult to comprehend the passing of Mr. Hoover.

In behalf of all the Members I extend to all who were associated with him, and to his family, the sympathy which we all feel at this sad moment.

Mr. GERALD R. FORD. Mr. Speaker, will the distinguished majority leader yield?

Mr. BOGGS. I am happy to yield to the distinguished minority leader.

Mr. GERALD R. FORD. Mr. Speaker, I appreciate the gentleman's yielding to me.

America today grieves over the passing of J. Edgar Hoover.

He served not only eight Presidents, as the gentleman from Louisiana indicated, but literally hundreds of millions of Americans in the most outstanding fashion. J. Edgar Hoover was one of the most capable public officials ever to serve the American people in a position of trust. His death is a great loss to a grieving Nation.

Mr. Speaker, Mr. Hoover was a veritable rock of strength, a man looked to with a feeling that here was an individual with the greatest integrity. He was incorruptible. He was unswerving in his devotion to duty. I cannot think of any other American, certainly in my lifetime who served his Nation more faithfully or more steadfastly.

Mr. Speaker, America's debt to J. Edgar Hoover is great.

He took over the direction of the FBI in 1924 when it was a scandal-ridden and ineffective bureaucracy.

Since Mr. Hoover's tenure as FBI Director began, not one FBI agent has been charged with wrongdoing. Himself, an "honest cop," Mr. Hoover set for the FBI the highest standards and those standards have never been lowered. Under J. Edgar Hoover the FBI achieved a worldwide reputation for excellence. He was a leader of an organization whose crime-fighting record is unsurpassed. Mr. Hoover almost singlehandedly transformed the FBI into the superlative law enforcement agency it became in the thirties and forties and is today.

Mr. Hoover professionalized the FBI. He made crime detection a science. He brought law enforcement out of the dark ages into a new era presided over by technicians and experts. He made the FBI a proud organization and made the American people proud along with it.

America now mourns the death of a great citizen. J. Edgar Hoover's passing leaves a large void.

Mr. BOGGS. I thank the gentleman.

Mr. ALBERT. Mr. Speaker, it was with grevious shock that I learned an hour ago that the eminent Director of the Federal Bureau of Investigation had passed away. J. Edgar Hoover served the FBI since 1917. He gave 55 years, most of his adult life, to serving his country in the manner which he deemed responsive to his conscience and the interests of his country. I do not think there is any doubt in anyone's mind that he was totally dedicated to preserving a law-abiding, orderly way of life in this country. He was first, last, and always a great patriot. He was determined to protect it from its enemies from within and without. Not only in his dedication but in his ability he must be considered one of the greatest officials in the history of our Government.

No man can give more than sum total of his talent and ability, and that, J. Edgar Hoover did for more than half a century. The FBI was a small agency in rather low esteem with limited capabilities when Mr. Hoover joined it many years ago. He built up a force of high quality employees and agents. He saw to it that the FBI employed the most advanced scientific techniques in the prevention and detection of crime. He policed the fronts of crime with courage and he suffered the often unfair onslaughts of those who took a permissive view of his obligation to deter crime and apprehend criminals.

No public servant has had longer tenure, none has given more completely of his energy and ability. Mr. Hoover's prestige was monumental and his standards of personal conduct and professional devotion exceeded by none. He was my friend. I feel a great personal loss in his passing. The country has suffered a grievous blow in the departure of this most eminent protector of justice, law, and order. The Nation will long miss this giant of public servants.

Mr. DENHOLM. Mr. Speaker, will the gentleman yield?

Mr. BOGGS. I yield to the gentleman from South Dakota (Mr. DENHOLM).

Mr. DENHOLM. Mr. Speaker, I join in the statement of our distinguished majority leader, Mr. BOGGS and the remarks of our distinguished minority leader, Mr. FORD, and in addition to that, may I say to you and to the Members of the House of the people that I was privileged to be associated with the Federal Bureau of Investigation as a special agent for several years, and I knew J. Edgar Hoover as a man. He has been properly described by the distinguished gentleman from Louisiana and the distinguished gentleman from Michigan today. No American has served his country for so many continuous years. No one has equaled his tenure of office with an equal awesome responsibility of public service. No one has served with greater dedication. Mr. Hoover was a man of compassion, decency, dignity, and destiny. He completed that service last night in his sleep—in the same quiet way that he nobly served a lifetime of duty to America. This is a sad day in May. J. Edgar Hoover is dead.

There are no words to express the gratitude of many Americans for the service of J. Edgar Hoover—a lifetime of devotion to the land he loved. There are no songs to be sung—and I am sure he asked for none. There are some that

may rejoice but the multitudes shall sorrow—for today he has left in honor to his surest reward. To all my former associates and those remaining to fulfill the course that he chartered—to all men in law enforcement, to special agents and successors of his duty—I join in sorrow, for today a leader of men—a man among men is no more.

It was Nathan Hale who said lastly in devotion to duty:

I regret that I have but one life to give for my country.

I personally regret that J. Edgar Hoover had but one life to give to America. He gave it all—and to all he gave it.

Mr. BURLESON of Texas. Mr. Speaker, will the gentleman yield?

Mr. BOGGS. I yield to the gentleman from Texas (Mr. BURLESON).

Mr. BURLESON of Texas. Mr. Speaker, I appreciate the majority leader yielding to me that I may join in expressing sadness and regret by reason of the death of a great American, J. Edgar Hoover.

Mr. Speaker, having served in the FBI for a time, I have had the feeling, subconsciously perhaps, that Mr. Hoover was indestructible and that he would be the Director of the Bureau as long as there was a Bureau.

Of course, we know that in our Government no man is indispensable. The structure of our system provides continuity and there will be, but it is difficult at the moment to imagine another with the total dedication and devotion to America as exemplified by this great man in the position he had held all these many years.

It is my understanding that the gentleman from Georgia (Mr. STUCKEY) has ready a joint resolution that the body of J. Edgar Hoover lie in state in the Rotunda of the Capitol, that people may pay their respects. I strongly support that resolution and urge it's approval.

Mr. BOGGS. I thank the gentleman.

Mr. ABERNETHY. Mr. Speaker, will the gentleman yield?

Mr. BOGGS. I yield to the gentleman from Mississippi (Mr. ABERNETHY).

Mr. ABERNETHY. Mr. Speaker, and Members of the House, I never had the privilege and great honor of serving with Mr. Hoover in his wonderful agency, as some of my colleagues have; but I was privileged to know him quite well. I regarded him as a friend and respected him as one of the most—if not the most—courageous law enforcement officer this country ever produced.

Today we are a much better law-abiding country than we would have been had it not been for Mr. Hoover.

He respected law. He believed in a nation under law. He led the men of his organization to firmly enforce the laws of our free society. Not the slightest hint of corruption found its way into the worldwide respected Bureau headed by Mr. Hoover.

Mr. Hoover had stability. Occasionally attacked in recent years, particularly by some of those to the left, by Reds and Communists who would overthrow this Government, by just plain radicals, and sometimes by well-intentioned people, he never lost his cool. He simply, as we sometimes say, stuck to his knitting—to the job assigned to him.

He had respect for his fellow man. He had the courage and the character to do exactly that which he was sworn to do and to do it to the very best of his ability. He inspired and instilled into his men and those associated with him over his many years of service the same type of courage that he himself displayed—always putting service above self, above personal reward. Duty came first with him. And so it has been with the men of his organization.

I deeply regret the passing of Mr. Hoover. Often it is said that it is impossible to find a man to fill the place of an able one who has passed on; and although we know that such a statement is in almost every instance an exaggeration, in this instance I dare say there will never be another to gain the height, the respect, and the prestige gained by J. Edgar Hoover as the Director of the Federal Bureau of Investigation.

This Nation has suffered a great loss, a tremendous loss. The entire Nation mourns the passing of this very great man. This is a sad hour for all of us.

Mr. BOGGS. Mr. Speaker, I yield to the gentleman from California.

Mr. DEL CLAWSON. Mr. Speaker, the Nation has lost an exemplary and dedicated public servant. The news we have just received of the death of J. Edgar Hoover inspires a personal reaction for most Americans I am sure. For so long the distinguished Director of the Federal Bureau of Investigation has been a part of the American scene, with his unique, legendary position of national respect surviving all attempts at detraction, that it is difficult to imagine the FBI without him at the helm. Yet the Bureau he has led these many years will continue its vital functions providing a tribute to his organizational genius. Few men could hope to equal his record of achievement in a lifetime. I join in commending that record and expressing the gratitude of most Americans for the governmental service of this competent, hard-working upright man.

Mr. DONOHUE. Mr. Speaker, I desire to join with my colleagues here this afternoon in expressing my deep personal sorrow at the news of the sudden passing of J. Edgar Hoover and in paying tribute to one of the greatest Americans of our time.

In the midst of constantly changing customs and values J. Edgar Hoover remained a national and world champion of those qualities and virtues that our founders regarded as the enduring strengths of this Nation. Integrity, courage, and forthrightness were certainly hallmarks of Mr. Hoover's administration of the Federal Bureau of Investigation from the time of its inception.

As a chief advocate of law and order, as a chief protector of individual rights and as this Nation's chief pursuer of the harsh criminal elements in our society, J. Edgar Hoover gave unselfishly of his time, energy and unsurpassed talents in the service of his fellow Americans.

His unswerving dedication to his unique responsibility and his relentless pursuit of justice won for him the everlasting respect of law enforcement officials throughout the Nation and the world and the grateful respect of our citizenry.

In simple summary, Mr. Speaker, Mr. Hoover's life clearly reflected the ideals and virtues which he held so dear and worked so hard to preserve for all Americans. His patriotism, his devotion to duty and his perseverance served him and this country well. His passing will create a void that will be nearly impossible to fill, but the noble manner in which he carried out his responsibilities will forever be an inspiration to those seeking peace and justice throughout the world.

Mr. BOW. Mr. Speaker, the death of J. Edgar Hoover is a great loss to the American people and I have suffered the loss of a personal friend. Mr. Hoover's service to his Nation has been without precedent in our history. The United States has had no more devoted and loyal citizen. His record will remain an outstanding chapter in our history long after the world has forgotten those who have attacked him so viciously in recent years. A grateful Nation owes the Director all honor and respect. We will miss him. It will be very difficult, indeed, to fill his place.

Mr. SIKES. Mr. Speaker, it was with a deep sense of personal regret that I learned of the death today of my longtime friend, John Edgar Hoover, Director of the Federal Bureau of Investigation.

He was a giant among men and his memory should be honored by a grateful nation. To me it appears highly appropriate that his name should be perpetuated by the FBI Building now nearing completion to stand as a symbol of all he accomplished in his lifetime.

J. Edgar Hoover stood guard over America through the trials of the twenties, the turmoil of the thirties and the horrors of war in the forties, fifties, and sixties, and, until his final breath today he gave no quarter to those who sought to bring down the America he knew and cherished.

Somehow those of us who knew him well never quite accepted the fact that one day he would pass from us. His work through many years stands as a monument to patriotism, love of justice, and dedication to his fellow man. Above all, his was a life devoted to public service through the Federal Bureau of Investigation. He has done much to maintain for future generations the America he loved.

Mr. PRICE of Illinois. Mr. Speaker, the death of J. Edgar Hoover, Director of the Federal Bureau of Investigation, marks the end of an era in the annals of government service. Having served the U.S. Government longer than any man, Director Hoover has earned a special place in American history.

There is no question that Director Hoover has been Mr. FBI. Serving as Director since 1924, J. Edgar Hoover dedicated his adult life to the service of his country. From the time he entered Federal service in 1917, J. Edgar Hoover has been a determined and forceful law enforcement official.

Throughout his career as Director, J.

Edgar Hoover made it abundantly clear that he was in charge. By virtue of his perseverance and dedication J. Edgar Hoover dominated the FBI as no other Government official has any department in the history of our Nation.

I doubt that our country will ever have another J. Edgar Hoover. He is clearly a unique individual whom the American people will long remember as a dedicated and loyal public official.

Mr. EDMONDSON. Mr. Speaker, the death of J. Edgar Hoover is a great loss for America, and signals the end of an era in the field of law enforcement.

In the minds of most Americans, the name of J. Edgar Hoover was synonymous with the Federal Bureau of Investigation, which he led as Director for nearly half a century. More than any other individual, he was responsible for the watchwords of the FBI—Fidelity, Bravery, and Integrity.

Under his dedicated leadership, the FBI became a worldwide symbol for honest and efficient law enforcement, and a model for the development of scientific techniques in the prevention and detection of crime.

In the perilous days of World War II, when the Nation was threatened by sabotage and subversion within our borders, Mr. Hoover's FBI was in the vanguard of the effort to secure our homefront.

In the years that have followed, he has continued to lead that effort, and no American has been more hated or more feared by the forces of organized crime and the organizers of internal subversion and revolution.

In the minds and in the hearts of most Americans, J. Edgar Hoover was a man of unquestioned integrity and complete dedication to his country. He was our first line of defense against the enemies of the Republic—both foreign and domestic.

J. Edgar Hoover spent himself in the worthy cause of law enforcement and national security, and his place in history is assured.

It was a privilege to have served with him in the FBI, and in the service of our country.

Mr. MONTGOMERY. Mr. Speaker, the country has lost a great patriot and an outstanding leader. My personal grief and sorrow at the death of J. Edgar Hoover is great, but it is overwhelmed by the sense of loss that I feel for our Nation.

J. Edgar Hoover's death ends one of the most illustrious careers in the history of our Nation. A great man whose organization produced great men, J. Edgar Hoover was the living symbol of America's commitment to an orderly society in which its citizens could live without fear. A man of supreme faith and undaunted courage, J. Edgar Hoover believed passionately in the inherent good of America; he said what he believed and felt no necessity to apologize for it. His faith and devotion to the causes he defended were never doubted by any man, even his most ardent enemies.

Mr. Hoover, by the force of his powerful personality, his dedication to his country, his devotion to duty, and his single-mindedness of purpose literally built the FBI into the smooth-working, efficient organization we have today. America will sorely miss this great leader. but will long be sustained by the institution which was his life's work.

I join with Americans everywhere in mourning his death and I pray for renewed strength to continue in his absence.

GENERAL LEAVE

Mr. BOGGS. Mr. Speaker, I ask unanimous consent that all Members may have five legislative days to extend their remarks on the passing of J. Edgar Hoover.

The SPEAKER. Without objection, it is so ordered.

There was no objection.

HON. J. EDGAR HOOVER

The SPEAKER. The Chair recognizes the gentleman from Georgia (Mr. STUCKEY).

Mr. STUCKEY. Mr. Speaker, today I have introduced a concurrent resolution expressing the sense of the Congress that the body of J. Edgar Hoover should lie in state in the Capitol of the United States.

I cannot think of a more dedicated man than J. Edgar Hoover. He built the FBI to its stature of today and consequently has made this country a safer one both from within and from without.

I think this concurrent resolution expresses in just a small way a show of our debt and our gratitude for what this great man has done for his country.

Also I think it is a very fitting tribute that all of those who loved and admired Mr. Hoover have an opportunity to come by and to express their gratitude and final respects.

J. EDGAR HOOVER TO LIE IN STATE IN ROTUNDA OF U.S. CAPITOL

Mr. STUCKEY. Mr. Speaker, I offer a concurrent resolution (H. Con. Res. 600) and ask unanimous consent for its immediate consideration.

The Clerk read the concurrent resolution as follows:

H. CON. RES. 600

Concurrent resoluton expressing the sense of Congress that the body of J. Edgar Hoover should lie in state in the United States Capitol

Resolved by the House of Representatives (the Senate Concurring), That it is the sense of Congress that the body of J. Edgar Hoover should lie in state in the Rotunda of the United States Capitol so that the citizens of the United States may pay their last respects to this great American.

The SPEAKER. Is there objection to the request of the gentleman from Georgia?

There was no objection.

The concurrent resolution was agreed to.

A motion to reconsider was laid on the table.

A GREAT VICTORY FOR DECENCY IN UNITED MINE WORKERS UNION

(Mr. HECHLER of West Virginia asked and was given permission to address the House for 1 minute, to revise and extend his remarks and include extraneous matter.)

Mr. HECHLER of West Virginia. Mr. Speaker, the United States District Court for the District of Columbia last evening handed down a monumental decision throwing out the 1969 election of Tony Boyle in his fraudulent campaign in an attempt to defeat Joseph A. "Jock" Yablonski. Three weeks after the corrupt election, there occurred the most brutal and mindless murders in American labor history, as three wonderful people, Jock Yablonski, his wife and his daughter were shot down in cold blood in their home in Clarksville, Pa.

The trail of blood from these murders leads to the doorstep of some officials of the United Mine Workers Union, and it may lead higher.

The decision of the district court yesterday, throwing out the 1969 election, is a tremendous victory for those who have struggled so long and hard against corruption in the leadership of this great union.

The decision is a tremendous victory for those who have struggled so long and hard against corruption in the leadership of this great union. The coal miners who risk death and injury every day they labor beneath the earth deserve a strong, clean and representative union, and they are now well on their way toward this goal. Several years ago, there were only a few courageous men who spoke out for reform within the union, and these men were led by a man who paid with his life—Jock Yablonski. Since the tragic Yablonski murders, the ranks of the reformers have grown into a mighty army which will not be denied or intimidated. Now the victory is in sight, and a great blow has been struck for decency.

The text of the decision is as follows:

[In the U.S. District Court for the District of Columbia, civil action No. 662–70]

OPINION

James D. Hodgson, Secretary of Labor, United States Department of Labor, Plaintiff, and Mike Trbovich, Intervenor, *v.* United Mine Workers of America, Defendant.

This action was instituted by the Secretary of Labor, United States Department of Labor, as plaintiff, under Titles II and IV of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401 et seq.), hereinafter referred to as the Act,[1] for a judgment declaring the election held by the United Mine Workers of America, hereinafter referred to as the defendant or the UMWA, on December 9, 1969, null and void and directing the conduct of a new election under the supervision of the plaintiff, and for an order directing and compelling defendant and its subordinate districts to maintain records as required by Section 206 of the Act (29 U.S.C. 436).

On January 17, 1972, the United States Supreme Court granted Mike Trbovich, a member in good standing of the UMWA, leave to intervene in the Title IV aspects of this action under Rule 24(a) of the Federal Rules of Civil Procedure. *Trbovich v. United Mine Workers of America*, 92 Supreme Court 630 (1972), and he thereafter fully participated in this action, through counsel, as a party plaintiff. Defendant, an unincorporated association engaged in collective bargaining, is an international labor organiza-

[1] Pertinent sections of the Act are attached to this memorandum as an appendix.

tion engaged in an industry affecting commerce within the meaning of the Act, and maintains a principal office at 900—15th Street, N. W., Washington, D. C., within the jurisdiction of this court.

Structurally the UMWA is a three-tiered organization composed of the International, District and Local unions. It has twenty-three districts and between 1290 and 1300 locals, with a total membership variously estimated to be between 193,000 and 200,000 in the United States and Canada. Of this number approximately 120,000 are actively engaged in mining coal and the remainder are retired pensioners. At the International level the president shares the responsibility of general supervision of the union with the International Executive Board. The districts are intermediate organizations having supervision over the local unions within their geographical boundaries, thus constituting a direct link between the International and the locals, inasmuch as the International Executive Board members are chosen from the districts. Of the districts, only four are autonomous; two are semi-autonomous and the remainder are provisional districts. In autonomous districts the local union members elect both the district officers and the International Executive Board members. In semi-autonomous districts the officers are appointed by the International President and the International Executive Board member is elected by the local union members. In the provisional districts, i.e. those in trusteeship, the officers are appointed by the International President and the Executive Board members are elected by the International convention. The International President appoints the nominating committee which presents the slate of candidates for the International Executive Board to the convention, and there has never been any opposition to the slate presented to the convention by the nominating committee. Thus it appears that for all practical purposes the International Executive Board members are chosen by the president. The authority to hire and fire most of the district personnel and International representatives puts almost complete control of the entire union in the hands of the president.

On December 9, 1969 the defendant held a regularly scheduled election of International officers, i.e. president, vice-president, secretary-treasurer, auditors, and tellers. The defendant's constitution requires that the election of International officers be conducted in each of its local unions, and clearly indicates that the local union election officials are agents of the International in the conduct of the election and accountable to it for any misconduct.

W. A. "Tony" Boyle, President, George J. Titler, Vice-President, and John Owens, Secretary-Treasurer, were candidates for reelection. On May 29, 1969 Joseph A. Yablonski publicly announced his candidacy for the presidency of the union, and the subsequent election campaign was primarily a bitter confrontation between him and Boyle. The entire Boyle slate was successful, including the candidates for International auditor and credential committee and International tellers. The results of the election were: for president, Boyle 80,577, Yablonski 46,073; for vice-president, Titler 77,379, Elmer Brown 45,151; for secretary-treasurer, Owens 102,346. Owens had been unopposed for reelection.

Alleging numerous violations of the Act and also the UMWA constitution, Yablonski filed an internal challenge to the election results with the International tellers and notified the three principal officers that he intended to present his protest to the next meeting of the International Executive Board as a further step in exhausting his internal remedies as required by the Act (Section 402(a) of the Act) 29 U.S.C. 482(a).

Joseph Yablonski, his wife and daughter were found murdered in their home on January 1, 1970.

On January 1, 1970 defendant's general counsel, acting on behalf of the defendant, requested an immediate investigation of the election by the United States Department of Labor, waiving post election exhaustion of internal remedies required by Section 402(a) of the Act (29 U.S.C. 482(a)). After the official report of the results of the election had been issued, Mike Trbovich, a member in good standing of defendant, through counsel, filed a written complaint with the Secretary of Labor challenging the conduct of the December 9, 1969 election of officers in which he incorporated by reference the complaint filed on December 18, 1969 by Yablonski. Plaintiff, in accordance with the provisions of the Act, immediately conducted an investigation of the complaints and found probable cause to believe that violations of Title IV of the Act had occurred in the conduct of the election at all levels of the union, and had not been remedied at the time of the filing of this action; and in addition that defendant had failed and was still failing to maintain records and to require its subordinate districts to maintain records on matters required to be reported under Title II of the Act (29 U.S.C. 431 *et seq.*), which provides that labor organizations subject to the Act retain the necessary basic information and data from which documents filed with the plaintiff may be verified, explained or clarified and checked for accuracy and completeness as required by Section 206 of the Act (29 U.S.C. 436). Thereupon this suit was filed.

One of plaintiff's principal reasons for asking that the election results be declared null and void is that the defendant used union assets to promote the candidacy of its incumbent International officers. This allegedly occurred through misuse of the union's Journal, the purchase and distribution of campaign materials, the manipulation of salary increases to its employees, and various other ways. The defendant denies any wrong doing in this regard, and claims that in most instances the matters complained of were nothing more or less than normal and traditional union activity.

THE JOURNAL

The United Mine Workers Journal is the official publication of the UMWA and is published and distributed free semi-monthly to the entire membership by a printing company which is furnished with a mailing list for that purpose. All this is completely financed by union funds. The editor of the Journal is an experienced journalist who serves at the pleasure of the International Executive Board which in turn has full power to decide all questions concerning publication, business management and policy. Journalistic policy is subject to the direct influence of President Boyle.

The election of 1964 marked the first time in the history of the union that the International President had been challenged. At that time, though not a serious threat to Boyle, a virtual unknown named Steve "Cadillac" Kochis did run against him. Although the Yablonski candidacy did not surface until May 29, 1969, the incumbent president knew as early as February 1969 that there were two contenders for his office: the same Steve "Cadillac" Kochis, and yet another, named Elijah Wolford.

Beginning with the March 1, 1969 issue and continuing until enjoined by the issuance of a restraining order by Judge Waddy of this court on August 28, 1969, the type of coverage given to the International officers by the Journal clearly supports the charge that it was a campaign instrument for the incumbents. The issues from March 1 through June 1 are replete with speeches, statements and pictures of Boyle, Titler and Owens. The April 15 issue even carried a convention song for Tony Boyle to be sung to the tune of "Hello Dolly," the first verse of which is

"Hello Tony and Hello Johnny, and Hello to Big George Titler, too. You're looking great fellows. We're feeling great fellows to be led by men the likes of all of you."

A none too subtle clue to the determination to use the Journal as an effective campaign sheet is revealed when we note that up to the time Yablonski announced his candidacy he had been mentioned and pictured in the Journal on several occasions. Thereafter we have an entirely different picture. Although admittedly newsworthy because of his prestigious position in the UMWA, Yablonski's announcement of his candidacy, though featured in the commercial press, was accorded not one word of mention in the Journal.

In the five issues from June 15 to September 15 there were no less than 166 references to Boyle, most of them in bold face type along with 16 pictures depicting his various activities. Again it is noted that while there were many references to Boyle's activities in support of the then pending health and safety bills, no mention was made of Yablonski's similar activities as head of the Non-Partisan League, even though the editor of the Journal later conceded that Yablonski had been very active in the long and tedious legislative efforts to get the union's bills through the Congress. In addition there were items which extolled the extraordinary leadership capabilities of Mr. Boyle, comparing him favorably with the late John L. Lewis, and urging the membership to stand behind the officers whom Mr. Lewis personally selected to guide the destiny of the UMWA. True it is that no editorials appeared in the UMWA Journal which directly endorsed Mr. Boyle for reelection or attacked Yablonski's candidacy, but the purpose of the literal saturation of the Journal with items pointing up the day-to-day accomplishments and the great leadership potential of Boyle is clearly discernable. In determining that the Journal was used as a campaign instrument for the incumbents, and particularly as to President Boyle, this court has considered the same factors as did Judge Pratt when he granted the preliminary injunction against its continued use as such, *Yablonski v. UMWA*, 305 F. Supp. 868, 871; and draws the same line that he drew "between the use of the Journal to report the activities of defendant Boyle as president which is permissible and the use of the Journal in such a way in reporting such activities as to promote his candidacy." Both on the grounds of comity and the evidence adduced in the trial, the court finds that the Journal was used as a campaign tool during a critical period of the election campaign, thus constituting a violation of Section 401(g) of the Act. When we take into account the widespread free distribution of the Journal as the official publication of the union to all its members—working and retired alike—the harmful effect of its misuse over a six-month period is far more than a mere possibility. It may well have accomplished its obvious purpose of affecting the outcome of the election.

CAMPAIGN MATERIALS

On October 6, 1969, just two months before the December 9, 1969, election, and at the height of the campaign, the UMWA ordered 5,000 pens from Art Enterprises, an advertising counselling firm. The pen is a ball-point T-ball jotter with a sleeve window in the side, and when the plunger at its top is pressed the names of Boyle, Titler and Owens and the United Mine Workers appear in the window in successive order. These items $9,085.00 and were paid for from UMWA funds. The purchase order was placed by Howard W. Channel, the Assistant to the Secretary-Treasurer of the UMWA, who

stated that he did so pursuant to instructions given to him by John Owens, International Secretary-Treasurer. The pens were similar to some which had been distributed at the 1968 convention as souvenirs and several defense witnesses insisted that the October 6, 1969, order was not for the purpose of campaigning, but solely for the purpose of fulfilling demands for additional convention souvenirs. However all of the other evidence in the case relative to this issue point to another objective.

The order was not placed until 13 months after the convention, and when Channel was asked why this was not done much earlier if the purpose was merely to fulfill demands from the field for souvenirs his only explanation was that he was following the instructions of John Owens. Additionally there was testimony that the pens were issued only to those union officials who were Boyle loyalists. William Rosser, the operator of Art Enterprises, testified that Channel asked him how long it would take to fill the order, and when told that it would take five weeks asked for delivery on a sooner date. Rosser further testified that Channel stated to him that he wanted delivery to coincide with the campaign. The pens were distributed in November during the final phase of the campaign. The timing of both the order and distribution of these pens demonstrate the true motive for their acquisition. As a matter of fact one defense witness testified that he picked up some of them along with other campaign materials in the district office and that he used them for campaign purposes. In these circumstances the purchase of these pens constituted an improved expenditure of union funds, and thus another violation of Section 401(g) of the Act.

SALARY INCREASES

Plaintiff claims that the defendant committed another violation of Section 481(g) of the Act by awarding salary increases to persons on its payroll for the purpose of securing their support for the incumbent officers. The defendant denies this accusation and contends that the salary increases were merely in conformity with a long standing UWMA tradition of increasing salaries of their union personnel as they obtain wage increases for their members from the coal operators. The circumstances surrounding the increases appear to be much more helpful to the proper resolution of this issue than the direct testimony relative to the reasons therefor.

The miners received salary increases of $1 per day on April 2, 1964, and a like amount on January 1, 1965. A salary increase of $1,000 for the officers and $600 for other employees of the union was effected on April 1, 1965, one year after the 1964 increase and three months after the one in 1965. April 1, 1965 was the day President Boyle was inaugurated for his first full term as president of the UMWA. The miners received an increase of $1 per day on April 1, 1966 and another increase of $3 per day on October 1, 1968. The officers and employees of the defendant received no increases during those years. On April 1, 1969 the administrative officers of the union received a $1,000 per year raise and the clerical staff one of $600.

Elijah Wolford had announced his candidacy for the presidency of the UMWA on March 20, 1969, and the aspirations of Kochis for the same office were well known by that time. This April 1, 1969 increase for those on the union payroll was the first in four years, and followed the 1966 raise for the miners by three years and the 1968 raise for the miners by six months. In explanation of the obvious deviation from the alleged traditional policy of tieing union employee pay raises to wage increases obtained for the miners, Mr. Owens, defendant's secretary-treasurer, stated that the International officers were "derelict in their responsibility to give them an increase." On the same subject, Mr. Boyle testified "They (union employees) were denied the increase until the following April which was not fair but they were denied it just the same." (Tr. 261).

The miners received a $2 per day increase on October 1, 1969, and on January 22, 1970 the International Executive Board passed a resolution authorizing salary increases for officers and employees of the union to become effective as of January 1, 1970. However, the increase was not promulgated until the secretary-treasurer, Mr. Owens, sent the district secretary-treasurers a letter on April 16, 1970 authorizing the increase retroactive to January 1, 1970. This marked the first time in the history of the UMWA that a pay increase for its employees was made retroactive. It also appears to be the first time that two raises within the short span of eight months (April 1, 1969 and the one retroactive to January 1, 1970) had been effected.

The reelection campaign of Boyle, Titler and Owens was financed in part through contributions to the Miners' Committee for Boyle, Titler, Owens, 815 - 15th Street, N.W., Washington, D.C. The Committee received a total of $142,710 in contributions from 229 persons, virtually all of whom were on the union payroll in 1969. Examination of the various contributions discloses a very definite relationship between their amount and the salary bracket of the contributors.

Those in the highest bracket, i.e. International Executive Board members, district presidents and secretary-treasurers, almost invariably gave $1,000. International representatives and district representatives almost always gave $500. Some contributors conceded the relationship between their salary bracket and the amount of their contribution.

Turning to another aspect of these donations we find that those of eleven individuals employed in District 25 all arrived at the Miners' Committee's office in Washington, D.C. on October 13, 1969. The contributions of the fourteen individuals employed in District 31 arrived on September 19, 1969, and those from District 29's fourteen employees were received on September 9, 1969, and those of the nine employees of District 19 on August 13, 1969.

A similar relationship between salary and the amount of the contribution is seen in the financing of the various district-wide committees formed to support the Boyle-Titler-Owens slate. Except for two individuals in District 17 all donations to the committees operating in Districts 2, 5, 17, 25 and 31 were made by individuals on the payroll of the UMWA or of one of the districts. In each case the contributions of the district officers were significantly higher than those of the lower paid staff members. Temporary, as well as permanent employees were found on the list of contributors. One of these, a Charles Kulp, testified that President Pnakovich of District 31 made it clear that his continued status on the District's payroll was contingent upon his willingness to contribute his so-called fair-share of $175 to a $5,000 personal note signed by the District's officers, the proceeds of which were used to defray campaign expenses. Pnakovich conceded that he expected all paid employees in his District to contribute to the repayment of that $5,000 and that he had made them aware of his expectations.

Shortly after the announcement of the retroactive wage increase of 1970, the political committees organized to support the Boyle-Titler-Owens slate in Districts 17, 29 and 31 repaid debts incurred by reason of their activities in the election campaign.

Defendant urges that the salary increases were justified and consistent with union policy; and that all of the campaign contributions were spontaneous and voluntary. It ascribes mere coincidence to the fact that the last two salary increases—though the first in four years—were only eight months apart and bracketed the successful election campaign of its incumbent officers. The same explanation is suggested for the marked similarity in amounts of the donations and the unusual simultaneity of their receipt from the various districts.

But these circumstances cannot be so easily discounted. All of the evidence on this issue seems to indicate that there was no tradition of salary increases for union employees paralleling wage increases obtained for the miners; or if there in fact was such a tradition, defendant completely ignored it during Mr. Boyle's regime as president.

On the other hand there is a clearly indicated tie-in of the union raises, not to the wage increases for the miners, but rather to the election years for the International officers. The court finds that the defendant timed and manipulated the salary increases for the purpose of throwing them into the election year in an effort to attract the support of its employees for the incumbent officers in terms of services and financial aid. This conclusion is even more compelling when we consider these salary increases in the light of the other violations of Section 401(g) of the Act (29 U.S.C. 481(g)), out of which emerges a demonstrated pattern of using union assets for the purpose of insuring reelection. This further violation of the Act obviously was calculated to affect the outcome of the election, and may very well have done so.

Plaintiff alleges that the defendant frustrated Yablonski in his efforts to cover the polls with his observers, and cites this as a major violation of another section of the Act, and one which most likely affected the outcome of the election.

The UMWA constitution sets out the procedures for the nomination and election of the International officers. The polling takes place at the local unions and the officers of the locals are designated as agents of the International in carrying out the procedures set out in the constitution and the special instructions given them by the International. The officers are personally responsible for any irregularities which may take place in the local unions during the election and may be fined, suspended or expelled by the International for any transgressions. The ultimate responsibility for the conduct of the election and to see to it that the requirements of the Act are carried out rest with the International union.

Section 401(c) of the Act (29 U.S.C. 481(c)) provides:

". . . Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots."

Observers to oversee the conduct of the voting procedures and the counting of ballots are considered necessary in any election whether national, state, local or otherwise, and are almost invariably specifically provided for by statute or regulation or an organization's constitution. That the importance of election observers was fully appreciated by the defendant is demonstrated by the fact that the president of its District 17 sent out letters to the officers of all the locals directing them to appoint observers for Boyle.

As has been mentioned, the great majority of the districts were in trusteeship, with their officers appointed by the International President, as were the International representatives assigned to the district. The almost 1300 locals where the balloting was to take place were scattered from the east coast to the Rocky Mountain region, many of them in isolated areas. In these circumstances it seems that an affirmative duty is on the International union to provide a modicum of cooperation with an adversary candidate in establishing a procedure which will give him a fair opportunity to place his observers at

the polls in order that he may have the protection afforded by the Act. Otherwise, both the letter and the spirit of the Act are undercut.

But this cooperation was not forthcoming. Although it was known that the election was to take place on December 9, 1969, the particular site and hour of the polling was left to the discretion of each local union. Few of the locals had a regular meeting place. Communications from the International were usually addressed to the recording secretary or financial secretary. Many of the locals voted at the mine itself, which might be at some remote place many miles from the address of the local. Many mines had several portals at considerable distances from each other and as many as three shifts, so that there could be any combination of times and places for voting. Obviously no candidate could hope to recruit several thousand observers and get them prepared to be at their stations unless he was assured that he would have some means of determining in advance of election day the time and place of the polling at the various locals.

Yablonski could not obtain the addresses of the various locals from the International, nor was he given any information as to the polling places of the 1964 election which might have been helpful in determining where the polling places for the current election might have been. Finally he decided to write directly to the locals requesting that they inform him of the time and place of the voting. On October 30, 1969 Yablonski delivered to the office of the International union envelopes to be mailed to all local unions. Each envelope contained a form letter addressed to the recording secretaries, and local union officers with a self-addressed post card. The letter requested that the time and place of the balloting be entered on the self-addressed post card and the card be returned. The envelopes were delivered to the International headquarters where an assistant to the secretary-treasurer addressed and mailed them to the local unions. Of 1299 letters and post cards sent out to the locals, only about 300 were returned to Yablonski. By his own efforts and those of his associates Yablonski was able to discover approximately 200 additional polling places. Thus at the time of the election he had between fifty and sixty percent of the total number of locals covered by observers.

When an officer of one of the locals called the general counsel of the UMWA and inquired as to whether he should fill out and return the post card which had been requested by Yablonski, he was told that the United Mine Workers of America took no position on the matter and that he should use his own judgment. The failure and refusal of the UMWA to assume any responsibility for providing sufficient information to Yablonski for him to avail himself of the opportunity to cover the polls with observers constitutes a flagrant violation of the Act which may have had an affect on the outcome of the election.

Plaintiff claims that Yablonski's removal from the directorship of Labor's Non-Partisan League was a reprisal action for his candidacy and thus a flagrant violation of Section 401(e) of the Act (29 U.S.C. 481(e)).

On April 17, 1969 President Boyle appointed Yablonski as Acting Director of Labor's Non-Partisan League, a division of UMWA, effective May 1, 1969. The League is the legislative arm of the union and its principal function is to lobby for legislation favored by the union. The Director of the League is an important and prestigious position, and this was especially true at the time in question because there was then pending in Congress legislation providing for increased safety measures in the mines.

On June 6, 1969, scarcely a week after his announcement as a candidate, and without any prior warning or notice, Yablonski was removed from his position as Acting Director of Labor's Non-Partisan League by his election opponent, Boyle, and ordered to report and work under the direction of a subordinate officer, Michael Budzanoski, President of UMWA District 5, and a leading Boyle loyalist.

This was accomplished by a letter from Boyle to Yablonski in which the assertion was made that the latter was "unable to spend more than an hour or so a day on the job." Boyle refused to respond to several letters of inquiry from Yablonski relative to his dismissal, and at a June 23, 1969, meeting of the International Executive Board obtained approval of his action in relieving Yablonski from his position, but on the entirely different ground that Yablonski had issued a public statement in which he opposed union policies regarding certain mine safety regulations. Shortly thereafter Yablonski brought suit in this court for an injunction to restrain Boyle from relieving him from his position as Acting Director and reinstate him to the same. During the course of that litigation, in response to an inquiry relative to Boyle's firing and transferring Yablonski without notice or warning, Boyle stated, "Mr. Yablonski was on notice, plenty of notice. He gave his own warning on May 20." This was the day when Yablonski announced his candidacy. In the reinstatement suit, which was heard by Judge Corcoran, the defendant union maintained that Yablonski was removed because he favored tougher and stronger mine health and safety legislation than the defendant and its officers advocated for tactical reasons. During the course of the instant trial, the defendant through its officers, advanced a wholly inconsistent reason for the discharge, i.e. that Yablonski favored weaker legislation than defendant.

This record clearly demonstrates that Yablonski's removal and transfer came about as a direct reprisal for his running for president of the union against Boyle, and thus was a violation of the Act.

It is true that Judge Corcoran ordered that Yablonski be restored to his position; but the Act clearly had been violated, and in a fashion which served notice of what might be expected on all officers, employees, and members of the defendant union who might have been Yablonski supporters, but who were also vulnerable to similar reprisals because of the immense power residing in Mr. Boyle. This is the type of violation which very well may have affected the outcome of the election.

Plaintiff charges that the defendant committed numerous violations of Section 401(g) of the Act at the District level by the use of union personnel, funds and facilities in support of its incumbent officers; and emphasizes the potential of these abuses for affecting the outcome of the election by pointing up the importance of the Districts in the overall structure of the organization.

Union funds in the amount of $8,000 were transferred to an attorney by the officers of District 2. It appears that at the time this money was not due and owing to him on account of any services rendered to the District or the UMWA, and that it was transferred by him to the Volunteers Committee for Boyle, Titler and Owens established in District 2.

District 5 is in Pittsburgh, Pennsylvania, and its president is Michael Budzanoski. The District is not financially self-sustaining, and money is borrowed from the International union to cover the expenses which exceed its income. There has never been a problem in obtaining money from the International for its activities and during 1969 large sums were made available to it. Some of the union's money was channeled through the District's treasury to the District's Committee for Boyle, Titler and Owens via a false voucher scheme originated by Budzanoski.

Also voluminous campaign literature was prepared, stored, and distributed from the District headquarters. The campaign committee had no address other than that of the District at 938 Pennsylvania Avenue, Pittsburgh, Pennsylvania 15272.

R. R. Humphrey was the president of District 17 and a Mr. Howell was district representative. In response to a number of inquiries by local union officers with respect to Yablonski's request to be advised of the time and place of the election in their locals, Howell advised them that it was strictly a local union matter and not the concern of the District. By way of contrast on November 26, 1969 Humphrey sent a letter on his official stationery to all local union presidents and recording secretaries in District 17. That letter, typed at the District headquarters by a paid employee of the District on one of its typewriters and thereafter mailed at the District's expense, read in part as follows:

"It is very important and essential that your local union, in addition to the regular tellers, have an observer representing Messrs. Boyle, Titler and Owens. These observers are supposed to sit in the polling place and watch the observers for the other candidates to see that no one does anything wrong. The observers are not there to watch the officers; they are there to watch the members voting. Under the Landrum-Griffin Law, ALL candidates have a right to a poll watcher. Be sure to keep the name of each poll watcher and the party he represents. This is very important. Also, these watchers do not have to be members of the Union."

On November 30, 1969, a little over a week before the election District 23 spent its funds in sponsoring a political rally in Madisonville, Kentucky. Though billed as one of the many Black Lung rallies, it obviously was mainly for political purposes, with a short period devoted to a discussion of the safety issues and, after a brief intermission during which the main participants did not even leave the stage, a full blown campaign rally. It was featured by Boyle making an extensive attack on Yablonski. In addition the District office was used as a depository for the incumbent's campaign materials.

District 25 spent union funds for stationery and the preparation of membership lists in order to complete a mass mailing of campaign literature in support of Boyle, Titler and Owens.

District 28 is a provisional district with 51 locals under its jurisdiction and its president is Carson Hibbitts. Hibbitts helped form a committee of all the employees of the District whose purpose was the reelection of the International officers. Meetings of the committee were held in the District office and campaign literature was prepared in, stored in and distributed from the same.

On June 26, 1969 a letter on the letterhead of the UMWA, Carson Hibbitts, President, District No. 28, was addressed to "All officers and members of all local unions, District 28, United Mine Workers of America." The letter was signed "Carson Hibbitts, President, District 28" and "Ray Thornbury, International Representative." Hibbitts admitted that it bore his signature.

A portion of the letter reads:

"In addition to this, District 28 has set up a voluntary organization for the reelection of our International officers W. A. Boyle, George J. Titler, and John Owens. These men have the proven ability to successfully lead our union in the future as they have in the past. This newly organized group will in the very near future send out information to each and every member pertaining to the record of some of the people who are out to destroy our union.

"The time has come for our members to back our union against the people who are out solely for the purpose of destroying the greatest union on earth, the United Mine Workers of America, along with our present International President, W. A. Boyle, who is being attacked viciously as John L. Lewis was some twenty-five years ago."

This is clearly an official letter from District 28 carrying a vigorous endorsement of the incumbent International officers.

In the late summer of 1969 Thornbury and a number of members of District 28 locals went to Pittsburgh, Pennsylvania, to meet with Michael Budzanoski and Robert Gordon of District 5 and hear them discuss Yablonski's background and lack of qualifications to be president. On August 7, 1969 the District issued checks to some of those attending the meeting at Pittsburgh which included a reimbursement for lost wages as a result of their attendance.

Carson Hibbitts was also president of District 30, another provisional district during the campaign period. The evidence establishes that between May 29 and December 9, 1969 offices personnel and facilities, including storage space, office equipment and supplies, were used to promote the candidacy of the incumbent officers.

The president of District 31, Leonard J. Pnakovich, ordered the staff of the District to participate in the organization of the Boyle-Titler-Owens campaign headquaters. The District office was used as a meeting place for campaign purposes and for the storage and distribution of literature, and a portion of the District's funds were also spent to finance the campaign committee.

The UMWA constitution places the districts in a most important role as supervisors of local union affairs. They settle locals' grievances with employers; they have the power to reverse actions of locals; they can call strikes, punish unauthorized work stoppages, regulate transfer cards, etc. The individual miner is ever aware of its presence. In these circumstances no district officer or employee should in his official capacity attempt to influence an election of International officers. No restriction is placed against their supporting and campaigning for candidates of their choice, just so long as they act as individuals on their own time, but any campaign activity engaged in by them in their official capacities in favor of any particular candidate or the use by such individuals of district funds or facilities constitute a gross violation of Section 401(g) of the Act. (29 U.S.C. 481(g)).

Plaintiff has established such violations and they are particularly serious in this case inasmuch as most of the Districts are in trusteeship where the officers are appointees of the International President and personally responsible to him. In addition they may have affected the outcome of the election.

Widespread and varied misconduct is alleged to have occurred at the local union level; and plaintiff contends that the nature and frequency of the proven misconduct establishes the existence of a pattern and practice throughout the locals.

The most serious of the claimed violations among the locals appear to be a) voting by non-secret ballot, b) campaigning within the polling area, and c) interference with the lawful activity of Yablonski's observers.

The evidence shows that in a great number of defendant's local unions little regard was shown for the requirement that the election be had by a secret ballot. Frequently ballots were marked on walls, chairs, window sills, the backs of other voters, and other places other than a polling booth. Sometimes this occurred under crowded conditions with members voting at the Tellers' table in plain view of officials and observers, or in groups at the same table or elsewhere in the polling place. These conditions, according to plaintiff, made it possible for voters to see how other voters marked their ballots. The defendant on the other hand contends that any body who cared to cast his vote in secrecy could have exercised enough ingenuity to accomplish his purpose.

These loose polling procedures fall short of the Act's specific requirement, and also seem at odds with what has come to be regarded generally as a minimum requirement of the democratic process and free elections.

The record does establish that the defendant allowed campaigning in a substantial number of polling places during the conduct of the election. This practice was widespread. The most prevalent method of campaigning was effected by Boyle partisans through the use of Boyle slate sample ballots and other literature. According to this evidence this literature, and in particular the sample ballots, appeared in various places in the polling places, including the Tellers' tables, on bulletin boards, in the voting booths and on tables at the entrance to the polling place. In many instances they were passed out to voters by the Tellers themselves or Boyle workers within the polling area.

The defendant has characterized the sample ballot issue as a "red herring" of mammoth proportions. It insists that sample ballots are ordinary electioneering materials recognized as perfectly valid by nearly all election regulations. But in taking this view defendant obviously oversimplifies the matter. No one contends that such materials are not acceptable or that their use is illegal or unfair—except within the polling area. Almost universally active campaigning is restricted to a certain distance *away* from the entrance to the polls, and election officials are instructed to vigorously enforce this regulation.

The defendant insists that the sample ballot was not improperly used, and even cites the applicable District of Columbia regulation which provides: "A voter may take sample ballots or such other materials as he may desire into the voting booth." (D.C. Rules & Regulations, Title 37, § 5.5(c) (1970). But another section of the same regulations, § 5.8(b), provides:

"Interference With Conduct of Elections. No partisan or nonpartisan political activity, or any other activity which in the judgment of the Team Captain may directly or indirectly interfere with the orderly conduct of the election, shall be permitted in, on, or within a reasonable distance outside the building used as a polling or vote counting place. The distance deemed 'reasonable' shall be approximately 50 feet from any door used to enter the building for voting. The exact distance will be determined by the Polling Team Captain depending on the physical features of the building and surrounding area. A description of limits for political activity for each polling place shall be available for public inspection at the office of the Board at least twenty-four hours in advance of the opening of the polls. Wherever possible, the limits shall also be indicated by a chalk line or by some other physical marker at the polling place. The term 'political activity' shall include without limitation any activity intended to persuade a person to vote for or against any candidate or to desist from voting."

And the same regulations impose the duty upon the Voting Supervisors to ". . . Remove sample ballots and trash from each vacant booth; and prevent voters from communicating with each other in the voting booth area."

The sample ballot per se is not offensive, but its improper usage cannot be condoned.

There is evidence tending to prove that in many cases Yablonski's observers were thwarted in their activities. In some cases they were held waiting for alleged clearance before performing their duties, and in others they were confined to spots in the polling area which made effective observation impossible.

It appears that these matters complained of at the local level did constitute violations of the Act. It should be remembered that "Congress' model of democratic elections was political elections in this country . . ." *Wirtz* v. *Hotel Employees*, 391 U.S. 492, 504.

The court is certain that all of the violations discussed herein have been established by the standard of proof required by the statute and it is equally certain that when viewed in the light of the Supreme Court's discussion of the "may have affected" language of the Act (Section 402(c), 29 U.S.C. 482(c)), *Wirtz* v. *Hotel Employees*, 391 U.S. 492, 505–9 (1968), the violations may have affected the outcome of the election.

This is true as to any one of the violations on the International level, and also as to some of those ascribed to the Districts, i.e. 163,000 copies of an election bulletin were prepared and distributed to the entire union membership by Budzanoski in District 5. And those violations proven to have occurred within the locals, when viewed in the light of those at the higher levels of the union could well have the cumulative effect of determining the outcome.

In the face of the evidence presented by the plaintiff—All references to the plaintiff are meant to include the Intervenor Plaintiff—the defendant has fallen far short of producing evidence which supports a finding that the violations did not affect the election result. Defendant, of course, urges a contrary view and takes the position that this result should not be disturbed.

Throughout the course of this litigation the court has been ever sensitive to the fact that the Act is not designed to deprive labor unions of control over their own affairs and have them supervised by the courts or any other governmental agency. But in order to reach the defendant's position the court would be forced to swim upstream against the tide of evidence too strong to resist.

SECOND CAUSE OF ACTION

On April 13, 1971 the court granted the Secretary of Labor's motion for a preliminary injunction compelling the defendant to comply with the record keeping requirements of Section 206 of the Act (29 U.S.C. 436). At that time the court found as a fact that defendant, while presenting evidence of corrective measures taken with regard to record keeping as to certain types of disbursements, has not demonstrated that corrective measures have been taken with respect to all of the record-keeping deficiencies found to exist by the court, and the likelihood of further violation is not entirely eliminated, and concluded as a matter of law that the granting of a preliminary injunction compelling defendant to comply with Section 206 of the Act (29 U.S.C. 436) is inappropriate in light of the defendant's past record keeping conduct as found by the court, and its inability to guarantee compliance in all respects in the future. This was after a finding that certain record keeping procedures were violative of Section 206 of the Act.

At the preliminary injunction hearing the defendant had the burden of showing that corrective measures had been taken and failed to do so. No evidence on this score was presented during the trial. Therefore the court finds that the defendant is still in violation of the Act and accordingly concludes that the injunction prayed for under Title II of the Act should be made permanent.

This memorandum opinion shall constitute the court's finding of facts and conclusions of law. Counsel will submit an appropriate order.

WILLIAM B. BRYANT,
Judge.

THE U.S. POSTAL SERVICE IS ENVIRONMENTALLY PERMISSIVE

(Mr. ALEXANDER asked and was given permission to address the House for 1 minute, and to revise and extend his remarks.)

Mr. ALEXANDER. Mr. Speaker, I regretfully report that the U.S. Postal Service is environmentally permissive. Today I appeared before the House Subcommittee on Postal Service to submit the findings of an investigation of the U.S. Postal Service. My findings reveal that the Postal Service has paid little, if any, attention to the provisions of the National Environmental Policy Act in selecting a site for the proposed midsouth regional bulk mail facility.

I question the judgment of the Postal Service and urge my colleagues to consider the facts set forth in my statement.

The statement is as follows:

TESTIMONY FOR MAY 2, 1972, APPEARANCE BEFORE THE HOUSE SUBCOMMITTEE ON POSTAL SERVICE.

Mr. ALEXANDER. Mr. Chairman, and members of the subcommittee, I appreciate your giving me this opportunity to bring to you information regarding the United States Postal Service's plans to locate a bulk mail center in the City of Memphis, Tennessee. I especially want to thank you for this time, as I understand that the principal topic of your hearing today is not related to the bulk mail system plans.

With your permission, I will summarize my statement, and submit a fuller one for inclusion in the subcommittee's records.

I believe that it is time for this committee to consider a serious situation developing in the United States Postal Service. My investigation of the Postal Service's proposal to locate a bulk mail facility for the Mid South within the confines of the City of Memphis has convinced me that the Postal Service is acting in conflict with the intent of the Congress.

It is my contention that the location which has been selected for the Mid South bulk mail facility will violate the intent of the Congress both with regard to the protection of the environment and the development of a balanced national growth policy. To help you achieve a clear understanding of the basis of my position, I would like first to quote from the National Environmental Policy Act of 1969 (NEPA) and from the Housing and Urban Development Act of 1970.

In its "Declaration of National Environmental Policy", Title I, Sec. 101 (a) of the NEPA states:

"The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influence of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with the State and local governments, and other concerned public and private organizations to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."

Section 102 of Title 1 of the NEPA requires, in part, that ". . . all agencies of the Federal government . . ." file environmental impact statements ". . . in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment . . ." I believe that a project which is going to cost at least 23.55 million dollars would have to be considered a "major Federal action". And, the location of it, regardless of where it is, will certainly affect the human environment. This is a subject to which I will return shortly, but first I want to provide you with some excerpts from the Housing and Urban Development Act of 1970.

Title VII deals directly with the subject of national growth policy. I believe that in order to put the Congress' position on this question clearly in focus, it would be worthwhile to quote Title VII, Part A, Sec. 702 in full.

SEC. 702 (a) The Congress finds that the rapid growth of urban population and uneven expansion of urban development in the United States, together with the decline in farm population, slower growth in rural areas, and migration to the cities, has created an imbalance between the Nation's needs and resources and seriously threatens our physical environment, and that the economic and social development of the Nation, the proper conservation of our natural resources, and the achievement of satisfactory living standards depend upon the sound, orderly, and more balanced development of all areas of the Nation.

(b) The Congress further finds that *Federal programs affect the location* of population, economic growth, and character of urban development; that such programs *frequently conflict and result in undesirable and costly patterns* of urban development which adversely affect the environment and wastefully use our natural resources; and that existing and future programs must be interrelated and coordinated within a system of orderly development and established priorities consistent with a national urban growth policy.

(c) To promote the general welfare and properly apply the resources of the Federal Government is strengthening the economic and social health of all areas of the Nation and more adequately protect the physical environment and conserve natural resources, the Congress declares that the Federal Government, consistent with the responsibilities of State and local government and the private sector, must assume responsibility for the development of a national urban growth policy which shall incorporate social, economic, and other appropriate factors.

(d) The Congress further declares that the national urban growth policy should—

(1) favor patterns of urbanization and economic development and stabilization which offer a range of alternative locations and encourage the wise and balanced use of physical and human resources in metropolitan and urban regions as well as in smaller urban places which have a potential for accelerated growth;

(2) foster the continued economic strength of all parts of the United States, including the central cities, suburbs, smaller communities, local neighborhoods, and rural areas;

(3) help reverse trends of migration and physical growth which reinforce disparities among states, regions, and cities;

(4) treat comprehensively the problems of poverty and employment (including erosion of tax bases, and the need for better community services and job opportunities) which are associated with disorderly urbanization and rural decline:

(5) develop means to encourage good housing for all Americans without regard to race or creed;

(6) refine the role of the Federal Government in revitalizing existing communities and encouraging planned, large-scale urban and new community development;

(7) strengthen the capacity of general governmental institutions to contribute to balanced urban growth and stabilization; and

(8) facilitate increased coordination in the administration of Federal programs so as to encourage desirable patterns of urban growth and stabilization, the prudent use of natural resources, and the protection of the physical environment.

When I began my investigation of the Postal Service's plans for the Mid South bulk mail facility more than a year ago, I had two basic concerns. I wanted to be sure that the intent of the Congress with regard to a balanced national growth policy was being complied with. And, I wanted to assure myself that the taxpayers were getting full value for their dollars. In the months since my study began, another concern has developed—about the environmental impact of constructing such a facility in Memphis or any city its size.

My search for information has convinced me that the Postal Service is paying scant, if any, heed to the Congressional intent set out in either Title I of the National Environmental Policy Act of 1969 or Title VII, Part A, Sec. 702 of the Housing and Urban Development Act of 1970.

I have been told by the Postal Service that the "rolling cost" of the 57.1 acre site in Memphis will be $3.55 million. By any method of division you may use, this is $62,000 per acre for land acquisition and site preparation alone. It does not include construction and equipment costs, which I have been told will be $20 million. But, more importantly, the formula for selecting the Memphis site has apparently not taken into account the long-term environmental and uneven development costs which will certainly be generated by the existence of this facility in such a congested metropolitan area.

It is an inarguable fact that people go where the jobs are available, and that the more heavily concentrated the people are, the more serious the environmental impact—both in physical and social terms. The facts which I shall relate to you in a few moments persuade me that the Postal Service has simply ignored a number of cost factors in making their decision. The total bill must surely include those public service costs which inevitably evolve from creating a situation which encourages more human and vehicular congestion in a municipality which already finds its agencies struggling with transportation problems, housing problems, and social welfare problems. It must also include the costs of failing to promote development in lesser populated areas.

It might be useful to refer briefly to a study by Ronald W. Crowley, titled "An Empirical Investigation of Some Local Public Costs of In-Migration to Cities," which was published in the 1970 Winter issue of the Journal of Human Resources. The study involved 94 of the Nation's largest cities. It found that migrants to these cities im-

posed a per capita public service burden of $72 compared to $8 for non-migrants.

This Mid South bulk mail facility, I am told, will employ 620 persons on a three-shift daily schedule. The drivers for the minimum of 110 and maximum of 230 trucks which are expected to serve the facility daily are not included in that figure.

Now, let us take a look at some facts about the location which the Postal Service has selected for the bulk mail facility and about a location within the Memphis Standard Metropolitan Statistical Area which was rejected.

The selected site is on U.S. Highway 51 South in Memphis Census Tract 78. Bureau of the Census figures show that 17,809 persons made their home in this 137-block area in 1970. The area also encompasses a large cemetery, a large public park (located at a street intersection which will necessarily have to be used by at least some of the mail trucks) and a number of commercial establishments. The site was, at the time of selection, zoned for *residential use.*

Census figures also show that the population of the City of Memphis grew 25.3 per cent—from 497,524 to 623,530—between 1960 and 1970. Shelby County, in which Memphis is located, grew 15.2 per cent—from 627,019 to 722,014—during the same period. In addition, it might be well to look at the average annual unemployment rates. For the nation the figures were 3.5 per cent in 1969, 4.9 per cent in 1970 and 5.9 per cent in 1971. For Shelby County these figures were 2.9 per cent in 1969, 3.6 per cent in 1970 and 4.2 per cent in 1971, consistently lower than the national average.

It is my understanding that the Postal Service requested the Corps of Engineers to evaluate nine possible sites for the facility. The site to which I would direct your attention now is in Crittenden County, Ark., the First Congressional District. Access would have been available to Interstate routes 55 and 40. The cost of the site, including land preparation, has been estimated at less than a million dollars.

This site is in an area which is zoned for industrial use. It is located in Census Tract 308. Only 122 persons were found to be living in the area in 1970. The Census Tract—No. 301—nearest the rejected site contained only 7,278 persons at the time of the census. The principal city in Crittenden County is West Memphis, which has a common boundary with Tract 308. In 1960, West Memphis had a population of 19,374 and in 1970 its population had only reached 25,892. The County of Crittenden went from a population of 47,564 to 48,106 in the ten-year period, an increase of 1.1 per cent.

While the unemployment rate in Shelby County, Tennessee, was consistently lower than the national average for the last three years, the situation in Crittenden County was reversed. In 1969 the average annual rate of unemployment for Crittendon County was 4 per cent. It was 5.7 per cent in 1970, and reached 6.9 per cent in 1971.

Thus, it would seem to me, that in terms of human need and human congestion selection of a site such as the one available in Crittenden County would have unquestionably been in compliance with the Congressional intent to establish a balanced national growth policy and with regard to environmental policy. Whereas, I believe, the choice of the Memphis site is a violation of the expressed intent of the Congress.

It is my understanding that the central reasons for the Postal Service's rejection of the Crittenden County site were the lack of piggyback rail service facilities and traffic congestion on the four-lane route connecting Crittenden County and Memphis, Tennessee.

With your permission, I shall quote here a paragraph from a letter received in my office on March 23, 1972, from Charles Fritzel, Congressional Liaison Officer, for the United States Postal Service. The letter said in part:

"No piggyback sites were found in West Memphis, Arkansas. Trucks using piggyback rail services would be required to cross the Mississippi River into Memphis on a four-lane bridge now carrying over 30,000 vehicles daily. This site was not given priority due to the high incremental truck costs, initial accesss difficulties, and the lack of piggyback services."

Now, let us look at the two principal routes which trucks will have to use in connection with the Memphis location. The Federal Highway Administration tells me that in 1970 U.S. Highway 51 South at the Intersection of South Parkway carried a daily average of 23,750 vehicles. South Parkway is the nearest access route from the selected site to Interstate 55. At the intersection of South Parkway and I–55, the daily vehicle load north of the interchange in 1971 was 47,170 and south of the interchange it was 48,120 vehicles.

The piggyback rail facilities nearest this site are two miles away. Should the Postal Service undertake to build, or have built, such a facility at the bulk mail center, there are railroads already located in close proximity of the Crittenden County site.

There is one other factor which the Postal Service apparently simply did not include in its calculations with reference to traffic between Memphis and West Memphis. That is the six-lane interstate bridge now under construction to link Memphis with Crittenden County. When this bridge opens the site which was rejected in Crittenden County will have a six-lane highway immediately to the north and a six-lane highway immediately to the south.

In view of these facts, Mr. Chairman, I feel compelled again to urge this committee to investigate what appears to be a decision by the Postal Service to ignore the intent of the Congress and expressed in the National Environmental Policy Act of 1969 and the Housing and Urban Development Act of 1970.

Thank you again for giving me the opportunity to appear before your committee and discuss this very serious situation.

HON. J. EDGAR HOOVER

(Mr. TAYLOR asked and was given permission to address the House for 1 minute, to revise and extend his remarks and include extraneous matter.)

Mr. TAYLOR. Mr. Speaker, I am proud to join my colleagues in paying tribute to J. Edgar Hoover, the first and only FBI Chief. Under his direction, the FBI has grown from a small investigative arm into the world's most respected crime fighting organization.

Hoover's zeal for professionalism at all levels of law enforcement revolutionized police techniques throughout the country. Officers from the most remote crossroads communities have been given intensive training in the FBI academy to better enable them to serve back home. Some of my own constituents have attended and I have personally witnessed the degree of pride reflected in their faces as they received their diplomas from the Chief himself. And the pride was in Hoover's face because he was proud of what he was doing for the United States.

A year ago I stated:

The Members of Congress and of the press who are criticizing the FBI and its Director, J. Edgar Hoover, are not speaking for me. This country is fortunate to have had the FBI under the direction of Mr. Hoover during the past 46 years. J. Edgar Hoover has built the FBI into the most effective and respected law enforcement agency in the world, and he deserves the appreciation of this nation.

The FBI has had the responsibility of maintaining the internal security of this Nation and during recent years that has become increasingly difficult and important.

J. Edgar Hoover will live on as an American legend. His contribution to good Government and to the well-being of his fellowman will endure. He will endure as a symbol of courage, integrity, and fearless law enforcement.

TRIBUTE TO KATHERINE H. WHITE

(Mr. WHITE asked and was given permission to address the House for 1 minute, to revise and extend his remarks and include extraneous matter.)

Mr. WHITE. Mr. Speaker, many fine men come to Congress and offer their talents, their hearts, and even their lives in the service of the country. Our lives are rewarding, interesting, combative, challenging, trying. Most of us have been blessed with an understanding and dedicated helpmate throughout the tribulations of campaigning and the sustaining of our good names, who share the triumphs along with the disappointments and heartaches; but the public rarely hears of them or their sacrifices.

In truth the life of a congressional wife is a difficult and somewhat lonely one which revolves about the public career of her husband. Those who join their husbands in the Washington area are removed from home and family other than their own children and their husband, and from home friends they love. When in their home area they are usually well known, involved in the civic, religious, and cultural life of their home community, and often loved. Subsequently they are more severely uprooted in the service of the country than are we the Congressmen—for we return to our district frequently while our ladies normally remain behind with the children. In their absence the public forgets somewhat, and fails to adequately understand their sacrifice or their great value and talents.

I had such a wife, a wonderful and lovely lady who shared my joys and sorrows, who fought beside me and undoubtedly was the major factor in my first election. She too was uprooted from the many things she loved and was just as much a part of the service of her country.

On March 2, 1972, just 2 months ago today, my wife was taken by a tragic accident, and while it may appear to be self-serving to speak of her now, I do so because I think she is symbolic of the grandeur and superb nature of the self-sacrificing congressional wives who ever support and sustain us, but never receive their proper accolades.

My own wife was unusually strongly loved by the people of my district; wherever I went they never failed to ask about her in glowing terms, because

many remembered her through occasional appearances and through light interesting articles she wrote for the newspapers of my district in order to share with the people of west Texas her experiences in Washington, and the worthiness of this Nation. People loved to read these articles, men and women alike. They were called "The Lighter Side of Washington," by Kathy White. With love and dedication and without pay she helped me on countless congressional projects.

Shortly after her death, the Public Housing Authority of El Paso, Tex., named a new low-income model housing project after her. Its official name is the Kathy White Memorial Housing Project, popularly known as the Kathy White Apartments. My family is very grateful for this kind remembrance.

At the dedication of this housing project I was privileged to make some remarks in eulogy of my wife, and with your permission I will recite these remarks so that others may know of her and her fine works, and so that her progeny, her friends, and the people of Texas can read of her in public record and of her worthiness. My remarks are as follows:

SPEECH PRESENTED BY RICHARD C. WHITE AT THE DEDICATION OF THE KATHY WHITE APARTMENTS, APRIL 22, 1972

Distinguished guests, ladies and gentlemen, friends of Kathy, this is a day that I feel is very appropriate and a day very personal to me. For today we are here to dedicate an important segment of public housing for El Paso and are naming it for a lady who influenced the spirit of West Texas and a lady whom I loved very deeply and who is loved by many and in turn loved many. More than my wife and the mother of our children, Kathy White was an example and an inspiration to us in her family and to many who knew her closely, for she was womanhood at its best, Americanism at its ideal.

For those of you who did not know her permit me to briefly describe her and mention some of her importance in this life.

Kathy was a very special person for all of us. She came into this world it seems to bring happiness and a beautiful quality of selfless love. She not only liked people, but she loved them as well. To me she epitomized the spirituality, grandeur, and loveliness of American womanhood. She gave so much of herself to her friends, her family, and mankind.

She was not only the most precious thing in my life but she was the loveliest person I have ever known and a person I totally admired and respected. She was petite, like a Dresden-doll with very lovely classic features. She was warm, loving, vivacious, charming, highly intelligent and very perceptive. She made people feel good, she made people feel happy and important with her genuine and humble interest in everyone, regardless of their circumstances in life. She was always friendly and of good humor. She never met a stranger.

She gave us more than love. She gave us refreshing enthusiasm, gentle kindness, courage and faith from one so small, so frail. She was beauty in her features and in her heart. She was the warm sunshine she loved so well, and the happy sensitive humor that hurt no one and gave joy in being alive.

She was an accomplished writer and had so many other talents. She could always find a human side of everyone. She understood people, and even more, wanted to understand people. Her interest in people had no personal or selfish gain other than pure love of humanity. She had the greatest, warmest, most infectious, most genuine personality of any person I have been privileged to know, and there is no doubt in my mind that because of Kathy I first entered the halls of Congress.

She was loved and respected not only in El Paso, but throughout Texas. I have received several thousand communications of concern, sympathy and grief at Kathy's passing from all over the country and from other nations, from people who have known her and considered her a friend. I treasure among these a telegram and letter from President and Mrs. Johnson with whom she had such rapport, letters from President Nixon, Secretary Connally and so many others, all personal.

So in her leaving she took a part of us with her. El Paso and some of the world will not be the same without her. It is certainly better for her having been here. She was a genuine, unasking ambassador of good will where ever she went. She had charmed many of the ladies of the diplomatic corps.

In her leaving she gave us a legacy of herself and left a little of herself in each of us who knew her, and a memory of charm that is bound to warm our hearts as we think back of lively, humorous, fun-loving, happy Kathy.

But Kathy lived beyond her strength and reserves, and a tragic accident took her away before her time. She was as lovely but as perishable as the camellias she loved. The tragedy was compounded because she left while still very productive and vital. Though she was still young in age, in heart, body, and spirit, she had already accomplished much more than most people who have a full course of life. Her life should not be measured in years but by what she had done, and its quality.

Her high school career is typical. Have you ever known one in a fairly large high school who in the same senior year was president of the student body, cheerleader, editor of the school paper, winner of the citizenship award, national honor society, outstanding student, best actress, to mention some. This was the nature of her life.

This was typical of her driving desire to accomplish, to do right, to be involved in the positive acts of mankind.

In her college at then Texas State College for Women, now Texas Women's University, she was secretary of the student body and earned many other recognitions, at the same time she worked part of her way through school. She married me in her third year, and still graduated with highest honors one year ahead of her class.

While rearing a family of three sons she found time to win her master's degree in history and wrote a thesis on Spanish land grants still used by lawyers, courts, and researchers. She became very involved with all nature of civic affairs in El Paso including the presidency of the American Association of University Women of El Paso, one of the largest chapters and most active in the Nation, and here her competency was very apparent.

During the presidential campaign of 1960 she was absorbed in the electoral process of this Nation. And again in 1964 when she proved to be the most important factor in my own election.

In Washington she gained immediate acceptance and leadership through her dynamism, her personality and good will, and through her perceptive intelligence and ability. She brought Texas hospitality and charm to Washington and she became quickly loved.

She was a chairman of a prayer group, president of the Friendship House, a charitable organization for the under-privileged, organized of periodic briefings by the State Department for congressional wives, a project which was immediately successful, and an active member of an international wives organization that sought to extend hospitality of this country to the wives of foreign diplomats. She was the first vice president of the 89th Congressional group, being the wives of all Members of Congress who first entered Congress during the 89th Congress, a rather large group. Some of her many accomplishment are listed in Who's Who of American Women, 1972–73.

She managed to do these, and be a wonderful wife and an excellent mother absorbed in the activities of her children. She had far more friends and activities than even we of her family realized, and she touched more lives than one can imagine. Yet she was so small and frail. Throughout this time she struggled with the frailties of her health, and with courage, sheer spirit, and nerve carried through unabated, cheerful, and in love with life.

She has meant so much to our part of our world that it is unthinkable that the inspiration of her life should be forgotten and that others who follow not know of her example.

This is the nature of the grand lady for whom these apartments are named, not as the Katherine H. White Memorial Housing Project, but as she was in life, the Kathy White Memorial Housing Project, as she would have wanted it, for everyone knew her as Kathy, the vivacious, cheerful, charming, lovely lady of true quality, character, and worth.

I have described her in length not only because I loved and respected her and admired her more each day of our 22 years of marriage, but also because there are other Kathy White's in this Nation now and will be in the future who might otherwise not be known, but who do the most important work of this country, that of rearing a family and keeping a household.

I know of no more important work in America than this, being a wife and a mother, being the cement that holds the family together. I know some women on filling out forms in the blank where it requests "occupation" will look up in bewilderment and some will say "none". Others will hesitantly put "housewife" in their humble way, forgetting that being a housewife is a total 24 hour occupation: wife, mother, and keeper of the family, the keystone of what it's all about; the factor that makes it all work and hold together. I am convinced even more now that the housewife is the key to the unity and perpetuation of the family, and therefore of our country. The man of the house may earn the living for the family, but the living becomes important with the woman in the home.

The site of these apartments is only two blocks from our home, and overlooks the sparkling lights of the city and the beautiful mountain which Kathy loved so well. Kathy had the same vistas.

So it is entirely appropriate that this housing project which will be the home of many families for America, where future citizens and leaders of this country will be reared, should be named for a housewife, and such a magnificent one at that.

I view this day as a triumph for womanhood.

At the conclusion of my remarks, the director of the housing project notified me and the public that a painting is being prepared of Kathy to be hung in the housing project, and a scroll of an editorial by Mr. Robert "Pete" Lee, of the El Paso Herald Post, be also hung in the housing project to remind people of Kathy's worth. I would like to repeat this editorial:

KATHY WHITE

The tragic death in Washington of Mrs. Richard C. White, wife of El Paso's popular Congressman, comes as a shock to all who

knew her—and there were thousands who did.

Kathy White was a gay and vivacious young woman, who was her husband's greatest asset and thereby an asset to the far flung district he serves in Congress. Small and slender, she was possessed of a driving enthusiasm and energy and a wonderful friendliness of nature that made her an instant favorite of everyone she met, whether it was on the campaign trail with her husband in West Texas, or in the social circles a Congressman must travel in Washington.

During the early years of the couple's residence in Washington, she was the most enthusiastic, though unpaid, worker on her husband's staff, helping all she could with the flood of paper work that crosses a congressman's desk, until ill health forced her to cut down on her activities. And she never lost her zest for living, nor failed to charm those with whom she came in contact.

With countless others in the 16th District, we extend our deepest sympathies to Congressman White and to his family.

THE HONORABLE J. EDGAR HOOVER

(Mr. HOGAN asked and was given permission to address the House for 1 minute and to revise and extend his remarks, and to include extraneous matter).

Mr. HOGAN. Mr. Speaker, I am sure that my reaction to the news of J. Edgar Hoover's death was typical of all other Americans. I was shocked and saddened. A few weeks ago my wife and I were in his office chatting with him, and at that time he appeared very robust, healthy, jovial, and happy. We had no idea that the end was so close at hand.

This afternoon, Mr. Speaker, I plan to take a special order to eulogize J. Edgar Hoover and I request permission for all Members to revise and extend their remarks in connection therewith.

Mr. Speaker, J. Edgar Hoover has left an indelible mark on the history of this country, but he has also left an indelible mark on those of us who had the great honor and the privilege of serving under him in the FBI. I am sure I speak for all former and present FBI agents when I say that, being associated with the great organization of the FBI, which he created—the discipline, the training, the esprit de corps—was not only a great influence in our lives, but, in my case, and I am sure in all cases of those who had such a privilege, it enriched our lives for all time.

Mr. Speaker, no one will ever be able to really replace J. Edgar Hoover, and the American people will sorely miss him.

RESULTS IN ON QUESTIONNAIRES SENT TO RESIDENTS OF 17TH CONGRESSIONAL DISTRICT OF PENNSYLVANIA

(Mr. SCHNEEBELI asked and was given permission to address the House for 1 minute and to revise and extend his remarks and include extraneous matter.)

Mr. SCHNEEBELI. Mr. Speaker, more than 22,000 residents of the 17th Congressional District of Pennsylvania have replied to my annual constituent survey. This represents an increase of more than 1,000 over last year's response, and questionnaires are still being returned at a rate of more than 100 per day.

Volunteers, who also mailed the forms, have now completed tabulation of many of these returns.

Voters in our district are most united in their opposition to forced busing as a means to achieve racial balance in public schools. This view is held by 88.2 percent, while only 7.0 percent favor busing; 4.7 percent were undecided.

The prospect of amnesty after our Vietnam involvement for men who avoided military duty during the conflict proved to be one of the most controversial issues on the survey. Opposing amnesty are 47.7 percent while the remaining 52.3 percent allow for some postwar possibility; 34.9 percent would allow amnesty if the individuals devote at least 2 years to public service, 9.6 percent believe the decision should be left to the President, and 7.8 percent believe amnesty should be granted unconditionally.

More than 75 percent of those responding to the survey support both President Nixon's handling of the Vietnam conflict and his China initiatives. Supporting Israel through the sale of military aircraft won the approval of 57.3 percent.

Voters registered the greatest confusion on economic issues. While 45.5 percent are more optimistic about the future of the economy and 31.5 percent are not, a large 23 percent are undecided. At the same time, only one-third think phase II for price and wage stabilization is working reasonably well, 42 percent do not, and 24.4 percent are unsure. Nearly 75 percent believe more trade restrictions are needed to help our domestic industries.

Just over half of the questionnaires show support for large-scale spending to ease unemployment, but only about one-fourth want the Federal Government to share revenues with States without guidelines and restrictions.

The possibility of replacing real estate taxes with some new Federal program to finance schools brought an almost evenly divided response.

In the social category, a majority express support for both Federal aid to public television, and for the federalization of welfare to create a more uniform national approach.

Voters of the 17th District divided over President Nixon's plan for national health insurance, with 41.0 percent for, 44.8 percent against, and 14.2 percent undecided.

Local government could and should do more to protect the environment, say 84.9 percent of those taking part in the survey. Only 30.7 percent indicate that they, themselves, have changed their livings habits in attempts to improve the environment. Congressman SCHNEEBELI noted that many of those who replied negatively said they have always acted out of respect for their surroundings, however.

Although spending for space exploration has been reduced from $5 to $3 billion per year, 60.4 percent believe it should be reduced more. Should moneys from the highway trust fund be used for for mass transit projects? The response was 38.4 percent yes, 49.8 percent no, and 11.8 percent undecided.

Area voters are largely united in their desire for stronger laws to deal with transportation strikes which may cause national emergencies; 84.7 percent support this view.

The details of the survey tabulation follows:

1972 QUESTIONNAIRE RESULTS—CONGRESSMAN HERMAN T. SCHNEEBELI

	Percent
Foreign affairs:	
1. It is estimated that about 70,000 men left the United States to avoid military service during the Vietnam conflict. After U.S. involvement in Vietnam ends, should they be allowed to return, without penalty:	
(a) under no circumstances	47.7
(b) at the President's discretion	9.6
(c) if they will devote at least 2 years to public service	34.9
(d) unconditionally	7.8

	Percent yes	Percent no	Percent undecided
2. Are you satisfied that President Nixon is moving in the direction to end the war in Vietnam?	77.9	14.3	7.7
3. Do you support President Nixon's efforts to open communications with Communist China?	75.1	14.8	10.1
4. Should the United States continue to maintain a balance of power in the Middle East by selling military aircraft to Israel?	57.3	26.1	16.4
5. Do you believe the Congress should legislate some type of trade restrictions to attempt to restore a balance of trade surplus?	74.2	11.8	13.9
Fiscal:			
1. Are you more optimistic about the future of the American economy, as the result of the Administration's new economic program?	45.5	31.5	23.0
2. Would you support spending several billions in tax dollars for government public works projects, to ease unemploymet?	51.6	36.7	11.7
3. Should the Federal Government share $5,000,000,000 of income tax revenues with State and local governments, for unrestricted use without Federal control?	21.8	61.7	10.2
4. Should the Federal Government support local schools via some new federal tax program rather than depend upon the present local real estate tax plan?	45.9	42.6	11.5
5. Do you believe that phase II for price and wage stabilization is working reasonably well?	33.3	42.0	24.4
Social:			
1. I believe the Federal Government should continue to assist financially public (educational) television	59.4	29.1	11.6

	Percent yes	Percent no	Percent undecided
2. Should the Federal Government plan to take over gradually the direction of all welfare programs, to create a more uniform national approach to this problem?	53.4	34.6	12.0
3. Medicare for people over 65 will probably be retained, much as is. In addition, the President has proposed a national health insurance for people under 65. It would provide free care for the indigent, and an employed person's cost would be financed 75 percent by the employer and 25 percent by the employee. Would you favor such a program?	41.0	44.8	14.2
4. Do you favor the busing of students to achieve racial balance in our public schools?	7.0	88.2	4.7
The environment:			
1. Do you believe your local government could and should do more to protect the environment and natural resources of your community?	84.9	9.4	5.7
2. Have you changed your living habits in any way, out of concern for the improvement of the environment?	30.7	58.7	10.6
General:			
1. Expenditures for space exploration have recently been reduced from $5,000,000,000 to $3,000,000,000 per year. Do you favor further reductions?	60.4	30.2	9.4
2. Do you believe that stronger laws should be enacted to deal with strikes that cause or threaten to cause national transportation emergencies, such as the east and west coast dock strikes, railroad strikes, etc?	84.7	11.0	4.3
3. Should monies from the highway trust fund—presently reserved only for highway construction—be made available for mass transit projects also?	38.4	49.8	11.8

THE HONORABLE J. EDGAR HOOVER

(Mr. MAYNE asked and was given permission to address the House for 1 minute, to revise and extend his remarks and include extraneous matter.)

Mr. MAYNE. Mr. Speaker, in mourning the passing of a great American, J. Edgar Hoover, I want to express a special tribute from a group of former special agents of the Federal Bureau of Investigation who served under him in the years leading up to and during World War II.

I refer to the thousands of American lawyers and accountants who probably would not have considered law enforcement as a career in more normal times, but who were attracted by the Bureau's increasing responsibilities for national defense and internal security.

We joined the FBI in great numbers in 1940 and 1941, many of us receiving our appointments while still in law school. Most of us stayed with the Bureau for the duration of the emergency, although some entered the Armed Forces after Pearl Harbor.

We found first the FBI training and later our service in the field to be tough, exacting and very much in the national interest. The Director would not compromise and always demanded the highest possible performance from every agent, as he did from himself. Nothing less would have been adequate to cope with the saboteurs, spies, and draft dodgers who tried to cripple the war effort.

Mr. Speaker, whatever may be said of other arms of our Government, the record is clear that J. Edgar Hoover had prepared the FBI for World War II and was equal to the challenge when it came. The wartime achievements of the FBI alone were more than enough to secure the Director's place in history.

Mr. Speaker, I now hold in my hand and will always treasure the first telegram I ever received from Mr. Hoover, in September 1941. Its first sentence reads:

> You are offered appointment special agent this bureau.

Like thousands of other former agents of the FBI, I am very proud that I accepted that appointment and had the great privilege of serving under Director J. Edgar Hoover during this most crucial period.

TRIBUTE TO THE LATE J. EDGAR HOOVER

(Mr. ARENDS asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. ARENDS. Mr. Speaker, the passing of J. Edgar Hoover will be mourned by every true American. No man was more dedicated to the United States as the citadel of freedom.

On the 10th of this month he would have celebrated his 48th year as Director of the FBI. Under his guidance the FBI became the most efficient and most respected law enforcement agency in the world. It has been the guardian of our national security and the protector of our free society founded on ordered liberty under law.

J. Edgar Hoover bent over backward to assure that FBI investigations were impartial and objective. He was a superb administrator, a tough disciplinarian, an able and exceptional man.

We have lost a truly great American to whom all of us owe a debt of gratitude.

FREE MARKET DISCIPLINES?

(Mr. ROUSSELOT asked and was given permission to address the House for 1 minute, to revise and extend his remarks and include extraneous matter.)

Mr. ROUSSELOT. Mr. Speaker, yesterday's announcement by Donald Rumsfeld, Director of the Cost of Living Council, that all wage and price controls would be removed from business firms with fewer than 60 employees is, indeed, welcome news for many employers and employees in this country. It is especially heartening to see our former colleague, Director Rumsfeld, state:

> . . . (it) appears to us that competition will exert pay and price control on these small businesses.

In other words, these estimated 5 million firms, which account for about 28 percent of the Nation's payroll, are being asked to return to a constructive alternative, that is, the free market place. In my opinion, that is what we should do with the entire wage and price control activity and it is my plea that the administration follow suit with the rest of the private enterprise economy and governmental agencies immediately.

The administration is to be complimented for lifting wage and price controls in this segment of the economy and in a proper consideration of "fairness and equity" will undoubtably remove these unworkable controls from other affected areas of the economy.

On November 11, 1971, I addressed my colleagues and stated that:

> The constructive and positive alternative to the use of wage and price controls is the free market. The free market permits the consumer to make the final determination on the basis of the daily free vote of what the consumer intends to either purchase or not purchase.

At that time, I asked that my colleagues review a chapter from the book of Leonard E. Read, "Let Freedom Reign," chapter 8 entitled "Free Market Disciplines." Since my former colleague, Donald Rumsfeld, has suggested that "competition will exert pay and price controls on small businesses"—which really means the free marketplace—I, therefore, ask once again that my colleagues consider the very thoughtful remarks of Leonard Read in his chapter entitled "Free Market Disciplines."

Free Market Disciplines

Contrary to socialistic tenets, the free market is the only mechanism that can sensibly, logically, intelligently discipline production and consumption. For it is only when the market is free that economic calculation is possible.[1] Free pricing is the key. When prices are high, production is encouraged and consumption is discouraged; when prices fall, the reverse holds true. Thus, production and consumption are always moving toward equilibrium. Shortages and surpluses are not in the lexicon of free market economics.

Conceded, the above is no news to those who apprehend free market economics; they well know of its disciplinary influence as regards production and consumption. This alone warrants our support of the free market. However, the free market has two other quite remarkable disciplinary possibilities which have seldom been explored.

Before making that exploration, it is necessary to recognize the limitations of the free market. The market is a mechanism, and thus it is wholly lacking in moral and spiritual suasion; further, it embodies no coercive force whatsoever. In these respects, the market is without disciplinary possibilities.

"Like all mechanisms, the market, with its function for the economizing of time and effort, is servant alike to the good, the com-

[1] Professor Ludwig von Mises establishes this point, irrefutably, in his book, *Socialism* (London: Jonathan Cape Ltd., 1969).

passionate, and the perceptive as well as to the evil, the inconsiderate, and the oblivious."[2] Scrupulousity is not among its characteristics.

The free market is a name we give to the economic activities—a short-hand term, we might say—of a people acting freely, voluntarily, privately, cooperatively, competitively. It is distinguished by universal freedom of choice and the absence of coercive force. Ideally, only defensive force—government—is employed to put down fraud, violence, predation, and other aggressions.

Given a society of freely choosing individuals, the market is that which exists as a consequence—it is a mechanism that is otherwise nondefinitive. It is the procession of economic events that occur when authoritarianism—political or otherwise—is absent.

While private enterprise is often practiced in a manner consonant with free market principles, the two terms are not synonymous. Piracy is an enterprise and also private. Many businesses when in league with unions, for instance—willingly or not—feature elements of coercion and thus are not examples of the free market at work.

The free market has only been approximated, never fully attained, and, doubtless, never will be realized. It is an out-of-reach ideal; we can only move toward or away from it. Yet, in the U.S.A., even in these days of a rapidly growing interventionism, the free market flourishes to a remarkable extent. To appreciate this, merely envision the countless willing exchanges—hundreds of millions daily—such as Mrs. Jones swapping a shawl she had made for a goose Mrs. Smith has raised, or the money you pay for a phone call or a quart of milk. In these instances, each party gains, for each desires what he gets more than what he surrenders. In a word, the free market is individual desire speaking in exchange terms. When the desire for Bibles is accommodated in noncoerced exchange, we can conclude, quite accurately, that we are witnessing a market for Bibles. Or, when the desire for pornography is being thus accommodated, we can conclude that there is a market for trash. I repeat, scrupulosity is not a feature of the market.

When the desires of people are depaved, a free market will accommodate the depravity. And it will accommodate excellence with equal alacrity. It is "servant alike to good . . . and evil."

AN AMORAL SERVANT

It is becauuse the free market serves evil as well as good that many people think they can rid society of evil by slaying this faithful, *amoral* servant. This is comparable to destroying the sun because we don't like the shadows we cast or breaking the mirror so that we don't have to see the reflection of what we really are.

When I sit in front of a TV and view trash, I tend to rant and rave at what I'm seeing. Wake up: What I hear and see is a reflection of what's in me! Thus, my only corrective is to read a good book or otherwise cease to patronize such low-grade performances.

The market is but a response to—a mirror of—our desires. Once this harsh reality is grasped, the market becomes a disciplinary force. To elaborate: Say that a person desires, buys, and reads a filthy book. Were he to realize that what he's reading is a picture of what's in his own make-up, such a realization, by itself, would tend to change him for the better. The market would then reflect the improvement. But note that the market has no such effect on those who are oblivious to this fact. *It's the knowledge of this character-revealing fact that makes of the market a disciplinary force.* I am only trying to point out the market's potentiality in this respect.

Instead of cursing evil, stay out of the market for it; the evil will cease to the extent we cease patronizing it. Trying to rid ourselves of trash by running to government for morality laws is like trying to minimize the effects of inflation by wage, price, and other controls. Both destroy the market, that is, the reflection of ourselves. Such tactics are at the intellectual level of mirror-smashing, attempts not to see ourselves as we are. The market's potentiality as a disciplinary force is thereby removed. To slay this faithful, amoral servant is to blindfold, deceive, and hoodwink ourselves. Next to forswearing a faith in an Infinite Intelligence over and beyond our own minds, denying the market is to erase the best point of reference man can have. So much for the first somewhat unexplored possibility of the market as a disciplinary force.

IMPERFECT MAN

Now to the second. This cannot be explained unless we are aware of our numerous shortcomings, of how narrow our virtues and talents really are—everyone's no exceptions.

Let's take, for example, the greatest mathematical genius who ever lived. He's a giant in his field. Yet, without any question, he's a know-nothing in countless other ways. This goes for outstanding generals, chemists, physicists, scientists or whatever brand. No one ever gets more than an infinitesimal peek at the Cosmic Scheme, at the over-all luminosity, even at himself. We must see that the biggest among us is tiny. And one who denies this about himself is displaying the greatest ignorance of all; he doesn't even know how little he knows! "If we wish to know anything we must resign ourselves to being ignorant of much."[3]

Reflect on this human reality, on imperfect man, particularly on the more imaginative and brilliant individuals among us. While they possess an outstanding and remarkable aptitude or two, they, too, are daydreamers. "If only I had a million dollars," is a dream that flashes across countless minds. Many of these specialists want above all else to pursue their own peculiar bent whether it be going to the moon, genetic alteration of other human beings, releasing the atom's energy, or whatever.

Knowing so much about one thing and so little about everything else, they are unable to know what effect their ambitions, if achieved, might have on the human situation. Just as a baby with a stick of dynamite and a match is unaware of what the consequences might be!

The lamentable fact is that scientists, pseudo scientists, and other technologists have been given a wishing well: the Federal grab bag. They, thus, are encouraged to carry out any experiment their hearts desire, without let or hinderance. Leaving aside the destruction of our economy by inflation—featured in the grab bag's financing—they are alarmingly endangering all the people on this earth, even the earth itself. And primarily because they suffer no restraining and disciplinary forces; their passions and ambitions are on the loose!

THE DISCIPLINE OF THE MARKET

The remedy? Let these ambitions be submitted to the discipline of the market precisely as are most other commodities and services. Go to the moon? Of course; that is, when the market permits the venture, if enough people voluntarily subscribe the cash. Release the atom's energy? By all means; that is, when the market is ready for it.

Am I saying that the market has a wisdom superior to the President of the United States, or the Congress, or a bureaucarcy? I am not. The market is a mechanism and is neither wise nor moral. I am only claiming that it has disciplinary qualities. To understand why requires no more than a knowledge of what the components of this mechanism are: millions upon millions of individual preferences, choices, desires. *The market is an obstacle course;* before I can pursue my bent or aptitude or obsession, I must gain an adequate, voluntary approval or assent! No wishing well, this! My own aspirations, regardless of how determined, or lofty, or depraved, do not control the verdict. What these others—impersonal as a computer—will put up in willing exchange for my offering spells my success or failure, allows me to pursue my bent or not.

These are exceptions to this rule, of course. For instance, some of us who may be unable to win the market will, like Van Gogh, face starvation in order to pursue our passions. The threat of starvation, however, is quite a discipline in itself; at least, not much is likely to be uncovered in these circumstances that will destroy life on earth. It takes big financing to do unearthly things.

The market very often returns fortunes for comparative junk and, on occasion, returns nothing at all for great and beneficial achievements—temporarily, that is. Eventually, in a free society, the junk goes to the junk heap and achievements are rewarded.

I believe that anyone should follow his star; but let him do so with his own resources or with such resources as others will voluntarily supply. This is to say that I believe in the market, a tough, diciplinary mechanism. I do not believe in cars without brakes, impulses without repulses, ambitions with check points, wishes run riot. Societal schemes that are all sail and no ballast head society for disaster!

The rebuttal to this line of reasoning is heard over and over again: "But we voted for it," meaning that the Federal grab bag—open sesame with other people's income—has been democratically approved. Granted! But this is nonsense: the fruits of the labor of one man are not up for grabs by others, that is, not rationally.[4] This is not a votable matter, except if one's premise be a socialistic society. What's right and what's wrong are not to be determined at the shallow level of nose-counting or opinion polls. To argue otherwise is to place the same value on the views of morons as you do on your own.

As a disciplinary force over wild aspirations, the President of the United States, a member of Congress, a bureaucrat is not only less effective than the market but less effective than any single buyer or seller in the market. An individual, when a government official, considers only how much of other people's money should be spent. The motivation in this instance favors spending over economizing. The same individual, in the free market, considers how much of his *own* property he is willing to put on the line. The motivation in this instance is self-interest. And this is tough! Ambitions as silly as tracking the meandering of polar bears by a nimbus satellite stand a chance for satisfaction when a grab bag made up of other people's money is readily at hand;[5] whereas, the free market gives short shrift to projects that are at or near the bottom of individual preferences.

True, were personal ambitions subjected to the disciplines of the market, trips to the moon would have to be postponed. Atomic energy might be a phenomenon of the future. Many other scientific explorations—some secret—taking place today in our universities and Federally financed would, under the discipline of the market, still be safely stored in imaginative minds.

This is no argument against technological breakthroughs. It is merely to suggest that these illuminations be financially encour-

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[2] See "Value—The Soul of Economics," by W. H. Pitt. *The Freeman,* September, 1969.

[3] John Henry Newman.

[4] For what I consider to be a rationally constructed explanation of this point, see "The Limits of Majority Rule" by Edmund A. Opitz. Copy on request.

[5] See "The Migration of Polar Bears," *Scientific American,* February, 1968.

aged only as the free market permits. The resulting steadiness in progress might then be harmonious with an expanded understanding of what it is we really want and can live with.

I repeat, societal schemes that are all sail and no ballast head society for disaster. The free market is ballast—a stabilizer—we might well put to use if we would avoid wreckage in the stormy seas of political chaos.

TRIBUTE TO J. EDGAR HOOVER

(Mr. DANIELSON asked and was given permission to address the House for 1 minute, to revise and extend his remarks, and include extraneous matter.)

Mr. DANIELSON. Mr. Speaker, I was much saddened this morning to learn of the sudden death of J. Edgar Hoover. He served our country for a very long time and had occupied a position of highest prominence probably for a longer time than any other public servant. More than 50 years ago, shortly after World War I, he took over the law enforcement arm of the Department of Justice when it was standing in poor repute and public disfavor. Guided by the highest principles of professional law enforcement, and with a firm but fair hand, he built that organization into the finest law enforcement organization of all time and set a standard of performance which, for more than a generation, has been the standard of the world.

I had the honor of serving for more than 5 years as a special agent of the FBI under Mr. Hoover's direction before and during the early part of World War II. We were a small organization at that time. I clearly recall that when my class graduated from the training school, he came in and visited with us and observed that for the first time, the Bureau's total strength had reached 750. Although the workload for that organization was immense, it was good to be small, for we all knew each other either personally or by reputation. There was a strong sense of oneness in the Bureau, for none of us ever doubted, nor was there reason to doubt, that each of us could at any time rely completely on the support and the integrity of each other. That spirit was felt throughout the Bureau and was the reflection of the dedication and integrity which J. Edgar Hoover brought to the FBI.

Law enforcement will be the poorer now that Mr. Hoover is gone, but both law enforcement and America are infinitely richer because he lived.

THE ABORTION RIGHTS ACT

The SPEAKER. Under a previous order of the House, the gentlewoman from New York (Mrs. ABZUG) is recognized for 60 minutes.

Mrs. ABZUG. Mr. Speaker, I am today introducing a bill that will, if enacted, finally and completely affirm the right of every American woman to choose whether or not she will be the mother of a child. H.R. 14715, the Abortion Rights Act of 1972, will give women the freedom of choice so long denied them by restrictive abortion laws which the Federal Government and individual States have passed over the years. These laws have consistently limited and qualified a woman's constitutional right to choose whether to terminate a pregnancy.

At the basis of the abortion debate that has gone on in this country since a State passed the first abortion law in the early 1800's is the question of a woman's right to choose.

There are other aspects of the abortion debate—legal, medical, religious, moral, and ethical questions—which for many people, caught up in this difficult period of social transition, present real obstacles to an acceptance of the concept of freedom of choice which is at the basis of the abortion movement.

Abortion is a controversial subject, and there are many diverse views with regard to it. Every woman should have the right to decide for herself whether she wishes to have an abortion. No woman should be required to have an abortion if her conscience forbids it, but no woman should be prevented from having an abortion because the conscience of some other individual would be offended by it. This freedom of choice for each and every female is all that is proposed here. Those who do not believe in abortion will be completely able to go on believing and practicing that tenet, but those whose beliefs are otherwise would henceforth have an equal right to practice their own philosophy.

THE CONSTITUTIONAL RIGHT TO ABORTION

I expect that some questions will be raised concerning the power of Congress to enact a bill such as this. I have researched this question extensively, and I believe that the bill, if enacted into law, would withstand any challenge as to its constitutionality.

Briefly stated—and I am going to discuss this in considerable detail below—the rationale supporting our power to enact this bill is as follows:

First, there exists a constitutional right of privacy, which includes the right of a female to terminate a pregnancy that she does not wish to continue.

Second, this right is a fundamental one, and applies to the States—through the due process clauses of the 14th amendment—as well as to the Federal Government.

Third, there is no countervailing governmental or public interest of a compelling or other nature which would justify the infringement of this right by the Federal Government of by any State.

Fourth, Congress possesses all legislative powers with regard to the Federal Government, and is empowered to enact "appropriate legislation" to enforce the restrictions which the 14th amendment places upon the States.

Fifth, in the exercise of these powers, Congress may prohibit the United States and the States from acting in a manner which "infringes the right of any female to terminate a pregnancy that she does not wish to continue, or which deprives any female of access to adequate medical assistance in the exercise of such right."

The literal wording of the Constitution does not establish a specific right to privacy or right to abortion, but our consideration cannot end with that fact. Many rights have been held to be constitutionally protected even though not expressly set forth in the Constitution. In the "family" context into which the question of abortion falls, there have been held to be constitutional rights to marry, to have offspring, to use contraceptives to avoid having offspring, and the right to control the upbringing and education of one's offspring. *Loving* v. *Commonwealth of Virginia*, 388 U.S. 1 (1967); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); Eisenstadt against Baird; *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

Griswold against Connecticut, supra, is the first case to definitively establish that there exists a constitutional right of privacy. The appellants in that case, whose learned counsel, Prof. Thomas Emerson, was among the many people who assisted me in the preparation of this legislation, had given information and instruction to married couples in the use of contraceptive devices and had been convicted as accessories to the violation of a Connecticut statute which prohibited the use of such devices. The seven Justices who voted to reverse the conviction propounded different rationales for so doing, but all four opinions on the majority side agreed that there was a constitutional right of privacy which was unjustifiably violated by the statute in question.

Justice Douglas, writing for the Court, began by noting a number of cases which set forth constitutional freedoms of expression which go beyond the literal wording of the first amendment, but which are necessary to clearly secure the rights which are expressly set forth in that amendment. He continued as follows:

> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. [citation omitted] Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.
>
> The Fourth and Fifth Amendments were described in *Boyd v. United States*, 116 U.S. 616, 630, as protection against all governmental invasions "of the sanctity of a mans home and the privacies of life." [Footnote omitted.] We recently referred in *Mapp v. Ohio*, 367 U.S. 643, 656, to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people." [Citations omitted.]
>
> We have had many controversies over these penumbral rights of "privacy and repose." [Citations omitted.] These cases bear witness that the right of privacy which presses for recognition here is a legitimate one. 381 U.S., at 484–85.

Justice Goldberg, writing for himself, Chief Justice Warren, and Justice Brennan, stated that the due process clause of the 14th amendment protects funda-

mental personal rights beyond those specified in the wording of the Bill of Rights:

> * * * The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.
>
> The Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights [footnote omitted] could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected [footnote, citation, Hamilton, Federalist No. 84, omitted] 381 U.S., at 488–89.

Justice Goldberg went on to state that "the right of privacy in marriage" is a basic and fundamental right protected by the ninth amendment, and that it is further a right of the people which is protected from State, as well as Federal infringement, by the due process clause of the 14th amendment.

Justice Harlan, who believed that the due process clause of the 14th amendment stands independently of the Bill of Rights and protects "basic values 'implicit in the concept of ordered liberty,'" 381 U.S., at 500, and Justice White, who spoke of the "freedoms of married persons," 381 U.S., at 507, also found the statute in question unconstitutional.

In the 7 years since the Griswold decision, the right of privacy has been significantly broadened by the courts. Only a few weeks ago, for example, the Supreme Court used it to strike down a Massachusetts law which prohibited only unmarried individuals from using contraceptives. Eisenstadt against Baird, supra. In a long series of decisions by State and Federal appellate courts below the Supreme Court, the right of privacy has also been held to include the right of a female to terminate a pregnancy that she does not desire to continue.

Justice Goldberg's opinion in Griswold contained the first suggestion of this when it referred to the "totalitarian limitation of family size" as being "at complete variance with our constitutional concepts." 381 U.S., at 497. The first decisions directly striking down abortion statutes, however, did not come until the autumn of 1969, and the first case striking down such a law due to its violation of the female's right to abortion was handed down in March 1970.

In *People* v. *Belous*, 71 Cal. 2d 854, 458 P. 2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970), the Supreme Court of California ruled that that State's old criminal abortion statute was invalid because the criteria it laid down, including the requirement that the abortion be "necessary to preserve" the life of the mother, were unconstitutionally vague. The court further noted that "the fundamental right of the woman to choose whether to bear children" is clearly a part of the right of privacy set forth in Griswold and other Supreme Court rulings relating to marriage and the family, 458 P. 2d. at 199.

In *United States* v. *Vuitch*, 305 F. Supp. 1032 (D.D.C., 1969), reversed, 402 U.S. 62 (1970), the district court found that the District of Columbia abortion statute was unduly vague and therefore violative of the due process clause of the fifth amendment. The court went on to note that recent Supreme Court decisions gave "increasing indication" that:

> A woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy. 305 F.Supp., at 1035.

The Supreme Court reversed the lower court decision in this case because it determined that the statute was constitutional if narrowly construed. It expressly referred to the district judge's comments on the right of privacy, stated that in its opinion, his decision was grounded solely on the vagueness question, and added that its decision was solely on the vagueness question.

The first case to declare an abortion statute unconstitutional squarely on the ground that it violated the mother's right to privacy was *Babbitz* v. *McCann*, 310 F. Supp. 293 (E.D. Wis.), app. dismissed, 400 U.S. 1, injunction granted, 320 F. Supp. 219 (E.D. Wis., 1970), vacated and remanded on other grounds, 402 U.S. 903 (1971). In that case, a three-judge court held that:

> The police power of the state does not . . . entitle it to deny to a woman the basic right reserved to her under the ninth amendment to decide whether she should carry or reject an embryo which has not yet quickened. 310 F.Supp., at 302.

In *Roe* v. *Wade*, 314 F. Supp. 1217 (N.D. Tex., 1970), juris. postponed to hearing on merits, 402 U.S. 941 (1971) a three-judge district court held the Texas abortion statutes unconstitutional "because they deprive single women and married couples of their right, secured by the ninth amendment, to choose whether to have children." 314 F. Supp., at 1221.

The Illinois statute fell in *Doe* v. *Scott*, 321 F.Supp. 1385 (N.D. Ill., E.D. 1971), wherein the court referred to "women's rights to life, to control over their own bodies, and to freedom and privacy in matters relating to sex and procreation," 321 F. Supp., at 1389, and held that the "zone of privacy" recognized by Griswold and its progeny includes the right of abortion within its parameters. A number of other cases, including *Doe* v. *Bolton*, 319 F.Supp. 1048 (N.D. Ga., Atlanta Div., 1970), juris. postponed to hearing on merits, 402 U.S. 941 (1971), *Abromowitz* v. *Kugler* (D.N.J., 1972), and *People* v. *Barksdale*, 1 Crim. 9526 (Dist. Ct. App., 1971), have invalidated abortion statutes in whole or in part due to their violation of the right of a woman to control her own body.

Under our Constitution, even fundamental personal liberties are not absolute. However, where such a right is involved, and a State desires to encroach upon it, "the State may prevail only upon showing a subordinating interest which is compelling," *Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960). In relating this to the right to terminate pregnancy, former Justice Tom Clark's recent article, "Religion, Morality, and Abortion: A Constitutional Appraisal," 2 Loyola U.L.Rev. 1 (1969), stated that—

> [U]nless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children, and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution. 2 Loyola U.L.Rev. at 8.

Griswold plainly implies that this strict test must be applied with regard to the right of abortion, and the Belous, Babbitz, Wade, and Scott cases expressly so state.

In Babbitz, supra, the court considered three possible State interest justifications for regulating abortions. The interest of the State in protecting the embryo, the need to protect the life and health of the mother, and the discouragement of nonmarital sexual intercourse were all held to be insufficient grounds for such regulation.

I ask that the text of relevant court decisions, relevant portions of briefs filed in the Supreme Court in the Wade and Bolton cases pending there, a pre-Griswold article by Norman Redlich, and Justice Clark's article be included in the RECORD at the conclusion of my remarks.

It is beyond doubt that a constitutional right of privacy exists and that its scope is quite broad. This right, or zone, includes the right of a female to terminate a pregnancy that she does not desire to continue. This right is fundamental and as such it is binding upon the States under the due process clause of the 14th amendment and subject to infringement only in furtherance of a compelling governmental interest to the contrary. No such compelling interest has been demonstrated to date, and I do not believe that such an interest exists.

THE POWER OF CONGRESS TO STRIKE DOWN STATE LAWS WHICH RESTRICT THE RIGHT TO ABORTION

The Supreme Court has yet to rule on the question of whether there is a constitutional right to abortion. The Wade and Bolton cases have been argued before it and will almost surely be decided before the term ends in June, and the rulings in those cases may enunciate the right which I believe exists. It is also possible that the Court will fail to reach the merits, or that it will decide that the challenged statutes do not violate the 14th amendment. However, even if the Court reaches the last of these possible conclusions, Congress will probably retain the power to pass a statute nullifying State abortion laws.

The only exception to this would be a Supreme Court determination that State abortion laws are constitutionally required; to say the least, it is highly unlikely that the Court will reach this conclusion.

Section 1 of the 14th amendment provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5 of that amendment provides that—

[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The nature of Congress power, under section 5, to enforce the guarantees set forth in section, was discussed at length in *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966). In enacting the Voting Rights Act of 1965, Congress included a provision that no person who has successfully completed the sixth grade in a public or accredited private school in the United States, including Puerto Rico in which the predominant classroom language was other than English, shall be prevented from voting in any election because of his ability to read or write English. The provision was accompanied by a congressional finding that it was necessary to secure the 14th amendment rights of the persons affected. In 1959, in *Lassiter* v. *Northampton County Board of Elections,* 360 U.S. 45 (1959), the Supreme Court had ruled that literacy tests, if fairly administered, did not violate the Constitution.

The appellees in Morgan argued that although Congress had the power to enforce the 14th amendment, it could only prohibit State activities which were violative of that amendment, and further, that the courts had the responsibility to make the ultimate determination of whether the prohibited activity was unconstitutional. They argued that since the New York literacy test in question had not been shown to have been unfairly applied, it was constitutionally permitted under the Lassiter decision and not subject to prohibition by Congress.

The Court, by a 7 to 2 margin, rejected this argument. It held that section 5 of the 14th amendment was designed to give Congress "the same broad powers" with respect to carrying out the substantive provisions of the amendment as the necessary and proper clause of the original Constitution, article I, section 8, gave it with respect to carrying out the substantive powers granted in that document:

§ 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment. 384 U.S., at 651.

The test of the constitutionality of a congressional enactment under section 5, was identical to the standard with respect to the necessary and proper clause which was set forth in *McCulloch* v. *Maryland,* 4 Wheat. (17 U.S.) 316 (1819): the law must be designed to enforce a provision of the Constitution; it must be plainly adapted to that end; and it must must not by its terms violate any other provision of the Constitution.

The Court found that the challenged statute satisfied this three-pronged test. It was meant to enforce the equal protection clause of the 14th amendment on behalf of persons who had migrated to New York City from Puerto Rico and who had been denied the right to vote because they could not read or write English. It was "plainly adapted" to enforce this clause because the Congress could and did find that giving these people the vote would enhance their political power and help in assuring that they would not be discriminated against as Puerto Ricans:

It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. *It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.* 384 U.S., at 653 (emphasis added).

The Court also found that the law in question did not violate any other provision of the Constitution.

In other words, Congress has the power to find that a given State statute or activity violates the 14th amendment, and to enact legislation which, in its judgment, will ameliorate that violation, so long as that remedial legislation does not itself violate the Constitution.

The issue of congressional powers under the 14th amendment came before the Court, once again in a voting rights context, in *Oregon* v. *Mitchell,* 400 U.S. 112 (1970). The Voting Rights Act Amendments of 1970 enfranchised citizens 18 years of age and older in Federal, State, and local elections. The amendments also prohibited the use of literacy tests in State and Federal elections and set up limited residence requirements for presidential and vice presidential elections, but these titles of the act, and the Court's treatment of their constitutionality, are not relevant to our discussion of congressional power.

In ruling on the title of the act which lowered the voting age to 18 in State and local, as well as Federal elections, four Justices found it to be entirely unconstitutional and four found it to be entirely constitutional. Justice Black believed that it was constitutional as to Federal elections, but not as to State and local contests, and his swing vote determined the outcome. In rejecting the argument that the decision in Morgan permitted the Congress to find that an age minimum of 21 years violated the equal protection clause and to prohibit the States from enforcing such a minimum, Black stated that the primary purpose of the equal protection clause was to prevent discrimination because of race, and that Congress could not invade an area reserved to the States by the Constitution unless it found that racial discrimination was involved. It is important to note that although Black's opinion in Oregon against Mitchell announced the judgments of the Court, it was his alone, and no other Justice joined him in it.

The other four Justices who voted that Congress could not lower the voting age to 18 for State and local elections did so for a variety of reasons. Justice Harlan presented a lengthy historical discourse which he said indicated that the equal protection clause was not intended to apply to State-imposed limitations on voting rights, even where those limitations were imposed in a racially discriminatory fashion. Justice Stewart, writing for himself, Chief Justice Burger, and Justice Blackmun, based his determination on the ground that while Congress has broad power to determine what action is appropriate to enforce the guarantees of the 14th amendment, it lacks the power to determine the substantive content of those guarantees and to decide what State interests are compelling." Thus, only three, and possibly four, of the members of the Court which decided Oregon against Mitchell raised any questions as to the continuing vitality of Katzenbach.

Thus, Congress has the power to enact this legislation, which would strike down State criminal abortion laws, if it can reasonably find that those laws, either on their face or as applied, violate the constitutional rights of individuals subject to them. I believe that State abortion statutes violate both the due process and the equal protection clauses of the 14th amendment.

As I stated earlier in my discussion of the constitutional aspects of the bill I am introducing today, there is a constitutional right of privacy, and it includes the right of any female to terminate a pregnancy that she does not wish to continue. As a fundamental right, it is part of the "liberty" protected by the due process clause, and is binding upon the States as such. *Griswold* v. *Connecticut,* supra, at 493.

State abortion statutes also violate the equal protection clause, for they clearly discriminate against the poor. Justice Clark's article, for example, refers to "the double standard which permits those with social status and financial ability to obtain abortions, while those in the lower social and economic classes are denied this opportunity," Clark, supra, at 6, and Justice White's concurring opinion in Griswold noted that the effect of the anticontraceptive statutes was to deny disadvantaged individuals, "those without either adequate knowledge or resources" to obtain counseling and assistance in birth control. Women in the upper-middle and upper classes have the wherewithal to either get a friendly physician to perform an abortion when one is needed or to travel to a jurisdiction where abortion is legal. Low income women do not have this opportunity, and it is the action of the State, in enacting and enforcing its abortion laws, which denies it to them. See, *Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966); *Williams* v. *Illinois,* 399 U.S. 235 (1970); *Morris* v. *Schoonfield,* 399 U.S. 508 (1970). Even if the Supreme Court were to hold that abortion laws are not unconstitutional per se because there is no constitutional right to abortion, we in Congress could—and should—find that the application of these laws blatantly

violates the equal protection clause and strike them down on that basis.

Mr. Speaker, I ask that the text of the decisions of the Supreme Court in Katzenbach against Morgan and Oregon against Mitchell be included in the RECORD at the conclusion of my remarks.

To sum up, there is a constitutional right of privacy which includes the right of a female to terminate a pregnancy that she does not wish to continue. This right is fundamental and binding upon the States under the due process clause of the 14th amendment; also, it may be limited only in furtherance of a compelling State interest, and no such interest has been or can be advanced.

Even if such a right does not exist, State abortion laws are applied in a manner which violates the equal protection clause.

In either case, Congress has the authority to find that these State statutes violate the constitutional rights of individuals and, having made that finding, has the power to nullify them in the exercise of its power to enforce the 14th amendment.

MEDICAL, SOCIAL, AND PSYCHOLOGICAL ASPECTS OF THE RIGHT TO ABORTION

I turn now to the medical, social, and psychological aspects which directly relate to the need for abortion.

One of the main problems is that of the illegal abortionist. He may be anyone from a doctor who is willing to risk his practice because he believes in abortions to a garage mechanic with a penchant for earning a few extra dollars on the side. It is estimated by Dr. Lester Breslow, president of the American Public Health Association and professor of preventive and social medicine at the University of California that at least 1 million illegal abortions are performed in this country every year. This certainly is an extremely serious problem in objective medical terms. It is ironic to note that the main reason for enactment of abortion laws in the early 19th century was that surgical operations that entered the body cavity, even when performed by physicians, were frequently fatal, and that today abortion performed by a physician is seven times as safe as childbirth.

But no one can tell how dangerous an abortion is when it is performed by an illegal abortionist. Thousands of women every day check into hospitals across the country with hideous infections of the uterus, or hemorrhaging or with perforated organs—all as a result of illegal abortions.

When a law is being violated to such a great extent, there must be something terribly wrong with the law. The book, "Abortion Rap," by Diane Schulder and Florynce Kennedy, discusses one case in New York where a teenage girl was having an abortion in a doctor's office, and the police broke in. Her mother, who was in the waiting room, pleaded with them to at least let the doctor finish the operation. They refused and barged in on the operation and took the doctor and the young girl away—in the middle of surgery.

The problem of illegal abortions is excellently discussed by Harvey L. Ziff in a Law Review article entitled "Recent Abortion Reforms (Or, Much Ado About Nothing)." In the article, which appears at 60 Journal of Criminal Law, Criminology and Police Science 3 (1969), he states:

The nature of the business requires that it be well organized, although illicit abortion services apparently are not controlled by any single organization. The professional abortionist needs an office, medical equipment, and some assistants. Customers must be able to locate him, even though he must maintain a certain amount of anonymity. Intervention by the police must be avoided as well.

The court records in New York reveal the operations of two complex organizations known as abortion "mills" and "rings." The mill is comprised of one or several abortionists working regularly in a single locale and aborting a dozen women daily. The less common ring consists of "interacting abortionists or mills working intermittently at several occasionally changing locations and aborting an even more considerable number of women daily." The rings are clandestine and swiftly operating organizations. They may give the women a code number by telephone and order her to meet the abortion contact in a parking lot. There, the contact may blindfold her and give her sleep-inducing drugs. After the operation he will return her to the parking lot in less than an hour.

A sizable portion of the price charged goes to intermediaries because the successful abortionist requires both business and medical assistants. He needs a shrewd secretary who can gauge the financial status of an applicant in order to charge the highest possible fee. He requires channels to direct patients to him. Physicians and druggists are the primary source of referral; others include women formerly aborted and satisfied with the results, taxi drivers and bell boys. Fees are split with all of these "feeders" except the former patients. The abortionist also has a business agent to handle contracts with the landlord, payment of salaries, bills, bribe money and split fees. The agent is usually a relative or close friend who can be trusted with this confidential position.

Few police officers have any illicit connection with abortionists; however, some do take advantage of the opportunities for extorting a known abortionist who is working in a fixed location. A common practice is to send a decoy, willing to submit to the operation, to the abortionist. The officers stop her as she attempts to leave the office. After "protesting" the legitimate nature of her visit, she "breaks down" and "confesses." The abortionist, who cannot know whether the raid is "legitimate," has no choice but to agree to bribe the officers.

The activities just described should not be tolerated even if one were to assume that illegal abortions are performed in a hygienic manner. The glaring need for adequate revision of the law thus becomes obvious when the suffering inflicted on women as a result of these activities is revealed.

Illegal abortions are a significant contributor to injuries suffered by women. Early commentators estimated five to ten thousand deaths per year are caused by abortions. As the use of antibiotics and increased care has become more common, a lower figure of one thousand deaths per year may now be more accurate. Nevertheless, recent studies in California and New York indicate that criminal abortion remains responsible for more maternal deaths than any other cause. The most common victims are married housewives, with several children, who attempted to abort themselves.

The techniques which cause death are numerous and variable. Several of these are often combined, each contributing to the fatality. Oral medications are commonly followed by direct assaults upon the uterus, apparently after the drugs seemed ineffective. These medications range from Castor oil to turpentine. Fluids injected into the uterine canal include pine oil, lysol, soap, and alcohol. Among the rigid objects forced into the uterus are chopsticks, copper wire, curtain rods, knitting needles, and coat hangers. Air is sometimes forced into the uterus by using a catheter, plastic straw, or football pump. Sepsis, i.e., infection, is the basic medical cause of death. Other medical causes of death, which may be found in combination with each other or with sepsis, include shock, hemorrhage, air or fat embolism, and poisoning.

Even though the aborted woman usually survives, almost all abortions performed by persons other than qualified physicians cause medical complications which require treatment. As in fatal cases, the most common after-effect is sepsis because the uterus is a delicate organ which is highly susceptible to infection. Most women who induce their own abortions fail to take proper hygienic precautions. Mill abortionists, also, often omit elementary aseptic techniques in order to save time in performing operations and increase profits. To treat the infections which result, forty percent of women admitted to hospitals after improper abortions require blood transfusions; the average hospital stay is seven days. In some cases good medical procedure dictates an immediate and total hysterectomy without a delay to assess the effectiveness of antibiotic therapy. All cases of septic abortion call for early diagnosis, treatment, and meticulous supportive care.

The amount of pain and humiliation inflicted by abortionists is staggering. Although physician-abortionists should be capable of operating in a professional manner without causing serious complications, the physician who has become a professional abortionist is almost invariably a deviate. Some are alcoholics who operate with disastrous results while they are intoxicated, and others are sexual perverts, as are many non-physician abortionists. Many criminal abortionists have little or no medical training, and come from the ranks of elevator operators, barbers, and unskilled laborers. Posing as physicians, they may attempt to perform a standard hospital operation known as a dilatation and curettage, or "D&C." The surgeon dilates the cervix, introduces a long, semi-sharp, spoon-shaped instrument called a curette, and scrapes the uterine cavity. Gentleness is the key to a proper operation; only a physician with obstetrical training is qualified to evacuate the uterus. Unskilled hands can easily damage the uterus and other nearby organs when they attempt this delicate procedure.

The lack of medical training is compounded because anesthetics are seldom used, another attempt to complete operations quickly, and also a precaution against a medical accident resulting in complications or homicide. Accordingly, the following account of an abortion is understandable:

Q. What did you feel at that time?

A. Well, there was so much pain—and I just don't—I can't explain it really. I just know it was like my whole stomach was coming out.

When the current laws were originally enacted, all abortions were dangerous procedures. Improvements have taken place in medical practice since that time. The D&C operation will be quite harmless when performed in a hospital under sanitary conditions today. The renowned physician Alan F. Guttmacher stated:

"There is little scientific evidence that in the United States today . . . any marked deterioration in the physical condition of women, aborted for therapeutic reasons in a hospital setting, will take place. . . . If the operation is properly performed so that no infection or laceration of the cervix results, it will have no effect on either the health of the woman or her reproductive future."

In addition to the D & C, an even safer,

and almost painless, method of performing abortions in the early stages of pregnancy recently has been developed. In this procedure, the vacuum aspiration method, a tube connected to a suction pump is inserted into the uterus. The uteral contents are then evacuated by negative pressure from the pump. Dilatation is often unnecessary, thereby eliminating the need for an anesthetic in many cases. In contrast to the incidence of perforation of the uterus in normal curettage which ranges from 0.09 per cent to 6 per cent, the chance of perforation with vacuum aspiration is virtually 0 per cent; one study reported no cases of perforation in 4,000 pregnancy terminations. Furthermore, the entire procedure requires only one to three minutes.

Obviously, all the suffering women endure because of the restrictive laws which compel them to perform crude and lethal operations on themselves, or submit to the butchery and lechery of criminal abortionists, is unnecessary. If sanitary facilities were made available to these women, this misery would be eliminated.

But there are other problems beside that of the incompetence of the illegal abortionist. What about the child that is the issue of an unwanted birth? What of the future life of a teenaged mother who is herself yet a child? What are the ramifications on society as a whole of one million illegitimate births a year? Many studies have been done on these questions. I would like to discuss a few of them and what they imply.

In 1966 a study was reported in a Scandinavian Psychiatric Journal. The aim of the study was to determine the mental health, social adjustment, and educational level of children born after their mothers had applied for legal abortion on psychiatric grounds, and had been refused. The results showed the damage. Twenty-eight percent of the children underwent some sort of psychiatric care in a clinic or hospital as compared with only 15 percent of the control group. Eighteen percent were classified as delinquents as opposed to 8 percent of the control group. The authors of this study look upon these figures as significant, as well as the following figure of the welfare statistic that 14 percent of the unwanted children were on public assistance, while only 2 percent of the control group was on welfare.

The conclusion to which the authors of the study come is this: The hardships for unwanted children throughout their lives are far greater in every aspect of society than for other children. They go on to say that—

The very fact that a woman seeks an authorized abortion, no matter how trivial her grounds may appear to some, means that the expected child will run a larger risk than its peers of an inferior standing in life.

The problem of unwanted children is a critical one, and occurs most often in poor families. They are most likely to have larger families, and are more likely to suffer the ill effects of too many children. It has always been the case that if a wealthy woman wanted an abortion, it was available to her. Poor women, on the other hand, have been compelled to bear their unwanted children and to subject them to the deprived environment of poverty. Studies have demonstrated that in the United States alone, there are presently about 5.4 million medically indigent women in need of family planning. Other social ills, not necessarily limited to the poor, affect the families of unwanted children: in an early marriage for instance, the young father is forced out of the educational process and into a job of unskilled labor. He is rarely able to go back to school or into a training program for fear that the little money he is getting would stop coming in.

The child, then, is born in a poverty-subsistence environment, with all the attendant deprivations—lack of education, unstable family situation, malnutrition—which contribute to the creation of an unhappy, unstable adult who has a difficult time adjusting to society. The report goes on to elaborate:

Children who lack a welcoming and nurturing parental home can be counted along a continuum of extrusion from the family origin. The continuum includes adoption, foster home placement, court action for neglect and dependency, and less severe but indifferent or otherwise unsatisfactory parental role performance within the family of origin.

It further states that—

Children born and living in their early years under psychological rejection by mothers, social abandonment by fathers, poverty, and other disadvantaged conditions, are exposed to the risk of impaired development which, regardless of all other consequence, is economically important as a cause of inferior earning power at maturity.

The report also discusses the problem of older women, taken out of the labor market when they had children at an earlier age. These mothers usually try to get back into the labor market, but are effectively restricted because of their age, lack of skill and limited educational background.

Another problem is that of how the mother deals with abortion. Our opponents would have us believe that the mother who seeks an abortion is initially abnormal, or if she is not, that the abortion will cause her to have massive feelings of guilt which will haunt her conscience for the rest of her life. This is simply not the case. In a review of studies on the subject, Dr. George S. Walter, in "Obstetrics and Gynecology", published in 1970, says that:

Consideration of the emotional stresses of parturition would suggest that induced abortion could be a traumatic and damaging episode in a woman's life. Extensive review of the literature reveals that this has not been true. In fact, for the healthy woman with a happy marriage, abortion is most often truly theraputic . . .

He also points out one of the most important reasons why abortion is not part of our national family planning policies attitudes within the health profession itself:

Abortion is foreign to the attitudes fostered in physicians during their medical training; the gynecologist, the one to do the abortion, has a basic psychological conflict. A whole generation of professional health workers refuses to let the myth die out that abortion will irreparably harm a woman and somehow place a stigma on her. Physicians remain adament. The male physician won't let the woman decide—reminiscent of the moralistic attitude about pain relief in childbirth before Queen Victoria demanded it for herself. The pregnant woman symbolizes proof of male potency, and if the male loosens his rule over women and grants them the right to dispose of that proof when *they* want to, the men then feel terribly threatened lest the woman can, at will, rob them of their potency and masculinity. This flaunting of traditional subservience may be one of the more powerful and less conscious determinants of our irrational opposition to granting women the right to decide matters in this crucial area of their lives. It may also function in the frequent insistence upon sterilization as a "package deal" with abortion. In this way, the male physician can maintain control. . . .

There is also the severe problem of population growth. Although the rate seems to have leveled off, most statisticians agree that at the present rates of birth and death, and at the rate we use up natural resources, we will have an extreme global survival problem by the year 2020.

The President's Commission on Population Growth acknowledges the problem by supporting abortion as one of the acceptable methods of family planning:

The abortion issue raises a great number of moral, legal, public health and demographic concerns. As a group, the Commission has carefully considered these issues and based on their personal views, individual members of the Commission have resolved these questions differently.

A few members of the Commission are opposed to abortion. These Commissioners consider abortion a remedial measure, and choose to emphasize society's responsibility for improving and enriching the lives of all citizens.

Some Commissioners approve of abortion only under the specific conditions set forth in the American Law Institute model abortion statute. These Commissioners believe that no woman should be forced to bear a child, thereby endangering her physical and mental health. Their concern is that abortion be available only on a limited basis and that it be considered as a last resort to protect life and health.

The majority of the Commission believes that women should be free to determine their own fertility, that the matter of abortion should be left to the conscience of the individual concerned, in consultation with her physician, and that the states should be encouraged to enact affirmative statutes creating a clear and positive framework for the practice of abortion on request. (Emphasis added)

CONCLUSION

This bill is the product of many months work and the assistance of many, many individuals and groups active in the fields of women's rights and constitutional law. I would like at this point to express my thanks to a few of them: the Womens National Abortion Action Coalition, WONAAC; the National Organization for Women, NOW; Zero Population Growth, Dr. Barbara Roberts of the Pre-Term Clinic in Washington, D.C., Matilde Zimmerman, Carol Foreman, Professor Thomas Emerson of Yale Law School, Harriet Pilpel and John Rigby.

The introduction of this bill is the beginning of a nationwide effort to secure its enactment. It is now up to the women of this country and their supporters to see that it is considered in public hearings, passed by both Houses of Congress and signed into law by the President.

Not one more child should come into

this world unwanted. Not one more woman should be compelled to carry a child that she does not want. Not one more woman should have to die on the filthy table of an illegal abortionist.

I include the following material:

H.R. 14715

A bill to enforce the constitutional right of females to terminate pregnancies that they do not wish to continue

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) The Congress finds and declares that—

(1) the constitutional right of privacy, embodied in the First, Third, Fourth, Fifth and Ninth Amendments to the Constitution of the United States, and applicable to the States through the due process clause of the Fourteenth Amendment thereto, includes the right of any female to terminate a pregnancy that she does not wish to continue;

(2) this right is a fundamental and inherent right, and is likewise not subject to infringement by the United States or by the several States by virtue of the due process clause of the Fifth Amendment to the Constitution of the United States and the due process and equal protection clauses of the Fourteenth Amendment thereto;

(3) there is no countervailing federal, State, or public interest of a compelling or other nature sufficient to justify the infringement of this right by the United States or any State.

(b) In order to secure the constitutional rights set forth in subsection (a) and this subsection, and in the exercise of its power to enforce the Fifth and Fourteenth Amendments to the Constitution of the United States, the Congress declares that it is necessary to prohibit the United States and the several States from enacting or enforcing any law, State constitutional provision, regulation, policy, or other device which infringes upon the said right in any way, or which deprives any female of access to adequate medical assistance in the exercise of such right.

SEC. 2. Neither the United States nor any State shall enact or enforce any law, State constitutional provision, regulation, policy, or other device which infringes the right of any female to terminate a pregnancy that she does not wish to continue, or which deprives any female of access to adequate medical assistance in the exercise of such right.

SEC. 3. Notwithstanding the amount in controversy, and notwithstanding the provisions of section 2283 of title 28, United States Code, or any successor provision thereto, the district courts of the United States shall have jurisdiction over actions brought to enforce the provisions of this Act, including but not limited to jurisdiction to grant injunctive relief to enforce the provisions of this Act.

SEC. 4. As used in this Act, the term "State" means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

SEC. 5. If any provision of this Act or the application of any provision thereof to any person or circumstance is judicially determined to be invalid, the remainder of this Act or the application of such provision to other persons or circumstances shall not be affected by such determination.

SEC. 6. This Act may be cited as the "Abortion Rights Act of 1972".

A PROTESTANT MINISTER'S VIEW

(By Joseph F. Fletcher, S.T.D.)

It is not possible to speak of "Protestantism's position on abortion" in anything like the way we can speak of Catholicism's, because of the pluralism of Protestant teaching and church organization. Historically, both traditions in Western Christianity have opposed induced abortion, specifically on grounds of alleged homicide in the case of Catholic moralists, and in a less defined, vaguer way by Protestants as a disregard of the "sacredness" of life—a kind of vitalism.[1]

Some Protestant churches, but only a few, have declared themselves on this urgent problem of conscience. To whatever extent the National Council of Churches speaks for pan-Protestant attitudes, advocates of a free and responsible ethics of abortion welcome its 1961 approval of abortion for the sake of the patient's *health*. The Lambeth Conference of 1958, speaking for Episcopalians, allowed abortion for "medical necessity"—which can cover a wide range of health concerns. Perhaps the most positively favorable positions have been taken by the American Baptists (1968), who favor abortion on request in the first trimester of pregnancy, and thereafter upon medical indication, and the Unitarian-Universalists (1968), who would abolish existing laws and leave the decision entirely to duly licensed physicians and their patients. The majority of Protestant churches have remained silent and will probably stay that way until the question is resolved for them in the social-cultural debate. They will not give much leadership, even if their opposition to medically responsible abortion is not as plainspoken and theologically sophisticated as Catholicism's.

Sometimes Protestants take the Catholic position—e.g., Karl Barth and Dietrich Bonhoeffer.[2] Roman Catholics can occasionally come close to the liberal Protestant and Jewish position—e.g., the Jesuit authors Joseph Donceel and Thomas Wassmer, who question the post-Thomas "doctrine" of immediate animation.[3]

As to popular or rank-and-file opinion, the American people at all income and educational levels are pretty well represented in a survey of New York which included 48 discernible subgroups and subcultures.[4] Favoring a change in the State law (which allows abortion only to save the patient's life) were 98 per cent of the Jews, 83 per cent of the Protestants, and—remarkably—72 per cent of the Catholics. When those whose religious affiliations were only nominal were excluded the results were not markedly different: 94 per cent of the Jews, 78 per cent of the Protestants, 63 per cent of the Catholics. Of the entire population 75 per cent favored liberalization of the law, 17 per cent opposed it, and 8 per cent were undecided.

The fact is that the Catholic view of abortion as "murder" and the Protestant taboo have never been convincing, only inhibiting; in the modern world of scientific biology and medicine, combined with an ethics of responsible decision rather than submission to inflexible moral laws, these traditional church positions become more and more archaic.

As Garrett Hardin has pointed out, the real issue is not whether we can justify abortion, but whether we can justify compulsory pregnancy.[5] My personal conviction (or "bias" to those who do not share it) is that we cannot ordinarily justify compulsory pregnancy, that in most situations we ought not to compel anybody either to conceive or bear a child against her will, and that abortion upon request should be morally licit unless medically contraindicated.

My own view—perhaps it is better called a suspicion—is that the motivation behind the historic theological and legislative prohibitions and restrictions on abortion came from conscious and unconscious male chauvinism. Women are still regarded by many as baby machines, pre- and postnatal. There is a widespread *feeling*, nontheological and nondoctrinaire, merely religious and psychosexual, which resists a rational ethics and liberal legislation. This taboo, so typical of Protestantism, expresses itself in tautologies like "a life is a life"—not knowing or offering any metaphysical arguments at all. It is an attitude only, sublogical but highly potent as a culture-dynamic.

People reinforce this feeling, however, with certain prudential (although not usually well-founded) reasons for opposing responsible abortion even if the situation calls for it. These are supposedly pragmatic objections in addition to appeals to metaphysical "doctrines" and predeterminative moral rules. It is said in Protestant circles, as in Catholic, that abortion is bad for the patient's health, that it undermines respect for life, and that it encourages extramarital sex relations. (These objections were all used at one time to oppose birth control.) But maybe an unexpressed and powerful objection is that responsible abortion, especially upon request, may give women the final control over reproduction.

Our task is to reeducate people on a deeper level than logic, not just by trying to show them the morass of inconsistencies in these objections, but at the level of empirical fact and a situational versatility which fits the realities of modern life, of human need, and of social welfare.

There are several basic issues posed by current proposals to ameliorate and relativize the rigid laws and popular morality of the nineteenth century. The first of these oppressive laws in America only came in 1827. Protestantism as such has no clear thought or voice about these issues.

1. *The philosophical issue.* Is abortion a form of homicide? And if so: (1) Why? (2) Under what circumstances is it justifiable?

2. *The ethical issue.* Is abortion inherently and always wrong ("sinful" in theological language)—i.e., is it as such morally evil: If it is wrong only extrinsically and according to the particular situation, what conditions and contexts make it so? What would make it good and right?

3. *The theological issue.* Are we human beings stewards of God's gift of life, ourselves responsible for producing lives carefully and creatively, or are we only subrational instruments of a reproductive process over which we may not exercise any control, i.e., responsibility? A subquestion is: If we may or should exercise a responsible control over the initiation of life, as in the prevention of conception (which Protestantism generally approves), then why not exercise it over the termination of life, as in the interruption of unwanted pregnancies at the start?

4. *The legal issue.* Should anybody be required or compelled to bear a child against her will, and if so, when and why?

5. *The social issue.* Should we tolerate, when it can be prevented, the presence in our common life of unwanted children, defective human beings, or a contaminated genetic pool, and dangerously large numbers of people? Should induced abortion not be a part of our total birth control program and a legitimate means of voluntary parenthood?

Some may wish to add a sixth issue, i.e., a biotheological one. Is a human being a body animated or "infused" by a "soul," or is it a psychophysical organism with certain personal-social characteristics to be determined empirically and experientially—not speculatively, as in the soul theory?

Medicine has a disturbing way of posing new questions of right and wrong, and then of reducing the range or incidence of situations in which the questions arise. For example, obstetrics and gynecology have shown us a way of safely interrupting pregnancy, only later to reduce or narrow the need by preventive care.

The need for surgical abortions may be falling off due to early embryo examinations by which it is possible to foretell deformities by taking amniotic and tissue samples. Preventives such as the antirubella vaccine are at hand. Eventually microbiology and

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Footnotes at end of article.

genetic selection will reduce the frequency of indications for abortion.

The best method of voluntary parenthood now is abortion. The Swedish synthetic abortifacient F6103 is perhaps a prototype of the so-called "morning-after" pill which will shortly replace the mechanical abortion of fertilized ova by IUD's, making abortion much more convenient and reliable.

Indeed, abortion in this prenidation form would appear to be not only the best method of birth control but the only method—since all other methods of voluntary parenthood are forms of conception control, not birth control. The issue over abortion is in fact the only real issue in "birth control," when this term is correctly understood.

The successful thrust of the Abortion Law Reform Association in England in recent years, leading to the Reform Bill of 1967, showed Parliament that the usual religious opposition is rejected by the conscience of the electorate. Our legislatures in America have that lesson coming to them too.

As we detect a growing open-mindedness in both Protestant and Catholic discussions of abortion, we have reason to hope that the lesson will be learned sooner rather than later. As the *aggiornamento* or updating of Catholic and Protestant thinking forges ahead, we can see that the hard test of ecumenical relations is less doctrinal or a matter of what we believe, and more a matter of ethics—of what we *do* about what we believe. Our highest ideals and best values can destroy us if they are trapped by rigid and suffocating rule for or against any human need.

FOOTNOTES

[1] In Eastern Christianity the Greek Orthodox prohibition of abortion is representative.

[2] Karl Barth, *Church Dogmatics*, pp. 415–22, Edinburgh, T. & T. Clark, 1961; Dietrich Bonhoeffer, *Ethics*, pp. 130–31, New York, Macmillan, 1955; cf. also Paul Ramsey, *Dublin Review*, Spring 1967, pp. 1–21.

[3] Joseph Doncell, S.J., *Continuum, 5*(No. 1):161–71 (1961); Thomas Wassmer, S.J. *Commonweal, 86*(No. 15):416–18 (1967); cf. also Patrick J. O'Mahoney and Malcolm Potts, *The Month* (London), *38*(Nos. 1–2): 45–50 (1967).

[4] Association for the Study of Abortion, *Newsletter, 3*(No. 1):2–3 (1968).

[5] Garrett Hardin, *Journal of Marriage and the Family, 30*(No. 2):246–51 (1968.

A REFORM RABBI'S VIEW

(By Israel R. Margolies, Ph. D.)

The basic ethical code that undergirds the faith of Judaism, and indeed much of the faith and philosophy of the Western world, is crystallized in the Ten Commandments. The classic command "Thou shalt not murder (*Lo Tirtzach*)" still remains the most profound moral restraint on what many consider the naturally predatory instinct of man, and a haunting reproach to nations' aggressions and conquests:

The entire question of abortion, whether it is explored from the religious, medical, or legal point of view, hinges on the baffling problem of how to define the fetus. Is it truly a spiritual entity in and of itself, or does it merely contain all of the myriad potentialities of humanity by virtue of its being an integral part of another human being, without, however, possessing an independent life and soul of its own? If the former is true, then the ethical imperative "Thou shalt not murder" is applicable as much to the fetus as to a full-grown man, and we would have to consider abortion for any reason willful murder. If the latter is true, as many of the greatest Jewish scholars believed, then the right to have an abortion would be a perfectly legitimate legal exercise of parental privilege in certain circumstances.

In Exodus 21:21–23, we read: "And if men strive together, and hurt a woman with child, so that her fruit depart, and yet no harm follow, he shall be surely fined, according as the woman's husband shall lay upon him; and he shall pay as the judges determine. But if any harm follow, then thou shalt give life for life." The inference clearly to be drawn from this principle of Biblical law was that the destruction of the fetus was equivalent to damaging property, not to the killing of a human being, for it was a part of the mother, and damages had to be paid for the injury to her. This became a capital offense, or murder, only "if any harm follow," in other words, if the woman herself died as a result of the injury.

According to Rabbinical law in the Talmud, that vast encyclopedia of scholarly interpretations of Biblical law: "If a woman has great difficulty in giving birth to her child, it is permitted to destroy the child to save her life. If the child puts forth its head or most of its body, it may no longer be destroyed to save its mother, because one life must not be pushed aside for another" (Ahalot 7:6). Obviously, the majority of the Rabbis of the Talmudic era, which covered the first five centuries of the common era, did not subscribe to the Pythagorean doctrine that the soul enters at conception. Instead, they were prepared, up to the very moment when the greater part of the child emerged from the womb, to eliminate it for the sake of the mother. It became a living soul, a *Nefesh*, only when it detached itself from its mother, and only then was it deemed to be a human life that may not be pushed aside for another. In Rabbinic terminology, the fetus is "Ayver yerech imo hoo," *pars viscera matrum*—mother's loin, an integral part of the mother's flesh. Indeed, if it should die during birth, or even during the first thirty days of infancy, no funeral service is held, no Kaddish, or memorial prayer for the dead, need be recited, because it is as though, not having been endowed with sufficient *élan vital* and individuality, this child is not considered to have lived at all.

Rabbi Joshua Falk, outstanding Talmudic scholar of the seventeenth century, in his brilliant commentary of M'irat Aynayim on the Choshen Mishpat, 425, end of section 8, declared: "While the fetus is within the body of the mother, it may be destroyed even though it is alive, for every fetus that does not come out, or has not come out into the light of the world, is not described as a *Nefesh* [a living soul]."

Rabbi Jacob Emden, the most gifted Jewish scholar of the eighteenth century, was once questioned regarding the ethical and legal ramifications of abortion. This towering authority answered boldly that it is not only permissible to conduct an abortion in order to save the life of the mother, but even to spare her excessive torture in childbirth.

During the nineteenth century, Rabbi Solomon of Skola, the revered sage who was the author of Bet Shlomo, indicated therein that there can be no objection of any sort to an abortion performed within the first forty days of gestation, and that it may also be done at any time thereafter, if the fetus threatens the life or health of the mother.

The most recent statement on this subject by a universally recognized authority on Jewish morality was that of the late Sephardic Chief Rabbi Ben Zion Uziel in this century. He concluded, after a broad analysis of abortion, than an unborn fetus is prehuman, not a *Nefesh*, a soul, at all, and has no independent life. It is indistinguishable from its mother, and just as a person may choose to sacrifice a limb of his body in order to be cured of a worse malady, so may the fetus be destroyed for the mother's sake.

Precisely because I am a Reform rabbi, and lest my position be susceptible to attack on the grounds that it flies in the face of Jewish tradition, I have deliberately rested my case on the interpretations of sages whose respect for the Orthodox Jewish methods can never be questioned. Naturally, there were others who differed, and decried abortion as a sin, exactly as some religious leaders do today. However, the position of the men whom I have cited remains, in my considered judgment, the most enlightened and accurate standards of ethical Jewish concepts in this challenging field.

It is all too easy to dismiss the entire subject of abortion, as so many holier-than-thou religionists do, under the ominous heading of "sin." I deem such spineless and irrational subservience to the dogmatism of theologians, who speculate with fined detachment upon such matters in their cloistered ivory towers, unbecoming to the rational and largely moral society of a great nation. I suggest that the truly civilized mind would be hard put to devise a greater sin than to condemn a helpless infant to a life of permanent deformity, or to the twilight world of the slum and orphanage, or to the cold environment of a home in which it is not welcome. If there is to be any talk of sin, then here is where it may be found.

If the sexual function of man was meant to be directed strictly to the purpose of procreation, then, like other members of the animal kingdom, he would experience the sexual drive only on regular, set occasions, devised by nature for the perpetuation of the species. The fact is, however, that man, and man alone, has been granted the boon of an unrestricted sexual appetite as an intimate expression of love that is unlimited by time or season. How he exercises this privilege is undeniably of some moral and legal concern to the community. However, as long as men and women find it in their hearts to fulfill their love for and joy in each other through sexual intercourse, there is no law of nature or of God, no ethical imperative or moral compulsion, that requires that such love and joy must perforce lead to conception and birth.

Until a child is actually born into the world, it is literally part of its mother's body, and belongs only to her and her mate. It does not belong to society at all, nor has it been accepted into any faith. Its existence is entirely and exclusively the business and concern of its parents, whether they are married or not. It is men and women who alone must decide whether or not they wish their union to lead to the birth of a child, not the synagogue or church, and certainly not the state.

Judaism declared a long time ago that the essence of religion is not theological, which is speculative at best, or metaphysical, which is a realm both elusive and frustrating, but rather unswerving devotion to ethical standards and moral principles. It is theology and metaphysics that are divisive and even, all too frequently, destructive and repressive. All religions are grounded on ethics, and it is this common foundation and aspiration that transcends the differences, harmonizes, and unites.

Religion, in this highest and most universal sense, calls upon each of us to disavow the old taboos that suggest that family planning and abortion are sinful. Let us assert proudly and honestly that, as creative partners of God, we reserve the right to build our families purposefully and joyfully, not accidentally and reluctantly. Let us declare unequivocally that the sexual relations of human beings and their reproductive consequences are not the business of the state, but rather free decisions that free people have every right to make for themselves in a free society.

A LIBERAL CATHOLIC'S VIEW

(By Joseph F. Donceel, S.J., Ph. D.)

I fully agree with the basic Catholic principle that we are never allowed to kill an innocent human being. Therefore, if there is a real human being from the moment of conception, abortion would have to be considered immoral at any stage of pregnancy. The majority Catholic opinion holds nowadays that there is indeed a real human being from the first moment of conception, or, at least, that we cannot be certain that such is not the case. But there is also a minority Catholic opinion, which has good standing in the church, which was the opinion of her greatest theologian, Thomas Aquinas,[1] and which is now slowly regaining favor among Catholic thinkers. This minority opinion holds that there is certainly no human being during the early stages of pregnancy. I would like to show you briefly why Thomas held this position, how it was given up by his successors on account of erroneous scientific theories, and how, even after these theories had been given up, the Catholic church did not return to her traditional view because of a philosophy which was at variance with her official doctrine of the nature of man.

Traditional Catholic philosophy holds that what makes an organism a human being is the spiritual soul and that this soul starts to exist at the moment of its "infusion" into the body. When is the human soul infused into the body? Nowadays the majority of Catholic thinkers would not hesitate to answer: at the moment of conception. This is known as the *theory of immediate animation.* However, during long centuries Catholic philosophy and theology held that the human soul was infused into the body only when the latter began to show a human shape or outline and possessed the basic human organs. Before this time, the embryo is alive, but in the way in which a plant or an animal is alive. It possesses, as the traditional terminology puts it, a vegetative or an animal soul, not yet a human soul. In more modern terms we might say that it has reached the physiological or the psychological, not yet the spiritual level of existence. It is not yet a human person; it is evolving, within the womb, toward hominization. This is the *theory of mediate or delayed animation.*

Why did Thomas and the great medieval thinkers favor this theory? Because they held the doctrine of hylomorphism, according to which the human soul is the substantial form of man, while the human body is the result of the union of this soul with materiality, with undetermined cosmic stuff, with what was then known as prime matter. Hylomorphism holds that the human soul is to the body somewhat as the shape of a statue is to the actual statue. The shape of a statue cannot exist before the statue exists. It is not something which the sculptor first makes and subsequently introduces into a block of statue. It can exist only in the completed statue. Hylomorphism holds that, in the same way, the human soul can exist only in a real human body.

Although Thomas knew nothing about chromosomes, genes, DNA, or the code of life, he knew that whatever was growing in the mother's womb was not yet, early in pregnancy, a real human body. Therefore he held that it could not be animated by a human soul, any more than a square block of marble can possess a human shape. The medieval thinkers knew very well that this growing organism would develop into a human body. that virtually, potentially, it was a human body. But they did not admit that an actual human soul could exist in a virtual human body. The Catholic church, which had officially adopted the hylomorphic conception of human nature at the Council of Vienne, in 1312, was so strongly convinced of this position that, for centuries, her law forbade the faithful to baptize any premature birth which did not show at least some human shape or outline.

Under the influence of erroneous scientific reports, however, Catholic thinkers gave up this traditional doctrine. In the early seventeenth century, as a result of a combination of poor microscopes and lively imaginations, some physicians saw in embryos which were only a few days old a tiny human being, a homunculus, with microscopic head, legs, and arms.[2] This view of the fetus implied the *preformation theory,* which held that organic development simply consists of the gradual increase in size of organs and structures which are fully present from the very start. If there really were from the beginning a human body, be it ever so small, there might also from the start exist a human soul. Even a microscopic statue must have a shape. Granted the preformation theory, immediate animation was compatible with the hylomorphic conception of man.

The theory of preformation was eventually replaced by the *theory of epigenesis,* which maintains that the organism, far from being microscopically preformed from the start, develops its organs through a complex process of growth, cleavage, differentiation, and organization.

Why did the Christian thinkers not return to the delayed animation theory, which seems to be demanded by their hylomorphic theory of man? The main reason seems to have been the influence of Cartesian dualism. For Descartes, both man's soul and his body are each a complete substance. The soul is a thinking substance, the body an extended substance. This is no longer hylomorphism. To express it in nontechnical language, this is no longer a "shape in the statue" conception, but rather a "ghost in the machine" conception of the human soul. A full-fledged ghost can manage very well with a microscopic machine. If the soul is no longer the formal cause, the constitutive idea of the body, it might well become its efficient cause, that which produces the ovum's development from the start. Instead of being the idea incarnated in the body, it has turned into the architect and the builder of the body. Just as the architect exists before the first stone of the building is laid, so there can be a real human soul from the first moment of conception, before the emergence of a real human body.[3]

This way of explaining embryogeny is not absurd. The Cartesian outlook, although quite unfashionable nowadays, has been held by many great thinkers. This kind of philosophy calls for immediate animation, which is clearly in conflict with the hylomorphic doctrine of man, solemnly endorsed by the Catholic church at the Council of Vienne.

There have been other influences which explain the shift in Catholic opinion. One of them may have been the long-standing opposition of the church to the idea of evolution. Thomas admitted some kind of evolution of the embryo and the fetus in the mother's womb. How could the church admit this evolution in the womb and reject it in the race? Since the Catholic church has finally come around to admitting the evolution of the human body, it might also be willing to return to Thomas's idea of evolution in the womb.[4]

Moreover, once we give up the idea of immediate animation, we can no longer say when the human soul is infused, when the embryo or the fetus becomes a human person. That is why those who want to play it absolutely safe claim that the human soul is present from the moment of conception. They seem to take it for granted that, since we do not known when the human soul is present, we neither can know for sure when it is not yet present. This assumption is false. Let us consider another case, where we do not know when a certain factor is present, while knowing very well when it is not yet present. Nobody can tell with certitude when a child is capable of performing his first free moral choice, but all of us are quite certain that, during the first months or years of his life, a human baby is not yet a free moral agent. Likewise, I do not know when the human soul is infused, when the embryo becomes human. But I feel certain that there is no human soul hence no human person, during the first few weeks of pregnancy, as long as the embryo remains in the vegetative stage of its development.

Some people make much of the following objection to my position. They say that from the very first the fertilized ovum possesses forty-six human chromosomes, all the human genes, its code of life—that it is a human embryo. This is undeniable. But it does not make it a human person. When a heart is transplanted, it is kept alive, for a short while, outside of the donor. It is a living being, a human heart, with the human chromosomes and genes. But it is not a human being; it is not a person.

The objection may be pressed. Not only does the fertilized human ovum possess the human chromosomes; unlike the heart, it will, if circumstances are normal, develop into a human being. It is virtually a human being. I admit this, but it does not affect my position. The fertilized human ovum, the early embryo, is virtually a human body, not actually. Correctly understood, the hylomorphic conception of human nature, the official Catholic doctrine, cannot admit the presence of an actual human soul in a virtual human body. Let me use a comparison again. A deflated rubber ball is virtually round; when inflated, it can assume no other shape than the spherical shape. Yet it does not actually possess any roundness or sphericity. In the same way, the early embryo does not actually possess a human soul; it is not a human person.

Experimental embryology tells us that every single cell of the early embryo, of the morula, is virtually a human body. It does not follow that each of these cells possesses a human soul. When embryologists carefully separate the cells of a morula in lower organisms, each one of these cells may develop into a complete organism. Starting with the pioneering attempts of Hans Driesch, such an experiment has been performed on many animal species. We do not see why it might not eventually succeed with the human embryo. As a matter of fact, nature frequently performs it on human ova. Identical twins derive from one ovum fertilized by one spermatozoon. This ovum splits into two at an early stage of pregnancy and gives rise to two human beings. In this case the defenders of immediate animation must admit that one person may be divided into two persons. This is a metaphysical impossibility.

Throughout my exposition I have taken for granted the hylomorphic conception of human nature. This is in line with the purpose of my essay, which is not only to present a liberal Catholic's view of fetal animation, but also to show that this view seems to be the only one which agrees with the official Catholic conception of human nature. In other words. I submit that Catholics, should give up the immediate animation theory, because it implies a Cartesian, dualistic conception of man, which conflicts with the doctrine endorsed by the Council of Vienne.

In conclusion I would like to say a few words about the standing of hylomorphism among contemporary philosophers. Very few non-Catholic philosophers hold the doctrine

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Footnotes at end of article.

of hylomorphism today. Even among Catholics it has fallen into disrepute, although personally I cannot see how one may avoid dualism without this theory or some theory which resembles it. Hylomorphism is radically opposed to dualism, to the doctrine which considers both the soul and the body as complete substances. Contemporary philosophy, as a rule, is also strongly opposed to this kind of dualism. In this sense, negatively, the doctrine I have defended continues to live; it is stronger than ever, although it may be known by other names.

Both linguistic analysis, the leading philosophy in the English-speaking countries, and existential phenomenology, which tends to dominate the field elsewhere, reject any form of Cartesian dualism.[5] Gilbert Ryle, a leading British analyst, has strongly attacked what he calls "the dogma of the ghost in the machine." And Maurice Merleau-Ponty, possibly France's greatest phenomenologist, defended a doctrine which looks very much like an updated form of hylomorphism. For him there are three kinds of behavior: the syncretic, the amovable, and the symbolic. We might perhaps put it more simply and speak of three levels in man: the level of reflex activity and of instincts, the level of learning, and the level of symbolic thinking. Or again, the physiological, the psychic, and spiritual level. Each lower level stands to the next higher one in the same relation as data stand to their meaning, as materiality stands to the idea embodied in it. The data are not data if they do not possess some meaning, and there can be no meaning which is not embedded in some data. Each higher level presupposes the lower one; there can be no mind before the organism is ready to carry one and no spirit before the mind is capable of receiving it. I submit that this clearly implies delayed animation.

In my opinion there is a great amount of agreement between the contemporary antidualistic trend of philosophy and the hylomorphic conception of man. It is wise therefore to return to this conception or, at least, to accept the conclusions which follow from it. One of these conclusions is that the embryo is certainly not a human person during the early stages of pregnancy, and that, consequently it is not immoral to terminate pregnancy during this time, provided there are serious reasons for such an intervention.

Let me insist on this restriction: the opinion which I have defended may lead to abuses, to abortions performed under flimsy pretexts. I would be among the first to deplore and condemn such abuses. Although a prehuman embryo cannot demand from us the absolute respect which we owe to the human person, it deserves a very great consideration, because it is a living being, endowed with a human finality, on its way to hominization. Therefore it seems to me that only very serious reasons should allow us to terminate its existence. Excesses will unavoidably occur, but they should not induce us to overlook the instances where sufficiently serious reasons exist for performing an abortion during the early stages of pregnancy.

FOOTNOTES

[1] See *Summa contra Gentiles*, II, 88–89; *De Potentia*, Q. 3, Art. 9–12; *Summa Theologica*, I,Q. 118, Art. 1–3.

[2] See H. de Dorlodot, "A Vindication of the Mediate Animation Theory," in E. C. Messenger (ed.), *Theology and Evolution*, pp. 273–83, London, 1949.

[3] The anonymous author of an article in Latin, "De Animatione Foetus" (*Nouvelle Revue Théologique*, 11:163–86,268–89 [1879]), quotes a certain Michael Alberti Germaniae Medicus, who wrote in 1725 "quod a primis conceptionis initiis anima rationalis in foetu adsit, eo quod sine anima illa conceptio fieri nequeat, quae tanquam artifex et architecta sui corporis praesto est; a qua deinde actus formationis dependet" (that the rational soul is present in the fetus from the first beginnings of conception, because the conception cannot take place without this soul, which is there *like the maker and the architect of its body;* hence the act of formation depends on it) (my italics). This sounds like pure Cartesianism.

[4] "For the evolutionistic way of thinking it is more probable that hominization occurs not at the moment of conception, but at a later time of embryonic development," writes J. Feiner in the most recent comprehensive treatise of dogmatic theology, *Mysterium Fidei*, edited by J. Feiner and M. Löhrer, vol. II, p. 581, Einsiedeln, 1967.

[5] Among the few exceptions we must mention J.-P. Sartre, whose dualism constitutes one of the weakest and most controversial aspects of his philosophy.

[Supreme Court of the United States]

APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT

Griswold et al. v. Connecticut.

No. 496. Argued March 29–30, 1965.—Decided June 7, 1965.

Thomas I. Emerson argued the cause for appellants. With him on the briefs was *Catherine G. Roraback.*

Joseph B. Clark argued the cause for appellee. With him on the brief was *Julius Maretz.*

Briefs of *amici curiae*, urging reversal, were filed by *Whitney North Seymour* and *Eleanor M. Fox* for Dr. John M. Adams et al.; by *Morris L. Ernst, Harriet F. Pilpel* and *Nancy F. Wechsler* for the Planned Parenthood Federation of America, Inc.; by *Alfred L. Scanlon* for the Catholic Council on Civil Liberties, and by *Rhoda H. Karpatkin, Melvin L. Wulf* and *Jerome E. Caplan* for the American Civil Liberties Union et al.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellant Griswold is Executive Director of the Planned Parenthood eLague of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven—a center open and operating from November 1 to November 10, 1961, when appellants were arrested.

They gave information, instruction, and medical advice to *married persons* as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced free.

The statutes whose constitutionality is involved in this appeal are §§ 53–32 and 54–196 of the General Statutes of Connecticut (1958 rev.). The former provides:

"Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

Section 54–196 provides:

"Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

The appellants were found guilty as accessories and fined $100 each, against the claim that the accessory statute as so applied violated the Fourteenth Amendment. The Appellate Division of the Circuit Court affirmed. The Supreme Court of Errors affirmed that judgment. 151 Conn. 544, 200 A. 2d 479. We noted probable jurisdiction. 379 U.S. 926.

We think that appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship. *Tileston* v. *Ullman*, 318 U.S. 44, is different, for there the plaintiff seeking to represent others asked for a declaratory judgment. In that situation we thought that the requirements of standing should be strict, lest the standards of "case or controversy" in Article III of the Constitution become blurred. Here those doubts are removed by reason of a criminal conviction for serving married couples in violation of an aiding-and-abetting statute. Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be, a crime.

This case is more akin to *Truax* v. *Raich*, 239 U.S. 33, where an employee was permitted to assert the rights of his employer; to *Pierce* v. *Society of Sisters*, 268 U.S. 510, where the owners of private schools were entitled to assert the rights of potential pupils and their parents; and to *Barrows* v. *Jackson*, 346 U.S. 249, where a white defendant, party to a racially restrictive covenant, who was being sued for damages by the covenantors because she had conveyed her property to Negroes, was allowed to raise the issue that enforcement of the covenant violated the rights of prospective Negro purchasers to equal protection, although no Negro was a party to the suit. And see *Meyer* v. *Nebraska*, 262 U.S. 390; *Adler* v. *Board of Education*, 342 U.S. 485; *NAACP* v. *Alabama*, 357 U.S. 449; *NAACP* v. *Button*, 371 U.S. 415. The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them.

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner* v. *New York*, 198 U.S. 45, should be our guide. But we decline that invitation as we did in *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 370; *Olsen* v. *Nebraska*, 313 U.S. 236; *Lincoln Union* v. *Northwestern Co.*, 335 U.S. 525; *Williamson* v. *Lee Optical Co.*, 348, U.S. 483; *Giboney* v. *Empire Storage Co.*, 336 U.S. 490. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parent's choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

By *Pierce* v. *Society of Sisters, supra*, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer* v. *Nebraska, supra*, the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read (*Martin* v. *Struthers*, 319 U. S. 141, 143) and freedom of inquiry, freedom of thought, and freedom to teach (see *Wieman* v. *Updegraff*, 344 U. S. 183, 195)—indeed the freedom of the entire university community. *Sweezy* v. *New Hampshire*, 354 U. S. 234, 249–250, 261–263; *Barenblatt* v. *United States*, 360

U. S. 109, 112; *Baggett* v. *Bullitt*, 377 U. S. 360, 369. Without those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

In *NAACP* v. *Alabama*, 357 U. S. 449, 462, we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid "as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." *Ibid.* In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members. *NAACP* v. *Button*, 371 U.S. 415, 430–431. In *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, we held it not permissible to bar a lawyer from practice, because he had once been a member of the Communist Party. The man's "association with that Party" was not shown to be "anything more than a political faith in a political party" (*id.*, at 244) and was not action of a kind proving bad moral character. *Id.*, at 245–246.

Those cases involved more than the "right of assembly"—a right that extends to all irrespective of their race or ideology. *De Jonge* v. *Oregon*, 299 U.S. 353. The right of "association," like the right of belief (*Board of Education* v. *Barnette*, 319 U. S. 624), is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See *Poe* v. *Ullman*, 367 U. S. 497, 516–522 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourth and Fifth Amendments were described in *Boyd* v. *United States*, 116 U.S. 616, 630, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life."* We recently referred in *Mapp* v. *Ohio*, 367 U.S. 643, 656, to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people." See Beaney, The Constitutional Right to Privacy, 1962 Sup. Ct. Rev. 212; Griswold, The Right to be Let Alone, 55 Nw. U. L. Rev. 216 (1960).

We have had many controversies over these penumbral rights of "privacy and repose." See, *e.g.*, *Breard* v. *Alexandria*, 341 U.S. 622, 626, 644; *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451; *Monroe* v. *Pape*, 365 U.S. 167; *Lanza* v. *New York*, 370 U.S. 139; *Frank* v. *Maryland*, 359 U.S. 360; *Skinner* v. *Oklahoma*, 316 U.S. 535, 541. These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama*, 377 U.S. 288, 307. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

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

Reversed.

MR. JUSTICE GOLDBERG, whom THE CHIEF JUSTICE and MR. JUSTICE BRENNAN join, concurring.

I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment. Although I have not accepted the view that "due process" as used in the Fourteenth Amendment incorporates all of the first eight Amendments (see my concurring opinion in *Pointer* v. *Texas*, 380 U. S. 400, 410, and the dissenting opinion of MR. JUSTICE BRENNAN in *Cohen* v. *Hurley*, 366 U. S. 117, 154), I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution[1] is supported both by numerous decisions of this Court, referred to in the Court's opinion, and by the language and history of the Ninth Amendment. In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment, *ante*, at 484. I add these words to emphasize the relevance of that Amendment to the Court's holding.

The Court stated many years ago that the Due Process Clause protects those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105. In *Gitlow* v. *New York*, 268 U. S. 652, 666, the Court said:

"For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the *fundamental* personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." (Emphasis added.)

And, in *Meyer* v. *Nebraska*, 262 U.S. 390, 399, the Court, referring to the Fourteenth Amendment, stated:

"While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also [for example,] the right . . . to marry, establish a home and bring up children. . . ."

This Court, in a series of decisions, has held that the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights.[2] The language

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* The Court said in full about this right of privacy:

"The principles laid down in this opinion [by Lord Camden in *Entick* v. *Carrington*, 19 How. St. Tr. 1029] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of the sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other." 116 U.S., at 630.

[1] My Brother STEWART dissents on the ground that he "can find no . . . general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court." *Post*, at 530. He would require a more explicit guarantee than the one which the Court derives from several constitutional amendments. This Court, however, has never held that the Bill of Rights or the Fourteenth Amendment protects only those rights that the Constitution specifically mentions by name. See, *e.g.*, *Bolling* v. *Sharpe*, 347 U.S. 497; *Aptheker* v. *Secretary of State*, 378 U.S. 500; *Kent* v. *Dulles*, 357 U.S. 116; *Carrington* v. *Rash*, 380 U.S. 89, 96; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232; *NAACP* v. *Alabama*, 360 U.S. 240; *Pierce* v. *Society of Sisters*, 268 U.S. 510; *Meyer* v. *Nebraska*, 262 U.S. 390. To the contrary, this Court, for example in *Bolling* v. *Sharpe*, *supra*, while recognizing that the Fifth Amendment does not contain the "explicit safeguard" of an equal protection clause, *id.*, at 499, nevertheless derived an equal protection principle from that Amendment's Due Process Clause. And in *Schware* v. *Board of Bar Examiners*, *supra*, the Court held that the Fourteenth Amendment protects from arbitrary state action the right to pursue an occupation, such as the practice of law.

[2] See, *e.g.*, *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226; *Gitlow* v. *New York*, *supra*; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Wolf* v. *Colorado*, 338 U.S. 25; *Robinson* v. *California*, 370 U.S. 660; *Gideon* v. *Wainwright*, 372 U.S. 335; *Malloy* v. *Hogan*, 378 U.S. 1; *Pointer* v. *Texas*, *supra*; *Griffin* v. *California*, 380 U.S. 609.

and history of the Ninth Amendment reveal that the Farmers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.

The Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights [3] could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.[4]

In presenting the proposed Amendment, Madison said:

"It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution [the Ninth Amendment]." I Annals of Congress 439 (Gales and Seaton ed. 1834).

Mr. Justice Story wrote of this argument against a bill of rights and the meaning of the Ninth Amendment:

"In regard to . . . [a] suggestion, that the affirmance of certain rights might disparage others, or might lead to argumentative implications in favor of other powers, it might be sufficient to say that such a course of reasoning could never be sustained upon any solid basis. . . . But a conclusive answer is, that such an attempt may be interdicted (as it has been) by a positive declaration in such a bill of rights that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people." II Story, Commentaries on the Constitution of the United States 626–627 (5th ed. 1891).

He further stated, referring to the Ninth Amendment:

"This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others." *Id.*, at 651.

These statements of Madison and Story make clear that the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.[5]

While this Court has had little occasion to interpret the Ninth Amendment,[6] "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury* v. *Madison*, 1 Cranch 137, 174. In interpreting the Constitution, "real effect should be given to all the words it uses." *Myers* v. *United States*, 272 U.S. 52, 151. The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right to basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that "[t]he enumeration in the Constitution, of certain rights, shall not be *construed* to deny or disparage others retained by the people." (Emphasis added.)

A dissenting opinion suggests that my interpretation of the Ninth Amendment somehow "broaden[s] the powers of this Court." *Post*, at 520. With all due respect, I believe that it misses the import of what I am saying. I do not take the position of my Brother BLACK in his dissent in *Adamson* v. *California*, 332 U.S. 46, 68, that the entire Bill of Rights is incorporated in the Fourteenth Amendment, and I do not mean to imply that the Ninth Amendment is applied against the States by the Fourteenth. Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive. As any student of this Court's opinions knows, this Court has held, often unanimously, that the Fifth and Fourteenth Amendments protect certain fundamental personal liberties from abridgement by the Federal Government or the States. See, *e.g.*, *Bolling* v. *Sharpe*, 347 U.S. 497; *Aptheker* v. *Secretary of State*, 378 U.S. 500; *Kent* v. *Dulles*, 357 U.S. 116; *Cantwell* v. *Connecticut*, 310 U.S. 296; *NAACP* v. *Alabama*, 357 U.S. 449; *Gideon* v. *Wainwright*, 372 U.S. 335; *New York Times Co.* v. *Sullivan*, 376 U.S. U.S. 254. The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments. I do not see how this broadens the authority of the Court; rather it serves to support what this Court has been doing in protecting fundamental rights.

Nor am I turning somersaults with history in arguing that the Ninth Amendment is relevant in a case dealing with a *State's* infringement of a fundamental right. While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon *federal* power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments. Cf. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 94–95.

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U.S. 97, 105. The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . ." *Powell* v. *Alabama*, 287 U.S. 45, 67. "Liberty" also gains content from the emanations of . . . specific [constitutional] guarantees" and "from experience with the requirements of a free society." *Poe* v. *Ullman*, 367 U.S. 497, 517

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[3] Madison himself had previously pointed out the dangers of inaccuracy resulting from the fact that "no language is so copious as to supply words and phrases for every complex idea." The Federalist, No. 37 (Cooke ed. 1961), at 236.

[4] Alexander Hamilton was opposed to a bill of rights on the ground that it was unnecessary because the Federal Government was a government of delegated powers and it was not granted the power to intrude upon fundamental personal rights. The Federalist, No. 84 (Cooke ed. 1961), at 578–579. He also argued.

"I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power." *Id.*, at 579.

The Ninth Amendment and the Tenth Amendment, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," were apparently also designed in part to meet the above-quoted argument of Hamilton

[5] The Tenth Amendment similarly made clear that the States and the people retained all those powers not expressly delegated to the Federal Government.

[6] This Amendment has been referred to as "The Forgotten Ninth Amendment," in a book with that title by Bennett B. Patterson (1955). Other commentary on the Ninth Amendment includes Redlich, Are There "Certain Rights . . . Retained by the People"? 37 N. Y. U. L. Rev. 787 (1962), and Kelsey, The Ninth Amendment of the Federal Constitution, 11 Ind. L. J. 309 (1936). As far as I am aware, until today this Court has referred to the Ninth Amendment only in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 94–95; *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118, 143–144; and *Ashwander* v. *TVA*, 297 U. S. 288, 330–331. See also *Calder* v. *Bull*, 3 Dall. 386, 388; *Loan Assn.* v. *Topeka*, 20 Wall. 655, 662–663.

In *United Public Workers* v. *Mitchell*, *supra*, at 94–95, the Court stated: "We accept appellants' contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments [is] involved. The right claimed as inviolate may be stated, as the right of a citizen to act as a party official or worker to further his own political views. Thus we have a measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments. And, if we look upon due process as a guarantee of freedom in those fields, there is a corresponding impairment of that right under the Fifth Amendment."

(dissenting opinion of MR. JUSTICE DOUGLAS).[7]

I agree fully with the Court that, applying these tests, the right of privacy is a fundamental personal right, emanating "from the totality of the constitutional scheme under which we live." *Id.*, at 521. Mr. Justice Brandeis, dissenting in *Olmstead* v. *United States*, 277 U.S. 438, 478, comprehensively summarized the principles underlying the Constitution's guarantees of privacy:

"The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

The Connecticut statutes here involved deal with a particularly important and sensitive area of privacy—that of the marital relation and the marital home. This Court recognized in *Meyer* v. *Nebraska*, *supra*, that the right "to marry, establish a home and bring up children" was an essential part of the liberty guaranteed by the Fourteenth Amendment. 262 U.S., at 399. In *Pierce* v. *Society of Sisters*, 268 U.S. 510, the Court held unconstitutional an Oregon Act which forbade parents from sending their children to private schools because such an act "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. at 534–535. As this Court said in *Prince* v. *Massachusetts*, 321 U.S. 158, at 166, the *Meyer* and *Pierce* decisions "have respected the private realm of family life which the state cannot enter."

I agree with MR. JUSTICE HARLAN'S statement in his dissenting opinion in *Poe* v. *Ullman*, 367 U.S. 497, 551–552: "Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . . Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations."

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

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution.

My Brother STEWART, while characterizing the Connecticut birth control law as "an uncommonly silly law," *post*, at 527, would nevertheless let it stand on the ground that it is not for the courts to "'substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.'" *Post* at 528. Elsewhere, I have stated that "[w]hile I quite agree with Mr. Justice Brandeis that . . . 'a . . . State may . . . serve as a laboratory; and try novel social and economic experiments,' *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 280, 311 (dissenting opinion). I do not believe that this includes the power to experiment with the fundamental liberties of citizens. . . ."[8] The vice of the dissenters' views is that it would permit such experimentation by the States in the area of the fundamental personal rights of its citizens. I cannot agree that the Constitution grants such power either to the States or to the Federal Government.

The logic of the dissents would sanction federal or state legislation that seems to me even more plainly unconstitutional than the statute before us. Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them. Yet by their reasoning such an invasion of marital privacy would not be subject to constitutional challenge because, while it might be "silly," no provision of the Constitution specifically prevents the Government from curtailing the marital right to bear children and raise a family. While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law required compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.

In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. "Where there is a significant encroachment upon personal liberty, the interest which is compelling," *Bates* v. *Little Rock*, 361 U.S. 516, 524. The law must be shown "necessary, and not merely rationally related, to the accomplishments of a permissible state policy." *McLaughlin* v. *Florida*, 379 U.S. 184, 196. See *Schneider* v. *Irvington*, 308 U.S. 147, 161.

Although the Connecticut birth-control law obviously encroaches upon a fundamental personal liberty, the State does not show that the law serves any "subordinating [state] interest which is compelling" or that it is "necessary . . . to the accomplishment of a permissible state policy." The State, at most, argues that there is some rational relation between this statute and what is admittedly a legitimate subject of state concern—the discouraging of extra-marital relations. It says that preventing the use of birth-control devices by married persons helps prevent the indulgence by some in such extra-marital relations. The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception, see *Tileston* v. *Ullman*, 129 Conn. 84, 26 A. 2d 582. But, in any event, it is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples. See *Aptheker* v. *Secretary of State*, 378 U.S. 500, 514; *NAACP* v. *Alabama*, 377 U.S. 288, 307–308; *McLaughlin* v. *Florida*, *supra*, at 196. Here, as elsewhere, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U.S. 415, 438. The State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication. See Conn. Gen. Stat. §§ 53–218, 53–219 *et seq.* These statutes demonstrate that means for achieving the same basic purpose of protecting marital fidelity are available to Connecticut without the need to "invade the area of protected freedoms." *NAACP* v. *Alabama*, *supra*, at 307. See *McLaughlin* v. *Florida*, *supra*, at 196.

Finally, it should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct. As my Brother HARLAN so well stated in his dissenting opinion in *Poe* v. *Ullman*, *supra*, at 553.

"Adultery, homosexuality and the like are are sexual intimacies which the State forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy."

In sum, I believe that the right of privacy in the marital relation is fundamental and basic—a personal right "retained by the people" within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the Fourteenth Amendment from infringement by the States. I agree with the Court that petitioners' convictions must therefore be reversed.

MR. JUSTICE HARLAN, concurring in the judgment.

I fully agree with the judgment of reversal, but find myself unable to join the Court's opinion. The reason is that it seems to me to evince an approach to this case very much like that taken by my Brothers BLACK and STEWART in dissent, namely: the Due Process Clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate some right assured by the letter or penumbra of the Bill of Rights.

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[7] In light of the tests enunciated in these cases it cannot be said that a judge's responsibility to determine whether a right is basic and fundamental in this sense vests him with unrestricted personal discretion. In fact, a hesitancy to allow too broad a discretion was a substantial reason leading me to conclude in *Pointer* v. *Texas*, *supra*, at 413–414, that those rights absorbed by the Fourteenth Amendment and applied to the States because they are fundamental apply with equal force and to the same extent against both federal and state governments. In *Pointer* I said that the contrary view would require "this Court to make the extremely subjective and excessively discretionary determination as to whether a practice, forbidden the Federal Government by a fundamental constitutional guarantee, is, as viewed in the factual circumstances surrounding each individual case, sufficiently repugnant to the notion of due process as to be forbidden the States." *Id.*, at 413.

[8] *Pointer* v. *Texas*, *supra*, at 413. See also the discussion of my Brother DOUGLAS, *Poe* v. *Ullman*, *supra*, at 517–518 (dissenting opinion).

In other words, what I find implicit in the Court's opinion is that the "incorporation" doctrine may be used to *restrict* the reach of Fourteenth Amendment Due Process. For me this is just as unacceptable constitutional doctrine as is the use of the "incorporation" approach to *impose* upon the States all the requirements of the Bill of Rights as found in the provisions of the first eight amendments and in the decisions of this Court interpreting them. See, *e.g.*, my concurring opinions in *Pointer* v. *Texas*, 380 U.S. 400, 408, and *Griffin* v. *California*, 380 U.S. 609, 615, and my dissenting opinion in *Poe* v. *Ullman*, 367 U.S. 497, 522, at pp. 539–545.

In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U.S. 319, 325. For reasons stated at length in my dissenting opinion in *Poe* v. *Ullman, supra*, I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

A further observation seems in order respecting the justification of my Brothers BLACK and STEWART for their "incorporation" approach to this case. Their approach does not rest on historical reasons, which are of course wholly lacking (see Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949)), but on the thesis that by limiting the content of the Due Process Clause of the Fourteenth Amendment to the protection of rights which can be found elsewhere in the Constitution, in this instance in the Bill of Rights, judges will thus be confined to "interpretation" of specific constitutional provisions, and will thereby be restrained from introducing their own notions of constitutional right and wrong into the "vague contours of the Due Process Clause." *Rochin* v. *California*, 342 U.S. 165, 170.

While I could not more heartily agree that judicial "self restraint" is an indispensable ingredient of sound constitutional adjudication, I do submit that the formula suggested for achieving it is more hollow than real. "Specific' provisions of the Constitution, no less than "due process," lead themselves as readily to "person" interpretations by judges whose constitutional outlook is simply to keep the constitutional in supposed "tune with the times" (*post*, p. 522). Need one go further than to recall last Term's reapportionment cases, *Wesberry* v. *Sanders*, 376 U.S. 1, and *Reynolds* v. *Sims*, 377 U.S. 533, where a majority of the Court "interpreted" "by the People" (Art I, § 2) and "equal protection" (Amdt. 14) to command "one person, one vote," an interpretation that was made in the face of irrefutable and still unanswered history to the contrary? See my dissenting opinions in those cases, 376 U.S., at 20; 377 U.S., at 589.

Judicial self-restraint will not, I suggest, be brought about in the "due process" area by the historically unfounded incorporation formula long advanced by my Brother BLACK, and now in part espoused by my Brother STEWART. It will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms. See *Adamson* v. *California*, 332 U.S. 46, 59 (Mr. Justice Frankfurter, concurring). Adherence to these principles will not, of course, obviate all constitutional differences of opinion among judges, nor should it. Their continued recognition will, however, go farther toward keeping most judges from roaming at large in the constitutional field than will the interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause.*

Mr. JUSTICE WHITE, concurring in the judgment.

In my view this Connecticut law as applied to married couples deprives them of "liberty" without due process of law, as that concept is used in the Fourteenth Amendment. I therefore concur in the judgment of the Court reversing these convictions under Connecticut's aiding and abetting statute.

It would be unduly repetitious, and belaboring the obvious, to expound on the impact of this statute on the liberty guaranteed by the Fourteenth Amendment against arbitrary or capricious denials or on the nature of this liberty. Suffice it to say that this is not the first time this Court has had occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes the right "to marry, establish a home and bring up children," *Meyer* v. *Nebraska*, 262 U.S. 390, 399, and "the liberty . . . to direct the upbringing and education of children," *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534–535, and that these are among "the basic civil rights of man." *Skinner* v. *Oklahoma*, 316 U.S. 535, 541. These decisions affirm that there is a "realm of family life which the state cannot enter" without substantial justification. *Prince* v. *Massachusetts*, 321 U.S. 158, 166. Surley the right invoked in this case, to be free of regulation of the intimacies of the marriage relationship, "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs* v. *Cooper*, 336 U.S. 77, 95 (opinion of Frankfurter, J.).

The Connecticut anti-contraceptive statute deals rather substantially with this relationship. For it forbids all married persons the right to use birth-control devices, regardless of whether their use is dictated by considerations of family planning, *Trubek* v. *Ullman*, 147 Conn. 633, 165 A. 2d 158, health, or indeed even of life itself. *Buxton* v. *Ullman*, 147 Conn. 48, 156 A. 2d 508. The anti-use statute, together with the general aiding and abetting statute, prohibits doctors from affording advice to married persons on proper and effective methods of birth control. *Tileston* v. *Ullman*, 129 Conn. 84, 26 A 2d 582. And the clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control. *State* v. *Nelson*, 126 Conn. 412, 11 A. 2d 856; *State* v. *Griswold*, 151 Conn. 544, 200 A. 2d 479. In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Skinner* v. *Oklahoma*, 316 U.S. 535; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232; *McLaughlin* v. *Florida*, 379 U. S. 184, 192.

An examination of the justification offered, however, cannot be avoided by saying that the Connecticut anti-use statute invades a protected area of privacy and association or that it demeans the marriage relationship. The nature of the right invaded is pertinent, to be sure, for statutes regulating sensitive areas of liberty do, under the cases of this Court, require "strict scrutiny," *Skinner* v. *Oklahoma*, 316 U.S. 535, 541, and "must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 488. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates* v. *Little Rock*, 361 U.S. 516, 524. See also *McLaughlin* v. *Florida*, 379 U.S. 184. But such statutes, if reasonably necessary for the effectuation of a legitimate and substantial state-interest, and not arbitrary or capricious in application, are not invalid under the Due Process Clause. *Zemel* v. *Rusk*, 381 U. S. 1.*

As I read the opinions of the Connecticut courts and the argument of Connecticut in this Court, the State claims but one justification for its anti-use statute. Cf. *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 530; *Martin* v. *Walton*, 368 U.S. 25, 28 [DOUGLAS, J., dissenting]. There is no serious contention that Connecticut thinks the use of artificial or external methods of contraception immoral or unwise in itself, or that the anti-use statute is founded upon any policy of promoting population expansion. Rather, the statute is said to serve the State's policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital, concededly a permissible and legitimate legislative goal.

Without taking issue with the premise that the fear of conception operates as a deterrent to such relationships in addition to the criminal proscriptions Connecticut has against such conduct, I wholly fail to see how the ban on the use of contraceptives by married

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*Indeed, my Brother BLACK, in arguing his thesis, is forced to lay aside a host of cases in which the Court has recognized fundamental rights in the Fourteenth Amendment without specific reliance upon the Bill of Rights. *Post*, p. 512, n. 4.

*Dissenting opinions assert that the liberty guaranteed by the Due Process Clause is limited to a guarantee against unduly vague statutes and against procedural unfairness at trial. Under this view the Court is without authority to ascertain whether a challenged statute, or its application, has a permissible purpose and whether the manner of regulation bears a rational or justifying relationship to this purpose. A long line of cases makes very clear that this has not been the view of this Court. *Dent* v. *West Virginia*, 129 U.S. 114; *Jacobson* v. *Massachusetts*, 197 U.S. 11; *Douglas* v. *Noble*, 261 U.S. 165; *Meyer* v. *Nebraska*, 262 U.S. 390; *Pierce* v. *Society of Sisters*, 268 U.S. 510; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232; *Aptheker* v. *Secretary of State*, 378 U.S. 500; *Zemel* v. *Rusk*, 381 U.S. 1.

The traditional due process test was well articulated, and applied, in *Schware* v. *Board of Bar Examiners, supra*, a case which placed no reliance on the specific guarantees of the Bill of Rights.

"A State cannot exclude a person from the the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. *Dent* v. *West Virginia*, 129 U.S. 114. Cf. *Slochower* v. *Board of Education*, 350 U.S. 551; *Wieman* v. *Updegraff*, 344 U.S. 183. And see *Ex parte Secombe*, 19 How. 9, 13. A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. *Douglas* v. *Noble*, 261 U.S. 165; *Cummings* v. *Missouri*, 4 Wall. 277, 319–320. Cf. *Nebbia* v. *New York*, 291 U.S. 502. Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory." 353 U.S., at 238–239. Cf. *Martin* v. *Walton*, 368 U.S. 25, 26 (DOUGLAS, J., dissenting).

couples in any way reinforces the State's ban on illicit sexual relationships. See *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 239. Connecticut does not bar the importation or possession of contraceptive devices; they are not considered contraband material under state law, *State* v. *Certain Contraceptive Materials*, 126 Conn. 428, 11 A. 2d 863, and their availability in that State is not seriously disputed. The only way Connecticut seeks to limit or control the availability of such devices is through its general aiding and abetting statute whose operation in this context has been quite obviously ineffective and whose most serious use has been against birth-control clinics rendering advice to married, rather than unmarried, persons. Cf. *Yick Wo* v. *Hopkins*, 118 U.S. 356. Indeed, after over 80 years of the State's proscription of use, the legality of the sale of such devices to prevent disease has never been expressly passed upon, although it appears that sales have long occurred and have only infrequently been challenged. This "undeviating policy . . . throughout all the long years . . . bespeaks more than prosecutorial paralysis." *Poe* v. *Ullman*, 367 U. S. 497, 502. Moreover, it would appear that the sale of contraceptives to prevent disease is plainly legal under Connecticut Law.

In these circumstances one is rather hard pressed to explain how the ban on use by married persons in any way prevents use of such devices by persons engaging in illicit sexual relations and thereby contributes to the State's policy against such relationships. Neither the state courts nor the State before the bar of this Court has tendered such an explanation. It is purely fanciful to believe that the broad proscription on use facilitates discovery of use by persons engaging in a prohibited relationship or for some other reason makes such use more unlikely and thus can be supported by any sort of administrative consideration. Perhaps the theory is that the flat ban on use prevents married people from possessing contraceptives and without the ready availability of such devices for use in the marital relationship, there will be no or less temptation to use them in extramarital ones. This reasoning rests on the premise that married people will comply with the ban in regard to their marital relationship, notwithstanding total nonenforcement in this context and apparent nonenforcibility, but will not comply with criminal statutes prohibiting extramarital affairs and the anti-use statute in respect to illicit sexual relationships, a premise whose validity has not been demonstrated and whose intrinsic validity is not very evident. At most the broad ban is of marginal utility to the declared objective. A statute limiting its prohibition on use to persons engaging in the prohibited relationship would serve the end posited by Connecticut in the same way, and with the same effectiveness, or ineffectiveness, as the broad anti-use statute under attack in this case. I find nothing in this record justifying the sweeping scope of this statute, with its telling effect on the freedoms of married persons, and therefore conclude that it deprives such persons of liberty without due process of law.

Mr. Justice Black, with whom Mr. Justice Stewart joins, dissenting.

I agree with my Brother Stewart's dissenting opinion. And like him I do not to any extent whatever base my view that this Connecticut law is constitutional on a belief that the law is wise or that its policy is a good one. In order that there may be no room at all to doubt why I vote as I do, I feel constrained to add that the law is every bit as offensive to me as it is to my Brethren of the majority and my Brothers Harlan, White and Goldberg who, reciting reasons why it is offensive to them, hold it unconstitutional. There is no single one of the graphic and eloquent strictures and criticisms fired at the policy of this Connecticut law either by the Court's opinion or by those of my concurring Brethren to which I cannot subscribe—except their conclusion that the evil qualities they see in the law make it unconstitutional.

Had the doctor defendant here, or even the nondoctor defendant, been convicted for doing nothing more than expressing opinions to persons coming to the clinic that certain contraceptive devices, medicines or practices would do them good and would be desirable, or for telling people how devices could be used, I can think of no reason at this time why their expressions of views would not be protected by the First and Fourteenth Amendments, which guarantee freedom of speech. Cf. *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U.S. 1; *NAACP* v. *Button*, 371 U.S. 415. But speech is one thing; conduct and physical activities are quite another. See, *e.g.*, *Cox* v. *Louisiana*, 379 U.S. 536, 554–555; *Cox* v. *Louisiana*, 379 U.S. 559, 563–564; *id.*, 575–584 (concurring opinion); *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490; cf. *Reynolds* v. *United States* 98 U.S. 145, 163–164. The two defendants here were active participants in an organization which gave physical examinations to women, advised them what kind of contraceptive devices or medicines would most likely be satisfactory for them, and then supplied the devices themselves, all for a graduated scale of fees, based on the family income. Thus these defendants admittedly engaged with others in a planned course of conduct to help people violate the Connecticut law. Merely because some speech was used in carrying on that conduct—just as in ordinary life some speech accompanies most kinds of conduct—we are not in my view justified in holding that the First Amendment forbids the State to punish their conduct. Strongly as I desire to protect all First Amendment freedoms, I am unable to stretch the Amendment so as to afford protection to the conduct of these defendants in violating the Connecticut law. What would be the constitutional fate of the law if hereafter applied to punish nothing but speech is, as I have said, quite another matter.

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth Amendment's guarantee against "unreasonable searches and seizures." But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy." To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provision should be given. The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. He simply wants his property left alone. And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures." "Privacy" is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. I have expressed the view many times that First Amendment freedoms, for example, have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used. See *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 293 (concurring opinion); cases collected in *City of El Paso* v. *Simmons*, 379 U.S. 497, 517, n. 1 (dissenting opinion); Black, The Bill of Rights, 35 N.Y.U.L. Rev. 865. For these reasons I get nowhere in this case by talk about a constitutional "right of privacy" as an emanation from one or more constitutional provisions.[1] I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. For these reasons I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law unconstitutional.

This brings me to the arguments made by my Brothers Harlan, White and Goldberg for invalidating the Connecticut law. Brothers Harlan[2] and White would invalidate it by reliance on the Due Process Clause of the Fourteenth Amendment, but Brother Goldberg, while agreeing with Brother Harlan, relies also on the Ninth Amendment. I have no doubt that the Connecticut law could be applied in such a way as to abridge freedom of speech and press therefore violate the First and Fourteenth Amendments. My disagreement with the Court's opinion holding that there is such a violation here is a narrow one, relating to the application of the First Amendment to the facts and circumstances of this particular case. But my disagreement with Brothers Harlan, White and Goldberg is more basic. I think that if properly construed neither the Due Process Clause nor the Ninth Amendment, nor both together, could under any circumstances be a proper basis for invalidating the Connecticut law. I discuss the due process and Ninth Amendment arguments together because on analysis they turn out to be the same thing—merely using different words to claim for the Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive.

The due process argument which my Brothers Harlan and White adopt here is based, as their opinions indicate, on the premise that this Court is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or on this Court's belief that a particular state law under scrunity has no "rational or justifying" purpose, or is offensive to a "sense of fairness and justice."[3] If these formulas based on "natural justice," or others which meant he same thing,[4] are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body. Surely it has to be admitted that no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous. I readily admit that no legislative body, state or national, should pass laws that can justly be given any of the invidious labels invoked as constitutional excuses to strike down state laws. But perhaps it is not too much to say that no legislative body ever does pass laws without believing that they will accomplish a sane, rational, wise and justifiable purpose. While I completely subscribe to the holding

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Footnotes at end of article.

of *Marbury* v. *Madison*, 1 Cranch 137, and subsequent cases, that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of "civilized standards of conduct." [5] Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them. The use by federal courts of such a formula or doctrine or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom and transfers that power to this Court for ultimate determination—a power which was specifically denied to federal courts by the convention that framed the Constitution.[6]

Of the cases on which my Brothers White and Goldberg rely so heavily, undoubtedly the reasoning of two of them supports their result here—as would that of a number of others which they do not bother to name, *e. g., Lochner* v. *New York*, 198 U. S. 45, *Coppage* v. *Kansas*, 236 U. S. 1, *Jay Burns Baking Co.* v. *Bryan*, 264 U. S. 504, and *Adkins* v. *Children's Hospital*, 261 U. S. 525. The two they do cite and quote from, *Meyer* v. *Nebraska*, 262 U. S. 390, and *Pierce* v. *Society of Sisters*, 268 U. S. 510, were both decided in opinions by Mr. Justice McReynolds which elaborated the same natural law due process philosophy found in *Lochner* v. *New York*, *supra*, one of the cases on which he relied in *Meyer*, along with such other long-discredited decisions as, *e. g., Adams* v. *Tanner*, 244 U. S. 590, and *Adkins* v. *Children's Hospital*, *supra*. *Meyer* held unconstitutional, as an "arbitrary" and unreasonable interference with the right of a teacher to carry on his occupation and of parents to hire him, a state law forbidding the teaching of modern foreign languages to young children in the schools.[7] And in *Pierce*, relying principally on *Meyer*, Mr. Justice McReynolds said that a state law requiring that all children attend public schools interfered unconstitutionally with the property rights of private school corporations because it was an "arbitrary, unreasonable and unlawful interference" which threatened "destruction of their business and property." 268 U. S., at 536. Without expressing an opinion as to whether either of those cases reached a correct result in light of our later decisions applying the First Amendment to the States through the Fourteenth,[8] I merely point out that the reasoning stated in *Meyer* and *Pierce* was the same natural law due process philosophy which many later opinions repudiated, and which I cannot accept. Brothers White and Goldberg also cite other cases, such as *NAACP* v. *Button*, 371 U. S. 415, *Shelton* v. *Tucker*, 364 U. S. 479, and *Schneider* v. *State*, 308 U. S. 147, which held that States in regulating conduct could not, consistently with the First Amendment as applied to them by the Fourteenth, pass unnecessarily broad laws which might indirectly infringe on First Amendment freedoms.[9] See *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1, 7–8.[10] Brothers White and Goldberg now apparently would start from this requirement that laws be narrowly drafted so as not to curtail free speech and assembly, and extend it limitlessly to require States to justify any law restricting "liberty" as my Brethren define "liberty." This would mean at the very least, I suppose, that every state criminal statute—since it must inevitably curtail "liberty" to some extent—would be suspect, and would have to be justified to this Court.[11]

Footnotes at end of article.

My Brother Goldberg has adopted the recent discovery [12] that the Ninth Amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this Court thinks violates "fundamental principles of liberty and justice," or is contrary to the "traditions and [collective] conscience of our people." He also states, without proof satisfactory to me, that in making decisions on this basis judges will not consider "their personal and private notions." One may ask how they can avoid considering them. Our Court certainly has no machinery with which to take a Gallup Poll.[13] And the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the "[collective] conscience of our people." Moreover, one would certainly have to look far beyond the language of the Ninth Amendment [14] to find that the Framers vested in this Court any such awesome veto powers over lawmaking, either by the States or by the Congress. Nor does anything in the history of the Amendment offer any support for such a shocking doctrine. The whole history of the adoption of the Constitution and Bill of Rights points the other way, and the very material quoted by my Brother Goldberg shows that the Ninth Amendment was intended to protect against the idea that "by enumerating particular exceptions to the grant of power" to the Federal Government, "those rights which were not singled out, were intended to be assigned into the hands of the General Government [the United States], and were consequently insecure." [15] That Amendment was passed, not to broaden the powers of this Court or any other department of "the General Government," but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication. If any broad, unlimited power to hold laws unconstitutional because they offend what this Court conceives to be the "[collective] conscience of our people" is vested in this Court by the Ninth Amendment, the Fourteenth Amendment, or any other provision of the Constitution, it was not given by the Framers, but rather has been bestowed on the Court by the Court. This fact is perhaps responsible for the peculiar phenomenon that for a period of a century and a half no serious suggestion was ever made that the Ninth Amendment, enacted to protect state powers against federal invasion, could be used as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs. Use of any such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention.

I repeat so as not to be misunderstood that this Court does have power, which it should exercise, to hold laws unconstitutional where they are forbidden by the Federal Constitution. My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.[16]

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me. And so, I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law. The Due Process Clause with an "arbitrary and capricious" or "shocking to the conscience" formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. See, *e.g., Lochner* v. *New York*, 198 U.S. 45. That formula, based on subjective considerations of "natural justice," is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had thought that we had laid that formula, as a means for striking down state legislation, to rest once and for all in cases like *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379; *Olsen* v. *Nebraska ex rel. Western Reference & Bond Assn.*, 313 U.S. 236, and many other opinions.[17] See also *Lochner* v. *New York*, 198 U.S. 45, 74 (Holmes, J., dissenting).

In *Ferguson* v. *Skrupa*, 372 U.S. 726, 730, this Court two years ago said in an opinion joined by all the Justices but one [18] that

"The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

And only six weeks ago, without even bothering to hear argument, this Court overruled *Tyson & Brother* v. *Banton*, 273 U.S. 418, which had held state laws regulating ticket brokers to be a denial of due process of law.[19] *Gold* v. *DiCarlo*, 380 U.S. 520. I find April's holding hard to square with what my concurring Brethren urge today. They would reinstate the *Lochner, Coppage, Adkins, Burns*, line of cases, cases from which this Court recoiled after the 1930's, and which had been I thought totally discredited until now. Apparently my Brethren have less quarrel with state economic regulations than former Justices of their persuasion had. But any limitation upon their using the natural law due process philosophy to strike down any state law, dealing with any activity whatever, will obviously be only self-imposed.[20]

In 1798, when this Court was asked to hold another Connecticut law unconstitutional, Justice Iredell said:

"[I]t has been the policy of all the *American* states, which have, individually, framed their state constitutions since the revolution, and of the people of the *United States*, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state, violates those constitutional provi-

sions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice." *Calder* v. *Bull*, 3 Dall. 386, 399 (emphasis in original).

I would adhere to that constitutional philosophy in passing on this Connecticut law today. I am not persuaded to deviate from the view which I stated in 1947 in *Adamson* v. *California*, 332 U.S. 46, 90–92 (dissenting opinion):

"Since *Marbury* v. *Madison*, 1 Cranch 137, was decided, the practice has been firmly established, for better or worse, that courts can strike down legislative enactments which violate the Constitution. This process, of course, involves interpretation, and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of a constitutional provision, thereby affecting policy. But to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of 'natural law' deemed to be above and undefined by the Constitution is another. 'In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other, they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people.' *Federal Power Commission* v. *Pipeline Co.*, 315 U.S. 575, 599, 601, n. 4." [21] (Footnotes omitted.)

The late Judge Learned Hand, after emphasizing his view that judges should not use the due process formula suggested in the concurring opinions today or any other formula like it to invalidate legislation offensive to their "personal preferences," [22] made the statement, with which I fully agree, that:

"For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." [23]

So far as I am concerned, Connecticut's law as applied here is not forbidden by any provision of the Federal Constitution as that Constitution was written, and I would therefore affirm.

Mr. Justice Stewart, whom Mr. Justice Black joins, dissenting.

Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.

In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law.

We *are* told that the Due Process Clause of the Fourteenth Amendment is not, as such, the "guide" in this case. With that much I agree. There is no claim that this law, duly enacted by the Connecticut Legislature, is unconstitutionally vague. There is no claim that the appellants were denied any of the elements of procedural due process at their trial, so as to make their convictions constitutionally invalid. And, as the Court says, the day has long passed since the Due Process Clause was regarded as a proper instrument for determining "the wisdom, need, and propriety" of state laws. Compare *Lochner* v. *New York*, 198 U.S. 45, with *Ferguson* v. *Skrupa*, 372 U.S. 726. My Brothers HARLAN and WHITE to the contrary, "[w]e have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson* v. *Skrupa*, *supra*, at 730.

As to the First, Third, Fourth, and Fifth Amendments, I can find nothing in any of them to invalidate this Connecticut law, even assuming that all those Amendments are fully applicable against the States.[24] It has not even been argued that this is a law "respecting an establishment of religion, or prohibiting the free exercise thereof." [25] And surely, unless the solemn process of constitutional adjudication is to descend to the level of a play on words, there is not involved here any abridgment of "the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." [26] No soldier has been quartered in any house.[27] There has been no search, and no seizure.[28] Nobody has been compelled to be a witness against himself.[29]

The Court also quotes the Ninth Amendment, and my Brother GOLDBERG's concurring opinion relies heavily upon it. But to say that the Ninth Amendment has anything to do with this case is to turn somersaults with history. The Ninth Amendment, like its companion the Tenth, which this Court held "states but a truism that all is retained which has not been surrendered," *United States* v. *Darby*, 312 U.S. 100, 124, was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the *Federal* Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States. Until today no member of this Court has ever suggested that the Ninth Amendment meant anything else, and the idea that a federal court could ever use the Ninth Amendment to annul a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison no little wonder.

What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy "created by several fundamental constitutional guarantees." With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.[30]

At the oral argument in this case we were told that the Connecticut law does not "conform to current community standards." But it is not the function of this Court to decide cases on the basis of community standards. We are here to decide cases "agreeably to the Constitution and laws of the United States." It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.[31]

FOOTNOTES

[1] The phrase "right to privacy" appears first to have gained currency from an article written by Messrs. Warren and (later Mr. Justice) Brandeis in 1890 which urged that States should give some form of tort relief to persons whose private affairs were exploited by others. The Right to Privacy, 4 Harv. L. Rev. 193. Largely as a result of this article, some States have passed statutes creating such a cause of action, and in others state courts have done the same thing by exercising their powers as courts of common law. See generally 41 Am. Jur. 926–927. Thus the Supreme Court of Georgia, in granting a cause of action for damages to a man whose picture had been used in a newspaper advertisement without his consent, said that "A right of privacy in matters purely private is . . . derived from natural law" and that "The conclusion reached by us seems to be . . . thoroughly in accord with natural justice, with the principles of the law of every civilized nation, and especially with the elastic principles of the common law . . . ." *Pavesich* v. *New England Life Ins. Co.*, 122 Ga. 190, 194, 218, 50 S. E. 68, 70, 80. Observing that "the right of privacy . . . presses for recognition here," today this Court, which I did not understand to have power to sit as a court of common law, now appears to be exalting a phrase which Warren and Brandeis used in discussing grounds for tort relief, to the level of a constitutional rule which prevents state legislatures from passing any law deemed by this Court to interfere with "privacy."

[2] Brother HARLAN's views are spelled out at greater length in his dissenting opinion in *Poe* v. *Ullman*, 367 U.S. 497, 539–555.

[3] Indeed, Brother White appears to have gone beyond past pronouncements of the natural law due process theory, which at least said that the Court should exercise this unlimited power to declare state acts unconstitutional with "restraint." He now says that, instead of being presumed constitutional (see *Munn* v. *Illinois*, 94 U.S. 113, 123; compare *Adkins* v. *Children's Hospital*, 261 U.S. 525, 544), the statute here "bears a substantial burden of justification when attacked under the Fourteenth Amendment."

[4] A collection of the catchwords and catch phrases invoked by judges who would strike down under the Fourteenth Amendment laws which offend their notions of natural justice would fill many pages. Thus it has been said that this Court can forbid state action which "shocks the conscience," *Rochin* v. *California*, 342 U.S. 165, 172, sufficiently to "shock itself into the protective arms of the Constitution," *Irvine* v. *California*, 347 U.S. 128, 138 (concurring opinion). It has been urged that States may not run counter to the "decencies of civilized conduct," *Rochin*, *supra*, at 173, or "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Massachusetts*, 291 U.S. 97, 105, or to "those canons of decency and fairness which express the notions of justice of English-speaking peoples," *Malinski* v. *New York*, 324 U.S. 401, 417 (concurring opinion), or to "the community's sense of fair play and decency," *Rochin*, *supra*, at 173. It has been said that we must decide whether a state law is "fair, reasonable and appropriate," or is rather "an unreasonable, unnecessary and arbitrary interference with the right of individual to his personal liberty or to enter into . . . contracts," *Lochner* v. *New*

York, 198 U.S. 45, 56. States, under this philosophy, cannot act in conflict with "deep rooted feelings of the community," *Halley* v. *Ohio*, 332 U.S. 596, 604 (separate opinion), or with "fundamental notions of fairness and justice," *id.*, 607. See also, *e.g.*, *Wolf* v. *Colorado*, 338 U.S. 25, 27 ("rights . . . basic to our free society"); *Herbert* v. *Louisiana*, 272 U.S. 312, 316 ("fundamental principles of liberty and justice"); *Adkins* v. *Children's Hospital*, 261 U.S. 525, 561 ("arbitrary restraint of . . . liberties"); *Betts* v. *Brady*, 316 U.S. 455, 462 ("denial of fundamental fairness, shocking to the universal sense of justice"); *Poe* v. *Ullman*, 367 U.S. 497, 539 (dissenting opinion) ("intolerable and unjustifiable") Perhaps the clearest, frankest and briefest explanation of how this due process approach works is the statement in another case handed down today that this Court is to invoke the Due Process Clause to strike down state procedures or laws which it can "not tolerate." *Linkletter* v. *Walker*, *post*, p. 618, 631.

[5] See Hand, The Bill of Rights (1958) 70:

"[J]udges are seldom content merely to annul the particular solution before them; they do not, indeed they may not, say that taking all things into consideration, the legislators' solution is too strong for the judicial stomach. On the contrary they wrap up their veto in a protective veil of adjectives such as 'arbitrary,' 'artificial,' 'normal,' 'reasonable,' 'inherent,' 'fundamental,' or 'essential,' whose office usually, though quite innocently, is to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision." See also *Rochin* v. *California*, 342 U.S. 165, 174 (concurring opinion). But see *Linkletter* v. *Walker*, *supra*, n. 4, at 631.

[6] This Court held in *Marbury* v. *Madison*, 1 Cranch 137, that this Court has power to invalidate laws on the ground that they exceed the constitutional power of Congress or violate some specific prohibition of the Constitution. See also *Fletcher* v. *Peck*, 6 Cranch 87. But the Constitutional Convention did on at least two occasions reject proposals which would have given the federal judiciary a part in recommending laws or in vetoing as bad or unwise the legislation passed by the Congress. Edmund Randolph of Virginia proposed that the President

". . . and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by [original wording illegible] of the members of each branch." 1 The Records of the Federal Convention of 1787 (Farrand ed. 1911) 21.

In support of a plan of this kind James Wilson of Pennsylvania argued that:

". . . It had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature." 2 *id.*, at 73.

Nathaniel Gorham of Massachusetts "did not see the advantage of employing the Judges in this way. As Judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures." *Ibid.*

Elbridge Gerry of Massachusetts likewise opposed the proposal for a council of revision:

". . . He relied for his part on the Representatives of the people as the guardians of their Rights & interests. It [the proposal] was making the Expositors of the Laws, the Legislators which ought never to be done." *Id.*, at 75.

And at another point:

"Mr. Gerry doubts whether the Judiciary ought to form a part of it [the proposed council of revision], as they will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality. . . . It was quite foreign from the nature of ye. office to make them judges of the policy of public measures." 1 *Id.*, at 97–98.

Madison supported the proposal on the ground that "a Check [on the legislature] is necessary." *Id.*, at 108. John Dickinson of Delaware opposed it on the ground that "the Judges must interpret the Laws they ought not to be legislators." *Ibid.* The proposal for a council of revision was defeated.

The following proposal was also advanced:

"To assist the President in conducting the Public affairs there shall be a Council of State composed of the following officers—1. The Chief Justice of the Supreme Court, who shall from time to time recommend such alterations of and additions to the laws of the U.S. as may in his opinion be necessary to the due administration of Justice, and such as may promote useful learning and inculcate sound morality throughout the Union. . . ." 2 *id.*, at 342. This proposal too was rejected.

[7] In *Meyer*, in the very same sentence quoted in part by my Brethren in which he asserted that the Due Process Clause gave an abstract and inviolable right "to marry, establish a home and bring up children," Mr. Justice McReynolds also asserted the heretofore discredited doctrine that the Due Process Clause prevented States from interfering with "the right of the individual to contract." 262 U. S., at 399.

[8] Compare *Poe* v. *Ullman*, 367 U. S., at 543–544 (HARLAN, J., dissenting).

[9] The Court has also said that in view of the Fourteenth Amendment's major purpose of eliminating state-enforced racial discrimination, this Court will scrutinize carefully any law embodying a racial classification to make sure that it does not deny equal protection of the laws. See *McLaughlin* v. *Florida*, 379 U. S. 184.

[10] None of the other cases decided in the past 25 years which Brothers WHITE and GOLDBERG cite can justly be read as holding that judges have power to use a natural law due process formula to strike down all state laws which they think are unwise, dangerous, or irrational. *Prince* v. *Massachusetts*, 321 U.S. 158, *upheld* a state law forbidding minors from selling publications on the streets. *Kent* v. *Dulles*, 357 U.S. 116, recognized the power of Congress to restrict travel outside the country so long as it accorded persons the procedural safeguards of due process and did not violate any other specific constitutional provision. *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, held simply that a State could not, consistently with due process, refuse a lawyer a license to practice law on the basis of a finding that he was morally unfit when there was no evidence in the record, 353 U.S., at 246–247, to support such a finding. Compare *Thompson* v. *City of Louisville*, 362 U.S. 199, in which the Court relied in part on *Schware*. See also *Konigsberg* v. *State Bar*, 353 U.S. 252. And *Bolling* v. *Sharpe*, 347 U.S. 497, merely recognized what had been the understanding from the beginning of the country, an understanding shared by many of the draftsmen of the Fourteenth Amendment, that the whole Bill of Rights, including the Due Process Clause of the Fifth Amendment, was a guarantee that all persons would receive equal treatment under the law. Compare *Chambers* v. *Florida*, 309 U.S. 227, 240–241. With one exception, the other modern cases relied on by my Brethren were decided either solely under the Equal Protection Clause of the Fourteenth Amendment or under the First Amendment, made applicable to the States by the Fourteenth, some of the latter group involving the right of association which this Court has held to be a part of the rights of speech, press and assembly guaranteed by the First Amendment. As for *Aptheker* v. *Secretary of State*, 378 U.S. 500, I am compelled to say that if that decision was written or intended to bring about the abrupt and drastic reversal in the course of constitutional adjudication which is now attributed to it, the change was certainly made in a very quiet and unprovocative manner, without any attempt to justify it.

[11] Compare *Adkins* v. *Children's Hospital*, 261 U.S. 525, 568, (Holmes J., dissenting):

"The earlier decisions upon the same words [the Due Process Clause] in the Fourteenth Amendment began within our memory and went to farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the world liberty. But pretty much all law consists in forbidding men to some things that they want to do, and contract is no more exempt from law than other acts."

[12] See Patterson, The Forgotten Ninth Amendment (1955). Mr. Patterson urges that the Ninth Amendment be used to protect unspecified "natural and inalienable rights." P. 4. The Introduction by Roscoe Pound states that "there is a marked revival of natural law ideas throughout the world. Interest in the Ninth Amendment is a symptom of that revival." P. iii.

In Redlich, Are There "Certain Rights . . . Retained by the People"?, 37 N.Y. U.L. Rev. 787, Professor Redlich, in advocating reliance on the Ninth and Tenth Amendments to invalidate the Connecticut law before us, frankly states:

"But for one who feels that the marriage relationship should be beyond the reach of a state law forbidding the use of contraceptives, the birth control case poses a troublesome and challenging problem of constitutional interpretation. He may find himself saying, 'The law is unconstitutional—but why?' There are two possible paths to travel in finding the answer. One is to revert to a frankly flexible due process concept even on matters that do not involve specific constitutional prohibitions. The other is to attempt to evolve a new constitutional framework within which to meet this and similar problems which are likely to arise." *Id.*, at 798.

[13] Of course one cannot be oblivious to the fact that Mr. Gallup has already published the results of a poll which he says shows that 46% of the people in this country believe schools should teach about birth control. Washington Post, May 21, 1965, p. 2, col. 1. I can hardly believe, however, that Brother GOLDBERG would view 46% of the persons polled as so overwhelming a proportion that this Court may now rely on it to declare that the Connecticut law infringes "fundamental" rights, and overrule the long-standing view of the people of Connecticut expressed through their elected representatives.

[14] U.S. Const., Amend. IX, provides:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

[15] "1 Annals of Congress 439. See also II Story, Commentaries on the Constitution of the United States (5th ed. 1891): "This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies." *Id.*, at 651 (footnote omitted).

[16] Justice Holmes in one of his last dissents, written in reply to Mr. Justice McReynolds' opinion for the Court in *Baldwin* v. *Missouri*, 281 U.S. 586, solemnly warned against a due process formula apparently approved by my concurring Brethren today. He said: "I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course the words 'due process of law,' if taken in their literal meaning, have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass." 281 U.S., at 595. See 2 Holmes-Pollock Letters (Howe ed. 1941) 267–268.

[17] *E.g.*, in *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423, this Court held that "Our recent decisions make plain that we do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."

Compare *Gardner* v. *Massachusetts*, 305 U.S. 559, which the Court today apparently overrules, which held that a challenge under the Federal Constitution to a state law forbidding the sale or furnishing of contraceptives did not raise a substantial federal question.

[18] Brother Harlan, who has consistently stated his belief in the power of courts to strike down laws which they consider arbitrary or unreasonable, see, *e.g.*, *Poe* v. *Ullman*, 367 U.S. 497, 539–555 (dissenting opinion), did not join the Court's opinion in *Ferguson* v. *Skrupa*.

[19] Justice Holmes, dissenting in *Tyson*, said:

"I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain." 273 U.S., at 446.

[20] Compare *Nicchia* v. *New York*, 254 U.S. 228, 231, upholding a New York dog-licensing statute on the ground that it did not "deprive dog owners of liberty without due process of law." And as I said concurring in *Rochin* v. *California*, 342 U.S. 165, 175, "I believe that faithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards" urged by my concurring Brethren today.

[21] *Gideon* v. *Wainwright*, 372 U.S. 335, and similar cases applying specific Bill of Rights provisions to the States do not in my view stand for the proposition that this Court can rely on its own concept of "ordered liberty" or "shocking the conscience" or natural law to decide what laws it will permit state legislatures to enact. *Gideon* in applying to state prosecutions the Sixth Amendment's guarantee of right to counsel followed *Palko* v. *Connecticut*, 302 U.S. 319, which had held that specific provisions of the Bill of Rights, rather than the Bill of Rights as a whole, would be selectively applied to the States. While expressing my own belief (not shared by Mr. Justice Stewart) that all the provisions of the Bill of Rights were made applicable to the States by the Fourteenth Amendment, in my dissent in *Adamson* v. *California*, 332 U.S. 46, I also said: "If the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the States, or the *Twining* rule applying none of them. I would choose the *Palko* selective process."

Gideon and similar cases merely followed the *Polko* rule, which in *Adamson* I agreed to follow if necessary to make Bill of Rights safeguards applicable to the States. See also *Pointer* v. *Texas*, 380 U.S. 400; *Malloy* v. *Hogan*, 378 U.S. 1.

[22] Hand, The Bill of Rights (1958) 70. See note 5, *supra*. See generally *id.*, at 35–45.

[23] *Id.*, at 73. While Judge Hand condemned as unjustified the invalidation of state laws under the natural law due process formula, see *id.*, at 35–45, he also expressed the view that this Court in a number of cases had gone too far in holding legislation to be in violation of specific guarantees of the Bill of Rights. Although I agree with his criticism of use of the due process formula, I do not agree with all the views he expressed about construing the specific guarantees of the Bill of Rights.

[24] The Amendments in question were, as everyone knows, originally adopted as limitations upon the power of the newly created Federal Government, not as limitations upon the powers of the individual States. But the Court has held that many of the provisions of the first eight amendments are fully embraced by the Fourteenth Amendment as limitations upon state action, and some members of the Court have held the view that the adoption of the Fourteenth Amendment made every provision of the first eight amendments fully applicable against the States. See *Adamson* v. *California*, 332 U.S. 46, 68 (dissenting opinion of Mr. JUSTICE BLACK).

[25] U.S. Constitution, Amendment I. To be sure, the injunction contained in the Connecticut statute coincides with the doctrine of certain religious faiths. But if that were enough to invalidate a law under the provisions of the First Amendment relating to religion, then most criminal laws would be invalidated. See, *e.g.*, the Ten Commandments. The Bible, Exodus 20:2–17 (King James).

[26] U.S. Constitution, Amendment I. If all the appellants had done was to advise people that they thought the use of contraceptives was desirable, or even to counsel their use, the appellants would, of course, have a substantial First Amendment claim. But their activities went far beyond mere advocacy. They prescribe specific contraceptive devices and furnished patients with the prescribed contraceptive materials.

[27] U.S. Constitution, Amendment III.

[28] U.S. Constitution, Amendment IV.

[29] U.S. Constitution, Amendment V.

[30] Cases like *Shelton* v. *Tucker*, 364 U.S. 479 and *Bates* v. *Little Rock*, 361 U.S. 516, relied upon in the concurring opinions today, dealt with true First Amendment rights of association and are wholly inapposite here. See also, *e.g.*, *NAACP* v. *Alabama* v. *Alabama*, 357 U.S. 449; *Edwards* v. *South Carolina*, 372 U.S. 229. Our decision in *McLaughlin* v. *Florida*, 379 U.S. 184, is equally far afield. That case held invalid under the Equal Protection Clause, a state criminal law which discriminated against Negroes.

The Court does not say how far the new constitutional right of privacy announced today extends. See, *e.g.*, Mueller, Legal Regulation of Sexual Conduct, at 127; Ploscowe, Sex and the Law, at 189. I suppose, however, that even after today a State can constitutionally still punish at least some offenses which are not committed in public.

[31] See *Reynolds* v. *Sims*, 377 U.S. 533, 562. The Connecticut House of Representatives recently passed a bill (House Bill No. 2462) repealing the birth control law. The State Senate has apparently not yet acted on the measure, and today is relieved of that responsibility by the Court. New Haven Journal-Courier, Wed., May 19, 1965, p. 1, col. 4, and p. 13, col. 7.

[458 P.2d 194]

REHEARING DENIED OCTOBER 1, 1969

The people, plaintiff and respondent, v. Leon Phillip Belous, Defendant and appellant.

Cr. 12739.

Supreme Court of California, In Bank. Sept. 5, 1969.

Defendant was convicted in the Superior Court, Los Angeles County, John G. Barnes, J., of abortion and conspiracy to commit an abortion, and he appealed. The Supreme Court, Peters, J., held that statue making a person who performs abortion punishable unless abortion is necessary to preserve mother's life as statute read before amended in 1967 was invalid where term "necessary to preserve" was not susceptible to a construction which, while satisfying legislative intent, was sufficiently certain to satisfy due process requirements without improperly infringing on fundamental constitutional rights of mother to life and to choose whether to bear children, and convictions of abortion and conspiracy to commit abortion could not stand.

Judgment reversed with directions to dismiss indictment.

Burke, McComb, and Sullivan, JJ., dissented.

A. L. Wirin, Fred Okrand, Zad Leavy and Beilenson & Leavy, Los Angeles, for defendant and appellant.

Thomas C. Lynch, Atty. Gen., William E. James, Asst. Atty. Gen., and Phillip G. Samovar, Deputy Atty. Gen., for plaintiff and repondent.

McCutchen, Doyle, Brown & Enersen, Burnham Enersen, Robert A. Blum, Terry J. Houlihan, San Francisco, Norma G. Zarky, Howard H. Jewel, Oakland, Paul N. Halvonik, San Francisco, William Kelly, Barbara N. Amstrong, Charles E. Beardsley, Los Angeles George A. Blackstone, A. Stevens Halsted Jr., Roderick M. Hills, Leonard S. Janofsky, Los Angeles, Herma Hill Kay, Berkeley, Frederick R. McBrien, Charles T. Munger, Stuart T. Peeler, Samuel O. Pruitt, Jr. Charles E. Riskershauser, Jr., Graham L. Sterling, Charles E. Stimson, Jr., Los Angeles, and Francis M. Wheat as amici curiae on behalf of defendant and appellant.

Charles H. Clifford, Walter R. Trinkaus, J. J. Brandlin, Los Angeles, Thomas J. Arata, Santa Rosa, Richard D. Andrews, Fresno, Cyril A. Coyle, Sacramento, Mazzera, Snyder & DeMartini, Stockton, John F. Duff, San Francisco, William R. Kennedy, Richard G. Logan, Oakland, and Curran, Golden, McDevitt & Martin, San Diego, as amici curie on behalf of plaintiff and respondent.

PETERS, Justice.

Dr. Leon Phillip Belous was convicted in January 1967, after a jury trial, of abortion, in violation of section 274 of the Penal Code, and conspiracy to commit an abortion, in violation of section 182 of the Penal Code, both felonies. The court suspended proceedings, imposed a fine of $5,000, and placed Dr. Belous on probation for two years. He appeals from the order granting probation.

Dr. Belous is a physician and surgeon, licensed since 1931 to practice medicine in the State of California, and specializing in obstetrics and gynecology. He has been on the attending staff of the gynecology department of Cedars of Lebanon Hospital in Los Angeles since 1931, is a fellow of the Los Angeles Gynecology and Obstetrical Society, the American College of Obstetrics and Gynecology, the Abdominal Surgical Society, and the Geriatric Society, and a member of the American Board of Obstetrics and Gynecology. He is on the Board of Directors of the California Committee on Therapeutic Abortion, an organization which seeks to liberalize abortion laws. He is considered by his associates to be an eminent physician in his field.

The prosecution's witnesses, a young woman and her husband, Cheryl and Clifton, testified to the following:

In 1966, Cheryl, then unmarried, believed she was pregnant. A family physician had given her pills which would induce menstruation if she were not pregnant, but the pills did not work. She and Clifton had sometime earlier seen Dr. Belous on television, advocating a change in the California abortion laws. They had never heard of Dr. Belous before. Clifton obtained the doctor's phone number from the television station and phoned Dr. Belous; he explained the problem and that they both were "pretty disturbed," and at their "wits' end" and asked for Dr. Belous' help. Dr. Belous told him there was nothing he could do, but Clifton "continued pleading," and threatened that Cheryl would go to Tijuana for an abortion. Finally the doctor agreed to see them at his office.

Dr. Belous examined Cheryl at his Beverly Hills office and confirmed that she was possibly pregnant. Cheryl was otherwise in good health. The visit lasted about 45 minutes and was very emotional. Both Clifton and Cheryl pleaded for help, cried, insisted they were going to have an abortion "one way or another." The doctor lectured them on the dangers of criminal abortions, and Tijuana abortions in particular, and suggested that they get married. He insisted he did not perform abortions. He refused to recommend anyone in Tijuana. Finally, in response to their pleadings, Dr. Belous gave them a piece of paper with a Chula Vista phone number. He told them an abortion would cost about $500. He gave Cheryl a prescription for some antibiotics and instructed her to return for an examination.

Dr. Belous testified that he was very familiar with the abortion business in Tijuana. He had visited the clinics there to learn about conditions and knew that women who went to Tijuana were taking their lives in their hands. He met Karl Lairtus while in Tijuana and knew from personal observation that Lairtus, licensed to practice in Mexico but not in California, was performing skilled and safe abortions in Mexico. Lairtus wanted to obtain a California license, and sought out Belous' help on a number of occasions. When Lairtus moved from Mexico to Chula Vista, he gave Dr. Belous his address and phone number. When Lairtus moved to Los Angeles, he gave the doctor a Hollywood address, and made it known to the doctor that he was performing abortions. It was Lairtus' number that Belous gave to Cheryl and Clifton. Although he had given out Lairtus' number before, in similar situations, where distraught pregnant women insisted they would do anything, Dr. Belous had no idea how many women actually went to Lairtus.

Cheryl and Clifton made arrangements with Lairtus, and went to the address which Lairtus gave them on the phone. After the abortion was performed, while Cheryl was resting, the police, having been advised by another woman that Lairtus was performing abortions at that address, came to his apartment, followed another couple into the apartment and arrested Lairtus. They found two notebooks containing women's names, ages, dates of last menstration, and physician's names, including Dr. Belous' name, which the police interpreted as the referring doctor with whom Lairtus was to split his fees. On the basis of this information, Dr. Belous was arrested at his office. Lairtus pleaded guilty. **At Dr. Belous' trial, he testified that,** although not solicited, he sent Dr. Belous about $100 as a professional courtesy in about half the cases that he had performed abortions on Dr. Belous' patients. Dr. Belous denied receiving any money from Lairtus.

The substance of Dr. Belous' defense was that he gave Lairtus' phone number to Cheryl and Clifton only because he believed that they would, in fact, do anything to terminate the pregnancy which might involve butchery in Tijuana or self-mutilation; that in face of their pleading and tears, he gave out the phone number of someone whom he knew to be a competent doctor, although unlicensed in this state. The doctor believed that if the young couple carried out their threats, Cheryl's very life was in danger.

Section 274 of the Penal Code, when the conduct herein involved occurred, read: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the State prison not less than two nor more than five years."

The statute was substantially unchanged since it was originally enacted in 1850.[1] In 1967, the statute was amended and sections 25950 through 25954 ("Therapeutic Abortion Act") added to the Health and Safety Code. The act extends the lawful grounds for obtaining an abortion.[2] Section 274 is directed towards the abortionist. Under section 275 of the Penal Code (also amended by the Therapeutic Abortion Act), a woman who solicits or submits to an abortion is punishable by up to five years' imprisonment; similarly, under section 276, any person who solicits a woman to submit to an abortion is punishable by up to five years' imprisonment.

We have concluded that the term "necessary to preserve" in section 274 of the Penal Code is not susceptible of a construction that does not violate legislative intent and that is sufficiently certain to satisfy due process requirements without improperly infringing on fundamental constitutional rights.

"The requirement of a reasonable degree of certainty in legislation, especially in the criminal law, is a well established element of the guarantee of due process of law. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. * * * "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." ' Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888; see also Connally v. General Const. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322. Such also is the law of the State of California. People v. McCaughan, 49 Cal. 2d 409, 414, 317 P. 2d 974.

"The required meaning, certainty and lack of ambiguity may appear on the face of the questioned statute or from any demonstrably established technical or common law meaning of the language in question. People v. McCaughan, *supra*, 49 Cal. 2d 409, 414, 317 P. 2d 974; Lorenson v. Superior Court, 35 Cal. 2d 49, 60, 216 P. 2d 859." (In re Newbern, 53 Cal. 2d 786, 792, 3 Cal. Rptr. 364, 368, 350 P. 2d 116, 120.) The requirement of certainty in legislation is greater where the criminal statute is a limitation on constitutional rights. (See Smith v. California (1959) 361 U.S. 147, 151, 80 S. Ct. 215, 4 L. Ed. 2d 205.) On the other hand, mathematical certainty is not required; "some matter of degree" is involved in most penal statutes. (Nash v. United States (1913) 229 U.S. 373, 377, 33 St. Ct. 780, 57 L. Ed. 1232.)

Dictionary definitions and judicial interpretations fail to provide a clear meaning for the words, "necessary" or "preserve." There is, no course, no standard definition of "necessary to preserve," and taking the words separately, no clear meaning emerges. "Necessary" is defined as: "1. Essential to a desirable or projected end or condition; not to be dispensed with without loss, damage, inefficiency, or the like; * * *" (Webster's New International Dictionary (2d ed.), unabridged.) The courts have recognized that " 'necessary' has not a fixed meaning, but is flexible and relative." (Westphal v. Westphal, 122 Cal. App. 379, 382, 10 P.2d 119, 120; see also, City of Dayton v. Borchers (Ohio Common Pleas, 1967) 13 Ohio Misc. 273, 232 N.E. 2d 437, 441 ["A *necessary* thing may supply a wide range of wants, from mere convenience to logical completeness."].)

The definition of "preserve" is even less enlightening. It is defined as: "1. To keep or save from injury or destruction; to guard or defend from evil; to protect; save. 2. To keep in existence or intact; * * * To save from decomposition, * * * 3. To maintain; to keep up; * * *" (Webster's New International Dictionary, *supra*.) The meanings for "preserve" range from the concept of maintaining the status quo—that is, the woman's condition of life at the time of pregnancy—to maintaining the biological or medical definition of "life"—that is, as opposed to the biological or medical definition of "death".

Since abortion before quickening was not a crime at common law (Perkins, Criminal Law (1957) 101; Means, The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality (1968) 14 N.Y.L. F. 411, 419–422; Stern, Abortion: Reform and the Law (1968) 59 J. Crim. L.C. & P.S. 84, 85) we cannot rely on common law meanings or common law referents (see Lorenson v. Superior Court, *supra*, 35 Cal. 2d 49, 60, 216 P.2d 859; People v. Agnello, 259 Cal.App.2d 785, 790–791, 66 Cal. Rptr. 571).[3]

Various possible meanings of "necessary to preserve * * * life" have been suggested. However, none of the proposed definitions will sustain the statute.

Respondent asserts: "If medical science feels the abortion should be performed as it is necessary to preserve her life, then it may be performed; that is, unless it is performed the patient will die."

Our courts, however, have rejected an interpretation of "necessary to preserve" which requires certainty or immediacy of death. (People v. Abarbanel, 239 Cal.App. 2d 31, 32, 35, 48 Cal.Rptr. 336; People v. Ballard, 218 Cal.App.2d 295, 298, 32 Cal. Rptr. 233; People v. Ballard, 167 Cal.App. 2d 803, 807, 335 P.2d 204.) Justice Fourt, in People v. Ballard, *supra*, 167 Cal.App. 2d 803, 814, 335 P.2d 204, 212, stated: "Surely, the abortion statute (Pen.Code, § 274) does not mean by the words 'unless the same is necessary to preserve her life'

Footnotes at end of article.

that the peril to life be imminent. It ought to be enough that the dangerous condition 'be potentially present, even though its full development might be delayed to a greater or less extent. Nor was it essential that the doctor should believe that the death of the patient would be otherwise *certain* in order to justify him in affording present relief.' [Citations.]" The above language was quoted in People v. Abarbanel, *supra*, 239 Cal.App.2d 31, 34, 48 Cal.Rptr. 336.

In People v. Ballard, *supra*, 167 Cal.App. 2d 803, 813–814, 335 P.2d 211, the evidence established that the woman was "extremely nervous * * * upset, had headaches, was unable to sleep, and thought that she was pregnant. She was agitated, disturbed and had many problems." (Italics omitted.) In People v. Ballard, *supra*, 218 Cal.App.2d 295, 307, 32 Cal.Rptr. 233, it was established that at the time each of the women went to the defendant doctor she was in a "bad state of health" because of self-imposed abortive practices. And in People v. Abarbanel, *supra*, 239 Cal.App.2d 31, 48 Cal.Rptr. 336, the obstetrician performed the abortion after receiving letters from two psychiatrists to the effect that abortion was indicated as necessary to save the woman's life from the "possibility" of suicide. In each of the cases the conviction was reversed.

If the fact of ill health or the mere "possibility" of suicide is sufficient to meet the test of "necessary to preserve her life," it is clear that a showing of immediacy or certainty of death is not essential for a lawful abortion. Two other jurisdictions have also rejected an interpretation of "necessary to preserve" which would require certainty or immediacy of death. (State v. Dunklebarger (1928) 206 Iowa 971, 221 N. W. 592, 596; State v. Hatch (1917), 138 Minn. 317, 164 N.W. 1017.)

After the decision in *Ballard*, the Legislature did not amend the statute to repudiate the rule suggested by that case and to establish a definition requiring certainty of death.[4]

It would be anomalous to uphold a criminal statute against a charge of vagueness by adopting a construction of the statute rejected by the courts of this state as not reflecting legislative intent unless there was a clear showing of a strong public policy or legislative intent requiring adoption of the rejected construction. No such showing has been made with regard to the construction urged by respondent.

Moreover, a definition requiring certainty of death would work an invalid abridgment of the woman's constitutional rights. The rights involved in the instant case are the woman's rights to life and to choose whether to bear children.[5] The woman's right to life is involved because childbirth involves risks of death.[6]

The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgement of a "right of privacy" or "liberty" in matters related to marriage, family, and sex. (See, e.g., Griswold v. Connecticut, *supra*, 381 U.S. 479, 485, 486, 500, 85 S.Ct. 1678, 14 L.Ed.2d 510; Loving v. Virginia (1967) 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 [statute prohibiting interracial marriages, violative of Due Process Clause]; Skinner v. Oklahoma ex rel. Williamson (1942) 316 U.S. 535, 536, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 [sterilization laws; marriage and procreation involve a "basic liberty"]; Pierce v. Society of Sisters (1925) 268 U.S. 510, 534–535, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468 [prohibition against nonpublic schools; same]; Meyer v. Nebraska (1923) 262 U.S. 390, 399–400, 43 S.Ct. 625, 67 L.Ed. 1042 [prohibition against teaching children German language; same]; Perez v. Sharp, 32 Cal.2d 711, 715, 198 P.2d 17; see also Custodio v. Bauer, 251 Cal.App.2d 303, 317–318, 59 Cal. Rptr. 463). That such a right is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right. (See, e. g., Carrington v. Rash (1965) 380 U.S. 89, 96, 85 S.Ct. 775, 13 L.Ed.2d 675 (fundamental but nonenumerated right to vote]; Aptheker v. Secretary of State (1964) 378 U.S. 500, 505–506, 84 S.Ct. 1659, 12 L.Ed.2d 992 and Kent v. Dulles (1958) 357 U.S. 116, 125, 78 S.Ct. 1113, 2 L.Ed.2d 1204 [right to travel]; Bolling v. Sharpe (1954) 347 U.S. 497, 500, 74 S.Ct. 693, 98 L.Ed. 884 [right to attend federal unsegregated schools]; Otsuka v. Hite, 64 Cal.2d 596, 602, 51 Cal.Rptr. 284, 414 P.2d 412 [right to vote]; cf. Finot v. Pasadena City Bd. of Education, 250 Cal. App.2d 189, 199, 58 Cal.Rptr. 520). It is not surprising that none of the parties who have filed briefs in this case have disputed the existence of this fundamental right.

The critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state (Shapiro v. Thompson (1969), 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600; Sherbert v. Verner (1963) 374 U.S. 398, 403, 83 S.Ct. 1790, 10 L. Ed.2d 965), whether the regulation is "necessary * * * to the accomplishment of a permissible state policy" (McLaughlin v. Florida (1964) 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222; see also, N.A.A.C.P. v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed. 2d 405; Bates v. City of Little Rock (1960) 361 U.S. 516, 527, 80 S. Ct. 412, 4 L.Ed.2d 480; Huntley v. Public Util. Comm., 69 A.C. 62, 69, 69 Cal.Rptr. 605, 442 P.2d 685; Vogel v. County of Los Angeles, 68 Cal.2d 18, 21, 64 Cal.Rptr. 409, 434 P.2d 961; People v. Woody, 61 Cal.2d 716, 718, 40 Cal.Rptr. 69, 394 P.2d 813), and whether legislation impinging on constitutionally protected areas is narrowly drawn and not of "unlimited and indiscriminate sweep" (Shelton v. Tucker (1960) 364 U.S. 479, 490, 81 S.Ct. 247, 5 L.Ed.2d 231; see also, Cantwell v. Connecticut (1940) 310 U.S. 296, 308, 60 S.Ct. 900, 84 L.Ed. 1213; In re Berry, 68 Cal.2d 137, 151, 65 Cal.Rptr. 273, 436 P.2d 273; In re Hoffman, 67 Cal. 2d 845, 853–854, 64 Cal.Rptr. 97, 434 P.2d 353).

It is possible that the definition suggested by respondent, requiring that death be certain, was that intended by the Legislature when the first abortion law was adopted in 1850 and that, in the light of the then existing medical and surgical science, the great and direct interference with a woman's constitutional rights was warranted by considerations of the woman's health. When California's first anti-abortion statute was enacted, any surgical procedure which entered a body cavity was extremely dangerous. Surgeons did not know how to control infection, and mortality was high. (Haagensen & Lloyd, A Hundred Years of Medicine (1943), p. 19.) In 1867, Joseph Lister first published his findings on antiseptic surgery (*id.*, at pp. 241–242), but even in 1883 the techniques he developed were condemned (*id.* at p. 245), and as late as 1895 were not well understood or properly applied by even leaders of the medical profession. (*Id.*, at p. 246; see also, H. Robb (1895) Aseptic Surgical Technique.)

Although development was slow, techniques of antisepsis and asepsis became major general advances in surgery at and after the turn of the century. In due course safe procedures were developed for specific operations. Curettage, used for abortion in the first trimester, became a safe, accepted and routinely employed medical technique, especially after antibiotics were developed in the early 1940's. (Douglas, Toxic Effects of the Welch Bacillus in Postabortal Infections (1956) 56 N.Y.State. J. Med. 3673). It is now safer for a woman to have a hospital therapeutic abortion during the first trimester than to bear a child.[7]

Although abortions early in pregnancy and properly performed present minimal danger to the woman, criminal[8] abortions are "the most common single cause of maternal deaths in California." (Fox, Abortion Deaths in California (1967) 98 Am.J.Obst. & Gynec. 645, 650.) In California, it is estimated that 35,000 to 100,000 such abortions occur each year. (Fox, *supra*, at p. 645.)

The incidence of severe infection from criminal abortion is very much greater than the incidence of death. The Los Angeles County Hospital alone, for example, in 1961 admitted over 3,500 patients treated for such abortions. (Kistner, Medical Indications for Contraception: Changing Viewpoints (editorial) (1965) 25 Obst. & Gynec. 285, 286.) Possibly more significant than the mere incidence of infection caused by criminal abortions is the result of such infection. "Induced Illegal Abortion . . . is one of the important causes of subsequent infertility and pelvic disease." (Kleegman & Kaufman, Infertility in Women (1966) p. 301; see also Curtis & Huffman, Gynecology (6th ed. 1950) pp. 564–566.)[9]

Amici for appellant, 178 deans of medical schools, including the deans of all California medical schools, chairmen of medical school departments, and professors of medical schools state: "These recorded facts bring one face-to-face with the hard, shocking—almost brutal—reality that our statute designed in 1850 to protect women from serious risks to life and health has in modern times become a scourge."[10]

Although we may assume that the law was valid when first enacted, the validity of a law in 1850 does not resolve the issue of whether the law is constitutionally valid today. (Compare, e.g., Gary v. Sanders (1963) 372 U.S. 368, 381, 83 S.Ct. 801, 9 L.Ed.2d 821, with South v. Peters (1950) 339 U.S. 276, 277, 70 S.Ct. 641, 94 L.Ed. 834; Baker v. Carr (1962) 369 U.S. 186, 237, 82 S.Ct. 691, 7 L.Ed.2d 663, with Colegrove v. Green (1946) 328 U.S. 549, 556, 66 S.Ct. 1198, 90 L.Ed. 1432; Brown v. Board of Education (1954) 347 U.S. 483, 495, 74 S. Ct. 86, 98 L.Ed. 873; with Plessy v. Ferguson (1896) 163 U.S. 537, 550–551, 16 S.Ct. 1138, 41 L.Ed. 256.)

Constitutional concepts are not static. Our United States Supreme Court said, regarding the equal protection clause of the Fourteenth Amendment: "We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment 'does not enact Mr. Herbert Spencer's Social Statics.' [Citation.] Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be authorized to practice surgery, carried out the limits of fundamental rights. * * *." (Harper v. Virginia State Bd. of Elections (1966), 383, U.S. 663, 669, 86 S.Ct. 1079, 1082, 16 L.Ed.2d 169; see also, Perez v. Sharp, *supra*, 32 Cal.2d 711, 727, 198 P.2d 17; Galyson v. Municipal Court, 229 Cal. App.2d 667, 671–672, 40 Cal. Rptr. 446, and cases cited therein ["[A] statute valid when enacted may become invalid by change in the conditions to which it is applied."] See also, Means, *supra*, 14 N.Y.L.F. 411, 514–515.)

In the light of modern medical surgical practice, the great and direct infringement of constitutional rights which would result from a definition requiring certainty of death may not be justified on the basis of considerations of the woman's health where, as here, abortion is sought during the first trimester.

It is next urged that the state has a compelling interest in the protection of the embryo and fetus[11] and that such interest warrants the limitation on the woman's

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constitutional rights. Reliance is placed upon several statutes and court rules which assertedly show that the embryo or fetus is equivalent to a born child. However, all of the statutes and rules relied upon require a live birth or reflect the interest of the parents.[12]

In any event, there are major and decisive areas where the embryo and fetus are not treated as equivalent to the born child. Probably the most important is reflected by the statute before us. The intentional destruction of the born child is murder or manslaughter. The intentional destruction of the embryo or fetus is never treated as murder, and only rarely as manslaughter but rather as the lesser offense of abortion. (Perkins, Criminal Law, *supra*, p. 103; Means, *supra*, 14 N.Y.L.F. at p. 445.)[13]

Furthermore, the law has always recognized that the pregnant woman's right to life takes precedence over any interest the state may have in the unborn. The California abortion statutes, as to the abortion laws of all 51 United States jurisdictions, make an exception in favor of the life of the prospective mother. (See Stern, Abortion: Reform and the Law, *supra*, 59 J. Crim.L.C. & P.S. 84, 86–87; George, Current Abortion Laws: Proposals & Movements for Reform (1965) 17 W.Res.L.Rev. 366, 375.) Although there may be doubts as to whether the state's interest may ever justify requiring a woman to risk death, it is clear that the state could not forbid a woman to procure an abortion where, to a medical certainty, the result of childbirth would be death. We are also satisfied that the state may not require that degree of risk involved in respondent's definition, which would prohibit an abortion, where death from childbirth although not medically certain, would be substantially certain or more likely than not. Accordingly, the definition of the statute suggested by respondent must be rejected as an invalid infringement upon the woman's constitutional rights.

Another definition of the term "necessary to preserve" is suggested by People v. Abarbanel, *supra*, 239 Cal.App.2d 31, 32, 34, 48 Cal. Rtpr. 336, where the court held that an abortion was not unlawful where the obstetrician performed the abortion based on the "possibility" of suicide. *Abarbanel* might be understood as meaning that "necessary to preserve" refers to a possibility of death different from or greater than the ordinary risk of childbirth. To so interpret "necessary to preserve" would mean that in nearly every case, if not all, a woman who wished an abortion could have one. A woman who is denied a desired lawful abortion and forced to continue an unwanted pregnancy would seem to face a greater risk of death, because of psychological factors, than the average woman, because the average includes all those women who wish to bear the child to term. The psychological factor alone, which under *Abarbanel* is a proper consideration, would seem to be decisive. Such a construction of the statute permitting voluntary abortions would render the statute virtually meaningless. Moreover, to determine the right to an abortion solely on the basis of the dangers of childbirth without regard to the relative dangers of the abortion would be contrary to good medical practice.

Nor can the statute be made certain by reading it as "substantially or reasonably" necessary to preserve the life of the mother. In the present context those terms are not sufficiently precise and would be subject to such different interpretations as to add little or nothing to "necessary." Thus, many people may feel that an abortion is reasonably or substantially necessary to preserve life where the risk of death is double or triple the ordinary risk in childbirth. Others may believe that anything which increases the possibility of death is a substantial risk which is not to be undertaken in the absence of countervailing considerations, so that "reasonably necessary" or "substantially necessary" becomes as destructive of the statute as "possibility of death." On the other hand, there may be those who feel that there is no reasonable or substantial necessity until it is more likely than not that the pregnant woman will not survive childbirth. Although in other contexts the implication of words such as "reasonably" and "substantially" may add certainty and avoid other due process objections, in the instant situation the implication of such words would merely increase the uncertainty.

There is one suggested test which is based on a policy underlying the statute and which would serve to make the statute certain. The test is probably in accord with the legislative intent at the time the statute was adopted. The Legislature may have intended in adopting the statute that abortion was permitted when the risk of death due to the abortion was less than the risk of death in childbirth and that otherwise abortion should be denied. As we have seen, at the time of the adoption of the statute abortion was a highly dangerous procedure, and under the relative safety test abortion would be permissible only where childbirth would be even more dangerous. In light of the test and the then existing medical practice, the question whether abortion should be limited to protect the embryo or fetus may have been immaterial because any such interest would be effectuated by limiting abortions to the rare cases where they were safer than childbirth.

The suggested test would involve an application of medical principles. Medical science may be able to tell us the proper method to treat a patient to minimize the risk of death, but without resort to matters outside medical competence, it cannot tell us the circumstances in which the safest treatment should be rejected and a more dangerous treatment followed in order to protect an embryo or fetus.

The new Therapeutic Abortion Act (Health & Saf.Code, §§ 25950–25954), has adopted a test analogous to the suggested one. Under the new statute, abortion is permissible during the first 20 weeks of pregnancy by a licensed physician in an accredited hospital (Health & Saf.Code, §§ 25951, 25953) if it is determined under prescribed procedures either that "There is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother" (Health & Saf.Code, § 25951, subd. (c) (1)), or that "The pregnancy resulted from rape or incest." (Health and Saf.Code, § 25951, subd. (c) (2).) Mental health includes mental illness to the extent that the woman would be dangerous to herself. (Health & Saf.Code, § 25954.) By limiting the abortion to the first 20 weeks, the Legislature has taken into account the danger to the mother of the later abortion and, by requiring the abortion to be performed by a licensed physician in an accredited hospital, has recognized the danger to the mother of other procedures. The further criteria for determining whether an abortion is permissible is the pregnant woman's physical and mental health. Thus, the test established is a medical one, whether the pregnant woman's physical and mental health will be furthered by abortion or by bearing the child to term, and the assessment does not involve considerations beyond medical competence. There is nothing to indicate that in adopting the Therapeutic Abortion Act the Legislature was asserting an interest in the embryo.

Although the suggested construction of former section 274, making abortion lawful where it is safer than childbirth and unlawful where abortion is more dangerous, may have been in accord with legislative intent, the statute may not be upheld against a claim of vagueness on the basis of such a construction. The language of the statute, "unless the same is necessary to preserve her life," does not suggest a relative safety test, and no case interpreting the statute has suggested that the statute be so construed. None of the parties or numerous amici who have filed briefs in the instant case suggest that the statute applies a relative safety test; to the contrary, the position of the parties and amici, including numerous lawyers, doctors, educators, clergymen and laymen, implies that the statute does not apply that standard. Thus, those claiming the statute is invalid urge that the only valid standard would be a relative safety test and that the statute fails to adopt such a test, and those urging the validity of the statute either state or imply that the standard applied is more restrictive. In the circumstances, we are satisfied that the statute may not be construed to adopt the relative safety test as against a claim of vagueness, because the language does not suggest that test and because of the practical evidence before us that men of "common" intelligence, indeed of uncommon intelligence, have not guessed at this meaning.[14]

The problem caused by the vagueness of the statute is accentuated because under the statute the doctor is, in effect, delegated the duty to determine whether a pregnant woman has the right to an abortion and the physician acts at his peril if he determines that the woman is entitled to an abortion. He is subject to prosecution for a felony and to deprivation of his right to practice medicine (Bus. & Prof. Code, § 2377) if his decision is wrong. Rather than being impartial, the physician has a "direct, personal, substantial, pecuniary interest in reaching a conclusion" that the woman should not have an abortion. The delegation of decision-making power to a directly involved individual violates the Fourteenth Amendment. (Tumey v. Ohio (1927) 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749; see also State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Cal.2d 436, 448, 254 P.2d 29 ["[T]he statute assumes to confer legislative authority upon those who are directly interested in the operation of the regulatory rule * * *."]; Blumenthal v. Board of Medical Examiners, 57 Cal.2d 228, 235, 18 Cal.Rptr. 501, 504, 368 P.2d 101, 104.)

The inevitable effect of such delegation may be to deprive a woman of an abortion when under any definition of section 274 of the Penal Code, she would be entitled to such an operation, because the state, in delegating the power to decide when an abortion is necessary, has skewed the penalties in one direction: *no* criminal penalties are imposed where the doctor refuses to perform a necessary operation, even if the woman should in fact die because the operation was not performed.

The pressures on a physician to decide not to perform an absolutely necessary abortion are, under section 274 of the Penal Code, enormous, and because section 274 authorizes—and requires—the doctor to decide, at his peril, whether an abortion is necessary, a woman whose life is at stake may be as effectively condemned to death as if the law flatly prohibited all abortions.

To some extent the Therapeutic Abortion Act reduces these pressures. The act specifically authorizes an abortion by a licensed physician in an accredited hospital where the abortion is approved in advance by a committee of the medical staff of the hospital, applying medical standards. (Health & Saf.Code, § 25951.) At least in cases where there has been adherence to the procedural requirements of the statute, physicians may not be held criminally responsible, and a jury may not subsequently determine that the abortion was not authorized by statute.

We conclude that the validity of section 274 of the Penal Code before amendment cannot be sustained.[15]

Since section 274 is invalid, Dr. Belous' conviction for violation of section 182 of the

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Penal Code, conspiracy to commit abortion, must likewise fall. The judgment is reversed with directions to the trial court to dismiss the indictment.

TRAYNOR, C. J., TOBRINER, J., and PIERCE, J. pro tem., concur.

BURKE, Justice (dissenting).

I dissent.

The defendant was found guilty by jury trial of a wilful violation of the abortion statute as it existed at the time of the offense. That he violated the statute is all but conceded in the briefs filed in his behalf. Although he testified that he directed the young couple to a doctor, unlicensed in California, because he believed that if they carried out their threats of going to Tijuana to procure an abortion the young woman's life would be in danger, he acknowledged upon cross-examination that her life would not have been endangered if she were not aborted. His assertions that he acted in good faith and out of compassion are tainted somewhat by the evidence which showed that he had referred other women to the same unlicensed physician on a number of occasions and that he had participated on at least one-half of those occasions in the fee paid the abortionist.

Had the doctor truly believed that the young woman's life was in danger he could have done what was the common practice of taking the patient to one of the several hospitals in which therapeutic abortions were being performed. To my knowledge there is not one single instance of a decision of the appellate courts of this state in which a doctor or a hospital has been prosecuted for the performance of an abortion where an independent hospital committee deemed the abortion to be necessary to preserve the woman's life. The plain fact is, the jury found it to be, that this doctor, whatever his motive, possessed the intent to assist in procuring the miscarriage of the woman for reasons other than to preserve her life. This is the specific intent which the law requires for conviction.

He supplied to the jury the answer an independent hospital committee undoubtedly would have given him had he seen fit to seek its approval for an abortion—the patient could bear the child without endangering her life; therefore, to abort her would violate the law.

The threatened danger to the woman's life arose only from the couple's assertions that they would seek an illegal abortion by an unlicensed person. To assist them in attaining this goal was to flaunt his profession's own standards and to aid in bringing about a direct violation of the law.

The majority would reverse the conviction by declaring the statute unconstitutional because of asserted uncertainty in the phrase, "necessary to preserve [the woman's] life."[16] This phrase has been an integral part of the California law against illegal abortions from the time of its enactment in 1872 until the 1967 amendment to the section, and similar language was in the original statute adopted in 1850.[17] Thus for over a hundred years in this state doctors, hospital committees, judges, lawyers and juries have been called upon to give the phrase the common sense interpretation which the words appear to me to suggest. For this court over a hundred years later to find the language unconstitutionally vague and uncertain is a "negation of experience and common sense." (United States v. Ragen, 314 U.S. 513, 524, 62 S.Ct. 374, 379, 86 L.Ed. 383.)

Not only was the phrase long used in the California statute, it was also employed at common law (see, e.g., Perkins on Criminal Law (2d ed.) p. 145; Clark and Marshall, Crimes (6th ed.) pp. 688–689) and is or has been in the abortion statutes of many states (see, e.g., Am.Jur.2d, Abortion, § 9, p. 192; 153 A.L.R. 1218, 1266; Smith, Abortion and the Law (1967) p. 7). Implicit in the decisions of this court, as well as those of countless other courts, is the view that the phrase does not render such a statute invalid (see, e.g., People v. Davis, 43 Cal.2d 661, 276 P.2d 801; People v. Gallardo, 41 Cal.2d 57, 257 P.2d 29; People v. Powell, 34 Cal.2d 196, 208 P.2d 974; People v. Wilson, 25 Cal.2d 341, 153 P.2d 720; People v. Rankin, 10 Cal.2d 198, 74 P.2d 71). In State v. Moretti, 52 N.J. 182, 244 A.2d 499, 504 [cert. den. 393 U.S. 952, 89 S.Ct. 376, 21 L.Ed.2d 363] the court stated that when the phrase "lawful justification," as used in a statute prohibiting abortions done maliciously or without lawful justification, is confined "to the preservation of the mother's life," the statute is not subject to constitutional attack on the ground of vagueness. (See also State v. Elliott, 234 Or. 522, 383 P.2d 382, 384–385.)

The proper test as to certainty was stated by this court in People v. Howard, 70 A.C. 659, 665, 75 Cal. Rptr. 761, 764, 451 P.2d 401, 404, to be: " 'A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language. As stated in Pacific Coast Dairy v. Police Court, 214 Cal. 668, at page 676, 8 P.2d 140, 143, 80 A.L.R. 1217, "Mere difficulty in ascertaining its meaning, or the fact that it is susceptible of different interpretations will not render it nugatory. Doubts as to its construction will not justify us in disregarding it." [Citation.]' "

The meaning of the phrase "necessary to preserve [the woman's] life" was considered in People v. Ballard, 167 Cal. App. 2d 803, 814–815, 355 P.2d 204, 212, wherein the court stated, "Surely, the abortion statute (Pen. Code, § 274) does not mean by [this phrase] that the peril to life be imminent. It ought to be enough that the dangerous condition 'be potentially present, even though its full development might be delayed to a greater or less extent. Nor was it essential that the doctor should believe that the death of the patient would be otherwise *certain* in order to justify him in affording present relief.' (State v. Dunklebarger, 206 Iowa 971, 221 N.W. 592, 596; see also Rex v. Bourne, 1 K.B. 687 * * *; Commonwealth v. Wheeler, 315 Mass. 394, 53 N.E.2d 4; 23 So. Cal. L. Rev. 523.) In State v. Powers * * * 155 Wash. 63, 67, 283 P. 439, 440, the court satisfied itself with an interpretation of 'necessity to save life' by stating, *'If the appellant in performing the operation did something which was recognized and approved by those reasonably skilled in his profession practicing in the same community * * * then it cannot be said that the operation was not necessary to preserve the life of the patient.'* " (Italic added.) (See also People v. Abarbanel, 239 Cal. App. 2d 31, 34, 48 Cal. Rptr. 336; People v. Ballard, 218 Cal. App. 2d 295, 307, 32 Cal. Rptr. 233.)

Amici for appellant, 178 deans of medical schools, state that the italicized sentence quoted from People v. Ballard, *supra*, 167 Cal. App. 2d 803, 814–815, 335 P.2d 204, is in error because "the medical profession has 'approved' abortions in cases [in which the objective was not to preserve the life of the woman and therefore] clearly outside of Penal Code section 274. Packer & Gampell, Therapeutic Abortion: A Problem in Law and Medicine, 11 Stan.L.Rev. 417, 447. * * *" However, that sentence must be understood to mean recognized and approved by such persons as being required to preserve the life of the patient.

The word "preserve" is defined in the dictionary as "1. To keep or save from injury or destruction; * * * to protect; save. 2. To keep in existence or intact; * * * To save from decomposition * *." (See Webster's New Internat. Dict. (3d ed. 1961).) As used in section 274, the word "preserve" has been regarded as synonymous with "save" (see, e.g., People v. Kutz, 187 Cal.App.2d 431, 436, 9 Cal. Rptr. 626; People v. Malone 82 Cal.App.2d 54, 59, 185 P.2d 870; Stern v. Superior Court, 78 Cal.App.2d 9, 18, 177 P.2d 308), and to save a life ordinarily is understood as meaning to save from destruction i.e. dying—not merely from injury. Thus the precipitation of a psychosis in the absence of a genuine threat of suicide is not a threat to life under section 274. (See Packer and Gampell, Therapeutic Abortion: A Problem in Law and Medicine, 11 Stan. L. Rev. 417, 433, 436.)

That the Legislature used the word "preserve" in the sense of save from destruction also appears from the purpose of the section. The law historically in various contexts has regarded the unborn child as a human being (See Louisell, Abortion, The Practice of Medicine, and the Due Process of Law, 16 U.C.L.A. L Rev. 233, 234–244.) Louisell (at p. 244) quotes from Prosser on Torts (3d ed. 1964) that "[M]edical authority has recognized long since that the child is in existence from the moment of conception, and for many purposes its existence is recognized by the law. The criminal law regards it as a separate entity, and the law of property considers it in being for all purposes which are to its benefit, such as taking by will or descent. * * * All writers who have discussed the problem have joined * * * in maintaining that the unborn child in the path of an automobile is as much as person in the street as the mother." In Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, 538 [cert. den. 377 U.S. 985, 84 S.Ct. 1894, 12 L.Ed.2d 1032] it was held that an unborn child of a woman who did not wish blood transfusions because they were contrary to her religious convictions was entitled to the law's protection and that an order would be made to insure such transfusions to the mother in the event they are necessary in the opinion of the attending physician.

Several statutes show that the California law has been in accord in regarding the unborn child as a human being for various purposes. (See, e. g., Pen.Code, §§ 3706 and 270; Civ.Code, § 29.)[18] In Scott v. McPheeters, 33 Cal.App.2d 629, 634, 92 P.2d 678, 681, the court declared: "The respondent asserts that the provisions of section 29 of the Civil Code are based on a fiction of law to the effect that an unborn child is a human being separate and distinct from its mother. We think that assumption of our statute is not a fiction, but upon the contrary that it is an established and recognized fact by science and by everyone of understanding."

It is reasonable to believe that section 274, as it read at the time in question, was not an exception to the law's attitude respecting the unborn child as a human being and that it was designed to protect not only the mother's life but also that of the child. In view of that purpose it would appear that the Legislature intended that the child would be deprived of his right to life only if in the absence of an abortion there was a danger of the mother's death—not merely of injury to her.

" '[T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices * * * .' United States v. Petrillo, 332 U.S. 1, 7–8, 67 S.Ct. 1538, 91 L.Ed. 1877." (Roth v. United States, 354 U.S. 476, 491, 77 S.Ct. 1304, 1312, 1 L.Ed.2d 1498.) The phrase in question, when applied according to the standard heretofore stated (namely, whether persons reasonably skilled in their profession practicing in the same community recognized and approved the act as being required to save the patient from dying) clearly gives such warning.

Furthermore, section 274 punishes only those who act with " '* * * the intent to

Footnotes at end of article.

commit a criminal abortion, that is, an abortion for a purpose other than to preserve [i.e. save from destruction] the life of the mother.' " (People v. Abarbanel, *supra,* 239 Cal. App. 2d 31, 34–35, 48 Cal. Rptr. 336, 339; People v. Ballard, *supra,* 167 Cal. App. 2d 803, 817, 335 P.2d 204.) The requirement of such an intent eviscerates much of the majority's claim that the section is impermissibly vague. (See generally Mishkin v. New York, 383 U.S. 502, 507, fn. 5, 86 S.Ct. 958, 16 L.Ed.2d 56; Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 342, 72 S.Ct. 329, 96 L.Ed. 367.) A person who performs an abortion with such an intent has fair warning that his conduct may violate the law even though he may not be certain where the jury will draw the line on the matter of necessity.

The principal cases relied upon by the majority, in which statutes have been declared unconstitutionally vague, do not support such a finding when applied to the abortion statute. In People v. McCaughan, 49 Cal. 2d 409, 317 P.2d 974, the statute prohibited, among other conduct, "harsh" or "unkind" treatment of a mentally ill person. These words were held not to have an established meaning either at common law or as a result of adjudication. They were held unconstitutionally vague. On the other hand, the phrase "neglect of duty" and the word "cruel" were upheld because they did have such well established meanings, just as do the words utilized in the phrase under attack here.

Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888, construed a statute defining "gangster" and making it a crime for anyone to be such a person. The phrase "consisting of two or more persons" was all that purported to define "gang," and the word "gang" was held so vague and uncertain as to violate the Fourteenth Amendment.

Connally v. General Const. Co., 289 U.S. 385, 395, 46 S.Ct. 126, 128, 129, 70 L.Ed. 322, involved a statute requiring a contractor to pay his employees "not less than the *current rate of* * * * *wages* in the *locality* where the work is performed," and the court held the italicized words unconstitutionally vague. Unlike the statute involved here, the statute in question was a new statute and the court noted that its application "depends, not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition * * *."

In contrast to these cases, here the challenged statute has a fixed meaning, frequently applied and impliedly interpreted by the courts in the more than one hundred years of its existence. In addition, the statute requires proof of the specific intent to commit a criminal abortion before a person may be successfully prosecuted under it.

There is, of course, a presumption in favor of constitutionality, and the invalidity of a legislative act must be clear before it can be declared unconstitutional. (In re Anderson, 69 Cal.2d 613, 628, 73 Cal.Rptr. 21, 447 P.2d 117.)

The majority cite no authority holding that the term "necessary to preserve [the woman's] life" is impermissibly vague, and I agree with the conclusion as to the constitutionality of the section that is implicit in the multitude of past decisions affirming convictions for illegal abortion, and for murder where death was the result of such an act.

I would affirm the judgment.

McCOMB and SULLIVAN, JJ., concur.

SULLIVAN, Justice (dissenting).

I concur in the views of Justice BURKE. Reading the majority's attack on Penal Code section 274, one would think that the English language which has been the sensitive instrument of our system of law for over 500 years, has lost, by the mere passage of time, all capacity for clarity of expression. The majority strike down the statute solely because they find so vague and uncertain as to offend constitutional standards of due process, a single brief clause of nine words of long and common usage: "unless the same is necessary to preserve her life." There is no mystique enveloping the statute and, as Justice BURKE points out, the clause now challenged has stood the test of over a hundred years, and presumably of countless human incidents falling within its scope, apparently without evoking a single whimpering cry against it.

The mandate of the section is plain and clear, and simply means this: no one shall intentionally procure the miscarriage of a woman unless it is necessary to save her life. "The criminal intent necessary to support a conviction of illegal abortion must show that it was performed for a purpose other than to save [the abortee's] life." (People v. Abarbanel (1965) 239 Cal.App. 2d 31, 34, 48 Cal. Rptr. 336, 338). I dare say that the average man in the street, confronted with this law, would have little trouble in extracting its sense (we hold him accountable to much more complicated enactments); and the doctor, with his professional training and expertise would have even less. We have said that "[i]t is a cardinal rule, to be applied to the interpretation of particular words, phrases, or clauses in a statute or a Constitution, that the entire substance of the instrument or of that portion thereof which has relation to the subject under review should be looked to in order to determine the scope and purpose of the particular provision therein of which such words, phrases, or clauses form a part, and in order also to determine the particular intent of the framers of the instrument in that portion thereof wherein such words, phrases, or clauses appear." (Wallace v. Payne (1925) 197 Cal. 539, 544, 241 P. 879, 881). In the case before us, the challenged clause when so examined, is clear in meaning.

Yet the majority, by engaging in a process of elaborate and lavish analysis, transform that which is simple and lucid into something complex and arcane. Actually the analysis is focused on only three words: "necessary to preserve." Their fair equivalent is "necessary to save" (see People v. Abarbanel, *supra,* 239 Cal. App.2d 31, 34, 48 Cal. Rptr. 336; People v. Ballard (1959) 167 Cal.App.2d. 803, 814, 817, 335 P.2d. 204). Rather than evaluate these words in the light of "the entire substance" (see Wallace v. Payne, *supra* 197 Cal. 539, 544, 241 P. 879), the majority resort to a dissection: "There is, of course, no standard definition of 'necessary to preserve', and taking the words separately, no clear meaning emerges." (Majority opn., p. 358.) In support of this thesis, it is asserted that the word "necessary" does not have a "fixed meaning." In general, few words do.[19] It is further insisted that the definition of "preserve" is "even less enlightening." Accordingly, the majority discard its obvious meaning, that is, "save," as used in the context "to save a life." From such analysis, the opinion concludes "that the term 'necessary to preserve' in section 274 of the Penal Code is not susceptible of a construction that does not violate legislative intent and that is sufficiently certain to satisfy due process requirements without improperly infringing on fundamental constitutional rights." (Majority opn., p. 357) Actually the gist of this is that the three words "necessary to preserve" are so shrouded in darkness that the average man cannot detect what they mean although average men and men above average have had no trouble with them for a hundred years.

I cannot accept so tortured a conclusion, wrenched from a statute which has had its roots in the law's historic solicitude for the priceless gift of life. The statute plainly prohibits an abortion unless it is necessary to save the mother's life. It strains reason to say that this crystal-clear exception to the law is "so vague that men of common intelligence must necessarily guess at its meaning * * *." (Lanzetta v. New Jersey (1939) 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888—see majority opn., p. 357.) And it strains credulity to assume that this defendant, who under the evidence wilfully violated the statute, had to engage in any such guesswork with respect to the law governing his conduct.

I would affirm the judgment.

McCOMB, J., concurs.

Rehearing denied; McCOMB, BURKE and SULLIVAN, JJ., dissenting.

PIERCE, J., sitting pro tem, in place of MOSK, J., who deemed himself disqualified.

FOOTNOTES

[1] Stats. 1850, ch. 99, § 45, at p. 233: "[E]very person who shall administer or cause to be administered or taken, any medicinal substances, or shall use or cause to be used any instruments whatever, with the intention to procure the miscarriage of any woman then being with child, and shall be thereof duly convicted, shall be punished by imprisonment in the State Prison for a term not less than two years, nor more than five years: *Provided,* that no physician shall be affected by the last clause of this section, who, in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life."

[2] Penal Code, section 274, as amended reads: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, * * * *except as provided in the Therapeutic Abortion Act * * * of the Health and Safety Code,* is punishable by imprisonment in the state prison * * *." (Stats. 1967, ch. 327, § 3, at p. 1523; italics added.)

The Therapeutic Abortion Act (Health & Saf.Code. §§ 25950–25954) authorizes abortions "only" if the abortion takes place in an accredited hospital (§ 25951, subd. (a)); the abortion is approved by a hospital staff committee consisting of at least three licensed physicians and surgeons (§ 25951, subd. (b)); and there is "substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother" (§ 25951, subd. (c) (1)); the pregnancy resulted from rape or incest (§ 25951, subd. (c) (2)); or the woman is under 15 years of age (§ 25952, subd. (c)).

[3] Compare United States v. Harriss (1954) 347 U.S. 612, 634, 74 S.Ct. 808, 820, 98 L.Ed. 989 (dissenting opinion): "Whoever kidnaps, steals, kills, or commits similar acts of violence upon another is bound to know that he is inviting retribution by society, and many of the statutes which define these long-established crimes are traditionally and perhaps necessarily vague."

[4] The definitions suggested by the two *Ballard* cases and by *Abarbanel* will be discussed later in this opinion.

[5] Dr. Belous' standing to raise this right is unchallenged. (Cf. Griswold v. Connecticut (1965) 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed.2d 510; Barrows v. Jackson (1953) 346 U.S. 249, 257, 73 S.Ct. 1031, 97 L.Ed. 1586; Parrish v. Civil Service Commission, 66 Cal. 2d 260, 264, 57 Cal.Rptr. 623, 425 P.2d 223.)

[6] E.g., The maternal death rate in 1966 was 0.5 per 100,000 population and 29.1 per 100,000 births. Statistical Abstract of the United States (1968) table 73, at p. 58, table 68, at p. 55.) In California in 1966 the maternal death rate was 2.1 per 10,000 live births. (California Statistical Abstract (1968) table E–3, at p. 67.) As to a particular pregnant woman the risk of death may be greater or lesser.

[7] C. Tietze & H. Lehfeldt, Legal Abortion in Eastern Europe (April 1961) 175 J.A.M.A. 1149, 1152; see also V. Kolblova, Legal Abor-

tion in Czechoslovakia (April 1966) 196 J.A.M.A. 371; K. H. Mehland, Combatting Illegal Abortion in the Socialist Countries of Europe (1966) 13 World Med.J. 84. There are, of course, no comparable data in the United States. However, in California from November 1967 through September 1968, 3,775 therapeutic abortions were reported without a maternal death. (See Annual Report on the Implementation of the Therapeutic Abortion Act, Department of Public Health, Bureau of Maternal and Child Health (January 1969), table 1.)

The only data contrary to the conclusions above is provided by amicus for respondent, relying on Swedish data showing that maternal mortality from giving birth. The Swedish figures are, however, explainable by the fact that abortions in Sweden are often performed during late pregnancy. (See Tietze & Lehfeldt, *supra*, 175 J.A.M.A. 1149, 1152 (e.g., in 1949, 35 percent of Swedish abortions were performed after the first trimester); Hoffmeyer, Medical Aspects of the Danish Legislation on Abortions (1965) 17 W.Res.L.Rev. 529, 544–545.)

[8] The phrases "criminal abortion" and "illegal abortion" are used by the medical profession—and by legal commentators—to encompass all abortions obtained other than from a physician in an accepted surgical environment. Any use of the phrase "criminal abortion" or "illegal abortion" in this opinion merely adopts the common phraseology; no legal conclusion is intended.

[9] There is considerable literature describing the experience of various hospitals with infected abortion. Hospital experience, however, can be assumed to be only the tip of the iceberg. Many badly infected women will be treated at home or in a doctor's office. (Reid, Assessment and Management of the Seriously Ill Patient Following Abortion (March 1967) 199 J.A.M.A. p. 805.) (See, for hospital data, Goodno, Cushner, Molumphey, Management of Infected Abortion (1963) 85 Am.J.Obst. & Gynec. 16 [Baltimore City Hospitals]; Knapp, Platt and Douglas, Septic Abortion (1960) 15 Obst. & Gynec. 344 [The New York Hospital]; Moritz & Thompson, Septic Abortion (1966) 95 Am.J.Obst. & Gynec. 46 [Miami Valley Hospital, Dayton, Ohio]; Stevenson & Yang, Septic Abortion With Shock (1962) 83 Am.J.Obst. & Gynec. 1229 [Detroit Receiving Hospital]; Studdiford & Douglas, Placental Bacteremia: A Significant Finding in Septic Abortion Accompanied by Vascular Collapse (1956) 71 Am.J.Obst. & Gynec. 842 [Bellevue Hospital, New York].)

[10] One of the amici in support of respondent agrees: "There is a substantial risk that abortions performed by persons in unregulated places, will bring injury or even death to the mother."

Authorities recognizing and discussing the tragic health problem created by illegal abortions are legion. (See, e. g., Bates, The Abortion Mill: An Institutional Study (1954) 45 J.Crim.L.C. & P.S. 157; Eastman, Expectant Motherhood (3d ed. 1957) 106 et seq.; Gold, Erhardt, Jacobziner & Nelson, Therapeutic Abortions in New York City: A 20-Year Review (1965) 55 Am.J.Pub.Health 964, 970–971; Guttmacher (ed. 1967) The Case for Legalized Abortion Now; Lader (1966) Abortion; Leavy & Kummer, Criminal Abortion: Human Hardship and Unyielding Laws (1962) 35 So.Cal.L.Rev. 123; Lucas, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes (1968) 46 N.C.L.Rev. 730; Niswander, Medical Abortion Practices in the United States (1965) 17 W.Res.L.Rev. 403).

[11] It has been pointed out that "embryo" is more accurately descriptive than "fetus" in the instant case. Webster's New International Dictionary, *supra*, states: "* * * In mammals * * * *embyro* is applied only to early stages passed within the mother's body; later (in human embrology, usually after the third month of development) the young is called a *fetus*. * * *" (Italics in original.)

[12] Statutes classifying the unborn child as the same as the born child require that the child be born alive for the provisions to apply. (E.g., Civ.Code, § 29 ["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; * * *"]; Prob.Code, § 250 ["A posthumous child is considered as living at the death of the parent."]; Prob.Code, § 255 [An illegitimate child is the heir of his mother, "whether born or conceived."].)

Similarly, cases holding that a child can recover for injuries caused before his birth require that the child be born alive. The interest protected is that of the child; and the right attaches, not to the embryo or fetus, but to the living child. (Scott v. McPheeters, 33 Cal.App.2d 629, 637, 92 P.2d 678, 93 P.2d 562 [child injured at birth can bring action for injuries]; see also, Carroll v. Skloff (1964), 415 Pa. 47, 202 A.2d 9, 11; Tomlin v. Laws (1922) 301 Ill. 616, 134 N.E. 24, 25; Prosser, Law of Torts (3d ed.1964) at p. 356 ["The child, provided that he is born alive, is permitted to maintain an action * * *."].)

Where the embryo or fetus is allowed to assert rights before birth it is the prospective mother or parents who are bringing the action; thus it is their interest that the law protects. (Kyne v. Kyne, 38 Cal.App.2d 122, 127–128, 100 P.2d 806 [action on behalf of unborn child for support and to establish paternity]; People v. Sianes, 134 Cal.App. 355, 357–358, 25 P.2d 487 [criminal action for nonsupport against father of unborn child]; People v. Yates, 113 Cal. App. Supp. 782, 298 P. 961 [same].) Similarly, in those jurisdictions which recognize a cause of action for the loss of an unborn child, it is the parents' "distressing wrong in the loss of a child" that the law has recognized. (Prosser, *supra*, § 56, at p. 357; Torigian v. Watertown News Co. Inc. (1967) 352 Mass. 446, 448, 225 N.E.2d 926.)

In a case involving a pregnant woman who refused a blood transfusion, in ordering the transfusion the court made clear that it was concerned with the woman, rather than the fetus: "* * * Mrs. Jones wanted to live." (Application of President & Directors of Georgetown Col. (1964)) 118 U.S. App. D.C. 90, 331 F.2d 1000, 1009, cert. denied, 377 U.S. 978, 84 S.Ct. 1883, 12 L.Ed.2d 746, but see Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson (1964) 42 N.J. 421, 201 A.2d 537, 538, cert. denied, 377 U.S. 985, 84 S.Ct. 1894, 12 L.Ed.2d 1032, suggesting that an 8-month pregnant woman could be required to have blood transfusions to protect the unborn child.)

Although sections 3705 and 3706 of the Penal Code, which provide for suspending the execution of a pregnant woman, reflect an interest in the unborn child, the sections do not affect any other significant private interests and thus furnish no basis to evaluate the interest protected or to conclude that the embryo or fetus is equivalent to a born child.

[13] One case has held that, for purposes of the manslaughter and murder statutes, human life may exist where childbirth has commenced but has not been fully completed. (People v. Chavez, 77 Cal.App.2d 621, 624, 626, 176 P.2d 92).

[14] The practical aspects of the need to guess at the meaning of the abortion statute is shown by Packer and Gampell, Therapeutic Abortion: A Problem in Law and Medicine (1959) 11 Stan.L.Rev. 417. A questionnaire survey directed to 29 San Francisco Bay Area and Los Angeles hospitals (*id.*, at p. 423) based on hypothetical cases involving pregnant women seeking abortions yielded the following results (*id.*, at p. 444):

Case No.	Authors' evaluation of legality of abortion	Hospital would perform abortion	
		Yes	No
1	Yes	21	1
2	No	10	12
3	No	6	16
4	No	15	7
5	No	8	13
6	No	8	14
7	Yes	17	4
8	No	5	17
9	Probably yes	10	11
10	Maybe	17	4
11	No	1	20

[15] It has been urged that the Therapeutic Abortion Act is unconstitutional because it contains uncertainties similar to those in the repealed statute, because it infringes on the woman's right to choose whether to bear children, and because the act does not expressly permit an abortion where there is a likelihood that a deformed child will be born. Since the act was adopted after the abortion in the instant case, we do not reach the issue of its validity. * Assigned by the Chairman of the Judicial Council.

[16] Section 274 then read: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is *necessary to preserve her life*, is punishable * * *." (Italics added.)

[17] The 1850 statute (ch. 99, § 45, p. 233) provided that every person who did any of the enumerated acts with a specified intent shall be punishable *"Provided*, that no physician shall be affected * * * who, in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life."

[18] Penal Code section 3706 requires that the execution of a death penalty be suspended if the defendant is pregnant and without regard to the stage of pregnancy.

Penal Code section 270 makes punishable a father's wilful failure to provide a minor child with necessary items and provides that "A child conceived but not yet born is to be deemed an existing person is so far as this section is concerned."

Civil Code section 29 provides in part that "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 * * *."

[19] "Words, however, do not have absolute and constant referrents. 'A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry, * * *.' (Pearson v. State Social Welfare Board (1960) 54 Cal.2d 184, 195, 5 Cal.Rptr. 553, 559, 353 P.2d 33, 39.) The meaning of particular words or groups of words varies with the '* * * verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). * * * A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning.' (Corbin, The Interpretation of Words and the Parole Evidence Rule (1965) 50 Cornell L.Q. 161, 187.)" (Pacific Gas & E. Co. v. G. W. Thomas Drayage Etc. Co. (1969) 69 Cal.2d 33, 38, 69 Cal.Rptr. 561, 564, 442 P.2d 641, 644.)

"Words are used in an endless variety of contexts. Their meaning is not subsequently attached to them by the reader but is formulated by the writer and can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words." (Universal Sales Corp. v. Cal. etc. Mfg. Co. (1942) 20 Cal.2d

751, 776, 128 P.2d 665, 679, Traynor, J. concurring.)

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305 F. SUPP. 1032

United States of America v. Milan Vuitch. Crim. Nos. 1043–68, 1044–68.

United States of America v. Shirley A. Boyd. Crim. No. 1587–69.

United States District Court, District of Columbia, Nov. 10, 1969.

Licensed physician and nurse's aide charged with abortion in unrelated cases moved for dismissal of indictments. The District Court, Gesell, J., held that it is within police power of Congress to outlaw abortions that are not performed under qualified licensed practitioner of medicine, but that provision in District of Columbia abortion statute making the inducing of an abortion a felony, unless it is done as necessary for preservation of mother's life or health, is invalid for failure to give that certainty which due process of law considers essential in criminal statute and for impinging constitutional rights of individuals, and that statute was severable and only preservation-of-life-or-health standard would be eliminated.

Motion of physician granted and motion of nurse's aide denied.

William H. Collins, Jr., Asst. U.S. Atty., for the United States.

Joseph Sitnick, Washington, D.C., for Vuitch.

Susan Chalker, Legal Aid Agency, for Boyd.

MEMORANDUM OPINION

Gesell, District Judge.

These cases involve motions to dismiss indictment for abortion brought under Title 22, Sec. 201, of the D.C. Code. Vuitch is a physician licensed in the District of Columbia; Boyd is a nurses's aide. There is no relation between the two except that each defendant has moved to dismiss the indictment on the ground that the District of Columbia abortion statute is unconstitutional. The elaborate briefs, replete with authorities and background materials, have been considered, including the brief amicus of the American Civil Liberties Union. The arguments having been completed today, the Court is prepared to rule from the bench because of the public urgency of the matter.

While there have been many prosecutions under this statute over the years, there are very few decisions interpreting it and none of recent vintage. Apart from the wording of the statute itself there is no significant legislative history giving any indication of the underlying congressional intent, either at the time of enactment or subsequent amendment. As far as can be ascertained, this is the first constitutional challenge of the statute and the issues presented in these motions have not been decided in this jurisdiction. The Court has taken judicial notice of the materials cited in the briefs but they are of such common understanding that they need not be elaborated here in any detail.

The statute in question was originally enacted as part of the District of Columbia Code of 1901 and thereafter re-enacted with only slight modification. It provides in pertinent part:

"Whoever * * * produce[s] an abortion * * * on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned * * *."

A felony penalty of from one to ten years is provided.

Basically the motions attack the statute for vagueness, allege that its practical operation denies equal protection to certain economic and other groups subject to its sanctions and assert a constitutional right of all women, regardless of their circumstances, to determine whether or not they shall bear a child. Constitutional doctrines of recent evolution are referred to by analogy to reinforce the motions.

The statute does not prohibit all abortions. An abortion is permitted where done "as necessary for the preservation of the mother's life or health" and "under the direction of a competent licensed practitioner of medicine." This two-partite exception clearly points up a basic congressional concern with what may broadly be said to be medical factors. The Court has a duty to interpret the statute in a manner consistent with the apparent congressional intent. As the briefs and arguments have emphasized, there are still many health or medical problems created by the varying conditions under which abortions are performed. While there have been many advances in medical knowledge and techniques since 1901, there is nothing before the Court which establishes that abortions may be safely and hygienically performed at various stages of pregnancy except under medical direction. Indeed there is ample evidence, and the parties so assert, that infection and death still often attend clumsy, unskilled terminations of pregnancy performed by non-physicians.

Under these circumstances, it was and still is well within the police power of the Congress to outlaw abortions that are not performed under a "competent", that is, a qualified, licensed, practitioner of medicine.

The true crux of the controversy here concerns the other part of the exception—"as necessary for the preservation of the mother's life or health." It is suggested that these words are not precise; that, as interpreted, they improperly limit the physician in carrying out his professional responsibilities; and that they interfere with a woman's right to avoid childbirth for any reason. The word "health" is not defined and in fact remains so vague in its interpretation and the practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health. While the law generally has been careful not to interfere with medical judgment of competent physicians in treatment of individual patients, the physician in this instance is placed in a particularly unconscionable position under the conflicting and inadequate interpretations of the D.C. abortion statute now prevailing. The Court of Appeals established by such early cases as Peckham v. United States, 96 U.S. App. D.C. 312, 226 F.2d 34 (1955), cert. denied 350 U.S. 912, 76 S.Ct. 195, 100 L.Ed. 800, and Williams v. United States, 78 U.S. App. D.C. 147, 138 F.2d 81, 153 A.L.R. 1213 (1943), that upon the Government establishing that a physician committed an abortion, the burden shifted to the physician to justify his acts. In other words, he is presumed guilty and remains so unless a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health. These holdings, which may well offend the Fifth Amendment of the Constitution, as interpreted in recent decisions such as Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532, 28 L.Ed.2d 57 (1969), and United States v. Gainey, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965), also emphasize the lack of necessary precision in this criminal statute. The jury's acceptance or nonacceptance of an individual doctor's interpretation of the ambivalent and uncertain word "health" should not determine whether he stands convicted of a felony, facing ten years' imprisonment. His professional judgment made in good faith should not be challenged. There is no clear standard to guide either the doctor, the jury or the Court. No body of medical knowledge delineates what degree of mental or physical health or combination of the two is required to make an abortion conducted by a competent physician legal or illegal under the Code. Other uncertainties in the phrase "as necessary for the preservation of the mother's life or health" are discussed and documented in People v. Belous, Cal., 80 Cal.Rptr. 354, 458 P.2d 194 (1969), and need not be repeated here.

Thus the phrase under discussion will not withstand attack for it fails to give that certainty which due process of law considers essential in a criminal statute. Its many ambiguities are particularly subject to criticism for the statute unquestionably impinges to an appreciable extent on significant constitutional rights of individuals.

At common law abortion prior to quickening was not an offense. In fact, abortion did not become a statutory crime in the United States until about 1830. It has repeatedly been held, even under the D.C. statute, that the woman who aborts commits no offense. Thompson v. United States, 30 App. D.C. 352 (1908). There has been, moreover, an increasing indication in decisions of the Supreme Court of the United States that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy. Griswold v. State of Conn., 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), Loving v. Commonwealth of Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed. 2d 1010 (1967). Matters have certainly reached a point where a sound, informed interest of the state must affirmatively appear before the state infringes unduly on such rights. The abortion debate covers a wide spectrum of considerations: moral, ethical, social, economic, legal, political and humanitarian, as well as medical. (*See* Abortion, Tietze & Lewit, Scientific American, January, 1969, Vol. 220, No. 1). But it does not appear to what extent Congress has weighed these matters in establishing abortion policy for the District of Columbia beyond an expression of a clear necessity of placing the matter in the hands of competent doctors.

The question is next presented whether the statute is severable, that is, whether it may be read as outlawing abortions except when performed under the direction of a competent physician, eliminating only the preservation-of-life-or-health standard. Boyd, a non-physician, urges that because of the vagueness of the life-and-health phrase, the entire statute must fall. The Court concludes otherwise. The statute still protects a proper legislative and separate legislative objective if the one factor is stricken and the other allowed to remain. The Court is satisfied that the statute is severable, United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L.Ed.2d 138 (1968), Stewart v. Washington, D.C., 301 F.Supp. 610 (1969), and holds that Congress has constitutionally required that abortions be undertaken only under the direction of a competent physician. Title 2–102, 130 of the D.C. Code governing licensing of the healing arts is not sufficient to protect the congressional purpose of limiting abortions to competent physicians. Even if the Court accepts Boyd's claim to standing under liberal criteria of such cases as Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), and Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), her challenge fails because the statute is severable.

Boyd's further contention that the statute discriminates against the poor and in its present operation denies medical help in city hospitals but is more liberally applied in some private hospitals has considerable support in the sketchy statistics and other data presented. The statute has received differing interpretations in the hospitals. In the light of the Court's ruling, however, there is no reason why the statute cannot henceforth be evenly applied throughout the city in a way which removes the principal basis for existing uncertainty and confusion. National and local policy provides free medical care for the poor. It is legally proper and indeed

imperative that uniform medical abortion services be provided all segments of the population, the poor as well as the rich. Principles of equal protection under our Constitution require that policies in our public hospitals be liberalized immediately. Other contentions advanced by Boyd are without merit in view of the rulings made.

The Court cannot legislate. A far more scientific and appropriate statute could undoubtedly be framed than what remains of the 1901 legislation. The asserted constitutional right of privacy, here the unqualified right to refuse to bear children, has limitations. Congress can undoubtedly regulate abortion practice in many ways, perhaps even establishing different standards at various phases of pregnancy, if informed legislative findings were made after a modern review of the medical, social and constitutional problems presented. The Court ventures the suggestion that Congress should re-examine the statute promptly in the light of current conditions.

The motion of Dr. Milan Vuitch in both cases is granted as to him only. The motion of Shirley A. Boyd is denied. These remarks shall constitute the Court's opinion when transcribed. A prompt appeal to the United States Supreme Court under 18 U.S.C. § 3731 is highly desirable.

Counsel shall submit an appropriate order promptly.

Supreme Court of the United States—
[No. 84.—October Term, 1970]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States, Appellant, v. Milan Vuitch.
April 21, 1971.

Mr. Justice Black delivered the opinion of the Court.*

Appellee Milan Vuitch, a licensed physician, was indicted in the United States District Court for the District of Columbia for producing and attempting to produce abortions in violation of 22 D.C. Code 201. Before trial, the district judge granted Vuitch's motion to dismiss the indictments on the ground that the District of Columbia abortion law was unconstitutionally vague. 305 F. Supp. 1032 (DCDC 1969). The United States appealed to this Court under the Criminal Appeals Act, 18 U.S.C. § 3731. We postponed decision on jurisdiction to the hearing on the merits, 397 U.S. 1061, and requested the parties to brief and argue specified questions on that issue. 399 U.S. 923. We hold that we have jurisdiction and that the statute is not unconstitutionally vague. We reverse.

I

The first question is whether we have jurisdiction under the Criminal Appeals Act to entertain this direct appeal from the United States District Court for the District of Columbia. That Act[1] gives us jurisdiction over direct appeals from district court judgments "in all criminal cases . . . dismissing any indictment where such decision is based upon the invalidity . . . of the statute upon which the indictment is founded." 18 U.S.C. § 3731. The decision appealed from is a dismissal of an indictment on the ground that the District of Columbia abortion law, on which the indictment was based, is unconstitutionally vague. This abortion statute, 22 D.C. Code 201, is an Act of Congress applicable only in the District of Columbia and we suggested that the parties argue whether a decision holding unconstitutional such a statute is appealable directly to this Court under the Criminal Appeals Act. The literal wording of the Act plainly includes this statute, even though it applies only to the District. A piece of legislation so limited is nevertheless a "statute" in the sense that it was duly enacted into law by both Houses of Congress and was signed by the President. And the Criminal Appeals Act contains no language that purports to limit or qualify the term "statute." On the contrary, the Act authorizes government appeals from district courts to the Supreme Court in *"all criminal cases"* where a district court judgment dismissing an indictment is based upon the invalidity of the statute on which the indictment is founded.

An examination of the legislative history of the Criminal Appeals Act and its amendments suggests no reason why we should depart from the Act's literal meaning and exclude D.C. statutes from its coverage. The committee reports and floor debates contain no discussion indicating that the term "statute" does not include statutes applicable only to the District of Columbia.[2] We therefore conclude that we have jurisdiction over this appeal under the Criminal Appeals Act.

Our Brother HARLAN has argued in dissent that we do not have jurisdiction over this direct appeal. He suggests that such a result is supported by the decision in *United States* v. *Burroughs*, 289 U.S. 159 (1933), the policy underlying the Criminal Appeals Act, and the canon of construction that statutes governing direct appeals to this Court should be strictly construed.

It is difficult to see how the *Burroughs* decision lends much force to his argument, since that case held only that the term "district court" in the Criminal Appeals Act did not include the then-existing Supreme Court of the District of Columbia. *Id.*, at 163–164. The dissent goes on to suggest the Act should be construed in light of the Congressional purpose of "avoiding inconsistent enforcement of criminal laws." *Post*, at 12. This purpose would not be served by our refusing to decide this case now after it has been orally argued. In the last several years, abortion laws have been repeatedly attacked as unconstitutionally vague in both state and federal courts with widely varying results. A number of these cases are now pending on our docket. A refusal to accept jurisdiction here would only compound confusion for doctors, their patients, and law enforcement officials. As this case makes abundantly clear, a ruling on the validity of a statute applicable only to the District can contribute to great disparities and confusion in the enforcement of criminal laws. Finally, my Brother HARLAN's dissent also appears to rely on the fact that this Court has never accepted jurisdiction over a direct appeal under the Criminal Appeals Act involving the validity of a District of Columbia statute. *Post*, at 13. Since this Court has never either accepted or rejected jurisdiction of such an appeal, it is difficult to see how the complete absence of precedent in this Court lends any weight whatever to his argument. Neither previous cases nor the purpose behind the Criminal Appeals Act provides any satisfactory reason why the term "statute" should not include those statutes applicable only in the District of Columbia.

One other procedural problem remains. We asked the parties to brief the question whether the Government could have appealed this case to the Court of Appeals for the District of Columbia under 23 D.C. Code 105, and, if so, whether we should refuse to entertain the appeal here as a matter of sound judicial administration. That D.C. Code provision states:

"In all criminal prosecutions the United States . . . shall have the same right of appeal that is given to the defendant. . . ."

The relationship between the Criminal Appeals Act and this Code section was considered in *Carroll v. United States*, 354 U.S. 394, 411, where the Court concluded:

"[C]riminal appeals by the Government in the District of Columbia are not limited to the categories set forth in 18 U.S.C. 3731 [the Criminal Appeals Act], although as to cases of the type covered by that special jurisdictional statute its explicit directions will prevail over the general terms of [23 D.C. Code 105]."

Since we have concluded above that this appeal is covered by the Criminal Appeals Act, it would seem to follow from *Carroll* that the Act's provisions control and no appeal could have been taken to the Court of Appeals. Although *Carroll* seems to be dispositive, it has been suggested that it may now be limited by *United States* v. *Sweet*, 399 U.S. 517 (1970), which contains some language suggesting that the Government may be empowered to take an appeal to the Court of Appeals under 23 D.C. Code 105, even when a direct appeal would be proper here under the Criminal Appeals Act. *Id.*, at 518. We do not elaborate upon that suggestion. We only hold that once an appeal is properly here under the Criminal Appeals Act, we should not refuse to consider it because it might have been taken to another court.

II

We turn now to the merits. Appellee Milan Vuitch was indicted for producing and attempting to produce abortions in violation of 22 D.C. Code 201. That Act provides in part:

"Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years; . . ."

Without waiting for trial, the District Judge dismissed the indictment on the ground that the abortion statute was unconstitutionally vague. In his view, set out substantially in full below,[3] the statute was vague for two principal reasons:

1. The fact that once an abortion was proved a physician "is presumed guilty and remains so unless a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health."

2. The presence of the "ambivalent and uncertain word 'health.'"

In concluding that the statute places the burden of persuasion on the defendant once the fact of an abortion has been proved,[4] the court relied on *Williams* v. *United States*, 138 F. 2d 81 (CADC 1943). There the Court of Appeals for the District of Columbia held that the prosecution was not required to prove as part of its case in chief that the operation was not necessary to preserve life or health. *Id.*, at 81, 83. The court indicated that once the prosecution established that an abortion had been performed the defendant was required "to come forward with evidence which with or without other evidence is sufficient to create reasonable doubt of guilt." *Id.*, at 84. The District Court here appears to have read *Williams* as holding that once an abortion is proved, the burden of persuading the jury that it was legal (*i.e.*, necessary to the preservation of the mother's life or health) is cast upon the physician. Whether or not this is a correct reading of *Williams*, we believe it is an erroneous interpretation of the statute. Certainly a statute that outlawed only a limited category of abortions but "presumed" guilt whenever the mere fact of abortion was established, would at the very least present serious constitutional problems under this Court's previous decision interpreting the Fifth Amendment. *Tot* v. *United States*, 319 U.S. 463 (1943); *Leary* v. *United States*, 395 U.S. 6, 36 (1969). But of course statutes should be construed whenever possible so as to uphold their constitutionality.

The statute does not outlaw all abortions, but only those which are not performed under the direction of a competent, licensed physician, and those not necessary to preserve the mother's life or health. It is a general guide to the interpretation of criminal statutes that when an exception is incorporated in the enacting clause of a stat-

Footnotes at end of article.

ute, the burden is on the prosecution to plead and prove that the defendant is not within the exception. When Congress passed the District of Columbia abortion law in 1901 and amended it in 1953, it expressly authorized physicians to perform such abortions as are necessary to preserve the mother's "life or health." Because abortions were authorized only in more restrictive circumstances under previous D.C. law, the change must represent a judgment by Congress that it is desirable that women be able to obtain abortions needed for the preservation of their lives or health.[5] It would be highly anomalous for a legislature to authorize abortions necessary for life or health and then to demand that a doctor, upon pain of one to ten years' imprisonment, bear the burden of proving that an abortion he performed fell within that category. Placing such a burden of proof on a doctor would be peculiarly inconsistent with society's notions of the responsibilities of the medical profession. Generally, doctors are encouraged by society's expectations, by the strictures of malpractice law and by their own professional standards to give their patients such treatment as is necessary to preserve their health. We are unable to believe that Congress intended that a physician be required to prove his innocence. We therefore hold that under 22 D.C. Code 201, the burden is on the prosecution to plead and prove that an abortion was not "necessary for the preservation of the mother's life or health."

There remains the contention that the word "health" is so imprecise and has so uncertain a meaning that it fails to inform a defendant of the charge against him and therefore the statute offends the Due Process Clause of the Constitution. See, *e.g., Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939). We hold that it does not. The trial court apparently felt that the term was vague because there "is no indication whether it includes varying degrees of mental as well as physical health." 305 F. Supp. 1032, at 1034. It is true that the legislative history of the statute gives no guidance as to whether "health" refers to both a patient's mental and physical state. The term "health" was introduced into the law in 1901 when the statute was enacted in substantially its present form. The House Report[6] on the bill contains no discussion of the term "health" and there was no Senate report. Nor have we found any District of Columbia cases prior to this district court decision that shed any light on the question. Since that decision, however, the issue has been considered in *Doe* v. *General Hospital of the District of Columbia*, 313 F. Supp. 1170 (DCDC 1970). There District Judge Waddy construed the statute to permit abortions "for mental health reasons whether or not the patients had a previous history of mental defects." *Id.*, at 1174–1175. The same construction was followed by the United States Court of Appeals for the District of Columbia in further proceedings in the same case. *Doe* v. *General Hospital of the District of Columbia*, 434 F. 2d 423; 434 F. 2d 427 (CADC 1970). We see no reason why this interpretation of the statute should not be followed. Certainly this construction accords with the general usage and modern understanding of the word "health," which includes phychological as well as physical well-being. Indeed Webster's Dictionary, in accord with that common usage, properly defines health as "the state of being sound in body or mind." Viewed in this light, the term "health" presents no problem of vagueness. Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered.[7]

We therefore hold that properly construed the District of Columbia abortion law is not unconstitutionally vague, and that the trial court erred in dismissing the indictments on that ground. Appellee has suggested that there are other reasons why the dismissal of the indictment should be affirmed. Essentially, these arguments are based on this Court's decision in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). Although there was some reference to these arguments in the opinion of the court below, we read it as holding simply that the statute was void for vagueness because it failed in that court's language to "give that certainty which due process of law considers essential in a criminal statute." 305 F. Supp. 1032, at 1034. Since that question of vagueness was the only issue passed upon by the District Court it is the only issue we reach here. *United States* v. *Borden Co.*, 308 U.S. 188 (1939); *United States* v. *Petrillo*, 332 U.S. 1 (1947); *United States* v. *Blue*, 384 U.S. 251, 256 (1966).

The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

FOOTNOTES

* The Chief Justice, Mr. Justice Douglas, Mr. Justice Stewart, and Mr. Justice White join in Part I of this opinion. The Chief Justice, Mr. Justice Harlan, Mr. Justice White, and Mr. Justice Blackmun join in Part II of this opinion.

[1] The Act states in pertinent part:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision of judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded. . . ." 18 U.S.C. § 3731.

[2] See H. Conf. Rep. No. 8113, 59th Cong., 2d Sess.; H.R. Rep. No. 2119, 59th Cong, 1st. Sess.; H.R. Rep. No. 45 and S. Rep. No. 868, 77th Cong, 1st. Sess.; H. Conf. Rep. No. 2052, 77th Cong., 2d Sess.

[3] The District Judge stated:

"It is suggested that these words [as necessary for the preservation of the mother's life or health] are not precise; that, as interpreted, they improperly limit the physician in carrying out his professional responsibilities; and that they interfere with a woman's right to avoid childbirth for any reason. The word "health" is not defined and in fact remains so vague in its interpretation and the practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health. While the law generally has been careful not to interfere with medical judgment of competent physicians in treatment of individual patients, the physician in this instance is placed in a particularly unconscionable position under the conflicting and inadequate interpretations of the D.C. abortion statute now prevailing. The Court of Appeals established by such early cases as *Peckham* v. *United States*, 96 U.S. App. D.C. 312 (1955), *cert. denied*, 350 U.S. 912, and *Williams* v. *United States*, 78 U.S. App. D.C. 147 (1943), that upon the Government establishing that a physician committed an abortion, the burden shifted to the physician to justify his acts. In other words, he is presumed guilty and remains so unles a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health. These holdings, which may well offend the Fifth Amendment of the Constitution, as interpreted in recent decisions such as *Leary* v. *United States*, 395 U.S. 89 Sup. Ct. 1532, 23 L. Ed. 2d 658 (1965), and *United States* v. *Gainey*, 380 U.S. 63, 85, Sup. Ct. 754, 13 L. Ed. 2d 658 (1965), also emphasize the lack of necessary precision in this criminal statute. The jury's acceptance or nonacceptance of an individual doctor's interpretation of the ambivalent and uncertain word 'health' should not determine whether he stands convicted of a felony, facing ten years' imprisonment. His professional judgment made in good faith should not be challenged. There is no clear standard to guide either the doctor, the jury or the Court. No body of medical knowledge delineates what degree of mental or physical health or combination of the two is required to make an abortion conducted by a competent physician legal or illegal under the Code. . . ." 305 F. Supp. 1032, at 1034.

[4] The trial court also cited *Peckham* v. *United States*, 226 F. 2d 34 (CADC 1955), as dealing with the D.C. abortion law. However, the opinion in that case does not discuss the burden of proof under the statute.

[5] Before 1901 the existing statute allowed abortion only "for the purpose of preserving the life of any woman pregnant . . ." Abert, The Compiled Statutes in Force in the District of Columbia, c. XVI, pp. 158–159 (1894).

[6] H.R. Rep. No. 1017, 56th Cong., 1st Sess.

[7] Our Brother DOUGLAS appears to fear that juries might convict doctors in any abortion case simply because some jurors believe all abortions are evil. Of course such a danger exists in all criminal cases, not merely those involving abortions. But there are well-established methods defendants may use to protect themselves against such jury prejudice: continuances, changes of venue, challenges to prospective jurors on *voir dire*, and motions to set aside verdicts which may have been produced by prejudice. And of course a court should always set aside a jury verdict of guilt when there is not evidence from which a jury could find a defendant guilty beyond a reasonable doubt.

[Supreme Court of the United States—No. 84.—October Term, 1970]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States, Appellant, *v.* Milan Vuitch.

April 21, 1971.

Mr. Justice White, concurring.

I join the Court's opinion and judgment. As to the facial vagueness argument, I have these few additional words. This case comes to us unilluminated by facts or record. The District Court's holding that the District of Columbia statute is unconstitutionally vague on its face because it proscribes all abortions except those necessary for the preservation of the mother's life or health was a judgment that the average person could not understand which abortions were permitted and which were prohibited. But surely the statute puts everyone on adequate notice that the health of the mother, whatever that phrase means, was the governing standard. It should also be absolutely clear that a doctor is not free to perform abortions on request without considering whether the patient's health required it. No one of average intelligence could believe that under this statute abortions not dictated by health considerations are legal. Thus even if the "health" standard were unconstitutionally vague, which I agree is not the case, the statute is not void on its face since it reaches a class of cases in which the meaning of "health" is irrelevant and no possible vagueness problem could arise. We do not, of course, know whether this is one of those cases. Until we do facial vagueness claims must fail. Cf. *United States* v. *National Dairy Corp.*, 372 U.S. 29 (1963).

[Supreme Court of the United States—No. 84.—October Term, 1970]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States, Appellant, *v.* Milan Vuitch.

April 21, 1971.

Mr. Justice Douglas, dissenting in part

While I agree with Part I of the Court's opinion that we have jurisdiction over this appeal, I do not think the statute meets the requirements of procedural due process.

The District of Columbia Code makes it a felony for a physician to perform an abortion "unless the same were done as necessary for the preservation of the other's life or health." 22 D.C. Code 201.

I agree with the Court that a physician—within the limits of his own expertise—would be able to say that an abortion at a particular time performed on a designated patient would or would not be necessary for the "preservation" of her "life or health." That judgment, however, is highly subjective, dependent on the training and insight of the particular physician and his standard as to what is "necessary" for the "preservation" of the mother's "life or health."

The answers may well differ, physician to physician. Those trained in conventional obstetrics may have one answer; those with deeper psychiatric insight may have another. Each answer is clear to the particular physician. If we could read the Act as making that determination conclusive, not subject to review by judge and by jury, the case would be simple, as MR. JUSTICE STEWART points out. But that does such violence to the statutory scheme that I believe it is beyond the range of judicial interpretation so as to read the Act. If it is to be revised in that manner, Congress should do it.

Hence I read the Act, as did the District Court, as requiring submission to court and jury of the physician's decision. What will the jury say? The prejudices of jurors are customarily taken care of by challenges for cause and by preemptory challenges. But vagueness of criminal statutes introduces another element that is uncontrollable. Are the concepts so vague that possible offenders have no safe guidelines for their own action? Are the concepts so vague that jurors can give them a gloss and meaning drawn from their own predilections and prejudices? Is the statutory standard so easy to manipulate that although physicians can make good-faith decisions based on the standard, juries can nonetheless make felons out of them?

The Court said in *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, that a ". . . statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process."

A three-judge court in evaluating a Texas statutory standard as to whether an abortion was attempted "for the purpose of saving the life of the mother" said:

"How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the women threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years?" *Roe v. Wade*, 314 F. Supp. 1217, 1223.

The *Roe* case was followed by a three-judge court in *Doe* v. *Scott*, — F. Supp. —, which struck down an Illinois statute which sanctioned an abortion "necessary for the preservation of a woman's life." And see *People* v. *Belous*, 71 Cal. 2d 954, 458 Pac. 2d 194.

A doctor may well remove an appendix far in advance of rupture in order to prevent a risk that may never materialize. May he do the same under the abortion statute?

May he perform abortions on unmarried woman who want to avoid the "stigma" of having an illegitimate child? Is bearing a "stigma" a "health" factor? Only in isolated cases? Or is it such whenever the woman is unmarried?

Is any unwanted pregnancy a "health" factor because it is a source of anxiety?

Is an abortion "necessary" in the statutory sense if the doctor thought that an additional child in a family would unduly tax the mother's physical well-being by reason of the additional work which would be forced upon her?

Would a doctor be violating the law if he performed an abortion because the added expense of another child in the family would drain its resources, leaving an anxious mother with insufficient budget to buy nutritious food?

Is the fate of an unwanted child or the plight of the family into which it is born relevant to the factor of the mother's "health?"

Mr. Justice Holmes, in holding that "unreasonable" restraint of trade was an adequate constitutional standard of criminality, said in *Nash* v. *United States*, 229 U.S. 373, 377, that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death."

He wrote in a context of economic regulations which are restrained by few, if any, constitutional guarantees.

Where, however, constitutional guarantees are implicated, the standards of certainty are more exacting.

Winters v. *New York*, 333 U.S. 507, 514, 519, held void-for-vagueness a state statute which as construed made it a crime to print stories of crime "so massed as to incite to crime," since such a regulatory scheme trenched on First Amendment rights of the press.

The standard of "sacrilegious" can be used in such accordion-like way as to infringe on religious rights protected by the First Amendment. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 505.

The requirement of a "narrowly drawn" statute when the regulation touches a protected constitutional right (*Cantwell* v. *Connecticut*, 310 U.S. 296, 311; *Thornhill* v. *Alabama*, 310 U.S. 88, 100) is only another facet of the void-for-vagueness problem.

What the Court held in *Herndon* v. *Lowry*, 301 U.S. 242, is extremely relevant here. The ban of publications made to incite insurrection was held to suffer the vice of vagueness:

"The statute, as construed and applied in the appellant's trial, does not furnish a sufficiently ascertainable standard of guilt. . . . Every person who attacks existing conditions, who agitates for a change in the form of government, must take the risk that if a jury should be of opinion he ought to have foreseen that his utterances might contribute in any measure to some future forcible resistance to the existing government he may be convicted of the offense of inciting insurrection. . . . *The law, as thus construed, licenses the jury to create its own standard in each case.*" *Id.*, 261, 262, 263. (Italics added.)

If these requirements of certainty are not imposed then the triers of fact have "a power to invade imperceptibly (and thus unreviewably) a realm of constitutionally protected personal liberties." Amsterdam, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 104 (1960).

Abortion touches intimate affairs of the family, of marriage, of sex, which in *Griswold* v. *Connecticut*, 381 U.S. 479, we held to involve rights associated with several express constitutional rights and which are summed up in "the right of privacy." They include the right to procreate (*Skinner* v. *Oklahoma*, 316 U.S. 535), the right to marry across the color line (*Loving* v. *Virginia*, 388 U.S. 1), the intimate familial relations between children and parents (*Meyer* v. *Nebraska*, 262 U.S. 390; *Levy* v. *Louisiana*, 391 U.S. 68, 71–72). There is a compelling personal interest in marital privacy and in the limitation of family size. And on the other side is the belief of many that the fetus, once formed, is a member of the human family and that mere personal inconvenience cannot justify his destruction. This is not to say that government is powerless to legislate on abortions. Yet the laws enacted must not trench on constitutional guarantees which they can easily do unless closely confined.

Abortion statutes deal with conduct which is heavily weighted with religious teachings and ethical concepts.[1] Mr. Justice Jackson once spoke of the "treacherous grounds we tread when we undertake to translate ethical concepts into legal ones, case by case." *Jordan* v. *De George*, 341 U.S.. 223, 242 (dissenting). The difficulty and danger are compounded when religion adds another layer of prejudice.[2] The end result is that juries condemn what they personally disapprove.

The subject of abortions—like cases involving obscenity[3]—is one of the most inflammatory ones to reach the Court. People instantly take sides and the public, from whom juries are drawn, makes up its mind one way or the other before the case is even argued. The interests of the mother and the fetus are opposed. On which side should the State throw its weight? The issue is volatile; and it is resolved by the moral code which an individual has. That means that jurors may give it such meaning as they choose, while physicians are left to operate outside the law. Unless the statutory code of conduct is stable and in very narrow bounds, juries have a wide range and physicians have no reliable guideposts. The words "necessary for the preservation of the mother's life or health" become free-wheeling concepts, too easily taking on meaning from the juror's predilections or religious prejudices.

I would affirm the dismissal of this indictment and leave to the experts the drafting of abortion laws[4] protecting good-faith medical practitioners from the treacheries of the present law.

FOOTNOTES

[1] "There remains the moral issue of abortion as murder. We submit that this is insoluble, a matter of religious philosophy and religious principle and not a matter of fact. We suggest that those who believe abortion is murder need not avail themselves of it. On the other hand, we do not believe that such conviction should limit the freedom of those not bound by identical religious conviction. Although the moral issue hangs like a threatening cloud over any open discussion of abortion, the moral issues are not all one-sided. The psychoanalyst Erik Erikson stated the other side well when he suggested that 'The most deadly of all possible sins is the mutilation of a child's spirit.' There can be nothing more destructive to a child's spirit than being unwanted, and there are few things more disruptive to a woman's spirit than being forced without love or need into motherhood." VII The Right to Abortion: A Psychiatric View, pp. 218–219 (Group for the Advancement of Psychiatry, 1969).

[2] Mr. Justice Clark recently wrote: "Throughout history religious belief has wielded a vital influence on society's attitude regarding abortion. The religious issues involved are perhaps the most frequently debated aspects of abortion. At the center of the ecclesiastical debate is the concept of 'ensoulment' or 'person-hood,' *i.e.*, the time at which the fetus becomes a human organism. The Reverend Joseph F. Donseel of Fordham University admitted that no one can determine with certainty the exact moment at which 'ensoulment' occurs, but we must deal with the moral problems of aborting a fetus even if it has not taken place. Many Roman Catholics believe that the soul is a gift of God given at conception. This leads to the conclusion that aborting a pregnancy at any time amounts to the taking of a human life and is therefore against the will of God. Others, including some Catholics, believe that abortion should be legal until the baby is

viable, *i. e.*, able to support itself outside the womb. In balancing the evils, the latter conclude that the evil of destroying the fetus is outweighed by the social evils accompanying forced pregnancy and childbirth." Region, Morality and Abortion: A Constitutional Appraisal, 2 Loy. L. Rev. 1, 4 (1969).

[3] I have expressed my views on the vagueness of criminal laws governing obscenity in *Dyson* v. *Stein*, decided February 23, 1971 (dissenting opinion). And see the dissent of Mr. JUSTICE BLACK in *Ginzburg* v. *United States*, 383 U. S. 463, 477.

[4] Clark, *supra* n. 2, at 10–11.

Cf. New York's new abortion law effective July 1, 1970, 39 McKinney's Consol. L. § 125.05:

"An abortional action is justifiable when committed upon a female with her consent by a duly licensed physician (a) under a reasonable belief that such is necessary to preserve her life, or, (b) within twenty-four weeks from the commencement of her pregnancy. A pregnant female's commission of an abortional act upon herself is justifiable when she acts upon the advice of a duly licensed physician (1) that such act is necessary to preserve her life, or, (2) within twenty-four weeks from the commencement of her pregnancy. The submission by a female to an abortional act is justifiable when she believes that it is being committed by a duly licensed physician, acting under a reasonable belief that such act is necessary to preserve her life, or, within twenty-four weeks from the commencement of her pregnancy." And see Hall, The Truth About Abortion in New York, Columbia Forum, Winter 1970, p. 18; Schwartz, The Abortion Laws, 67 Ohio St. Med. J. 33 (1971).

[Supreme Court of the United States—No. 84—October Term, 1970]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States, Appellant, *v.* Milan Vuitch. April 21, 1971.

Mr. Justice Harlan, with whom Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Blackmun join, dissenting as to jurisdiction.

Appellee Vuitch was indicted in the United States District Court for the District of Columbia for violations of 22 D. C. Code 201, the District of Columbia abortion statute. This statute is applicable only within the District of Columbia. On pretrial motion by Vuitch, the indictments were dismissed on the ground that the abortion statute was unconstitutionally vague. The United States appealed directly to this Court under the terms of the Criminal Appeals Act of 1907, 18 U.S.C. § 3731, relying on the provision allowing direct appeal "[f]rom a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded."[1] It is not contested that, but for this provision of the Criminal Appeals Act, the Government would have a right of appeal to the Court of Appeals for the District of Columbia under 23 D. C. Code 105, which provides:

"In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal that is given to the defendant, including the right to a bill of exceptions: *Provided*, That if on such appeal it shall be found that there was error in the rulings of the court during a trial, a verdict in favor of the defendant shall not be set aside."

The Court today—relying on the generic reference to "statutes" and "all criminal cases" in the text of 18 U. S. C. § 3731 and the absence of an express exclusion of statutes applicable only within the District of Columbia—concludes that 18 U. S. C. § 3731 rather than 23 D. C. Code 105 provides the proper appellate route for this case. I must disagree.

I

The historical development of the Government's right to appeal in criminal cases both in the District of Columbia and throughout the Nation is surveyed in *Carrol* v *United States*, 354 U.S. 394 (1957). Section 105 of the D.C. Code was passed in 1901 as § 935 of the Code of 1901. 31 Stat. 1341. Prior to the Criminal Appeals Act of 1907, the Government had no right of appeal in criminal cases outside of the District of Columbia. To remedy this situation, a bill was introduced in the House of Representatives. That bill practically tracked the language of the D. C. statute, and made no provision for direct appeal to this Court. 40 Cong. Rec. 5408. The accompanying House Report described the bill as follows: "The accompanying bill will extend [§ 935] of the code of the District of Columbia to all districts in the United States." H. R. Rep. No. 2119, 59th Cong., 1st Sess., at 2 (1906). That bill passed the House, but the Senate Committee on the Judiciary rejected the House approach of simply extending the provisions of the D. C. appeals statute to the rest of the Nation; the Senate Committee instead substituted a more narrowly drawn measure which enumerated specific substantive categories of criminal cases to be appealable by the Government and allocate jurisdiction over these appeals between the Supreme Court and the then Circuit Courts of Appeals according to the allocation of appellate jurisdiction for civil cases established in the Circuit Court of Appeals Act of 1891. S. Rep. No. 3922, 59th Cong., 1st Sess. (1906). See *Carroll* v. *United States*, *supra*, at 402 n. 11. Even that bill as narrowed could not pass the Senate; it provoked extended debate in which the opponents of the measure focused on the potential for abuse of individual rights arising from repeated court proceedings, delays in appeals, and restraints on personal freedom while the Government prosecuted its appeal. See generally *United States* v. *Sission*, 399 U.S. 267 (1970). The upshot of these debates was that Senator Nelson, the bill's floor manager in the Senate, agreed to accept a variety of amendments which further narrowed the categories of the cases appealable by the Government and made special provision for the defendant's release on his own recognizance. See 41 Cong. Rec. 2818–2825.[2]

It is at this point that Senator Clarke of Arkansas offered an amendment limiting the Government's right to appeal decisions dismissing indictments or arresting judgments for insufficiency of the indictment to intances where the decision was based upon "the validity or construction of the statute." The purpose of that amendment was described by Senator Clarke as follows:

"Mr. President, the object of the amendment is to limit the right of appeal upon the part of the General Government to the validity or constitutionality of the statute in which the prosecution is proceeding. It has been enlarged by the addition of another clause, which gives the right of appeal where the construction by the trial court is such as to decide that there is no offense committed, notwithstanding the validity of the statute, and in other respects the proceeding may remain intact. I think that is a broad enough right to concede to the General Government in the prosecution of persons in the court.

* * * * *

"In view of the defects that recent years have disclosed, I do not believe it to be sound policy to go beyond the necessities as they have developed defects in our procedure. A case recently occurring has drawn attention to the fact that if a circuit judge or a district judge holding the circuit should determine that a statute of Congress was invalid, the United States is without means of having that matter submitted to a tribunal that under the Constitution has power to settle that question. I do not believe the remedy ought to be any wider than the mischief that has been disclosed. I do not believe that any additional advantages ought to be given to the General Government in the prosecution of persons arraigned in court, but I do not believe the paragraph ought to be perfected in that behalf, so as to provide that there shall be an appeal to the court having authority to give uniformity to the practice which shall prevail in all the courts of the United States, and that they shall be ready to say, and say promptly, what the statute means and whether or not it is a valid statute.

* * * * *

"So I think this amendment gives expression to the prosposition that the remedy we provide here now should be no wider than the defect that has been disclosed in the preceding criminal procedure; and that is that whenever the validity of a statute has been adversely decided by a trial court, wherever its unconstitutionality has been pronounced by a trial court, the Government ought to have the right to promptly submit that to the tribunal having authority to dispose of such questions in order that there may be a uniform enforcement of the law throughout the entire limits of the United States.

"This is the purpose, I have, Mr. President, and having discussed it with the distinguished Senator from Wisconsin . . . and the distinguished Senator from Minnesota [Mr. Nelson], we agreed that that would probably meet the defect." 41 Cong. Rec. 2819–2820. See generally 41 Cong. Rec. 2819–2822.

The bill as thus amended passed the Senate; the House disagreed to the Senate amendment, but yielded in conference. The bill in conference was amended to provide for direct appeals to the Supreme Court. See H. R. Conf. Rep. No. 8113, 59th Cong., 2d Sess. (1907). No explanation was given in the conference report for the exclusive direct appeal route.

I draw from these legislative materials the following relevant propositions: (1) The Congress was definitely advertent to the existence of a governmental appeal right in criminal cases within the District; (2) the Congress explicitly rejected the simple approach of extending the D.C. provision to the Nation; (3) the particular provision of the Act relied on by the Government as supporting its direct appeal in this case was amended with a view to limiting its reach to a relatively precise defect; *i.e.*, the debilitating effect on the enforcement of criminal laws arising from conflicting judicial interpretations; and (4) the substitution of an exclusive direct appeal to this Court, while not expressly explained, is perfectly compatible with the goal of promptly achieving uniformity in construction of statutes applicable nationwide, while at the same time being wholly unnecessary to the resolution of conflicting district court constructions of local D.C. statutes, given the existence of a right of appeal to the Court of Appeals for the District of Columbia.

II

The question of overlap between the appellate routes available to the Government in criminal cases under the D.C. Code and 18 U.S.C. § 3731 was first dealt with by this Court in *United States* v. *Burroughs*, 289 U.S. 159 (1933). In *Burroughs* the defendants were indicted in the then Supreme Court of the District of Columbia for violation of the Federal Corrupt Practices Act, a statute of nationwide applicability. They successfully

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Footnotes at end of article.

demurred on two grounds: one involving the construction of the statute, and the other involving the sufficiency of the indictment as a pleading. The Government took an appeal to the Court of Appeals for the District of Columbia under the D.C. appeals statute. The appellate court certified to this Court the question whether it had jurisdiction over an appeal where a § 3731-type challenge was joined with a challenge to the sufficiency of the indictment as a pleading. The Court disposed of the question by holding that the Criminal Appeals Act is inapplicable to any criminal case appealable under the provision of the D.C. Code:

"The Criminal Appeals Act, in naming the courts from which appeals may be taken to this court, employs the phrase 'district courts;' not 'courts of the United States,' or 'courts exercising the same jurisdiction as district courts.' We need not, however, determine whether the statute should be construed to embrace criminal cases tried in the Supreme Court of the District if § 935 of the District Code were not in effect. That section deals comprehensively with appeals in criminal cases from all of the courts of first instance of the District and confers on the Court of Appeals jurisdiction of appeals by the Government seeking review of the judgments of those courts. The Criminal Appeals Act, on the other hand, affects only certain specified classes of decisions in district courts, contains no repealing clause, and no reference to the courts of the District of Columbia or the territorial courts, upon many of which jurisdiction is conferred by language quite similar to that of the Code of Law of the District. We cannot construe it as impliedly repealing the complete appellate system created for the District of Columbia by § 935 of the Code, in the absence of expression on the part of Congress indicating that purpose. Implied repeals are not favored; and if effect can reasonably be given to both statutes, the presumption is that the earlier is intended to remain in force. . ." 289 U. S., at 163–164.[3]

The holding in *Burroughs* established a complete separation of the two statutory schemes for Government appeals in criminal cases; the essence of the Court's rationale was a presumption against implied repeals.

In 1942, Congress amended the Criminal Appeals Act to provide for Government appeals to the Courts of Appeals from all decisions dismissing indictments or arresting judgments of convictions except where a right of direct appeal to this Court exists. 56 Stat. 271. The new amendment expressly included the United States Court of Appeals for the District of Columbia as one of the intermediate appellate tribunals to which the Government could appeal;[4] in addition, the Act added a new provision to the Judicial Code establishing appellate jurisdiction in the then circuit courts of appeal "in criminal cases on appeals taken by the United States in cases where such appeals are permitted by law." 56 Stat. 272. The latter provision also expressly incorporated the United States Court of Appeals for the District of Columbia.[5] *Ibid.*

The legislative history of the 1942 amendment offers no explication of Congressional intent in including the D.C. courts within the Act.[6] It is certain that this amendment generates some form of overlap between the two statutory schemes for Governmental appeals in criminal cases. In *Carroll* v. *United States*, 354 U.S. 394, 411 (1957), the Court recognized the new situation created by the 1942 amendment:

"It may be concluded, then, that even today criminal appeals by the Government in the District of Columbia are not limited to the categories set forth in 18 U.S.C. § 3731, although as to cases of the type covered by that special jurisdictional statute, its explicit directions will prevail over the general terms of [the D.C. statute] . . ."

That, however, leaves open the question which cases come within the categories set forth in 18 U.S.C. § 3731.

III

After this Court's holding in *Burroughs*, it was clear that if Congress wished to effectuate any displacement of the pre-1907 route for Government appeals of criminal cases within the District of Columbia, some express manifestation of its intent was required. The 1942 amendment followed the *Burroughs* decision . . . Since Congress then acted to create some overlap between the two statutes without further limiting the categories of directly appealable criminal cases, it may be argued that we should presume Congress intended, as of 1942, to embrace within the very special appeals procedures of 18 U.S.C. § 3731 criminal cases based upon statutes applicable only within the District.

But that presumption from a completely silent legislative record flies in the face of the principle that statutes creating a right of direct appeal to this Court should be narrowly construed. Cf. *Swift & Co. v. Wickham*, 382 U.S. 111, 128–129 (1965); *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 92–93 (Frankfurter, J., dissenting). And, in light of the legislative history of the 1907 Act and this Court's explicit holding in *Burroughs* that the 1907 Act had no impact on cases appealable under the D.C. provision, it is especially inappropriate to rely on the absence of any further limiting language in the 1942 amendment as a justification for reading the term "statute" as encompassing criminal prosecutions in the District based on local as well as nationwide statutes.

The legislative history of the 1907 Act suggests a perfectly plausible reason for interpreting the language "based upon the invalidity or construction of the statute" as excluding D.C. statutes: that language was put in the Act by Senator Clarke with the express intention of limiting the Act's goal to remedying the precise defect of inconsistent enforcement of criminal statutes arising from the lack of a Government appeal. The Court of Appeals for the District of Columbia constitutes a perfectly adequate appellate tribunal for resolving conflicting interpretations given local statutes by judges within the District of Columbia.[7] Where, however, the Government brings a prosecution in the District of Columbia based on a statute of nationwide applicability, the Court of Appeals for the District of Columbia cannot achieve uniformity in the enforcement of the statute.

As an original proposition, then, a construction of the relevant provisions of the 1907 Act as excluding criminal cases in the District brought under local statutes but including cases brought under nationwide statutes would have been consistent both with the express purpose of Senator Clarke's amendment and the canon of strict construction as applied to direct appeals statutes.[8] But the Court in *Burroughs* too the position that Congress could not displace the pre-existing appellate route to any extent without indicating an express intent to do so; *Burroughs*, significantly involved a prosecution under a statute of nationwide applicability. Subsequently, Congress did expressly indicate an intent to displace the alternative appellate route available within the District. The extent of that displacement, I think, should now be measured by the express goal of the relevant provision of the 1907 Act, as limited by Senator Clarke: avoidance of inconsistent enforcement of criminal laws. That theory of legislative purpose—combined with the *Burroughs* holding that Congress should be required to affirmatively indicate an intent to displace the prior appellate route—yields an interpretation of the 1907 Act as amended in 1942 which is consistent with the canon of strict construction generally applied to direct appeals statutes.[9]

IV

I have little doubt that, had the Criminal Appeals Act not been recently amended to dispense with direct appeals to this Court, see n. 1 *supra*, the interpretation of the Act I have suggested would be adopted by the Court. This Court has never taken jurisdiction over a direct appeal from a dismissal of a prosecution brought in the District of Columbia for violation of a statute applicable within the District. It is worth noting that, given the Court's adherence to the principles of *Carroll* v. *United States*, *supra*, the rather absurd waste of our judicial resources on cases such as *United States* v. *Waters*, 175 F. 2d 340, appeal dismissed on motion of the United States, 335 U.S. 869 (1948), and *United States* v. *Sweet*, 399 U.S. 517 (1970), see n. 7 *supra*, could not even be avoided by the exercise of governmental discretion in choosing appellate routes. In light of *Carroll*, I cannot believe that a perfectly acceptable reading of congressional purpose underpinning the definition of categories of cases directly appealable under 18 U.S.C. § 3731 which excludes statutes applicable only within the District of Columbia would have been turned down by the Court.

Of course, the recent elimination of the direct appeal route removes a great deal of the incentive to continue the stringent standards of construction with respect to this statute that have traditionally prevailed in this Court. Indeed, at this stage of the game, the canon of strict construction produces the ironic result of compelling a relatively greater expenditure of judicial energies in assessing our jurisdiction over the remainder of the criminal cases pending in the district courts of the Nation at the time of the most recent amendment than would be involved in deciding those cases on the merits. Nonetheless, this very Term we have indicated that we intend to adhere to the rules of construction evolved by this Court during the long and tortuous history of this statute. *United States* v. *Weller*, No. 77, October Term 1970 (decided February 24, 1971).

The only response we offered to the reading of congressional purpose I have suggested is that the interests of avoiding inconsistent enforcement of criminal laws argues for exercising jurisdiction over this case because similar statutes in other jurisdictions are under attack on vagueness grounds. See the Court's opinion, at [3]. Surely those of my Brethren who subscribe to the views on jurisdiction expressed in the opinion of the Court must recognize that we cannot limit the category of appealable cases under this provision of the Act to prosecutions brought under D.C. statutes which are (a) duplicated in other jurisdictions, and (b) under attack on similar federal question grounds in other jurisdictions. The proffered response is, therefore, not truly a reason for concluding we have jurisdiction over the relevant category of cases; rather, it is a reason for exercising our power in this one case to settle Dr. Vuitch's vagueness claim in spite of the absence of the jurisdictional prerequisites which legitimize the exercise of that judicial power.

V

Having concluded that the Government cannot directly appeal the dismissal of the indictment to this Court under the provisions of 18 U.S.C. § 3731, it also follows that we cannot utilize the remand provisions of that statute to reroute the appeal to the Court of Appeals for the District of Columbia. However, we do have jurisdiction to determine our jurisdiction, and, in the analogous three-judge court situation where an alter-

Footnotes at end of article.

native appellate route exists but the statute according this Court direct jurisdiction over the certain appeals includes no remand procedure, this Court has vacated the judgment of the court of original jurisdiction and remanded the case to that court for the entry of a fresh decree from which timely appeal may be taken to the proper appellate tribunal. *Rockefeller* v. *Catholic Medical Center of Brooklyn & Queens*, 397 U.S. 820 (1970). The instant case, of course, is a criminal prosecution, and there is a consideration not present in the three-judge court situation; *i. e.*, the additional anxiety caused the defendant by virtue of the Government's erroneous choice of appellate routes. But, while 18 U.S.C. § 3731 cannot empower us to transfer the case, that statute is still relevant as an expression of congressional policy to save the Government's appeal where an erroneous choice of appellate routes is made, even at the expense of additional anxiety to the defendant. Accordingly, I think the proper disposition of this case would be to vacate the judgment of the District Court and remand the case for the entry of a fresh judgment from which the Government could take a timely appeal to the Court of Appeals for the District of Columbia pursuant to 23 D.C. Code § 105.

VI

Not withstanding the views on jurisdiction expressed above, and speaking only for myself, and not for those of my Brethren who agree with my discussion of the jurisdictional issue in this case, I have concluded, substantially for the reasons set forth in MR. JUSTICE BLACKMUN'S separate opinion, that I should also reach the merits. Accordingly, I concur in Part II of the Court's opinion and the judgment of the Court.

FOOTNOTES

[1] The text of 18 U.S.C. § 3731 was as follows:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof execpt where a direct appeal to the Supreme Court of the United States is provided by this section.

"From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

"The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

"Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

"If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

"If an appeal shall be taken pursuant to this section to any court of appeals which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court."

As noted in *United States* v. *Weller*, No. 77, October Term 1970 (decided Feb. 24, 1971), these provisions were amended by § 14(a) of the Omnibus Crime Control Act of 1970, 84 Stat. 1890 (1971). But cases begun in the District Court before the new statute took effect are not affected. See *United States* v. *Wellar, supra*, at n. 1.

[2] The bill had been amended earlier to require the Government to take an appeal within 30 days. 41 Cong. Rec. 2193–2194.

[3] The Court's opinion characterizes *Burroughs* as having "held only that the term 'district court' in the Criminal Appeals Act did not include the then-existing Supreme Court of the District of Columbia." *Ante*, at [3]. As I read the italicized portion of the above-quoted passage, that is the precise question that the *Burroughs* Court concluded it did *not* have to decide, in light of its holding that the Criminal Appeals Act could not, by implication, effect the repeal of § 935 of the District Code.

[4] These explicit references were subsequently omitted by amendment in 1949, 63 Stat. 97, which altered the language of the statute to conform to the changed nomenclature of the federal courts.

[5] This last provision was an amendment to 28 U.S.C. § 225 (1940 ed.); see 56 Stat. 272 and *Carroll* v. *United States, supra*, at n. 5.

[6] The focus was on the decision to accord the Government a right of appeal to the courts of appeal where no direct appeal to this Court lay. See H.R. No. 45, 77th Cong., 1st Sess. (1941); S. Rep. No. 868, 77th Cong., 1st Sess. (1941).

[7] The Government suggests a construction of the Criminal Appeals Act excluding D.C. statutes would require the Court to exclude other criminal statutes of only limited territorial application, *e.g.*, 18 U.S.C. §§ 1111–1112; (punishing homicide "[w]ithin the special maritime and territorial jurisdiction of the United States"); 18 U.S.C. §§ 1151–1165 regulating offenses within Indian territory). See Gov. Brief, at 15–16. But I would not construe 18 U.S.C. § 3731 as excluding D.C. criminal cases punishable under D.C. statutes because they are of limited territorial application; rather, the point is that given the existence of a prior right of Government appeal, the risks of disuniformity which Senator Clarke described the statute as intended to cure do not exist.

[8] The Government suggests, in its Supplemental Memorandum for the United States, at 6–7, that a construction of the 1907 Act excluding statutes applicable only within the District of Columbia from the scope of the first two provisions leads to the "anomalous consequence" that 18 U.S.C. § 3731 would still allow a direct appeal in a D.C. case where the motion-in-bar provision is concerned. *E.g.*, *United States* v. *Sweet*, 399 U.S. 517 (1970). The alleged "anomaly" would seem to argue for the conclusion that D.C. cases involving the motion-in-bar provision are not directly appealable here, either. Certainly, the Court's disposition in *Sweet* would not foreclose that result.

In any event, the purpose Senator Clarke had in mind in offering his limiting amendment with regard to the first two provisions of 18 U.S.C. § 3731 was rather clearly expressed; that he failed to address himself to the motion-in-bar provision—which, after all, received very little attention in the prolonged debates on the floor of the Senate—hardly justifies an expansive reading of the other provisions of the Act.

[9] The Government relies principally on *Shapiro* v. *Thompson*, 394 U.S. 618, 625 n. 4, as supporting its construction of the generic reference to "statutes" in 18 U.S.C. § 3731 to include statutes applicable only within the District of Columbia. *Shapiro* dealt with 28 U.S.C. § 2282, which requires a three-judge court to hear requests for injunctions against the enforcement of "any Act of Congress" when the ground for the requested relief is the alleged unconstitutionality of the Act. Decisions of such three-judge courts are, under the circumstances set forth in 28 U.S.C. § 1253, directly appealable to this Court. In *Shapiro*, the Court noted at least one prior instance where the Court has taken jurisdiction over a case involving a statute applicable only within the District and then stated: "Section 2282 requires a three-judge court to hear a challenge to the constitutionality of '*any* Act of Congress.' We see no reason to make an exception for Acts of Congress pertaining to the District of Columbia." 394 U.S., at 625 n. 4 (emphasis in original).

The *Shapiro* approach is obviously inappropriate for the present problem. First, despite the Government's assertion to the contrary, see Gov. Brief. at 15, the phrase "*any* Act of Congress" is arguably broader than a generic reference to "statutes." Indeed, the *Shapiro* Court explicitly chose to emphasize the presence of the word "any" in the relevant portion of that statute. Second, while an exercise of jurisdiction in a case where jurisdiction is not challenged is of little precedential value, the Court in *Shapiro* still chose to take note of such a prior case; in the present context, this Court has never taken jurisdiction of a § 3731 appeal involving a statute applicable only within the District.

Third, and most importantly, Congress at the time of the three-judge court Acts altered the principles of both original and appellate jurisdiction for the substantive categories of litigation involved; the new procedural routes reflect crucial considerations of comity between sovereigns and among the branches of the Federal Government. See generally Currie, The Three-Judge Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1 (1964). There is no legislative history supporting the notion that the new procedures were narrowed to alleviate particular defects of inconsistent constitutional interpretation due to the absence of any appellate route for the substantive categories of cases to be included within the Act.

In these circumstances, it is fair to conclude that the principle of strict construction applicable to such statutes must yield to the "inert language" of the statute. Cf. *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 92 (1960) (Frankfurter, J., dissenting).

[Supreme Court of the United States—No. 84.—October Term, 1970]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States, Appellant *v.* Milan Vuitch.

April 21, 1971.

Mr. Justice Stewart, dissenting in part.

I agree that we have jurisdiction of this appeal for the reasons stated in Part I of the Court's opinion.

As to the merits of this controversy, I share at least some of the constitutional doubts about the abortion statute expressed by the District Court. But, as this Court today correctly points out, "statutes should be construed whenever possible so as to uphold their constitutionality." The statute before us can be so construed, I think, simply by extending the reasoning of the Court's opinion to its logical conclusion.

The statute legalizes any abortion performed "under the direction of a competent licensed practitioner of medicine" if "necessary for the preservation of the mother's life or health." Under the statute, therefore, the legal practice of medicine in the District of Columbia includes the performing of abortions. For the practice of medicine consists of doing those things which, in the judgment of a physician, are necessary to preserve a patient's life or health. As the Court says, "whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered."

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

It is true that the statute can be construed in other ways, as MR. JUSTICE DOUGLAS has made clear. But I would give it the reading I have indicated "in the candid service of avoiding a serious constitutional doubt." *United States* v. *Rumely*, 345 U.S. 41, 47.

[Supreme Court of the United States—No. 84.—October Term, 1970]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States, Appellant, *v.* Milan Vuitch.

April 21, 1971.

Mr Justice Blackmun.

Although I join Mr. JUSTICE HARLAN in his conclusion that this case is not properly here by direct appeal under 18 U.S.C. § 3731, a majority, and thus the Court, holds otherwise. The case is therefore here and requires decision.

The five Justices constituting the majority, however, are divided on the merits. One feels that 22 D.C. Code § 201 lacks the requirements of procedural due process and would affirm the dismissal of the indictment. One would hold that a licensed physician is immune from charge under the statute. Three would hold that, properly construed, the statute is not unconstitutionally vague and that the dismissal of the indictment on that ground was error.

Because of the inability of the jurisdictional-issue majority to agree upon the disposition of the case, I feel obligated not to remain silent as to the merits. See *Screws* v. *United States*, 325 U.S 91, 134 (1945) (addendum by Mr Justice Rutledge); *United States* v. *Jorn*, 400 U.S. 470, 487–488 (1971) (statement of BLACK and BRENNAN, JJ.); *Mills* v. *Alabama*, 384 U.S. 214, 222–223 (1966) (separate opinion of HARLAN, J.); *Kesler* v. *Department of Public Safety*, 369 U.S. 153, 174, 179 (concurring opinion of STEWART, J., and dissenting opinion of Warren, C. J.). Assuming, as I must in the light of the Court's decision, that the Court does have jurisdiction of the appeal, I join Part II of Mr. JUSTICE BLACK's opinion and the judgment of the Court.

[United States District Court, E. D. Wisconsin—March 5, 1970]

BABBITZ CASE

Sidney G. Babbitz, M.D., Plaintiff, v. E. Michael McCann, District Attorney of Milwaukee County, F. Ryan Duffy, Jr., Judge of the County Court, Milwaukee County, Defendants.

No. 69–C–548.

A physician brought an action challenging constitutionality of Wisconsin abortion statute and sought injunctive and declaratory judgment relief. A Three-Judge District Court held that Wisconsin statute making it a criminal offense to perform an abortion except a therapeutic abortion which is necessary to save life of mother is not unconstitutionally vague or a denial of equal protection of the laws, but is an unconstitution tional invasion of woman's private right to refuse to carry unquickened embryo during the early months of pregnancy.

Declaratory judgment for plaintiff and injunctive relief denied.

Nathaniel Rothstein, Milton R. Bordow and Roy O. Conen, Milwaukee, Wis., for plaintiff.

E. Michael McCann, Dist. Atty., Milwaukee, Wis., for defendants.

Before Kerner, Circuit Judge, and Reynolds and Gordon, District Judges.

Per Curiam.

The plaintiff is a physician who challenges the constitutionality of the Wisconsin abortion statute. He seeks an injunction restraining the defendants from enforcing a part of Wis. Stat. § 940.04 and a judgment declaring it unconstitutional.

A temporary restraining order was denied by the order of a single-judge district court, 306 F.Supp. 400, and the instant three-judge district court was convened to consider the other issues presented. We hold that portions of the statute are constitutionally invalid, but we decline to enjoin the pending state prosecution of the plaintiff.

The plaintiff is being prosecuted by the district attorney of Milwaukee county for allegedly having performed an abortion in violation of § 940.04, Wis. Stats. The statute provides in part as follows:

"(1) Any person, other than the mother, who intentionally destroys the life of an unborn child may be fined not more than $5,000 or imprisoned not more than 3 years or both.

"(2) any person, other than the mother, who does either of the following may be imprisoned not more than 15 years:

"(a) Intentionally destroys the life of an unborn quick child; or

* * * * *

"(5) This section does not apply to a therapeutic abortion which:

"(a) Is performed by a physician; and

"(b) Is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother; and

"(c) Unless an emergency prevents, is performed in a licensed maternity hospital.

"(6) In this section 'unborn child' means a human being from the time of conception until it is born alive."

The state warrant issued against Dr. Babbitz reads as follows:

"That the above named Defendant on the 6th day of September, 1969, in the County of Milwaukee, Wisconsin, did feloniously destroy the life of an unborn child of one, [woman], said offense occurring at number 231, West Wisconsin Avenue, Milwaukee, Wisconsin, said abortion not being advised by two other physicians as necessary to save the life of [woman], the mother of said child, said information being obtained by sworn testimony of [woman] before the Honorable Christ T. Serpahim, County Judge, acting as magistrate."

The complaint asserts that there is jurisdiction in this court pursuant to 28 U.S.C. § 1343, 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202; we agree with such position.

The complaint charges that the Wisconsin statute is unconstitutional for violating the first and fourteenth amendments of the United States Constitution and for abridging the mother's right of privacy. Dr. Babbitz has not been charged with having destroyed an unborn child which was "quick", and therefore subsections (2) and (2) (a) of the statute quoted above are not applicable in the instant case. There is no allegation that the state officials are acting in bad faith in prosecuting Dr. Babbitz.

I. ABSTENTION

The plaintiff has alleged a deprivation of rights secured by the Constitution, and serious federal questions are raised here concerning the constitutionality of certain portions of the Wisconsin abortion statute. Since the complaint seeks injunctive relief and since the statute in question has state-wide operation, the designation of a three-judge court was appropriate under 28 U.S.C. § 2281.

The request for an injunction raises a threshold problem of abstention. Congress, in 28 U.S.C. § 2283, has stated a strong policy of abstention, as follows:

"Stay of State court proceedings. A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effecuate its judgments."

Except for those rather recent cases which have noted exceptions to the scope of § 2283, the federal courts have generally given the statute literal application. In addition, the policy of abstention has found expression in a long history of judge-made rules of federal judicial forebearance. Mr. Justice Frankfurter's expressions in Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 500–501, 61 S.Ct. 643, 645, 85 L.Ed 971 (1941), typify these court-fashioned rules of abstention:

"Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, Fenner v. Boykin, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927; Spielman Motor Co. v. Dodge, 295 U.S. 89, 55 S.Ct. 678, 79 L.Ed. 1322; or the administration of a specialized scheme for liquidating embarrassed business enterprises, Pennsylvania v. Williams, 294 U.S. 176, 55 S.Ct. 380, 79 L.Ed. 841, 96 A.L.R. 1166; or the final authority of a state court to interpret doubtful regulatory laws of the state, Gilchrist v. Interborough Co., 279 U.S. 159, 49 S.Ct. 282, 73 L.Ed. 652; cf. Hawks v. Hamill, 288 U.S. 52, 61, 53 S.Ct. 240, 77 L.Ed. 690. These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion', restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary."

The abstention policy has also played a role in the development of the law of removal of pending state cases to the federal courts. In City of Greenwood, Miss. v. Peacock, 384 U.S. 808, 828, 86 S.Ct. 1800. 1812, 16 L.Ed.2d 944 (1966), the Supreme Court observed:

"* * * the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court."

The approach to abstention which this policy requires has been followed by many federal courts without any general exception being recognized for cases arising under 42 U.S.C. § 1983. Boyle v. Landry, 422 F.2d 631 (7th Cir. February 5, 1970); Goss v. Illinois, 312 F.2d 257, 259 (7th Cir. 1963); Smith v. Village of Lansing, 241 F.2d 856 (7th Cir. 1957); Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964); Vick v. Schiro, 296 F. Supp. 173 (E.D.La.1969). Cf. Cooper v. Hutchinson, 184 F.2d 119 (3rd Cir. 1950).

One of the reasons underlying this practice of refusing to enjoin pending state prosecutions is particularly apposite to the case at bar. In Stefanelli v. Minard, 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138 (1951), a federal court was petitioned to enjoin the use of illegally seized evidence in a state criminal trial. Denying relief, the Supreme Court said, at page 123, 72 S.St. at page 121–122:

"The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal posecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts."

Notwithstanding the impressive authority which would bar our enjoining the prosecution of Dr. Babbitz, he presses us to issue such an injunction. Perhaps he draws comfort from the fact that the United States Supreme Court has on two separate occasions expressly reserved ruling on the question whether the Civil Rights Act suspends the anti-injunction provisions of § 2283. Cameron v. Johnson, 390 U.S. 611, 614, n. 3, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968); Dombrowski v. Pfister, 380 U.S. 479, 484, n. 2, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).

Also, the plaintiff may arguably find support for his position from expressions by several of the justices of the United States Supreme Court. For example, in Gorun v. Fall, 393 U.S. 398, 399, 89 S.Ct. 678, 679, 21 L.Ed.2d 628 (1969), four members of the Court referred to "our recent decisions saying over and over again that a federal claim in a federal court should be decided by the federal court and not relegated to a state tribunal".

Finally, it may seem somewhat anomalous that a court may find a state statute unconstitutional and yet deny an injunction against its enforcement by the state. In effect, such a ruling might protect all persons from prosecution except the very man who has persuaded us of the statute's unconstitutionality.

Notwithstanding these arguments, we do not believe that the circumstances of this case justify an exception to the oft-repeated and strong policy of federal abstention, especially in a criminal case. The forebearance required under § 2283 is not lifted in the case at bar by the teachings of Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed. 2d 22 (1965). We have already noted that the case at bar does not involve a bad faith enforcement of the abortion statute. In addition, we doubt that the prosecution of Dr. Babbitz has resulted in a chilling of his first amendment rights. A first amendment right is more than a personal right; it is also a public right. When such a right is impinged, the general public is hurt, and the effective functioning of our free society is encumbered.

This may explain why § 2283 is not strictly applied in first amendment cases. We do not accept the plaintiff's claim that his prosecution under the state abortion statute dampened his first amendment rights.

Although the subject of abortion is fraught with highly emotional pressures, we do not find here any "special circumstances" as discussed in Cameron v. Johnson 390 U.S. 611, 618, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968), which would entitle Dr. Babbitz to injunctive action. Cf. Machesky v. Bizzell, 414 F. 2d 283 (5th Cir. 1969); Romero v. Weakley, 226 F.2d 399 (9th Cir. 1955); 80 Harv. L. Rev. 604, 608–9 (1967).

We believe we must apply the standard established in Douglas v. City of Jeanette, 319 U.S. 157, 163, 63 S.Ct. 877, 87 L.Ed. 1324 (1943); there the Supreme Court observed that it was Congressional policy to leave to the state courts the trial of state criminal cases, and that such proceedings should be enjoined only in exceptional circumstances.

We do not regard this as an exceptional case, and Dr. Babbitz is not entitled to injunctive relief. In the event that the state persists in the prosecution of Dr. Babbitz, we have no reason to doubt that the state courts of Wisconsin will fully vindicate his federal constitutional rights. See Zwicker v. Boll, 270 F. Supp. 131 (W.D.Wis.1967) aff'd 391 U.S. 353, 88 S.Ct. 1666, 20 L.Ed.2d 642 (1968); Soglin v. Kauffman, 286 F. Supp. 851 (W.D. Wis. 1968).

Notwithstanding our denial of injunctive relief, a federal court is obliged to weigh separately the issue of declaratory relief. In Zwickler v. Koota, 389 U.S. 241, 254, 88 S.Ct. 391, 399, 19 L.Ed.2d 444 (1967), the Supreme Court held that the federal district court must decide the "merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction". Although it was the application for an injunction which triggered the appointment of this three-judge court under § 2281, we do not understand that the denial of injunction relief precludes us from resolving the declaratory judgment application.

II. VAGUENESS

The plaintiff urges that § 940.04(5), Wis. Stats., is vague and nebulous upon its face. That subsection, quoted above, excepts a therapeutic abortion when it is performed under specified terms. We have examined the challenged phraseology and are persuaded that it is not indefinite or vague. In our opinion, the word "necessary" and the expression "to save the life of the mother" are both reasonably comprehensible in their meaning.

The United States Supreme Court has ruled that a criminal statute must be definite enough to acquaint those who are subject to it with the conduct which will render them liable to its penalties. Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 83, L.Ed. 888 (1939); Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L. Ed. 322 (1926). See also Unconstitutional Uncertainty—An Appraisal, 40 Cornell Law Quarterly, 195, 196 (1955).

We believe that § 940.04(5) sets forth with reasonable clarity and sufficient particularity the kind of conduct which will constitute a violation. Jordan v. De George, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1951); United States v. Ragen, 31 U.S. 513, 62 S.Ct. 374, 86 L.Ed. 383 (1942). In United States v. Wurzbach, 280 U.S. 396, 399, 50 S.Ct. 167, 169, 74 L.Ed. 508 (1930), Mr. Justice Holmes stated:

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

In People v. Belous, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), the California court found that the words "necessary to preserve her life" in that state's abortion statute were unconstitutionally vague.

While the Wisconsin statute uses slightly different language ("necessary to save"), we doubt that the distinction between the words used in the two statutes is significant. However, we do not share the view of the majority in *Belous* that such language is so vague that one must guess at its meaning.

Slightly different langauge was before the court in United States v. Vuitch, 305 F. Supp. 1032 (D.D.C.1969), which invalidated an abortion law. That statute contained the following expression: "necessary for the preservation of the mother's life or health". The court concluded that the word "health" was vague both in interpretation and in practice. That precise problem is not presented under the terms of the Wisconsin statute.

Our reading of the Wisconsin statute persuades us that it meets the test set forth by the United States Supreme Court in *Connally*, cited above, 269 U.S. at page 391, 46 S.Ct. at page 127:

"And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The plaintiff also charges that there is confusion in subsection (6), which provides that the words "unborn child" mean "a human being from the time of conception until it is born alive". The plaintiff may have medical or even practical justification for his disagreement with the correctness of this statutory definition of an unborn child, but he fails in his effort to convince us that the Wisconsin legislature was vague or indefinite in its choice of language.

III. EQUAL PROTECTION OF THE LAWS

The plaintiff contends that the statute denies to him equal protection of the laws as guaranteed by the fourteenth amendment. It is urged that medical facilities are not constant throughout the state and that a doctor in a rural area in Wisconsin might be justified in performing a "necessary" abortion, whereas a doctor treating the same patient in Milwaukee would be unwarranted in performing the abortion because of the availability in Milwaukee of superior medical facilities.

We find more cogency in the argument that a wealthy woman, but not a poor one, is able, upon demand, to secure a safe and legal abortion in Japan or some other locale in which abortion is permitted. We take judicial notice of the fact that there are a number of places throughout the world where legal abortions are available. We have also considered the argument that an affluent woman, unlike the poor one, may enjoy a long-standing, personal relationship with a well-paid physician, who might more likely be willing or able to persuade his fellow doctors to authorize a therapeutic abortion. We are reluctant to equate these types of inequality with a denial of a protected right under the fourteenth amendment. We know of no analogous situations which goes as far as the plaintiff would have us go in applying the fourteenth amendment to the case at bar.

There is presently pending in the United States Supreme Court a challenge to the practice of imposing a jail term upon a defendant who is unable to pay an assessed fine. Williams v. Illinois, 396 U.S. 1036, 90 S.Ct. 689, 24 L.Ed. 2d 680, probable jurisdiction noted January 19, 1969, being an appeal from People v. Williams, 41 Ill.2d 511, 244 NE. 2d 197 (1969). We cannot anticipate that the decision in the *Williams* case will buttress plaintiff's contention that there is a denial of equal protection of the laws implicit within the Wisconsin abortion statute.

IV. INVASION OF PRIVATE RIGHTS

The ninth amendment to the United States Constitution provides:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

An examination of recent Supreme Court pronouncements regarding the ninth amendment compels our conclusion that the state

of Wisconsin may not, in the manner set forth in § 940.04(1) and (5), Wis. Stats., deprive a woman of her private decision whether to bear her unquickened child.

In terms of the Wisconsin statute, we do not purport to decide the question of a woman's aborting a fetus which has already quickened. We received into evidence the view of a gynecologist that a fetus normally becomes quick at about four and a half months after conception. Dorland's Illustrated Medical Dictionary (24th ed. 1965) defines "quick" as "Pregnant and able to feel the fetal movements." "Quickening" is defined as "The first recognizable movements of the fetus in utero, appearing usually from the sixteenth to the eighteenth week of pregnancy." The plaintiff is being prosecuted under § 940.04(1) and (5); he is not being prosecuted under those portions of § 940.04 which relate to the abortion of a quickened child; therefore, the validity of such provisions are beyond the scope of this opinion.

While problems of over-population, ecology and pollution have been brought to our attention, we deem them secondary as decisional factors in a judicial resolution of the issues at hand. So, too, we find it necessary to set aside arguments involving theological and ecclesiastical considerations.

Obviously, there is no topic more closely interwoven with the intimacy of the home and marriage than that which relates to the conception and bearing of progeny. Recent court cases have considered the sanctity of the right to privacy in home, sex and marriage; however, the concept of private rights, with which the state may not interfere in the absence of a compelling state interest, is one of long standing.

As long ago as 1891, in Union Pacific Railway Co. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891), the court said:

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

In Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), the United States Supreme Court held that the private right "to marry, establish a home and bring up children" was protected under the fourteenth amendment as an essential liberty. In Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944), the court spoke of the "private realm of family life which the state cannot enter".

In Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), there was a challenge to the constitutionality of a state statute which purported to restrict marriages solely on the basis of race. While the Supreme Court observed, at page 7, 87 S.Ct. at page 1821, that "marriage is a social relation subject to the State's police power," the court held, at page 12, 87 S.Ct. at page 1824:

"The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."

See also Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); Farrington v. T. Tokushige, 273 U.S. 284, 47 S.Ct. 406, 71, L.Ed. 646 (1927); Pierce v. Society of the Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). See, generally, Warren and Brandeis, "The Right to Privacy," 4 Harv.L. Rev. 193 (1890).

Recent decisions have asserted a judicial application of the ninth amendment to the matter of privacy in marital relations and contraception.

In Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the court struck down the Connecticut statute which forbade the use of contraceptives. In so doing, the Court noted that the Bill of Rights contains both specific and penumbral guarantees which protect an individual from governmental invasion of the sanctity of his home and the privacies of his life. In the words of the Court, at page 485, 85 S.Ct. at page 1682, many decisions by the Supreme Court "bear witness that the right of privacy which presses for recognition here is a legitimate one." Three of the justices in a concurring opinion stated, at page 491, 85 S.Ct. at page 1685:

"To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever."

In People v. Belous, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), the California supreme court invalidated a state statute which made it illegal to perform an abortion on a woman unless it was necessary to preserve her life. The court said, 80 Cal.Rptr. at page 359, 468 P.2d at page 199:

"The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgement of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex."

The Belous court pointed out, 80 Cal.Rptr. at page 360, 458, P.2d at page 200, that although this protected area of privacy is not explicitly stated in the Constitution, it is a fundamental liberty that is implicit in the penumbrae of the Bill of Rights, and is supported, by analogy, in many past decisions.

In United States v. Vuitch, 305 F. Supp. 1032, 1035 (D.D.C. 1969), the court further observed:

"There has been, moreover, an increasing indication in decisions of the Supreme Court of the United States that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy."

Although no final decision has as yet been rendered, a three-judge court has been convened in New York in a case involving the same issues under consideration here. Hall v. Lefkowitz, 305 F. Supp. 1030 (S.D.N.Y. 1969).

In 2 Loyola University Law Review 1, 8 (April, 1969), former Supreme Court Justice Tom C. Clark concluded from a study of *Griswold* and its predecessor cases:

"The result of these decisions is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution."

It is clear that in order to justify the regulation of such fundamental private rights, the state must show a compelling need. In Bates v. City of Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412, 417, 4 L.Ed.2d 480 (1960), the Court stated:

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

The Supreme Court, in *Griswold*, said, 381 U.S. at page 485, 85 S.Ct. at 1682:

"The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' NAACP v. Alabama, 377 U.S. 288, 307, 84 S.Ct. 1302, 1314, 12 L.Ed. 2d 325."

A comparable viewpoint was set forth by the California supreme court in *Belous*, 80 Cal. Rptr. at page 360, 458 P.2d at page 200, where that court said:

"The critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state * * *."

Similarly, in the case at bar, we must decide whether the state of Wisconsin has a sufficiently compelling interest to justify the broad restriction on a woman's inherently personal right that is contained in § 940.04(1) and (5), Wis. Stats.

The defendants urge that the state's interest in protecting the embryo is a sufficient basis to sustain the statute. Upon a balancing of the relevant interests, we hold that a woman's right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the state without a more compelling public necessity than is reflected in the statute in question. When measured against the claimed "rights" of an ambryo for four months or less, we hold that the mother's right transcends that of such an embryo.

We also find no compelling state interest in a need to protect the mother's life. At common law, abortion was not a crime unless the mother was quick with child. People v. Belous, supra, 80 Cal.Reptr. at 358, 458 P.2d at 198. This position was reflected in the original Wisconsin abortion statute, Wis. R.S. 1849, c. 133, § § 10 and 11, enacted in 1849, which only made abortion a punishable offense only if performed upon an unborn quick child. However, in 1858 the abortion statute was revised by elimination of the word "quick," thereby making it an offense to perform an abortion at any time during pregnancy. This change reflected an interest in protecting the life of the mother, for in 1858 any surgical procedure done inside the body was extremely dangerous. Today, many types of surgery, including abortion in the first trimester, are safe and routinely employed medical techniques. People v. Belous, supra, 80 Cal. Rptr. at 360 458 P2d. at 200. Thus, the result of this court's decision that a mother has the right to determine whether to carry or reject an embryo that has not quickened is a return to the common law definition of abortion; this is not a position without well-established precedent in the common law.

We are persuaded that a medical abortion during early pregnancy is not inherently dangerous to the mother. Nor do we find a compelling state interest in connection with the discouragement of non-marital sexual intercourse. The statute involved does not purport to distinguish between married and unmarried women.

We are invited to resolve the philosophical question, raised in some of the amicus curiae briefs, as to when an embryo becomes a child. For the purposes of this decision, we think it is sufficient to conclude that the mother's interest are superior to that of an unquickened embryo, whether the embryo is mere protoplasm, as the plaintiff contends, or a

human being, as the Wisconsin statute declares.

There are a number of situations in which there are especially forceful reasons to support a woman's desire to reject an embryo. These include a rubella or thalidomide pregnancy and one stemming from either rape or incest. The instant statute does not distinguish these special cases, but in our opinion, the state does not have a compelling interest even in the normal situation to require a woman to remain pregnant during the early months following her conception.

Under its police power, the state can regulate certain aspects of abortion. Thus, it is permissible for the state to require that abortions be conducted by qualified physicians. The police power of the state does not, however, entitle it to deny to a woman the basic right reserved to her under the ninth amendment to decide whether she should carry or reject an embryo which has not yet quickened. The challenged sections of the present Wisconsin statute suffer from an infirmity of fatal overbreadth.

V. CONCLUSION

The plaintiff is entitled to a declaratory judgment declaring § 940.04 (1) and (5) violative of the United States Constitution. The plaintiff is not entitled to an injunction enjoining the defendants or their successors in office from prosecuting the plaintiff under § 940.04 (1) and (5).

It is so ordered.

[United States District Court, N. D. Texas, Dallas Division—June 17, 1970]

ROE CASE

Jane Roe, Plaintiff, v. Henry Wade, Defendant, v. James Hubert Hallford, M.D., Intervenor.

John Doe and Mary Doe, Plaintiffs, v. Henry Wade, Defendant.

Civ. A. Nos. 3-3690-B, 3-3691-C.

Action for judgment declaring Texas abortion laws unconstitutional and to enjoin their enforcement. The three-judge District Court held that laws prohibiting abortions except for purpose of saving life of the mother violated right secured by the Ninth Amendment to choose whether to have children and were unconstitutionally overbroad and vague, but Court would abstain from issuing injunction against enforcement of the laws.

Order accordingly.

Linda N. Coffee, Dallas, Tex., Sarah Weddington, Austin, Tex., for plaintiffs.

Fred Bruner, Daugherty, Bruner, Lastelick & Anderson, Ray L. Merrill, Jr., Dallas, Tex., for intervenor.

John B. Tolle, Asst. Dist. Atty., Dallas, Tex., Jay Floyd, Asst. Atty. Gen., Austin, Tex., for defendant.

Before Goldberg, Circuit Judge, and Hughes and Taylor, District Judges.

Per curiam:

Two similar cases are presently before the Court on motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The defendant in both cases is Henry Wade, District Attorney of Dallas County, Texas. In one action plaintiffs are John and Mary Doe, and in the other Jane Roe and James Hubert Hallford, M.D., intervenor.[1]

From their respective positions of married couple, single woman, and practicing physician, plaintiffs attack Articles 1191, 1192, 1193, 1194, and 1196 of the Texas Penal Code,[2] hereinafter referred to as the Texas Abortion Laws. Plaintiffs allege that the Texas Abortion Laws deprive married couples and single women of the right to choose whether to have children, a right secured by the Ninth Amendment.

Defendant challenges the standing of each of the plaintiffs to bring this action. However, it appears to the Court that Plaintiff Roe and plaintiff-intervenor Hallford occupy positions *vis-a-vis* the Texas Abortion Laws sufficient to differentiate them from the general public. Compare Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), and Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965),[3] with Frothingham v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L. Ed. 1078 (1923). Plaintiff Roe filed her portion of the suit as a pregnant woman wishing to exercise the asserted constitutional right to choose whether to bear the child she was carrying. Intervenor Hallford alleged in his portion of the suit that, in the course of daily exercise of his duty as a physician and in order to give his patients access to what he asserts to be their constitutional right to choose whether to have children, he must act so as to render criminal liability for himself under the Texas Abortion Laws a likelihood. Dr. Hallford further alleges that Article 1196 of the Texas Abortion Laws is so vague as to deprive him of warning of what produces criminal liability in that portion of his medical practice and consultations involving abortions.

On the basis of plaintiffs' substantive contentions,[4] it appears that there then exists a "nexus between the status asserted by the litigant[s] and the claim[s] [they present]." Flast v. Cohen, 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

Further, we are satisfied that there presently exists a degree of contentiousness between Roe and Hallford and the defendant to establish a "case of actual controversy" as required by Title 28, United States Code, Section 2201. Golden v. Zwickler, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969).

Each plaintiff seeks as relief, *first*, a judgment declaring the Texas Abortion Laws unconstitutional on their face and, *second*, an injunction against their enforcement. The nature of the relief requested suggests the order in which the issues presented should be passed upon.[5] Accordingly, we see the issues presented as follows:

I. Are plaintiffs entitled to a declaratory judgment that the Texas Abortion Laws are unconstitutional on their face?

II. Are plaintiffs entitled to an injunction against the enforcement of these laws?

I

Defendants have suggested that this Court should abstain from rendering a decision on plaintiffs' request for a declaratory judgment. However, we are guided to an opposite conclusion by the authority of Zwickler v. Koota, 389 U.S. 241, 248-249, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967):

"The judge-made doctrine of abstention * * * sanctions * * * escape only in narrowly limited 'special circumstances.' * * * One of the 'special circumstances' * * * is the susceptibility of a state statute of a construction by the state courts that would avoid or modify the constitutional question."

The Court in Zwickler v. Koota subsequently quoted from United States v. Livingston, 179 F.Supp. 9, 12-13 (E.D. S.C. 1959):

"Regard for the interest and sovereignty of the state and reluctance needlessly to adjudicate constitutional issues may require a federal District Court to abstain from adjudication if the parties may avail themselves of an appropriate procedure to obtain state interpretation of state laws requiring construction. * * * The decision in [Harrison v. N.A.A.C.P., 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed. 2d 1152], however, is not a broad encyclical commanding automatic remission to the state courts of all federal constitutional questions arising in the application of state statutes * * * Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of its bearing fruit."[6]

Inasmuch as there is no possibility that state question adjudication in the courts of Texas would eliminate the necessity for this Court to pass upon plaintiffs' Ninth Amendment claim or Dr. Hallford's attack on Article 1196 for vagueness, abstention as to their request for declaratory judgment is unwarranted. Compare City of Chicago v. Atchison T. & S.F.R. Co., 357 U.S. 77, 84, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (1958), with Reetz v. Bozanich, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed. 2d 68 (1970).

On the merits, plaintiffs argue as their principal contention[7] that the Texas Abortion Laws must be declared unconstitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment,[8] to choose whether to have children. We agree.

The essence of the interest sought to be protected here is the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals. The manner by which such interests are secured by the Ninth Amendment is illustrated by the concurring opinion of Mr. Justice Goldberg in Griswold v. Connecticut, 381 U.S. 479, 492, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965):

"[T]he Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and intent that the list of rights included there not be deemed exhaustive." * * *

"The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments." (Emphasis added.)[9]

Relative sanctuaries for such "fundamental" interests have been established for the family,[10] the marital couple,[11] and the individual.[12]

Freedom to choose in the matter of abortions has been accorded the status of a "fundamental" right in every case coming to the attention of this Court where the question has been raised. Babbitz v. McCann, 312 F. Supp. 725 (E.D. Wis.1970); People v. Belous, 80 Cal. Rptr. 354, 458 P.2d 194 (Cal. 1969); State v. Munson, (South Dakota Circuit Court, Pennington County, April 6, 1970). Accord, United States v. Vuitch, 305 F. Supp. 1032 (D.D.C.1969). The California Supreme Court in Belous stated:

"The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgement of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." 80 Cal. Rptr. at 359, 458, P.2d at 199.

The District Court in Vuitch wrote:

"There has been * * * an increasing indication in the decisions of the Supreme Court of the United States that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy." 305 F.Supp. at 1035.

Writing about Griswold v. Connecticut, supra, and the decisions leading up to it, former Associate Justice Tom C. Clark observed:

"The result of these decisions is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children and day-to-day living habits. This is one of the most funda-

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Footnotes at end of article.

mental concepts that the Founding Fathers had in mind when they drafted the Constitution." [13]

Since the Texas Abortion Laws infringe upon plaintiffs' fundamental right to choose whether to have children, the burden is on the defendant to demonstrate to the satisfaction of the Court that such infringement is necessary to support a compelling state interest.[14] The defendant has failed to meet this burden.

To be sure, the defendant has presented the Court with several compelling justifications for state presence in the area of abortions. These include the legitimate interests of the state in seeing to it that abortions are performed by competent persons and in adequate surroundings. Concern over abortion of the "quickened" fetus may well rank as another such interest. The difficulty with the Texas Abortion Laws is that, even if they promote these interests,[15] they far outstrip these justifications in their impact by prohibiting all abortions except those performed "for the purpose of saving the life of the mother." [16]

It is axiomatic that the fact that a statutory scheme serves permissible or even compelling state interests will not save it from the consequences of unconstitutional overbreadth. *E.g.*, Thornhill v. Alabama, 310 U.S. Buchanan v. Batchelor, 308 F.Supp. 729 (N.D. Tex. 1970). While the Ninth Amendment right to choose to have an abortion is not unqualified or unfettered, a statute designed to regulate the circumstances of abortions must restrict its scope to compelling state interests. There is unconstitutional overbreadth in the Texas Abortion Laws because the Texas Legislature did not limit the scope of the statutes to such interests. On the contrary, the Texas statutes, in their monolithic interdiction, sweep far beyond any areas of compelling state interest.

Not only are the Texas Abortion Laws unconstitutionally overbroad, they are also unconstitutionally vague. The Supreme Court has declared that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888 (1939). *See also* Giaccio v. Pennsylvania, 382 U.S. 399, 402–403, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). Under this standard the Texas statutes fail the vagueness test.

The Texas Abortion Laws fail to provide Dr. Hallford and physicians of his class with proper notice of what acts in their daily practice and consultation will subject them to criminal liability. Article 1196 provides:

"Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

It is apparent that there are grave and manifold uncertainties in the application of Article 1196. How likely must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How imminent must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered.

The grave uncertainties in the application of Article 1196 and the consequent uncertainty concerning criminal liability under the related abortion statutes are more than sufficient to render the Texas Abortion Laws unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment.

II

We come finally to a consideration of the appropriateness of plaintiffs' request for injunctive relief. Plaintiffs have suggested in oral argument that, should the Court declare the Texas Abortion Laws unconstitutional, that decision would of itself warrant the issuance of an injunction against state enforcement of the statutes. However, the Court is of the opinion that it must abstain from granting the injunction.

Clearly, the question whether to abstain concerning an injunction against the enforcement of state criminal laws is divorced from concerns of abstention in rendering a declaratory judgment. Quoting from Zwickler v. Koota,

"[A] request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against enforcement of that statute. We hold that a federal district court has the duty to decide the appropriateness and merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." 389 U.S. at 254, 88 S.Ct. at 399.

The strong reluctance of federal courts to interfere with the process of state criminal procedure was reflected in Dombrowski v. Pfister, 380 U.S. 479, 484–485, 85 S.Ct. 1116, 1120–21, 14 L.Ed 2d 22 (1965):

"[The] Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

This federal policy of non-interference with state criminal prosecutions must be followed except in cases where "statutes are justifiably attacked on their face as abridging free expression," or where statutes are justifiably attacked "as applied for the purpose of discouraging protected activities." Dombrowski v. Pfister, 380 U.S. at 489–490, 85 S.Ct. at 1122.

Neither of the above prerequisites can be found here. While plaintiffs' first substantive argument rests on notions of privacy which are to a degree common to the First and Ninth Amendments, we do not believe that plaintiffs can seriously argue that the Texas Abortion Laws are vulnerable "on their face as abridging free expression." [17] Further, deliberate application of the statutes "for the purpose of discouraging protected activities" has not been alleged. We therefore conclude that we must abstain from issuing an injunction against enforcement of the Texas Abortion Laws.

CONCLUSION

In the absence of any contested issues of fact, we hold that the motions for summary judgment of the plaintiff Roe and plaintiff-intervenor Hallford should be granted as to their request for declaratory judgment. In granting declaratory relief, we find the Texas Abortion Laws unconstitutional for vagueness and overbreadth, though for the reasons herein stated we decline to issue an injunction. We need not here delineate the factors which could qualify the right of a mother to have an abortion. It is sufficient to state that legislation concerning abortions must address itself to more than a bare negation of that right.

JUDGMENT

This action came on for hearing on motions for summary judgment before a three-judge court composed of Irving L. Goldberg, Circuit Judge, Sarah T. Hughes and W. M. Taylor, Jr., District Judges. The defendant in both cases is Henry Wade, District Attorney of Dallas County, Texas. In one action plaintiffs are John and Mary Doe, husband and wife, and in the other Jane Roe and James Hubert Hallford, M.D., intervenor.

The case having been heard on the merits, the Court, upon consideration of affidavits, briefs and arguments of counsel, finds as follows:

Findings of fact

(1) Plaintiff Jane Roe, plaintiff-intervenor James Hubert Hallford, M.D., and the members of their respective classes have standing to bring this lawsuit.

(2) Plaintiffs John and Mary Doe failed to allege facts sufficient to create a present controversy and therefore do not have standing.

(3) Articles 1191, 1192, 1193, 1194 and 1196 of the Texas Penal Code, hereinafter referred to as the Texas Abortion Laws, are so written as to deprive single women and married persons of the opportunity to choose whether to have children.

(4) The Texas Abortion Laws are so vaguely worded as to produce grave and manifold uncertainties concerning the circumstances which would produce criminal liability.

Conclusions of law

(1) This case is a proper one for a three-judge court.

(2) Abstention, concerning plaintiffs' request for a declaratory judgment, is unwarranted.

(3) The fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment.

(4) The Texas Abortion Laws infringe upon this right.

(5) The defendant has not demonstrated that the infringement of plaintiffs' Ninth Amendment rights by the Texas Abortion Laws is necessary to support a compelling state interest.

(6) The Texas Abortion Laws are consequently void on their face because they are unconstitutionally overbroad.

(7) The Texas Abortion Laws are void on their face because they are vague in violation of the Due Process Clause of the Fourteenth Amendment.

(8) Abstention, concerning plaintiffs' request for an injunction against the enforcement of the Texas Abortion Laws, is warranted.

It is therefore ordered, adjudged and decreed that: (1) the complaint of John and Mary Doe be dismissed; (2) the Texas Abortion Laws are declared void on their face for unconstitutional overbreadth and for vagueness; (3) plaintiffs' application for injunction be dismissed.

FOOTNOTES

[1] On March 3, 1970, plaintiff Jane Roe filed her original complaint in CA-3-3690-B under the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution. She alleged jurisdiction to be conferred upon the Court by Title 28, United States Code, Sections 1331, 1343, 2201, 2202, 2281, and 2284 and by Title 42, United States Code, Section 1983. On April 22, plaintiff Roe amended her complaint to sue "on behalf of herself and all others similarly situated."

On March 23, James Hubert Hallford, M.D., was given leave to intervene. Hallford's complaint recited the same constitutional and jurisdictional grounds as the complaint of plaintiff Roe. According to his petition for intervention, Hallford seeks to represent "himself and the class of people who are physicians, licensed to practice medicine under the laws of the State of Texas and who fear future prosecution."

On March 3, 1970, plaintiffs John and Mary Doe filed their original complaint in CA-3-

3691–C. The complaint of plaintiffs Doe recited the same constitutional and jurisdictional grounds as had the complaint of plaintiff Roe in CA–3–3690 and, like Roe, plaintiffs Doe subsequently amended their complaint so as to assert a class action.

Plaintiffs Roe and Doe have adopted pseudonyms for purposes of anonymity.

[2] *Article 1191 Abortion*

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

Article 1192 Furnishing the Means

Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

Article 1193 Attempt at Abortion

If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

Article 1194 Murder in Producing Abortion

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

Article 1196 By Medical Advice

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

[3] By the authority of *Griswold*, Dr. Hallford has standing to raise the rights of his patients, single women and married couples, as well as rights of his own.

[4] "[I]n ruling on standing, it is both appropriate and necessary to look to the substantive issues * * * to determine whether there is a logical nexus between the statutes asserted and the claim sought to be adjudicated." Flast v. Cohen, 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Ed. 2d 947 (1968).

[5] Zwickler v. Koota, 389 U.S. 241, 254, 88 S.Ct. 391, 19 L. Ed.2d 444 (1967); Cameron v. Johnson, 390 U.S. 611, 615, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968).

[6] 389 U.S. at 250–251, 88 S.Ct. at 396–397. (Citations omitted.)

[7] Aside from their Ninth Amendment and vagueness arguments, plaintiffs have presented an array of constitutional arguments. However, as plaintiffs conceded in oral argument, these additional arguments are peripheral to the main issues. Consequently, they will not be passed upon.

[8] "The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people."

[9] At 492, 85 S.Ct. at 1686 the opinion states: "In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] * * * as to be ranked as fundamental'. Snyder v. [Commonwealth of] Massachusetts, 291 U.S. 97, 105 [54 S.Ct. 330, 78 L.Ed. 674]. The inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." * * * ' Powell v. Alabama, 287 U.S. 45, 67 [53 S.Ct. 55, 77 L.Ed. 158]."

[10] Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); and Prince v Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944).

[11] Loving v. Commonwealth of Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); Griswold v. Connecticut, 381 U.S 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); and Buchanan v. Batchelor, 308 F.Supp. 729 (N.D.Tex.1970).

[12] Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); and Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed. 2d 542 (1969).

[13] Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola Univ. L.Rev. 1, 8 (1969). Mr. Justice Clark goes on to write, "* * * abortion falls within that sensitive area of privacy—the marital relation. One of the basic values of this privacy is birth control, as evidenced by the *Griswold* decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent contraception, why can he not nullify that conception when prevention has failed?" *Id.* at 9.

[14] "In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' Bates v. [City of] Little Rock, 361 U.S. 516, 524 [80 S.Ct. 412, 4 L.Ed.2d 480]." Griswold v. Connecticut, 381 U.S. 479, 497, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (concurring opinion of Mr. Justice Goldberg). *See also* Kramer v. Union Free School District, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969).

[15] It is not clear whether the Texas laws presently serve the interests asserted by the defendant. For instance, the Court gathers from a reading of the challenged statutes that they presently would permit an abortion "for the purpose of saving the life of the mother" to be performed *anywhere* and quite possibly by *one other than a physician.*

[16] Article 1196.

[17] "[T]he door is not open to all who would test the validity of state statutes or conduct a federally supervised pre-trial of a state prosecution by the simple expedient of alleging that the prosecution somehow affects First Amendment rights." Porter v. Kimzey, 309 F. Supp. 993, 995 (N.D.Ga.1970).

[United States District Court, N. D. Illinois, E. D.—Jan. 29, 1971]

JANE DOE CASE

Jane Doe and Sally Roe, suing on behalf of themselves and all others similarly situated, and David N. Danforth, M.D., Charles Fields, M.D., Ralph M. Wynn, M.D., and Frederick P. Zuspan, M.D., suing on behalf of themselves and all others similarly situated, Plaintiffs.

Mary Poe, by her mother, Pauline Poe, suing on behalf of herself, and all others similarly situated, Intervening Plaintiff, v. William J. Scott, Attorney General of the State of Illinois, and Edward V. Hanrahan, State's Attorney of Cook County, Illinois, Defendants,

Dr. Bart Heffernan, Intervening Defendant.

Civ. A. No. 70 C 395.

Action for declaratory and injunctive relief challenging constitutionality of Illinois abortion statute. The three-judge District Court, Swygert, Chief Circuit Judge, held that the Illinois abortion statute, by forcing the birth of every fetus, no matter how defective or how intensely unwanted by its future parents, displayed no legitimately compelling state interest in fetal life which would justify intrusion on woman's privacy which is involved in forcing her to bear an unwanted child; consequently, during the early stages of pregnancy—at least during the first trimester—the state may not prohibit, restrict or otherwise limit women's access to abortion procedures performed by licensed physicians operating in licensed facilities.

Plaintiffs' motion for summary judgment granted and defendants' motion denied.

Campbell, Senior District Judge, dissented and filed opinion.

Sybille Fritzsche, The Roger Baldwin Foundation of ACLU, Inc., Susan Grossman, Chicago, Ill., for plaintiffs; Marshall Patner, Patner & Karaganis, Chicago, Ill., of counsel.

Gordon H. S. Scott, Legal Aid Bureau, Chicago, Ill., for intervening plaintiff Mary Poe.

William J. Scott, Atty. Gen. Bernard Genis, Asst. Atty. Gen., Edward V. Hanrahan, State's Atty., Daniel Coman, James C. Murray, Asst. State's Attys., for defendants.

Dennis J. Horan, Thomas M. Crisham and Jerome A. Frazel, Hinshaw, Culbertson, Moelmann, Hoban & Fuller, Chicago, Ill., for intervening defendant Bart Heffernan.

Before Swygert, Chief Circuit Judge Robson, Chief District Judge, and Campbell, Senior District Judge.

MEMORANDUM OPINION

Swygert, Chief Circuit Judge.

This is an action for declaratory and injunctive relief brought to declare that the Illinois abortion statute [1] is violative of the United States Constitution for one or more reasons.[2] After a three-judge district court was convened the parties were ordered to restrict their arguments to the allegations that the statute is unconstitutionally vague and unconstitutionally invades the privacy of pregnant women. Oral argument was heard, and the case is now before us on a multiplicity of motions including cross-motions of plaintiffs and defendants for summary judgment.

Plaintiffs Doe and Roe, suing anonymously on behalf of themselves and all other women similarly situated, assert that they were unable to obtain legal, medically safe abortions in Illinois because their physicians reasonably believed that they could not perform such an operation upon the plaintiffs without fear of prosecution by defendant law enforcement officials pursuant to the challenged statute. Plaintiff Doe, a woman of means, subsequently had a successful abortion performed in Great Britain, while plaintiff Roe, who is indigent, was compelled to bear an unwanted child since the option of a foreign abortion was economically foreclosed. Plaintiffs Danforth, Fields, Wynn and Zuspan, all licensed physicians, sue on behalf of themselves, and all other similarly situated physicians, alleging that the existence of the challenged statute interferes with and adversely affects their ability to conduct their medical practices with proper regard for their patients' best interests. Intervening plaintiff Poe is a high school girl who was pregnant as a result of a forcible rape and sues anonymously by her mother as next friend asserting the same claims as Doe and Roe.[3]

The principal defendants are William J. Scott, Attorney General of the State of Illinois, and Edward V. Hanrahan, State's Attorney of Cook County, Illinois. Both are law enforcement officials of the State of Illinois who are charged with enforcing its laws, including the challenged statute. Intervening defendant Heffernan is a licensed physician who has been granted leave to appear herein as guardian *ad litem* for those conceived but not yet born.

Defendant Scott asserts that he is not a proper party to this action. Although the Illinois statutes do not make the attorney general the chief prosecutor pursuant to the state's criminal statutes, the leading Illinois

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Footnotes at end of article.

case clothes his office with the same authority as attorneys general at the common law. In Fergus v. Russell, 270 Ill. 304, 110 N.E. 130 (1915), the Illinois Supreme Court held that, although the state legislature may confer powers additional to those inherent in the common law office of attorney general, it may not deprive the office of any of its historical powers and duties as chief legal representative of the state.[4] The court further stated, "[A]t common law the Attorney General was the law officer of the crown and its chief representative in the courts." [5] Furthermore, the attorney general has conceded that he is required to represent the people of the state before the supreme court in all matters in which their interests are apparent and to assist in the prosecution of any criminal trial when he believes the people's interest requires it.[6] Indeed, the overlap of the powers and duties of the state's attorneys of the several counties and the attorney general is such that it appears that, where their powers are concurrent, either officer may initiate appropriate proceedings in the name of the state if the other has not acted.[7] We hold, therefore, that the attorney general is a proper party defendant in this action.

Defendants challenge the standing of the plaintiffs to raise the claims which they assert. The female plaintiffs allege that the operation of the statute deprived them of their asserted right to terminate unwanted pregnancies in the state of their residence. They assert that they have been injured either by having been forced to bear unwanted children or by having to travel to foreign states to obtain abortions by qualified medical personnel. We have no doubt that, "On the basis of plaintiffs' substantive contentions, * * * there * * * exists a 'nexus between the status asserted by the [female plaintiffs] and the claim(s) (they present).'" [8] The standing requirements of Flast v. Cohen, 392 U.S.C. 83, 102 S.Ct. 1942, 20 L.Ed. 2d 947 (1968), are thus satisfied by the litigative posture of the female plaintiffs. Moreover, the physician-plaintiffs have standing to raise the claims of their patients even if we assume that no independent claim of theirs could withstand a motion for judgment on the pleadings.[9] All plaintiffs thus have standing to raise the claims which they assert.

I

Plaintiffs contend that the Illinois abortion statute must be adjudged unconstitutionally vague. We agree. The statute prohibits all abortions except those "performed by a physician * * * in a licensed hospital or other licensed medical facility because *necessary for the preservation of the woman's life.*" [10] Plaintiffs point to the italicized language as the basis for their assertion that the statute is invalid under the due process clause of the fourteenth amendment because of its imprecision. It is clear that, as the Supreme Court has said:

"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. * * * '[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" [11] The question thus becomes whether men of ordinary intelligence must guess at the meaning of the words, "necessary for the preservation of the woman's life."

We note at the outset that these words, or substantially identical ones, have convinced some courts that they are incapable of certain interpretation,[12] and other courts have disagreed.[13] If courts cannot agree on what is the essential meaning of "necessary for the preservation of the woman's life" and like words, we fail to see how those who may be subject to the statute's proscriptions can know what it prohibits. On the issue of vagueness, we are in agreement with the reasoning of People v. Belous [14] and Roe v. Wade.[15] One need not inquire in great depth as to the meaning of such words as "necessary" and "preserve" to conclude that the holdings of those cases are correct. "Necessary" has been characterized as vague by the United States Supreme Court [16] and has been similarly described by other courts.[17] It is "a word susceptible of various meanings." It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, proper, or conducive to the end sought.[18]

The word "preserve" is similarly susceptible of so broad a range of connotations as to render its meaning in the statute gravely amorphous, since it may mean anything from maintaining something in its status quo to preventing the total destruction of something.[19] The treating physician who believes an abortion is medically or psychiatrically indicated thus finds himself threatened with becoming a felon as well as with the possibility of losing his right to practice his profession if he errs in the legal interpretation of a penal statute, the words of which have not been sufficiently definite for courts to agree on their meaning.[20] This is precisely the kind of situation that the void-for-vagueness doctrine is intended to prevent.

II

Aside from the fact that the statute is vague, its practicable effect is to make abortion unavailable to women unless there is a reasonable certainty that death will result from a continuation of pregnancy. This practical effect of the statute constitutes an intrusion on constitutionally protected areas too sweeping to be justified as necessary to accomplish any compelling state interest. These protected areas are womens rights to life, to control over their own bodies, and to freedom and privacy in matters relating to sex and procreation.

The Supreme Court has long recognized that a person possesses a fundamental, constitutionally protected right to privacy and freedom in certain personal and intimate matters, especially those pertaining to the home and family.[21] This right was developed and applied by the Supreme Court to strike down a state's birth control statute in Griswold v. Connecticut.[22] The Court there held that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. * * * Various guarantees create zones of privacy." [23] *Griswold* set out in broad terms the right of married couples to be free from governmental intrusion into their intimate affairs:

We cannot distinguish the interests asserted by the plaintiffs in this case from those asserted in *Griswold*. In both, "[t]he essence of the interest sought to be protected * * * is the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals." [24] It is as true after conception as before that "there is no topic more closely interwoven with the intimacy of the home and marriage than that which relates to the conception and bearing of progeny." [25] We believe that *Griswold* and related cases establish that matters pertaining to procreation, as well as to marriage, the family, and sex are surrounded by a zone of privacy which protects activities concerning such matters from unjustified governmental intrusion.[26]

We do not agree with the defendants that the choice whether to have a child is protected before conception but is not so protected immediately after conception has occurred.[27] A woman's interest in privacy and in control over her body is just as seriously interfered with by a law which prohibits abortions as it is by a law which prohibits the use of contraceptives. The majority of courts which have considered the question have so held, concluding that a woman has a fundamental interest in choosing to terminate a pregnancy. In People v. Belous, *supra*, the California Supreme Court struck down that state's abortion statute, holding:

"The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a "right of privacy" or "liberty" in matters related to marriage, family, and sex." [28]

In United States v. Vuitch, *supra*, a single district court judge struck down a portion of the District of Columbia abortion statute, saying:

"There has been, moreover, an increasing indication in decisions of the Supreme Court of the United States that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy. * * * Matters have certainly reached a point where a sound, informed interest of the state must affirmatively appear before the state infringes unduly on such rights." [29]

More recently, in Babbitz v. McCann,[30] and in Roe v. Wade,[31] three-judge courts found that the right to choose whether to bear a child was fundamental and struck down state abortion statutes.

Of course, the determination that women have a fundamental interest in choosing whether to terminate pregnancies does not establish that the Illinois statute is unconstitutional. The critical issue is whether the state has a compelling interest in preventing abortions in the early stages of pregnancy except where the death of the woman is reasonably certain.[32] A statute which requires a woman to risk physical and emotional harm short of death when a therapeutic abortion would remove that risk does not bear scrutiny as a health measure for the benefit of women.

Moreover, a statute which forces the birth of every fetus, no matter how defective or how intensely unwanted by its future parents, displays no legitimately compelling state interest in fetal life, especially when viewed with regard for the countervailing rights of pregnant women. We do not believe that the state has a compelling interest in preserving all fetus life which justifies the gross intrusion on a woman's privacy which is involved in forcing her to bear an unwanted child. We therefore rule that during the early stages of pregnancy—at least during the first trimester—the state may not prohibit, restrict or otherwise limit women's access to abortion procedures performed by licensed physicians operating in licensed facilities.

In holding that the state has not shown sufficient justification to permit us to uphold its abortion statute in its entirety, we are in agreement with the court's statement in Babbitz v. McCann:

"The defendants urge that the state's interest in protecting the embryo is a sufficient basis to sustain the statute. Upon a balancing of the relevant interests, we hold that a woman's right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the state without a more compelling public necessity than is reflected in the statute in question." [33]

Accordingly, the Illinois abortion statute, Illinois Revised Statutes, Chapter 38, Section 23–1, is unconstitutional because it is impermissibly vague and unduly infringes women's right to privacy insofar as it restricts or prohibits the performance of abortions during the first trimester of pregnancy by licensed physicians in a licensed hospital or other licensed medical facility.

Footnotes at end of article.

ORDER

1. The foregoing opinion shall stand as findings of fact and conclusions of law.

2. The motion of plaintiffs for summary judgment is hereby granted, and the motion of defendants for summary judgment is hereby denied.

3. The motion of defendant Scott to dismiss this action as against him is hereby denied.

4. All other motions presently outstanding are hereby denied to the extent not expressly granted herein or mooted by or subsumed in the foregoing opinion or this order.

It is therefore ordered, adjudged and decreed:

1. That the Illinois abortion statute, Illinois Revised Statutes, Chapter 38, Section 23–1, be and the same is hereby declared to be violative of the Constitution of the United States and is null and void insofar as it restricts or prohibits the performance of abortions during the first trimester of pregnancy by licensed physicians in a licensed hospital or other licensed medical facility.

2. That the defendants, their officers, agents, servants, employees, and attorneys, and those persons who act in active concert or participation with them be and the same are hereby permanently enjoined, without bond, from executing or enforcing, the Illinois abortion statute, Illinois Revised Statutes, Chapter 38, Section 23–1 against physicians licensed to practice medicine and surgery in all its branches performing abortions during the first trimester of pregnancy in a licensed hospital or other licensed medical facility.

Campbell, Senior Judge (dissenting).

The typically erudite opinion of our distinguished Chief Judge Swygert excellently presents some philosophical reasons for amendment to or repeal of the existing abortion statute by the Illinois Legislature. I must respectfully disagree however when these reasons are advanced to support a judicial determination that the statute "is unconstitutional because it is impermissibly vague and unduly infringes women's right to privacy." Neither the wisdom of this statute nor its comformity to the accepted mores of Illinois in 1971 is the issue before us. As a federal court we are concerned only with the limited question of whether in enacting this statute the people of Illinois have exceeded the limitations of the United States Constitution.

By their foregoing decision and order in this case concluding that those limits have been exceeded, my learned brothers strike down a state statute which has been enforced for one hundred years [34] and impose upon the people of Illinois their own views on this most important and controversial issue concerning public health and morals. In my view this unwarranted intrusion by the federal judiciary into the affairs of Illinois in the name of constitutional interpretation is far beyond properly limited federal powers and is not supported by the facts of this case nor the precedents cited by my brethren.

The basis of the majority decision is twofold: (1) the Illinois statute (and particularly the exception found therein) is so vague as to render it unconstitutional; and (2) by prohibiting the destruction of fetal life the statute invades the privacy of the women and the family entities of Illinois.

On the vagueness question I first observe that we have before us no contention by any party that an actual situation exists where a licensed physician acting in good faith is in jeopardy of prosecution for performing an abortion he believed to be "necessary for the preservation of the woman's life." In other words we are presented with no actual circumstance where the vagueness question is in issue. The rather forced game of semantics urged by plaintiffs and adopted by the majority has not presented any *actual* controversy but is merely a convenient vehicle for these plaintiffs to challenge a law which they believe is unwise and which they have thus far despite heroic efforts been unable to repeal or amend by the legislative process.[35]

A perusal of state and federal criminal codes reveals numerous examples of statutes which have been held constitutional and which are not as clear and definite as this one. Indeed Chief Judge Swygert, in writing his court's opinion upholding the constitutionality of the Illinois disorderly conduct statute, found that the language of that statute prohibiting any act done in "such unreasonable manner as to alarm or disturb another" was not unconstitutionally vague. As stated by him in that opinion: "The Constitution does not require impossible standards of specificity in penal statutes. It requires only that the statute convey 'sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" United States v. Woodard, 376 F.2d 136, 140 (7th Cir. 1967).

His opinion goes on to state, "The statute proscribes conduct that is so unreasonable as to 'alarm or disturb' another and provoke a 'breach of the peace'. The term 'breach of the peace' has never had a precise meaning in relation to specific conduct. Yet from its early common law origin to the present it has received a fairly well defined gloss." (Id. at 141). In our case, however, the same judge concludes that men and women of ordinary intelligence cannot understand the essential meaning of the words, "necessary for the preservation of the woman's life." I find it difficult to reconcile the reasoning in the *Woodard* case with that set forth in the opinion of the majority herein.

The words of the Illinois Abortion Statute taken in their ordinary meaning sufficiently convey definite warning as to the proscribed conduct and "have over a long period of years proved entirely adequate to inform the public, including both lay and professional people, of what is forbidden." Steinberg v. Rhodes, 321 F.Supp. 741, 745 (N.D.Ohio, 1970); Babbitz v. McCann, 310 F.Supp. 293, 297 (E.D.Wis.1970). The statement of the court in the *Steinberg* opinion is appropriate here:—"The problem of the plaintiffs is not that they do not understand, but that basically they do not accept, its proscription." 321 F.Supp. at p. 745.

I find the second conclusion of the majority, that the statute is not supported by a sufficient legitimate state interest, even more disconcerting. As the majority correctly points out, the determination that women have a fundamental interest in choosing whether to terminate pregnancies does not in and of itself establish that the Illinois statute is unconstitutional. The critical issue is whether the state has a sufficient interest in preventing abortion to justify its prohibition. My brothers conclude that the State of Illinois does not have a sufficient interest in preserving fetal life to support the statute before us, when the same is viewed with regard for countervailing rights to terminate pregnancies. It is at this juncture that I again part company with my brothers.

We, as did the Illinois Legislature, have before us the following undisputed facts relating to fetal life. Seven weeks after conception the fertilized egg develops into a well proportioned small scale body. It bears all of the familiar external features and all the internal organs of an adult human being. It has muscles; hands with fingers and thumbs; and the legs have recognizable knees, ankles and toes.

The brain is operative and sends out impulses that coordinate the function of the other organs. Brain waves have been noted at 43 days. The heart beats; the stomach produces digestive juices; the liver manufactures blood cells; and the kidneys begin to function by extracting uric acid from the blood.

In the third month it can kick its legs, turn its feet, curl and fan its toes, make a fist, move its thumb, bend its wrist, turn its head, and even open its mouth and swallow and drink the amniotic fluid that surrounds it. Thumb sucking has been noted at this age and the first respiratory motions have fluid in and out of its lungs with inhaling and exhaling respiratory movements.

In the twelfth week it can move its thumb, in opposition to its fingers. It swallows regularly. It has active reflexes. The facial expressions of a fetus in its third month are already similar to the facial expression of its parents. By the end of that first trimester the fetus is a sentient moving being.

In the third month finger nails appear; sexual differentiation is apparent in both internal and external organs; and vocal chords are completed.

From the twelfth to the sixteenth week the child grows to eight or ten inches in height and receives oxygen and food from its mother through the placental attachment. In the fifth month it gains two inches in height and ten ounces in weight. A doctor will soon hear the heart beat with his stethoscope. It sleeps and wakes and may be awakened by external vibrations.

In the sixth month the fetus develops a strong muscular grip with its hands; starts to breathe regularly and can maintain a respiratory response for twenty-four hours if born prematurely. It may even have a slim chance of surviving in an incubator. A child has been known to survive between twenty to twenty-five weeks old. Indeed, as medical science progresses in the field of detection the date of potential viability moves continually closer to earlier stages of gestation.

Dr. Arnold Gessell, in his publication. *"The Embryology of Behavior,*[36] notes:

"Our own repeated observation of a large group of fetal infants (an individual born and living at any time prior to forty weeks gestation) left us with no doubt that psychologically they were individuals. Just as no two looked alike, so no two behaved precisely alike. One was impassive when another was alert. Even among the youngest there were discernible differences in vividness, reactivity and responsiveness. These were genuine individual differences, already prophetic of the diversity which distinguishes the human family."

Similar facts of fetal life are discussed in detail in a recently published Law Review article, Byrn, Abortion-On-Demand: Whose Morality? 46 N.D. Law. 5 (1970). Professor Byrn concludes:—

"In summary: at eight weeks, after which the great majority of abortions are performed, the fetus is irreversibly organized into a recognizable human-child, is responsive to stimulation, and is possessed of a pumping heart, a functioning circulatory system, an active brain and all other internal organs. From the practical scientific point of view, 'By the eighth week the embryo or fetus, as we now call it, is an unmistakable human being * * *'."

This author also points out that abortion is a violent procedure regardless of the stage of pregnancy. Byrn, Supra, p. 32.

Professor Byrn also relates (at pp. 8–9) the following experience of Paul E. Rockwell, M.D., Director of Anesthesiology at Leonard Hospital, Troy, New York:

"Eleven years ago while giving an anesthetic for a ruptured ectopic pregnancy (at two months gestation) I was handed what I believe was the smallest living human being ever seen. The embryo sac was intact and transparent. Within the sac was a tiny (approx. 1 cm.) human male swimming extremely vigorously in the amniotic fluid, while attached to the wall by the umbilical cord. This tiny human was perfectly developed, with long, tapering fingers, feet and

Footnotes at end of article.

toes. It was almost transparent, as regards the skin, and the delicate arteries and veins were prominent to the ends of the fingers.

"The baby was extremely alive and swam about the sac approximately one time per second, with a natural swimmer's stroke. This tiny human did not look at all like the photos and drawings and models of 'embryos' which I have seen, nor did it look like a few embryos I have been able to observe since then, obviously because this one was alive!

"* * * When the sac was opened, the tiny human immediately lost its life and took on the appearance of what is accepted as the appearance of an embryo at this age (blunt extremities, etc.)

"It is my opinion that if the lawmakers and people realized that very vigorous life is present, it is possible that abortion would be found much more objectionable than euthanasia."

In my opinion the undisputed medical facts of record herein establish a sufficient state interest in the preservation of life to support the constitutionality of the statute before us.

The majority opinion does not hold that the Illinois statute is void in its entirety or that every statute that prohibits the destruction of fetal life is unconstitutional. Rather, is seems to hold that the people of this State have a legitimate legislative interest in protecting *some* fetal life, but that the present statute which protects, "every fetus, no matter how defective or how intensely unwanted by its future parents, displays no legitimately compelling state interest." I believe what the majority is suggesting is that if the Illinois Legislature had adopted a statute which, while prohibiting abortions generally, permitted the destruction of the "defective" fetus or one that is "intensely unwanted" it would have displayed a legitimate state interest. It seems to me apparent, however, that if the legislature has the power to decide that a *non defective* fetus may not be destroyed, it can also decide that a *defective* fetus may not be destroyed. How much latitude shall judicially be given the legislature in its determination as to what is and what is not a sufficient "defect" to warrant destruction? How unwanted must a potential child be before its parents can demand destruction under the suggested judicial "intensely unwanted" standard? Merely stating these propositions illustrates the extent to which my brothers have wandered into the legislative domain in reaching their decision in this case.

But the majority does not rest its conclusion of unconstitutionality on such a tenuous base. Instead, the majority states: "We therefore rule that during the early stages of pregnancy—at least during the first trimester—the state may not prohibit, restrict, or otherwise limit women's access to abortion procedures * * *" The opinion does not explain or even intimate how it arrived at this constitutional conclusion. It appears to me that my brothers have, by judicial flat, successfully amended the Illinois statute to permit abortions in the first three months of pregnancy. Ironically, their amendment does not even meet sound legislative standards. No where do they explain how the "first trimester" test was arrived at, or what relationship it might have to the previously discussed notions of defectiveness or unwantedness. What rational basis supports their conclusion that the people of Illinois may have a sufficient interest in protecting the life of a fetus which has matured to the first trimester, but that no legitimate interest exists for protecting a life of a fetus a few days younger? I believe the Illinois Legislature, in adopting the present statute, was less arbitrary even if not as competent as my brothers on these social and moral matters. In my opinion, however, the legislature alone should determine what value society will place on this form of life, regardless of the age of development.

Thus far I have avoided any discussion of the sensitive subject of whether fetal life is "human" life. Admittedly physicians argue as to what point in the fetal development human life commences. As former Supreme Court Justice Tom C. Clark states in the Law Review article quoted by the majority, "Some physicians argue that abortion should be permitted with impunity at any time up to the sixth month of pregnancy since prior to that time the fetus is no more than a growing plant. On the other hand, many eminent physicians believe that the fertilized ovum has human life from the time of conception. In support of this argument they refer to the International Code of Medical Ethics, which states that a physician will maintain the utmost respect for human life, from the time of its conception." Clark, Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loy.U.L.Rev. 1, 5 (1969). Assuming *arguendo* that fetal life is human life, can there be any question but that the State of Illinois has a sufficient legislative interest in its protection? And, in view of the varied opinions in medical science, is not the determination of when human life commences better left to the legislature, rather than the courts? This was the conclusion reached by Mr. Justice Clark in the above quoted article. Significantly, while liberally quoting Justice Clark's article on the subject of abortion (see notes 26 and 27), the majority conveniently ignores its conclusion and admonition as follows:—

"Accommodation of conflicting doctrine is more difficult to achieve in the judicial than in the legislative process. Courts cannot reach out to reform our society. A problem comes to the Court in the form of a justiciable issue and is narrowly drawn, rendering the Court's ruling contracted and finespun. Legislatures, on the other hand, have such facilities for investigation as hearings and may address themselves to the necessities of broad social needs and the correction of evils, both probable and existing. As Mr. Justice Cardozo said, 'Legislation can eradicate a cancer, right some hoary wrong, correct some definitely established evil, which defies the feebler remedies, the distinctions and the fictions familiar to the judicial process.'

"The courts work on a case-by-case system which deals with the past rather than the future. Society would not have the benefit of the sweeping effect of a statute, nor would the doctor have the protection that he is entitled to receive. The case method would be slow, expensive, and possibly disastrous. It is for the legislature to determine the proper balance, i.e., that point between prevention of conception and viability of the fetus which would give the State the compelling subordinating interest so that it may regulate or prohibit abortion without violating the individual's constitutionally protected rights." (At pp. 10–11).

To support their conclusion that the people of Illinois have exceeded the proper bounds of legislative interest, the majority primarily rely on the rationale of the Supreme Court in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510. But *Griswold* held only that a statute which forbade the use of contraceptives by married couples violated their rights to privacy. In writing the opinion of the Court, Mr. Justice Douglas indicated that the Connecticut statute was "unnecessarily broad" and prevented activities which might otherwise be subject to state regulation. (381 U.S. 485, 85 S.Ct. 1678). The more thorough concurring opinion, written by Mr. Justice Goldberg, stressed that there was in that case no showing that the statute was necessary to accomplish a permissible state interest.

In this case, however, there is in my opinion a valid and permissible state interest—the protection of human life or at least the protection of potential human life in the fetus. In my opinion the statute in question is no broader than is necessary to accomplish this valid and permissible state interest even though it does not distinguish or provide exceptions, as my brothers would prefer, for those which are "defective" or "intensely unwanted," or have not matured to "the first trimester of pregnancy."

In citing *Griswold*, the majority concludes: "we cannot distinguish the interests asserted by the plaintiffs in this case from those asserted in *Griswold*." In other words, in their views, there is no distinction that can be made between prohibiting the use of contraceptives and prohibiting the destruction of fetal life, which as explained above may reasonably be construed to be human life. I find this assertion incredible. Contraception prevents the creation of new life. Abortion destroys existing life. Contraception and abortion are as distinguishable as thoughts or dreams are distinguishable from reality.

As for myself I am confronted with and bound by the plain facts before us people of Illinois have a legitimate and sufficient interest in protecting fetal life to support the statute here considered. I find nothing in the Court's teachings in *Griswold* to the contrary.

No individual right or freedom is ever advanced in this country through an unwarranted intrusion of the judiciary into the proper province of the legislature. Indeed, in these days of pressure groups regularly seeking from courts that which only legislatures can properly give, constitutional government is weakened each time courts place their personal philosophical views above the law.

I would grant the motion of defendants for summary judgment and leave the plaintiffs' cause where under the Constitution it belongs—in the Illinois Legislature.

FOOTNOTES

[1] Ill. Rev. Stat., ch. 38, § 23–1 (1969).

[2] Jurisdiction is based upon 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343, 2201, 2202, 2281 and 2284.

[3] On March 23, 1970, Poe moved for leave to intervene and for the issuance of a temporary restraining order enjoining the defendants from attempting to enforce the Illinois statute against Poe's physician for terminating her pregnancy. On March 27 Poe was allowed to intervene, but her request for a restraining order was denied. On March 30 the Court of Appeals for the Seventh Circuit issued the temporary restraining order requested by Poe.

[4] 270 Ill. at 337–339, 110 N.E. at 143–144.

[5] 270 Ill. at 336, 110 N.E. at 143.

[6] Ill. Rev. Stat. ch. 14, § 4 (1969).

[7] *E.g.*, People ex rel. Kuntsman v. Shinsaku Nagano, 389 Ill. 231, 59 N.E.2d 96 (1945); People ex rel. Miller v. Fullenwider, 329 Ill. 65, 160 N.E. 175 (1928). *But see* People v. Flynn, 375 Ill. 366, 368, 31 N.E.2d 591, 593 (1940).

[8] Roe v. Wade, 314 F.Supp. 1217, 1220 (N.D. Tex. 1970) (citing Flast v. Cohen, 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Fd. 2d 947 (1968)).

[9] Griswold v. Connecticut, 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed2d 510 (1965); Barrows v. Jackson, 346 U.S. 249, 257, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953).

[10] Ill.Rev.Stat., ch. 38, § 23–1(b) (1969) (emphasis added).

[11] Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939); *accord*, Jordan v. DeGeorge, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1951); Connally v. General Constr. Co., 269 U.S. 385, 46 S.Ct. 126, 70 I.Ed. 322 (1026).

[12] *E.g.*, Roe v. Wade, 314 F. Supp. 1217, 1223 (N.D.Tex.1970); United States v. Vuitch, 305 F.Supp. 1032, 1034 (D.D.C. 1969); People v. Belous, 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194, 197 (1969), cert. denied 397 U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970).

[13] *E.g.*, Babbitz v. McCann, 310 F.Supp. 293, 298 (E.D.Wis.1970); Rosen v. Louisiana State Board of Medical Examiners, 318 F.Supp.

1217, (E.D.La.1970); Steinberg v. Rhodes, 321 F.Supp. 741 (N.D. Ohio, filed Dec. 18, 1970).

[14] 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), cert. denied, 397 U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970).

[15] 314 F.Supp. 1217 (N.D.Tex.1970).

[16] Yu Cong Eng v. Trinidad, 271 U.S. 500, 517–518, 46 S.Ct. 619, 70 L.Ed. 1059 (1926).

[17] *E.g.*, Phillips v. Borough of Folcroft, 305 F.Supp. 766, 770–771 (E.D.Pa.1969); Westphal v. Westphal, 122 Cal.App. 379, 382, 10 P.2d 119, 120 (1932).

[18] Black's Law Dictionary 1181 (4th ed. 1957).

[19] Webster's Third New International Dictionary 1794 (1961).

[20] The problem faced by a treating physician in Illinois is as described in Roe v. Wade, 314 F.Supp. 1217, 1223 (N.D.Tex, 1970):

How *likely* must death be? Must death be certain if the abortion is not performed? Is is enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *immenent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered.

[21] *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944); Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed2d 1010 (1967); and Stanley v. Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243. 22 L.Ed.2d 542 (1969).

[22] 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

[23] *Id.* at 484, 85 S.Ct. at 1681.

[24] Roe v. Wade, 314 F.Supp. 1217, 1221 (N.D.Tex.1970).

[25] Babbitz v. McCann, 310 F.Supp. 293, 299 (E.D.Wis.1970).

[26] As former Supreme Court Justice Tom C. Clark has said:

"The result of [Griswold and its predecessors] is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children, and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution."

Clark, Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola Univ. (L.A.) L.Rev. 1, 8 (1969).

[27] Again, Mr. Justice Clark observed:

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

Id. at 9.

[28] 71 Cal.2d 954, 963, 80 Cal.Rptr. 354, 359, 458, P.2d 194, 199 (1969), cert. denied, 397 U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970).

[29] 305 F.Supp. 1032, 1035 (D.D.C.1969).

[30] 310 F.Supp. 293 (E.D.Wis.1970).

[31] 314 F.Supp. 1217 (N.D.Tex.1970).

[32] As the court stated in Roe v. Wade, 314 F. Supp. 1217, 1222 (N.D. Tex. 1970):

"Since the Texas Abortion Laws infringe upon plaintiffs' fundamental right to choose whether to have children, the burden is on the defendant to demonstrate to the satisfaction of the Court that such infringement is necessary to support a compelling state interest.

See also Bates v. Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412. 4 L. Ed. 2d 480 (1960); Griswold v. Connecticut, 381 U.S. 479, 497, 85 S. Ct. 1678, 14 L. Ed 2d 510 (1965) (Goldberg, J., concurring).

[33] 310 F. Supp. 293, 301 (E.D. Wis. 1970).

[34] The present statute is essentially the same as that enacted in 1874. (R.S. 1874, Ch. 38, Div. 1, § 3.)

[35] Attempts to amend or repeal the present statute failed in the last (1969) session of the General Assembly. New proposals have already been introduced in the present (1971) session.

[36] Harper and Brothers, Publishers (1945), at p. 172.

[United States District Court, N. D. Georgia, Atlanta Division—July 31, 1970]

MARY DOE CASE

Mary Doe et al., v. Arthur K. Bolton, as Attorney General of the State of Georgia, Lewis R. Slaton as District Attorney of Fulton County, Georgia and Herbert T. Jenkins, as Chief of Police of the City of Atlanta.

Civ. A. No. 13676.

Supplemental Opinion Oct. 14, 1970.

Class action attacking validity of state abortion statute. A Three-Judge District Court held that claims by physicians and nurses that because of state abortion statute they were not free to perform or counsel obtaining of abortions and were therefore unconstitutionally restricted in practice of their professions did not present justiciable controversy and that statute was invalid to extent it limited cases in which abortion could be performed.

Order accordingly.

Margie Pitts Hames, Tobiane Schwartz, Elizabeth Rindskopf, Bettye Kehrer, Atlanta, Ga., for plaintiffs.

Arthur K. Bolton, Atty. Gen., Tony H. Hight, Asst. Dist. Atty., Atlanta, Ga., for Slaton.

Ralph H. Witt, Atlanta, Ga., for Jenkins.

Ferdinand Buckley, Atlanta, Ga., for unborn child of Mary Doe.

Before Morgan, Circuit Judge, and Smith and Henderson, District Judges.

Per Curiam.

This is an action for declaratory and injunctive relief brought pursuant to 28 U.S.C.A. §§ 2201 and 2202, and 42 U.S.C.A. § 1983 and 28 U.S.C.A. § 1343. It is a class action attacking Ga. Code Ann. § 26–1201 et seq. (1969) Georgia's "Abortion Act."

Plaintiffs claim to represent four subclasses: pregnant women, single or married, wishing legal abortions; licensed physicians who wish to perform or counsel performance of legal abortions; registered nurses who desire to participate in performing or counsel performance of legal abortions; and ministers and social workers who wish to be free to advise abortion in counseling pregnant women.

Plaintiffs seek an order declaring Georgia's Abortion Statute unconstitutional and enjoining its enforcement on various grounds:

(1) the Statute is unconstitutionally vague and indefinite on its face and as applied, failing to provide sufficient warning of the conduct proscribed, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

(2) Georgia's Abortion Statute unconstitutionally abridges a woman's right to decide to terminate an unwanted pregnancy, in restricting that fundamental liberty without an overriding compelling state interest;

(3) the Statute unconstitutionally restricts the right of the physicians, nurses, ministers and social workers to practice their professions;

(4) Georgia's Abortion Statute produces discrimination against poor and non-white women in violaton of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

PENDING MOTIONS

Arthur K. Bolton, sued in his official capacity as Attorney General of Georgia has moved for an order dismissing the claim against him on the ground that no relief could be granted against him since he is not charged generally with the enforcement, application or administration of the Georgia criminal statutes.

As plaintiffs observe, Article VI, § X, Par. II of the Georgia Constitution, Ga. Code Ann. § 2–4502 (1933) requires the Attorney General to represent the State in any civil or criminal case when required by the Governor. Furthermore, he may be required to give the Governor advisory opinions on the abortion statute. Ga. Code Ann. § 40–1602 (1933). Finally, the Attorney General is head of the Department of Law, which is vested with authority and jurisdiction in all matters of law relating to governmental departments, boards and agencies. Ga. Code Ann. § 40–1614 (1943). The Attorney General has sufficient connection with enforcement of the statutes attacked to justify retaining him as a party.[1] See Arneson v. Denny, 25 F.2d 993 (W.D.Wash 1928); Jackson v. Colorado, 294 F.Supp. 1065, 1072 (D. Colo.1968); James v. Almond, 170 F.Supp. 331, 341–342 (E.D.Va.1959); International Longshoremen's & Warehousemen's Union v. Ackerman, 82 F.Supp. 65, 124 (D.Haw. 1948), rev'd on other grounds 187 F.2d 860 (9th Cir. 1951); Bevins v. Prindable, 39 F.Supp. 708, 710 (E.D.Ill.1941). Accordingly, that motion is denied.

The Attorney General has also objected to interrogatories which plaintiffs served for answer by a witness, Roger Rochat, M.D. In view of the disposition of this case made below, no ruling on this motion is necessary.

The motion of Ferdinand Buckley, Esquire, for reconsideration of the revocation of his appointment as guardian and litem will be dealt with in connection with the discussion under MERITS below.

The motion of the National Legal Program on Health Problems of the Poor to submit a brief as *amicus curiae* is granted.

The defendant Lewis R. Slaton, District Attorney of Fulton County, filed motions seeking order requiring disclosure of plaintiff's identity, granting a continuance for discovery for a reasonable time thereafter, and requiring plaintiff to submit to a physical and mental examination. In view of the reasons for which it is held that the complaint of this plaintiff presented a justiciable controversy, these motions are directed toward obtaining information which is not relevant to the case. Accordingly, they are denied.

JURISDICTION

A. Substantial constitutional question

A three-judge court was convened pursuant to 28 U.S.C.A. §§ 2281 and 2284. Such action is proper where plaintiffs attack the constitutionality of a state statute, raising a substantial constitutional question, and seek equitable relief against its enforcement. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715, 82 S.Ct. 1294, 8 L.Ed.2d 794 (1962).

Plaintiffs here attack the constitutionality of Ga. Code Ann. § 26–1201 et seq. (1969) on the grounds that it infringes rights protected by various Amendments to the United States Constitution. They seek an injunction against enforcement. In light of recent cases on the subject of the Constitutional right to an abortion, this Constitutional question appears substantial. *See* Roe v. Wade, 314 F. Supp. 1217 (N.D.Tex., June 17, 1970); Doe v. Randall, 314 F.Supp. 32 (D.Minn., May 19, 1970); Doe v. Scott, 310 F.Supp. 688 (N.D.Ill., March 27, 1970); Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970); United States v. Vuitch, 305 F.Supp. 1032 (D.D.C.1969), app. docketed, No. 1155 (February 5, 1970); California v. Belous, 71 Cal.2d 954, 80 Cal.Rptr.

354, 458 P.2d 194 (1969), cert. den. 397 U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970)).

B. Justiciability

Standing

By motion to dismiss, Lewis R. Slaton, District Attorney of Fulton County, contends that all plaintiffs other than Mary Doe lack standing to maintain this action. The basis for the claims of these plaintiffs is that because they are not free to perform or counsel the obtaining of abortions, they are unconstitutionally restricted in the practice of their professions.

There are certainly instances in which any of these plaintiffs would have standing to claim a constitutional right to practice his profession, and infringement thereof. For instance, few would dispute that a social worker being prosecuted for conspiracy because he (or she) counselled obtaining an abortion, and referred the client to a physician for the abortion, would have standing to seek a declaratory judgment of his (or her) asserted constitutioned right and infringement thereof. *See* Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

But absent prosecution or indictment, that these plaintiffs do have standing is more difficult to see. Whether their claim is otherwise justiciable is irrelevant. Flast v. Cohen, 392 U.S. 83, 100 n. 21, 99 S.Ct. 1942, 20 L.Ed.2d 947 (1968). The sole issue is whether there is a logical link between the status they assert (physician, nurse) and the claim they seek adjudicated, or between their status and both the type of enactment attacked and the nature of the constitutional infringement alleged. 392 U.S. at 102, 88 S.Ct. 1942.

Under either test, all the plaintiffs have standings. As physicians, nurses, ministers or social workers they attack a criminal statute potentially applicable to them, on the grounds that it unconstitutionally restricts their rights to practice. Accordingly, the motion to dismiss for lack of standing is denied.

COLLISION OF INTERESTS

Article III of the United States Constitution limits the jurisdiction of the federal courts to cases and controversies. And it is well established that in action for declaratory judgments, a District Court may not render an advisory opinion on the constitutionality of a state statute. Rather there must be "exigent adversity," an actual controversy in which the constitutionality of the statute is drawn into question in a truly adversary context. *See* Golden v. Zwickler, 394 U.S. 103, 108, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969); Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961); United Public Workers of America v. Mitchell, 330 U.S. 75, 89, 67 S.Ct. 556, 91 L.Ed. 754 (1947).

Most akin to the instant case is Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed. 2d 989 (1961). There, a married couple, a married woman and their physician sought a declaratory judgment that Connecticut's statutes prohibiting the use of contraceptive devices and the giving of medical advice in the use of such devices violated plaintiffs' Fourteenth Amendment rights, depriving them of life and liberty without due process of law. None of the plaintiffs had been indicted or prosecuted under the statutes. There had been only one recorded prosecution for violation of the statutes in the seventy-five years since their enactment, and that single instance occurred twenty years before the declaratory judgment action was brought. The Supreme Court suggested that the lack of a pending prosecution or immediate threat of such prosecution against the particular plaintiffs made the claims non-justiciable, citing United Public Workers of America v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). Poe v. Ullman, 367 U.S. at 501, 81 S.Ct. 1752. But the Justices went on to find that the lack of recorded prosecutions, the unchallenged, open, ubiquitous public sales of contraceptive devices showed a deeply embedded State policy against enforcement, amounting to a tacit agreement not to prosecute violators of the statutes. The majority therefore held:

"It is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting." 367 U.S. at 507, 81 S.Ct. at 1758.

However, these three cases seem precedent for the proposition that in the absence of a pending or threatened indictment or prosecution of the particular plaintiffs bringing a declaratory judgment action, a federal court cannot consider the constitutionality of the challenged criminal statute.

However in 1968, the Supreme Court decided Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968), in which a public school teacher argued that the Arkansas statute prohibiting the teaching of evolution was unconstitutional. There was no pending or threatened indictment or prosecution against the teacher. There was no record of any prosecutions under the challenged statute. The teacher's dilemma was solely that (1) the new biology textbooks she was supposed to use in the approaching term contained a chapter on evolution, and (2) her action for a declaratory judgment in state court, granted on the trial level, had been reversed by the Arkansas Supreme Court. The United States Supreme Court majority reached the merits and reversed the decision of the Arkansas Supreme Court in an opinion which summarily brushed aside the question of justiciability. 393 U.S. at 101–102, 89 S.Ct. 266. Apparently, then, the majority felt that the appeal presented a "substantial controversy * * * of sufficient immediacy and reality." Golden v. Zwickler, 394 U.S. 103, 108, 89 S.Ct. 956, 959–960 (1969).

In the instant case, the plaintiff Mary Doe alleges that having properly applied to the Abortion Committee of Grady Memorial Hospital for a legal therapeutic abortion allowed by Ga. Code Ann. § 26–1202 (1969), she was denied an abortion solely on the grounds that her present situation did not come within the terms of Ga. Code Ann. § 26–1202(a)(1) (1969).

Georgia's Abortion Act defines a criminal abortion as the act performed by a person who administers a substance or uses an instrument or other means with intent to produce a miscarriage or abortion. Ga. Code Ann. § 26–1201 (1969). However, Ga. Code Ann. § 26–1202(a) establishes three circumstances under which an abortion shall not be considered a criminal abortion. And Ga. Code Ann. § 26–1202(b) (1969) prescribes procedure which *must* be followed if an abortion is to be authorized by or performed under 1202(a).

Ga. Code Ann. § 26–1202(b) (1969) provides in relevant part:

"No abortion is authorized or shall be performed under this section unless each of the following conditions is met:

* * * * *

(5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose."

Thus, the denial of plaintiff's application for an abortion, on the grounds alleged, was not the decision of a private physician declining to render professional services, occasioned by the mere existence of Georgia's Abortion Act. The statute confers upon the hospital committee power to grant or deny abortions. A decision denying an application for abortion on the ground that the woman's situation does not fall within one of the three enumerated exceptions is an exercise of that power, which allegedly violated plaintiff's constitutional rights. To this extent then, this statute has been invoked against the plaintiff Mary Doe, causing an alleged constitutional deprivation. Here, there has been actual interference with a claimed constitutional right by the decision of a body which the State has vested with power to grant or deny legal abortions. These circumstances put plaintiff and the defendants on opposite sides of a very real and lively controversy, amenable to judicial resolution.

Accordingly, it appears that Mary Doe's complaint, in this context, presents a justiciable controversy. Since the claims of the other plaintiffs do not stand in such a posture, the Attorney General's motion to dismiss must be granted to that extent.

C. Exhaustion

There is no merit to the defendant Slaton's motion to dismiss for failure to exhaust state remedies. It does not appear that there are any administrative remedies for the denial by a hospital committee of an application for an abortion. And however desirable such a requirement might be for orderly judicial administration, there is no requirement that a litigant in federal court exhaust state judicial remedies, where he is asserting a claim in proceedings other than *habeas corpus* involving a subject over which the federal and state courts have concurrent jurisdiction. As will appear below, the instant case does not involve granting injunctive relief.

THE MERITS

Plaintiff asserts that certain cases leading up to and following Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L.Ed.2d 510 (1965) establish a Constitutional right to privacy broad enough to encompass the right of a woman to terminate an unwanted pregnancy in its early stages, by obtaining an abortion. See Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (dissenting opinion of Mr. Justice Brandeis); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). While the Court agrees that the breadth of the right to privacy encompasses the decision to terminate an unwanted pregnancy, we are unwilling to declare that such a right reposes unbounded in any one individual. Rather, we are of the view that although the state may not unduly limit the reasons for which a woman seeks an abortion, it may legitimately require that the decision to terminate her pregnancy be one reached only upon consideration of more factors than the desires of the woman and her ability to find a willing physician.

In Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the Supreme Court held that the decision to use contraceptive devices is an aspect of a relationship lying within a penumbral zone of privacy created by several fundamental constitutional guarantees, and that a state law forbidding the use of such devices unduly invades that area of protected freedoms with maximum destructive effect upon that relationship. 381 U.S. at 485, 85 S.Ct. 1678. In a

concurring opinion, Mr. Justice Goldberg differed with the majority only to the extent stipulating that the right to marital privacy is encompassed in his concept of personal liberty because of the Ninth Amendment, rather than because of penumbral emanations of specific constitutional guarantees.

For whichever reason, the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy.[3] Like the decision to use contraceptive devices, the decision to terminate an unwanted pregnancy is sheltered from state regulation which seeks broadly to limit the reasons for which an abortion may be legally obtained. However, unlike the decision to use contraceptive devices, the decision to abort a pregnancy affects other interests than those of the woman alone, or even husband and wife alone.

Once conception takes place and an embryo forms, for better or for worse the woman carries a life form with the *potential* of independent human existence.[3] Without positing the existence of a new being with its own identity and federal constitutional rights, we hold that once the embryo has formed, the decision to abort its development cannot be considered a purely private one affecting only husband and wife, man and woman.

A potential human life together with the traditional interests in the health, welfare and morals of its citizenry under the police power grant to the state a legitimate area of control short of an invasion of the personal right of initial decision.

The whole thrust of the present Georgia statute[4] is to treat the problem as a medical one. Such approach is reasonable and seemingly sound inasmuch as medical practitioners are in the best position by virtue of training to judge concurrently the basis as well as the risk inherent in such a decision. In this respect, the state moreover has a legitimate interest in seeing to it that the decision—personal and medical—is not one undertaken lightly and without careful consideration of all relevant factors, whether they be emotional, economic, psychological, familial or physical. For example, the legislature might require any number of conditions such as consultation with a licensed minister or secular guidance counselor as well as the concurrence of two licensed physicians or any system of approval related to the quality and soundness of the decision in all its aspects. It certainly has a clear right to circumscribe a decision made by a woman alone or by a woman and a single physician and to guard against the establishment of transient "abortion mills" by the occasional opportunistic or unethical practitioner and the concomitant dangers to his patrons and the public. Such controls and requirements, so long as they do not restrict the reasons for the initial decisions and do not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment, are properly within the sphere of legislative discretion. In that respect, where abortions may be obtained only from licensed physicians and surgeons, and only after psychiatric consultation, the mere fact that physicians and psychiatrists are more accessible to rich people than to poor people, making abortions more available to the wealthy than to the indigent, is not in itself a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Cf.* Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed. 2d 491 (1970); MacQuarrie v. McLaughlin, 294 F.Supp. 176 (D.Mass. 1968), aff'd 394 U.S. 456, 89 S.Ct. 1224, 22L.Ed.2d 417 (1969).

Moreover, there is an overriding interest in the manner of performance as well as the quality of the final decision to abort. Obvious need for control through licensing, sanitation requirements and proper medical standards in the execution of a legal abortion are examples. Again such decisions address themselves to legislative decision based upon informed judgment.

[11] Having decided that the reasons for an abortion may not be proscribed, but that the quality of the decision as well as the manner of its execution are properly within the realm of state control, the present statute must be examined in such light.

Rather than regulating merely the quality of the decision to have an abortion, and the manner of its performance, the Georgia statute also limits the number of reasons for which an abortion may be sought. This the State may not do, because such action unduly restricts a decision sheltered by the Constitutional right to privacy. See Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); California v. Belous, 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), cert. den. 397, U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970). The question becomes a matter of statutory overbreadth.

[12] Based upon the above, the court finds the following portions of Georgia Code § 26–1202 to be in violation of the constitutional rights of petitioner:

A. Section (a) beginning with the word "because" on line 5 and through subsection (a)(3) in its entirety.

B. Section (b) subsection (3) beginning with the word "because" on line 6 and through the end of said subsection.

C. Section (b) subsection (6) in its entirety.

D. Section (c) in its entirety.

There being no showing to the contrary, the court further finds the remainder of said Code § 26–1202 to constitute a proper exercise of state power within the context of this opinion.[5]

An appropriate formal declaratory judgment may be presented upon request of any party.

ABSTENTION

It is recognized that there is no pending state court proceeding against which the injunction prayed by plaintiff would operate. Nevertheless, the request for injunctive relief is denied, on the same basis as such a prayer would be denied were a state proceeding actually in progress:

"* * * the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted * * * that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court." City of Greenwood v. Peacock, 384 U.S. 808, 1812, 16 L.Ed.2d 944 (1968).

However, under the authority of Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967), the Court has proceeded to issue the declaratory relief, in spite of its unwillingness to broadly enjoin future prosecutions under the Act. Accordingly, plaintiff's request for a declaratory judgment is hereby granted. Judgment shall issue in the form described above.

It is so ordered.

SUPPLEMENTAL OPINION

Since the Court's opinion of July 31, 1970, several motions have been filed necessitating this opinion and order.

MOTION OF AMICUS CURIAE

Ferdinand Buckley filed a motion on September 3, 1970, to alter or amend the Court's judgment of August 25, 1970, to rule on several of his earlier motions and prayers. Accordingly, that judgment is hereby amended in the following (See FN) respect:

Mr. Buckley's motion for reconsideration of the order revoking his appointment as guardian *ad litem* for the embryo (or fetus) and his motion to intervene in any representative capacity on behalf of the embryo or fetus is denied. This ruling makes it unnecessary, and the Court declines, to rule on the prayers in the answer and counterclaim Mr. Buckley filed before revocation of his appointment as guardian *ad litem*.

MOTIONS OF JANE ROE

Jane Roe petitions for leave to intervene as a plaintiff, moves for a temporary restraining order, and asks that the Court clarify and enforce its opinion of July 31, 1970. Said petition, and accordingly also the motion and the request are denied for two reasons.

First, the Court is informed by counsel for all concerned that Georgia Baptist Hospital has reconsidered its earlier decision and subsequently granted Jane Roe's application for an abortion. Said action renders the petition of Jane Roe moot, there now being no sufficient collision of interests between Jane Roe and the defendants.

Second, Jane Roe's petition to intervene makes it clear that her controversy was with Georgia Baptist Hospital, and only tangentially with the defendants in this case. Under such circumstances there is no showing that Mary Doe—representing the class of pregnant women denied abortions because of the Georgia statute attacked—could not adequately represent the tangential interest of Jane Roe in this action. *See* Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137, 141, 64 S.Ct. 905, 88 L.Ed. 1188 (1944); Durkin v. Pet Milk Co., 14 F.R.D. 374 (W.D.Ark.1953).

In spite of the above, the motion presents an aspect of the case which justifies some amplification of the previous declaratory judgment. The court concludes that this should be done by way of amendment sua sponte. Rule 60(b)(6); Klapprott v. United States, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266 (1948); Bros. Incorporated v. W. E. Grace Mfg. Co., 320 F.2d 594 (5th Cir. 1963).

The problem relates to the role and function of the "abortion committees" in the several hospitals. Ga. Code § 26–202b(5). The thrust of the original opinion was to carry out the apparent intent of the Georgia legislature by making the ultimate decision on individual abortions a medical one. However, in line with constitutional principles, the ultimate decision cannot be restricted to the three reasons stated in the statute. This left the abortion committee free to decide whether an abortion was "necessary" on the broader medical basis, namely, the totality of circumstances surrounding each patient.

From the motion it is apparent that those committees who have voluntarily adopted the standards promulgated by the American College of Obstetricians and Gynecologists as controlling have placed themselves in the position of being restricted by the same reasons stated in the statute.[6] What is denied directly cannot be accomplished indirectly. It follows that the abortion committees cannot be limited to the stated reasons as the sole basis for approval of an individual abortion, nor can they so limit themselves by the adoption of such standards. Any such action by a hospital committee is declared to be an unconstitutional exercise of delegated power.

In sum, the statutory processes of approval are left standing. The patient is required to obtain the approval of (1) the certifying physician, (2) the two consulting physicians, and (3) the abortion committee of the admitting hospital. Failure to obtain approval at any level necessarily precludes abortion on that application. A majority of the abortion committee shall control its action, whether for approval or for disapproval.

To the extent stated herein, the original opinion is modified.

It is so ordered.

FOOTNOTES

[1] The Court is also aware that the Attorney General regularly interprets State criminal laws and decisions in published opinions and circulars to State judges and law enforcement officers.

[2] We see no connection between this theory and the claimed unlimited right of a woman "to use her body in any way she wishes" read into Griswold by some. There are obvious limitations to the latter such as self abuse, *e.g.* disease, drugs, suicide, etc. and the rights of others in which the state clearly has an interest. Any such theory in its ultimate is flatly rejected.

[3] This view of the impact of conception on the decision not to have children implies that the distinction between a quick and unquick fetus, and even that between embryo and fetus is not relevant here. And since the Court does not postulate the existence of a new being with federal constitutional rights at any time during gestation, the motion of Mr. Ferdinand Buckley for reconsideration of the order revoking his appointment as guardian *ad litem* for the embryo (or fetus) is denied. Mr. Buckley's motion to intervene in such capacity is also denied. However, he has the Court's appreciation for this participation in this litigation as *amicus curiae*.

[4] Apparently patterned after the American Law Institute, Model Penal Code § 230.3 (Proposed Official Draft, 1962).

[5] It is not thereby implied that those provisions constitute the only or best means of state control. On the whole, the present system appears unnecessarily cumbersome, a potential hazard under due process and equal protection considerations.

[6] The Georgia statute requires the hospital to apply standards promulgated by the Joint Commission on the Accreditation of Hospitals. No such restrictive reasons for approval of an abortion are contained therein. However, the voluntary standards promulgated by the American College of Obstetricians and Gynecologists in part limit the grounds for abortion to the three stated statutory reasons: injury to health of the mother; danger of grave physical or mental defect to the child; and pregnancy due to rape. Any such limiting restrictions, as seen, must fail. Likewise, lack of consent by the husband, while it may freely be considered by the committee, may not be automatically established as an absolute bar.

By way of additional comment, good faith administration of the statute as now constituted would prohibit a committee from secretly restricting abortions to those statutory reasons, which the court has already deleted. To the contrary, all relevant factors should be considered and an informed medical judgment made.

[In the Supreme Court of the United States—No. 70–18, 1971 Term]

BRIEF FOR APPELLANTS

Jane Roe, John Doe, Mary Doe, and James Hubert Hallford, M.D., Appellants, v. Henry Wade, District Attorney of Dallas County, Texas, Appellee.

On appeal from the United States District Court for the Northern District of Texas.

Of Counsel:

Norman Dorsen, School of Law, New York University, Washington Square, New York, N.Y. 10003.

Roy Lucas, James Madison Constitutional, Law Institute, Four Patchin Place, New York, N.Y. 10011.

Sarah Weddington, James R. Weddington, 709 West 14th, Austin, Texas 78701.

Linda N. Coffee, 2130 First Nat'l Bank Bldg., Dallas, Texas 75202.

Fred Bruner, Roy L. Merrill, Jr., Daugherty, Bruner, Lastelick & Anderson, 1130 Mercantile Bank Bldg., Dallas, Texas 75201.

Attorneys for Appellants.

Appellants bring this direct appeal from a June 17, 1970 judgment (A. 124–126)[1] of the United States District Court for the Northern District of Texas, Goldberg, Cir. J. and Hughes & Taylor, D.J.J. The judgment related to two separate actions and an action commenced by an intervening plaintiff.[2] As to the action by Appellants John and Mary Doe, the Court found the Does lacked standing and so dismissed their complaint (A. 124, 126), denying declaratory and injunctive relief against enforcement of the Texas abortion law, which prohibits the medical procedure of induced abortion unless undertaken "by medical advice for the purpose of saving the life of the mother." 2A TEXAS PENAL CODE art. 1196, at 436 (1961) (A. 126). As to the action by Jane Roe and the complaint of intervenor Dr. Hallford, the court granted the declaratory relief prayed for, declaring the Texas abortion law unconstitutional, but denied injunctive relief against future enforcement of the statute (A. 124–126). Plaintiffs John and Mary Doe appeal from the dismissal of their complaint and the denial of injunctive relief (A. 127). Plaintiff Jane Roe and Intervenor-Plaintiff Dr. Hallford also appeal from the denial of injunctive relief (A. 127).

Appellants submit this brief to show that this is a direct appeal over which the Court has jurisdiction, and that the lower court should have granted declaratory and injunctive relief to the plaintiffs in each of the three actions below.

CITATION TO OPINION BELOW

The June 17, 1970 opinion of the statutory three-judge United States District Court for the Northern District of Texas is reported as *Roe* v. *Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam), and set out at A. 111–123.

JURISDICTION

(i) On March 3, 1970, Apellant Jane Roe filed her original complaint, basing jurisdiction on 28 U.S.C. § 1343(3) (1964 ed.), and complementary remedial statutes, 28 U.S.C. § 2201 (1964); 42 U.S.C. § 1983 (1964). On the same day Appellants John and Mary Doe filed a complaint predicating federal jurisdiction on the same statutes. On March 23, 1970, the District Court granted leave for Appellant James H. Hallford, M.D., to intervene as a party-plaintiff, on the same jurisdictional grounds set out above (A. 22–36). Subsequently, on April 22, 1970, Appellant Jane Roe amended her complaint to sue "on behalf of herself and all others similarly situated" (A. 10). Appellants John and Mary Doe also amended their complaints to assert a class action (A. 15). All appellants, from their respective positions as married couples, pregnant single women, and practicing physicians asked that the Texas abortion law[3] which restricts the medical procedure of induced abortion be declared unconstitutional, and that future enforcement be enjoined. A statutory three-judge United States District Court was requested and convened (A. 6, 8) pursuant to 28 U.S.C. §§ 2281, 2284 (1964).

(ii) The final judgment of the statutory three-judge District Court was entered on June 17, 1970 (A. 124). On Monday, August 17, 1970, all appellants filed with the United States District Court for the Northern District of Texas notices of appeal to this Court (A. 127), pursuant to 28 U.S.C. § 2101(b) (1964), and SUP. CT. RULES 11, 34 (July 1, 1970 ed.), 398 U.S. 1015, 1021, 1045 (1970) Protective appeals to the United States Court of Appeals for the Fifth Circuit were noticed on July 23, 1970, by Appellant Hallford (A. 134), and on July 24, 1970, by Appellant Jane Roe (A. 133).

(iii) Jurisdiction of this Court to review by direct appeal the three-judge District Court's final judgment denying a permanent injunction is conferred by 28 U.S.C. § 1253 (1964). The question of jurisdiction was postponed to the hearing on the merits by this Court's order of May 3, 1971, 402 U.S. ——.

STATUTES INVOLVED

2A TEXAS PENAL CODE art. 1196, at 436 (1961):

"Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

2A TEXAS PENAL CODE art. 1191, at 429 (1961):

"If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused."

2A TEXAS PENAL CODE art. 1192, at 433 (1961):

"Whoever furnishes the means for procuring an abortion knowing the purpose intended is an accomplice."

2A TEXAS PENAL CODE art. 1193, at 434 (1961):

"If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars."

2A TEXAS PENAL CODE art. 1194, at 435 (1961):

"If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder."

UNITED STATES CODE, Title 28, § 1343(3) (1964):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * *

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States . . ."

UNITED STATES CODE, Title 42, § 1983 (1964):

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

UNITED STATES CODE, Title 28, § 2201 (1964):

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

UNITED STATES CODE, Title 28 § 1253 (1964):

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

QUESTIONS PRESENTED

I. Whether the Statutory Three-Judge Court Improperly Denied Standing, and Declaratory and Injunctive Relief, to the Class of Married Couple Plaintiffs, Who Were Damaged in Their Marital Relations by the Impact of the Statutes in Question, Unable to

Footnotes at end of article.

Utilize Effective Means of Contraception, at Risk of Serious Injury to Health in the Event of Pregnancy, and Without a Remedy at Law or Equity in the Event of Unplanned Pregnancy?

II. Whether the District Court Should Have Enjoined Future Enforcement of the Texas Abortion Laws on Behalf of the Classes of Pregnant Women Plaintiffs and Physician Plaintiffs, After Having Granted Declaratory Relief, Where an Injunction Was Necessary to Prevent Continuing Grave and Irreparable Injury and to Effectuate the Judgment by Clarifying the Status of the Statute Pending Appeal?

III. Whether These Three Appeals from the District Court Necessitate Plenary Review of Both Jurisdictional and Substantive Features of the Decision Below?

IV. Whether the Provisions in the Texas Penal Code, Articles 1191–1194 and 1196, Which Prohibit the Medical Procedure of Induced Abortion Unless "procured or attempted by medical advice for the purpose of saving the life of the mother," Abridge Fundamental Personal Rights of Appellants Secured by the First, Ninth, and Fourteenth Amendments?

V. Whether the Texas Abortion Law Is Unconstitutionally Vague and Indefinite, in That the Statutory Language Is Not Meaningfully Correlated With Medical Practice, and Provides Wholly Inadequate Warning to Physicians, Their Counsel, Judges, and Jurors, of the Physical, Mental, and Personal Factors Which May Be Considered When Assessing the Applicability of the Statutory Exception?

VI. Whether the Texas Abortion Law, as Applied to Impose Upon a Physician the Burden of Pleading and Proving That a Medical Abortion Procedure Was "procured or attempted by medical advice for the purpose of saving the life of the mother," Violates the Due Process Guarantee of Presumed Innocence and Invades the Privilege Against Self-Incrimination?

STATEMENT OF THE CASE

This appeal was taken by the parties in three independent civil actions heard and decided by a statutory three-judge United States District Court for the Northern District of Texas. *Roe* v. *Wade*, Civ. No. CA–3–3690–B (N.D. Tex., filed Mar. 3, 1970); *Doe* v. *Wade*, Civ. No. CA–3–3691–C (N.D. Tex., filed Mar. 3, 1970); *Hallford, Intervenor* v. *Wade*, Civ. No. CA–3–3690–B (N.D. Tex., filed Mar. 23, 1970).

I. Facts Regarding Appellants Which Gave Rise to the Actions

The facts which gave rise to these three actions will be considered in the context of each class of Appellant-Plaintiffs.

A. Jane Roe

Appellant Jane Roe sued as an unmarried pregnant adult woman on behalf of herself "and all other women who have sought, are seeking, or in the future will seek to obtain a legal, medically safe abortion but whose lives are not critically threatened by the pregnancy" (A. 12). At the time the action was filed, Jane Roe had been "unable to secure a legal abortion in Dallas County because of the existence of the Texas Abortion Laws" (A. 11). She had sought this medical procedure "because of the economic hardship which pregnancy entailed and because of the social stigma attached to the bearing of illegitimate children in our society" (A. 57).[4] Miss Roe admitted that insofar as her own interpretation of Texas law was concerned, her "life [did] not appear to be threatened by the continuation of her pregnancy" (A. 11), other than in a qualitative sense, and in the "extreme difficulty in securing employment of any kind" (A. 57) because of her pregnant condition.

Jane Roe suffered emotional trauma when unable to obtain a legal abortion in Texas (A. 11). She regarded herself as a law-abiding citizen and did not want to participate in a felony offense by obtaining an illegal abortion (A. 57). Also, she had only a tenth grade education and no well-paying job which might provide sufficient funds to travel to another jurisdiction for a legal abortion in a safe, clinical setting (A. 58).

In her complaint filed in federal court, Jane Roe alleged that the Texas abortion law deprived her of various fundamental personal rights protected by decisions of this Court and Amendments to the Constitution, including the "right to safe and adequate medical advice pertaining to the decision of whether to carry a given pregnancy to term."[5]

B. Mary and John Doe

Appellants in the second action are a childless married couple, suing on behalf of all married couples at risk of unwanted pregnancy, and fearful of adverse health consequences. Mary Doe presents the frequent case of a married woman whose health, but not life, would be seriously affected by unwanted pregnancy (A. 17). She has been so advised by her physician (A. 16), and this fact is not contradicted nor challenged in the record. Although her physician has told her to avoid pregnancy for these health reasons, he has also advised her, in light of a neural-chemical disorder, not to use the highly effective oral contraceptives (A. 16). Alternate methods of contraception present significant risks of failure, as detailed on pp. 43–44, *infra*, of this brief.

Mary and John Doe face a realistic risk of unwanted pregnancy which presently injures the harmony of their marital relationship. It was uncontradicted that they "face the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible pregnancy" (A. 18). When the class action feature of the Doe claim is taken into account, it is clear not only that a large number of married couples faced a similar dilemma, but also that many of the class would become pregnant during the litigation and be unable to obtain legal abortions in Texas because of the delays involved in securing adequate judicial relief.

According to the 1965 National Fertility Study (NFS), among *married* couples in the United States, nearly 20 percent of all recent births were unwanted. Bumpass & Westoff, *The "Perfect Contraceptive" Population*, 169 SCIENCE 1177, 1180 (1970); Supp. App. 340, 342.[6] Of the 220,000 births in Texas in 1969,[7] 20% would equal 44,000 births resulting from an unwanted pregnancy. Not one of these 44,000 women, however, would have been adequately protected by a judicial proceeding brought *after* pregnancy had begun. A full fifteen weeks passed between the March 3, 1970, filing date of Mary Doe's complaint, and the June 17, 1970, date of the decision on the merits. The medical procedure of induced abortion after the twelfth week of pregnancy poses continually increasing hazards to the patient, as contrasted with the exceptionally safe procedures available in early pregnancy (A. 52; *see also* pp. 30–34, *infra*). For these sensible reasons, Mary and John Doe sought judicial relief to prevent the present injury caused by a realistic fear of unwanted pregnancy shared by the class. The Does raised constitutional claims similar to those of Jane Roe (A. 19–21).

C. James H. Hallford, M.D.

The third separate action was commenced by a complaint filed on behalf of Dr. Hallford as an intervening plaintiff (A. 24–35).[8] Dr. Hallford is a licensed physician in Dallas who complained of the regular and recurring effect of the statute. He pointed out that the statute's terminology gave no guidance as to how it should be applied in the common types of situations wherein a patient requested the medical procedure of induced abortion (A. 27–29, 33, 63–70). The verified complaint and affidavit of Dr. Hallford explain carefully how he and his patients were injured by the statute and the precise manner in which the statute affected his and their conduct in recurring types of instances (*Id.*). For example, his patients had included those seeking medical abortions because of rape, incest, cancer, uncertain or slight danger of suicide, and recent infection with German measles (rubella) (A. 64–65).

No administrative mechanism exists for interpreting the law; the language of the statute does not correlate with the regular and recurring medical indications of patients; and other physicians and hospital committees are extremely reluctant to implicate themselves in a definitive opinion, according to the exeprience of Dr. Hallford (A. 64–70). Moreover, the enforcement practices of police officers were devoid of any effort to seek an explanation from a physician of the reasons for a given abortion (A. 62). The burden of pleading and proving that an abortion was lawful rests with the physician in Texas. Law enforcement authorities and the courts assume that *all* medical abortion procedures are felonious unless the physician proves the contrary. See *Veevers* v. *State*, 354 S.W.2d 161 (Tex. Crim. App. 1962).

To rectify this on-going governmental invasion of the physician-patient relationship, Dr. Hallford brought this action. No relief was requested against the two indictments then pending against him (A. 73, 74). Dr. Hallford's claim was primarily against the continuing impact of the statute upon him, other members of the medical profession, and their patients.

II. Decision by the district court

Argument was heard from the plaintiffs in each action at a single hearing before the three-judge court (A. 75–110). On June 17, 1970, the court entered judgment and issued an opinion dealing with the substantive and procedural questions at issue (A. 111–126).

As to Mary and John Doe, the three-judge court refused to grant either declaratory or injunctive relief, and dismissed the complaint for lack of standing (A. 124). However, Jane Roe and Dr. Hallford were held to have standing to contest the statute.[9] Both presented a "ripe" case or controversy.[10] Abstention was deemed unjustifiable because no reasonably foreseeable state law interpretation would resolve the federal questions.[11]

On the merits, the three-judge court accepted the claims of plaintiffs that "the Texas Abortion Laws must be declared unconstitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children" (A. 116). Reliance was placed on decisions by this Court establishing "[r]elative sanctuaries for such 'fundamental' interest [as] the family,[12] the marital couple,[13] and the individual."[14] Further precedent was found in similar decisions by other federal and state courts,[15] as well as in a major treatment of the abortion question by Retired Justice Tom C. Clark, *see* Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOYOLA UNIV. (L.A.) L. REV. (1966); reprinted in Supp. App. at 315–326.

Not only were the statutes overbroad, and not justified by a narrowly drawn compelling State interest, but the language of the statutes was unconstitutionally vague. Although a physician might lawfully perform an abortion "for the purpose of saving the life of the [pregnant woman]," [16] the circumstances giving rise to such necessity

Footnotes at end of article.

were far from clear. The district court detailed a few of the more apparent ambiguities:

"How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered" (A. 121).

After finding the Texas statute unconstitutional on two grounds, the district court considered the propriety of injunctive relief. Without noticing that no criminal prosecutions were pending against appellants Jane Roe, John and Mary Doe, and that Dr. Hallford had not requested specific relief from outstanding indictments, the court declined to enforce the declaratory judgments, citing *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) (A. 122). The result, which might reasonably have been foreseen by the lower court, was the issuance of a judgment without meaningful effect.

III. Impact of the denial of injunctive relief

In assessing the district court's judgment denying an injunction, it is necessary to look both to facts preceding the decision and those which followed. These will establish beyond a reasonable doubt that the bare declaratory judgment was ignored and was without force or effect.

Over one year after the declaratory judgment was rendered, Appellee-Defendant Wade's office openly avowed to "continue to enforce Articles 1191, 1192, 1193, 1194, and 1196 of the Texas Penal Code in all abortion cases in which indictments are returned by the Dallas County Grand Jury." A copy of the letter to that effect from District Attorney Wade's office to counsel for appellants is included as Appendix A to this brief, *infra*, at A–1.

As verified by Dr. Paul C. MacDonald, Chairman of the Department of Obstetrics and Gynecology, The University of Texas Southwestern Medical School at Dallas, the declaratory judgment had no effect at that institution which "is virtually the only source of medical services available to the medically indigent of Dallas and Dallas County . . . ." Affidavit of Paul C. MacDonald, M.D., Appendix B, *infra*, at B–1. "[T]he only marked impact of the *Roe* v. *Wade* decision was to increase the frustration felt by many of the faculty members . . . regarding the matter of abortion." *Id.* Appellee Henry Wade, District Attorney, is also the official legal counsel for the hospital staffed by members of the medical school faculty. A representative of Wade's office had communicated the decision to ignore the declaratory judgment to Mr. C. J. Price, hospital administrator, who had in turn conveyed the decision to Dr. MacDonald as follows:

"[P]ertinent points which the District Attorney's Office considers of importance are:

1. The law is still what it has been,

The Statutes pertaining to abortion are still on the books,

3. The District Attorney's Office has ruling [*sic*] by the Federal judges under appeal.

4. The Federal judges did not issue any injunctions against the District Attorney to preclude prosecution or following the state law . . . ." Appendix B, at B–4 to B–5.

Since but minimal respect for the federal declaratory judgment was shown by appellees, the medical profession had no choice but to yield to the official law enforcement policy. Otherwise, indictments would have been forthcoming.

Dr. Joseph Seitchik, Chairman of the Department of Obstetrics and Gynecology, The University of Texas Medical School at San Antonio, verified that the District Attorney of Bexar County considered that "the Texas law still stood and that it would still be enforced." Appendix C, at C–4. A similar understanding prevailed at The University of Texas Medical Branch, Galveston. According to Dr. William J. McGanity, Chairman of the Department of Obstetrics and Gynecology there,

"The situation regarding when, under what circumstances, and after what administrative procedures an abortion may be performed in John Sealy Hospital is exactly what it was prior to the June 17, 1970 decision of the three-judge court in *Roe* v. *Wade*. The decision has had no impact on medical practice in the Medical Branch hospitals." Appendix D, at D–3 to D–4.

Not only have the medical centers in Texas continued to fear prosecution after the June 17, 1970 declaratory judgment, but this fear has been realistic. Appendix E to this brief includes an indictment on abortion charges against a physician filed on June 8, 1971, almost a year after the federal decision, and illustrates the basis for anxiety. It is not difficult to understand why 728 Texas women travelled to New York City from July 1, 1970, to March 31, 1971, to obtain legal abortions. Chase, *Abortions to Out-of-State Residents* (June 29, 1971) (Report of the Health Services Administration, City of New York).

RELEVANT BACKGROUND AND MEDICAL FACTS

I. The medical nature of abortion

A. Spontaneous and Induced Rejection of Pregnancy

The standard text on obstetrics and gynecology defines abortion, both *spontaneous* and *induced*, as follows:

"Abortion is the termination of a pregnancy at any time before the fetus has attained a stage of viability. Interpretations of the word 'viability' have varied between fetal weights of 400 g (about 20 weeks of gestation) and 1,000 g (about 28 weeks of gestation). . . . Although our smallest surviving infant weighed 540 g at birth, survival even at 700 or 800 g is unusual." L. HELLMAN & J. PRITCHARD, WILLIAMS OBSTETRICS 493 (14th ed. 1971).

Both *induced* and *spontaneous* abortions amount to a rejection of pregnancy. The procedure of *induced* abortion differs from spontaneous not in the result, nor in the under-lying reason for the abortion but primarily in its being conscious and volitional. For example, a patient infected with rubella (German measles) may abort spontaneously, because her *body* rejects a badly damaged embryo. Another similarly situated patient may seek an *induced* abortion as part of a reasoned mental judgment to reject a damaged embryo in favor of a subsequent normal pregnancy. From this perspective, "spontaneous abortion can be regarded as an important biologic mechanism which has evolved in viviparous animals to deal with the numerous embryologic errors arising during development." Potts, *Postconceptive Control of Fertility*, 8 INT'L J.GYN. & OBST. 957 (1970).

The importance and biologic necessity of spontaneous abortion cannot be denied:

"If spontaneous abortion did not occur, life as we know it would be impossible. At present approximately 1 in 50 of the population is congentially abnormal, but fortunately most defects are minor. If all the abnormal embryos that were conceived survived, then 1 in 10 to 1 in 5 of the population would be abnormal and most of the defects would be gross and incapacitating. Potts, *The Problem of Abortion*, in BIOLOGY AND ETHICS 3 (1969).

Spontaneous abortions cannot be brought about, under current technology, solely by the will of the patient. Yet, the bio-chemical systems of patients play an increasing role in what had previously been regarded as an accidental phenomenon. One recent study of spontaneously aborted embryo showed that 38% "had a chromosomal abnormality." Carr, *Chromosome Studies in Selected Spontaneous Abortions*, 37 OBSTETRICS & GYNECOLOGY 750 (1971). Not only do fetal defects frequently cause spontaneous abortion, but numerous other causes beyond the patient's control, and often working in her favor, appear to be involved. In fact, "[w]hen pregnancy is defined as beginning at fertilization or implantation, then the rate of spontaneous wastage is even higher and many approach 50%." *Potts, supra.*

No law requires that a patient seek or a physician provide treatment to prevent *spontaneous* abortion. Neither nature nor the law values an embryo which the patient's bio-chemical system rejects. In such cases the needs of the patient and the treatment provided by the physician are committed by law in every state to the discretion of the physician and patient. No hospital committees interfere with this relationship; no government programs seek to promote confinement and treatment in cases of threatened spontaneous abortion.

Indeed, spontaneous abortions before the fourth week of pregnancy are "perceived by the patient as delayed menstruation or may not be recognized at all." L. HELLMAN & J. PRITCHARD, WILLIAMS OBSTETRICS 496 (14th ed. 1971). This is perhaps the case because in early pregnancy, when the overwhelming number of all abortions take place, embryonic development has scarcely begun. "The 4 weeks old embryo measures 5 mm. [1/5 in.]. . . ." Shettles, *Fertilization and Early Development From the Inner Cell Mass*, in SCIENTIFIC FOUNDATIONS OF OBSTETRICS AND GYNECOLOGY 154 (E. E. Philipp, *et al.*, eds. 1970). As noted in standard embryology texts, "during these early stages, the development of all mammals is fundamentally the same. The specific characteristics of any form emerge but slowly, and relatively late. . . The illustrations of sections of 5-mm human embryos are quite applicable, for example, to similarly located sections of 5-mm pig embryos. The basic plan of early body structure is amazingly similar." B. PATTEN, HUMAN EMBRYOLOGY 5 (3d ed. 1968).

The 5-mm embryo, for example, still has "a conspicuous *tail*. . . ." L. AREY. DEVELOPMENTAL ANATOMY 98 (7th ed. 1965((italics in original). Indeed, "[f]or the first week of development the human embryo is invisible to the naked eye. . . ." Potts, *The Problem of Abortion*, in BIOLOGY AND ETHICS 1 (1969).

Neither the medical profession nor state health authorities treat spontaneous or induced abortions prior to 20 weeks of development as events which in any way are comparable to the loss of human life. As one prominent physician recently stated:

"To the medical profession operating within its present framework, the conceptus, prior to twenty weeks of age, does not have the same legal status as one after that time. Should there be an untimely birth before twenty weeks, the act is considered an abortion, not a delivery, and is not listed on the mother's parity record. A birth or death certificate is not required and the body is handled as a pathological specimen without requiring legal interment." Ryan, *Humane Abortion Laws and the Health Needs of* Society, 17 W. RES. L. REV. 424, 427 (1965).

B. Frequency of Medically Induced Abortion in the United States and Texas

In the United States on the whole, induced abortion under medical auspices was relatively restricted until 1967, when the first of twelve states, Colorado, enacted the American Law Institute abortion law proposal in the Model Penal Code.[17]

Only 5,000 therapeutic abortions were estimated to have been done in the United States medical facilities in 1963,[18] as contrasted with 200,000 to 1,000,000 unwanted pregnancies

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Footnotes at end of article.

thought to be termined annually outside of the clinical setting.[19] These are over and above the "nearly 20 percent of all recent births [which] were unwanted," according to the 1965 National Fertility Study (NFS). Bumpass & Westoff, *The "Perfect Contraceptive"* Population, 169 SCIENCE 1177, 1180 (1970).

Since 1967, the incidence of abortions in medical facilities has risen substantially, but only in the few states which have removed virtually all restrictions that previously differential abortion from other forms of medical treatment. In New York City alone, for example, approximately 120,000 abortions were performed between July 1, 1970 and March 31, 1971.[20] Nearly 40,500 of these women were not residents of New York State![21] 728 were from Texas, and a total of 36,006 were from states with the Texas-type restrictive law.[22] It goes without saying that only the well-informed and financed women from out-of-state were able to undertake the expense and effort to travel to New York.

C. Medical safety aspects of induced abortion in surgical practice

The law on abortion cannot be understood without reviewing the pertinent aspects of medical and legal history which gave rise to the law. When this is done, it becomes abundantly clear that public health considerations motivated this type of legislation, and that these factors no longer justify maintaining such stringent restrictions in the criminal code.

1. Induced abortion in 19th century medicine

In the 1820's when the first American abortion statutes were enacted, there was no medical profession as we know it. Physicians and quacks alike advertised their treatments and potions in the same marketplace. Both had little to offer the public.

Medical science, an infant branch of learning in the 1800's, did not uncover the need for clean hands in gynecological examinations until the 1840's. Even then, "[d]uring the period 1850–70, there was no gynecology worthy of the name. This had to wait for the twentieth century and the development of an understanding of ovarian function, recognition of the details of the menstrual cycle, establishment of safe surgery, and a host of other things. Obstetrics was, of course, old, but it was still in the hands of midwives whose only interest lay in practical problems." McKelvey, *Ninety Years of Obstetrics and Gynecology,* THE LANCET 242 (May 1960).

The first work published in this area was produced by none other than Oliver Wendell Holmes (Cr.), a physician who was better known as a writer and father of the great jurist. Holmes discovered that puerperal fever was spread by physicians who attended infected patients and corpses, and then went into the maternity wards without washing or changing clothes. These findings were first presented to the Boston Society for Medical Improvement on February 13, 1843. Holmes, *The Contagiousness of Puerperal Fever,* 1 NEW ENG. QUARTERLY J. OF MEDICINE 503 (1842–43).

Virtually simultaneous discoveries along the same lines were made by I. P. Semmelweis, working in Vienna:

"The story of Semmelweis is more generally known. His main work was done in the first Women's Clinic in Vienna, where he recognized that the horrible mortality rates from puerperal infection were the result of something which was introduced by the hands of the physicians who examined the women in labor. . . . The average mortality rate in this clinic for the year 1846 was 13.7 per cent, and almost all of this was due to puerperal infection. In May 1847, Semmelweis introduced careful hand washing with various compounds, and for the year 1848, the mortality rate dropped to 1.27 per cent." [23] McKelvey, *Ninety Years of Obstetrics and Gynecology,* THE LANCET 242, 243 (May 1960).

Not until 1867, however, did Joseph Lister put forth the novel concept that *in all surgery* antiseptic techniques were necessary to prevent infection and death. *See* Lister, *On A New Method of Treating Compound Fracture, Abscess, etc.,* 1 THE LANCET 328 (Mar. 16, 1867):

"In 1867, Lister published the first series of cases on the virtue of carbolic acid in the management of compound fractures. Of the 11 consecutive cases, one required amputation, and another died of secondary hemorrhage several months later. The remaining 9 recovered, a remarkable percentage in that era." J. TALBOTT, *Lord Lister (1827–1912),* in A BIOGRAPHICAL HISTORY OF MEDICINE 755, 756 (1970).

Data on pre-Listerian mortality rates from simple, not to mention complex, surgery present a frightening spectacle.[24] A review of 19th century operations reported the following:

"There were the almost inevitable suppuration of the wound, the putrefaction and sloughing off of tissue, the sickening odor, the high fever, the danger of hemorrhage, the slow healing, the complications of blood poisoning, erysipelas, gangrene and tetanus, the physical and mental anguish, and the uncertainty of the final outcome. *The mortality from major operations was from 50 to 100 percent."* F. S. LEE, SCIENTIFIC FEATURES OF MODERN MEDICINE (1911) (emphasis added).

Reports on gynecological surgery revealed a recurring theme. Relatively external surgery was undertaken cautiously and rarely. Internal surgery was frowned upon unless death were imminent. As an early history of gynecological surgery pointed out:

"General surgery in the first part of the nineteenth century was in the hands of more skillful surgeons, but it was the surgery of amputations, disarticulations, ligations of large vascular trunks and removal of superficial tumors. Gynecological surgery was limited to the removal of polyps, excision of a hypertrophied clitoris, incision of an imperforate hymen and attempts at repair of a third degree perineal laceration. The more daring undertook repair of a vesco- or recto-vaginal fistula, an occasional ovariotomy, a cervical amputation, or vaginal hysterectomy for malignancy, an abdominal hysterectomy for fibroids or an operation for abdominal pregnancy, amputation of an inverted uterus, drainage of a pelvic abscess and a rare extraction of an extra-foetal mass or even a full term living foetus, either by vaginotomy or abdominal incision. For the greater part of the century, no one ventured a laparotomy for removal of a tubal pregnancy or a tubo-ovarian inflammatory mass. But success and popularization of all these major therapeutic measures awaited the three fundamentals—anaesthesia, asepsis, and haemostatis which ushered in the golden age of surgery and operative gynecology." J. RICCI, DEVELOPMENT OF GYNECOLOGICAL SURGERY AND INSTRUMENTS 279 (1949).

The author emphasized not only the dangers of routine external surgery, but the near impossibility of a patient's recovery from any operation which involved entry into the abdominal cavity. With respect to this contrast in gynecological surgery, Dr. Ricci states:

"If ovariatomy was considered a dangerous operation during the greater part of the nineteenth century, prior to antiseptic decades, intra-abdominal uterine surgery was looked upon as almost impossible. While the most common cause of death in ovariotomy was peritonities, in uterine surgery the added facts of shock and hemorrhage increased the mortality rate. Thus ⅞ of the attempts to remove a fibroid uterus prior to 1863 were either abandoned or ended fatally. The voices of medical practioners rose in unison against this phase of surgery. C. D. Meigs 1848) stated that doing anything about those fibroids was hopeless. He detested all abdominal surgery save that which was clearly warranted 'by the otherwise imminent death of the patient.'" *Id.* at 501–502.

This did not end after 1867. Lister's techniques were slow to reach the United States, and even slower of acceptance. One American physician, Roswell Park, reported with horror his earliest experience in hospitals in this country:

"[W]hen I began my work, in 1876 . . . in one of the largest hospitals in this country, it happened that during my first winter's experience—with but one or two exceptions—every patient operated upon in that hospital, and that by men who were esteemed the peers of anyone in their day, died of blood poisoning, while I myself nearly perished from the same disease. This was in an absolutely new building, where expenditures had been lavish; one whose walls were not reeking with germs, as is the case yet in many of the old and well-established institutions." R. PARK, AN EPITOME OF THE HISTORY OF MEDICINE 326 (1898).

The same experience was reported everywhere in the United States. A significant chapter in this history is the contribution made by the Mayo brothers, who brought antisepsis and safe surgery to Minnesota, and the midwest, and then made improvements from which the remainder of the American medical profession could benefit and learn.

H. CLAPESATTLE. THE DOCTORS MAYO (1941), details this experience. The significant facts are as follows:

(1) By 1874 "only five attempts at ovariotomy [25] had been made in the entire state [of Minnesota]. . . . All five patients had died." *Id.* at 140.

(2) The Senior "Dr. Mayo piled up a record of thirty-six ovariotomies during the decade [1870–1879], with . . . a mortality of twenty-five per cent. . . ." *Id.* at 214.

(3) In the mid-1890's Drs. Will and Charlie Mayo began to perform appendectomies. "Although their mortality rate was not the thirty per cent admitted by some city hospitals it was still twelve to fifteen per cent too high to justify operation if the patient had a chance without it." *Id.* at 305.

(4) "Word of the work of Pasteur and Lister was getting around by 1880, but more as the story of an outlandish new fad than as the report of scientific truth." *Id.* at 143. It was only after a tour of hospitals on the continent of Europe, in 1889, that the Mayo brothers could envision "the prospect of a surgery of expediency, of operating that would not be just a last desperate throw of the dice with death but a means of restoring health. . . ." *Id.* at 269.

The year 1890 was separated by a continent and almost four decades from the 1854 enactment of abortion legislation in Texas.[26] Still, surgical dangers warned against any medical procedure. Induced abortion, in particular, involved internal use of surgical instruments, and the inevitable introduction of infection into the womb. Far better, the legislature obviously deemed, that a woman risk childbirth, than death on the operating table. Only when the risks cancelled themselves out did she have an option.

Today the comparative risks weigh heavily in favor of permitting induced abortion, not as an emergency matter as in 1851, but as an elective medical procedure. Surgery in those times was almost always fatal. As the next section shows, medicine is a different science today.

2. Induced abortion in contemporary surgery

Induced abortion, in medical practice today, is a relatively minor surgical procedure, insofar as risks to the patient's physical or mental well-being are concerned. This excep-

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tional safety consideration was noted by Dr. John McKelvey, former head of obstetrics and gynecology at the University of Minnesota:

"Under ideal circumstances, abortions can be done with very little vital risk. The procedures which are open to the poor on the contrary can be very risky not only to the life of the individual but to her future health." McKelvey, *The Abortion Problem*, 50 MINN. MED. 119, 124 (1967).

The degree of safety can be readily seen by comparing patient mortality rates for induced abortion with those of childbirth and other typical medical procedures.

The maternal mortality rate in the United States for 1967 averaged 28.0 deaths per 100,000 live births. For non-whites the rate was almost three times as high, 69.5 deaths per 100,000 live births.[27] The comparable mortality rates for various surgical procedures in the United States, per 100,000 operations, have been as follows: [28] Appendectomy [29]—400 per 100,000; cholecystectomy [30] (gall bladder operation)—1,600 per 100,000; Tonsillectomy/adenoidectomy [31]—5.2 per 100,000.

In the years 1963 to 1968, therapeutic abortions were unavailable in the United States on any large scale. Most patients had to show serious physical or mental disease to obtain the procedure. Of the 9,722 therapeutic abortions in the 1963–68 survey by the Commission on Professional and Hospital Activities only a single death "unequivocally resulted from the operation." [32] This death represents the equivalent of a mortality rate of 10.3 per 100,000 therapeutic abortions. Even this figure is misleadingly high in that the abortion was induced by an abdominal operation (hysterotomy) which poses substantial hazards of its own. Nonetheless, a 10.3 rate is 2.7 times safer than childbirth, 38.8 times safer than appendectomy, and 155 times safer than cholecystectomy, all other factors being equal.

A more correct estimation of the surgical risks from induced abortion can be made by examining the induced abortion mortality rates from jurisdictions in which abortion is available as an elective procedure in cases of contraceptive failure.

The experience in New York State following the amending of the New York State abortion statute to permit elective abortion, the first such experience with abortion on a large scale in the United States, further demonstrates the safety of the procedure. 165,000 abortions were performed in New York City in the first eleven months under the new law. The mortality rate for legal abortion during this period was only 5.3 per 100,000.[33] New York City health officials expect this low rate to decline even further with time. According to City Health Administrator Gordon Chase, "the safety record is improving, probably because doctors are gaining experience with the procedure, and certainly because the proportion of first trimester abortions . . . has been increasing." "Complications are decreasing steadily in both early and later abortions. . . ." [34] That the mortality rate has already declined is evidenced by the fact that not one abortion mortality occurred in the last four months of the eleven month period.

In New York City the percentage of second trimester abortions, which in the City's experience entailed a six times higher complication rate than for first trimester abortions, has fallen to below 25%.[35] Only in eastern Europe, where "almost all legal abortions are performed in the first trimester of pregnancy with the majority in the second month," [36] have mortality rates dropped to as few as 1.2 per 100,000 operations (Hungary: 1964–67, 9 deaths, 739,000 legal abortions).

The extent to which elective induced abortion for healthy women is enormously safer than childbirth and various other medical procedures can be seen by tabulating the figures given above:

Medical Procedure or Event—Mortality per 100,000 procedures	
Elective induced abortion (Hungary: 1964–67)	1.2
Tonsillectomy (U.S.: PAS 1969)	5.2
Elective induced abortion (N.Y.C.: 1970–1971)	5.3
Therapeutic induced abortion (U.S.: 1963–68)	10.3
Childbirth (U.S.: 1967)	28.0
Appendectomy (U.S.: PAS 1968)	400
Cholecystectomy (U.S.: PAS 1968	1,600

On another level as well, abortion is a safe procedure: it is without clinically significant psychiatric sequellae. A number of recent studies confirm that abortion does not produce serious psychological side-effects damaging to the mental well-being of the patient.[37]

In sum, the medical procedure of induced abortion, which is severely restricted by the statute involved in this case, is potentially 23.3 (28/1.2) times as safe as the process of going through ordinary childbirth and without psychiatric side-effects.

II. Legal and medical standards of practice regarding induced abortion in Texas and the United States

A. Induced Abortion at Common Law

At common law, abortion could be induced by a physician, midwife, or anyone without penalty, prior to the period of pregnancy called "quickening," *i.e.*, 16–18 weeks. *See* L. AREY, DEVELOPMENTAL ANATOMY 106–07 (Reference Table of Correlated Human Development) (1965 ed.). This principle was accepted in the overwhelming majority of American jurisdictions.[38] From 1828 onward, however, states began to modify the common law rule by legislation which prohibited all forms of abortion (other than spontaneous) at all stages of pregnancy.[39]

B. Legislative History of the Texas Abortion Law

The first Texas law deviating from the common law on abortion was approved February 8, 1954. TEXAS LAWS OF 1854, ch. 49, § 1, at 58, in 3 GAMMEL, LAWS OF TEXAS 1502 (1898). The text is set out in the note below.[40] Two years later, the law on abortion was modified [41] into language which is substantially the same as that of the statute currently in force, 2A TEXAS PENAL CODE arts. 1191–1194, 1196, at 429–36 (1961). Intervening revisions and codifications made no changes of any significance.

The sole evidence of statutory intent is found in the circumstances under which the 1854 Act was passed, and its derivation. As shown earlier in this brief, at pp. 26–29, the dangers of internal surgery in the mid-1800's were formidable. Public health justifications were readily available for outlawing all or most surgery, and intra-abdominal surgery in particular. Indeed, because of the demand for drugs and procedures for interrupting unwanted pregnancy, this area in particular required surveillance to protect the health of women from backroom practitioners, offering drugs and noxious things for bringing about a miscarriage.

Contemporaneous judicial explication of 19th century American abortion legislation can be found in an 1858 decision interpreting the 1849 New Jersey statute, which from all appearances was the likely model for the Texas statute. As stated by the highest court of New Jersey in *State* v. *Murphy*, 27 N.J.L. (3 Dutcher) 112, 114–15 (Supp. Ct. 1858):

"The design of the statute was not to prevent the procuring of abortions, so much as to *guard the health and life of the mother against the consequences of such attempts.* . . . It is immaterial whether the foetus is destroyed, or whether it has quickend or not. * * * "*The offense of third persons*, under the statute regards her as the victim of crime, not as the criminal; as the object of protection, rather than of punishment." (Emphasis added.)

The Reviser's Note to 1829 New York legislation plainly show the same purpose. A section was proposed, but not enacted, to prohibit all major surgical procedures:

"Every person who shall perform any surgical operation, by which human life shall be destroyed or endangered, such as the amputation of a limb, or of the breast, trepanning, cutting for the stone, or for hernia, unless it appear that the same was necessary for the preservation of life, or was advised, by at least two physicians, shall be adjudged guilty of a misdemeanor." [42]

The purpose of this bill was stated by the Revisers:

"Reviser's Note: The rashness of any young practitioners in performing the most important surgical operations for the mere purpose of distinguishing themselves, has been a subject of much complaint, and we are advised by old and experienced surgeons, that the loss of life occasioned by the practice, is alarming. The above section furnishes the means of indemnity [impunity], by a consultation, or leaves the propriety of the operation to be determined by the testimony of competent men. This offense is not included among the mal-practices in manslaughter, because, there may be cases in which the severest punishments ought not to be inflicted. By making it a misdemeanor, and leaving the punishment discretionary, a just medium seems to be preserved." [43]

Even religious doctrine with respect to abortion was unavailable in 1851 to support the law. Pope Pius IX's *Apostolicae Sedis* in 1869 was the first enduring break from the theory that an embryo had life at 40 days if male and 80 days if female. In 1854 induced abortion was not an excommunicable offense when undertaken in the early stages.

Today, only abortions performed in non-medical environments present significant risks of morbidity and mortality; with proper medical supervision, abortions are safe and simple procedures. In keeping with modern medical practice, this Court would reinforce the purpose of early abortion legislation if it invalidated the statute. This would permit abortions to be done by licensed physicians in adequate medical facilities and discourage abortions by unskilled practitioners. Moreover, it would preserve the 117-year-old purpose of the law, and the common law.

C. CONTEMPORARY LEGISLATION ON INDUCED ABORTION

Item No. 1, p. 1 of the Supplementary Appendix to this brief contains an accurate chart on the current status of laws in the United States regulating the medical procedure of induced abortion. The statutes vary in restrictiveness. Those in Texas and thirty-one other states sharply limit the justifications for abortions to instances wherein the woman's life would otherwise be sacrificed.[44] Others, patterned after the UNIFORM ABORTION ACT (2d Tent. Draft 1970), follow the American Medical Association's position and that of the American College of Obstetricians, by treating induced abortion the same as spontaneous abortion—a medical procedure to be considered in light of the patient's overall life situation.

D. CONTEMPORARY STANDARDS OF MEDICAL PRACTICE REGARDING INDUCED ABORTION

1. National medical organizations

Evidence of American standards of medical practice respecting induced abortion is found in the policy statements of professional organizations. Both the American Medical Association and the American College of Obstetricians and Gynecologists have set standards of professional practice in recent years.

Footnotes at end of article.

ACOG policy sanctions therapeutic and elective abortion "to safeguard the patient's health or improve her family life situation." ACOG recognizes that "abortion may be performed at the patient's request. . . ." Supp. App. at 23. A very similar position was taken by the American Medical Association. The AMA at one time had followed the A.L.I. model, listing four or five vaguely defined situations for sanctioned abortion. This proved unworkable, and the policy was changed in order not to limit the physician's traditional responsibility for evaluating "the merits of each individual case. . . ." Supp. App. at 33.

From this it is clear that the Texas law sharply interferes with professional medical practice.

2. The Texas Medical Association

On May 6, 1966, a special committee to study and consider the modernization of abortion law in Texas was appointed as a result of a resolution adopted by the Texas Medical Association's House of Delegates, meeting in annual convention. This action was prompted by a resolution previously adopted by the Texas Association of Obstetricians and Gynecologists under the leadership of Dr. Hugh Savage calling for the T.M.A. to give serious study to determine the need for modernizing the Texas abortion law.

The Special Committee's report called for amendment of the Texas law to allow abortion in cases of rape, incest, impairment of the physical or mental health of the woman, or substantial risk of a child born with a grave physicial or mental defect. The report was approved by the Executive Board of the Association on October 2, 1966. *Report of Executive Board*, TRANSACTIONS OF THE HOUSE OF DELEGATES, TEXAS MEDICAL ASSOCIATION 43 (1967).

The 1968 Report of the Special Committee on Abortion Laws in Texas, TRANSACTIONS OF THE HOUSE OF DELEGATES, TEXAS MEDICAL ASSOCIATION 79 (1968), included the results of a survey of Texas hospitals covering the years 1965–1967. The results indicated that 81 abortions had been done in Texas hospitals for fetal indications, 1 for rape, and 1 for incest, even though such abortions were illegal. It again concluded that the Texas abortion law should be changed.

Further studies were undertaken, and in 1968 a written poll was taken in which the Association's members were asked to state whether they felt the current Texas abortion law should be amended. Of the 9,338 doctors polled, 53% responded. 4,435 physicians stated that they desired a change in the present statute, while 536 responded negatively. Members were also asked to indicate the reasons for which an abortion should be performed. Maternal indications approved by those voting included physical health, mental health, socio-economic factors, and cases of criminal incest and rape. Fetal indications of viral diseases, drug-induced deformities, and diagnosed intrauterine abnormalities were approved. All of the maternal and fetal indications except socio-economic factors were approved by margins ranging from 10 to 1 to 100 to 1. Socio-economic factors were approved by a 3 to 2 margin. *Report of Special Committee on Abortion Laws in Texas*, TRANSACTIONS OF THE HOUSE OF DELEGATES, TEXAS MEDICAL ASSOCIATION 96 (1969).

On September 20, 1970, the Association's Executive Board adopted as policy the recommendation that:

"WHEREAS, Abortion, like any other medical procedure, should not be performed when contrary to the best interests of the patient since good medical practice requires due consideration for the patient's welfare and not mere acquiescence to the patient's demands; and

"WHEREAS, The standards of sound clinical judgment, which, together with informed patient consent should be determined according to the merits of each individual case; therefore be it

"RESOLVED, That abortion is a medical procedure and should be performed only by a duly licensed physician and surgeon in a licensed hospital acting only in conformance with standards of good medical practice, and after proper medical consultation; be it further

"RESOLVED, That no physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor personnel shall be required to perform any act which violates moral principles which they might hold." *Report of Executive Board*, TRANSACTION OF THE HOUSE OF DELEGATES, TEXAS MEDICAL ASSOCIATION (1970).

This resolution was adopted by the Association's House of Delegates at its 1971 annual convention with the following addition:

"RESOLVED, This definition of position shall not be interpreted as endorsement of abortion on demand or request; further, it shall not be interpreted as endorsement of the use of abortion as a part of a social movement."

III. Relationship between contraception and the medical procedure of induced abortion

Widespread lack of information about contraception, and significant contraceptive failure rates are two of the many factors which must be understood in assessing the impact of abortion laws on families and individuals in Texas and the United States.

A. Lack of Public Access to Information and Medical Service for Family Limitation by Use of Contraceptives

All too frequently it is presumed that people have access to and are able to use highly effective contraceptives, and are themselves at fault in cases of unwanted or unplanned pregnancy. This assumption could not be further from medical reality. Contraception is not widely available in the United States. In fact, Congress passed the *Family Planning Services and Population Research Act of 1970*, Pub. L. No. 91–572 (Dec. 24, 1970), with an overall appropriation exceeding $380 million "to assist in making comprehensive voluntary family planning services readily available to all persons. . . ." National studies on the magnitude of unwanted births, such as data from HEW's 1965 National Fertility Study, for example, showed:

"[In] the period 1960 to 1965 there were 4.7 million births that would have been prevented by 'perfect contraception.' These births represent one fifth of all births during the period. Approximately two million of these births occurred among the poor and the near-poor and half of these among Negro poor and near-poor." [45]

The most recent studies identify as a principal problem the absence of adequate information and services for people with a need to know about contraception, and when that fails, medically induced abortion. As late as the close of 1969, "some 4.3 million women in need of subsidized family planning services were not receiving them insofar as could be determined from reports of organized programs; no programs at all could be identified in 1,636 counties—53 percent of all counties—containing one-fourth of the unmet need. Services continue to be concentrated in relatively few populous counties. . . ." [46]

The basic 1968 study covered each State by county. In Texas a total of 355,120 medically indigent women in need of family planning information were shown to be unserved. This amounted to 89% of such women.[47] These individuals can hardly be thought to be able to protect their marital and personal privacy through contraception, when that is altogether unavailable to them.

This deficiency is not confined to patents. Only a few short years ago, a review of texts used in medical schools revealed that "[t]wo thirds of the texts (25 texts) contained either no mention of contraception or only isolated reference to it, with no complete discussion." Tietze, *et al., Teaching of Fertility Regulation in Medical Schools*, 196 J. AMERICAN MEDICAL ASS'N 20, 23 (1966).

Patients have limited access to contraceptive methods and information. Physicians have limited willingness to prescribe contraception. As if this were not enough, contraceptive devices, techniques, and use are far from effective as a means whereby a family can determine how many children they will have and no more.

B. Ineffectiveness of Contraceptives Due to Significant Degree of Failure in Method and Use

The most effective contraceptive known, "the pill" or oral contraceptive, has in practice produced side effects "disagreeable enough to cause a 20 to 40 per cent drop-out rate" among those patients who were informed of and chose to use the method in the first place. E. NOVAK, *et al.*, TEXTBOOK OF GYNECOLOGY 647 (8th ed. 1970). The vast proportion of the population not receiving family planning services never reach that option, of course. Other methods are less effective in practice than the 99% effective oral contraceptive. *Id.* These range from the intrauterine devices, which pose problems of their own and vary in effectiveness, to abstention and rhythm, which are not seriously regarded by the medical profession in this century.[48]

The chart on the following page illustrates the contraceptive failure problem.

FAILURE RATES OF CONTRACEPTIVE METHODS

Method	Pregnancy rates for 100 woman-years of use [49]	
	High	Low
No contraceptive	[50] 80.0	80
Aerosol foam		29
Foam tablets	43.0	12
Suppositories	42.0	4
Jelly or cream	38.0	4
Douche	41.0	21
Diaphragm and jelly	35.0	4
Sponge and foam powder	35.0	28
Condom	28.0	7
Coitus interruptus	38.0	10
Rhythm	38.0	0
Lactation	26.0	24
Steriod contraception (the "pill")	2.7	0
Abortion	0	0
Intrauterine contraception (averages):		
Lippes loop (large):		
0 to 12 months	2.4	
12 to 24 months	1.4	

Source: Berelson et al., "Family Planning and Population Programs," University of Chicago Press, 1966.

SUMMARY OF ARGUMENT

This case presents three separate actions: (1) that of Jane Roe, an unmarried pregnant woman, who sues of behalf of herself and other women unable to obtain a legal abortion because of the Texas abortion laws; (2) that of John and Mary Doe, a childless married couple who sue on behalf of themselves and others similarly situated complaining of the adverse effect of the Texas abortion law on their martial relations; and (3) that of James Hubert Hallford, M.D., a Texas physician who intervenes on behalf of himself and other doctors similarly situated, alleging the constraint of the Texas abortion law on the practice of medicine.

The parties requested that articles 1191–1194 and 1196 of the Texas Penal Code, which make abortion a crime unless performed "upon medical advice for the purpose of saving the life of the mother," be declared unconstitutional and that Defendant Henry Wade be enjoined from instituting future prosecutions thereunder.

Footnotes at end of article.

The three-judge federal court declared the statutes unconstitutional on two grounds: first "because they deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children" and are overbroad and not supported by compelling state interests; and second because they are unconstitutionally vague. The court, however, refused to grant an injunction and found that John and Mary Doe had no standing.

Appellants appeal to this Court from the denial of injunctive relief and from the holding that John and Mary Doe have no standing; they urge the Court to go beyond jurisdictional points to a consideration of the merits of the statute in question.

Appellants urge first that John and Mary Doe do have standing to challenge the Texas abortion law and that they do present a case or controversy. The Does are complaining not of a future, anticipated injury resulting from the unavailability of legal abortions, but rather are complaining of the effect that unavailability is currently having upon their marital relationship. They are facing a dilemma forced upon them by the abortion statute: whether to discontinue normal marital intimacies or to risk contraceptive failure, which would be detrimental to Mary's health. Mary could not obtain a legal abortion in Texas since pregnancy would pose no immediate danger to her life. The continuing spectre of pregnancy is having a divisive effect upon their marriage. They are vitally affected by the Texas abortion law and do present a case or controversy within the meaning of those terms as established by prior decisions of this Court. *Flast* v. *Cohen*, 392 U.S. 83 (1968); *Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1971).

Appellants urge that they are entitled to injunctive relief to effectuate the rights established by the decision of the three-judge court and that the court erred in refusing to grant the injunction.

Appellants have suffered and are continuing to suffer irreparable injuries which are both great and immediate, and there is no opportunity for them to eliminate the threat to their rights posed by the abortion statute through the defense of a single prosecution. Under the standards laid down in *Younger* v. *Harris*, 401 U.S. 37 (1971), they have brought their case within those special circumstances where Federal equitable relief against the enforcement of state criminal statutes is justified. *Ex parte Young*, 209 U.S. 123 (1908).

Appellants required an injunction to vindicate their rights; since no injunction was issued, appellee continues to consider the laws to be in force and effect and Dallas physicians, reasonably fearful of prosecution, continue to refuse to perform medical abortions. As a consequence, safe abortion procedures are no more available now in Texas than they were prior to the district court's decision holding the Texas law unconstitutional.

Further, appellants contend that injunctive relief was appropriate and should have been granted since no adequate state remedy is available (particularly as to appellants Roe and Doe) due to the unique Texas division of criminal and civil jurisdiction.

As to the merits, appellants contend that the Texas abortion law is unconstitutional since it interferes with the exercise of fundamental rights and is neither narrowly drawn nor supported by a compelling state interest. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). The law abridges rights emanating from the First, Fourth, Ninth, and Fourteenth Amendments to seek and receive health care, to privacy and autonomy in deciding whether to continue pregnancy, and, as to physicians, to administer medical care according to the highest professional standards. The right of personal and marital privacy has been recognized by this Court and by numerous state and lower federal courts, and is grievously infringed by the statute in question. The law is unconstitutional since it is overbroad and since it does not support any compelling state interest.

The primary interest asserted by appellee in the lower court was an interest in protecting fetal life, yet appellants have clearly shown that the state's position is fatally inconsistent since it does not exhibit any interest in or provide any protection of fetal life in any circumstance other than the medical procedure of abortion.

Additionally, the Texas abortion law is unconstitutionally vague since it gives no meaningful indication to physicians of the conditions under which an abortion may legally be performed.

Finally, the law in question imposes an unconstitutional burden of proof on a physician accused of having performed an abortion to establish that an alleged abortion was within the statutory exception established by article 1196.

In summary, appellants urge this Court to render a decision holding that the three-judge court erred in refusing to grant injunctive relief; that the three-judge court erred in holding that John and Mary Doe presented no case or controversy and did not have standing to challenge the Texas abortion law; and affirming the decision of the three-judge court that articles 1191–1194 and 1196 of the Texas Penal Code are unconstitutional.

ARGUMENT AND AUTHORITIES

Obviously a single brief cannot present all of the considerations which should be brought to bear on the issue of the constitutionality of the Texas abortion law. Beyond the authority applicable to the questions of injunctive relief and standing, Counsel for the Appellants have chosen primarily to amplify the constitutional issues relied upon by the lower court.

Counsel for Appellants invite this Court's attention to each of the *amicus curiae* briefs filed herein on appellants' behalf. Each presents unique aspects of legal, medical and social factors relating to the question of abortion which this Court is urged to consider in deciding the instant case.

I. The statutory three-judge district court was properly convened and had jurisdiction to grant declaratory relief to the three complaining classes of party plaintiffs.

A. The Class of Adversely Affected Married Couple: Mary and John Doe

1. Standing of Mary and John Doe

The uncontradicted allegations of Mary and John Doe have been discussed at pp. 10–11 of this brief. It is not contested that the Texas abortion law has a recurring, present adverse impact upon their marital relations. This Court has frequently upheld the standing of parties with far less at stake than marital harmony and overall health. As to standing in itself, there exists a "nexus between the status asserted by the litigant[s] and the claim[s] [they present]." *Flast* v. *Cohen*, 392 U.S. 83, 102 (1968). Laws regulating the medical procedure of induced abortion inevitably affect the class of married couples.

2. Case or controversy between the Does and defendant-appellee

Nothing in Article III nor considerations of judicial policy justified the determination below that the Does failed to present a case or controversy.

Regardless of the possibility that a married couple might present a *more* concrete controversy, Mary and John Doe satisfy all of the logical and constitutional prerequisites for invoking the jurisdiction of a court over their controversy with appellees.

Unspecified economic injury between a litigant and a *potential* business competitor was held to create a case or controversy in *Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1971); *accord*, *Arnold Tours* v. *Camp*, 400 U.S. 45 (1970) (per curiam). Mary and John Doe, who assert a *present* personal injury to their marital harmony, not measurable in economic terms, are in a dilemma of far greater reality than that in *Investment Co. Institute*.

The Arkansas Monkey-Law case, *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), is more akin to this problem. There a teacher posed a case or controversy with state officials because she was inhibited by a statute which had never been enforced. The inhibition in the present case is more serious. Both present a realistic case or controversy, and both cases have been vigorously pursued by the parties. The decisions above, and the long line of loyalty oath cases, show a realistic approach to Article III and recognize that the quantifiable impact of a statute, rather than the imminence of jail, is a sound criteria. *See also LSCRRC* v. *Wadmond*, 401 U.S. 154, 158–59 (1971); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964).

B. The Class of Adversely Affected Pregnant Women Denied Medical Care: Jane Roe

1. Standing of Jane Roe

At the time she filed her complaint, Jane Roe was pregnant and had been denied a legal, hospital abortion in Texas because of the law. She sought to contest the statute on behalf of herself and others presently or in the future similarly situated. The lower court upheld her standing, and this has not been questioned.

2. Case or controversy between the Jane Roes and defendant-appellee

The fact that Jane Roe was forced to continue her pregnancy pending determination of her suit and that she could not then obtain a safe abortion does not moot the appeal in any sense, particularly in light of the class allegations. "The problem is . . . 'capable of repetition, yet evading review,' *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). The need for its resolution thus reflects a continuing controversy. . . ." *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969). The case is the same as those in which events of nature or conduct by one of the parties threatens to obscure a substantial, on-going problem which must be finally resolved. *See e.g.*, *Gaddis* v. *Wyman*, 304 F. Supp. 713, 717 (S.D. N.Y. 1969), *aff'd mem. sub nom. Wyman* v. *Bowens*, 397 U.S. 49 (1970); *Kelly* v. *Wyman*, 294 F. Supp. 887, 890, 893 (S.D.N.Y. 1968), *aff'd sub nom. Goldberg* v. *Kelly*, 397 U.S. 254, 257 n. 2 (1970). The 728 Texas women who were forced to travel to New York City for medical care from July 1, 1970, to March 31, 1971 [51]—a rate of 81 per month—illustrate the continuing controversy. This Court held that a "mere possibility of [recurrence] . . . serves to keep the case alive." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953). In the present context, mere possibility has been replaced with the inevitability of Texas women being forced to seek out unknown doctors at medical facilities in distant states at great expense.

C. The Class of Adversely Affected Physicians Prohibited on a Regular and Recurring Basis From Providing Necessary Medical Care for Their Patients: James H. Hallford, M.D.

1. Standing of Dr. Hallford

The action on behalf of physicians, represented by Dr. Hallford, alleged throughout the abortion statute directly curtailed the interests in providing adequate medical advise and treatment for patients. These interests are aspects of "liberty," "property," and association directly protected by the Fourteenth and First Amendments. The opportunity to pursue one's profession is en-

Footnotes at end of article.

compassed within the concepts of "liberty" and "property." This has been the teaching of decisions involving members of and aspirants to the bar, *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, 102–03 (1963); teachers, *Slochower* v. *Board of Higher Educ.*, 350 U.S. 551 (1956); scientists, *Greene* v. *McElroy*, 360 U.S. 474, 492 (1959); and physicians as well, *Birnbaum* v. *Trussell*, 371 F.2d 672 (2d Cir. 1966).

The present case, therefore, is wholly unlike *Tileston* v. *Ullman*, 318 U.S. 44 (1943) (per curiam). There a physician, who claimed no rights whatsoever of his own, sought declaratory relief against a statute which prohibited *patients* from using contraceptives. Here, physicians are drastically affected by direct enforcement provisions of the challenged statute. Tileston, however, had made "no allegations asserting any claim under the Fourteenth Amendment of infringement of [his] liberty or his property rights." 318 U.S. at 44. It is abundantly clear that the physician sub-class,

"alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).

2. Standing of the physician-class to assert the rights of patients to seek the medical care of induced abortion

Dr. Hallford also invoked the rights of present, past, and prospective patients. A pregnant woman is generally in no position to undertake protracted litigation to establish her right to an abortion, and none has ever been prosecuted. Neither a physician's rights, nor those of his patients, should depend upon the ability to find a cooperative martyr.

This case, then, is a close parallel to *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), because, "[t]he rights of [patients] are likely to be diluted or adversely affected unless those rights are considered in a suit involving [physicians] who have this kind of confidential relationship to them." 381 U.S. at 479.

Similarly, it has been held in abortion prosecutions that the physician may assert his patient's rights, a proposition which the lower court correctly accepted, and *California* v. *Belous* [52] considered so self-evident as to justify no more than a footnote. In fact, each federal and state court decision in recent months has concluded, without the need for extensive discussion, that physicians in both declaratory and defensive actions have standing to assert the rights of patients. *E.g.*, *United States ex rel. Dr. Jesse Williams, II* v. *Zelker*, — F.2d. —, No. 35381 (2d Cir. July 2, 1971) (Tom C. Clark, J.); *Crossen* v. *Breckenridge*, —— F.2d ——, No. 20852 (6th Cir. June 23, 1971) (Miller, J.). *See also Truax* v. *Raich*, 239 U.S. 33 (1915); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *see generally* Sedler, *Standing to Assert Constitutional Jus Tertii*, 71 YALE L.J. 599 (1962).

Physicians, in light of their direct involvement in the day to day effects and enforcement of the statute, are situated in much the same way as the defendant-covenantor in *Barrows* v. *Jackson*, 346 U.S. 249 (1953), because here as there "it would be difficult if not impossible for the persons whose rights are asserted to present their grievances before any court." 346 U.S. at 257. In any medical context it is meaningless to speak of physicians without patients and patients without physicians. In law it would be equally meaningless to hold that a physician may not rely upon her or his patients' rights.

3. The recurring case or controversy between the physician-class and defendant-appellee

"There can be little doubt that fear of the law is a determining factor in the policy adopted by hospitals and surgeons, both in the United States and in Great Britain." G. WILLIAMS, THE SANCITY OF LIFE AND THE CRIMINAL LAW 168 (1966). Medical professionals, commendably, do not habitually flout laws in order to contest their validity. This Court, and lower courts, should not force such anti-social conduct by taking an unduly narrow view of the Article III case or controversy requirement. Nothing in Article III, prior decisions by this Court, or considerations of judicial management remotely suggests that a physician must flout a statute, undertake piecemeal defense of repeated prosecutions and risk fines, imprisonment, and license revocation in order to challenge a law which poses concrete cases and controversies in the physician's office day after day.

The nature of the recurring case or controversy produced by the challenged statute is understandable, specific, and fully manageable within sound judicial procedures. Physicians do not simply "feel inhibited" by the restrictions on reasons and procedures for medical abortions in Texas. *See Younger* v. *Harris*, 401 U.S. 37, 42 (1971). They *are inhibited* in a very serious, plainly demonstratable, concrete, and specific manner.

Federal courts in Wisconsin,[53] Colorado,[54] Illinois,[55] North Carolina,[56] and Ohio [57] have faced the same questions of recurring case or controversy, and ruled in the manner suggested by Appellants.

Prospective lawyers are not required to be disbarred or refused admission to the bar in order to contest statutes which affect the conduct of law students. *LSCRRC* v. *Wadmond*, 401 U.S. 154, 158–59 (1971). The teachers in *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), and *Baggett* v. *Bullitt*, 377 U.S. 360 (1964), did not face a court-imposed dilemma forcing them to flout an anti-evolution statute in the Scopes tradition, or risk entanglement in a perjury prosecution which might follow the signing of a loyalty oath.

Similarly, the drug companies in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), were permitted by this Court to make a broad attack on labelling regulations promulgated by the Commissioner of Food and Drugs. Physicians, even more than drug companies, "deal in a sensitive (profession), in which public confidence," 387 U.S. at 153, is especially important.

Indeed, even the earlier "ripeness" cases which found no controversy support the presence of a sufficient degree of justiciable adversity on the fact presented here.[58]

A bare majority in *Poe* v. *Ullman*, 367 U.S. 497 (1961), for example, fund no controversy over the unenforced Connecticut law against the use of contraceptives. Justice Frankfurter's plurality opinion relied upon four factors: (1) a history of non-enforcement of the statutes against physicians and patients. 367 U.S. at 501–02; (2) the fact that "contraceptives are commonly and notoriously sold in Connecticut stores. Yet no prosecutions are recorded. . . ." 367 U.S. at 502; (3) the absence of "real threat of enforcement," 367 U.S. at 507; and (4) the failure to find "deterrent effect . . . grounded in a realistic fear of prosecution." 367 U.S. at 508.

Each of these features is different in the present case, and additional considerations make this case even more appropriate for decision, on the merits.

(1) The Texas abortion statutes are regularly enforced by criminal prosecutions and license revocations. In addition, hospital committees in effect enforce the laws within their institutions. Neither *Poe* nor *Griswold* indicated that hospital committees in Connecticut regulated the prescription of contraceptives to patients.

(2) Abortions in Texas hospitals are obviously not "commonly and notoriously" available upon request.

(3) There is more than "real threat of enforcement" of the Texas abortion laws. There is frequent actual enforcement.

The above analysis considers the *Poe* plurality opinion in isolation and assumes the case was correctly decided. However, *Poe* was handed down over persuasive dissents by Justices Harlan and Douglas, and memorandum notations of dissent from Justices Stewart and Black. *Poe* has been repeatedly criticized and suggestions made that it be or was limited to its facts.[59]

Poe appears to be one of the exceedingly few decisions which requires a litigant to invite and undergo criminal prosecution. Ultimately, the physicians prevailed, seven-to-two, four years later. Suppose they had not? The *Poe* decision would have consigned them to accepting the penalty. Other decisions, as Justices Harlan and Douglas pointed out, dissenting in *Poe*, imposed no such Hobson's choice.

Justice Harlan's dissent in *Poe* undertook at length to demonstrate that the majority was in substantial error. 367 U.S. at 522–39. The Justice placed chief reliance on *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), and *Truax* v. *Raich*, 239 U.S. 33 (1915). Both permitted anticipatory relief to avoid damage caused by the present *effect* of a statute rather than imminence of enforcement. Significantly, in *Pierce*, "a Court which included Justices Holmes, Brandeis, and Stone rejected a claim of prematureness and then passed upon and held unconstitutional a state statute whose sanctions were not even to become effective for more than seventeen months after the time the case was argued. . . ." *Poe* v. *Ullman*, 367 U.S. 497, 538 (1961) (Harlan, J., dissenting). See also *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943) (students allowed to challenge possible expulsions prior to actual dismissal, and prior to effective date of rule which, if enforced, would have required expulsion); *Terrace* v. *Thompson*, 263 U.S. 197, 216 (1923) ("They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights").

Congress, in passing the Declaratory Judgment Act, recognized the need to provide a federal anticipatory remedy in lieu of defense to a criminal prosecution. A Senate Report reflected this specific concern:

"It is often necessary, in the absence of the declaratory judgment procedure, to violate or purport to violate a statute in order to obtain a judicial determination of its meaning or validity." S. Rep. No. 1005, 73d Cong., 2d Sess., at 2–3.

In the instant case, physicians positively refrain from treating and advising patients for the reason that they fear criminal prosecution, or administrative sanctions. They are not uninterested citizens urging an academic question, but are a class of citizens greatly affected and deterred by the challenged statutes. As Professor Bickel suggested, in a slightly different context, "it may be true that by hypothesis no more suitable case can ever be constructed, because those who are unjustifiably deterred will never be prosecuted, and what deters them is precisely the prospect of litigation." [60]

In light of the considerations set out above, the lower court correctly recognized the claims of the physician class as presenting a recurring case or controversy within the meaning of Article III.

II. The three-judge court should have granted injunctive relief to the three complaining classes of plaintiffs

The relief sought by Appellants below did not include any order against actual pending or contemplated state court proceedings. Appellants' claims met the requirements of equitable jurisdiction, and posed a situation justifying injunctive relief against future

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Footnotes at end of article.

enforcement of the abortion statutes. By denying the requested injunction, the Court below in effect failed to enforce the very Constitutional rights which that Court had found to be in jeopardy.

A. Injunctions Against Future Enforcement of State Criminal Statutes Are Proper Absent a Showing of Bad-Faith Enforcement for the Purpose of Discouraging Protected Rights

The District Court based its refusal to issue an injunction on an erroneous interpretation of *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), stating that:

"This federal policy of non-interference with state criminal prosecutions must be followed except in cases where 'statutes are justifiably attacked on their face as abridging free expression,' or where statutes are justifiably attacked 'as applied for the purpose of discouraging protected activities.' *Dombrowski* v. *Pfister*, 380 U.S. at 489–490. Neither of the above prerequisites can be found here." *Roe* v. *Wade* (314 F. Supp. at 1224; A. 122).

The district court's opinion seemed to require literal threats of bad-faith prosecution for the purpose of discouraging plaintiffs' constitutionally-protected activities before the plaintiffs would have been entitled to an injunction. However, the quoted phrases from *Dombrowski* relate to the appropriateness of abstention in cases where a statute might be construed by a state court to be inapplicable to the conduct of the federal court plaintiff. While the facts in *Dombrowski* included a threat to freedom of expression and bad faith on the part of the local law enforcement officials, the case should not be read as a restriction of the law relating to equitable relief from unconstitutional criminal statutes.

The correct standard by which the claims of the appellants for injunctive relief should have been judged was restated by Mr. Justice Black in *Younger* v. *Harris*, 401 U.S. 37, 47 (1971). The plaintiff must show: (1) irreparable injury; (2) that the irreparable injury is both great and immediate; and (3) that the threat to plaintiff's federally protected rights is one that cannot be eliminated by his defense against a single criminal prosecution. *Ex parte Young*, 290 U.S. 123 (1908), and injunction cases decided since, indicate that the three prerequisites for injunctive relief may be met absent actual threats of bad-faith enforcement.

The actions resulting in *Ex parte Young*, 209 U.S. 123 (1908), were initiated on the day *before* the statute in question took effect. It was not until a temporary injunction had been issued against the attorney general of Minnesota that he took any action against the railroad involved. The pleadings of the plaintiffs merely alleged that *should* the railroad fail to observe the law, "such failure *might result* in an action against the company or criminal proceeding against its officers . . ." *Id.* at 131 (emphasis added). In fact, the plaintiffs were stockholders in the railroad and could not have been subjected to either civil or criminal action. Their interest was only monetary.

In *Truax* v. *Raich*, 239 U.S. 33 (1915), the plaintiff filed his bill in the district court one day after the statute in question (establishing penalties against employers who employed fewer than 80 per cent native-born citizens) was signed into law. The immediate and irreparable injury about to be suffered by Raich, an alien, was that his employer, fearing criminal sanction, was planning to discharge him. After Raich applied for an injunction against the local prosecutor, the employer was arrested. Raich was not arrested, nor was he threatened. There were no allegations of bad faith. Rather, this Court emphasized the inadequacy of the plaintiff's remedy at law and spoke of the exception to the rule against interference with criminal prosecution that existed, "when the prevention of such prosecutions is essential to the safeguarding of rights of property. The right to earn a livelihood and continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection. . . ." 239 U.S. at 37–38. (Citations omitted.)

In *Terrace* v. *Thompson*, 263 U.S. 197 (1923), this Court spoke of the "threatened enforcement of the law" in question as being subject to an injunction if necessary to protect federal rights. There was no allegation that the threats were anything more than good-faith willingness on the part of the state officials to enforce a law on the books.

Hygrade Provision Co. v. *Sherman*, 266 U.S. 497 (1925), involving a New York statute establishing penalties for falsely representing meat as "kosher," perhaps represents the "low-water" mark in the quality of allegations necessary to support equitable jurisdiction. The offenses in question were classified as misdemeanors with a maximum fine of $500.00, and the "threats" of prosecution were general, directed to the public. Yet, the Court's unanimous opinion stated that: "If the statutes under review are unconstitutional, appellants are entitled to equitable relief. . . ." 266 U.S. at 500.

Perhaps because of a constant parade into the federal courts of litigants such as those in *Hygrade*, whose anticipated injuries consisted of small fines under economic regulation statutes, this Court began to tighten the prerequisites for equitable interference with state criminal statutes. Thus, in a series of economic regulation statute cases including *Fenner* v. *Boykin*, 271 U.S. 240 (1926); *Beal* v. *Missouri Pac. R.R. Corporation*, 312 U.S. 45 (1941); *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89 (1935); and *Watson* v. *Buck*, 313 U.S. 387 (1941); this Court somewhat narrowed the factual requirement necessary to obtain an injunction. That the substantive law was not changed or narrowed can be gleaned from the individual facts of the cases. In *Fenner*, the state statute made participation in certain assignments for purchase or sale of future commodities a crime. The plaintiffs were commodity dealers. The district court concluded that the statute only applied to gambling transactions, and dismissed the bill. This Court affirmed holding that the plaintiffs should first set up their defense in state court, unless it plainly appeared that such a course would not afford adequate protection. *Fenner*, *supra*, at 244. Thus, not only was it unclear that the statute jeopardized the plaintiff's federal rights, but it was clear that the validity of the statute depended upon whether it would apply to plaintiffs.

Spielman involved a misdemeanor statute with a maximum $500 fine. The defendant-prosecutor stipulated only one prosecution until a decision on the constitutionality of the state statute was reached and it was not clear that plaintiff's business would be seriously hurt. This Court stressed that the injury must be both great and immediate to warrant equitable relief. Obviously from the facts, Spielman's anticipated injury was not.

Beal also dealt with the problem of single versus multiple prosecutions. The penalty was a fine and it was an issue of fact, undecided by the district court, whether multiple prosecutions were contemplated. If there was to be only one, this Court felt that the injury entailed in a single defense with only the possibility of a fine at stake was not great enough to warrant injunction. *Beal*, *supra*, at 50.

In *Watson*, the statutes in question (regulating music copyrights) were extremely complicated and had not been construed by the state courts. The district court had enjoined enforcement of the entire statute, whereas only part of it was constitutionally suspect. Whether multiple prosecutions were contemplated was also in doubt. In fact this Court spoke of "an absence of any showing of a definite and expressed intent to enforce particular clauses of a broad, comprehensive and multi-provisioned statute." *Watson*, *supra*, at 400.

Contrasted with the above cases, the facts of *Hague* v. *CIO*, 307 U.S. 496 (1939), decided during the same period, are particularly enlightening. There, the injuries alleged involved ordinances which among other things flatly prohibited distributing any newspapers, paper, periodical, book, magazine, circular, card or pamphlet on any public street or public place. The plaintiffs had been denied the right to meet, had been arrested and at times "thrown out of town." While much was said in the opinion concerning the "rights and immunities" of citizens of the United States and the states, and whether free speech and assembly were included in the Civil Rights Acts, there was never any indication that only violations of speech and assembly rights would establish a case for equitable relief.

In *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943), an injunction was denied but the decision did not hinge on the question of threats or bad-faith enforcement to discourage federally protected rights. First, the ordinance was general, relating to all peddlers and was only unconstitutional as applied to plaintiffs and other Jehovah's Witnesses; second, there was no factual allegation of multiple prosecutions and it appeared that the plaintiffs could completely present their claims in the defense of a single suit—especially since this Court had that day held the statute void as to those in plaintiffs' class; third, since the ordinance was not void as to all applications, the district court would have had to attempt to envision all possible applications, enjoining some and leaving others alone; and finally, the rather unique situation that existed in this Court's having declared the ordinance as applied unconstitutional in a companion case effectively mooted whatever injuries might have been suffered in the future by the plaintiffs.

Stefanelli v. *Minard*, 342 U.S. 117 (1951), and *Cleary* v. *Bolger*, 371 U.S. 392 (1963), are often cited as precedents against injunctions involving state criminal process, but both cases involved pending prosecutions. The rights in jeopardy were procedural rather than substantive and involved only the single trials in which the plaintiffs were being prosecuted. Also, another policy, that of avoiding piecemeal review of cases, militated against an injunction.

In *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), this Court spoke again of the reluctance of federal courts to intervene when a plaintiff's rights might be fully determined in the defense and ultimate Supreme Court review of a single indictment, but held that such was not the situation in the case being considered.

"[T]he allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights." 380 U.S. at 485.

The rights could not be vindicated by setting up a defense in a criminal trial because the prosecutions were in bad-faith and for the purpose of harassment. The special vulnerability of speech to such tactics made the injuries irreparable, immediate and great. This, taken with the bad-faith prosecutions, made out a case for equitable relief. That free expression and bad faith on the part of state prosecutors were the determinative factors in *Dombrowski* cannot be denied, but to hold that these are the only factors justifying an injunction is to ignore the substantive law contained in *Ex parte Young*, 209 U.S. 123 (1908), *Traux v. Raich*, 239 U.S. 33 (1915), and other cases cited above while keying upon the peculiar factual situation to

which the substantive law was applied in *Dombrowski*.

That *Dombrowski*-type situations are not the only cases in which federal interference is justified was affirmed by this Court last term in the case of *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). There the threats to the plaintiff's rights were not in the form of threats of prosecution either in good or bad faith. The only criminal sanctions involved applied to those who sold alcoholic beverages to persons whose names had been posted. The statute itself, by allowing officials and relatives to "post" a person's name without notice or hearing, posed the threat to the plaintiff's rights. The rights could not be vindicated by defending a single state prosecution.

B. The question of relief by injunction against the Texas abortion statute is not foreclosed by the decisions in Younger v. Harris and Companion cases

Younger v. *Harris*, 401 U.S. 37 (1971), *Samuels* v. *Mackell*, 401 U.S. 66 (1971), *Dyson* v. *Stein*, 401 U.S. 200 (1971), *Byrne* v. *Karalexis*, 401 U.S. 216 (1971), *Boyle* v. *Landry*, 401 U.S. 77 (1971) and *Perez* v. *Ledesma*, 401 U.S. 82 (1971), all involved, in part, the requested injunction of a *pending* prosecution. Since those plaintiffs who were being prosecuted did not make out a case of bad faith on the part of the local officials, they failed to satisfy the requirement that the threats to their rights must be such that they could not be vindicted in the defense of a single prosecution. As Mr. Justice Stewart pointed out in his concurring opinion to *Younger* v. *Harris*, 401 U.S. 37T, 54–55 (1971):

"[T]he Court today does not resolve the problems involved when a federal court is asked to give injunctive or declaratory relief from *future* state criminal prosecutions."

Although the plaintiff, Dr. Hallford, was being prosecuted under the Texas Abortion Statutes at the time he filed his motion to intervene and complaint, he requested an injunction only against future prosecutions under the statutes, reserving the right to ask for an injunction against the *pending* prosecutions against him (A. 34). In fact, as the record discloses, he never asked the district court to enjoin the pending prosecutions. Plaintiffs Roe and Doe were not in any sense involved in the pending prosecutions. Under the authority of *Hale* v. *Bimco Trading, Inc.*, 306 U.S. 375 (1939), neither the Anti-Injunction Statute, 28 U.S.C. § 2283, nor collateral court-made rules relating to comity would bar their actions as strangers to the pending prosecution of Dr. Hallford. To hold otherwise would be to ignore that three different rights are being claimed: (1) The physician's right to perform an arbortion; (2) the pregnant woman's right to obtain an abortion and (3) the married couple's right to the assurance of abortion as a back-up procedure to protect their marital harmony. Dr. Hallford might fail to vindicate his rights in defending the criminal action. He may rely in part upon the rights of his patients, but there is no guarantee that those rights will be reviewed by this Court. Plaintiffs Doe and Roe are not required to leave the defense of their personal rights to another. *Pearlman* v. *United States*, 247 U.S. 7 (1918). The fact that the pending state action did not involve the same parties as the federal action eliminates the danger the type of gratuitous interference with state court litigation spoken of in *Brillhart* v. *Excess Ins. Co. of America*, 316 U.S. 491, 495 (1942).

In both *Younger* v. *Harris*, 401 U.S. 37 (1971), and *Boyle* v. *Landry*, 401 U.S. 77 (1971), there were plaintiffs who were not being prosecuted under the statutes in question. However, in both instances it was not clear that the statutes prohibited what those plaintiffs wished to do. In *Boyle* the statute involved threatening to commit a criminal offense. The majority opinion by Mr. Justice Black indicates that the plaintiffs were asking for an injunction because they feared bad-faith enforcement of the statutes, not because the statutes on their face forbade any activity in which plaintiffs wished to participate. Since no facts showing that actual threats or arrests had been received were introduced in the district court, plaintiffs failed to make out a case of bad-faith harassment. In *Younger*, the three plaintiffs who were not being prosecuted only alleged that they felt "inhibited" by the statute. It was not clear that the statute would apply to them, nor that their inhibitions were at all justified. *Younger* v. *Harris, supra*, at 57, 58 (Mr. Justice Brennan concurring).

By contrast, Plaintiffs Roe, Doe and Hallford in the present case presented factual allegations to the District Court which clearly brought them within the criteria necessary to invoke equitable relief from the statute. Whether the rights alleged by the plaintiffs are federally protected has yet to be decided by this Court, and arguments related to those rights are treated in this brief in the section on the merits of the statutes in question. Similarly, the arguments relating to the impact of an unwanted pregnancy and a physician's right to use his best medical judgment are also treated elsewhere in this brief. It is enough for purposes of this section to point out that in the case of plaintiff Jane Roe and the class she represents, the economic, social, psychological, and physiological effects of being forced to go through an unwanted pregnancy and deal with an unwanted child certainly represent irreparable injuries. When she and those in her class are forced to continue an unwanted pregnancy their lives are irremediably altered. They have no action for damages or any other traditional legal action which in fact or theory can remedy their situation. That problems concerning pregnancy are both great and immediate obviously follows from even a cursory consideration of the nature of the condition. Plaintiff Roe and those in her class cannot eliminate the threat to their rights by setting up a defense in a single prosecution or any number of prosecutions since under Texas law a woman upon whom an abortion is performed cannot be prosecuted as either a principal or an accomplice. *Gray* v. *State*, 77 Tex. Cr. R. 221, 178 S.W. 411 (1915); *Moore* v. *State*, 37 Tex. Cr. R. 552, 40 S.W. 287 (1897). Plaintiff Roe in her complaint and in her affidavit, which was uncontroverted by the defendant, presented a factual resume consisting of pregnancy out-of-wedlock, social stigma and economic hardship due to that pregnancy, a desire to put an end to that condition, and an inability to do so under conditions which would not jeopardize her life. That there are many in her situation is uncontroverted. If Jane Roe and those in her class have a constitutional right to an abortion, there is but one way to effectuate that right—by enjoining the enforcement of the statute so that physicians will be willing to attend to their health needs.

Plaintiffs John and Mary Doe presented claims and facts to the District court which showed a pervasive and continuing injury to their most intimate marital relations. The Texas abortion statute poses a constant threat to their ability to plan their family and avoid possible injury to Mary Doe's health. Each day that they must face this uncertainty represents a great and immediate injury. Like Plaintiff Roe, there is no way that they can eliminate this threat to the rights of marital privacy by setting up a constitutional defense in a criminal prosecution. Mary Doe could not be prosecuted. While her husband could theoretically be prosecuted as an accomplice should Mary undergo an illegal abortion, his defense on constitutional grounds would come too late to prevent the disruption of their marital relations prior to pregnancy. For it is not their right to end an unwanted pregnancy at present that is being violated by the statute, but rather, the right to engage in normal marital relations with the assurance that should contraception fail, Mary's health would not be endangered. Again, if John and Mary have a constitutional right to the availability of abortion as means to insure normal marital relations, there is only one way they can be secure in that right—the enforcement of the statutes must be enjoined.

Plaintiff Dr. Hallford's threatened rights include his license to practice medicine and earn a livelihood, his right to administer to his patients to the best of his medical ability, and his right to be free from arbitrary regulation which furthers no legitimate state interest. The abortion statute and its enforcement pose a constant threat and interference to those rights. Of course, Dr. Hallford's case for equitable relief differs in one respect from that of the other plaintiffs. He is being prosecuted, so that theoretically he could vindicate his rights by his defense in the criminal prosecution. However, several problems arise in this context. Under Texas law, the State has no appeal in any criminal case. TEX. CODE CRIM. PROC., art. 44.02, TEX. CONST., art. 5, § 26. Therefore, even if Dr. Hallford's trial judge determines that the abortion statute is unconstitutional, the decision would affect only that trial judge. Should Dr. Hallford perform an abortion in the future not within the statutory exception, he could be brought to trial again in a different court before another trial judge who would in no way be bound by the first judge's ruling. Also, how far must Dr. Hallford go in attempting to vindicate his rights? Must he deliberately eschew all other defenses save that based on the Federal Constitution so as to be sure that the issue will be preserved for ultimate review by this Court? If he is acquitted by the jury on the facts he can be prosecuted again if he perform abortions in the future.

C. No Effective State Remedy was Available to Appellants Roe and Doe

The underlying considerations for the professed policy against federal court interference with state criminal process have been stated by this Court many times. They include basic factors unique to federalism, a reluctance to embarrass state officials, and the fact that state courts are under a duty to protect constitutional rights. Despite these considerations, this Court has affirmed time and again that when absolutely necessary to protect federal rights the policy may be set aside. Certainly one basic factor to be considered in determining whether such absolute necessity exists is the availability of a state remedy by which one whose rights are affected may test the allegedly unconstitutional statute.

Due to a rather unique situation existing in Texas, Plaintiffs Roe and Doe had absolutely no effective method of testing the Abortion Statutes in a state court.

The Texas Declaratory Judgment Act, TEX. REV. CIV. STAT. art. 2524–1, only provides a remedy for determining property rights. Furthermore, the general rule is that there is no right to a declaratory judgment involving any penal statute unless property rights are concerned. *State* v. *Parr*, 293 S.W. 2d 62 (Tex. Crim. App. 1956);[61] *Bean* v. *Town of Vidor*, 440 S.W.2d 676 (Tex. Civ. App. 1969).

Likewise, the same general rule applies to injunctions against enforcement of a penal statute. They are not allowed unless property is about to be destroyed. *City of Austin* v. *Austin City Cemetery Ass'n*, 28 S.W. 528 (Tex. 1894); *City of Richardson* v. *Kaplan*, 438 S.W.2d 366 (Tex. 1969).

While the Texas Supreme Court recently held in *Passel* v. *Fort Worth Independent School District*, 440 S.W.2d 61 (1969), that it would be possible in the case of an unconstitutional statute to obtain an injunction

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even though only personal rights are involved, the opinion pointed out that in that case the plaintiffs were not seeking to enjoin prosecutions. *Id.*, at 63.

At best the practical availability of the remedies is still questionable, especially if one seeks to enjoin prosecution under a penal statute. But even if Plaintiff Roe or Plaintiffs Doe could manage to obtain an injunction in state court restraining enforcement of the abortion statutes, they would still not have an effective remedy. The Texas Constitution, Article 5, § 3 grants appellate jurisdiction over civil matters to the Texas Supreme Court, while Article 5, § 5 gives appellate jurisdiction over criminal matters to the Texas Court of Criminal Appeals. Thus if Plaintiffs sought the civil remedy of an injunction, their case would eventually be reviewed in the Texas Supreme Court. But a judgment in their favor from that court would be, in effect, useless since the Supreme Court has ruled that it has no jurisdiction to mandamus a trial court to dismiss a prosecution, even though the statute in question is clearly unconstitutional, because to do so would encroach upon the jurisdiction of the Court of Criminal Appeals. *Pope* v. *Ferguson*, 445 S.W. 2d 950 (Tex. 1969). And in *State ex rel. Flowers* v. *Woodruff*, 200 S.W. 2d 178, 182–183 (Tex. Crim. App. 1947), the Court of Criminal Appeals issued a writ of prohibition to a district court prohibiting it from enforcing its injunction against enforcement of a penal statute, saying that the district court had no jurisdiction to enjoin a penal statute. To do so would deprive the Court of Criminal Appeals of its jurisdiction.

As might be expected there are problems concerning the precedential value of one court's opinion over the other. A dramatic illustration of the problem may be found in *Barnes* v. *State*, 170 S.W. 548, 554 (Tex. Crim. App. 1914), where the Court of Criminal Appeals was dealing with a penal statute which had been ruled constitutional by the State Supreme Court. The Court of Criminal Appeals pointed out that the two courts were of equal dignity, said the Supreme Court's opinion was not binding in any way, and held the statute to be unconstitutional.

Thus had the plaintiffs resorted to state court they could have *at best* gotten a declaratory judgment or injunction which could not be enforced and possibly a decision that would not preclude future prosecutions under the statute. As has been stated before, they could not be prosecuted under the statutes. They were completely without state remedy. Surely no concept of federalism can dictate that these plaintiffs must live with a law that vitally affects their lives—not on occasion, but each day and yet have no right to test that law in a court—anywhere.

D. The Existence of a Pending Prosecution Against One of the Plaintiffs Below Does Not Foreclose Equitable Relief Against Future Prosecutions

Under the *holdings* of this Court, the special considerations and facts present in this case make it one in which federal intervention by injunction is both necessary and proper. The fact that all plaintiffs brought class actions; that no injunction against pending prosecutions was asked; that even if injunctive or declaratory relief might be considered improper in Dr. Hallford's case because of the decision in *Samuels* v. *Mackell*, 401 U.S. 66 (1971), plaintiffs Doe and Roe are claiming rights which are distinct from those of Dr. Hallford and do not and should not have to rely upon him to vindicate those rights; and finally that while Dr. Hallford may have some opportunity to present his claims at the defense of his prosecution, Plaintiffs Doe and Roe have no opportunity whatsoever to test the statutes either by incurring prosecution or seeking state ajudication of their rights, leave no doubt that the *actual holdings* of this Court do not foreclose all of the plaintiffs.

However, certain language in the majority opinion of *Samuels v. Mackell, supra*, at 72–73, and Mr. Justice Brennan's separate opinion in *Perez* v. *Ledesma*, 401 U.S. 93, 118–121, is susceptible to two different interpretations. It might be concluded that in speaking of the reluctance of federal courts to interfere with pending state prosecutions, the same considerations apply to both prosecutions pending against the parties before the federal court and any other prosecutions. Such an interpretation, however, is not only a direct departure from precedent, but if adopted would cause hopeless confusion among the federal courts and render the procedure of testing unconstitutional statutes by suit for injunction into a theoretical tool of interest only to historians.

That such an interpretation is not dictated by *Younger* v. *Harris, supra*, and companion cases is demonstrated by the fact that in both *Younger and Boyle v. Landry, supra*, this Court determined the appropriateness of the relief, which was requested by the plaintiffs who were *not* being prosecuted, on traditional equitable grounds, rather than by merely stating that the pending prosecutions against their co-plaintiffs foreclosed any discussion.

In the present case, Plaintiffs Roe and Doe initially brought their actions with no knowledge of the prosecution pending against Dr. Hallford. Because of his intervention the fact became apparent. Were there other prosecutions pending in other parts of the state? At the time the actions resulting in *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), were brought, were there other, *good-faith* prosecutions pending in another part of the state? Must a federal plaintiff in Texarkana, Texas, ascertain that the statute he is contesting is not the basis of a prosecution in El Paso, Texas, 780 miles away and must the three-judge court also determine that fact? Obviously, if the statute in question has any vitality at all, there is always the danger that somewhere a state prosecution is pending which will be "affected," if not legally then psychological, by either an injunction or declaratory judgment.

The special concerns over friction between the Federal and State judiciaries do not dictate that injunctions against future prosecutions should never issue when there is a pending state prosecution dealing with the statute in question. Obviously, in the situation posed in *Steffanelli* v. *Minard*, 342 U.S. 117 (1951), and *Cleary* v. *Bolger*, 371 U.S. 392 (1963), friction would be imminent, for the arm of the federal government would literally be interjected into the state court room to pluck out all or part of the case. It is easy to see why such an action would be unseemly. However, in the case of a federal injunction against future prosecutions issued while a prosecution concerning the statute dealt with in the federal action is in process, the state judge may use his own discretion. If he agrees with the interpretation of the federal court, he may stay proceedings pending this Court's review of the injunction and avoid the possible waste of both his time and that of everyone else concerned. If not, he may proceed in the belief that the federal court's ruling on the statute will be reversed.

E. The Special Considerations Underlying the Doctrine of Comity Are Inapplicable to the Present Case

Volumes have been written concerning the principles of comity and federal-state relations in the area of state enforcement of criminal statutes. Appellants do not presume that they could add to the discussions of the historical and philosophical background of that policy in the opinions written in *Younger* v. *Harris* and companion cases last term. That the principles of comity avoid confusion and friction in some instances cannot be doubted, but in cases like the present the very reluctance of federal courts to intervene in the state criminal process produces confusion and friction and wastes the efforts of state judges, juries, and state officials.

The issue is not procedure, as in *Steffanelli*. The issue is not a statute which may proscribe both harmful and protected activity as in *Cameron* v. *Johnson*, 390 U.S. 611 (1968), or *Boyle* v. *Landry* and thus if enjoined would leave the states confused as to what they may or may not legislate against. Rather, the case involves a set of statutes with deep and fundamental constitutional infirmities. Thus, even if federal courts do not intervene, the issue of abortion will continue to cause confusion and delay in the state's criminal process until a decision is reached by this Court.

While it seems likely that eventually the question of whether a woman has a right to an abortion will reach this Court in the context of review of a criminal conviction, that process might very well entail the convening of countless state courts, both trial and appellate, the assembling of countless jurors, and the occupation of countless prosecutors, not to mention the untold anxiety, expense and humiliation of those physicians willing to offer themselves as potential sacrificial lambs to test the statutes.

Added to the waste of manpower will be the unquantifiable effect of the willful violation by respectable citizens of criminal laws for the purpose of testing them. Perhaps it may be moral to defy a law that one considers unjust and unconstitutional, but to hold that "except in rare circumstances" that is the only way to judicially bring about an end to such laws places a stamp of approval on the activity which can lead to chaos. Is the orderly adjudication of suspect statutes to be abandoned to those who delight in confrontation with those who enforce the laws?

Consider the moral dilemma of a Texas trial judge when presented with a constitutional defense to the violation of the abortion statute. He is of course obligated to uphold the United States Constitution. His zealousness in protecting federal rights may equal or surpass that of his brother in the federal judiciary. He may be firmly convinced that the statute is totally unconstitutional. And yet, if he dismisses the indictment the State cannot appeal.[62] The question will be foreclosed from appellate consideration. Another factor he must bear in mind is that if he dismisses the indictment his action may very well become the basis of a political attack when he must run for reelection, turning the question of who will sit on the bench into one not of competence or intellect, but of religion or political philosophy. In the face of such considerations the state judge may feel that he has no choice but to enforce an unconstitutional statute. Far from resenting the "intrusion" of a federal court, he may well welcome the end to his moral quandary—the reprieve from his threatened violation of oath and conscience.

On the state appellate level, the considerations involving the "politicization of the judiciary" also apply since, in Texas, all judges are elected. Also, should the Texas Court of Criminal Appeals hold the statute unconstitutional, the State must either violate Article 5, §26 of the Texas Constitution, which provides that the State shall have no appeal in a criminal case, by appealing the decision to this Court, or let the matter rest.

Contrasted with the problems above, the institution of a suit for injunction in federal court represents a much more orderly, civilized method for the vindication of federal rights. If the three-judge court is unsure of the effects of an injunction upon state law enforcement, the judgment can be stayed pending appeal to this Court. That the in-

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validation of a state statute will cause friction is not denied, but there is no reason to assume that federal-state relations are damaged more in the case of an injunction proceeding than when this Court reverses a conviction based on a statute which until reaching this Court had been ruled constitutional. The friction is caused by the act of intercession of federal constitutional concerns with individual notions of morality and "law and order," not by the particular procedure of intercession. It is not the federal court that interferes with the enforcement of a state statute, but the Constitution itself. Such an interference can never be accomplished without friction, for it is clear that there are many who would repeal that Constitution, especially where it protects the rights of a racial, religious or political minority.

F. Having Decided That the Texas Abortion statute Unconstitutionally Infringes Upon Plaintiff's Rights, the Three Judge Court by Failing to Grant an Injunction Against Future Prosecutions Effectively Failed to Protect Those Rights.

The three-judge court was presented with allegations and uncontroverted fact that set up a class action in which the right of women to have an abortion was claimed. The affidavit of a medical expert, whose qualifications and opinions were uncontroverted by any evidence from the defendant-district attorney, stated that physicians in Texas refused to do abortions because of fear of jeopardizing their careers. Were abortions legal, the physician-expert stated that he and other physicians would perform them. Affidavit of Paul C. Trickett, M.D. (A. 54–55). Plaintiff-Intervenor Dr. Hallford also testified by way of affidavit that physicians in the Dallas area feared criminal prosecution under the abortion statutes and for that reason refused to do abortions (A. 67). The Court below found that:

"Since the Texas Abortion Laws infringe upon plaintiffs' fundamental right to choose whether to have children, the burden is on the defendant to demonstrate to the satisfaction of the Court that such infringement is necessary to support a compelling state interest. The defendant has failed to meet this burden." *Roe* v. *Wade*, 314 F. Supp. 1212 1222 (1970) (A. 118, 119) [footnotes omitted].

Yet, despite the conclusion that rights were being infringed, the Court failed to grant the only relief that could reasonably allow the class bringing the suit to exercise their "fundamental right to choose whether to have children."

In explaining the denial of injunctive relief, the Court below quoted from *Dombrowski* v. *Pfister*, 380 U.S. 479, 484–485 (1965):

"It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." *Roe, supra* at 1224 (A. 122).

However, it is precisely the "mere possibility of erroneous initial application of constitutional standards" that effectively foreclose any possibility of the women within the classes represented being able to obtain an abortion. Having obtained an affirmance of their rights these women must still depend on the willingness of physicians to risk prosecution if state officials choose to ignore the declaratory judgment. If the women themselves were subject to prosecution, at least some of them might be willing to take the risk. But they must rely upon strangers for help. In view of the fact that a declaratory judgment "neither mandates nor prohibits state action" *Perez* v *Ledesma*, 401 U.S. 82, 124 (1971) (Brennan, J.) individual physicians, having no personal issue at stake, would be foolhardy to risk performing an abortion.

In fact, the declaratory judgment was ignored, as is evidenced by the affidavits of the chairmen of obstetrics and gynecology (Appendices B, C, D at B–1, C–1, D–1) letter from Defendant's office, Appendix A at A–1 and indictments brought since the Three-Judge Court's judgment (Appendix E at E–1). No facts or pleadings were presented to the Court below that could have led to any conclusion but that such would be the case.

Given the affidavits of the physicians, the special problems of the class of women who must rely on others in order to exercise their fundamental rights, and the omission of any evidence whatsoever that Defendant would abide by the declaratory judgment, it follows that the Court below was not relying on any separate factual ground in denying an injunction. Their decision was based wholly on an erroneous view that no allegations had been presented which required that considerations of comity in the area of state criminal enforcement be disregarded.

Although the decision of whether or not to grant an injunction is spoken of as being "discretionary," *Bokulich* v. *Jury Commission of Greene County, Alabama*, 394 U.S. 97, 98 (1969), *Abbott Laboratories* v. *Gardner*, 387 U.S. 138, 148 (1967), it is clear that if the claims of the plaintiffs present "sufficient irreparable injury to justify equitable relief," the case should be remanded with instructions to enter a decree enjoining enforcement of the statute. *Dombrowski* v. *Pfister*, 380 U.S. 479, 497 (1965).[63]

III. The appeals were properly taken directly to this court and represent the entire case for plenary review by this court

The appeals are "from an order . . . denying . . . [a] permanent injunction," pursuant to 28 U.S.C. § 1253. The actions attacked state statutes on constitutional grounds and requested declaratory and injunctive relief from enforcement of the statutes which are applicable statewide. The defendant was and is a state officer and the complaints presented a substantial federal question. Thus all requirements for direct appeal to this Court are met. *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89 (1935). *Bell* v. *Waterfront Commission of New York*, 279 F.2d 853 (2d Cir. 1960).

Although appellants technically "won" the issue of declaratory relief in the Court below, they join with appellee in urging this Court to decide the merits and constitutionality of the Texas abortion statute, regardless of its decision on other aspects of the case. That such action is within this Court's jurisdiction is illustrated by its action in the case of *Carter* v. *Jury Commission of Greene County*, 396 U.S. 320 (1969). There, the plaintiffs had requested (1) a declaration that qualified Negroes were systematically excluded from grand and petit juries; that the Alabama statutes governing jury selection were unconstitutional and that the jury commission was a deliberately segregated agency; (2) injunction forbidding systematic exclusion of Negroes and the enforcement of the jury selection statutes; and, (3) an order vacating the appointments of the Governor to the commission. The three-judge district court found that Negroes were being excluded and enjoined their systematic exclusion. The plaintiffs appealed the denial of injunctive relief against the jury selection statute and the Governor's appointments. In affirming the District Court, this Court not only discussed the questions concerning the constitutionality of the jury selection statute and the Governor's appointments, but also discussed the merits of the district court's finding of systematic exclusion and the injunction against that exclusion. No mention of appeal by the defendants from the granting of the injunction against systematic exclusion is made, so that theoretically the issue was not before the Court.

In a slightly different context, but of value, is Mr. Justice Frankfurter's statement in *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73 (1960):

"Cases in this Court . . . have consistently adhered to the view that, in an injunction action challenging a state statute on substantial federal constitutional grounds, a three judge court . . . has—just as we have on a direct appeal from its action—jurisdiction over *all* claims raised against the statute." 362 U.S. at 80, 81.

The statutes here were attacked on the basis of: overbroad denial of the fundamental rights of privacy, choice as to giving birth to children, to seek health care, and to practice medicine without arbitrary restraint; vagueness; and denial of due process concerning burden of proof. It is certain that appellee will base a major portion of his argument on a defense of the statutes, so as to insure that all of the issues above are fully briefed and argued before the Court thus meeting the requirements set out in *Dandridge* v. *Williams*, 397 U.S. 471, 475, n. 6. (1970).[64]

Thus the question hinges, not on this Court's power to reach the merits, but on whether the judicial inefficiency and confusion which will result from its failure to do so outweigh the professed doctrine that the Court will usually avoid reaching a constitutional issue if possible. This Court's willingness to consider the effect of a decision upon pending cases in state and federal courts was illustrated last term in Mr. Justice Black's opinion in *United States* v. *Vuitch*, 402 U.S. 62 (1971).

"In the last several years, abortion laws have been attacked as unconstitutionally vague in both state and federal courts with widely varying results. A number of these cases are now pending on the docket. A refusal to accept jurisdiction here would only compound confusion for doctors, their patients, and law enforcement officials. As this case makes abundantly clear, a ruling on the validity of a statute applicable only to the District can contribute to great disparities and confusion in the enforcement of criminal laws." 402 U.S. at 66.

The confusion spoken of in *Vuitch* has not subsided. The abortion laws of Texas,[65] Wisconsin,[66] Illinois,[67] California,[68] and Georgia [69] have been partially or completely declared invalid as denying fundamental rights, while abortion laws in Ohio,[70] Louisiana [71] and North Carolina [72] have been upheld. At least three appeals involving physicians indicted for violations of abortion statutes are presently pending in state courts.[73]

Appellants respectfully submit that nothing will be gained by another round of consideration by lower courts. It seems obvious that, rather than reaching a consensus, the federal district courts will continue to split on the question. It also seems obvious that this difference of opinion will carry over to the courts of appeals if they are required to decide the issue. Considering its effect on the area of marital relations, illegitimacy, poverty, women's rights, women's mental and physical health, mentally and physically deformed children, and the practice of medicine, the question of abortion potentially and actually affects virtually every person in the United States. The question itself compels an answer and appellants urge this Court to reach the merits.

Footnotes at end of article.

IV. The provisions in the Texas Penal Code, articles 1191–1194 and 1196, which prohibit the medical procedure of induced abortion unless "procured or attempted by medical advice for the purpose of saving the life of the mother," abridge fundamental personal rights of appellants secured by the first, fourth, ninth, and fourteenth amendments, and do not advance a narrowly drawn compelling State interest

As former Supreme Court Justice Tom C. Clark has said:

"The result of [Griswold and its predecessors] is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children, and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution." Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOYOLA UNIV. (L.A.) L. REV. 1, 8 (1969).

The Constitution does not specifically enumerate a "right to seek abortion," or a "right of privacy." That such a right is not enumerated in the Constitution is no impediment to the existence of the right. Other rights not specifically enumerated have been recognized as fundamental rights entitled to constitutional protection [74] including the right to marry,[75] the right to have offspring,[76] the right to use contraceptives to avoid having offspring,[77] the right to direct the upbringing and education of one's children,[78] as well as the right to travel.[79]

The difficulty in identifying the precise sources and limits of these rights has long been evident. In 1923 in *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), this Court outlined some of the protections afforded by the Due Process Clause of the Fourteenth Amendment:

"While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and *some of the included things have been definitely stated*. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men." 262 U.S. at 399. [Emphasis added.]

The 1965 Court, in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), demonstrated the variety of sources of these fundamental rights.[80]

Appellants contend that fundamental rights [81] entitled to constitutional protection are involved in the instant case, namely the right of individuals to seek and receive health care unhindered by arbitrary state restraint; the right of married couples and of women to privacy and autonomy in the control of reproduction; and the right of physicians to practice medicine according to the highest professional standards. These asserted rights meet constitutional standards arising from several sources and expressed in decisions of this Court. The Texas abortion law infringes these rights, and since the law is not supported by a compelling justification, it is therefore unconstitutional.

A. The Right to Seek and Receive Medical Care for the Protection of Health and Well-Being Is a Fundamental Personal Liberty Recognized by Decisions of This Court and by International and National Understanding

In *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1904), the defendant resisted his conviction under a compulsory vaccination statute by asserting "the inherent right of every freeman to care for his own body and health in such way as to him seems best." 197 U.S. at 26. Appropriately, this Court responded that liberties secured by the Constitution are not wholly free from restraint and found the dangers of widespread smallpox justified the statute. Far from downgrading the importance of defendant's asserted rights, however, the Court repeatedly emphasized the imminence of pervasive disease; "the evils of smallpox . . . imperiled an entire population." 197 U.S. at 31. In explaining the principle underlying the decision, the Court paralleled the statute's intrusion to protect national security, and emphasized the compelling interest necessary to justify the invasion of personal rights:

"There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government—especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, *under the pressure of great dangers*, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand . . . It is not, therefore, true that the power of the public to *guard itself against imminent danger* depends in every case involving the control of one's body upon his willingness to submit to reasonable regulations established under the sanction of the state, for the purpose of protecting the public effectively against such danger." 197 U.S. at 29–30. [Emphasis added.]

The reference for the Court's standard of reasonableness was the compelling interest of the state in meeting the danger of epidemic smallpox. *Jacobson* thus embodies the principle that the personal right to care for one's health is a fundamental right which can be abridged by state law only when justified by a compelling interest.

The personal right to care for and protect one's health in the manner one deems best has been honored by legislatures, except as to measures necessary to check widespread disease and except for the intrusion of restrictive contraception, abortion, and sterilization laws.

Although this Court has not expressly delineated a right to seek health care, the importance of such care has been recognized and the existence of such a right suggested. In *United States* v. *Vuitch*, 402 U.S. 62 (1971), this Court reaffirmed society's expectation that patients receive "such treatment as is necessary to preserve their health." 402 U.S. at 71. In this Court's invalidation of Connecticut's proscription against contraception, Justice White noted that statute's intrusion upon "access to medical assistance . . . in respect to proper methods of birth control." *Griswold* v. *Connecticut*, 381 U.S. 479, 503 (1965) (White, J., concurring).

A right of access to health care has been held necessary in other factual settings. *McCollum* v. *Mayfield*, 130 F. Supp. 112 (N.D. Cal. 1955), involved an accused prisoner injured while in custody awaiting trial. The sheriff and jailer refused him medical care. As a result he became paralyzed. The court upheld a claim for relief under the Civil Rights Act based on deprivation of the plaintiff's life, liberty, and property without due process. *Accord*, *Coleman* v. *Johnson*, 247 F.2d 273 (7th Cir. 1957); *Edwards* v. *Duncan*, 355 F.2d 993 (4th Cir. 1966); *Tolbert* v. *Eyman*, 434 F.2d 625 (9th Cir. 1970). Custodial patients have been afforded a constitutional right to receive sufficient treatment to provide a realistic opportunity to improve or to be cured. *Wyatt* v. *Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971). *Chrisman* v. *Sisters of St. Joseph of Newark*, Civ. No. 70–430 (D. Ore., July 22, 1971), held that a hospital's refusal, for non-medical reasons, to permit voluntary sterilization of a plaintiff violated her federal rights. And *EDF* v. *Hoerner Waldorf*, 1. E.R. 1960 (D. Mont. 1970), recognized a right to protection of health against environmental pollution.

The existence of other types of state statutes, not under constitutional attack, which affect matters of personal health does not negate the right asserted here. In constrast to laws which intrude upon the protection of personal health, statutes which prescribe working conditions have an indirect, positive impact on the person's well-being. None intrude so far as the assault alleged in *Jacobson* or the compulsory pregnancy asserted here. *See, e.g., Prince* v. *Massachusetts*, 321 U.S. 158; *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937). Similarly, laws prescribing requisites for medical practice are designed to assure qualified practitioners, not to impose upon a citizen's person. *See, e.g., Dent* v. *West Virginia*, 129 U.S. 114 (1889); *Graves* v. *Minnesota*, 272 U.S. 425 (1926).

Finally, policy statements of national and international organizations indicate a pervasive recognition of the right to seek health care. For example, the Constitution of the World Health Organization provides:

"The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition." [82]

Congress, in passing the Comprehensive Health Planning Act of 1966, took a similar position:

"[T]he fulfillment of our national purpose depends on promoting and assuring the highest level of health attainable for every person, in an environment which contributes positively to healthful individual and family living. . . ." [83]

Abortion is an accepted medical procedure for terminating pregnancy. *See* pp. 30–35, *supra*. *Amici* medical organizations recognize the acceptability of abortion, as their policy statements indicate; they draw no distinction between abortion and other medical procedures.

The Texas abortion law effectively denies Appellants Roe and Doe access to health care. Jane Roe was forced to bear a pregnancy to term though an abortion would have involved considerably less risk to her health. *See* p. 34 *supra*. Physicians who would otherwise be willing to perform an abortion in clinical surrounding are deterred by the fear of prosecution. Since Appellant Roe could not afford to travel elsewhere to secure a safe abortion, to avoid continuation of pregnancy she would have been forced to re sort to an unskilled layman and accept all the health hazards attendant to such a procedure.[84] Even had she been able to travel out of state, the time required to make financial and travel arrangements would have entailed greater health risks inherent in later abortions. *See* p. 33 *supra*.

B. The Fundamental Rights to Marital and Personal Privacy Are Acknowledged in Decisions of This Court as Protected by the First, Fourth, Ninth, and Fourteenth Amendments.

1. The right to marital privacy

The importance of the institution of marriage and of the family has long been recognized by this Court. Consequently the Court and its members have often affirmed the sanctity of the marital relationship and of the family union. In *Maynard* v. *Hill*, 125 U.S. 190, 211 (1888), marriage was called "the foundation of the family and of society, without which there would be neither civilization nor progress." The opinion of the Court in *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942), spoke of marriage and procreation as being 'fundamental to the very ex-

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istence and survival of the race." Mr. Justice Harlan, for example, has written:

"[T]he integrity of [family] life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . . . Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations." *Poe* v. *Ullman*, 367 U.S. 497, 551–52 (1961) (Mr. Justice Harlan, dissenting).

Mr. Justice Douglas, in delivering the opinion of the Court in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), wrote of marriage as being "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." 381 U.S. at 486.

Most recently in *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), this Court reaffirmed "the basic position of the marriage relationship in this society's hierarchy of values" 401 U.S. at 374, and reiterated that "[a]s this Court on more than one occasion has recognized, marriage involves interests of basic importance in our society." 401 U.S. at 376.

Recognition of the sanctity of the marital relationship has resulted in recognition of a right of marital privacy, or as the *Griswold* decision states, "notions of privacy surrounding the marriage relationship", 381 U.S. at 486, and of rights attendant to the marital state. Protection has been extended to such rights as the rights to marry and have offspring because of their fundamental nature, even though such rights are not expressly enumerated in the Bill of Rights. These decisions support the proposition that there is a sphere of marital privacy and that important interests associated with marriage and family are, and should be, protected from arbitrary government intrusion.

Loving v. *Commonwealth*, 388 U.S. 1, 12 (1967) (alternate ground of decision), specifically held that the due process clause of the Fourteenth Amendment protects "[t]he freedom to marry . . . as one of the vital personal rights essential to the orderly pursuit of happiness by men." *Loving* stands for the proposition that "the right to marry" is protected by the due process clause although not specifically mentioned in the Bill of Rights. Yet the right *to* marry is meaningful only to the extent that there are rights *of* marriage, *i.e.*, rights attendant to the marital state which promote the happiness of the couple.

Associated with the right to marry is the right to have children, if one chooses, without arbitrary governmental interference. This Court unanimously held that "the right to have offspring" is a constitutional protected "human right" which cannot be taken away by a discriminatory statute requiring the sterilization of some persons convicted of crime, but not others similarly situated. *Skinner* v. *Oklahoma*, 316 U.S. 535, 536 (1942). The *Skinner* Court recognized a constitutionally protected right to *have* offspring even though such right is not mentioned in the Bill of Rights; a right *not to have* offspring should be of equal constitutional stature.

Further cases supporting these family rights include *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), and *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), both of which were reaffirmed in *Griswold* v. *Connecticut*, 381 U.S. 479, 483 (1965). A unanimous Court in *Pierce* recognized a right to send one's children to private school. This right derived from "the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. at 534–35. This liberty, and the responsibility it implies, suggests a concomitant right of persons to determine the number of children whose "upbringing and education" they will direct.

Similar in principle is *Meyer*, a 7–2 decision invalidating a State statute which prohibited teaching German to pupils below the eighth grade. The *Meyer* Court stated that the due process clause includes "the right . . . to marry, establish a home and bring up children." 262 U.S. at 399. Again the Court recognized a fundamental right not enumerated in the Constitution entitled to Constitutional protection.

Griswold reaffirms these privacy concepts, and makes it clear that a husband and wife are constitutionally privileged to control the size and spacing of their family at least by contraception.

Taken together, the *Griswold, Loving, Skinner, Pierce and Meyer* decisions illustrate that the Constitution protects certain privacy and family interests from governmental intrusion unless a compelling justification exists for the legislation. The right of a family to determine whether to have additional children, and to terminate a pregnancy in its early stages if a negative decision is reached, is such a right and is fully entitled to protection.

The number and spacing of children obviously have a profound impact upon the marital union. Certainly the members of this Court know from personal experience the emotional and financial expenditures parenthood demands. For those couples who are less fortunate financially and especially for those who are struggling to provide the necessities of life, additional financial responsibilities can be economically disastrous. For families who require two incomes for economic survival, the pregnancy can be ruinous since the wife will generally have to resign her job. In many other situations, such as where husband and wife are working to put themselves through school, pregnancy at a particular time can present a crisis.

Pregnancy can be a significant added problem in marriages. The added pressures of prospective parenthood can be "the last straw."

This Court has previously upheld the right to use contraceptives to avoid unwanted pregnancy.

"[I]t would seem that if there is a right to use contraception, this right must also take account of the fact that most techniques are not 100 per cent protective. If the contraceptive method fails and the *Griswold* right of choice is preserved, it is a strong argument toward recognizing the right to an abortion." [85]

As did the law considered in *Griswold*, "[t]his law . . . operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation." 381 U.S. 482. The Texas abortion law in forbidding resort to the procedure of medical abortion, has a maximum destructive impact upon the marriage relationship.

2. The related rights to personal privacy and physical integrity

In addition to rights associated with marital privacy, an overlapping body of precedent extends significant constitutional protection to the citizen's sovereignty over his or her own physical person.

As early as 1891 this Court stated:

"No right is more sacred, [n]or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said to be a right of complete immunity: to be let alone.' " *Union Pac. Ry.* v. *Botsford*, 141 U.S. 250, 251 (1891), quoted in *Terry* v. *Ohio*, 392 U.S. 1, 8–9 (1968).

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This right like all rights, does have some limitations, as illustrated in *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1904), *supra* at 94 *et seq.* Nonetheless, absent a compelling justification, one is entitled to personal autonomy.

In family matters relating to child rearing and procreation, the Court has recognized and sustained individual rights on a constitutional plane. "The freedom to marry . . .," *Loving* v. *Commonwealth*, 388 U.S. 1, 12 (1967); "the right to have offspring," *Skinner* v. *Oklahoma*, 316 U.S. 535, 536 (1942); "the liberty of parents and guardians to direct the upbringing and education of children under their control," *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534–35 (1925); as well as the right, at least of a married woman, to use contraceptives, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), are all protected constitutionally.

Most recently the Court reaffirmed the "fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy," *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969) (Marshall, J.), and embraced with approval Mr. Justice Brandeis' dissent in *Olmstead* v. *United States:*

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." 277 U.S. at 478.

The Chief Justice, then a Circuit Judge, in *Application of Georgetown College, Inc.*, 331 F.2d 1010, 1016–17 (D.C. Cir.) (en banc), *cert. denied*, 377 U.S. 978 (1964), also urged a right to be let alone, in the context of a religious objection to blood transfusions, which could include "even absurd ideas which do not conform, such as refusing medical treatment even at great risk." 331 F. 2d at 1017.

Pregnancy obviously does have an overwhelming impact on the woman. The most readily observable impact of pregnancy, of course, is that of carrying the pregnancy for nine months. Additionally there are numerous more subtle but no less drastic impacts.[86]

3. The right to terminate unwanted pregnancy is an integral part of privacy rights

Without the right to respond to unwanted pregnancy, a woman is at the mercy of possible contraceptive failure, particularly if she is unable or unwilling to utilize the most effective measures.[87] Failure to use contraceptives effectively, if pregnancy ensues, exacts an exceedingly high price.

The court in *Baird* v. *Eisenstadt*, 429 F.2d 1398 (1st Cir. 1970), *prob. juris. noted*, 401 U.S. 934 (U.S. No. 70–17, 1971 Term), recognized the inhumane severity of laws which impose continued pregnancy and compulsory parenthood as the cost of inadequate contraception. The statute there proscribed distribution of contraceptives to unmarried women, but the deciding principle applies to restrictive abortion laws as well.[88]

". . . [P]ersons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights." 429 F.2d at 1402.

Baird involved contraceptives unavailable to unmarried women; this case involves measures unavailable to all women. The impact of the two statutes is identical for the women

affected. Moreover, the magnitude of the impact is substantial.

When pregnancy begins, a woman is faced with a governmental mandate compelling her to serve as an incubator for months and then as a ostensibly willing mother for up to twenty or more years. She must often forego further education or a career and often must endure economic and social hardships. Under the present law of Texas she is given no other choice. Continued pregnancy is compulsory, unless she can persuade the authorities that she is potentially suicidal or that her life is otherwise endangered. TEXAS PENAL CODE, arts. 1191–1194, 1196 (1961). The law impinges severely upon her dignity, her life plan and often her marital relationship. The Texas abortion law constitutes an invasion of her privacy with irreparable consequences. Absent the right to remedy contraceptive failure, other rights of personal and marital privacy are largely diluted.

Commentators and courts have articulated and recognized the privacy which restrictive abortion laws invade:

"[A]bortion falls within that sensitive area of privacy—the marital relation. One of the basic values of this privacy is birth control, as evidenced by the *Griswold* decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention has failed?" [89]

The decisions of this Court which implicitly recognize rights of marital and personal privacy have been followed by state and federal court decisions expressly holding the decision of abortion to be within the sphere of constitutionally protected privacy.

That there is a fundamental constitutional right to abortion was the conclusion of the court below in the instant case:

"On the merits, plaintiffs argue as their principal contention that the Texas Abortion Laws must be declared unconstitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment to choose whether to have children. We agree.

"The essense of the interest sought to be protected here is the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals." (A. 116)

That view has been shared by a number of other courts which have considered the question and have affirmed that this is a fundamental right.[90] The progression of decisions by courts which have indicated their recognition of abortion as an aspect of protected privacy rights included the following:

"The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgement of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." *California* v. *Belous*, 71 Cal. 2d 954, 458 P.2d 194, 199, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

"For whatever reason, the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy. Like the decision to use contraceptive devices, the decision to terminate an unwanted pregnancy is sheltered from state regulation which seeks broadly to limit the reasons for which an abortion may be legally obtained." *Doe* v. *Bolton*, 319 F. Supp. 1048, 1055 (N.D. Ga. 1970) (per curiam).

"It is as true after conception as before that 'there is no topic more closely interwoven with the intimacy of the home and marriage than that which relates to the conception and bearing of progeny.' We believe that *Griswold* and related cases establish that matters pertaining to procreation, as well as to marriage, the family, and sex are surrounded by a zone of privacy which protects activities concerning such matters from unjustified governmental intrusion." *Doe* v. *Scott*, 321 F. Supp. 1385, 1389–90 (N.D. Ill.) *appeal docketed sub nom. Hanrahan* v. *Doe*, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (No. 70–105, 1971 Term).

Without the ability to control their reproductive capacity, women and couples are largely unable to control determinative aspects of their lives and marriages. If the concept of "fundamental rights" means anything, it must surely include the right to determine when and under what circumstances to have children.

4. Physicians have a fundamental right to administer health care without arbitrary State interference

The First, Ninth, and Fourteenth Amendments protect the right of every citizen to follow any lawful calling, business, or profession he may choose, subject only to rational regulation by the state as necessary for the protection of legitimate public interests. *See, e.g., Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957); *Smith* v. *Texas*, 233 U.S. 630 (1914); *Dent* v. *West Virginia*, 129 U.S. 114 (1889). In reviewing legislation affecting the medical profession, courts have particularly respected the knowledge and skill necessary for medical practice, the broad professional discretion necessary to apply it, and the concomitant state interest in guaranteeing the quality of medical practitioners:

"Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which life and health depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind.

* * * * *

Every one may have occasion to consult [the physician], but comparatively few can judge the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license . . . that he possesses the requisite qualifications." *Dent* v. *West Virginia*, 129 U.S. 114, 122–23 (1889).

Similarly, courts have been alert to protect medical practice from rash or arbitrary legislative interference. Thus, the court in *United States* v. *Freund*, 290 Fed. 411 (D. Mont. 1923), invalidated a Prohibition-era statute restricting the amount of alcohol a physician could prescribe:

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

Most recently, this Court, in *United States* v. *Vuitch*, 402 U.S. 62 (1971), recognized that "doctors are encouraged by society's expectations . . . and by their own professional standards to give their patients such treatment as is necessary to preserve their health." 402 U.S. at 71. The *Vuitch* decision went on to construe the term health to encompass "psychological as well as physical health," and "'the state of being sound in body or mind.'"

Here, the practice of medicine clearly includes the treatment of pregnancy and conditions associated with it. However, the Texas statute prohibits physicians from administering the appropriate remedy to preserve the patient's health or well-being. Physicians are not required to forego the right to make medically sound judgments and to act upon them with respect to any other human disease or condition. With appropriate consents they may administer electric shock therapy, excise vital organs, perform prefrontal lobotomies and take any other drastic action they believe indicated. They are not indictable for these actions. However, obstetricians and gynecologists who are asked to abort their patients for sound medical reasons risk a prison sentence if they do so. The statute severely infringes their practice and seriously compromises their professional judgments.

The state must demonstrate a legitimate interest to impair doctors' rights to practice their profession. *Dent* v. *West Virginia*, 219 U.S. 114 (1889). Historically, the interest asserted by the state is a health interest, and courts have upheld laws designed to ensure the quality of medical practice, *e.g., Dent* v. *West Virginia, supra; Douglas* v. *Noble*, 261 U.S. 165 (1923); *Graves* v. *Minnesota*, 272 U.S. 425 (1926). Similarly, statutes have been upheld which require doctors' intervention in sales of medically-related products in order to protect public health. *See, e.g., Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483 (1955) (doctor's prescription required for optician to perform eye-glass fitting operations); *see also Head* v. *New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963) (prohibition against eyeglass price advertising).

None of the above interests are applicable here, however. The statute in question here does not protect the public from unqualified practitioners. *Cf. Dent* v. *West Virginia*, 129 U.S. 114 (1889); *Douglas* v. *Noble*, 261 U.S. 168 (1923); *Graves* v. *Minnesota*, 272 U.S. 425 (1926); *Schware* v. *Board of Examiners*, 353 U.S. 232 (1957). Rather the statute applies to laymen and physicians alike. Indeed, it endangers patients' health by unduly confining doctors' exercise of medical judgment. This endangering of health distinguishes the case from *Williamson;* the court there afforded broad discretion to the legislature *because public health was at stake.* Further, the statute addresses no other legitimate state interest. *See* pp. 115–124, *infra.*

C. Appellants' Rights to Seek Medical Care, and to Marital and Individual Privacy May Not Be Abridged Unless the State Can Establish a Compelling Interest Which Can Not Be Protected By Less Restrictive Means

In his concurring opinion in *Griswold* v. *Connecticut*, 381 U.S. 479, 497 (1965), Justice Goldberg indicated the stricter standard of review that applies when state laws affect personal rights:

"In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.'"

This Court has applied the stricter standard to protect marital privacy, *Griswold* v. *Connecticut, supra;* religious freedom, *Sherbert* v. *Verner*, 374 U.S. 398 (1963); freedom of expression and of association, *N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963); freedom to travel, *Shapiro* v. *Thompson*, 394 U.S. 618 (1968); and access to courts, *Boddie* v. *Connecticut*, 401 U.S. (1971). As argued above, the Texas abortion laws infringe privacy rights here as much as the Connecticut statute did in *Griswold.* As in that case, the compelling interest test is the proper standard for reviewing the Texas statute. See also *Roe* v. *Wade*, 314 F. Supp. 1217, 1222 (N.D. Tex. 1970); *Doe* v. *Scott*, 321 F. Supp. 1385, 1390 (N.D. Ill. 1971); *Babbitz* v. *McCann*, 310 F. Supp. 293, 301 (E.D. Wis. 1970); *California* v. *Belous*, 71 Cal. 2d 954, 458 P.2d

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194, 80 Cal. Rptr. 354, 360 (1968), *cert. denied* 397 U.S. 915 (1970).

Appellants further urge this Court to reaffirm the personal right to health care recognized in *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1904). The infringements upon personal health care caused by the Texas law are described earlier, pp. 94–98. The physical and psychological harm caused by the statute fully warrants a demonstration of compelling justification to sustain it.

A further constitutional condition of the statute's intrusion upon fundamental rights is that the law must be minimally restrictive:

"Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Griswold* v. *Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring).

Here, the availability of adultery and fornication statutes to enforce strictures on sexual behavior, the absence of any distinctions based on gestation period in the abortion statute, and its blanket application to gynecologists and laymen alike suggest classifications which are overly broad. To meet these constitutional objections, the State must show that a less restrictive statute will not effectuate any compelling interests it can establish.

D. The Texas Statute Does Not Advance Any State Interest of Compelling Importance in a Manner Which is Narrowly Drawn

1. The statute is not rationally related to any legitimate public health interest

As shown earlier, at pages 30–35, medical abortion is a safe and simple procedure when performed during the early stages of pregnancy; indeed, it is safer than childbirth. This fact alone vitiates any contention that the statute here serves a public health interest. Numerous state and federal courts have taken notice of this fact and concurred that no health rationale supports a statute like the one here. *See, e.g., California* v. *Belous*, 71 Cal. 2d 954, 965, 458 P.2d 194, 200, 80 Cal. Rptr. 354, 360 (1969), *cert. den.*, 397 U.S. 915 (1970); McCann 1. *Babbitz*, 310, F. Supp. 293, 301 (E.D. Wis. 1970), *appeal dismissed*, 400 U.S. 1 (1970) (per curiam); *Doe* v. *Scott*, 321 F. Supp. 1385, 1391 (N.D. Ill. 1971).

Moreover, no concern for mental health justifies the statute, for it does not permit abortion even if a woman's mental health is threatened. Such a view is untenable for the additional reason that abortion is a procedure without clinically significant psychiatric sequellae.

Additional data reveal that statutes like the one here actually *create* "a public health problem of pandemic proportions" [91] by denying women the opportunity to seek safe medical treatment. Severe infection, permanent sterility, pelvic disease, and other serious complications accompany the illegal abortions to which women are driven by laws like this one.[92]

Any notion that less restrictive abortion laws would produce excessive demands on medical resources and thereby endanger public health also is unfounded. The experience in New York City after one year under an elective abortion law dispels any such fears:

"New York City has accounted for the lion's share of abortions in the State and has been a resource for women all over the country. Nevertheless, the catastrophe many foresaw a year ago failed to materialize: we have been able to serve our residents as well as substantial numbers of out-of-state women, and, most important, we are serving women safely." Chase, "Twelve Month Report on Abortions in New York City" (Health Services Administration, City of New York, June 29, 1971).

The absence of a public health problem accompanying less restrictive abortion is indicated by comparative mortality rates: for the first eleven months of operation, the mortality for abortion in New York City is approximately equal to that of tonsillectomy in the United States.[93]

Against this background of medical fact, there is no support whatever for the suggestion that public health is an interest protected by this statute.

2. The statute is not rationally related to any legitimate interest in regulating private sexual conduct

One of the constitutional defects in the Connecticut statute struck down in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) was its overbreadth; the law there prohibited use of contraceptives by married couples as well as unmarried ones. Thus, the statute could not be justified as a device to discourage pre-marital or extra-marital relations, for it had the same impact on marital relations.

The Texas abortion law operates identically. No distinction is made between married and unmarried women, and married women who seek abortion are not required to reveal whether they were impregnated through a lawful marital relation. The Texas statute, if explained as a deterrent to illegal sexual conduct, is unconstitutionally overbroad for failing to make these distinctions.

Moreover, if the state desires to discourage certain sexual conduct, it may enforce laws prohibiting adultery and fornication. To view the abortion law as protecting public morals by making pregnancy the penalty for forbidden conduct would ascribe a monstrous intention to the Texas legislature. *State* v. *Baird*, 50 N.J.L. 376, 235 A.2d 673, 677 (1967). Furthermore, using the abortion law for such a purpose would be overbroad and beyond the competence of the state. *Baird* v. *Eisenstadt*, 429 F.2d 1938, *jur. noted*, 401 U.S. 934 (1971) (No. 70–17, 1971 Term); *King* v. *Smith*, 392 U.S. 309, 320 (1968); *Griswold* v. *Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring). *See also* Brief *Amicus Curiae* on Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Action Coalition, at 44 *et seq.*

No evidence exists that limited access to abortion curtails promiscuity, nor is it conceivable that such a correlation could exist. The widespread availability of contraception would seem to be a more significant factor. In any event, from the physician's standpoint, a patient is no less worthy of medical care simply because she has unfortunately conceived out of wedlock. Moreover, as one prominent physician observed, "[t]he fear that the availability of abortion will lead to promiscuity is sheer nonsense. . . ." Ryan, *Humane Abortion Laws and the Health Needs of Society*, 17 W. RES. L. REV. 424, 432 (1965).

3. The statute does not advance any public interest in protecting human life

As counsel for appellee admitted during oral argument, "the State only has one interest and that is the protection of the life of the unborn child" (A. 104–105). The question then becomes whether this interest is sufficiently compelling to overcome the couple's or woman's fundamental right to privacy and autonomy. In this regard it is revealing to examine other aspects of the State's attitude toward the fetus. Such an inquiry reveals that only in the area of abortion does the State exhibit an interest in the fetus or treat it as having legal personality.

First, the pregnant woman who searches out a person willing to perform an abortion and who consents to, if not pleads for, the procedure is guilty of no crime. Texas courts have repeatedly held that the woman is neither a principal nor an accomplice. *Willingham* v. *State*, 33 Cr. R. 98, 25 S.W. 424 (1894); *Shaw* v. *State*, 73 Cr. R. 337, 165 S.W. 930 (1914); *Moore* v. *State*, 37 Cr. R. 552, 40 S.W. 287 (1897); *Cave* v. *State*, 33 Cr. R. 335, 26 S.W. 503 (1894). Similarly, the women who travel from Texas to states with less restrictive abortion laws in order to secure medical abortions and avoid the alleged state interest in protecting the fetus are guilty of no crime. Moreover, self-abortion has never been treated as a criminal act. The State has failed to seek to deter through criminal sanctions the person whose interests are most likely to be adverse to those of the fetus. This suggests a statutory purpose other than protecting embryonic life.

An unborn fetus is not a "human being" and killing a fetus is not murder or any other form of homicide. "Homicide" in Texas is defined as "the destruction of the life of one human being by the act, agency, procurement, or culpable omission of another," 2A TEX. PEN. CODE art. 1201 (1961). Since the common law definition of "human being" is applicable, a fetus neither born nor in the process of birth is not a "human being" within the meaning of those words as they appear in the homicide statute. In *Keeler* v. *Superior Court*, 2 Cal. 3d 619, 470 P.2d 662, 87 Cal. Rptr. 481 (1970), a pregnant woman was assaulted by her former husband; a Caesarean section and examination *in utero* revealed that the fetus, of approximately thirty-five weeks gestation, had died of a severely fractured skull and resultant hemorrhaging. The California Supreme Court held the man could not be guilty of murder; the same result would apply in Texas. A fetus is not considered equal to a "human being," and its destruction involves a significantly lesser penalty." [94]

The State does not require that a pregnant woman with a history of spontaneous abortion go into seclusion in an attempt to save the pregnancy. No pregnant woman having knowingly engaged in conduct which she reasonably could have foreseen would result in injury to the fetus (such as skiing in late pregnancy) has ever been charged with negligent homicide.

No formalities of death are observed regarding a fetus of less than five months gestation. Property rights are contingent upon being born alive. There has never been a tort recovery in Texas as the result of injury to a fetus not born alive. No benefits are given prior to birth in situations, such as workman's compensation, where benefits are normally allowed for "children." [95]

Appellants realize that the fact that states have failed in most instances to protect the rights of the fetus does not automatically mean that a state would not have a compelling interest in doing so. One assumes that if a state had never enacted a statute prohibiting theft, a constitutional right to steal would not necessarily follow. However, the traditional subjects of legislation which bear upon individual liberty have, of necessity, always guided our notions of what the state may or may not do. The fact that the fetus has only been protected in the area of abortion, and not even then when the mother's life is in danger or she performs the abortion herself, together with the strong evidence that abortion laws were passed in response to the dangers of surgery, makes out a strong case for a traditional right of the mother to abort the fetus which was only taken away for her own protection. The converse is that the state has no *traditional* interest in protection of the fetus. If an interest exists, it must be relatively recent in its discovery.

It is sometimes argued that scientific discoveries show that human life exists in the fetus. Scientific studies in embryology have greatly expanded our understanding of the process of fertilization and development of

Footnotes at end of article.

the fetus and studies relating to the basic elements of life have shown that life is not only present in the fertilized egg, sperm and ova but that each cell contains elements which could conceivably constitute the beginning of a new human organism. Such studies are significant to science but only confuse the problem of defining human life.

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

"It can be answered, but not briefly. What does the embryo receive from its parents that might be of value? There are only three possibilities: substance, energy and information. As for the substance, it is not remarkable: merely the sort of thing one might find in any piece of meat, human or animal, and there is very little of it—only one and a half micrograms, which is about a half of a billionth of an ounce. The energy content of this tiny amount of material is likewise negligible. As the zygote develops into an embryo, both its substance and energy content increase (at the expense of the mother); but this is not a very important matter—even an adult from this standpoint is only a hundred and fifty pounds of meat.

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

"People who worry about the moral danger of abortion do so because they think of the fetus as a human being, hence equate feticide with murder. Whether the fetus is or is not a human being is a matter of definition, not fact, and we can define it any way we wish." Hardin, *Abortion or Compulsory Pregnancy?* 30 J. MAR. & FAM. No. 2 (May, 1968).

Thus science only leads to a worse quandary for obviously if one goes far enough back along the continuum of human development one encounters the existence of sub-microscopic double-helix molecules which have human life potential. When does something become human? As Judge Cassibry pointed out in his dissent in *Rosen* v. *Louisiana State Board of Medical Examiners*, 318 F. Supp. 1217, 1232 (E.D. La. 1970) appealed docketed 39 U.S.L.W. 3302 (U.S. Dec. 27, 1970) (No. 1010), the "meaning of the term 'human life' is a relative one which depends on the purpose for which the term is being defined." [96]

Once the fact that science can offer no guidance on the question of when human life begins is conceded, arguments concerning preservation of the fetus almost always fall back to the proposition of potential life. Despite disagreements as to when human characteristics are assumed by the fetus, its would-be protectors argue that since there is potential human life present, which, unlike "DNA" molecules *can* be protected, it must be preserved. But matters are not so simple. Obviously all potential life may not be protected. A legislative decision to cut appropriations for slum clearance, for medical facilities, for food subsidies; a declaration of war; a court's refusal to consider the habeas corpus petition of a condemned man—all in some way destroy life. And, to the extent that past exeprience shows that in the future "x" number of lives will be lost if the decisions are made, they are conscious decisions.

It is obvious that the legislative decision forbidding abortions also destroys potential life—that of the pregnant woman—just as a legislative decision to permit abortions destroys potential life.[97] The question then becomes not one of the destroying or preserving potential, but one of who shall make the decision. Obviously some decisions are better left to a representative process since individual decisions on medical facilities, wars, or the release of a convict would tend toward the chaotic. It is our contention that the decision on abortion is exactly the opposite. A representative or majority decision making process has led to chaos. Indeed, in the face of two difficult, unresolvable choices—to destroy life potential in either a fetus or its host—the choice can only be left to one of the entities whose potential is threatened.

The above argument is perhaps only another way of stating that when fundamental rights are infringed upon, the State bears the burden of demonstrating a compelling interest for doing so. The question of the life of the fetus versus the woman's right to choose whether she will be the host for that life is incapable of answer through the legislative fact-finding process. Whether one considers the fetus a human being is a problem of definition rather than fact. Given a decision which cannot be reached on the basis of fact, the State must give way to the individual for it can never bear its burden of demonstrating that facts exist which set up a compelling state interest for denying individual rights.

V. The provisions in articles 1191–1194 and 1196 of the Texas Penal Code, which prohibit medically induced abortions unless undertaken "by medical advice for the purpose of saving the life of the mother" are unconstitutionally vague and indefinite, facially and in application, because the language is not meaningful in medical practice, and provides wholly inadequate warning to physicians, their counsel, judges, and jurors, of which physical, mental, and personal factors may be taken into consideraiton when assessing necessity

Appellants successfully challenged the statutory exception in the lower court on grounds of unconstitutional uncertainty. The provision sanctioning the medical procedure of induced abortion for "saving the life" of the woman, on its face and as interpreted in practice, provides insufficient prior warning of what conduct it proscribes, and what it authorizes. It shows the difficulties encountered when an instrument as blunt as the criminal law crudely attempts to define and regulate "those subtle and mysterious influences upon which life and death depend. . . ." *Dent* v. *West Virginia*, 129 U.S. 114, 122 (1889).

A vast body of case law exists on the problem of unconstitutional uncertainty.[98] This doctrine has, moreover, several complementary, and competing strands. The test most frequently articulated has been that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process. . . ." [99]

This is partly because "it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large." [100]

Clearly, "[v]ague laws in any area suffer a constitutional infirmity," [101] be they of common law antiquity,[102] administrative,[103] or criminal.[104] Furthermore, statutes challenged for vagueness which impinge upon sensitive human rights are to be closely scrutinized. *Grisworld* dealt with "a right of privacy older than the Bill of Rights . . ." [105] and that right is invoked again here, as well as the rights to seek and administer medical care. Thus, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." [106]

This Court has never ruled on a vagueness challenge to a similar statute, and accordingly this case must be decided on its own merits as one largely of first impression. *United States v. Vuitch*, 402 U.S. 62 (1971), is in no way dispositive, moreover, having involved not only a differently worded statute, having been based upon no record whatever of statutory application in practice, and having been concerned with *federal* legislation which this Court might construe. The Texas courts have upheld this statute against vagueness claims, *Jackson* v. *State*, 55 Tex. Crim. 79, 115 S.W. 262 (1908), and it stands construed as written. In any event no construction could possibly meet the claim of physicians and patients to access to the medical procedure of induced abortion in cases of contraceptive failure, where the procedure would in no way be detrimental to the patient.

Both medical and legal commentary have recognized the uncertainty of American abortion laws, of which the Texas statute is a typical example. Retired Justice Clark recently remarked:

"The increasing number of abortions subjects physicians to increased dangers of liability for incorrectly interpreting a statute. . . . [D]octors face an uncertain fate when performing an abortion. This uncertainty will continue unless the legislatures or courts provide relief from liability." [107]

Christopher Hietze, M.D., perhaps internationally the most knowledgeable authority on abortion practices and statistics, commented.

"The application of these laws, however, varies greatly between localities and between hospitals." [108]

Similarly, a 1967 study concluded:

"Abortion policies vary not only from hospital to hospital but also from service to service within the same hospital. They also vary widely from doctor to doctor on the same service of the same hospital." [109]

And, as Dr. Alan F. Guttmacher indicated in an early study, "[t]he doctor's dilemma lies in the phrase 'preserving the life of the woman.' " [110]

The medical profession has no experience in applying the provisions of felony statutes to the day-to-day practice of their science.[111] It is not an offense to perform an appendectomy far in advance of rupture, and when only necessary to prevent a risk that might never materialize. General malpractice principles, which take all circumstances into account, govern the physician's everyday practice, not the criminal law. Nor is an instance of malpractice *per se* ever a cause for license revocation, much less criminal prosecution, unless so serious, wanton, and reckless as to constitute criminal negligence. The physician's professional role is directed toward preserving a patient's *health*, that term is used in its broadest sense:

"Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

"The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition." [112]

In no sphere of medicine other than abortion does a criminal statute impose such a burden upon a physician, and in no other sphere of medical practice is treatment restricted by criminal law to those instances in which it is necessary to save the patient's life. The Court might consider the impact on the lives of all citizens if a penal statute prohibited gall bladder surgery, kidney stone removal, the prescription of contraceptives,[113] use of antibiotics, vaccination, or even the taking of aspirin "unless necessary for the preservation of the life or health" of the patient. There are not and never have been such laws or practices.

Footnotes at end of article.

An increasing number of federal and state courts have been asked to declare similarly worded statutes unconstitutionally vague. A comparison of the analysis by invalidating judges with that by others is instructive. The case language discussing vagueness in the two types of decision can be compared as follows:

Vague

"[T]here are grave and manifold uncertainties in the application of Article 1196. How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered." *Roe v. Wade*, 314 F. Supp. 1217, 1223 (N.D. Tex. 1970) (per curiam); Supp. App. at 83.

"If courts cannot agree on what is the essential meaning of 'necessary for the preservation of the woman's life' and like words, we fail to see how those who may be subject to the statute's proscriptions can know what it prohibits. . . . One need not inquire in great depth as to the meaning of such words as 'necessary' and 'preserve' to conclude that the holdings of those cases are correct. 'Necessary' has been characterized as vague by the United States Supreme Court and has been similarly described by other courts. It is 'a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, proper, or conducive to the end sought.'

"The word 'preserve' is similarly susceptible of so broad a range of connotations as to render its meaning in the statute gravely amorphous, since it may mean anything from maintaining something in its status quo to preventing the total destruction of something." *Doe* v. *Scott*, 321 F. Supp. 1385, 1388–89 (N.D. Ill. 1971); Supp. App. at 128–29.

"Dictionary definitions and judicial interpretations fail to provide a clear meaning for the words, 'necessary' or 'preserve.' There is, of course, no standard definition of 'necessary to preserve,' and taking the words separately, no clear meaning emerges. 'Necessary' is defined as: '1. Essential to a desirable or projected end or condition; not to be dispensed with without loss, damage, inefficiency, or the like; * * * ' (Webster's New International Dictionary (2d ed.), unabridged.) The courts have recognized that ' "necessary" has not a fixed meaning, but is flexible and relative.' (Westphal v. Westphal, 122 Cal. App. 379, 382, 10 P. 2d 119, 120; see also, City of Dayton v. Borchers (Ohio Com. Pl., 1967) 13 Ohio Misc. 273, 232 N.E.2d 437, 441 ['A *necessary* thing may supply a wide range of wants, from mere convenience to logical completeness.'].)

"The definition of 'preserve' is even less enlightening. It is defined as: '1. To keep or save from injury or destruction; to guard or defend from evil; to protect, save. 2. To keep in existence or intact: * * * To save from decomposition, * * * 3. To maintain; to keep up; * * *' (Webster's New International Dictionary, *supra*.) The meanings for 'preserve' range from the concept of maintaining the status quo—that is, the woman's condition of life at the time of pregnancy—to maintaining the biological or medical definition of 'life'—that is, as opposed to the biological or medical definition of 'death'. * * *

"Various possible meanings of 'necessary to preserve * * * life' have been suggested. However, none of the proposed definitions will sustain the statute." *California* v. *Belous*, 71 Cal. 2d 954, 961–62, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970); Supp. App. at 104.

"It is my opinion that the difficulty with the statute in question is not its failure to be phrased in 'numerous paragraphs of fine-spun legal terminology', but rather its attempt to define a medical problem in terms that are not understandable by the medical profession. A continuing complaint of the medical profession is that the laws in general, and judicial decisions, are not responsive to the realities of medical science. It is interesting to note that while the body of the statute condemns the attempt to procure a 'miscarriage', the statute is captioned 'Attempt to procure abortion.' This failure of this statute, and others like it, to observe the medical distinction between abortion and miscarriage has been noted, and it is said that the two terms are used indiscriminately by the courts. . . . I should like to set forth what I believe to be a primary example of the vagueness of the Ohio statute: the suicidal patient.

"A pregnant woman informs her physician that if her pregnancy goes to term she will take her own life. Is an abortion *necessary to preserve* the life of that patient? The patient will not die from any physiological condition related to her pregnancy. Suicide is an intentional act (although, perhaps, not truly a volitional one), and the patient may not, in fact, carry out her threat. Assuming that the physician has strong and valid reasons to believe that his patient will take her own life, does this statute tell him whether he may legally terminate the pregnancy?

"There are other questions created by this statute. How imminent must the threat of death be to warrant an abortion 'to preserve life?' If permitting a pregnancy to go to term would clearly shorten the mother's life by a substantial number of years, would a physician be justified in performing an abortion in accordance with the term 'necessary to preserve her life?'

"An Ohio court has recently defined a 'necessary thing' as follows:

'A necessary thing may supply a wide range of wants, from mere convenience to logical completeness.' City of Dayton v. Borchers, 13 Ohio Misc. 273, 232 N.E.2d 437, 441, 42 O.O.2d 193, 197 (Ohio Com.Pl. 1967)

Such a definition certainly does not advise what is permitted and what is forbidden.

"With regard to the assertion that the lessons of time have compensated for the deficiencies of the statute, I do not find that to be the case. I have endeavored to examine all recorded Ohio decisions construing O.R.C. § 2901.16 and the predecessor thereto, and find that not one of the cases I have reviewed construes the statutory phrase 'necessary to preserve her life', or the language of similar import in the earlier statutes. (A listing of the said decisions is appended hereto). A study of the Ohio case histories offers little guidance to the physician searching for the meaning of the language 'necessary to preserve her life.'" *Steinberg* v. *Brown*, 321 F. Supp. 741, 749–50 (N.D. Ohio 1970) (Green, J., dissenting); Supp. App. at 197–98.

Not Vague

"We have examined the challenged phraseology and are persuaded that it is not indefinite or vague. In our opinion, the word 'necessary' and the expression 'to save the life of the mother' are both reasonably comprehensible in their meaning. * * * [T]he California court found that the words 'necessary to preserve her life' in that state's abortion statute were unconstitutionally vague. While the Wisconsin's statute uses slightly different language ('necessary to save'), we doubt that the distinction between the words used in the two statutes is significant. However, we do not share the view of the majority in *Belous* that such language is so vague that one must guess at its meaning." *Babbitz* v. *McCann*, 310 F. Supp. 293, 297–98 (E.D. Wis. 1970) (per curiam); Supp. App. at 145–46.

"On the vagueness question I first observe that we have before us no contention by any party that an actual situation exists where a licensed physician acting in good faith is in jeopardy of prosecution for performing an abortion he believed to be 'necessary for the preservation of the woman's life.' In other words we are presented with no actual circumstances where the vagueness question is in issue. The rather forced game of semantics urged by plaintiffs and adopted by the majority has not presented any *actual* controversy but is merely a convenient vehicle for these plaintiffs to challenge a law which they believe is unwise. . . .

"The words of the Illinois Abortion Statute taken in their ordinary meaning sufficiently convey definite warning as to the proscribed conduct . . ." *Doe* v. *Scott*, 321 F. Supp. 1385, 1392–93 (N.D. Ill. 1971) (Campbell, J., dissenting); Supp. App. at 132–33.

"Amici for appellant, 178 deans of medical schools, state that . . . 'the medical profession has "approved" abortions in cases [in which the objective was not to preserve the life of the woman and therefore] clearly outside of Penal Code section 274. Packer & Gampell, Therapeutic Abortion: A Problem in Law and Medicine, 11 Stan.L.Rev. 417, 447. * * * ' However, that sentence must be understood to mean recognized and approved by such persons as being required to preserve the life of the patient.

"The word 'preserve' is defined in the dictionary as '1. To keep or save from injury or destruction; * * * to protect; save. 2. To keep in existence or intact; * * * To save from decomposition * * *.' (See Webster's New Internat. Dict. (3d ed. 1961).) As used in section 274, the word 'preserve' has been regarded as synonymous with 'save' * * * and to save a life ordinarily is understood as meaning to save from destruction, i.e. dying—not merely from injury. Thus the precipitation of a psychosis in the absence of a genuine threat of suicide is not a threat to life under section 274." *California* v. *Belous*, 71 Cal. 2d 954, 974–75, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) Burke, J., dissenting); Supp. App. at 112–13. "[O]ne would think that the English language which has been the sensitive instrument of our system of law for over 500 years, has lost, by the mere passage of time, all capacity for clarity of expression. . . . There is no mystique enveloping the statute and . . . the clause now challenged has stood the test of over a hundred years, and presumably of countless human incidents falling within its scope, apparently without evoking a single whimpering cry against it." *Id.* at 979–80 (O'Sullivan, J., dissenting).

"It appears to us that the vagueness which disturbs the plaintiffs herein results from their own strained construction of the language used, coupled with the modern notion among law review writers that anything that is not couched in numerous paragraphs of fine-spun legal terminology is too imprecise to support a criminal conviction. . . . The words of the Ohio statute, taken in their ordinary meaning, have over a long period of years proved entirely adequate to inform the public, including both lay and professional people, of what is forbidden. The problem of the plaintiffs is not that they do not understand, but that basically they do not accept, its proscription." *Steinberg* v. *Brown*, 321 F. Supp. 741, 745 (N.D. Ohio 1970); Supp. App. at 193.

"We have examined the challenged language and are persuaded that it is neither vague nor indefinite, but is instead reasonably comprehensible in its meaning, with its reach delineated in words of common understanding.

"The clause 'unless done for the relief of a woman whose life appears in peril' requires no guessing at its meaning. Rosen focuses upon the words 'relief,' 'appears,' and 'life.' These are widely used and well understood words, particularly when read in the context of section 37:1285(6). We conclude that the statute was intended to permit an

induced abortion of an embryo or fetus only when the physician, after due consultation with another licensed physician, determines in good faith that continuation of the pregnancy will directly and proximately result in the death of the woman. In our opinion, the statute so read provides fair warning that Louisiana does not suffer the performance of all medically indicated abortions, however wise in the physician's estimation such an operation might be in a particular case, but rather allows the induced abortion of an embryo or fetus to be performed without sanction only when the life of the mother is directly endangered by the condition of pregnancy itself." *Rosen* v. *Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217, 1220 (E.D. La. 1970); Supp. App. at 214.

Little can be added to the analysis offered by numerous distinguished state and federal judges on the vagueness questions raised here. It is sufficient to note that the courts upholding the statute as not vague committed three plain errors. First, the validating courts completely and deliberately ignored the discussions in medical literature which carefully explain why and how interpretative difficulties arise. Second, those courts did not even discuss the various possible interpretations of the statutory language, and point to any likelihood that state courts would adopt or had adopted a specific meaning. Third, the validating courts did not draw the obvious distinction between the fluid and varying standards of ordinary medical practice, and the different standards brought about with respect to induced abortion by the variant ethic views of physicians that are compounded by the threat of felony punishment and license revocation for committing what would at most be a medical misunderstanding in any other context.

VI. Texas Penal Code articles 1191–1194 and 1196, as applied to impose upon a physician the burden of Pleading and Proving that a medical abortion procedure was "procured or attempted by medical advice for the purpose of saving the life of the mother," reverses the due process guarantee of presumed innocence and invades the privilege against self-incrimination

The Texas abortion law comes to this Court with a supplementary gloss of state law that cannot be squared with the Fourteenth Amendment. According to *Veevers* v. *State*, 354 S.W.2d 161, 166 (Tex. Crim. App. 1962), and numerous prior decisions, "[it] is unnecessary for the State to allege that the act was 'unlawfully' done." Although Article 1196 permits the medical procedure of induced abortion in a limited class of cases, the State need not inquire whether the exception applied. As the *Veevers* case held, "[t]his is a separate statute, and it need not be negated in the allegations of the indictment. It would be an affirmative defense available in the proper case to an accused." *Id.* at 166.

The import of the *Veevers* gloss is that a physician may be indicted and tried before a jury each time he undertakes the medical procedure of induced abortion. It is up to him to raise Article 1196 as a defense, admit complicity in the offense, and prove that the medical procedure was done "for the purpose of saving the life of the mother."

Indictments contained in the record (A. 73, 74; Appendix E, E–1 to E–9) illustrate this practice. Law enforcement authorities are free to seek indictments without even the bare courtesy of seeking an explanation from the physician.

Medical literature has shown at least one Dallas, Texas hospital which has generally performed 1 abortion for each 680 deliveries.[114] If this ratio has been consistent on a statewide basis, then the 220,000 births in Texas during 1969 [115] permit an inference that there were also 324 medical abortions done in Texas hospitals. Under Texas law, the physicians, their cooperating associates, and perhaps the hospitals themselves could have been indicted without warning on abortion charges in any of the 324 cases.

This Court's decision in *United States* v. *Vuitch*, 402 U.S. 62 (1971), and the weight of authority, support the contention that lack of medical justification for the abortion "is an objective element of the crime." George, *Current Abortion Laws: Proposals and Movements for Reform*, 17 W. Res. L. Rev. 371, 377 (1965). As the Court in *Vuitch* stated:

"Certainly a statute that outlawed only a limited category of abortions but 'presumed' guilt whenever the mere fact of abortion was established, would at the very least present serious constitutional problems under this Court's previous decisions interpreting the Fifth Amendment." 402 U.S. at 70.

An initial infirmity of the *Veevers* rule inheres in its inevitable invasion of the Fifth Amendment privilege against self-incrimination. *Veevers* requires that the physician bring forth evidence that the abortion was necessary to preserve the patient's "life." This means that the accused physician stands mute at penalty of certain conviction because of his failure to testify. If he testifies, however, he must admit the very fact of the abortion, *i.e.*, complicity in one element of the offense, and then attempt to persuade the jury that the second element of the offense was not present. If the jury finds his justifications insufficient, or that his "good faith" was not "good enough," the physician has been convicted upon his own testimony. Moreover, if the jury had not believed the prosecution's evidence that an abortion was performed, the physician's testimony could supply proof from his own mouth of *both* elements of the offense.

Leary v. *United States*, 395 U.S. 6 (1969), teaches that the *Veevers* rule must be held to violate the privilege against self-incrimination. In *Leary*, registration and payment under the Marihuana Tax Act "compelled [an accused] to expose himself to a 'real and appreciable' risk of self-incrimination. . . ." 395 U.S. at 16. Such registration "would surely prove a significant 'link in a chain' of evidence tending to establish . . . guilt." *Marchetti* v. *United States*, 390 U.S. 39, 48 (1968).

So it is with the *Veevers* rule. If the physician comes forward with evidence that the abortion was necessary for medical reasons, he must perforce admit presence at the scene, and performance of the very act charged in the indictment. His own testimony will suffice to corroborate the first element of the offense, namely, that he performed the abortion. Not only will his own testimony provide a "link" in the chain, it may provide both links to a two-link chain, that is, the entire chain. He will have admitted performing the abortion and the jury may not believe his reasons for justification. Accordingly, a weak prosecution case may be fortified and proved from the physician's own testimony. Since *Veevers* requires that testimony, the rule invades the physician's privilege against self-incrimination. Under *Leary*, and earlier supporting decisions,[116] this is not permissible.

The Texas felony abortion statute, as construed in *Veevers*, also violates the due process clause of the Fourteenth Amendment by reversing the presumption of innocence. The physician must take the burden upon himself of proving that the abortion was necessary to save the patient's life. To undertake such proof, the physician must first waive any defense based upon not having participated at all in the alleged offense. He must admit what the indictment states, that he performed the abortion, and prove that the act was justified.

A long line of decisions by this Court, carefully reviewed by the Eighth Circuit *en banc* in *Stump* v. *Bennett*, 398 F.2d 111 (8th Cir. 1968 (*en banc*), establishes the presumtion of innocence on its constitutional plane.[117] As this Court stated in *Deutch* v. *United States*:

"'One of the rightful boasts of Western civilization is that the [prosecution] has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assurring an accused all the safeguards of a fair procedure.' Irving v. Dowd, 366 U.S. 717, 729. Among these is the presumption of the defendant's innocence." 367 U.S. 456, 471 (1961).

Plainly, this right is invaded when a physician can be convicted solely because he performed an abortion, and without further proof.

Necessity is not a collateral matter, like self-defense. With respect to abortion, the circumstances under which the procedure was undertaken go to the very heart of the matter. It is not every abortion which the statute condemns, but only a special, opaquely defined class. *Veevers* incorrectly suggests that the exceptions are collateral and affirmative justifications. In every physican case, however, the center of the controversy will be whether the abortion in question fell within the exception. Abortions *per se* are no offense. It is only unnecessary abortions which the statute proscribes. Under a broad definition of "life" there are many necessary abortions. Under other definitions, there may be more. By presuming that all abortions are legally unnecessary, the State may convict, as it did in *Veevers*, upon no more than a showing persuasive to the jury, that the physician performed the abortion. It is presumed, unless the physician shows otherwise, that the abortion was unnecessary. In other words, Texas practice resumes, upon proof of one element of the offense, that the second element is present, that the accused is guilty. This presumption of guilt cannot stand in light of the constitutional status of the presumption of innocence under the due process clause of the Fifth Amendment, as applied through the Fourteenth.

CONCLUSION

For the reasons stated in this brief this Court should reverse the lower court's judgment denying standing to Appellants Doe and denying injunctive relief, declare that the Texas Abortion Statutes, Arts. 1191, 1192, 1193, 1194, 1196, Texas Penal Code, violate the United States Constitution and remand with instructions that a permanent injunction against enforcement of said statutes be entered.

Respectfully submitted.

Roy Lucas, James Madison Constitutional Law Institute, Four Patchin Place, New York, New York 10011.

Sarah Weddington, James R. Weddington 709 West 14th, Austin, Texas 78701.

Linda N. Coffee, 2130 First Nat'l Bank Bldg., Dallas, Texas 75202.

Fred Bruner, Roy L. Merrill, Jr., Daugherty, Bruner, Lastelick & Anderson, 1130 Mercantile Bank Bldg., Dallas, Texas 75201, *Attorneys for Appellants.*

FOOTNOTES

[1] Citations are to the Single Appendix.

[2] James Hubert Hallford, M.D., filed his Application for Leave to Intervene in the *Roe* case March 19, 1970 (A. 22).

[3] The Law, 2A Texas Penal Code arts. 1191–1194, 1196, at 429–36 (1961), are set out verbatim, *infra*, at 4-5.

[4] Over 339,200 out-of-wedlock children were born during 1968 in the United States. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1970*, Table 58, at 50 (91st ed.). 80.5% (273,600) of these children were born to women between the ages of 11 and 24 years.

[5] Other rights asserted by Jane Roe were: "the fundamental right of all women to choose whether and when to bear children"; "[the] right to privacy in the physician-

patient relationship"; and the "right to personal privacy" (A. 13). The origin and extent of these rights are discussed *infra*.

[6] "Supp. App." hereinafter refers to the *Supplementary Appendix to Brief of Appellants*, the offset bound volume filed with this brief.

[7] U.S. BUREAU OF THE CENSUS, *Statistical Abstract of the United States: 1970*, Table 57, at 49 (91st ed.).

[8] While Texas does not punish the woman who persuades a physician to abort her, the anti-abortion statute imposes a felony sanction of up to five years for the physician. 2A TEXAS PENAL CODE art. 1191, at 429 (1961). Moreover, the physician risks cancellation of his license to practice. 12B TEXAS CIV. STAT. art. 4505, at 541 (1966); *id* art. 4506, at 132 (Supp. 1969–70). Also, the hospital can lose its operating license for permitting an illegal abortion within its facilities. 12B TEXAS CIV. STAT. art. 4437f, § 9, at 216 (1966).

[9] Jane Roe and Dr. Hallford had standing because they "occupy positions *vis-à-vis* the Texas Abortion Laws sufficient to differentiate them from the general public" (A. 113). Also, Dr. Hallford had standing to raise the "rights of his patients, single women and married couples, as well as rights of his own" (A. 113, no. 3).

[10] The district court was "satisfied that there presently exists a degree of contentiousness between Roe and Hallford and the defendant to establish a 'case of actual controversy' . . ." (A. 114.)

[11] Zwickler v. Koota, 389 U.S. 241, 248–49 (1967), was sufficient authority to preclude abstention.

[12] *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); Prince v. Massachusetts, 321 U.S. 158 (1944), all cited by the district court.

[13] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

[14] *See* Skinner v. Oklahoma, 316 U.S. 535 (1942); Stanley v. Georgia, 394 U.S. 557 (1969).

[15] *See, e.g.*, McCann v. Babbitz, 310 F. Supp. 293 (E.D. Wis. 1970) (per curiam); United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969); California v. Belous, 71 Cal. 2d 954, 458 P.2d 194, SO Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

[16] 2A TEXAS PENAL CODE art. 1196, at 436 (1961).

[17] MODEL PENAL CODE § 230.3(2) (Proposed Official Draft, 1962). The twelve states are Arkansas, California, Colorado, Delaware, Georgia, Kansas, Maryland, New Mexico, North Carolina, Oregon, South Carolina, and Virginia. *See generally* Roemer, *Abortion Law Reform and Repeal; Legislative and Judicial Developments*, 61 AM. J. PUBLIC HEALTH 500 (1971); Supp. App. at 329.

[18] Tietze, *United States: Therapeutic Abortions, 1963–1968*, 59 STUDIES IN FAMILY PLANNING 5 (1970).

[19] Secret induced abortions are inherently incapable of quantification. Nonetheless, one can be certain that the number is very high. For estimates, see Fisher, *Criminal Abortion*, in ABORTION IN AMERICA 3–6 (H. Rosen ed. 1967); M. CALDERONE (ed.), ABORTION IN THE UNITED STATES 180 (1958): P. GERBARD *et al.*, PREGNANCY, BIRTH AND ABORTION 136–37 (1958); F. TAUSSIG, ABORTION: SPONTANEOUS AND INDUCED 25 (1936): Regine, *A Study of Pregnancy Wastage*, 13 MILBANK MEM. FUND QUART. No. 4, at 347 65 (1935).

[20] Chase, *Twelve Month Report on Abortions in New York City* (Health Services Administration, City of New York, June 29, 1971).

[21] *Id.*

[22] *Id.*

[23] Dr. McKelvey's basic point about the dangers of pre-Lister "medical" care is well taken, although his figures here are somewhat inaccurate. The clinic was known as the "First Obstetric Clinic at the Allgemeines Krankenhaus [General Hospital]," not the Women's Clinic. J. TALBOTT, *Ignaz Phillip Semmelweis (1818–1865)*, in A BIOGRAPHICAL HISTORY OF MEDICINE 660 (1970). The mortality rate in 1846 "was 11.4% in the First Division [physicians] and 2.7% in the Second Division [midwives]." *Id.* at 661. Chlorine disinfection was used in 1848 to reduce the First Division mortality rate to "slightly less than the mortality in the Second Division," *id.*, which had been 2.7%. It was 1861, however, before Dr. Semmelweis published his findings in German. I. P. SEMMELWEIS, ETIOLOGY, CONCEPT AND PROPHYLAXIS OF CHILDBED FEVER (1861), *transl. in* 5 MEDICAL CLASSICS 339–715 (1941).

[24] *See generally* H. ROBB, ASEPTIC SURGICAL TECHNIQUE WITH ESPECIAL REFERENCE TO GYNAECOLOGICAL OPERATIONS (1875); C. HAGENSEN & W. LLOYD, A. HUNDRED YEARS OF MEDICINE (1943).

[25] "Ovariotomy" is the abdominal operation for removal of an ovarian tumbor.

[26] TEXAS LAWS of 1854, ch. 49, § 1, at 58, in 3 GAMMEL, LAWS OF TEXAS 1502 (1898).

[27] U.S. Bureau of the Census: *Statistical Abstracts of the United States: 1970*, Table 69, at 55 (91st ed.).

[28] The data are derived from surveys by the Commission on Professional and Hospital Activities, in Ann Arbor, Michigan, which are published in the Professional Activities Survey (PAS) Reporter. Over 1,200 hospitals provide the Commission with data for more than 10 million patients per year. *See PAS Hospitals*, 8 PAS REPORTER No. 1, at 1 (Jan. 12, 1970).

[29] *Appendectomy Profile, 1968*, 7 PAS REPORTER No. 16, at 1-4 (Dec. 22, 1969).

[30] *Cholecystectomy Mortality*, 8 PAS REPORTER No. 8, at 1 (Apr. 20, 1970).

[31] *T. & A Profile*, 8 PAS REPORTER No. 5 (Mar. 9, 1970).

[32] Tietze, *United States: Therapeutic Abortions, 1963–1968*, 59 STUDIES IN FAMILY PLANNING 5, 7 (1970).

[33] Chase, *Twelve Month Report on Abortions in New York City* (Health Services Administration, City of New York, June 29, 1971).

[34] *Id.* at 2.

[35] *Id.*

[36] Tietze, *Abortion Laws and Abortion Practices in Europe*, in V. ADVANCES IN PLANNED PARENTHOOD 194, 208 (1969) (Proceedings of the Seventh Annual Meeting of the American Ass'n of Planned Parenthood Physicians).

[37] Fleck, *Some Psychiatric Aspects of Abortion*, 151 J. NERV. & MENT. DIS. 42 (1970); Simon, *Psychological and Emotional Indications for Therapeutic Abortion*, 2 SEM'RS IN PSYCH. 283 295 (1970); Margolis, et al., *Therapeutic Abortion Follow-up Study*, 110 AM. J. OB. GYN. 243 (1971); Notman, et al., *Psychological Outcome on Patients Having Therapeutic Abortions*, Paper presented at Third International Congress of Psychosomatic Problems in Obstetrics and Gynecology, London, April, 1970 (Available at Beth Israel Hosp., Boston, Mass.); Whittington, *Evaluation of Therapeutic Abortion as an Element of Preventive Psychiatry*, 126 AM. J. PSYCH. 1224 (1970).

[38] *See* Gray v. State, 77, Tex. Crim. 221, 178 S.W. 337 (1915); Smith v. Gaffard, 31 Ala. 45 (1857); Hunter v. Wheate, 53 App. D.C. 206 (D.C. Cir. 1923); Eggart v. Florida, 40 Fla. 527, 25 So. 144 (1898); State v. Alcorn, 7 Idaho 599, 64 Pac. 1014 (1901); Abrams v. Foshee, 3 Iowa 274, 66 Am. Dec. 77 (1856); Mitchell v. Commonwealth, 78 Ky. 204, 39 Am. Rep. 227 (1879); Lamp v. Maryland, 67 Md. 524, 10 Atl. 298 (1887); Smith v. State, 33 Me. 48, 54 Am. Dec. 607 (1851); Commonwealth v. Bangs, 9 Mass. 387 (1812); Evans v. People, 49 N.Y. 86 (1872); Edwards v. State, 79 Neb. 251, 112 N.W. 511 (1907); State v. Cooper, 22 N.J.L. (2 Zab.) 52, 51 Am. Dec. 248 (1849); State v. Tippie, 89 Ohio St. 35, 105 N.E. 75 (1913); State v. Ousplund, 86 Ore. 121, 167 Pac. 1019 (1917), *appeal dismissed per stip.*, 251 U.S. 563 (1919); Miller v. Bennet, 190 Va. 162, 56 S.E.2d 217 (1949); State v. Dickinson, 41 Wis. 299 (1877). *See generally* Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968) [hereinafter Means]. *Contra:* Mills v. Commonwealth, 13 Pa. St. 631 (1850); Willis v. O'Brien, 151 W.Va. 628, 153 S.E.2d 178, *cert. denied*, 389 U.S. 848 (1967); State v. Slagle, 83 N.C. 630 (1880).

[39] *See, e.g.*, N.Y. REV. STAT., pt. IV, ch. 1, tit. 6, §§ 20–22 (1829); ILL. REV. CODE, § 46 (1827); *see generally* George, *Current Abortion Laws: Proposals and Movements for Reform*, 17 W. RES. L. REV. 371 (1966); Lucas, *Laws of the United States*, in I ABORTION IN A CHANGING WORLD 127 (R. Hall ed. 1970); Roemer, *Abortion Law Reform and Repeal: Legislative and Judicial Developments*, 61 AM. J. PUBLIC HEALTH 500 (1971).

[40] Setting out the New Jersey abortion law of 1849 beside the 1854 Texas law is instructive:

"If any person, with the intent to procure the miscarriage of any woman being with child, unlawfully and maliciously shall administer to her or cause to be taken by her any poison or other noxious thing, or shall use any instrument or any means whatever, with like intent . . . shall be punished . . . ." TEXAS LAWS of 1854, Ch. 49, § 1, at 58.

"[I]f any person or persons, maliciously or without lawful justification, with intent to cause and procure the miscarriage of a woman then pregnant with child, shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine or noxious thing . . . ." N.J. LAWS at 266 (1849).

[41] TEXAS PENAL CODE, ch. VII, arts. 531–536 (1857).

[42] 6 Revisers' Notes, pt. IV, ch. 1, tit. 6, § 28, at 75 (1828).

[43] *Id.* This significant historical evidence was first disclosed in Means, *supra* note 39, at 451–453.

[44] *See* ALA. CODE. 14, § 9 (1958) (". . . unless the same is necessary to preserve her life or health . . . ."); ARIZ. REV. STAT. ANN. § 13–211 (1956) (". . . unless it is necessary to save her life . . . ."); CONN. GEN. STAT. ANN. §53–29 (1960) (". . . unless the same is necessary to preserve her life or that of her unborn child . . . ."); FLA. STAT. ANN. § 782.10 (1965) (" . . . unless the same shall have been necessary to preserve the life of the mother . . . ."); IDAHO CODE ANN. tit. 18, § 601 (1948) (". . . necessary to preserve her life . . . ."); ILL. ANN. STAT. ch. 38, § 23–1 (1970) (". . . necessary for the preservation of the woman's life."); IND. ANN. STAT. § 10–105 (1956) (". . . necessary to preserve her life . . . ."); IOWA CODE ANN. § 701.1 (1950) (". . . necessary to save her life . . . ."); KY. REV. STAT. ANN. § 436.020 (1970) (". . . necessary to preserve her life . . . ."); LA. REV. STAT. § 14:87 (1951) (". . . unless done for the relief of a woman whose life appears in peril . . ."); ME. REV. STAT. ANN. tit. 17, § 51 (1965) (". . . necessary for the preservation of the mother's life . . . ."); MASS. GEN. LAWS ANN. ch. 272, § 19 (1970) (prohibits unlawful abortions, interpreted by court to allow abortions by a surgeon if, ". . . necessary for the preservation of the life or health of the woman." Kudish v. Bd. of Registration, 248 N.E.2d 264 (1969)); MICH. STAT. ANN. § 28.209 (1967) (". . . necessary to preserve the life of such woman . . . ."); MINN. STAT. ANN. § 617.18 (1964) (". . . unless the same is necessary to preserve her life or that of the child with which she is pregnant . . . ."); MISS. CODE ANN. § 2223 (1966) (". . . necessary for the preservation of the mother's life . . . ."); MO. REV. STAT. § 559:100 (1953) (". . . unless the same is necessary to preserve her life or that of an unborn child . . . ."); MONT. REV. CODES ANN. § 94–401 (1969) (". . . necessary to preserve her life . . ."); NEB. REV. STAT. § 28–405 (1965) (". . . necessary to pre-

serve the life of such woman . . . ."); NEV. REV. STAT. ch. 201.120 (1967) (". . . necessary to preserve her life or that of the child with which she is pregnant . . . ."); N.H. REV. STAT. ANN. § 585.13 (1955) (". . . unless by reason of some malformation or of difficult or protracted labor, it shall have been necessary, to preserve the life of the woman . . . ."); N.J. STAT. ANN. § 2A:87-1 (1969) (prohibits abortions when done maliciously or without lawful justification; lawful justification has been interpreted as perhaps being limited to the preservation of the mother's life. State v. Moretti, 52 N.J. 182, 244 A.2d 499, *cert. denied*, 393 U.S. 952 (1968); *compare* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967)); N.D. CENT. CODE ANN. § 12-25-01 (1960) (". . . necessary to preserve her life . . . ."); OHIO REV. CODE ANN. § 2901.16 (1954) ("necessary to preserve her life . . . ."); OKLA. STAT. tit. 21, § 861 (1958) (" . . . necessary . . . to preserve her life . . . ."); P.R. LAWS ANN. tit. 33, § 1053 (1969) (". . . necessary to preserve her life . . . ."); R.I. GEN. LAWS ANN. § 11-3-1 (1970) (". . . necessary to preserve her life . . . ."); S.D. COMP. LAWS ANN. § 22-17-1 (1969) (". . . necessary to preserve her life . . . ."); TENN. CODE ANN. § 39-301 (1955) (". . . to preserve the life of the mother . . . ."); UTAH CODE ANN. § 76-2-1 (1953) (". . . necessary to preserve her life . . . ."); VT. STAT. ANN. tit. 13 § 101 (1958) (". . . necessary to preserve her life . . . ."); W. VA. CODE § 61-2-8 (1966) (". . . with the intention of saving the life of such woman or child . . . ."); WIS. STAT. ANN. § 940.04 (1958) (". . . necessary . . . to save the life of the mother . . . ."), WYO. STAT. ANN. § 6-77 (1959) (". . . necessary to preserve her life . . . .").

[45] Bumpass & Westoff, *The "Perfect Contraceptive" Population*, 169 SCIENCE 1177, 1179 (1970).

[46] Dryfoos, *et al., Eighteen Months Later: Family Planning Services in the United States, 1969*, 3 FAMILY PLANNING PERSPECTIVES No. 2, at 29 (Apr. 1971).

[47] *Need for Subsidized Family Planning Services: United States, Each State and County, 1968*, Table I, p. 92, cols. 10 & 11 (OEO, 1968).

[48] For discussion of contraceptive-techniques, effectiveness, and the full range of complex factors involved, *see generally* J. PEEL & M. POTTS, CONTRACEPTIVE PRACTICE (1969).

[49] The factor of patient *use*, or non-use is always relevant. Well motivated, sophisticated users might have no failure with a contraceptive foam, for example.

[50] The number 80 in the first line indicates that among 100 women utilizing no contraception for one year, 80 will become pregnant.

[51] Chase, *Twelve Month Report on Abortions in New York City* (June 29, 1971) (Health Services Administration, City of New York).

[52] 71 Cal.2d 954, 963 n. 5, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969) ("Dr. Belous' standing to raise this right is unchallenged."), *cert. denied*, 397 U.S. 915 (1970).

[53] McCann v. Babbitz, 310 F. Supp. 293 (E.D. Wis.) (per curiam), *appeal dismissed*, 400 U.S. 1 (1970) (percuriam).

[54] Doe v. Dunbar, 320 F. Supp. 1297 (D. Colo. 1970)

[55] Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill.), *appeal docketed sub nom.* Hanrahan v. Doe, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (No 70-10[illegible], 1971 Term).

[56] Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C.), *appeal docketed*, 40 U.S.L.W. 3048 (U.S. July 17, 1971) (No. 71-92, 1971 Term).

[57] Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970).

[58] This is not a case like *Hall* v. *Beals*, 396 U.S. 45 (1969) (per curiam), where no continuing injury whatsoever was present. Nor is *Brockington* v. *Rhodes*, 396 U.S. 41 (1969) (per curiam) pertinent. There the relief sought was limited in nature and rendered impossible to grant by the passage of time.

[59] *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 143-55 (1962); Note, 62 COLUM. L. REV. 106 (1962); Comment, 50 CALIF. L. REV. 137 (1962). For an excellent general discussion of the "ripeness" question in the context of criminal law, see Note, *Declaratory Relief in the Criminal Law*, 80 HARV. L. REV. 1490 (1967).

[60] A. BICKEL, THE LEAST DANGEROUS BRANCH 149-50 (1962).

[61] *Parr* involved an original petition for declaratory judgment by the State of Texas. The petition was denied.

[62] Art. 44.01, Tex. Code Crim. App., states: "The State shall have no right of appeal in criminal actions."

[63] In *Bokulich*, the Court held that the District Court had not "abused its discretion" in failing to grant the injunction; however, it then proceeded to state that the plaintiffs' claims could be raised at their criminal trial and thus the case was not a "proper" one for injunction. 394 U.S. at 98, 99.

[64] See also, Mercer v. Theriot, 377 U.S. 152 (1964); Reece v. Georgia, 350 U.S. 85 (1955); Urie v. Thompson, 337 U.S. 163 (1939).

Professor Wright indicates that while the Court is severely limited in its review of direct appeals under the Criminal Appeals Act, it is not so limited on other direct appeals from district courts. C. Wright, HANDBOOK OF THE LAW OF FEDERAL COURTS 431 (1963).

[65] The present case.

[66] Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis.) (*per curiam*), *appeal dismissed*, 400 U.S. 1 (1970) (*per curiam*).

[67] Doe v. Scott, 321 F. Supp. 1384 (N.D. 1971), *appeals docketed, sub noms.* Hanrahan v. Doe and Hefferman v. Doe, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) Nos. 1522, 1523, 1970 Term; renumbered Nos. 70-105, 70-106, 1971 Term).

[68] People v. Barksdale, Docket No. 1 Crim. 9526 (Calif. Ct. of Appeal, First App. Dist., Division 1, July 22, 1971).

[69] Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970) (per curiam), *ques. of juris. postponed to merits*, 91 S. Ct. 1614 (1971) (No. 971, 1970 Term; renumbered No. 70-40, 1971 Term).

[70] Steinberg v. Brown, 321 F. Supp. 741 (W.D. Ohio, 1970).

[71] Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970), *appeal docketed*, 39 U.S.L.W. 3247 (U.S. Nov. 27, 1970) (No. 1010, 1970 Term; renumbered No. 70-42, 1971 Term).

[72] Corkey v. Edwards, 322 F. Supp. 1248 (W.D. N.C. 1971), *appeal docketed*, 40 U.S.L.W. 3048 (U.S. July 17, 1971) (No. 71-92).

[73] Hodgson v. State of Minnesota, No. 42966, Minnesota Supreme Court; State v. Munson, South Dakota Supreme Court, State of Kansas v. Jamieson, No. 46150, Kansas Supreme Court.

[74] "The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the first Amendment has been construed to include certain of those rights." Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

[75] Loving v. Commonwealth, 388 U.S. 1, 12 (1967) (alternate ground of decision).

[76] Skinner v. Oklahoma, 316 U.S. 535, 536 (1942).

[77] Griswold v. Connecticut, 381 U.S. 479 (1965).

[78] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[79] United States v. Guest, 383 U.S. 745 (1966). What was said by Mr. Justice Stewart in that opinion may be aptly paraphrased to apply in the present context:

"The Constitutional right [of marital privacy] . . . occupies a position fundamental to the concept of our Federal Union.* * * [T]hat right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be . . . necessary . . ." 383 U.S. at 757.

[80] Justice Douglas, delivering the opinion of the Court that Connecticut could not constitutionally outlaw the use of contraceptives, relied upon the penumbras of specific guarantees in the Bill of Rights, "formed by emanations from those guarantees that help give them life and substance." 381 U.S. at 484. Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, concurred, relying upon the Ninth Amendment. Justice Harlan's concurring opinion stated the inquiry to be whether the statute infringed the Due Process Clause of the Fourteenth Amendment by violating basic values implicit in the concept of liberty. 381 U.S. 500. Justice White found that the law deprived plaintiffs of "liberty" without due process, as used in the Fourteenth Amendment. 381 U.S. 502.

[81] The complaints of appellants invoked the jurisdiction of the district court under the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments (A. 10-11, 15-16, 24). The district court confined its consideration to the Ninth Amendment and vagueness arguments and did not pass upon the "array of constitutional arguments" (A. 116). Appellants have chosen in this brief to stress the application of the First, Ninth, and Fourteenth Amendments. However, the arguments relating to application of other Amendments and particularly the Eighth Amendment, are well developed in the Brief *Amicus Curiae* filed in this case by Attorney Nancy Stearns. Brief *Amicus Curiae* on Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Coalition, at 34 *et seq.* (Eighth Amendment).

[82] BASIC DOCUMENTS OF THE WORLD HEALTH ORGANIZATION 1 (Geneva 1969 ed.). *See also* Curran, *The Right to Health in National and International Law*, 284 NEW ENG. J. OF MEDICINE 1258 (1971).

[83] Public Law 89-749.

[84] *See* Brief *Amici Curiae* for Planned Parenthood Federation of America, Inc. and American Association of Planned Parenthood Physicians, at 22-24.

[85] Brodie, *Marital Procreation*, 49 ORE. L. REV. 245, 256 (1970).

[86] For a discussion of the impacts of pregnancy on women *see* Brief *Amici Curiae* or Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Action Coalition filed herein by Nancy Stearns as follows: employment, at 17-21, 27-28; education, at 21-22; responsibility for the child, at 29-30; emotional, at 38-42.

[87] *See* Brief *Amici Curiae* for Planned Parenthood Federation of America, Inc. and American Association of Planned Parenthood Physicians filed herein. "The Facts About Contraception," pp. 12-21.

[88] *See* Lamm & Davison, *Abortion Reform*, 1 YALE REV. L. & SOC'L ACTION, No. 4, at 55, 58-59 (Spring 1971).

[89] Tom C. Clark, *Religion, Morality and Abortion: A Constitutional Appraisal*, 2 LOYOLA UNIV. (L.A.) L. REV. 1, 9 1969).

[90] *E.g., Doe* v. *Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970) (per curiam), *ques. of juris. postponed to merits*, 91 S. Ct. 1614 (1971) (No. 971, 1970 Term; renumbered No. 70-40, 1971 Term); Doe v. Scott, 321 F. Supp. 1384 (N.D. Ill.), *appeals docketed sub noms.* Hanrahan v. Doe and Heffernan v. Doe, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (Nos. 1522, 1523, 1970 Term; renumbered Nos. 70-105, 70-106, 1971 Term); Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis.) (per curiam), *appeal dismissed*, 400 U.S. 1 (1970) (per curiam); California v. Belous, 71 Cal. 2d 954, 458, P.2d 194, 80 Cal. Rptr. 354 (1969), *cert.*

denied, 397 U.S. 915 (1970); People v. Barksdale, ——— Cal. App. 3d ———, ——— Cal. Rptr. ———, 1 Crim. 9256 (Calif. Dist. Ct. App. July 22, 1971); *contra*, Corkey v. Edwards, 322 F. Supp. 1248 (W.D. N.C. 1971), *appeal docketed*, 40 U.S.L.W. 3048 (U.S. July 17, 1971) (No. 71–92); Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970), *appeal docketed*, 39 U.S.L.W. 3247 (U.S. Nov. 27, 1970) (No. 1010, 1970 Term; renumbered No. 70–42, 1971 Term).

[91] Hall, "Abortion in American Hospitals," 57 *Am. J. Pub. Health* 1933, 1934 (1967).

[92] *See Brief Amici Curiae* for Planned Parenthood Federation of America, Inc. and American Association of Planned Parenthood Physicians, at 22–24.

[93] There were 8 deaths in over 150,000 abortions during the first eleven months, a rate of 5.3 per 100,000. Chase, Twelve Month *Report on Abortions in New York City* (June 29, 1971) (Health Services Administration, City of New York). The 1969 mortality rate for tonsillectomy in the United States was 5.2 per 100,000. *T&A Profile*, 8 PROFESSIONAL ACTIVITIES SURVEY (PAS) REPORTER No. 5 (Mar. 9, 1970).

[94] Abortion, if the woman consented is punishable by confinement in the penitentiary for not less than two nor more than five years. 2A TEX. PEN. CODE art. 1191 (1961). The punishment for murder is death or confinement in the penitentiary for life or for any term of years not less than two. 2A TEX PEN. CODE art. 1257 (1961).

[95] Although parents of stillborn or miscarried fetuses, have recovered under wrongful death statutes in some states, it is very likely that what is really being compensated is the "mental anguish" of the parents. PROSSER, TORTS §§ 105, 715 (2nd ed. 1955). The general subject of civil law treatment of the fetus is exhaustively treated in Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579 (1965), and Lamm & Davison, *Abortion Reform*, 1 YALE REV. OF LAW & SOC. ACTION 55 (1971).

[96] Section 1 of the Fourteenth Amendment of the United States Constitution refers to "All persons born or naturalized in the United States. . . ." There are no cases which hold that fetuses are protected by the Fourteenth Amendment.

[97] "Potential life" is used here in the sense that each living person has a life "potential" in the future which may or may not be realized (i.e., the person may die in the next few moments or live "x" number of years). When speaking of the "potential life" of the mother being destroyed, not only is an actual cessation of brain waves included, but damage to her health, emotional security and happiness—all things which may result from an unwanted pregnancy, in effect those things which can destroy life while leaving a living organism.

[98] *See generally*, Amsterdam, *The Void for Vagueness Doctrine*, 109 U. PA. L. REV. 67 (1960); Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORN. L.Q. 195 (1955); Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 831 (1923); Freund, *The Use of Indefinite Terms in Statutes*, 30 YALE L.J. 437 (1921); Note, 62 HARV. L. REV. 77 (1948).

[99] Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

[100] United States v. Reese, 92 U.S. 214, 221 (1875).

[101] Ashton v. Kentucky, 384 U.S. 195, 200 (1966) (ancient common law offense of "criminal libel" void for uncertainty).

[102] Lanzetta v. New Jersey, 306 U.S. 451, 454–55 (1939); Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 242–43 (1932). *See also*, United States v. Evans, 333 U.S. 483 (1948), in which the statute had been passed in 1917; and Giaccio v. Pennsylvania, 382 U.S. 399 (1966), in which the statute had been passed in 1860.

As Professor Amsterdam stated in his extensive study of vagueness, "common-law terms may have no more illuminating clarity to the layman offender than the neologisms of Ronsard. . . ." Amsterdam, *supra*, note 136, 109 U. PA. L. REV. at 84.

[103] *See, e.g.*, Keyishian v. Regents, 385 U.S. 5889 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964).

[104] Lanzetta v. New Jersey, 306 U.S. 451 (1939).

[105] Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

[106] NAACP v. Button, 371 U.S. 415, 438 (1963).

[107] Tom C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOYOLA UNIV. (L.A.) L. REV. 1, 7 (1969) [hereafter "Clark"].

[108] Tietze, *Maternal Morality Associated With Legal Abortion*, Proceedings of the Fifth International Conference on Planned Parenthood 24 (Oct. 1955) (Tokyo).

[109] Hall, *Abortion in American Hospitals*, 57 AM. J. PUB. HEALTH 1933, 1935 (1967). Dr. Hall continues:

"The victim of all this confusion is, of course, the American female . . . [S]he must find Doctor X in hospital Y with policy Z in order to have it done." *Id.*

For a vivid illustration of the variations among hospitals in assessing the legality of therapeutic abortion on a given set of facts, see the questionnaire study and analysis of results in Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417, 423 (1959). The study, directed to 29 San Francisco Bay Area and Los Angeles hospitals (*id.*, at p. 423) based on hypothetical cases involving pregnant women seeking abortions, yielded the following results (*id.*, at p. 444):

Case No.	Authors' Evaluation of Legality of Abortion	Hospital Would Perform Abortion	
		Yes	No
1	Yes	21	1
2	No	10	12
3	No	6	16
4	No	15	7
5	No	8	13
6	No	8	14
7	Yes	17	4
8	No	5	17
9	Prob. Yes	10	11
10	Maybe	17	4
11	No	1	20

[110] Guttmacher, *Therapeutic Abortion: The Doctor's Dilemma*, 21 J. MT. SINAI HOSP. 111 (1954).

[111] Materials from medical and psychiatric literature which illustrate the wide-ranging interpretations of language in laws on abortion, and the sometimes arbitrary implementation of these laws include the following authorities:

(1) M. CALDERONE, (ed.), ABORTION IN THE UNITED STATES 34–35, 52 (1958):

"[N]ecessity as a sine qua non of performing an abortion . . . leaves the doctor's position perilous and uncertain. * * * The current laws provide no accurate criteria by which the doctor can govern his actions."

(2) White, *Induced Abortions: A Survey of their Psychiatric Implications, Complications, and Indications*, 24 TEX. REPS. OF BIOLOGY & MEDICINE 531, 541 (1966):

"[T]he enormous variability in the frequency of therapeutic abortions from one hospital to another . . . must surely reflect, more than anything else, differences in the personal values, religious beliefs, and social ideology of the staffs of the respective hospitals about the matter of abortion."

(3) R. H. SCHWARZ, SEPTIC ABORTION 11 (1968):

"The legal status of abortion varies not only throughout the world but from state to state. Interpretation and enforcement differ from community to community; professional assessment varies from hospital to hospital, and from physician to physician."

(4) GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, THE RIGHT TO ABORTION: A PSYCHIATRIC VIEW 40 (Comm. on Law & Psychiatry, 1970):

"[T]he rate of therapeutic abortion varies dramatically from hospital to hospital within a state, even though all are supposedly governed by the same statutes."

In addition to the above authorities, who stress variations from place-to-place and person-to-person, much research and analysis has examined some of the many reasons why physicians and psychiatrists have difficulty with the statutes, including specific aspects of confusion:

(5) Ryan, *Humane Abortion Laws and the Health Needs of Society*, 17 W. RES. L. REV. 424, 431 (1965):

"Distinctions between physical and mental health are meaningless in terms of modern medical thinking. Health cannot be divorced from socio-economic factors which influence people's lives since health is a product of these conditions."

(6) White, *supra* no. (2), at 532:

"[T]here are no generally accepted policies, little or no systematically gathered data, and remarkably few well and objectively substantiated points of view among psychiatrists about 'legally' or 'illegally' induced abortions."

(7) Pike, *Therapeutic Abortion and Mental Health*, 111 CALIF. MED. 318, 319 (Oct. 1969).

"One of the controversial aspects of the situation is the undeniable effect of sociological factors on an individual's mental health. The stress and consequences of an unwanted pregnancy as they affect mental health must be determined for an individual patient, taking into consideration her total life situation. Factors such as martial status, family support, economic conditions, subcultural attitudes toward the pregnancy, and personality structure all contribute toward her ability to maintain and complete her pregnancy without damage to her mental functioning.

The new law requires physicians to make judgments that are difficult to make, impossible to prove and of crucial importance to the patient's welfare and the welfare of those dependent on her and intimately involved with her."

(8) Sir Dugald Baird, *The Obstetrician and Society*, 60 AM. J. PUBLIC HEALTH 628, 635 (1970).

"[E]ven in a basically stable woman, emotional health and subsequently physical health can be undermined by adverse social conditions: for example, substandard housing, overcrowding, illness in other children, elderly or bedridden parents, alcoholic husband, and economic necessity for the mother to work outside the home."

(9) Thompson, Cowen & Berris, *Therapeutic Abortion: A Two-Year Experience in One Hospital*, 213 J.A.M.A. 991, 994 (1970):

"Psychiatric and socioeconomic problems are so intertwined that it is difficult for the Therapeutic Abortion Board to extract the relevant data in order to make a just and lawful decision. . . . In light of the previously stated vagueness of the law, the evaluation of the patient for psychiatric indications has been one of our major problems."

(10) Moyers, *Abortion Laws: A Study in Social Change*, 7 SAN DIEGO L. REV. 237, 241 (1970):

"Although some hospitals in the state have done away with the requirement, most committees still require psychiatric consultation when a request for abortion is presented on this [mental health] ground."

[112] *Constitution of the World Health Organization*, in BASIC DOCUMENTS OF THE WORLD HEALTH ORGANIZATION 1 (Geneva 1969 ed.).

[113] Griswold v. Connecticut, 381 U.S. 479 (1965), at least implies that such a requirement would violate the patient's right of privacy, but Connecticut, for obvious reasons, made no such contention.

[114] Hall, *Therapeutic Abortion, Sterilization and Contraception*, 91 AM. J. OBSTETRICS & GYNECOLOGY 518, 524–25, Table VI, line 2 (1965); Supp. App. at 402.

[115] U.S. BUREAU OF THE CENSUS, *Statistical Abstract of the United States: 1970*, Table 57, at 49 (91st ed.)

[116] *See, e.g.*, Haynes v. United States, 390 U.S. 85 (1968); Tot v. United States, 319 U.S. 463 (1943).

[117] Authorities recognizing the constitutional status of the presumption of innocence go back to Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 328 (1866). *See also* United States v. Romano, 382 U.S. 136, 139–44 (1965) (presence at still does not justify inference that accused possesses or controls the still); Speiser v. Randall, 357 U.S. 513, 525–26 (1958); Morissette v. United States, 342 U.S. 246, 274–75 (1952); Morrison v. California, 291 U.S. 82 (1934).

[In the Supreme Court of the United States—October Term, 1971—Nos. 70–18 and 70–40]

MOTION FOR PERMISSION TO FILE BRIEF AND BRIEF AMICUS CURIAE ON BEHALF OF NEW WOMEN LAWYERS, WOMEN'S HEALTH AND ABORTION PROJECT, INC., NATIONAL ABORTION ACTION COALITION

Jane Roe, et al., appellants vs. Henry Wade, appellee.

Mary Doe, et al., appellants vs. Arthur K. Bolton, appellee.

MOTION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE AND TO PARTICIPATE IN ORAL ARGUMENT

Amici, the New Women Lawyers, the Women's Health and Abortion Project, Inc. and the Women's National Abortion Action Coalition, by their undersigned counsel hereby move this Court for permission to file the annexed Brief *Amicus Curiae* in the above-captioned cases and to participate in oral argument.

Amici have requested permission of the attorneys for the parties to file the annexed brief but have not yet received responses from all of them.

Amici have set forth the reasons why they seek to file a brief amicus curiae and why they feel their brief would be of special assistance to the Court in the statement of interest, accompanying their motion. *Amici* believe they have raised aspects of the constitutional issues before this court hitherto unexplored by the parties.

Any decision by this Court in the two cases before it will deeply affect the lives of more than half the citizens of this country. *Amici* are aware that this Court has treated limited aspects of the question of abortion before and recognize the competence of the counsel in the above-captioned cases. Nonetheless, given the gravity of the question of a woman's right to abortion, aspects of which are being raised *de novo* before this Court, and given the fact that some decisions of this Court have turned on arguments raised by an *amicus curiae*, *amici* believe their participation in oral argument could be of assistance to this Court in determining the sensitive and complex issues before it.

Therefore *amici* respectfully urge this Court to grant their motion and permit them to file the requested brief *amicus* and participate in the oral argument of the cases of *Roe* v. *Wade* and *Doe* v. *Bolton*.

STATEMENT OF INTEREST

During the past two years the question of the constitutionality of abortion laws—of the right of a woman to control her own body and life—has become one of the most burning issues for women throughout the country. As women have become aware of the myriad levels of unconstitutional discrimination they face daily, they have become most acutely aware of the primary role which restrictions on abortions plays in that discrimiation. As a result, women throughout the country have become determined to free themselves of the crippling and unconstitutional restrictions on their lives. As a major part of their efforts, thousands of women have sought and continue to seek the aid of federal and state courts in their challenges to abortion statutes. In New York State, more than three hundred persons, primarily women sued to have their state laws declared unconstitutional. *Abramowicz* v. *Lefkowitz*, 69 Civ. 4469 (S.D.N.Y.) dismissed as moot on July 1, 1970 when the New York State Statute went into effect permitting the performance of abortions up to twenty-four weeks of pregnancy. In New Jersey more than one thousand women sought the aid of the federal courts. *Abromowitz* v. *Kugler*, 431–1970 D.N.J., argued in December, 1970, and awaiting decision. In Pennsylvania again well over one thousand persons, most of whom were women, similarly sought the aid of the court in *Ryan* v. *Spector*, 70–2527, E.D.Pa. See also Connecticuit, where 858 women sued in *Aberle* v. *Markel*, Civ. Action #14291 D. Conn. (May 14, 1971), dismissed, presently on appeal; and Rhode Island, where over one hundred took similar action in *Women of Rhode Island* v. *Israel*, Civ. Action #4605 (D.R.I.) in which a three judge court has been convened.*

Similar efforts to challenge the abortion laws of their states are being developed by women in other states throughout the country. These women have sought the assistance of the federal courts because of the degree to which restrictions on the availability of abortion have crippled and even destroyed their own lives and lives of many other women.

The organizations listed below share the concern of these thousands of women who have sought the assistance of the courts. Each of the groups has a particular concern to see that these unconstitutional burdens and restrictions on a woman's life be removed.

The issues raised by the Texas and Georgia cases presently before this Court are not local but national issues. The problems raised by restrictive abortion laws are problems of millions of pregnant women.**

Therefore, *Amici* have drawn on cases and statutes throughout the country in order to aid this Court in deeply and fully understanding the problem before it.

The New Women Lawyers is an unincorporated membership association of women lawyers and law students in the New York City area.

Amongst its purposes is to work through the courts to redress the discrimination and oppression which women face under the law.

As women lawyers and law students amici are both members of the class whose interests are before this Court and advocates for that class. Therefore, *amici* have special insight into the problems and issues presented in the two abortion cases which may be of assistance to the Court.

The Women's Health and Abortion Project, Inc., is a non-profit corporation in the State of New York which grew out of the challenge to the constitutionality of the former New York abortion statute. Amongst the purposes of the Project is to counsel, and provide information to women concerning family planning and abortion without fee. Since the liberalized New York abortion law went into effect on July 1, 1970, the Project has counseled thousands of desperate women from across the country who came to New York seeking abortions. The women's Health and Abortion Project therefore has particular concern for and understanding of the problems of women in need of abortion and is particularly concerned with the infringement of women's rights by laws such as those of Georgia and Texas restricting the availability of abortion to women.

The Women's National Abortion Action Coalition is a coalition of women's groups and individual women throughout the country who have united in efforts to eliminate all abortion laws. Many of the individual women within the Coalition are plaintiffs in class action litigation challenging the constitutionality of the abortion laws of their own states. Many others work with pregnancy counseling groups and are members of women's groups whose prime concern is the elimination of discriminatory laws such as abortion laws.

Therefore, the Coalition is particularly concerned about the issues presented in the two cases before this Court, and well suited to understand and present to this Court, to the fullest extent, the tolls which these laws take on the lives of women.

Amici believe that their special perspective on the constitutional issues before this Court will be of assistance to this Court in its deliberations on one of today's most sensitive issues—an issue of overwhelming importance to more than 50% of the nation's population. *Amici* have sought to present aspects of the issue involving the constitutional rights of women which they believe have not been treated by the parties to this litigation or by other amici such as the manner in which the challenged Texas and Georgia statutes deprive women of their rights to life, liberty and the equal protection of the laws guaranteed by the Fourteenth Amendment and the degree to which they constitute cruel and usual punishment in violation of the Eighth Amendment to the Constitution.

Amici, therefore, urge this Court to accept their Brief Amicus in the hope that it will be of assistance in unravelling the crucial constitutional issues before this Court.

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*These actions by women are only a portion of the sweeping challenges on the abortion laws of this country which have taken place in the last two years. The following is a partial list of such challenges. *California* v. *Belous*, 80 Cal. Rptr. 354 (1969), cert. denied, 397 U.S. 915 (1970); *People* v. *Robb*, No. 149005 and 159061, Munic. Ct., Orange Co. Cal. (Jan. 9, 1970); *Babbitz* v. *McCann*, 310 F.Supp. 293 (E.D. Wis., 1970), remanded 91 S.Ct. 1375 (1971); *Kennan* v. *Nichol*, 71–C–118 (W.D.Wisc.); *Hodgson* v. *Randall*, 7 Cr. L. 2186, affirmed, 91 S.Ct. 1656 (1971); *Hodgson* v. *Minnesota*, cert. denied, 41 S.Ct. 1655 (1971); *Doe* v. *Scott*, Civ. Action No. 70 C 395 (E.D.Ill.); *Rosen* v. *Louisiana State Board of Medical Examiners*, 318 F.Supp. 1217 (1970), upholding the constitutionality of the Louisiana statute, Cassibry, J., dissenting. *Rogers* v. *Danforth*, Civ. Action No. 18360–2 W.D.Miss., dismissed September 10, 1970; *Steinberg* v. *Rhodes*, C–70–289, W.D. Ohio; *Doe* v. *Dunbar*, Civ. Action No. C–2402, D.Colo.; *South Dakota* v. *Murson*, Circuit Ct., Pennington Cty. S.D., April 20, 1970; *Walsingham* v. *Florida*, No. 40,210 (Sup.Ct. Fla., July 12, 1971).

**There are three basic types of laws used throughout the United States to prevent the performance of abortion, laws permitting the performance of abortion, a) only when necessary to save the life of the woman, b) when necessary to preserve her life and health and c) the "reform type law which permits abortion for reasons of life and health, as well as when the fetus resulted from rape, incest or when there is a likelihood of fetal deformity, etc. In discussing the constitutional infirmities of abortion laws, amici have not distinguished amongst the different types of laws because regardless of their wording their effect has all been the same—to deny an abortion to nearly every woman who wishes one.

SUMMARY OF ARGUMENT

This is a brief *Amicus* in support of actions challenging the constitutionality of the abortion statutes of Georgia, Georgia Code Annotated § 26–1201 *et seq.* (1969); and Texas, Texas Penal Code Articles 1191, 1192, 1193, 1194 and 1196. The Texas statute permits abortion only when necessary to preserve the life of the pregnant woman. Under the Georgia statute a woman may obtain an abortion only with the approval of a committee of doctors where the abortion is necessary to preserve her life or health, or when the pregnancy resulted from rape, or would result in a deformed child.

Amici have argued that both statutes are void in that they violate the most basic constitutional rights of women.

First, the Texas and Georgia statutes and other statutes which restrict the availability of abortion, deny to women their right to control and direct their lives and bodies as protected by the Fourteenth Amendment's guarantees of life and liberty. Amici have attempted to set forth for this Court the manner in which the status of pregnancy and motherhood severely restricts the life of a woman the way in which an unwanted pregnancy can unalterably change and even destroy her life.

Amici have next shown that despite the fact that both man and woman are responsible for any pregnancy, it is the woman who bears the disproportionate share of the *de jure* and *de facto* burdens and penalties of pregnancy, child birth and child rearing. Thus, any statute which denies a woman the right to determine whether she will bear those burdens denies her the equal protection of the laws.

Carrying, giving birth to, and raising an unwanted child can be one of the most painful and longlasting punishments that a person can endure. Amici have argued that statutes which condemn women to share their bodies with another organism against their will, to be child breeders and rearers against their will, violate the Eighth Amendment's proscription against cruel and unusual punishment.

Finally, *amici* contend there is no compelling state interest in forcing a woman to these deprivations of her constitutional rights. For, it is no longer possible to justify a ban on abortions to protect a woman's health and such a ban is a constitutionally unacceptable method to use to establish a particular moral standard. Furthermore, the argument that the state must protect the life of the fetus when examined closely is in reality a codification of a particular religious doctrine and therefore constitutionally insufficient.

In closing, *amici* have urged that the doctrine of *Younger* v. *Harris* does not bar the Court from deciding this matter before it for in fact Mary Doe in *Doe* v. *Bolton* and Jane Roe in *Roe* v. *Wade* may not challenge the abortion statutes of Georgia and Texas in state criminal proceedings as envisioned in *Younger* and must turn to the Federal Courts to safeguard their constitutional rights.

I. The Georgia and Texas statutes restricting the availability of abortion violate the most basic rights of women to life, liberty, and property guaranteed by the Fourteenth Amendments to the Constitution

Under the Fourteenth Amendment to the Constitution, no state shall " . . . deprive any person of life, liberty, or property without due process of law." The courts have not yet, however, begun to come to grips with the fact that approximately one half of our citizenry is systematically being denied those guarantees of the Fourteenth Amendment. That is exactly the effect of the abortion laws of Texas and Georgia, and nearly every other state in the United States. Amici urge this Court not to shrink from redressing the constitutional wrongs perpetrated on women.

For the first time, this Court has the opportunity to give serious and full consideration to the degree to which laws such as those challenged herein, in denying women the control of their reproductive life, violate their most basic constitutional rights.

In the past two years, the Supreme Court of the State of California, the United States District Court for the District of Columbia below, and the Municipal Court of Central Orange County, California, recognized that it is "the fundamental right of the woman to choose whether to bear children. . . ." *California* v. *Belous*, 80 Cal. Rptr. 354, 359 (1969), Cert. Denied, 397 U.S. 915 (1970). See also, *United States* v. *Vuitch*, 305 F.Supp. 1032 (D.D.C., 1969) reversed on other grounds, 91 S.Ct. 1294(1971); *Roe* v. *Wade*, 314 F. Supp. 1217 (N.D. Tex., 1970) jurisdiction noted, 91 S.Ct. 1610 (1971); *Babbitz* v. *McCann*, 310 F.Supp. 293 (E.D.Wisc. 1970) remanded 400 U.S. 1 (1971); *South Dakota* v. *Munson*, 7th Jud'l District, Pennington Co., S. Dak. (1970); *Doe* v. *Scott*, #70 C 395 (N.D.Ill.) Jan 29, 1971; *California* v. *Robb*, #140, 005 Mun. Ct., Orange Co., Cal., Jan. 9, 1970, and most recently, *Walsingham* v. *Florida*, #40, 210, Sup.Ct. Fla., (July 12, 1971) which overturned convictions of three men convicted of conspiring to commit abortion and cast severe doubt on the constitutionality of the Florida statute, and *City of New York* v. *Wyman*, reported in full, New York Law Journal, May 19 1971, invalidating state restrictions on medicaid reimbursement for abortions. In *Wyman*, Justice Spiegel spoke of ". . . the fundamental nature of the right to terminate pregnancy" and stated that "a woman has a Constitutional right pursuant to the United States Constitution Amendments IX and XIV to terminate an unwanted pregnancy."

The decision by a woman of whether and when she will bear children may be the most fundamental decision of her life because of its far-reaching significance, affecting almost every aspect of her life from the earliest days of her pregnancy.

A. The right to life

Persons seeking to uphold restrictive abortion laws argue that the State has a compelling interest in protecting human life. *Amici* could not agree more. But, we argue that the responsibility of the State runs to persons who are living and that the State may not maintain laws which effect the most serious invasions of the constitutional rights of its citizens.

From the very fact, as noted by the California Supreme Court in *Belous*, that "childbirth involves the risk of death", *California* v. *Belous*, *supra*, at 359, it should be most obvious that laws which force women to bear every child she happens to conceive raises the most severe constitutional questions under the Fourteenth Amendment.

Nearly ten years ago a medical expert reported that "the risk of life from an abortion, performed by an experienced physician in a hospital on a healthy woman in the first trimester of pregnancy is far smaller than the risk ordinarily associated with pregnancy and childbirth." (Dr. Christopher Tietze, Legal Abortion in Eastern Europe *J.A.M.A.* 175:1149 (1961, April). A recent study of the death rate from childbirth in the United States revealed that there are still 20 deaths per 100,000 pregnancies among American women. *Studies in Family Planning*, 34:6–8 September 1969, Population Council, New York. The same study reported that the death rate due to legalized abortions performed in hospitals in Eastern Europe is 3 per 100,000 pregnancies. And so, in the United States today, giving birth is nearly 7 times more dangerous than a therapeutic abortion.

Furthermore, if a woman truly believes she should not continue an unwanted pregnancy and give birth to and raise an unwanted child, she will not be deterred by the fact that an abortion in her circumstances would be illegal. She will do this despite the great hazards to her physical and mental health—and the great financial expense involved. She will do this even though she knows that under local law she is performing a criminal act.

The very fact that legal abortion is unavailable for most women forces them into an additional hazard to their health and life. Aware of the failure rate of most contraceptives* and afraid of an accidental pregnancy which they will be unable to terminate, millions of women daily expose themselves to the known and as yet unknown dangers of the pill** even though they would prefer not to.

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*There is no such thing as a contraceptive device which is both 100% safe and 100% effective. Oral contraceptives, which have the highest degree of effectiveness are the least safe. However, for a variety of reasons, 15–28% of the women who use the pill stop taking it after two years. The interuterine device (I.U.D.) is not 100% effective though its failure rate has not yet been fully determined. However, to date, 50% of the women who use the I.U.D. have it removed within two years. Sheldon J. Segal, Ph. D., Population Council, and Christopher Tietze, M.D. Population Council, "Contraceptive Technology, Current and Perfected eMthods, Reports of Population Family Planning," issued by the Population Council and the International Institute for the Study of Human Reproduction, Columbia University, October 1969, pp. 9 and 7.

The failure rate for the diaphragm is 12% (that is, of 100 women using the diaphragm in a year, twelve women will become pregnant). The failure rate for the condom is 14%. Ernest Havamann, Ed., Time-Life, Inc. *A Special Report: Birth Control*, New York, 1967, p. 159.

**Although there are not yet definitive conclusions concerning the dangers of oral contraceptives, their safety and general effects on women are sufficiently in question to have warranted full-blown Senate hearings by the Subcommittee on Monopoly of the Senate Select Committee on Small Business which began in January 1970, and continued in February and March. See "Competitive Problems in the Drug Industry," Subcommittee on Monopoly of Senate Select Committee on Small Business, 91st Cong. 2nd Sess. Although there has been a conflict of medical and scientific opinion expressed at the hearings, the response of the government to the question seems to be markedly casual in contrast with its swift action on a somewhat related matter—cyclamates. It certainly leads women to believe that their government is less concerned with their health and safety than with curbing population or with health matters which also affect men. This concern on the part of women was not eased when they observed the action of the Food and Drug Administration with respect to warnings about possible dangers of birth control pills. Following the first part of the Senate hearings the F.D.A. ordered that a leaflet listing in detail the dangers of oral contraceptives be enclosed in each package of pills. *New York Times*, "Warning on Pill Drafted by F.D.A.", March 5, 1970. Only one month later the Department of Health, Education, and Welfare announced that a "compromise" warning would be used. A warning "far shorter and less emphatic about dangers than [the] earlier version." The compromise version not only eliminated nearly the entire list of potential hazards, merely noting there might be side effects and further stated, without any basis in fact, " 'These points were discussed with you when you chose this method of contraception.' " *New York Times*, "Compromise Warning on Birth Pill Announced," April 8, 1970.

The fear of accidental pregnancy is so great that even women who have medical histories that indicate that they should not take oral contraceptives feel compelled to do so.*

Thus while governments profess their overwhelming concern for human life, they force their female citizens into the intolerable dilemma of choosing between what in many instances would be a totally irresponsible act of bearing and casting off, or even "raising" an unwanted child or jeopardizing their life and health, both physical and mental, by obtaining an illegal abortion or attempting to self-abort. What is more, this professed concern for life in fact results in hazards to women's lives, often forcing them into the hands of unskilled and unscrupulous persons directly in the face of the guarantees of the Fourteenth Amendment.

B. The Right to Liberty

If the Fourteenth Amendment and its guarantees are to have any real meaning for women, they must not be read to protect only women's physical survival. The Fourteenth Amendment speaks not merely of life, but of life and liberty. For the framers of our Constitution recognized well that it is not life alone which must be protected, but also personal liberty and freedom. Because of that fact, the Constitution has established requirements that neither life nor liberty may be denied a person without the guarantees of due process. As the Court of Appeals for the Second Circuit stated in *Madera* v. *Board of Education of the City of New York*, 386 F.2d 778, 783–4 (2nd Cir., 1967), invoking a longstanding constitutional principle:

'. . . The 'liberty' mentioned in [the Fourteenth] Amendment means, not only the right of the citizen to be free from the mere physical restraint of his person by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation. . . . *'Allgeyer* v. *State of Louisiana*, 165 U.S. 578, 589, 17 S. Ct. 427, 37 L. Ed. 832 (1897).

The right of liberty is one which is complex and closely related to other rights protected by the Constitution. As stated by this Court in *Smith* v. *Texas*, 233 U.S. 630, 636 (1914).

Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use [her] powers of mind or body in any lawful calling.

The right of liberty has long been seen by this Court as one which is basic to matters of family and children. In *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1823) this Court stated

Without doubt 'liberty' denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, and acquire undue knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

It should go without saying that the liberty to establish a home and bring up children is nearly meaningless if it does not include the liberty to decide when and whether to have those children. Of course, this right to control the timing of one's family is now expressed in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

Even this does not circumscribe the limits of liberty, however. As Justice Douglas expressed in his dissent in *Poe* v. *Ulman*, 367 U.S. 497, 516 (1961):

Though I believe that 'due process' as used in the Fourteenth Amendment includes all of the first eight Amendments, I do not think it is restricted and confined to them. . . . The right 'to marry, establish a home and bring up children' was said in *Meyer* v. *Nebraska* . . . to come within the 'liberty' of the person protected by the Due Process Clause of the Fourteenth Amendment. . . . 'Liberty' is a conception that sometimes gains content from the examinations of other specific guarantees . . . or from experience with the requirements of a free society.

Most recently the understanding of personal liberty has come to include such matters as physical appearance—the way in which a person presents himself or herself to the world. In *Breen* v. *Kahl*, 296 F.Supp. 702, 706 (W.D.Wisc., 1969), aff'd 419 F.2d 1034 (7th Cir., 1969), the court ordered the reinstatement of high school students whose hair length did not conform to the school board standard stating:

The freedom of an adult male or female to present himself or herself physically to the world in the manner of his or her own choice is a highly protected freedom. . . .

For the state to impair this freedom, in the absence of a compelling subordinating interest in doing so, would offend a widely shared concept of human dignity, would assault personality and individuality, would undermine identity, and would invade human 'being'. It would violate a basic value 'implicit in the concept of ordered liberty'. *Palko* v. *Connecticut*, 302 U.S. 219, 325. . . .

It would deprive a man or woman of liberty without due process of law in violation of the Fourteenth Amendment. See *Griswold*, 381 U.S. at 499–500 (Harlan, J., concurring).

Accord, *Griffin* v. *Tatum*, 300 F. Supp. 60 (M.D. Ala., 1969); *Westley* v. *Rossi*, 305 F. Supp. 706 (D. Minn., 1969); *Durham* v. *Pulsiter*, 312 F. Supp. 114 (D. Vt., 1970); *Reichenberg* v. *Nelson*, 310 F. Supp. 248 (D. Nebr., 1970).

The concept of the right to liberty is one which has developed from the right to contract in *Allgeyer*, to the right to raise a family in *Meyer*, to the right to control one's own appearance in *Breen*. Surely none of these rights can be seen as more basic, fundamental or worthy of protection than a woman's right to control her body and the nature, direction and quality of her life.

In light of this understanding of the meaning of the guarantees of the Fourteenth Amendment, it is even more critical that this Court carefully examine the ways in which women are systematically deprived of their rights by the abortion laws of Texas and Georgia as well as those of nearly every state in the nation.

It should be obvious that from the moment a woman becomes pregnant her status in society changes as a result of both direct and indirect actions of the government and because of social mores. Except in very rare cases (primarily among the wealthy) she is certainly no longer "free in the enjoyment of all [her] faculties; . . . free to use them in all lawful ways; to live and work where [she] will; to earn [her] livelihood by any lawful calling; to pursue any livelihood or avocation . . .". *Madera* v. *Board of Education of the City of New York*, *supra* at 783–4.

Pregnancy, from the moment of conception, severely limits a woman's liberty. In many cases of both public and private employment women are forced to temporarily or permanently leave their employment when they become pregnant. The employer has no duty to transfer a pregnant woman to a less arduous job during any stage of pregnancy (should the woman or her doctor consider this advisable); nor is there any statutory duty to rehire the woman after she gives birth. For example, under the New York State Civil Service Law, Rule 3, a female employee must report her pregnancy to the appointing authority not later than the fourth month. The appointing authority then may in his discretion ". . . place the employee on leave *at any time* when in its judgment the *interest of either the department* or the employee would be best served." [emphasis supplied] There is no indication that the employee's medical condition is the critical factor and there are no standards on which the decision is made. What is plain is that regardless of whether the woman wishes and/or needs to continue working, regardless of whether she is physically capable of working, she may nonetheless be required to stop working solely because of her pregnancy. In many if not most states women who are public employees are compelled to terminate their employment at some arbitrary date during pregnancy regardless of whether they are capable of continuing work. See for example *Cohen* v. *Chesterfield County School Board*, Civ. Action No. 678–70–R (E.D.Va.) May 17, 1971; *Schattman* v. *Texas Employment Commission*, Civil Action No. A–70–CA–75 (W.D. Tex.) February 25, 1971; and *LaFleur* v. *Cleveland School Board of Education*, Civil Action No. C–71–292 N.D. Ohio, May 27, 1971.

In Connecticut a directive from the Attorney General in 1938 stated that a pregnant woman could not be employed "during the four weeks previous to and following her confinement." This rule still exists. In fact, such employment is a criminal offense (directed against the employer). This denial of liberty in one's work is accompanied by an unconstitutional taking of property, for Connecticut provides no maternity benefits. A woman is also denied unemployment compensation during her last two months of pregnancy, even when her unemployment is due to some reason other than pregnancy. CGST 31–236 (5). *Janello* v. *Administrator, Unemployment Compensation Act*, 178 A.2d 282, 23 Conn. Supp. 155 (1961). If "total or partial unemployment is due to pregnancy," the woman is completely ineligible for benefits. *Janello*, *supra* at 156. Even worse, the employer has the absolute, arbitrary right to fire a pregnant woman when, in his estimation, her pregnancy would interfere with her work. *Janello*, supra at 157.

In Louisiana a recent amendment in 1968 of L.S.A.–R.S. 23:1601(6)(b) enables a woman who is forced to leave her employment either by contract or otherwise on account of pregnancy, to qualify for unemployment compensation. But, as illustrated in the case of *Grape* v. *Brown*, 231 So. 2d 663 (Ct. App. La., 1970) the unemployment compensation in no way adequately compensates either for the actual wages lost, or for the denial of liberty which forces a woman to receive unemployment compensation. Mary Grape was employed as a key punch operator by Southwestern Electric Power Co. When she became pregnant she was advised that the company policy required that expectant mothers terminate employment no later than the end of the 150th day of pregnancy and that no leaves of absence would be granted. Thus she was forced onto unemployment compensation and had lost her job.

Mississippi laws curtail even more severely the liberty of a woman and her property. Sec. 7379(a), Miss. Code 1942 Rec. states that a married woman who has left work because of pregnancy is considered to have voluntarily severed her employment without good cause

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* It may be reassuring to note that a high use of abortion is generally coupled with a high use of contraception. That is, women who use contraceptives have "a higher motivation toward fertility control. They are likely to resort to abortion when contraceptive efforts fail. The greater the expectation of avoiding pregnancy through contraception the greater the likelihood of an induced abortion once pregnancy occurs . . ." "What is more, liberalization of abortion laws tends to accompany an increase in the use of contraceptives." *Induced Abortion and Contraception*, paper delivered by Emily Moore at Workshop of National Institute of Child Health and Human Development and National Institute of Mental Health, December 15–16, 1969, p. 12.

and therefore is not even entitled to unemployment compensation. See *Mississippi Employment Security Commission* v. *Corley*, 148 So.2d 715 (Miss., 1963). Thus, the pregnant woman loses her job, her source of income, and is *forced* to become economically *dependent* on others. The law is most harsh on pregnant women who are heads of households, and depended upon as breadwinners. Statistics show that a very high percent of all working women are in this position, i.e., they must work to support themselves and/or their children.

But restrictions on a woman's liberty and property only *begin* with pregnancy. A woman worker with children is considered "unavailable for work" (which means that she cannot qualify for unemployment compensation), if she restricts her hours of availability to late afternoon and night shifts so that she may care for her children during the day. Connecticut courts have often held that "domestic responsibilities" are "personal reasons unrelated to employment," *Lukienchuk* v. *Administrator, Unemp. Comp. Act*. 176 A.2d 892, 23 Conn. Sup. 85 (Super. Ct., 1961) or "entirely disconnected from any attribute of employment" *Lenz* v. *Administrator, Unemp. Comp. Act*, 17 Conn. Sup. 315 (Super. Ct., 1951). In one decision the court said that a woman had just *five weeks* to try to rearrange her life and her domestic responsibilities to try to make herself "available for work" according to Connecticut standards (i.e. ready to work at all hours of the day.)

There is only one case that held that a woman who restricted her availability for personal reasons was entitled to unemployment compensation. The woman had *seven* children. *Carani* v. *Danaher*, 13 Conn. Supp. 109 (Super. Ct., 1943).

But the dominant belief is that a woman's "personal reasons" (in most cases, "domestic responsibilities") for seeking work during specific hours are not relevant to employment. Thus, women with home responsibilities (children or husband)—who need or want to work—are considered "unavailable for work." They are denied the freedom "to live and work where they will, to earn their livelihood by any lawful calling" *Allgeyer* v. *Louisiana*, *supra* and "to engage in any of the common occupations of life" *Meyer* v. *Nebraska*, *supra*—freedoms that are implicit in the Fourteenth Amendment's "concept of ordered liberty." *Palko* v. *Connecticut*, 302 U.S. 319 (1937). It becomes clear from Connecticut decisions on pregnant working women that the State of Connecticut considers pregnancy a "malady," *Adams* v. *American Fastener Co.*, 7 Conn. Supp. 379 (1939). Under these circumstances, a case can well be made that the anti-abortion law, in compelling a pregnant woman to continue this condition against her wishes, is not merely a denial of liberty, but also an imposition of cruel and unusual punishment on the woman. See Section III *infra*. "Confinement" well describes the situation of the pregnant woman, or mother, who is denied work, or restricted in her work because of an employer's decision on her ability to work.

Here we see how inextricably the rights to life and liberty are mixed and even more how laws restricting abortion deny women both.

Once a woman has given birth, according to the Court of Appeals for the Fifth Circuit, she may still be barred from employment as long as she has pre-school children. *Phillips* v. *Martin Marietta Corp.*, 411 F.2d 1 (5th Cir., 1969). See Section II, *infra*, for a discussion of the treatment of *Phillips* by this Court. Furthermore, if she needs or merely wishes to work while she has preschool children she cannot unless she is fortunate enough to have family who will care for the children or is wealthy enough to hire help. And, though a housekeeper, nurse, or baby sitter is a necessary expense enabling her to work, she may not deduct the salary of that person from her income tax 26 U.S.C. 214 and thus is normally left with little if any of her pay after those expenses are covered.

Thus as long as a woman has young children she is denied the right to obtain employment though her ". . . power to earn a living for [herself] and those dependent upon [her] is in the nature of personal liberty." *Smith* v. *Hill*, 285 F. Supp. 556, 560 (D.N.C., 1968).

A further denial of liberty results from the fact that women are generally forced to arbitrarily end their education because of pregnancy. Until recently, girls who became pregnant were forced to drop out of public school in New York. In New York City, Central Harlem, more than forty percent of the girls who leave school before graduation do so because of pregnancy. Haryou, 1964, *Youth in the Ghetto*, N.Y. Orans Press, p. 185. This still happens in countless other cities throughout the country as well. See, for example, *Perry* v. *Grenada Municipal Separate School District*, 300 F. Supp. 748 (N.D. Miss., 1969). Many women are also deprived of higher education because of college rules requiring that pregnant women leave school.

The importance of education in modern society has been stressed and restressed in recent years, since Chief Justice Warren stated in *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954):

Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic responsibilities. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening . . . cultural values, in preparing . . . for later professional training and in helping . . . to adjust normally to his environment.

It has been recognized more recently that there are special problems for women in obtaining education for though "men and women are equally in need of continuing education . . . at present women's opportunities are more limited than men's." *American Women*: Report of the President's Commission on the Status of Women, 1963, p. 11. Nonetheless, women are robbed of their education and opportunity for any development and self-fulfillment; robbed of their rights to be "free in the enjoyment of all (their) faculties," Madera, *supra*, at 783–4, by chance of an unwanted pregnancy.

The incursions on the liberty of an unmarried woman who became pregnant are even more severe. She too may be fired from her job and is even more likely to be compelled to discontinue her education. Unable to terminate her pregnancy, she is often forced into marriage against her will and better judgment in an attempt to cope with the new economic and social realities of her life. Such marriages are forced on women despite the fact that the right to marry or *not to marry* may not be invaded by the state. *Loving* v. *Virginia*, 388 U.S. 1 (1967).*

Of course, frequently, the man who is responsible for the pregnancy refuses to marry her. Then unable to support herself she may be forced to become a welfare recipient, become part of that cycle of poverty, and expose herself to the personal humiliation, loss of personal liberty and inadequate income that entails.

To further add to her difficulties, the mere fact of her out-of-wedlock pregnancy or child resulting from that pregnancy may be used as "some evidential or presumptive effect" to a decision to exclude or remove her from public housing. *Thorpe* v. *Housing Authority*, 393 U.S. 268, 271 (1969). Thus, having been forced to bear a child she did not want, she may be deprived of her right and ability to provide for herself and her child either because of employer policies or because of her inability to leave the child. Surviving on at least marginal income, she who is most obviously in need of public housing is then deprived of decent shelter because of the existence of that very same child.

For a woman perhaps the most critical aspect of liberty is the right to decide when and whether she will have a child—with all the burdens and limitations on her freedom which that entails. But that has been robbed from her by men who make the laws which govern her.

As early as 1848 women spoke out against the way in which men controlled their lives—denied them of any meaningful liberty. At the Women's Rights Convention held in Seneca Falls, New York, on July 14, 1848, the women spoke of men as follows:

He has compelled her (woman) to submit to laws in the formation of which she has no voice . . . He has taken all her rights to property, even to the wages she earns. . . . In the covenant of marriage . . . the law (gives) him power to deprive her of her liberty and to administer chastisement. . . . He closes against her all the avenues of wealth and distinction which he considers most honorable to himself. . . . He has denied her the facilities for obtaining a thorough education. . . . He has endeavored in every way that he could to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead an abject life. *Victory, How Women Won It*, National American Suffrage Association, A Centennial Symposium, 1840–1940, H.W. Wilson Co., 1940, pp. 15–25.

Restrictive laws governing abortion such as those of Texas and Georgia are a manifestation of the fact that men are unable to see women in any role other than that of mother and wife. Furthermore,

So long as he continues to think and write, to speak and act, as if maternity was the one and sole object of a woman's existence—so long as children are conceived in weariness and disgust—you must not look for high-toned men and women capable of accomplishing any great and noble achievement.*

As recently as July 12, 1971 the Supreme Court of the State of Florida reversed three convictions for conspiracy to commit abortion. In the concluding sentence of its opinion the Court stated: "In sum the [abortion] statute intrudes into the area of personal liberty of women and does it crudely in vague, uncertain, archaic language." *Walsingham* v. *Florida*, *supra*, slip opinion, p. 15, Ervin, J., Concurring.

The Florida statute does not alone abridge a woman's fundamental right to liberty. The statutes of Georgia, Texas and nearly every other state in the nation similarly deny to women throughout the country their most precious right to control their lives and bodies.

II. The Georgia and Texas statutes restricting the availability of abortions deny women the equal protection of the laws guaranteed to them by the fourteenth amendment

The express guarantee of equal protection was originally designed to protect black people. Since that time, its protection has been greatly extended. First the courts extended equal protection to protect Chinese, *Yick Wo* v. *Hopkin*, 118 U.S. 356 (1886). More recently it has been extended to protect aliens, *Taka-*

*The reaction of forcing a pregnant girl or women into marriage as a "solution" to an unwanted out-of-wedlock pregnancy is exemplified by the ruling of a Maryland court in 1955, waiving the marriage age requirements to permit a thirteen year old pregnant girl to marry. Harold Rosen, M.D., *Psychiatric Implications of Abortion*, A Case Study of Social Hypocrisy, 17 Wes. R.L. Rev. 454, at 454.

*Elizabeth Stanton to Gerrit Smith, December 21, 1857, Stanton Papers, LC, quoted in Andrew Sinclair, *The Emancipation of the American Woman*, Harper Colophon Books, New York, 1966, p. 259.

hashi v. *Fish and Game Commission*, 334 U.S. 410 (1948);

Mexican American, *Hernandez* v. *Texas*, 347 U.S. 475 (1954), and poor persons, *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 372 U.S. 353 (1963), and *Shaprio* v. *Thompson*, 394 U.S. 618 (1969).

Most recently federal estate courts have begun to apply the guarantees of the equal protection of the laws to prohibit discrimination against women.

In *White* v. *Crook*, 251 F. Supp. 401 (M.D. Ala. 1966) exclusion of women and Negroes from Alabama juries was held unconstitutional. In *United States ex rel Robinson* v. *York*, 281 F. Supp. 8, (D. Conn. 1968) differential sentences for men and women were struck down as "invidious discrimination against [women] which is repugnant to the equal protection of the laws guaranteed in the Fourteenth Amendment." In *Kirstein* v. *Rector and Visitors of the University of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970) a three judge court held that the exclusion of women from the University of Virginia violated their rights to the equal protection of the laws. In 1970 a federal District Court in New York held that a public tavern could not deny service to a woman. *Seidenberg* v. *McSorely's Ale House, Inc.*, 317 F. Supp. 583 (S.D.N.Y., 1970).

More recently the Supreme Court of the state of California rejected the ruling of this Court in *Muller* v. *Oregon*, 208 U.S. 412 (1908) to find that laws restricting women from being bartenders except in the most limited circumstances stand in violation of the guarantees of the Fourteenth Amendment. *Sail'er Inn* v. *Kirby*, # 29811 Sup. Ct. Calif. May 27, 1971. Federal district courts have also looked to the guarantees of equal protection to invalidate regulations compelling female employees to take a leave of absence from work because of pregnancy. *Cohen* v. *Chesterfield County School Board*, # 678–70–R (E.D.Va.) (May 17, 1971); *Schattman* v. *Texas Employment Commission*, # A–70–Ca–75 (W.D. Tex.) (April 16, 1971) Order Denying Motion for Relief from Judgment. See also *Mengelkoch* v. *Industrial Welfare Commission*, 437 F. 2d 563 (9th Cir. 1971) holding that plaintiffs' challenge to California protective labor laws raised substantial constitutional questions.

Despite the fact that women are entitled to the equal protection of the laws, one major area in which they are daily denied that protection is in the area of abortion.

Man and women have equal responsibility for the act of sexual intercourse. Should the woman accidentally becomes pregnant, against her will, however, she endures in many instances the entire burden or "punishment."

In obtaining an abortion, the threats and punishments fall on the woman. This happens even where the decision to have an abortion has been a mutual one. Only the woman is subjected to the variety of threats which often accompany the painful search for abortion—the threats of frightened or hostile doctors of giving her name to the police—the threat of subpoena and/or prosecution if the doctor who would help her is arrested.

It is often said that if men could become pregnant or if women sat in the legislatures there would no longer be laws prohibiting abortion. This is not said in jest. It reaches to the heart of the unequal position of women with respect to the burdens of bearing and raising children and the fact that they are robbed of the ability to choose whether they wish to bear those burdens.

And the woman carries an unequal and greater share of the burden, not merely for nine months, but for many years, all in violation of the equal protection of the laws, as we shall discuss below. The abortion laws herefore present a rather unusual constitutional situation. At first glance, it would appear that the concept of equal protection of the laws might not even apply to abortion since the laws relate only to women. However, when we look beyond the face of the laws to their effect, we see that the constitutional test of equal protection must be applied.* For the effect of the laws is to force women, against their will, into a position in which they will be subjected to a whole range of *de facto* forms of discrimination based on the status of pregnancy and motherhood.

As we have discussed at length above, a woman who has a child is subject to a whole range of *de jure* and *de facto* punishments, disabilities and limitations to her freedom from the earliest stages of pregnancy. In the most obvious sense she alone must bear the pains and hazards of pregnancy and childbirth. She may be suspended or expelled from school and thus robbed of her opportunity for education and self-development. She may be fired or suspended from her employment and thereby denied the right to earn a living and, if single and without independent income, forced into the degrading position of living on welfare.

For example, many if not most employers including public employers have policies requiring pregnant women to take a leave of absence or otherwise terminate their employment at a given stage of pregnancy. Recently the case of *LaFleur* v. *Cleveland Board of Education*, #C–71–299 N.D. Ohio, May 12, 1971 upheld one such regulation. *Contra*, *Cohen* v. *Chesterfield County School Board*, *supra*, and *Schattman* v. *Texas State Employment Commission*, *supra*. If she has preschool age children, employers may refuse to hire her despite the provisions of the Civil Rights Act of 1964 which states that it is unlawful for an employer *"to fail or refuse to hire* or to discharge any individual . . . because of such individual's sex. . . ." 42 U.S.C. 200 e–2(a)(4) (emphasis added), for, according to the Fifth Circuit, it is inconceivable that Congress intended to: exclude absolutely any consideration of the normal relationship of working father to their preschool age children and to require that an employer treat the two exactly alike in the administration of its general hiring policies. *Phillips* v. *Martin Marietta*, *supra*, 411 F. 2d at 4.

Only this winter this Court effectively affirmed that court's ruling with Justice Marshall dissenting by holding that—The existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under § 703(e) of the [civil rights] Act. *Phillips* v. *Martin Marietta Corp.* 91 S. Ct. 496, 498 (1971).

In other words this court said if men refuse to share equally in the care of their children then women may be doubly burdened—they may be burdened with the responsibilities of child care and they may be deprived of employment opportunities as well.

If a woman is unmarried, unless she succeeds in obtaining an abortion, she has no choice but to bear the child, while the man who shares responsibility for her pregnancy can, and often does, just walk away.

As a practical matter, the woman is then alone with the problem of seeking and financing an abortion and if that fails, she is alone paying the expenses of pre-natal care and childbirth and raising and supporting the child. She could seek to establish paternity of the father and therefore some measure of financial responsibility. However, to do this she must expose herself to accusations by the father concerning her sexual behavior as part of his attempt to avoid legal responsibility for the child. In some states she would further be forced to admit the commission of a crime, e.g. D.C. Code § 22–1002 (Crime of Fornication). Furthermore, although in most areas a parent has the legal responsibility to support his or her child whether married or single, e.g. D.C. Code § 22–903, in some of those same places a parent will only be punished for neglect where married—thus the irresponsibility of the man who walks away from the child he has helped to create is reinforced by the rule of law. For example, under New York law the mother is expressly liable for child support if the father is unable to support the child or cannot be found within the state. New York Family Court Act § 414.

In Texas, a father of an out-of-wedlock child has neither the common law nor the statutory duty to support his child. *Home of Holy Infancy* v. *Kaska*, 397 S.W. 2d 208 (Tex. 1965). See also *Lane* v. *Phillips*, 6 S.W. 610 (Tex. 1887), *Beaver* v. *State*, 256 S.W. 929 (Cr. App. Tex., 1923).

Having been forced to give birth to a child she did not want, a woman may be subject to criminal sanctions for child neglect, e.g., D.C. Code § 22–902, if she does not care for the child to the satisfaction of the state. In some states even here the disabilities for the woman are greater than for the man. The New York courts seem to have found as a matter of law that the mother has a greater responsibility for the child than the father. In the case of *People* v. *Edwards*, 42 Misc. 2d 930, 249 N.Y.S. 2d 325 (1964), though the father and mother were jointly indicted for failure to provide shelter and medical attention for their baby, the court held that only the mother could be punished for failing to bring the baby to a doctor when a condition which began with a diaper rash resulted in the child's death. Of course, again, if the woman is unmarried and paternity was never legally established, the woman bears these legal burdens alone.

The unwed mother may suffer additional disabilities by being denied employment because of her status. Courts are gradually recognizing the inequities of so penalizing unwed mothers. Nonetheless, not every woman is in a position to go to court to contest such discriminatory actions and many such policies and practices still exist throughout the country unchallenged.

Even where the father is present, the mother rather than father will be primarily responsible for raising the children. As long as "women, as a class earn less than men." *Gruenwald* v. *Gardner*, 390 F.2d 591 (2d Cir., 1968), and women have less opportunity for advancement**, they, rather than the father, will remain at home to raise the family.

The rulings of the Fifth Circuit and this Court in *Phillips* v. *Martin Marietta*, *supra*, further reinforce this arbitrary role differentiation, forcing the greater burden on child care on the mother. For in saying that a mother of pre-school age children may constitutionally be denied employment though a father may not, the power and authority of the courts is reinforcing the actions of private employers and society to *force* a woman to 'stay at home and take care of the children' even if she has otherwise provided for their care.

If such a broad range of disabilities are permitted to attach to the status of pregnancy and motherhood, that status must be one of choice. And it is not sufficient to say that the women "chose" to have sexual in-

* Here, of course, we are discussing not the secondary effect of the laws on persons who perform abortions and who might be men or women, but on the persons who feel the greatest impact of the laws, women.

** See, for example, *Study of Employment of Women in the Federal Government*, 1968; U.S. Civil Service Commission, Manpower Statistics Division, Washington, D.C.

tercourse, for she did not choose to become pregnant. As long as she is forced to bear such an extraordinarily disproportionate share of the pains and burdens of child-rearing (including, of course, pregnancy and childbirth), then, to deprive her of the ultimate choice as to whether she will in fact bear those burdens violates the most basic aspects of "our American ideal of fairness" guaranteed and enshrined in the Fourteenth Amendment. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

There is yet another way in which women are denied the equal protection of the laws. This Court has shown great concern with the "conception of political equality" *Reynolds* v. *Sims*, 377 U.S. 533, 558 (1964) and particularly with "questions of alleged 'invidious discriminations * * * against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.'" *Reynolds* v. *Sims*, *supra*, 377 U.S. at 561 citing *Skinner* v. *Oklahoma*, 316 U.S. 535, 536 (1942). Because of this concern, in a line of cases the court has sought to guarantee that each citizen is fairly and equally represented in the legislature which makes laws governing his or her life. See *Baker* v. *Carr*, 369 U.S. 186 (1962), *Reynolds* v. *Sims*, *supra*, and their progeny. Nevertheless, in the instance of abortion laws one finds the grossest form of lack of representation.

This court can surely take judicial notice of the fact that the state legislatures in Texas and Georgia, like state legislatures throughout the country are composed almost exclusively of men. As the supreme court of the state of Oregon stated in *State* v. *Hunter*, 300 P. 2d 455, 357–7, 208 Ore. 282 (Ore., 1956).

. . . We believe that we are justified in taking judicial notice of the fact that the membership of the legislative assembly which enacted this statute was predominately masculine. That fact is important in determining what the legislature might have had in mind with respect to this particular statute . . .

Therefore we have a situation in which persons are making laws which could never possibly affect them.*

These laws which are passed largely by men and only affect women were first instituted many years prior to the time that women even had the vote. The Georgia statute was enacted in 1876, the Texas in 1907. This relationship between the legislators and the laws they are making is even more complex than it may appear on the surface. For laws such as the abortion laws presently before this court in fact insure that women never will be able to function fully in the society in a manner that will enable them to participate as equals with men in making the laws which control and govern their lives. For as long as women are unable to control their reproductive lives they will be forced to disrupt their education, forgo their career, and will never be a totally functioning part of the government which determines her rights. Forced to remain at home with her children a woman has neither the time, the money, nor the mobility to either organize an effective lobby on her own behalf or to assert her own rights as a direct participant in the legislative workings of government. The underrepresented city dweller could not realistically look to the rural dominated legislature to rectify the inequality of representation, nor could black people look to a white controlled legislature to eliminate the gerrymandering which cheapened their votes. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). Neither can women realistically look to male controlled legislatures to change laws which will return to them the control of their lives and bodies and that may incidentally free them to actively participate in those same legislatures. Therefore, if women are to have their rights redressed they can look only to the courts.*

III. Abortion laws violate the constitutional guarantee against the imposition of cruel and unusual punishment

To understand what having an unwanted pregnancy and child means to a woman, it may be best to consider the following analogy: a group of people are walking along the street. Half the group crosses; the remainder are stopped by a red light. Those stopped by the light are told the following:

"From now on, for about nine months, you are going to have to carry a twenty-five pound pack on your back. Now, you will have to endure it, whether you develop ulcers under the load whether your spine becomes deformed, no matter how exhausted you get, you and this are inseparable.

Then, after nine months you may drop this load, but from then on you are going to have it tied to your wrist. So that, wherever you go this is going to be with you the rest of your life and if, by some accident, the rope is cut or the chain is cut, that piece of rope is always going to be tied to you to remind you of it."

Of course, this analogy is not complete. It does not include the extreme, sometimes excruciating pain and risk of death involved with the process of transferring the pack from your back to your wrist, nor does it fully describe the limitations placed on your liberty by having that load chained to your wrist for a substantial portion, if not all of your life. It does, however, begin to give some picture of the pain and burden of pregnancy and motherhood when both are involuntary. Forcing a woman to bear a child against her will is indeed a form of punishment, a result of society's ambivalent attitude towards female sexuality. The existence of the sexual "double standard" has created the social response that when a woman becomes pregnant accidentally, she must be "punished" for her transgression, particularly if she is single. This punishment falls solely on the woman: she must face the physical burdens and emotional strains of an unwanted pregnancy, the degrading experience of having an illegal abortion "often in filthy motel rooms at the mercy of quacks who are charging exorbitant fees." Ervin, J. concurring, *Walsingham* v. *Florida*, Case No. 40,210 (S.Ct. Fla., July 12, 1971), and if unable to get such an abortion, the responsibilities and trauma involved in raising an unwanted child. The man equally responsible for the pregnancy faces no such punishment.

Those who seek to impose the punishment of forcing a woman to bear a child against her will could not be considering its scope and dimensions. Such a punishment condemns a woman to severe physical burden, pain and labor not only during pregnancy, but also through the birth process and after the child is born, imposing on her years of toil and loss of freedom. To deny an unmarried woman an abortion is even more obviously a punishment and an act of greater cruelty as she is totally alone, with *all* of the physical, financial and social burdens of raising a child.

The Eighth Amendment to the United States Constitution protects all persons against the infliction of "cruel and unusual punishment." Amici contend that the expanding constitutional concern, as expressed by this Court, with practices which "offend the dignity of man", are contrary to "the evolving standards of decency that mark the progress of a maturing society" and punishment "disproportionate to the offense committed" as violative of the Eighth Amendment necessitates a finding that laws restricting abortion are unconstitutional.

In 1910, the Supreme Court in *Weems* v. *United States*, 217 U.S. 349 (1910), repudiated the nineteenth century assumption that the punishments proscribed by the Eighth Amendment were limited to the barbarous practices of seventeenth century England. "The Cruel and Unusual Punishment Clause and The Substantive Criminal Law" 79 Harv. L. Rev. 635, 636–7 (1966). The Court in *Weems*, invalidating a section of the Philippine Penal Code authorizing a sentence of 15 years hard labor and concomitant forfeiture of citizenship rights noted that a "principle to be vital must be capable of wider application than the mischief which gave it birth," 217 U.S. at 373. Further the Court held that the Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." 217 U.S. at 367. Underlying the Court's holding was the concept of "proportional punishment" as a "precept of the fundamental law." Significantly, the Court considered the moral stigma and mental anguish suffered as a result of such punishment to be of equal relevance as the purely physical burden imposed.

In *Trop* v. *Dulles*, 356 U.S. 86 (1958), invalidating a punishment of denaturalization for desertion as unconstitutional in violation of the Eighth Amendment, the Court again emphasized the standard of proportion, and the flexible, expansive nature of the Eighth Amendment's ban, while declaring their willingness to apply the Eighth Amendment affirmatively to protect individual liberty. Noting that the "traditional" punishment for desertion was death, the court rejected the notion that "excessiveness" alone was determinative of constitutional validity. Instead, the Court asserted that "the question is whether the punishment subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment." 356 U.S. at 99. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." 356 U.S. at 100. The Amendment, the Court noted, was not a static one; it "must draw its meaning from evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 101. In setting a standard for the application of the Amendment, the Court rejected, as well, an exclusive concern with the physical aspect of punishment, forbidding what it characterized as "the total destruction of the individual's status in organized society, 356 U.S. at 101.

This Court's most recent analysis of the flexibility of the Eighth Amendment is found in *Robinson* v. *California*, 370 U.S. 660 (1962). In that case, the Court held that a state law which made the "status" of narcotics addiction a criminal offense constituted "cruel and unusual punishment in violation of the guarantees of the Eighth Amendment. For Justice Douglas stated in his analysis of the constitutional development of the Eighth Amendment: Douglas, J. concurring at 675.

The historic punishments that were cruel and unusual included "burning at the stake, crucifixion, breaking on the wheel" (*In re Kemmler*, 136 U.S. 436, 446, 10 S.Ct. 930, 933 34 L.Ed. 519) quartering, the rack and the

*It may be worth noting that the only other major areas of law in which this occurs is with laws governing children and incompetents; that alone may give interesting insights into the views of legislators towards women.

Amici have not addressed themselves to the economic discrimination resulting from the application of the abortion laws of Texas and Georgia on the understanding that the issue is being treated fully by other *amici* and by parties to the litigation. *Amici* are deeply concerned, however about the economic hardship and blatant economic discrimination effected by such laws restricting the availability of legal abortion.

thumbscrew (see *Chambers* v. *Florida*, 309 U.S. 227, 237, 60 S.Ct. 472, 477, 84 L.Ed. 716) and in some circumstances even solitary confinement (See *In re Medley*, 134 U.S. 160, 167–8, 10 S.Ct. 384, 386, 33 L.Ed. 835). The question presented in the earlier cases concerned the degree of severity with which a particular offense was punished or the element of cruelty present. A punishment out of all proportion to the offense may bring it within the ban against "cruel and unusual punishment." See *O'Neil* v. *Vermont*, 144 U.S. 323, 331, 12 S.Ct. 693, 696, 36 L.Ed. 450. So may the cruelty of the method of punishment as, for example, disemboweling a person alive. See *Wilkerson* v. *Utah*, 99 U.S. 130, 135, 25 L.Ed. 345. But the principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick.

The essence of the Eighth Amendment, as evolved in the cases discussed above, lies in its concern with the "disproportionate" nature of the punishment imposed, the moral anguish as well as physical burdens of punishment, the extent to which punishment is a response to an individual's 'status' and is measured by "evolving standards of decency", and offensiveness to the "dignity of man." Laws which force women to endure unwanted pregnancy and motherhood against their will or to become criminals and take the risks to physical and mental health resulting from an illegal abortion are disproportionate to the act for which they are being punished—an act which, in many instances, is not even illegal. Further, *amici* contend that abortions, in fact if not in theory, punish women for private, sexual activity for which only women bear the repercussions of pregnancy therefore punishing them for their status as women and potential childbearers.

The pain and suffering associated with an unwanted pregnancy or child, is not solely physical pain. The emotional pain and scarring which accompanies an unwanted pregnancy is an equally important and far more lasting form of pain which must be considered in the context of guarantees of the Eighth Amendment, and the emphasis given to mental anguish as a crucial component of "cruel and unusual punishment."* According to Dr. Natalie Shainess, who has devoted the majority of her 25-year practice as a psychoanalyst and psychiatrist to the area of feminine psychology and particularly with the experience of being a mother, a woman who does not want her pregnancy suffers depression through nearly the entire pregnancy and often that depression is extremely severe. Furthermore, according to Dr. Shainess that depression continues even after birth may even go into psychotic states, and may result in permanent emotional damage to the woman.

Such potential permanent emotional damage, the risks to physical health and safety which may also result in permanent physical harm, see *Fletcher* v. *State*, 362 S.W.2d 845 (Cr. App. Tex., 1962), and the burdens of taking care of an unwanted child, constitute a form of long-term imprisonment. Such long term imprisonment . . . "could be so disproportionate to the offense as to fall within the inhibition" of the Eighth Amendment. *Hemans* v. *United States*, 163 F.2d 228 (6th Cir., 1947). For most women, bearing and raising an unwanted child is worse, it is *life-term* imprisonment. For the woman, the unwanted pregnancy may also carry with it the trauma of being rejected or mistreated by the man when he learns of the pregnancy. Under such conditions, the child resulting from the relationship would constitute a lasting and omnipresent reminder of the suffering the woman experienced from the man. Such a life-long reminder is a form of constant punishment that the woman should not be forced to face. When she is forced into that situation, however, not only does she suffer emotionally, but her suffering is manifested in her relations with her child. She may vent her anger by physically injuring the child,* neglecting the child, or being extremely over protective, virtually "smothering" the child emotionally.

According to New York law as interpreted by its courts, a "child at tender age is entitled to have such care, love and discipline as only a good and *devoted* mother can usually give," *Ullman* v. *Ullman*, 151 A.D. 419, 135 N.Y.S. 80 (1912) (emphasis added); it is entitled to care which includes its "spiritual and moral life" *In re Roe*, 92 N.Y.S. 2d 882, 883, 196 Misc. 830 (Dom. Rel. Ct., 1949). Nonetheless, the State, by its insistence on the right to life for the fetus, practically ensures that once born, the child will receive neither the care, love, nor spiritual and moral life to which it is entitled. If indeed, the unwanted child is a hated child, in denying women the right to abortion Texas, Georgia, and all other states with laws which restrict abortion are punishing not only the mother, but also the very child they claim to protect. Furthermore, under New York law a mother is required to give "care, guidance, supervision, love and affection," *In re Carl*, 174 Misc. 955, 22 N.Y.S. 2d 782, 784 (Dom. Rel., 1940), to the child she never wanted in the first place and she is punished if she is unable to.

By denying women the right to abortion the state is punishing her for her sexual activity with the equivalent of long-term imprisonment and giving her an indeterminate sentence of life with an unwanted child. Sentencing a woman to a full term pregnancy and motherhood against her will is thus a clear violation of her right to be free from cruel and unusual punishment. The words of this Court in *Weems, supra*, are most appropriate in describing such a "sentence."

> [Her] prison bars and [some] chains are removed, it is true after [nine months], but [she] goes from them to a perpetual limitation of [her] liberty. [She] is forever kept under the shadow of [her] crime. . . .
>
> . . . [She] is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty. It may be that even the cruelty of pain is not omitted. [She] must bear a chain night and day. [She] is condemned to painful as well as hard labor. 30 S.Ct. at 549.

Even where the woman decides she cannot endure the pains and penalties of pregnancy and motherhood, which the law attempts to force on her, she is still exposed to what may be the great physical and emotional pain and the far greater danger of illegal abortion. It has long been thought that abortion in and of itself caused substantial destructive emotional effects on women. More recently, however, a number of studies have shown that when abortions are legally obtained women do not suffer psychological harm as a result of their experience, but rather in most cases their emotional status improves and many report that they experience emotional growth as a result of the abortion experience. Pratt, Rappaport & Barlow, *Arch. Gen. Psychiat.*, 20:408–414 (1969).

It is no answer to suggest that the woman may always choose to minimize her pain by placing the child for adoption following birth—performing the function of "commodity" or a "baby breeder." For as one woman has movingly described.*

> The kind of trauma of giving a baby up for adoption leaves you with the feeling of—at least I had my feeling about it as a mother—I was a mother who had abandoned my child and I fought against this self-concept.
>
> I prepared to think of myself as a breeder, I was just breeding babies for someone else to take rather than think of myself as a mother who abandoned her baby.
>
> But the guilt—for months after I left the home, I'd wake up in the night crying and sort of rocking my pillow and this feeling sometimes of deprivation but . . . the guilt was stronger than the feeling that someone else had deprived, someone had ripped the baby from my arms.
>
> I would have been more comfortable that way than what I did, because I actually signed the papers and gave the baby up.

For this woman, and for many others, this experience carries with it a further overwhelming sense of guilt at having done something shameful—a sense of guilt which may haunt her for years after and which, in the same person, will not develop in connection with an abortion—even an illegal abortion. Such mental anguish, and the emotional harm which ultimately results is certainly disproportionate to the act for which a woman is being punished, and constitutes cruel and unusual punishment for her.

Finally, some might feel that whereas it may be constitutionally impermissible to deny a married woman an abortion, it is permissible to force an unmarried woman to see her pregnancy and its consequences through as a "deterrent to her immorality." However, not only is such a position unconstitutional, it is irrational. Compared with a married woman, an unmarried woman is likely to experience even greater unconstitutional deprivations of her liberty, as a result of the greater pain and suffering from being forced to bear and raise an unwanted child with no help from the man who is equally responsible for the conception of that child. Furthermore, both she and the child, will become a financial "burden" on the society if she is forced to go on welfare.

Millions of women are now becoming truly conscious of the manifold forms of oppression and discrimination of their sex in our society. They are beginning to publicly express their outrage at what they have always known—that bearing and raising a child that they do not want is indeed cruel and unusual punishment. Such punishment involves not only an indeterminate sentence and a loss of citizenship rights as an independent person as held unconstitutional in *Weems, supra*, great physical hardship and emotional damage 'disproportionate' to the "crime" of participating equally in sexual activity with a man, as held unconstitutional in *Trop, supra*, but is punishment for her 'status' as a woman and a potential childbearer as held unconstitutional in *Robinson, supra*. As this Court in *Trop* so firmly stated, the concept underlying the Eighth Amendment is "nothing less than the dignity of man" 356 U.S. at 100 and "must draw its meaning from evolving standards of decency" at 101. Abortion laws reinforce the legally-legitimized indignities that women have already suffered under for too long and bear witness to the inferior position to which women are relegated. The total destruction of a woman's status in society results from compelling her to take sole responsibility for having the illegal abortion or bear the unwanted child, and suffer the physical hardship and mental anguish whichever she chooses. Only the woman is punished by society for an act in which she has participated equally, only she is punished for her

*Schulder and Kennedy, *supra*. p. 122.

* According to Ray E. Helfer, M.D., who has recently edited a book called *The Battered Child*, University of Chicago Press, 1968, and is an expert in the field, an unwanted pregnancy may be a crisis situation in the three factor pattern which leads to physical abuse of children.

*Schulder and Kennedy, *Ibid.*, p. 23.

"status" as child-bearer. In light of "evolving standards of decency that mark the progress of a maturing society", the basis of the Eighth Amendment as set forth in *Trop, supra*, the struggle of women for full and meaningful equality in society over the last hundred years indicates that it would indeed be a sign of the immaturity of our social development if these laws were upheld. White persons have had to readjust their thinking and actions to question whether laws which discriminated against blacks were unconstitutional.

Men (of whom the legislatures and courts are almost exclusively composed) must now learn that they may not constitutionally impose the cruel penalties of unwanted pregnancy and motherhood on women, where the penalties fall solely on them.

IV. There is no compelling State interest justifying the violation of fundamental constitutional rights effected by the challenged abortion laws

Historically under common law and in the early years of American law, abortion was legally permissible before the fetus was "quick" inside the mother. See generally, Cyril S. Means, Jr., *"The Law of New York Concerning Abortion and the Status of the Fetus, 1664–68: A Case of Cessation of Constitutionality,"* 14 N.Y.L.F. 411, Feb. 1968; and Roy Lucas, *"Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes,"* 46 N.C. L. Rev. 732, June 1968. The adoption of laws regulating (and almost effectively eliminating) legal abortion came about for a combination of three major reasons, none of which can any longer constitutionally justify the extreme incursion into and violation of protected rights effected by the challenged abortion laws. The three reasons were: (a) "compelling uniform adherence to specified moral norms . . . [by] (1) egal bans on both contraception and all abortion. . . ." Lucas, *supra*, p. 732, i.e., moral norms regarding sexual relations; (b) protecting the health of the mothers from the dangers then inherent in any operation, Lucas, *supra*, p. 732; Means, *supra;* and (c) enforcing the newly established religious concept that the soul was present in the body from the time of conception. Lawrence Lader, *Abortion*, Beacon Press, Boston, 1966.

The operation and effect of the challenged Georgia and Texas abortion laws directly violate plaintiffs' constitutionally protected rights of life, liberty, equal protection. personal privacy of associations and others as well. As the Supreme Court of California stated in *California* v. *Belous*, supra, 80 Cal. Rptr. at 360:

> The critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state (Shapiro v. Thompson (1969), 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600; Sherbert v. Verner, (1963), 374 U.S. 398, 403, 83 S.Ct. 1790, 10 L.Ed.2d 965), whether the regulation is "necessary * * * to the accomplishment of a permissible state policy" (McLaughlin v. Florida (1964), 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222; see also, NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 105; Bates v. City of Little Rock (1960) 361 U.S. 516, 527, 80 S.Ct. 412, 4 L.Ed.2d 480; Huntley v. Public Util. Comm. 69 A.C. 62, 69 Cal. Rptr. 605, 442 P.2d 685; Vogel v. County of Los Angeles, 68 Cal. 2d 18, 21, 64 Cal. Rptr. 409, 434 P.2d 961; People v. Woody, 61 Cal.2d 716, 718, 40 Cal. Rptr. 69, 394 P.2d 813.

The fact that the abortion laws may have been valid when first enacted does not resolve the questions concerning the present constitutionality of the law. *California* v. *Belous, supra*, at 362. Compare *Gary* v. *Sanders*, 372 U.S. 368, 381 (1963) with *South* v. *Peters*, 339 U.S. 276, 277 (1950); *Baker* v. *Carr*, 369 U.S. 186, 237 (1962); with *Colgrove* v. *Green*, 328 U.S. 549, 556 (1946); *Brown* v. *Board of Education, supra*, with *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

Most persons who seek to justify the constitutionality of abortion laws would now concede that the first two of the three justifications mentioned above are no longer able to sustain abortion laws which take such great tolls on the lives of women.

It is common knowledge that an abortion no longer entails the danger it did in the mid 1800's and early 1900's when the Texas and Georgia abortion laws as well as the laws of nearly all the other states were first enacted. In fact, as pointed out above, there is considerable evidence that abortion now carries about the same, if not lesser risks then childbirth. See p. 10, *supra*. Therefore the medical rationalization to sustain abortion restrictions can be easily dispensed with.

As for the use of abortion laws to ensure the community standard of morality, it should be clear from this Court's decision in *Griswold* v. *Connecticut, supra*, 381 U.S. at 498, Justices Goldberg, Warren and Brennan, concurring that such an argument is not constitutionally sufficient. See also *Walsingham* v. *Florida, supra*, slip opinion, p. 12, which notes that the abortion statutes themselves ". . . [do] not show a compelling state interest in prohibiting premarital sexual intercourse (the prelude to unwed mothers) since [they draw] no distinction between married and unmarried women." In any case it is quite evident that the "community" standard is at present a changing one. Furthermore, we must consider just who is the community. For on this particular issue there are at minimum two communities—the community of men and the community of women. Normally, we cannot and should not consider legislation from such a perspective but in this case we can and must. For, here we have legislation which is made by men [see Page 32–33, supra] who are never directly affected by it (except to the extent that they fear that they themselves might never have been born were there no abortion law). It is women, who at best have an indirect voice in the determination of these laws, who must suffer from them. And it should be plain that the community of women does not support these laws. For centuries they have been seeking and obtaining abortions even at substantial risk to themselves despite the voice of the legislature.

It may well be said that the abortion laws which the states seek to maintain in fact undermine the moral fabric of the community. For, it is those laws which not only force countless women to flagrantly violate the law each year, but forces them into the sordid underworld of criminal abortions.*

However, even assuming the maintenance of a particular standard of morality for men and women were sufficient to sustain some legislation in the area, that legislation could not be drawn in such a way as to consistently place all of its weight and burden on only one sex. For this is just the sort of invidious discrimination prohibited by the Fourteenth Amendment.

Thus we must look to the third rationale for abortion laws. Although it is generally discussed in terms of the "right to life," if we analyze it more closely, the third rationale is actually a means of enforcing the religious concept that the soul is present in the body from the time of conception and therefore must be saved. The use of criminal statutes to enforce the views of one or more particular religious groups is of course proscribed by the First Amendment's Establishment Clause.

Looking closer at the argument that the state must guarantee to every fetus its right to life, we must immediately be struck by tremendous inconsistencies in the state's alleged concern for life.

In fact, claims of great concern for the life of the fetus are at best questionable in practice and turn sour when examined in light of their consequences on the lives of women.

It is clear both from the application of the abortion laws as well as from other areas of law that the concern of the state in the life of the fetus is at best a qualified concern. Firstly, under the laws of many states the fetus has "no legal personality or identity until it sees the light of day." *Endresz* v. *Friedberg*, 24 N.Y. 2d 478, 301 N.Y.S. 2d 65, 70 (1969), and, therefore, an action for wrongful death of a fetus cannot be sustained. See also, *Graf* v. *Taggart*, 43 N.J. 303, 204 A. 2d 140 (1964); *Norman* v. *Murphy*, 124 Cal. App 2d 95, 268 P. 2d 178 (Dis. Ct. App., 1954); *Keyes* v. *Construction Service*, 340 Mass. 633, 165 N.E. 2d 912 (1960); *Powers* v. *City of Troy*, 4 Mich. App. 572, 145 N.W. 2d 418 (1966); *Carroll* v. *Skloff*, 415 Pa. 47, 202 A. 2d 9 (1964), for similar rules in New Jersey, California, Massachusetts, Michigan and Pennsylvania.

What are more laws govering abortion in Georgia as in several other states with supposed "reform laws" show at best a qualified concern for the life of a fetus. Those statutes permit the abortion of a fetus resulting from rape or incest, and in some states a fetus growing within the body of an unmarried woman under the age of fourteen, fifteen or sixteen, or a woman with German Measles, e.g., Colo. Rev. Stat. Ann. § 40–2–50 *et seq.* (Supp. 1967).

In other states, a pregnant woman may not be executed if she is "quick with child". New York Code of Criminal Procedure, §§ 501 *et seq.* Presumably, as was true historically, a woman who is pregnant with an unquick fetus may be executed.* Of course, in that case the fetus wil die with her.

Furthermore, in no other way do the states act to protect the fetus from dangers to its existence. There exist no intensive prenatal care programs for those expectant mothers who do not receive this necessary care. There exist no massive education programs concerning diet, exercise, etc., for expectant mothers. There is no mandatory innoculation against rubella, a crippling disease for a fetus to be affected by. Drugs harmful to the fetus are allowed on the market even though alternative treatment could be utilized. In New York, for example, the State Department of Social Services does not provide additional money for the fetus until the fourth month of pregnancy. Title 18, Codes, Rules and Regulations of the State of New York, § 353.2. Clearly, the states take no affirmative action to care for the fetus in which they claim such a compelling interest. Nor do the governments consistently protect the interest of the children who are subsequently born. * *

Amici do not take either the position that women who have abortions are "criminals" or that all persons who are willing to aid women in terminating unwanted pregnancies are criminals. However, there are many persons who unscrupulously profit from women's predicament and misery with little concern for their health and safety.

*For further historical discussion of this distinction between the quick and unquick fetus in New York laws, see Means, *supra*, 14 N.Y.L.F. at pp. 441–3.

** If governments insist that there is a compelling state interest in protecting human life and therefore in outlawing abortions, why is it that these same governments fail to protect the rights of illegitimate children who are subsequently born. Although *Levy* v. *Louisiana*, 391 U.S. 68 (1968), stated that a state cannot treat an illegitimate child differently from legitimate offspring, in *Labine* v. *Vincent*, 91 S.Ct. 1017 (1971), this Court upheld a Louisiana statute which prohibited illegitimate children, though duly acknowledged, from claiming and taking property by interstate succession for their father's estate. There are cases in both the

In light of these facts we must look again at the argument that the state must protect each and every fetus which has been conceived. In order to assert this view one must assume that every fetus is a human being equal in all respects to every living citizen from the moment of conception. Stripped of any religious definitions of when meaningful human life begins, that is when the soul enters the human organism, the various medical procedures for terminating pregnancy that are currently illegal under the challenged laws are not significantly different from some current methods of birth control.**

There is a great variation in positions as to when the essential "humanness" which causes society to protect the life of its citizens actually develops. In fact, the final determination is a philosophical or religious one.

For example, one might consider that the moment of fertilization is the moment of creation of a human being. Under that approach the development of that "life" could not be interfered with from that moment of fertilization. In that case no I.U.D.'s could be legally used by women though they are widely used throughout the country, according to Father Robert F. Drinan, former Dean of the Boston College Law School, and now United States Congressman.

There is no doubt whatever that countless individuals and several opinion molding groups in America are convinced that the Catholic Church is using its persuasion, its prestige and its political power to fight any change in the abortion laws. These individuals and associations are sometimes afraid to speak openly about the role of the Church lest they deepen the Church's antagonism to the causes they espouse. Drinan, Robert F., S.J., *"The Morality of Abortion Laws,"* 14 Cath. Lawyer 190, 195 Summer (1968).

For that reason the political activities of the Catholic Church and its proponents in opposing even *liberalization* of abortion laws remains an open secret which is difficult if not impossible to "prove" in a traditional legal sense. However, in reporting the passage by the Hawaii legislature of a bill repealing that state's abortion law, the New York Times stated that "The Roman Catholic Church waged a long battle to try to keep the abortion bill from passing." New York Times, 2/25/70, 1:5. The Hawaiian experience is plainly not an isolated experience.

Significantly, under the common law there appears to have been no legal proscription against abortion before the fetus was quick within the mother—and it was at that time that the soul was thought to enter the organism. Means, *supra*, at 426–8. At approximately, the time that the view of the Catholic Church shifted concerning the entry of the soul, laws concerning abortion did too—both moving back to the time of conception.**

What is more, according to Rabbi David M. Feldman, Author of *Birth Control in Jewish Law*, the position of the Catholic Church on the question of abortion is doctrinal rather than a general moral position. The position stems in part from an ancient interpretation of the Hebrew Septuagint, with respect to "ensoulment" leading to the proscription of abortion of a "formed" fetus. Feldman, *Birth Control in Jewish Law*, New York University Press 1968, pp. 257–8 and 269. It further stems from the position of the Church on original sin and baptism, which leads to the conclusion that if a fetus is not permitted to develop to term so that it can be baptized at birth, it is "worse than murder" for then the fetus is doomed to limbo. Feldman, *Ibid.*, pp. 268 and 270.

In contrast with the Catholic approach to abortion, under Jewish law, the welfare of the woman—her pain and suffering—is paramount. Feldman, *Ibid.*, pp. 291–2. In Jewish law, the fetus does not become a *person* until the moment of birth, Feldman, *Ibid.*, pp. 255 and 272. The fetus, at least in the early stages is considered part of its mother's body, Feldman, *Ibid.*, p. 265, and only when its head emerges is it inviolate. Feldman, *Ibid.*, p. 275. Therefore, in any number of situations in which abortion would be permissible under Jewish law it would be forbidden under the laws of Texas and Georgia and nearly every other state in the country as would be more consonant with Catholic doctrine.

Abortion laws throughout the country are thus based on a religious definition of when "human" life begins. As a result, no woman may legally terminate an unwanted pregnancy except under the most limited circumstances, because to do so would offend the religious precepts of others. She then, though forced to adopt certain beliefs, has her personal constitutional freedoms eroded by laws which not only favor one religious doctrine but actually enforce it. Thus, the Texas and Georgia as well as most other abortion laws are in direct conflict with constitutional rule that "[t]he government is neutral, and while protecting all, it prefers none, and it disparages none." *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 215 (1965). As this Court stated in that case:

The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or all orthodoxies. 374 U.S. at 222.

Just such fusion deprives countless of women each year of the most basic control over their bodies and their lives in a way which will affect them for the rest of their days, and all in violation of the constitutional proscription against the establishment of religion.

The establishment of religion's clause of the First Amendment means at least this: Neither a state nor Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or the remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a State nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state." *Everson* v. *Board of Education*, 330 U.S. 1, 15–16 (1947), citing *Reynolds* v. *United States*, 98 U.S. 145, 164 (1878).

The Texas and Georgia laws governing abortion constitute the most glaring example of the demolition of that wall. Furthermore, insisting that a woman carry to term each and every pregnancy which may occur the state is not only enforcing a particular religious belief but developing a form of right unique in American law. For, in no other instance does the right to live include the right to use another person's body—his or her kidney, heart and lungs. Yet the denial to women the right to an abortion gives a fetus the right to occupy an unwilling woman's body and use not only her uterus but every other organ of her body without her consent.

Thus stripped of the remaining religious justification for the prohibition of abortion, there is no argument sufficient to sustain the abridgement of a women's rights effected by the denial of abortion.

"Where there is a significant encroachment upon personal liberty, the State may prevail only by showing a subordinating interest which is compelling." *Griswold* v. *Connecticut, supra*, 381 U.S. at 497, citing *Bates* v. *City of Little Rock*, 361 U.S. 516, 524 (1960).

Amici urge this Court to consider the following questions:

Are the interests of society being served by a law which exposed over a million women last year to such risks [as described above]? Are the interests of society being served by women bearing unwanted children, subjected to the pressures of an emotionally and financially deprived existence? Are the interests of society being served by the population explosion we are now witnessing? *South Dakota* v. *Munson, supra*, slip opinion, p. 9.

Thus the real question is not "How can we justify abortion"? but "How can we justify compulsory childbearing?" Cisler, "Unfinished Business: Birth Control and Women's Liberation," *Sisterhood is Powerful*, ed., Robin Morgan, Random House, 1970, p. 278.

This Court must then conclude, as other courts have across the nation, that,

Upon a balancing of relevant interest, we hold that a woman's right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the state without a more compelling public necessity than is reflected in the statute in question. *Walsingham* v. *Florida, supra*, slip opinion, p. 12, citing *Babbitz* v. *McCann, supra*.

And further that,

The Court can find no compelling interest of the state and concludes that the right to choose to bear or not to bear children is a fundamental right of the individual woman to be exercised in any manner she chooses and which may not in any way be abridged by law. *People* v. *Robb, supra*, slip opinion, p. 9.

V. Younger v. Harris does not impair or lessen the jurisdiction, power or responsibility of this court to grant the relief requested

In *Younger* v. *Harris*, 91 S.Ct. 746 (1971), and its companion cases this Court refused to rule on the constitutionality of several state statutes challenged on First Amendment grounds. The Court held that the constitutional objections could and should be raised by the litigants in defense to a criminal prosecution, and the litigants would not be irreparably harmed by raising their constitutional rights in that forum. That is not the case here however.

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states of Georgia and Texas which reveal the same form of discrimination. In *Patterson* v. *Liberty Mutual Insurance Co.*, 147 S.E.2d 64 (1966), the Georgia Court of Appeals refused to allow a posthumous illegitimate child who brought a proceeding to recover compensation for death of the deceased employee, the child's father, to recover. In *Hargrove* v. *Lloyds Casualty Company of New York*, 66 S.W.2d 466 (1933), the Texas Court held that an illegitimate child could not recover compensation for her father's death under Workingman's Compensation Act. Thus there would seem to be a fundamental inconsistency in vigorously protecting the right of the child to be born and then denying that same child equal protection. Such protection of the property of the father from the claims of his out-of-wedlock children may well be yet another factor to encourage men to desert the children they have fathered and the mothers of those children.

**E.G., it is commonly accepted that the intrauterine device (IUD) acts as an abortive agent rather than as a contraceptive which prevents conception.

**This was coupled with crusades in Calvinist theology and New England Puritanism against sex and immorality. Lader, Lawrence, *Abortion*, Beacon Press (1966).

In the two cases before this Court the primary plaintiffs are women in need of abortions. Neither they, nor other women throughout the country, who daily have their rights denied by the Georgia, Texas and other abortion statutes, can turn to the state criminal process for a determination of their rights. For, the violation of their rights does not stem primarily from the fact that they may be prosecuted for having an abortion (though in rare cases they are), but from the fact that a very real threat of criminal prosecution of third parties prevents them from obtaining the medical care they require. As long as abortion laws such as those of Georgia and Texas are in effect they will not be able to obtain abortions. As the Supreme Court of the State of California recognized in *California* v. *Belous*, supra, 80 Cal. Rptr. at 366, since the doctor is risking his own freedom and professional career in performing an abortion, "Rather than being impartial, the physician has a 'direct, personal, substantial, pecuniary interest in reaching a conclusion' that the woman should not have an abortion." The situation of women barred from obtaining abortions by unconstitutional laws is therefore distinguishable from that of appellees in *Boyle* v. *Landry*, 91 S.Ct. 758 (1971). This Court found that they were deterred from exercising their constitutional rights only by their *own* "imaginary or speculative fears of prosecution." 91 S.Ct. at 758. Furthermore, women are not required to entrust the protection of their constitutional rights to a third party which has little interest in protecting those rights. *Perlman* v. *United States*, 247 U.S. 7, 12–13 (1918).

Amici have attempted to show that to require a woman to carry, give birth to and raise a child against her will is indeed irreparable harm sufficient to satisfy the standard of *Dyson* v. *Stein*, 91 S.Ct. 769 (1971), decided with *Younger* v. *Harris*, supra, in which the Court stated that,

...federal intervention affecting pending state criminal prosecutions, either by injunction or by declaratory judgment is proper only where irreparable injury is threatened. The existence of such injury is a matter to be determined carefully under the facts of each case.

The rights of women such as Mary Doe and Jane Roe who are denied the abortions they seek must not turn on whether some few medical personnel are courageous enough to open themselves to prosecution by performing the needed abortions, and then challenge the restrictive law in a criminal proceeding. This is too tenuous a thread for millions of women throughout the country to rest their constitutional rights on. In *Younger* v. *Harris, supra*, 91 S.Ct. at 751, this Court noted that it has long been considered appropriate for the federal courts to rule on the constitionality of state criminal statutes where,

...The threat to the plaintiff's federally protected rights [is] one that cannot be eliminated by his defense against a single criminal prosecution. See, e.g., *Ex Parte Young*, 209 U.S. 123, 145–7.

That is exactly the situation before the Court. Women are having their lives and bodies mangled and destroyed daily by abortion laws such as those of Georgia and Texas and cannot look to the state criminal process to rid themselves of the bonds of those laws. This Court must, therefore, exercise the "duty" of the federal courts to hear and decide federal constitutional claims, for the federal courts are the "...primary and powerful reliances for vindicating every right given by the Constitution...." *Zwickler* v. *Koota*, 381 U.S. 241, 247 (1967).

CONCLUSION

For the foregoing reasons Amici urge this Court to find Georgia Code Annotated § 26–1201 and Texas Penal Code Articles 1191, 1192, 1193, 1194 and 1196 violate the most fundamental rights of women guaranteed by the United States Constitution.

Respectfully submitted,

NANCY STEARNS
c/o Center for Constitutional Rights,
588 Ninth Avenue, New York, New York 10036.

The attorney for amici wishes to note with appreciation the invaluable assistance of Elizabeth Schneider of New York University School and Chris Stern of Brooklyn Law School in the preparation of this Brief.

RELIGION, MORALITY, AND ABORTION: A CONSTITUTIONAL APPRAISAL

(By Mr. Justice Tom C. Clark) *

2 Loyola Univ. Law Review 1 (1969)

Thought without action is an abortion: action without thought is folly.[1]

Our society is currently in the midst of a sexual revolution which has cast the problem of abortion into the forefront of religious, medical, and legal thought. In my day at the bar all discussion of abortion was taboo. For more than sixty years the American Medical Association had a negative policy respecting abortion. The A.M.A. often sought the prosecution of any doctor who engaged in the practice of abortion, regardless of the merits of the individual situation. Society's general attitude toward abortion was such that the patient was ostracised and the doctor was disgraced. As in so many other facets of its moral code, however, society was hypocritical in its behavior. Despite the public pronouncements against its practice, abortions increased, especially among married women, and judicial action against the participants decreased in proportion.[2]

Some social commentators argue that Freud prepared the way for the Kinsey Report, which in turn set the stage for the sexual permissiveness that Reinhold Niebuhr called "moral anarchism." [3] This permeating permissiveness engendered a need for more efficient birth control methods, such as "the pill," and precipitated the doom of the old hypocrisy.

The law, lagging behind as usual, began to emerge from its quagmire and rid itself of the archaic restraints on abortion. In 1962 the American Law Institute proposed an affirmative policy declaring that the termination of pregnancy is justified whenever (1) its continuance would gravely impair the physical or mental health of the mother, (2) the child would be born with grave physical or mental defects, or (3) the pregnancy was the result of rape, incest, or other felonious intercourse.[4]

Within five years of this proposal, the A.M.A. reversed its negative policy and adopted the A.L.I. proposal with only a few nuances.[5] During the next two years, five states liberalized their abortion laws and adopted the A.L.I. proposal.[6]

A further liberalization occurred in Great Britain with the adoption of the 1967 Abortion Act, which permits doctors to consider the mother's "actual or forseeable environment" in deciding whether an abortion is necessary.[7] The American College of Obstetricians and Gynecologists (A.C.O.G.) recently advocated enactment of similar legislation in this country.[8] While the permissiveness of the legislation would contradict existing laws in all states, the A.C.O.G. made it clear that it does not counsel disobedience to the law. It merely recommended liberalization and repeal of innconsistent laws. It did not, however, advocate the legalization of abortion for any unwanted pregnancy or as a population control device.

Various religious, medical, psychological, and legal organizations have been striving to reach some level of accord on the issues involved in promulgating a realistic and acceptable policy toward abortion. Emphasis on this topic is the result of many factors, including the chaotic state of thinking that prevails among the professions and the public, and the medical, emotional, and legal consequences which aborticide has on today's society.

The Christian Medical Society's symposium on controlling human reproduction provides a recent illustration of the disagreement that exists among professionals concerning abortion. Distinguished clerics, psychologists, doctors, and lawyers sought to determine what course of action should be followed. They were unable to answer many important questions, such as: Is the control of human reproduction against the will and spirit of God? At what stage of the gestation period does the fetus acquire human status? What are the constitutional limitations upon the State in prohibiting or limiting the control of reproduction? I ask myself, "Heaven knows; who can tell? Who shall decide when experts disagree?" These and many other questions must be answered if we are to attain our goal of an aborticide policy that is responsible to modern society's needs and desires.[9]

In a recent conference the Association for the Study of Abortion experienced far greater success in agreeing on an aborticide policy. Dr. Robert Hall, President of the Association, said that the conference was designed to "relate what we know about abortion, and to determine what, if any, extent our attitude toward abortion should change with changing times. . . ." [10] The conference reviewed numerous reports dealing with present abortion laws. One of these reports concerned the effect of California's recently liberalized abortion law. It was noted that while the number of therapeutic abortions performed in California hospitals this year will rise from six hundred to about four thousand, there will continue to be some one hundred thousand illegal abortions performed in that state, because doctors are concerned about risking a prison sentence for an incorrect interpretation of ambiguous provisions of the liberalized law.[11] The conference was also informed that psychiatrists and physicians in various states were referring patients to doctors in states which have more liberal abortion laws. This practice renders the availability of legal abortion dependent upon the woman's ability to reach such states.[12] Many doctors admitted privately that they and most of their non-Catholic colleagues perform several illegal abortions each month. Kenneth R. Whittemere reported that his recent interviews revealed that in one small Southern city, women had a choice between "a chiropractor, an antique dealer, a mid-wife, a mechanic and a doctor dissatisfied with his profession to perform the operation." [13]

The Association reached an almost unanimous conclusion that all abortion laws should be abolished and that the right of childbirth should be left to each woman acting on the advice of her doctor. This would have the effect of removing the issue from the hands of the legislatures and the courts, which are virtually helpless to decide an ethical question as controversial and far-reaching as abortion.[14] Whether or not we agree with the Association's recommendations, it is readily apparent at this point that a uniform scheme concerning abortion is highly desirous.

Throughout history religious belief has wielded a vital influence on society's attitude regarding abortion. The religious issues involved are perhaps the most frequently debated aspects of abortion. At the center of the ecclesiastical debate is the concept of "ensoulment" or "personhood," *i.e.*, the time at which the fetus becomes a human organism. The Reverend Joseph F. Ronseel of Fordham University admitted that no one can determine with certainty the exact moment at which "ensoulment" occurs, but we must deal with the moral problems of aborting a fetus even if it has not taken place.[15] Many

Footnotes at end of article.

Roman Catholics believe that the soul is a gift of God given at conception. This leads to the conclusion that aborting a pregnancy at any time amounts to the taking of a human life and is therefore against the will of God. Others, including some Catholics, believe that abortion should be legal until the baby is viable, *i.e.*, able to support itself outside the womb. In balancing the evils, the latter conclude that the evil of destroying the fetus is outweighed by the social evils accompanying forced pregnancy and childbirth.[16]

Most civilizations of antiquity prohibited the practice of abortion. Ancient Judaism prohibited birth control except in times of famine.[17] Assyrian law imposed the death penalty upon any person participating in an abortion, including the procurer.[18] Even pagan writers described abortion as an evil act prohibited by law.[19]

The New Testament is devoid of pronouncements bearing directly on the issue of birth control or abortion. The Old Testament, however, does not condemn abortion as a capital offense since the fetus was not regarded as possessing a soul within the Sixth Commandment proscription.[20] It does declare, however, that conception is a gift of God which can be withdrawn at His will.[21] Many theologians today argue that man must not destroy what God has created and that aborting a pregnancy destroys the gift of human life.[22]

The medical profession is far from agreeing on the time at which the fetus becomes a human life. Some physicians argue that abortion should be permitted with impunity at any time up to the sixth month of pregnancy since prior to that time the fetus is no more than a growing plant.[23] On the other hand, many eminent physicians believe that the fertilized ovum has human life from the time of conception.[24] In support of this argument they refer to the International Code of Medical Ethics, which states that a physician will maintain the utmost respect for human life, from the time of its conception. A third view is that the decision to terminate a pregnancy must be made according to the circumstances of the particular case. Among the factors to be considered are the duration of the pregnancy, the physical and mental health of the mother, and the risk of serious fetal abnormality. This places the burden of decision upon the doctor and renders the selection of the physician a governing factor in securing permission to perform a therapeutic abortion.[25]

Sociologists have found themselves in a similar quandary over the issue. Some of these social philosophers argue that man is not merely a chemical machine and that he possesses a soul from the earliest stages of fetal development. Therefore the fetus cannot be destroyed with impunity. The control of human reproduction, according to this view, should concentrate on the prevention of conception rather than on abortion.[26] Other sociologists believe that there is no conclusive evidence or persuasive argument that the fetus is human.[27] Indeed, it cannot interact with other human beings. Therefore, there is no proof of life in the sense that the law contemplates proof of fact.

The moving spirit of the times also raises moral issues that divide the disciplines within themselves. A group of one hundred psychiatrists were questioned on the morality of abortion.[28] Twenty-four agreed that abortion should be available upon demand at an appropriate stage of pregnancy. Fifty-six, however, would require consideration of all of the medical and social factors involved in each case before deciding whether to terminate the pregnancy. Sixteen of those questioned would abort only when actual or threatened maternal disaster was present. Only four expressed other views. While this indicates a vast departure from the Christian concept, it does reveal residuals of morality affecting the opinions of over two-thirds of the group. In other words, over two-thirds of the group would not abort a pregnancy solely on demand.

Despite the fact that religious belief continues to permeate our attitude toward abortion, most people today agree with Justice Holmes that "moral predilections must not be allowed to influence our minds in settling legal distinctions." [29] This is illustrated by the fact that the present change in attitude toward abortion has developed while the need for abortion has diminished as a technique to save the life or health of the mother or to prevent fetal deformities. Despite the medical developments, the demand for abortions has increased astronomically.[30] This indicates a definite change in social mores, which is undoubtedly the result of increased knowledge and use of abortion. This attitude of permissiveness is replacing the hypocrisy that prevailed in the last generation.

A major contributing factor to this change in attitude has been the growing antagonism toward the double standard which permits those with social status and financial ability to obtain abortions, while those in the lower social and economic classes are denied this opportunity. We are in the midst of a worldwide movement to make "the pill" and abortion available in the slums as well as on Fifth Avenue. The statistics illustrate the disparity between the affluent and the nonaffluent. Three counties surrounding San Francisco are relatively affluent. These counties account for sixteen per cent of the live births and fifty per cent of the abortions in California. The less affluent Los Angeles County with its widespread slum areas accounts for sixty per cent of the live births and twenty-three per cent of the abortions in California.[31] These facts demonstrate quite clearly that the affluent areas account for a number of abortions disproportionate to their population density.

The increasing number of abortions subjects physicians to increased dangers of liability for incorrectly interpreting a statute. It appears that doctors face an uncertain fate when performing an abortion. This uncertainty will continue unless the legislatures or courts provide relief from liability. Very few states, if any, will repeal all abortion laws as the Association for the Study of Abortion has recommended. Some states, however, may liberalize their laws in accordance with the A.L.I. suggestion, but we have already seen that in states such as California this is an inadequate remedy in many respects. If the medical profession is to be accorded complete protection, it will have to come through the judicial system.

The Supreme Court of the United States has gone far—some critics contend too far—in permitting individual action in the areas of the Bill of Rights. It has not, however, dealt directly with the problem under discussion, nor do the decided cases cast much light on its solution. The best that we can do is examine related areas and draw some analogies.

In 1922 the Court held that the right "to marry, establish a home and bring up children" was an essential liberty within the guarantees of the Fourteenth Amendment.[32] In 1925 a public school statute requiring attendance exclusively at state schools was declared unconstitutional on the ground that it unreasonably interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control." [33] This concept was later extended to include "the private realm of family life which the state cannot enter."[34] And in 1960 the Court declared, in very broad language, that where State action significantly encroached upon personal liberty, its action would be invalid unless the State had a compelling subordinating interest in the particular activity.[35] Finally, in *Griswold* v. *Connecticut* [36] the Court struck down the state's statute prohibiting the use of contraceptives. The statute was found to operate upon "an intimate relation of husband and wife" which came within the zone of privacy created by several constitutional fundamental guarantees, the penumbras of which gave protection to the sancity of a man's home and the privacies of his life. The Court determined that the statute was aimed at use rather than regulation and therefore violated the principle that legislation must not be unnecessarily broad. This does not mean that judges are given a free rein to strike down state regulatory statutes. They must look to the collective conscience of our society determining rights are fundamental and therefore protected by the Constitution.

The result of these decisions is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children, and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution. No one will deny that a State has a valid interest in regulating the well-being of its inhabitants, especially when it is dealing with children, who are more susceptible to undesirable influences. We have also seen that a State may not unreasonably interfere with the intimate relations of its inhabitants. When deciding on the constitutional restraints imposed on a State's interference with individual rights, the vital question becomes one of balancing. It must be determined at what point the State is interfering with individuals and at what point it is exercising valid authority by regulating the well-being of children.

In his concurrence in Griswold, my brother Goldberg asked whether a decree requiring all husbands and wives to be sterilized after the birth of ten children would be valid. He answered the question in the negative.[37] But suppose that the husband and wife voluntarily submitted to sterilization. Would it then violate the Constitution? I think not. Does it therefore follow that voluntary destruction of the fetus is also protected from interference by the State? Perhaps—unless life is present so that the State's compelling subordinating interest in the life of one of its people predominates. However, I submit that until the time that life is present, the State could not interfere with the interruption of pregnancy through abortion performed in a hospital or under appropriate clinical conditions. I say this because State interference is permissible only if reasonably necessary to the effectuation of a legitimate and compelling State interest.[38] Prior to the time that life is present in the fetus, what interest does the State have? Procreation is certainly no longer a legitimate or compelling State interest in these days of burgeoning populations. Moreover, abortion falls within that sensitive area of privacy—the marital relation. One of the basic values of this privacy is birth control, as evidenced by the Griswold decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention has failed?

The common law courts uniformly held that an infant could not be the subject of a homicide until its complete expulsion from the body of the mother and the establishment of an independent existence.[39] The distinction between fetal life and independent life is that the latter has an independent circulatory system.[40] Hence, where the evidence showed that an infant was killed before its birth was complete or was killed by means

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used to assist in its delivery, it was not deemed a homicide.[41] Therefore, under the common law, abortion could not be murder. These concepts and distinctions have been somewhat eroded in recent years. At present the courts do not agree on the time when life begins. The courts, however, have held an accoucheur responsible for prenatal brain damage to an infant in a viable state.[42] In this line of cases, the courts have found that the unborn infant was a separate biological entity and hence a legal one in contemplation of law, indicating a departure from the requirement of an independent existence. From this reasoning the courts may well take the unborn child into their protective custody. Indications of such a trend are illustrated by the abolition of the viability rule in some jurisdictions [43] and the repudiation of the "live birth" doctrine by fourteen states.[44]

To say that life is present at conception is to give recognition to the potential, rather than the actual. The unfertilized egg has life, and if fertilized, it takes on human proportions. But the law deals in reality, not obscurity—the known rather than the unknown. When sperm meets egg life may eventually form, but quite often it does not. The law does not deal in speculation. The phenomenon of life takes time to develop, and until it is actually present, it cannot be destroyed. Its interruption prior to formation would hardly be homicide, and as we have seen, society does not regard it as such. The rites of Baptism are not performed and death certificates are not required when a miscarriage occurs.[45] No prosecutor has ever returned a murder indictment charging the taking of the life of a fetus. This would not be the case if the fetus constituted human life.

It has been urged that the courts are the proper forum to determine when life begins. I submit, however, that the professionals are better able to determine when life begins than are the courts. Tort cases might cast some light on the issue,[46] but I would prefer that the courts yield to the expert testimony of doctors. This testimony would vary greatly, but that is nothing new to our judicial system.

This is not a question that will be easily resolved. Few questions that reach the Supreme Court are. As was stated at the Christian Medical Society's Symposium, "professionals . . . do not wish to play God with human lives, whether in being or inchoate with life. But we can inform our judgment . . . by the widest interchange, airing and consensus. Humility is a large part of every professional's code." [47] It must be remembered that many imponderables are a part of Supreme Court adjudications.

Accommodation of conflicting doctrine is more difficult to achieve in the judicial than in the legislative process. Courts cannot reach out to reform our society. A problem comes to the Court in the form of a justiciable issue and is narrowly drawn, rendering the Court's ruling contracted and finespun. Legislatures, on the other hand have such facilities for investigation as hearings and may address themselves to the necessities of broad social needs and the correction of evils, both probable and existing. As Mr. Justice Cardozo said, "Legislation can eradicate a cancer, right some hoary wrong, correct some definitely established evil, which defies the feebler remedies, the distinctions and fictions familiar to the judicial process." [48]

The courts work on a case-by-case system which deals with the past rather than the future. Society would not have the benefit of the sweeping effect of a statute, nor would the doctor have the protection that he is entitled to receive. The case method would be slow, expensive, and possibly disastrous. It is for the legislature to determine the proper balance, *i.e.*, that point between prevention of conception and viability of the fetus which would give the State the compelling subordinating interest so that it may regulate or prohibit abortion without violating the individual's constitutionally protected rights.

The present climate seems favorable for immediate legislative action. Five states have already led the way.[49] With appropriate action, many more will follow suit in liberalizing their abortion laws. But this process will take less talk and more action. As Nehru once said:

"I am tired of people who merely talk about things. However wise you may be, you can never enter into the spirit of a thing if you only talk about it and do nothing. Even scientists have a tendency to let a wonderful experiment remain an experiment once it has been performed. The next stage somehow does not come. They may well say that the next stage is somebody else's job, but I think if the scientist had a sense of practical application, he would either try to do it himself, or get somebody else to do it. This association of thought with action is, I think, of utmost importance. Thought without action is an abortion; action without thought is folly." [50]

FOOTNOTES

* Associate Justice, Supreme Court of United States (Retired), 1949–67.

[1] *The Wisdom of Nehru*, 34 WISDOM (The Wisdom of India ed. 1960).

[2] R. THOMLINSON, POPULATION DYNAMICS 198–99 (1965).

[3] Niebuhr, *Kinsey and the Moral Problem of Man's Sexual Life*, in AN ANALYSIS OF THE KINSEY REPORTS ON SEXUAL BEHAVIOR IN THE HUMAN MALE AND FEMALE 62 (D. Geddes ed. 1954).

[4] MODEL PENAL CODE § 230.3(2) (Proposed Official Draft, 1962).

[5] Committee on Human Reproduction, *AMA Policy on Therapeutic Abortion*, 201 J.A.M.A. 544 (Aug., 1967).

[6] CAL. HEALTH & SAFETY CODE §§ 25950–54 (West Supp. 1967); COLO. REV. STATS. 40–2–50 (Perm. Cumm. Supp. 1968); GA. CODE ANN. § 26–1202 (effective July 1, 1969), LAWS OF MD. ch. 470 (Supp. 1968); N.C. GEN. STAT. § 14–45.1 (Supp. 1967).

[7] Abortion Act 1967, c. 87, at 2033.

[8] *Just How Great Are the Risks of The Pill?*, MEDICAL WORLD NEWS, May 24, 1968, at 23.

[9] The theological and medical scholars did agree on *A Protestant Affirmation*. It did not undertake to answer any of the questions posed in the text. In substance, the consensus concluded that as to abortion "each case should be considered individually, taking into account the various factors involved and using Christian principles of ethics." It suggested that suitable cases for abortion would fall within the scope of the A.C.O.G. statement, but not including abortion for convenience only or on demand. *See* CHRISTIAN MED. SOC'Y J. (Nov.-Dec., 1968).

[10] Meeting of the Ass'n for the Study of Abortion, Hot Springs, Va., Nov. 18, 1968, reported in N.Y. Times, Nov. 24, 1968, at 77, col. 1.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] For studies in this area see L. EPSTEIN, MARRIAGE LAWS IN THE BIBLE AND THE TALMUD (1942); L. EPSTEIN, SEX LAWS AND CUSTOMS IN JUDAISM (1948).

[18] H. SAGGS, THE GREATNESS THAT WAS BABYLON 215 (1962).

[19] PAULY'S REAL-ENCLOPÄDIE DER CLASSICHEN ALTERTUMSWISSENSCHAFT (Wisowa ed. 1962).

[20] *Exodus* 3:21.

[21] *Genesis* 1:28, 4:1, 11:30, *Ruth* 4:13.

[22] Montgomery, *How to Decide the Birth Control Question*, CHRISTIANITY TODAY, March 4, 1966, at 10.

[23] Stern, *The Issue of Legalized Abortion*, 88 CAN. MED. ASS'N J. 899 (1963); J. FLETCHER, MORALS AND MEDICINE 152 (1967): address by E. Bidinton, Symposium of Christian Medical Society, Aug., 1968.

[24] *See generally* PHILOSOPHY AND ETHICS IN MEDICINE (M. Gelfand ed. 1968).

[25] *See Therapeutic Abortion*, 98 CAN. MED. ASS'N J. 512 (1968).

[26] R. ETTINGER, THE PROSPECT OF IMMORTALITY 132 (1962). *But see* Hudeeczek, *De Tempore Animatianis Foetus Human Secundum Embryologian Hodierman*, in XXIX ANGELCUM 162–81 (1952). *See also Cryonics and Orthodoxy*, XII CHRISTIANITY TODAY 816 (1968).

[27] Address by John Scanzoni, Ph. D., Assoc-Prof. of Sociology, Indiana Univ., Nat'l Convention of Christian Medical Society, Aug., 1968.

[28] Howells, *Legalizing Abortion*, 1 LANCET 728 (1967).

[29] O. W. HOLMES, THE COMMON LAW, (1881).

[30] *The Cost of Life*, 60 PROCEEDINGS OF ROYAL SOC'Y OF MEDICINE, 1235 (1962); Cogan, *A Medical Social Worker Looks as the New Abortion Law*, 2 BRITISH MED. J. 235 (1968).

[31] N.Y. Times, Nov, 24, 1968, at 77, col. 1.

[32] Meyer v. Nebraska, 262 U.S. 390 (1923).

[33] Pierce v. Society of Sisters, 268 U.S. 510, 534–35, (1925).

[34] Prince v. Massachusetts, 321 U.S.C. 158, (1944).

[35] Bates v. Little Rock, 361 U.S. 516, 524 (1960).

[36] 381 U.S.C. 479 (1965).

[37] *Id.*, at 482.

[38] *Id.* at 503 (concurring opinion).

[39] Morgan v. State, 148 Tenn. 417, 256 S.W. 433 (1923).

[40] State v. Prude, 76 Miss. 543, 24 So. 871 (1899).

[41] Evans v. State, 48 Tex. Cr. App. 589, 89 S.W. 974 (1905).

[42] Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946).

[43] *See* PROSSER ON TORTS (3d. ed. 1964).

[44] Del Tufo, *Recovery for Prenatal Torts: Actions for Wrongful Death*, 15 RUTGERS L. REV. 61 (1960).

[45] Schwartz, *Abortion and 19th Century Laws*, TRIAL June–July, 1967, at 41.

[46] Kwaterski v. State Farm Mut. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967); Hatala v. Markiewicz, 26 Conn. Supp. 358, 224, A.2d 406 (1966). *Contra*, Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954); Marko v. Philadelphia Transp. Co., 420 Pa. 124, 216 A.2d 502 (1966).

[47] Prof. Thomas Lambert, Jr., Editor-in-Chief, American Trial Lawyers Ass'n, former Prof. of Law, Boston Univ.

[48] B. CARDOZO, GROWTH OF THE LAW 134 (1924).

[49] Georgia, Maryland, North Carolina, California, and Colorado.

[50] WISDOM, *supra* note 1.

[37 N.Y.U. Law Review 787 (1962)]

ARE THERE "CERTAIN RIGHTS . . . RETAINED BY THE PEOPLE"?

(By Norman Redlich *)

The overriding constitutional issue of our time has been the split between those who view the Bill of Rights as a firm judicial mandate empowering the Supreme Court to invalidate procedures and statutes which violate its specific prohibitions and those who consider the Bill of Rights more as a general expression of our nation's tenets to be balanced on the judicial scales along with such factors as the legislative needs and the judge's understanding of basic standards of decency and justice.

As a result of constant restatements of strongly held positions, the libertarian justices have conveyed the impression that individual liberties can best be protected by a vigorous enforcement of the first eight

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amendments and by the application of these amendments to the states either in whole or in major part. While this is an understandable position in terms of the great constitutional controversies of the past twenty years, we may be approaching an era where human dignity and liberty will require the protection of rights other than those contained in the first eight amendments. It is the purpose of this discussion to consider whether a libertarian judicial philosophy can stand firmly for a strict interpretation of the Bill of Rights and be sufficiently flexible to meet new and formidable challenges to individual liberty.

THE ADAMSON CONTROVERSY

In 1947 Justices Black and Frankfurter set the stage for what has been a continuing controversy concerning the meaning of the first paragraph of the Fourteenth Amendment. Although Justice Frankfurter did not speak for the Court in *Adamson* v. *California*,[1] and Justice Black was not the sole dissenter, the *Adamson* case connotes to all students of constitutional law the articulate expounding of two divergent constitutional philosophies—Justice Frankfurter's belief in flexible due process and Justice Black's belief that the Fourteenth Amendment was intended to make the Bill of Rights applicable against the states.[2]

A sophisticated observer promptly dubbed the controversy a futile search for objectivity in an area where the subjective views of the individual justices were far more controlling than the verbal formulations of their positions.[3] By divorcing words from the men who speak them, one might argue that a judge concerned with human rights could encompass them within a broad definition of a "scheme of ordered liberty," [4] and a judge indifferent to such claims could incorporate the Bill of Rights into the Fourteenth Amendment and then interpret their provisions narrowly. Quite often, in fact, proponents of each position have used their different judicial approaches to reach the same result.[5] There are a few instances where judges using a flexible standard of due process have actually reached more libertarian results than did those justices who felt themselves bound by the written Bill of Rights but did not find the asserted claim to be contained within its provisions.[6]

It would be a mistake to conclude, however, that the dispute over the meaning of the Fourteenth Amendment is merely a matter of semantics, that only the results rather than the reasons are important. It is no accident that in the fifteen years since the *Adamson* decision the justices most generally associated with a libertarian approach to individual rights have spoken in terms of the incorporation of specific guarantees of the Bill of Rights into the Fourteenth Amendment, while the adherents of a flexible concept of due process most often find that it is easier to be flexible on the side of the state.

One has only to look at the substantive area of law which gave rise to the *Adamson* decision to see that those who believe that the Fourteenth Amendment incorporates the privilege against self-incrimination will most frequently sustain the individual's claim that the privilege has been violated, while those who view due process as encompassing "those canons of decency and fairness which express the notions of justice of English-speaking peoples" [7] will tend to find that the state procedures do not violate those canons. In cases dealing with the right of the state to discharge an employee who pleads the privilege,[8] or to prevent him from practicing law,[9] or to prosecute someone on the basis of testimony compelled in another jurisdiction under promise of immunity,[10] we generally find a rough division of the Court along the lines suggested by the competing philosophies of the *Adamson* case.

A similar division occurs in cases dealing with the right to counsel. While in recent years the Court has been fairly consistent in its use of the flexible due process standard of *Betts v. Brady* [11] to sustain the right to counsel,[12] in those cases where the claim was denied the dissenters were those who felt that the Sixth Amendment's right to the assistance of counsel should be applied *in toto* as a restriction against the states.[13] In the area of Fourth Amendment protections we find the same pattern.[14]

The years since *Adamson* have confirmed Justice Black's fearful prediction in his dissent: "I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its points of departure in interpreting and enforcing that Bill of Rights.[15] It requires a high level of courage for justices to strike down existing procedures and statutes when reliance is placed on specific constitutional provisions. But if, instead of relying on specific provisions, judges substitute their own views as to what constitutes basic canons of decency and fairness, then the judge himself, rather than the Constitution, must bear the full brunt of the inevitable public pressures, and the area of individual liberty will inevitably diminish." [16]

THE COMING END OF THE ADAMSON CONTROVERSY

We have seen how the *Adamson* controversy has demonstrated the importance of a written Bill of Rights, as opposed to the vague flexible standard of due process, in the protection of individual liberties. Viewed in the broad sweep of history, the *Adamson* case, and its important predecessor, *Palko v. Connecticut*,[17] brought to the forefront an issue which has inhered in the federal system ever since the Supreme Court in *Barron v. Baltimore* [18] held that the Bill of Rights did not act as a limitation on the powers of the states. The issue may be simply stated: were the states to be raised to the standards emblematized by the Bill of Rights or was the Bill of Rights to be watered down to conform to the lower standards of state governments? The adoption of the Fourteenth and Fifteen Amendments, containing specific restrictions on state power, transferred to the Federal judiciary the ultimate power to resolve the question.

Justice Brennan has painted what is probably the most accurate word picture to describe the role of the Supreme Court in this area when he said: "The Court has opened a door through the Fourteenth Amendment's due process clause. During the last half century the Court has opened that door to admit some of the federal list. Moreover, the Court has indicated that the door may be opened to still more." [19] This is Justice Brennan's restatement of Justice Cardozo's position in *Palko* that certain federal rights have been brought into the Fourteenth Amendment "by a process of absorption." [20]

Judges, teachers and advocates have debated for so long the *Palko-Adamson* question of whether the Fourteenth Amendment was intended to encompass the provisions of the Bill of Rights that they have failed to perceive how near we are to the end of this phase of the controversy.

A long line of decisions has established that the protections of the First Amendment apply equally against the states.[21] Two very recent opinions, *Engel* v. *Vitale* [22] and *Wood* v. *Georgia*,[23] were decided specifically in terms of the "First and Fourteenth Amendments," thus re-emphasizing that the same standard is to apply whether the governmental practice is challenged directly under the First Amendment or indirectly through the due process clause of the Fourteenth Amendment. The Fourth Amendment guarantee against unreasonable searches and seizures was "absorbed" in 1949 [24] and given full breadth by *Mapp* v. *Ohio* [25] in 1961.

In *Snyder* v. *Massachusetts*,[26] the Court catalogued some of the rights in the Sixth Amendment and stated that the accused must be informed of the nature of the charge.[27] Moreover, the Court assumed, without squarely deciding, that "the privilege to confront one's accusers and cross-examine them face to face," which is secured by the Sixth Amendment, "is reinforced by the Fourteenth Amendment." [28] We can hopefully and confidently expect that when the Court reconsiders *Betts* v. *Brady* during the October 1962 term,[29] it will finally require the states to assign counsel to indigent defendants in all criminal cases, thereby incorporating fully the Sixth Amendment's guarantee of assistance of counsel.

Only last June the Court held that a California statute which made it a crime to be addicted to narcotics violated the "Eighth and Fourteenth Amendments." [30] And for sixty-five years the states have been compelled to adhere to the commands of the Fifth Amendment that "just compensation" must be paid when private property is taken for public use.[31]

Some provisions of the Bill of Rights have been specifically held not to apply to the states, notably the Seventh Amendment's requirement for a jury trial in civil cases [32] and the Fifth Amendment's provision for a grand jury indictment.[33] Some important areas are uncertain. The Fifth Amendment's protection against double jeopardy, for example, while never excluded from the Fourteenth Amendment,[34] has been narrowly interpreted. At the same time the Court has implied that the defendant's claim might be sustained if an actual case of double jeopardy, as so defined by the Court,[35] were to arise. The Court has stated in dicta that a jury might not be necessary in all criminal cases,[36] but there is good reason for Justice Brennan's apparent skepticism that these dicta would survive a real case in which the state eliminated jury trials for serious crimes.[37]

Assuming the imminent demise of *Betts v. Brady*,[38] the one major protection of the Bill of Rights which remains specifically excluded from application to the states is the privilege against self-incrimination. Despite recent reaffirmation [39] of the rule of the *Adamson* case and *Twining v. New Jersey*,[40] I believe that the time is not far off when the courts will reconsider these cases and hold that the prosecutor may not comment on the defendant's failure to testify, thereby applying the privilege against self-incrimination to the states. Certain aspects of the privilege have already been adopted as part of due process,[41] and the *Mapp* case, in applying the exclusionary rule to the states, indicated strongly that compulsory self-incrimination and unconstitutionally obtained evidence were too closely related to be considered separately.[42] Even before *Mapp*, one member of the Court had said that "a cloud has plainly been cast on the soundness of *Twining* and *Adamson* by our decisions absorbing the First and Fourth Amendments in the Fourteenth." [43] The *Mapp* case reinforces this conclusion. It is important to add that the overruling of *Adamson* and *Twining* would have far less effect on state judicial administration than was caused by the adoption of the exclusionary rule in the *Mapp* case,[44] the free transcript rule in *Griffin v. Illinois*,[45] or some of the other procedural safeguards which have been imposed through the due process clause.[46] All of the states recognize the privilege against self-incrimination, and the vast majority forbid comment by the prosecution on the defendant's failure to testify.[47]

As the Court moves inexorably in the direction of applying the important provisions of the Bill of Rights to the states,

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the principal attention will be devoted to the meaning of these provisions rather than to the question of whether they apply at all. The first eight amendments, with relatively unimportant exceptions, would then form the basic ingredients of the rights of all Americans against all governments in our country.

ARE THE FIRST EIGHT AMENDMENTS ENOUGH?

Does the absorption of the major provisions of the Bill of Rights into the Fourteenth Amendment mean that Americans must consider their rights as rooted only in the specific provisions of the first eight amendments and those additional restrictions on governmental power spelled out in the main body of the Constitution? [48] To suggest that the people have judicially enforceable rights other than those specifically enumerated in the Constitution raises for many the spectre of conservative jurists striking down regulator legislation under the banner of "freedom of contract." [49] Justice Black's dissents in *Adamson v. California* and *Betts v. Brady* plead for a concept of judicial review based only on specific constitutional provisions lest another court in another day use a flexible concept of due process to re-enact the sorry history of the mid-1930's.

The New Deal constitutional crisis has understandably had a profound effect on current judicial attitudes. It has left all of the justices in agreement that on matters of economic and social policy the people must have their way unless barred by a specific constitutional prohibition. It has led some justices to extend this attitude of self-restraint to the area of civil liberties in the face of the anti-Communist public pressures of the cold war.[50] And it has caused justices who believe deeply in the specific guarantees in the Bill of Rights to eschew the assertion of "fundamental rights" not found in the Bill of Rights for fear that other justices would use the same words to undermine the Bill of Rights and to impose their personal social and economic philosophies upon the people.[51]

Whatever historical justification may have existed for libertarian justices to confine their thinking about human rights to the specifically enumerated provisions of the Constitution, I believe that the time has come for a fresh appraisal of this attitude. This was an understandable position when the controversy was posed in terms of flexible due process versus a Bill of Rights. As already indicated, however, most of the major provisions of the Bill of Rights have either been incorporated into the Fourteenth Amendment, or are likely to be in the near future. Today we are more concerned with the interpretation of these provisions at both the state and federal level. To assert that the people have certain rights other than those specifically mentioned in the Constitution would not dilute the Bill of Rights but would add to it. Nor should we be concerned that the assertion of such rights would impair the principle of judicial deference on matters of economic and social policy. However valid may have been the fears of Justice Black in 1947, we now have the experience of fifteen additional years from which we can draw the conclusion that this issue is settled.

The well-publicized case concerning the constitutionality of Connecticut's birth control laws may provide the opportunity for a reconsideration of basic judicial attitudes toward the individual's rights in a free society. When the well thought out formulae of the past fail to provide the answer to a case which raises issues of such fundamental importance, perhaps it is time to pause and look for fresh concepts.

THE BIRTH CONTROL CASE

Under Connecticut law any person "who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." [52] In addition, the "accessories" provision of Connecticut's laws permits the punishment "as if he were the principal offender" of any person "who assists, abets, counsels, causes, hires or commands another to commit any offense." [53]

In 1940 the state, in what has been described as a test case, prosecuted two doctors and a nurse as "accessories," charging them with disseminating contraceptive information. The Supreme Court of Errors and Appeals of Connecticut sustained the constitutionality of the act and the state promptly moved to dismiss the information.[54] Three years later the United States Supreme Court held that a doctor, who sought a declaration of unconstitutionality on grounds that the act endangered the health of his patients, did not have "standing to assert" the constitutional question.[55]

In 1961 the Supreme Court in *Poe* v. *Ullman* [56] again refused to decide the constitutionality of the act even though the action for a declaratory judgment was brought by married individuals who claimed that the enforcement of the statute would imperil their health and life. An additional action was brought by the doctor asserting that the statute, by preventing him from giving advice to one of the patients mentioned in the other action, deprived him of liberty and property without due process of law. The Court held that the failure of the state to enforce the statutes "deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication." [57] Justice Frankfurter's opinion, in which three other Justices joined, said that the patients themselves had no legitimate fear of prosecution and that the doctor's fear of prosecution was too "chimerical" to form the basis of a justiciable controversy either with regard to the doctor or his patients.

Justice Brennan concurred in a brief opinion stating that the proper time to consider the constitutional question is when individuals are prosecuted for the opening of birth-control clinics or when "the State makes a definite and concrete threat to enforce these laws against individual married couples." [58] Justices Black and Stewart dissented on the issue of justiciability and Justices Harlan and Douglas, in separate opinions, argued that the case should have been heard and that the statute was unconstitutional. Since the state has subsequently prosecuted individuals for operating a birth-control clinic and for giving information about the use of contraceptives,[59] it is almost certain that the case will come back to the Court in a form which will compel adjudication.

If one views the Connecticut statute simply as a state regulation of health and morals, there would be little difficulty in sustaining its validity in terms reminiscent of the ringing dissents in the cases where the Court sanctified such concepts as freedom of contract. One could easily transpose the words of the first Justice Harlan, dissenting in *Lochner* v. *New York*: [60]

"Our duty, I submit, is to sustain the statute as not being in conflict with the Federal Constitution, for the reason—and such is an all-sufficient reason—it is not shown to be plainly and palpably inconsistent with that instrument. Let the state alone in the management of its purely domestic affairs, so long as it does not appear beyond all question that it has violated the Federal Constitution. This view necessarily results from the principle that the health and safety of the people of a state are primarily for the state to guard and protect."

At one time or another the leading exponents of the varying judicial philosophies on the Court have expressed themselves in similar terms when dealing with matters which could reasonably be said to affect the safety, health, morals, or general welfare of the state.[61] And it is not difficult to portray the Connecticut statute in those terms. Could not reasonable men believe that the use of contraceptives will encourage adultery and other types of nonmarital sexual relations because the fear of pregnancy is substantially reduced? If the state permits contraceptives to be available for some purposes, it increases the likelihood that they will be available for the purposes which the state has a right to prohibit.[62] Therefore, it is argued, a law which forbids the use of contraceptives and the dissemination of information concerning their use is a reasonable means toward the attainment of a legitimate state objective. The sunday closing law cases recently demonstrated that even Justices most closely associated with protection of individual rights may vote to sustain legislation if no specific constitutional guarantee appears to bar it and if the legislation can be designtaed as within such traditional areas of the police power as safety, health, welfare, and morals.[63]

But for one who feels that the marriage relationship should be beyond the reach of a state law forbidding the use of contraceptives, the birth control case poses a troublesome and challenging problem of constitutional interpretation. He may find himself saying. "The law is unconstitutional—but why?" There are two possible paths to travel in finding the answer. One is to revert to a frankly flexible due process concept even on matters that do not involve specific constitutional prohibitions. The other is to attempt to evolve a new constitutional framework within which to meet this and similar problems which are likely to arise.

FLEXIBLE DUE PROCESS

It is not surprising that Justice Harlan, who has consistently resisted the linking of due process with any specific provision in the Bill of Rights,[64] would have little difficulty invalidating the Connecticut law in a manner quite consistent with his judicial philosophy. His words express the familiar philosophy of *Twining, Adamson,* and *Betts v. Brady:*

"Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society." [65]

Unlike the earlier due process cases, however, in *Poe v. Ullman* this approach leads Justice Harlan to invalidate the Connecticut law because it intrudes "the whole machinery of the criminal law into the very heart of marital privacy." [66] Although re-emphasizing that the Fourteenth Amendment does not incorporate any particular amendment or right found in the first eight amendments, Justice Harlan concludes that the Fourth Amendment's concept of "privacy," which has previously been regarded as a fundamental right, includes the privacy of a married couple's sexual relations. When such a right is threatened, it is not enough that the statute is "rationally related to the effectuation of a proper state purpose." [67] The state must demonstrate a compelling justification, which Connecticut failed to do.

Civil libertarians may find this approach more satisfying when it is used to uphold individual rights rather than to deny them, but in either event it is subject to the criticism that it leaves judges without any fixed textual standard in determining which rights are fundamental. By refusing to acknowledge the incorporation of any of the specific provisions of the Bill of Rights, relying instead only on "fundamental" rights, Justice Harlan's philosophy creates the grave danger that Justices may fail to regard as fundamental

the more important provisions of the Bill of Rights. It would be difficult for a believer in a strict interpretation of the Bill of Rights to accept Justice Harlan's route to invalidation of the birth control laws.[68]

As Justice Douglas demonstrated in his dissent in *Poe v. Ullman*,[69] however, it is possible to interpret the due process clause of the Fourteenth Amendment to include rights in addition to those specified in the first eight amendments. Justice Murphy expressed this position in his brief dissent in the *Adamson* case, where he said: [70]

"I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights." Although Justice Douglas had not joined in Justice Murphy's *Adamson* dissent,[71] he clearly adopted this position in *Poe* v. *Ullman* and rejected the idea that the only limits on the exercise of state power were the explicit guarantees of the Constitution.

The substantive right which Justice Douglas sought to protect was the same as that defended by Justice Harlan—the privacy of the marital relationship: [72]

"But when the State makes "use" a crime and applies the criminal sanction to man and wife, the State has entered the innermost sanctum of the home. If it can make this law, it can enforce it. And proof of its violation necessarily involves an inquiry into the relations between man and wife.

"That is an invasion of the privacy that is implicit in a free society."

We have seen that basic to the "incorporation" theory of Justice Black or the "absorption" approach of Justice Brennan is the assumption that the Fourteenth Amendment, either by original intention in 1868 or by subsequent interpretation, includes certain rights which, prior to 1868, were available to Americans only as a protection against intrusion by the federal government. One would be hard pressed, however, to find anything in the first eight amendments which would have barred the United States from adopting for the District of Columbia a law similar to the Connecticut statute. In fact, neither Justices Douglas nor Harlan relied explicitly on any constitutional amendment in reaching the conclusion that the Connecticut law deprives the married couple of liberty without due process of law. Arguably, the due process clause of the Fifth Amendment could serve this purpose, but the narrow scope of the Fifth Amendment's due process clause in substantive areas [73] may have inhibited Justice Douglas from taking this route.

If Justice Douglas has thus accepted the view that the Fourteenth Amendment is not confined, either by original intention or subsequent interpretation, to the federal rights set forth in the first eight amendments, is he not open to the same criticism which Justice Black (originally supported by Justice Douglas) leveled at the *Adamson* majority, namely, that a departure from the text of the Bill of Rights will make it easier for other Justices either to limit the application of those rights or to roam freely across the judicial terrain substituting their own standard of reasonableness for that of the legislature? Justice Douglas attempts to answer these criticisms directly.

He retreats not one inch from his previously expressed view that the Fourteenth Amendment includes the first eight amendments. These rights, he argues, were "indispensable to a free society" in 1791 and the "constitutional conception of 'due process' must, in my view, include them all until and unless there are amendments that remove them." [74] Perhaps there is implicit in the willingness of Justice Douglas to broaden the concept of due process an awareness of the fact that, as we have shown, the major provisions of the Bill of Rights have either been applied to the states or are likely to be so applied in the near future. The danger felt by Justice Black is thus much less real than it was in 1947.

But if the Connecticut statute is invalidated under a concept of due process which speaks of rights "implicit in a free society," does this not invite a repetition of the pre-New Deal experience? The reply by Justice Douglas is that

"The error of the old Court . . . was not in entertaining inquiries concerning the constitutionality of social legislation but in applying the standards that it did. . . . Social legislation dealing with business and economic matters . . . has a wide scope for application. . . . The regime of a free society needs room for vast experimentation. . . . Yet to say that a legislature may do anything not within a specific guarantee of the Constitution may be as crippling to a free society as to allow it to override specific guarantees so long as what it does fails to shock the sensibilities of a majority of the court." [75]

Then, as if to answer the charge from Justice Black that this is nothing more than personal jurisprudence, Justice Douglas says, "This notion of privacy is not drawn from the blue. It emanates from the totality of the constitutional scheme under which we live." [76]

There is unquestionably a difference between this concept of flexible due process and that advocated by Justice Harlan. As applied by Justice Douglas it establishes the Bill of Rights as a minimum protection and it leaves the legislature free to deal with economic and social regulation so long as certain ill-defined rights, not mentioned in the Bill of Rights, are protected. And Justice Douglas correctly points to instances where the Court has seemingly recognized such rights.[77] As a practical matter this approach may enable the Court to allow flexibility to the states in areas where flexibility is called for, while at the same time preventing the states from tampering with such concepts as the right to determine the size of one's family.

AN EXPANDED BILL OF RIGHTS—AMENDMENTS NINE AND TEN

Whatever may be its practical appeal, Justice Douglas' forceful reaffirmation of Justice Murphy's *Adamson* dissent is, nevertheless, hardly likely to fit the intellectual pattern of those Justices who have looked to the Federal Bill of Rights as the source of judicial restrictions on state and federal power. And this is not simply a matter of conceptual neatness. Recent developments in the field of heredity control suggest that governmental intrusions into basic personal relationships may take forms which have hitherto been relegated to the domain of science-fiction.[78] "Selective breeding" may well be within the extended reach of man, in which event federal and state regulation may become a necessity.[79]

The Fourteenth Amendment has frequently been used as a barrier against state action which a majority of the Court finds shocking. But the first eight amendments contain specific restrictions, and except for an interlude when the due process clause of the Fifth Amendment was used to invalidate laws involving economic regulation,[80] the Bill of Rights has not been viewed as devise for substantive review of federal legislation passed pursuant to the enumerated or implied powers.[81] Even the much-criticized opinions of the mid-1930's, striking down key New Deal legislation, were based primarily on a narrow interpretation of certain federal powers rather than on the application of the Bill of Rights.[82]

If we are unable to draw upon any portion of the Bill of Rights to meet problems such as those raised by the Connecticut birth control laws,[83] and other possible similar statutes, limitations on federal action in this area appear quite uncertain, and flexible due process would loom as the best immediate answer to the problem at the state level.

But the Bill of Rights contains two additional amendments—the Ninth and Tenth, whose history suggests that they might be peculiarly suited to meet the unique and important problems suggested by the Connecticut birth control law case.

The Ninth Amendment provides: "The Enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." The Tenth Amendment, better-known because it has been invoked more often in litigation, provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

These two Amendments have frequently been linked together and, particularly in recent years, written off as redundancies adding "nothing to the rest of the Constitution." [84] A careful reading of the words and history of the two Amendments, however, indicates that they were intended to play a role in our constitutional scheme and ought not to be so lightly dismissed.

The Ninth Amendment was drafted by Madison to cope with the problem created by the enumeration of specific rights in a Bill of Rights. Fearing that the enumeration of these rights would imperil others not enumerated, Madison said:

"It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights unto this system; but I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution." [85]

Earlier, in The Federalist No. 37, Madison expressed the closely allied idea that words were incapable of expressing complex ideas with complete accuracy.[86] The fear that certain rights may have been omitted, and that the vagaries of language might adversely affect other rights intended to be included, led Madison to the Ninth Amendment.

Although the claim has been made that this Amendment was intended to restrict the states as well as the federal government, the sketchy legislative history would seem to support the holding in *Barron* v. *Baltimore* [87] that it was intended to restrict only the federal government. The adoption of the Fourteenth Amendment in 1868, however, provided the framework for applying these restrictions against the states, even though they may have been originally intended to apply only against the United States.

The Tenth Amendment, it will be recalled, speaks not of "rights retained by the people" but of "powers" which are "reserved to the States respectively, or to the people." Were it not for the last four words, the Tenth Amendment could easily be dismissed as a redundancy in a constitution establishing a government of limited powers. These four words—"or to the people"—were not included in Madison's original draft which may account for the fact that when Madison introduced his proposed amendments, he said that the words of the Tenth Amendment "may be considered superfluous. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated." [88]

Footnotes at end of article.

The Senate added the words "or to the people," but we have no record of the Senate debates and this addition did not occasion any further debate in the House, which ultimately accepted the Senate version.[89]

One might argue that the addition of the last four words was intended to place certain powers beyond the reach of the States, but it is extremely unlikely that a decision of such importance would have slipped through the First Congress with no debate.[90] Moreover, the Senate had rejected another of Madison's proposed amendments which would have prevented the states from infringing the right of trial by jury, free speech, free press, and the "rights of conscience." [91] It would be unrealistic to attribute to the Senate an intent to impose ill-defined legally enforceable restraints on the states in light of this rejection.

The principal reason why the Tenth Amendment is currently thought of as a redundancy is that it has been invoked by litigants who have claimed that certain federal laws were unconstitutional because they invaded powers "reserved to the states." As between the federal government and the states the Tenth Amendment *is* a redundancy. Although the Court has on occasion appeared to give substantive content to the Tenth Amendment,[92] these cases can more appropriately be viewed as having been based on a restrictive view of the delegated federal powers. Reliance on the Tenth Amendment in cases like *Hammer* v. *Dagenhart*.[93] and *United States* v. *Butler* [94] resulted from a preliminary decision that the asserted federal power was not within the purview of the commerce clause or the taxing power. When the Court overruled *Hammar* v. *Dagenhart*, it stated, "Our conclusion is unaffected by the Tenth Amendment which . . . states but a truism that all is retained has not been surrendered." [95]

But the Tenth Amendment becomes a "truism" only if it is viewed as defining the division of powers between the federal government and the states. This was all the Amendment contained when Madison described it as "superfluous." The Amendment would not be a truism, however, if the last four words are viewed as delineating powers possessed by neither the federal government nor the states. Since, as we have indicated, the Amendment was not intended to restrict the states, the last four words have meaning only if they were intended to impose additional restrictions on the federal government. The pieces start to fall into place when the Tenth Amendment is considered in conjunction with the Ninth Amendment.

Once "certain rights . . . retained by the people" had been removed from the scope of federal power, it would have been inconsistent to provide that all powers reside either in the federal government or the states. The last four words of the Tenth Amendment must have been added to conform in its meaning to the Ninth Amendment and to carry out the intent of both—that as to the federal government there were rights, not enumerated in the Constitution, which were "retained . . . by the people," and that because the people possess such rights there were *powers* which neither the federal government nor the states possessed.

In an age where men looked to the states as the chief guardians of individual rights, it was not surprising that the barrier of the Ninth and Tenth Amendments was erected against only the federal government. The adoption of the Fourteenth Amendment in 1868 provides the constitutional basis for judicial enforcement of both Amendments against the states.

Thus far, neither Amendment has been specifically invoked by a Supreme Court majority for the protection of individual rights not specified in the Constitution, even though they would appear to have been designed for this purpose. The Ninth Amendment has been mentioned in several cases but no decision has ever been based on it.[96] And while several decisions appear to have been based on the Tenth Amendment, it has not been because of rights reserved "to the people" but because, in the Court's view, the federal government was exercising powers which were not delegated or implied and which were, therefore, reserved to the states.[97]

If the Court decided to approach the Connecticut birth control law through the Ninth and Tenth Amendments, it could start with the strong historical argument that they were intended to apply in a situation where the asserted right appears to the Court as fundamental to a free society but is, nevertheless, not specified in the Bill of Rights. [98] Those Justices who consider the Fourteenth Amendment as having embodied either or all the major portions of the Bill of Rights could appropriately consider the Ninth and Tenth Amendments as "incorporated" or "absorbed" into the first paragraph of the Fourteenth Amendment. Certainly those Justices who have viewed the Fourteenth Amendment as limited only to "fundamental" rights unrelated to the specific provisions of the Bill of Rights should have no difficulty in adopting a Constitutional provision which appears to have been almost custom-made for this approach. The Ninth and Tenth Amendments, moreover, provide a formula for protecting the individual against both the federal and state governments in the enjoyment of these rights, something which the approach of Justice Murphy in *Adamson* and Justice Douglas in *Poe* v. *Ullman* failed to offer.

The Connecticut statute would provide a particularly appropriate vehicle for giving life to these dormant constitutional provisions. A birth control law is totally unlike the regulatory laws of the 1920's and 1930's whose invalidation spurred an entire generation of Justices to keep hands off legislative experimentation in this area. The birth control law invades the privacy of the martial relationship by preventing a married couple from limiting the size of its family. Whether the decision not to have children is based on economic factors, health, simple personal preference, or a multitude of other possible reasons, no government in this country should force a husband and wife to choose between abandoning this most basic of human choices and either breaking the law or abstaining from sexual relations.[99] In Justice Harlan's words, "In sum, the statute allows the State to enquire into, prove and punish married people for the private use of their marital intimacy." [100]

The Court could hold that the Ninth and Tenth Amendments reserve to a married couple the right to maintain the intimacy of the marital relationship without government interference. This would include the right of a married couple to use medically acceptable contraceptive techniques in order to limit the size of their family.

When we move into the question of the right to have children, we run into the compulsory sterilization laws and Justice Holmes' famous quip in *Buck v. Bell:* "Three generations of imbeciles is enough." [101] The Court has specified that the person to be sterilized must be afforded a fair hearing to determine whether he falls within the state-designated category.[102] Moreover, the state must justify its designation of a particular group in terms which are more stringent than usually required for state regulatory legislation.[103] But the constitutional validity of compulsory sterilization laws creates a disturbing precedent for future governmental control of eugenic development.[104] How easily might a judge say, "Three generations of subnormal I.Q.'s is enough."

The Ninth and Tenth Amendments could well form the basis for limiting *Buck v. Bell* to a situation where the evidence clearly demonstrates that the undesirable traits are not only likely to be inherited but are of the nature which, if possessed by an individual, will cause either criminal behavior or a mental state which could justify commitment. This would preclude a legislative majority or an administrator from using the technique of sterilization or selective application of drugs to develop certain physical characteristics in the population or to eradicate others. Rights retained by the people need not necessarily be absolute, just as not all the rights in the Bill of Rights are expressed in absolute terms. The right to have children would be a preferred right which the state could restrict only under the type of strictly circumscribed standards indicated here.[105]

JUDICIAL CRITERIA

What criteria are judges to apply when faced with a claim that the Government is infringing a right reserved to the people and which is not enumerated in the Constitution? Is there any textual standard or have we merely substituted one constitutional formula for another by which judges are to apply their own notions of fundamental justice and fairness?

When the question of standards is posed within the context of the Ninth and Tenth Amendments, rather than in terms of due process, a definite pattern starts to emerge. To comply with the purposes of these Amendments, the textural standard should be the entire Constitution. The original Constitution and its amendments project through the ages the image of a free and open society. The Ninth and Tenth Amendments recognized—at the very outset of our national experience—that it was impossible to fill in every detail of this image. For that reason certain rights were reserved to the people. The language and history of the two Amendments indicate that the rights reserved were to be of a nature comparable to the rights enumerated. They were "retained . . . by the people" not because they were different from the rights specifically mentioned in the Constitution, but because words were considered inadequate to define all of the rights which man should possess in a free society and because it was believed that the enumeration might imply that other rights did not exist.

Let us consider a few examples. The right of employees to contract with employers concerning hours of work, which was the right upheld in *Lochner v. New York,*[106] hardly fits into the scheme of rights set forth in our Constitution. But the right of a married couple to maintain the intimacy of their marital relationship free from the criminal sanction of the state does fit into the pattern of a society which set forth in its national charter that men should be free from unreasonable searches and seizures.[107] Similarly, the state might sterilize an individual upon clear and convincing proof that this particular individual possesses inheritable characteristics likely to produce criminal conduct or insanity. But if the Government were to enforce a policy of selective breeding, designed to produce a genetically superior race, the individual could claim that among the rights reserved to the people is the right freely to choose a spouse and to produce children. Only through the most obnoxious invasion of personal privacy could such a program be enforced. Moreover, a Constitution which specifically provides that a person guilty of treason could not be deprived of the right to transmit property [108] would hardly countenance taking from law-abiding citizens the right to transmit life.

Taking an example from an earlier period, *Crandall* v. *Nevada* [109] held that a state tax on every person leaving the state was unconstitutional. Instead of relying on a specific provision, the Court said that the Constitution established a national government whose existence requires that the people have access to the seat of government, its courts, and its offices wherever they may be located in the several states. It might have added that since the states are forbidden to tax

Footnotes at end of article.

imports or exports, it would be inconsistent to permit a state to prevent, through taxation or regulation, an individual from reaching a seaport to carry on the business of importing or exporting. Both of these reasons and have justified the result under the Ninth and Tenth Amendments because they are related to the general pattern of government establishment by our Constitution.[110]

The Ninth and Tenth Amendments, unlike other portions of the Bill of Rights, should be viewed as dealing not with absolute rights but generally with preferred rights, where the balancing of interests is appropriate. We are concerned here with areas where there would normally be a presumption of constitutionality and a willingness to uphold the statute if it appears reasonably related to a valid legislative end. When the individual asserts rights recognized under the Ninth and Tenth Amendments, however, the Court should sound a different note: "These are rights which a free society reserves to the people. You may not 'deny or disparage' them by a mere showing of reasonableness. In areas of general economic and social policy we defer to your judgment and your constitutional power. But when you extend this power to regulate rights which we consider an essential ingredient of the free society established by our Constitution, we require overwhelming proof of necessity and the absence of other and less burdensome means to achieve your objectives."

In this realm, as in others, there exists no purely objective set of criteria. That the criteria are loose, however, does not mean that they do not exist. Our Constitution provides the basic text for the delineation of rights retained by the people with respect to which state and federal governments have been denied the power to act. Accordingly, the Ninth and Tenth Amendments should be used to define rights adjacent to, or analogous to, the pattern of rights which we find in the Constitution. They should not be used as a substitute for a vigorous application of those rights which are specified in the Constitution or for the adoption of rights which bear no connection to our constitutional scheme. To define the rights "retained by the people," judges must, of course, make personal judgments. What has been suggested here is a judicial approach for making these judgments which is at least consistent with our constitutional theory and history.

FOOTNOTES

*Norman Redlich is Professor of Law at New York University School of Law.

[1] 332 U.S. 46 (1947).

[2] The Adamson case gave rise to considerable discussion as constitutional lawyers and historians quickly took opposing sides. See, e.g., 2 Crosskey, Politics and the Constitution, ch. 31, 32 (1953); Fairman & Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5, 140 (1949); Kadish Methodology and Criteria in Due Process Adjudication—A Survey and Criticism, 66 Yale L.J. 319 (1957); Comment, 58 Yale L.J. 268 (1949).

[3] Braden, The Search for Objectivity in Constitutional Law, 57 Yale L.J. 571 (1948).

[4] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[5] See, e.g., Reynolds v. Cochran, 365 U.S. 525 (1961); McNeal v. Culver, 365 U.S. 109 (1961); Rochin v. California, 342 U.S. 165 (1952).

[6] The most outstanding recent example is the Connecticut birth control case, Poe v. Ullman, 367 U.S. 497 (1961). See pp. 796–98, infra. Justice Harlan dissented stating that the Connecticut statute, which made the use of contraceptives a crime, violated the due process clause of the Fourteenth Amendment. Justice Brennan and Chief Justice Warren voted with the majority without stating their views on the constitutional question. Justice Black felt that the court should have decided the case although he withheld his own views on the merits. In Solesbee v. Balkcom, 339 U.S. 9 (1950), Justice Black held that Georgia's procedures for determining the sanity of a man about to be executed did not violate due process. Justice Frankfurter dissented, arguing that when the state attempts to execute an insane man, "The Due Process Clause says to a State: 'Thou shalt not.'" 339 U.S. at 21. He found Georgia's procedures unfair in light of this constitutional prohibition. Compare the positions of Justices Harlan and Brennan on questions of obscenity in Roth v. United States, 354 U.S. 476 (1957).

[7] Adamson v. California, 332 U.S. 46, 67 (1947).

[8] Justices Douglas, Brennan and Black, and Chief Justice Warren dissented in Beilan v. Board of Educ., 357 U.S. 399 (1958), and Lerner v. Casey, 357 U.S. 468 (1958). In Nelson v. County of Los Angeles, 362 U.S. 1 (1960), Chief Justice Warren did not participate, but the other three Justices dissented. In all three cases the technical ground for discharge was that the refusal of the witness to answer showed lack of candor, incompetence, or failure to supply necessary information. In Slochower v. Board of Higher Educ., 350 U.S. 551 (1956), which held that New York City could not discharge an employee solely because of his use of the privilege before a congressional committee, Justice Reed, who wrote the majority opinion in Adamson, dissented in an opinion in which Justices Burton and Minton concurred. Justice Harlan, perhaps the most forceful exponent of the flexible due process approach, also wrote a dissenting opinion. Justices Clark and Frankfurter joined with Chief Justice Warren and Justices Black and Douglas in forming the majority. The fact that Justice Clark wrote the opinions in both the Slochower and Nelson cases indicates how uncertain a flexible concept of due process can be.

[9] Cohen v. Hurley, 366 U.S. 117 (1961) (Justices Black, Brennan and Douglas, and Chief Justice Warren, dissenting).

[10] See Feldman v. United States, 322 U.S. 487 (1944) (4–3 decision). See also Knapp v. Schweitzer, 357 U.S. 371 (1958), where the Court held that a state could compel an answer under a grant of immunity notwithstanding the possibility that the information could be used in a federal prosecution. Chief Justice Warren and Justices Black and Douglas dissented. Justice Brennan concurred with the majority but only after indicating that he wished to reconsider the Feldman case, supra, which had upheld the right of the United States to prosecute under such circumstances.

[11] 316 U.S. 455 (1942).

[12] See Carnley v. Cochran, 369 U.S. 506 (1962); Reynolds v. Cochran, 365 U.S. 525 (1961); McNeal v. Culver, 365 U.S. 109 (1961). See also Ferguson v. Georgia, 365 U.S. 570 (1961); Hudson v. North Carolina, 363 U.S. 697 (1960).

[13] See Quicksall v. Michigan, 339 U.S. 660 (1950); Bute v. Illinois, 333 U.S. 640 (1948); Betts v. Brady, 316 U.S. 455 (1942).

[14] In Mapp v. Ohio, 367 U.S. 643 (1961), which elevated the exclusionary rule to constitutional status and held it binding against the states, the dissenters were Justices Frankfurter, Harlan and Whittaker.

[15] 332 U.S. at 89 (1947).

[16] The importance of specific written constitutional guarantees in a system of judicial enforcement of individual rights is discussed in an article entitled Parchment Barriers, by Edmond Cahn, which will appear in the Winter 1963 issue of the American Scholar.

[17] 302 U.S. 319 (1937).

[18] 32 U.S. (7 Pet.) 242 (1833).

[19] Brennan, The Bill of Rights and the States, 36 N.Y.U.L. Rev. 761, 769 (1961).

[20] 302 U.S. at 326.

[21] See, e.g., Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Everson v. Board of Educ., 330 U.S. 1 (1947); Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931); Gitlow v. New York, 268 U.S. 652 (1925).

[22] 370 U.S. 421 (1962).

[23] 370 U.S. 375 (1962).

[24] Wolf v. Colorado, 338 U.S. 25 (1949).

[25] 367 U.S. 643 (1961).

[26] 291 U.S. 97 (1934) (defendant's presence at jury view of scene of crime held not required by the due process clause).

[27] Id. at 105.

[28] Id. at 106.

[29] When the Supreme Court granted certiorari in the case of Gideon v. Cochran, 135 So. 2d 746 (Fla. 1961), counsel was requested to discuss the question of whether Betts v. Brady should be "reconsidered." 370 U.S. 908 (1962). See concurring opinion of Justice Douglas in McNeal v. Culver, 365 U.S. 109 (1961), urging the overruling of Betts v. Brady.

[30] Robinson v. California, 370 U.S. 660 (1962). See Note, The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment, 36 N.Y.U.L. Rev. 846 (1961), in which the author concluded prior to the Robinson case that the cruel and unusual punishment clause had been incorporated into the Fourteenth Amendment.

[31] Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).

[32] Walker v. Sauvinet, 92 U.S. 90 (1875).

[33] Hurtado v. California, 110 U.S. 516 (1884).

[34] In Palko v. Connecticut it was not necessary for the Court to reach this precise issue because the second prosecution was held not to constitute double jeopardy.

[35] Palko v. Connecticut, 302 U.S. 319, 328 (1937), where Justice Cardozo wrote: "What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. . . . The state is not attempting to wear the accused out by a multitude of cases with accumulated trials."

[36] Palko v. Connecticut, 302 U.S. 319, 324 (1937); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[37] Brennan, supra note 19, at 772–73.

[38] This assumption is based upon the increasing emphasis which the Court seems to be placing on the equal protection clause in connection with the claims of indigents in criminal proceedings. See Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959); Griffin v. Illinois, 351 U.S. 12 (1956). See also McNeal v. Culver, 365 U.S. 109 (1961) (concurring opinion). In addition, the Court has applied the Betts v. Brady rule consistently, only to find that the absence of counsel violated due process. The practical effect of the rule is thus to penalize only those who are convicted without counsel and never raise the issue. See Carnley v. Cochran, 369 U.S. 506 (1962); Reynolds v. Cochran, 365 U.S. 525 (1961); Hudson v. North Carolina, 363 U.S. 697 (1960).

[39] See Cohen v. Hurley, 366 U.S. 117, 127–28 (1961).

[40] 211 U.S. 78 (1908). Both Twining and Adamson dealt with the question of the judge's and prosecutor's comments, respectively, on the defendant's failure to testify, and both assumed that such comment violated the privilege.

[41] In Slochower v. Board of Higher Educ., 350 U.S. 551 (1956) the Court held New York could not discharge a teacher merely because he pleaded the privilege before a congressional committee. The state could not draw an inference of guilt from the exercise of the privilege. See the dissenting opinion of Justice Brennan in Cohen v. Hurley, 366 U.S. 117, 159 (1961), in which it is pointed out that the various coerced confession cases are based "in fact" upon the privilege against self-incrimination.

[42] We find that, as to the Federal Government, the Fourth and Fifth Amendments

and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation" in their perpetuation of "principles of humanity and civil liberty [secured] . . . only after years of struggle" . . . . They express "supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy."

Mapp v. Ohio, 367 U.S. 643, 656–57 (1961). (Footnotes omitted.)

[43] Cohen v. Hurley, 366 U.S. 117, 159 (1961) (dissenting opinion of Justice Brennan).

[44] Approximately half the states, including such important jurisdictions as New York, Massachusetts, New Jersey, Pennsylvania and Ohio had held that unconstitutionally obtained evidence was admissible. See Elkins v. United States, 364 U.S. 206, 224–32 (1960); Day & Berman, Search and Seizure and the Exclusionary Rule: A Re-Examination in the Wake of Mapp v. Ohio, 13 W. Res. L. Rev. 56, 74, n.85 (1961).

[45] 351 U.S. 12 (1956). See Willcox & Bloustein, The Griffin Case—Poverty and the Fourteenth Amendment, 43 Cornell L.Q. 1 (1957); Comment, The Effect of Griffin v. Illinois on the States' Administration of the Criminal Law, 25 U. Chi. L. Rev. 161 (1957).

[46] Foremost among these would be the increasing tendency of the Court to require the assignment of counsel in all cases. See note 38 supra. The extension of the Griffin rule to collateral remedies and to requirements for filing fees would appear to have had more widespread effect than would be occasioned by the incorporation of the privilege against self-incrimination into the Fourteenth Amendment.

[47] 8 Wigmore, Evidence § 2272 (McNaughton rev. 1961).

[48] E.g., the prohibition against ex post facto laws and bills of attainder found in Article I, section 9, and the provision in Article VI that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

[49] See Morehead v. New York ex rel. Tipaldo, 298 U.S. 557 (1936); Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905).

[50] In Communist Party v. Subversive Activities Control Bd., Justice Frankfurter states that the legislative judgment as to how the threat of Communism "may best be met consistently with the safeguarding of personal freedom is not to be set aside merely because the judgment of judges would, in the first instance, have chosen other methods." 367 U.S. 1, 96–97 (1961). Cf. Barenblatt v. United States 360 U.S. 109 (1959) (opinion of Justice Harlan).

[51] Justice Black, in criticizing the majority's approach to due process in the Adamson case, said, "this formula has also been used in the past, and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government." 332 U.S. 46, 90 (1947). See also Rochin v California, 342 U.S. 165 (1952) (concurring opinion of Justice Douglas).

[52] Conn. Gen. Stat. Rev. § 53–32 (1958).

[53] Conn. Gen. Stat. Rev. § 54–196 (1958).

[54] State v. Nelson, 126. 412, 11 A.2d 856 (1940).

[55] Tileston v. Ulman, 318 U.S. 44 (1943).

[56] 367 U.S. 497 (1961).

[57] Id. at 508.

[58] Id. at 509.

[59] Connecticut v. Griswall and Connecticut v. Buxton, CR6–5653 and CR6–5654, Conn. Cir. Ct., Jan. 2, 1962, appealed docketed, App. Div., Jan. 12, 1962.

[60] 198 U.S. 45, 73 (1905).

[61] McGowan v. Maryland, 366 U.S. 420, 425–26 (1961) (opinion of Chief Justice Warren); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) (opinion of Justice Douglas); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536–37 (1949) (opinion of Justice Black); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 666 (1943) (dissenting opinion of Justice Frankfurter).

[62] See discussion in Comment, 70 Yale L.J. 322, 331 (1960).

[63] See Braunfield v. Brown, 366 U.S. 599 (1961) (opinion of Chief Justice Warren); McGowan v. Maryland, 366 U.S. 420 (1961) (opinion of Chief Justice Warren).

[64] Mapp v. Ohio, 367 U.S. 643, 679 (dissenting opinion); Lanza v. New York, 370 U.S. 139 (1962) (concurring opinion).

[65] Poe v. Ullman, 367 U.S. 497, 542 (dissenting opinion).

[66] Id. at 553.

[67] Id. at 554.

[68] It is interesting to note that although Justice Harlan relied on the right of privacy which he derived from the Fourth Amendment, he dissented vigorously in Mapp v. Ohio and argued against extending to the states the full measure of the constitutional protection of the Fourth Amendment, which, for purpose of the dissent, Justice Harlan assumed to include the exclusionary rule. Mapp v. Ohio, 367 U.S. 643, 678–79 (1961). Thus, in one opinion a right to the privacy of the marital relationship, which has never been specifically included in the Fourth Amendment, is deemed to be protected against the state infringement, while in another case a right which is assumed to be included in the Fourth Amendment is denied application at the state level.

[69] 367 U.S. 497, 509 (1961).

[70] 332 U.S. 46, 124 (1947), Justice Rutledge joined in this dissent.

[71] In Adamson, Justice Douglas joined with Justice Black. Poe v. Ullman appears to mark his first public adoption of the Murphy-Rutledge dissent in Adamson.

[72] 367 U.S. at 520–21.

[73] See notes 80 & 81 infra.

[74] 367 U.S. at 516.

[75] 367 U.S. at 517–18.

[76] Id. at 521.

[77] In Poe v. Ullman Justice Douglas cited Meyer v. Nebraska, 262 U.S. 390 (1923), for the proposition that the Court has recognized the right to "establish a home and bring up children.'" 367 U.S. at 517. The danger of using the due process clause of the Fourteenth Amendment to reach this result, without relying on any provision of the Bill of Rights, is apparent from the very case which Justice Douglas cites, because the paragraph of the Meyer opinion which upholds the right to "establish a home and bring up children" also speaks of "the right of the individual to contract," which few today would defend as being an essential component of liberty, 262 U.S. at 399. Justice Douglas might also have referred to his own opinion in Skinner v. Oklahoma, 316 U.S. 535, 536 (1942), in which he referred to the "right to have offspring" as "basic to the perpetuation of a race," although deciding the case on the basis of the equal protection clause of the Fourteenth Amendment. See concurring opinion of Justice Stone who stated that the statute, which provided for compulsory sterilization, did not afford an opportunity for a hearing "to discover whether . . . [petitioner's] criminal tendencies are of an inheritable type." 316 U.S. 535, 544 (1942). Moreover, in the area of procedural due process we have many instances in which the Court invalidates state trials based on conceptions of "fairness" rather than on a specific guarantee in the first eight amendments. See Alcorta v. Texas, 355 U.S. 28 (1957). See In re Oliver, 333 U.S. 257, 273 (1948), in which Justice Black states that the "right to reasonable notice" and the "right to examine the witnesses against him, to offer testimony" are "basic in our system of jurisprudence." See also Lambert v. California, 355 U.S. 225 (1957), in which Justice Douglas, speaking for the Court, held unconstitutional a statute which required persons who had been convicted of a felony to register within five days of their arrival in Los Angeles. The opinion seems to be based on procedural due process because of a lack of notice of the duty to register. There is a serious question, however, whether procedural due process calls for this type of notice, which appears to be merely the existence of the statute, or whether the opinion is really based on substantive due process concepts of fairness.

[78] See Lasagna, Heredity Control: Dream or Nightmare?, N.Y. Times Magazine, Aug. 5, 1962, p. 7. The author states, "It would seem that while drastic changes in the manipulation of human heredity are not yet here, they are not so remote as one would have thought even a decade ago. . . . Scientists cannot be expected to act in any other way but to accelerate our now limited abilities along the lines of genetic control." Id. at 59, col. 3. See also Engel, The Race to Create Life, Harper's, Oct. 1962, p. 40: "Before long we will have to decide whether we want chemical control of human heredity . . . and if so, how it should be exercised. And we will all have to take part in the decision as citizens. There are problems that are much too important to be left to scientists alone. This is one of them."

[79] If science does develop the means to control eugenic factors or to determine the sex of offspring, few would question the interest of both the states and federal government to regulate the private use of these techniques. How, then do we limit governmental activity in this area? Dr. Lasagna, supra note 78, at 59, quotes Sir Charles Darwin, speaking on the centennial of his grandfather's Origin of Species, as follows: "There can be little doubt that if any country should carry out a eugenic policing for even a few generations, that country should dominate all its neighbors by the sheer increase in the ability of its people. . . . The accuracy of this prediction is unimportant; if large numbers of people believe it to be true, the possibilities are indeed frightening." See Engel, supra note 78.

[80] See Adkins v. Children's Hosp., 261 U.S. 525 (1923), overruled, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). See also Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935). Justice Douglas in Kent v. Dulles, 357 U.S. 116 (1958), states the proposition that "freedom to travel" is part of the liberty protected by the due process clause of the Fifth Amendment. That case held that Congress had not delegated to the Secretary of State the power to deny a passport because of Communist Party membership. If Congress had actually authorized the Secretary of State to withhold passports for this reason, then presumably the constitutional question raised would have been in terms of the political rights of the First Amendment rather than the due process clause of the Fifth.

[81] In Bolling v. Sharpe, 347 U.S. 497 (1954), the due process clause of the Fifth Amendment was broadened to include the concept of equal protection in matters of racial discrimination. It is unlikely, however, that this decision, which involved the constitutionality of racially segregated public schools in the District of Columbia, could be said to justify the use of the Fifth Amendment as a basis for substantive review of federal legislation. The Court in Bolling v. Sharpe considered equal protection to be "a more explicit safeguard of prohibited unfairness" than due process and held that some forms of invidious discrimination would violate due process. In essence the Court was incorporating into the Fifth Amendment a specific provision whose meaning had been developed through the interpretation of the identical clause in the Fourteenth Amendment. Although litigants have frequently invoked the

due process clause of the Fifth Amendment in attacking federal legislation as unreasonable, we find very few instances where the Court has given substantive content to the provision other than in procedural terms. See Dumbauld, The Bill of Rights 93–98 (1957). In those few instances where such claims have been sustained, the Court has spoken of the legislation as being without reasonable basis. See Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330, 361 (1935); Chicago R.I. & P. Ry. v. United States, 284 U.S. 80, 97 (1931); Adkins v. Children's Hosp., 261 U.S. 525, 554–55 (1923), overruled, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). The difficulty with the birth control law or laws which might attempt "selective breeding" is that they will have a reasonable relationship to objectives which society has a right to effectuate through legislation.

[82] See, e.g., Carter v. Carter Coal Co., 298 U.S. 238 (1936); United States v. Butler, 297 U.S. 1 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935). Although the Butler case was based in part on the Tenth Amendment, this was because of a conclusion that Congress had no power to regulate agricultural production. Therefore, an expenditure to regulate agricultural production invaded the powers reserved to the states.

[83] Justice Douglas argued, in his dissenting opinion in Poe v. Ullman, that the Connecticut statute violated the First and Fourteenth Amendments because "of course a physician can talk freely and fully with his patient without threat of retaliation by the State." 367 U.S. at 514. It would be extremely unfortunate if those who argue most strenuously for the "absolute" interpretation of First Amendment rights attempt to place within the protection of the First Amendment words which are inseparably linked with conduct which the state has a right to regulate. Surely the state has a right to regulate the practice of medicine. The state may, for example, make it a crime for a physician to give injections of vaccines other than those approved by a state board. May not the state also make it a crime for a physician to advise the patient where these illegal injections may be obtained. Illegal medical practices may take the form of words spoken by a doctor to a patient and the inclusion of such activity within the area of protected free speech would materially weaken the position of those who have correctly, in my view, argued for an absolute prohibition against laws abridging freedom of speech. A similar problem was created in the area of peaceful picketing. See Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Thornhill v. Alabama, 310 U.S. 88 (1940). In Justice Harlan's dissenting opinion in Poe v. Ullman, the view was expressed that the Connecticut law violates the Fourth Amendment's concept of privacy. Justice Harlan is able to apply the right of privacy in this manner because he does not feel compelled to base a Fourteenth Amendment decision on a particular provision of the Bill of Rights. He can, thus, speak in terms of concepts which undelie a provision of the Bill of Rights without feeling concerned that the particular provision in the Bill of Rights might not be so interpreted if it were brought into play in a case involving the federal government. It is doubtful whether Justices who base their Fourteenth Amendment decisions on specific provisions in the Bill of Rights would follow Justice Harlan's reasoning in Poe v. Ullman.

[84] Dumbauld, supra note 81, at 65.

[85] I Annals of Cong. 456 (1834). The clause referred to contains the present Ninth Amendment.

[86] The use of words is to express ideas. Perspicuity therefore requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriated to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence, it must happen, that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered.

The Federalist No. 37, at 236 (Cooke ed. 1961).

[87] 32 U.S. (7 Pet.) 242 (1833). In his book on the Ninth Amendment, Mr. Bennett B. Patterson argues that the Amendment was intended from the start as a restriction upon the states. Patterson, The Forgotten Ninth Amendment 13 (1955). There is strong contrary evidence, however. When Madison intended an amendment to restrict the states in his proposal to prevent the states from abridging free speech or press, he was quite specific. See note 91 infra and accompanying text. Moreover, under Madison's original proposal the Ninth Amendment would have appeared as part of Article I, Section 9, which deals with specific restrictions against the Federal Government. I Annals, note 85 supra, at 451–52. It is unlikely that Madison would have inserted at this point a provision designed to restrict the states. Madison's phrasing of the Amendment is different from the final version: "The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution." Id. at 452.

[88] I Annals, supra note 85, at 459.

[89] Debate on the Tenth Amendment centered primarily around various attempts to limit the powers of the federal government by providing that all powers not "expressly" delegated are reserved to the states. See I Annals, supra note 85, at 790, 797. See Dumbauld, supra note 81, at 42, n. 32.

[90] Article I, Section 10, imposes certain restrictions on the states, such as the enactment of bills of attainder or ex post facto laws. It is unlikely, however, that the reserved powers referred to these restrictions, because the second clause in the Tenth Amendment makes it clear that the Amendment is dealing with those powers *not* prohibited by the Constitution to the states.

[91] I Annals, supra note 85, at 452, 458. Madison is quoted in the Annals as considering "this to be the most valuable amendment in the whole list." Id. at 784.

[92] See The Constitution of the United States, Analysis and Interpretation 915–21 (Corwin ed.), S. Doc. No. 170, 82 Cong. 2d Sess. (1953).

[93] 247 U.S. 251 (1918).

[94] 297 U.S. 1 (1936).

[95] United States v. Darby, 312 U.S. 100, 124 (1941). See Case v. Bowles, 327 U.S. 92, 102 (1946); Northwestern Elec. Co. v. Federal Power Comm'n, 321 U.S. 119 (1944).

[96] It has been discussed in several cases. See, e.g., United Public Workers v. Mitchell, 330 U.S. 75, 94–96, 99 (1947). For a summary of the judicial interpretation of the Ninth Amendment, see Patterson, supra note 87, at 27–35.

[97] See notes 92–95 supra.

[98] In addition to the Madison statement, note 86 supra, Madison had written to Jefferson in October 1788 explaining his grounds for the omission of a Bill of Rights from the original Constitution. He said, "My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration." Letter From Madison to Jefferson, Oct. 17, 1788, in 5 Writings of James Madison 269–75, at 271 (Hunt ed. 1906).

[99] See Comment, 70 Yale L.J. 322, 328–29 (1960).

[100] Poe v. Ullman, 367 U.S. 497, 548 (1961).

[101] Buck v. Bell, 274 U.S. 200, 207 (1927).

[102] Id. at 206–07.

[103] See Skinner v. Oklahoma, 316 U.S. 535 (1942). In this case a compulsory sterilization law for "habitual criminals" was held to violate the equal protection clause. The customary deference which would be accorded to state classifications would not be followed in the case of "legislation which involves one of the basic civil rights of man." In a concurring opinion, Justice Stone stated that the state must afford the individual an opportunity to demonstrate that he does not have the inheritable qualities which the state has assumed are possessed by the entire group.

[104] It should be added that the rapid developments in medical treatment of the mentally ill might completely preclude the state from making the irrevocable decision of sterilization. A trait which one legislature believes to be inheritable might actually be limitable or curable. In that event Buck v. Bell might well be overruled.

While one could conceive of conditions where the state might limit the free choice of adult men and women to marry, the same factors which lead to the limiting or possible overruling of Buck v. Bell would apply with regard to marriage.

[105] For possible attempts to decide the birth control case under other provisions, see discussion pp. 798–802 supra.

[106] 198 U.S. 45 (1905).

[107] It is interesting that Justices Harlan and Douglas both relied on a specific provision in the Bill of Rights to invalidate the birth control law, although they did so within a context of flexible due process. Instead of altering the contours of the Fourth and First Amendments, it would have been possible to rely on the Ninth and Tenth Amendments, as incorporated in the Fourteenth Amendment, using other Amendments to substantiate the claim that the right was of the nature of those reserved to the people.

[108] U.S. Const. art. III, § 3.

[109] 73 U.S. (6 Wall.) 35 (1867).

[110] A similar approach could have been used in Edwards v. California, 314 U.S. 160 (1941), which held invalid a statute making it a crime for a person to bring an indigent person into California. The Edwards case might also have been decided on the basis of the privileges and immunities clause of the Fourteenth Amendment, which was not available at the time of Crandall v. Nevada, supra note 109.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Katzenbach, Attorney General, et al. *v.* Morgan et ux.

No. 847. Argued April 18, 1966—Decided June 13, 1966.

Solicitor General Marshall argued the cause for appellants in No. 847. With him on the brief were *Assistant Attorney General Doar, Ralph S. Spritzer, Louis F. Claiborne, St. John Barrett* and *Louis M. Kauder.*

J. Lee Rankin argued the cause for appellant in No. 877. With him on the brief were *Norman Redlich* and *Seymour B. Quel.*

Alfred Avins argued the cause and filed a brief for appellees in both cases.

Rafael Hernandez Colon, Attorney General, argued the cause and filed a brief for the Commonwealth of Puerto Rico, as *amicus curiae,* urging reversal.

Jean M. Coon, Assistant Attorney General, argued the cause for the State of New York, as *amicus curiae,* urging affirmance. With her on the brief were *Louis J. Lefkowitz,* Attorney General, and *Ruth Kessler Toch,* Acting Solicitor General.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case concerns the constitutionality of § 4(e) of the Voting Rights Act of 1965.[1] That law, in the respects pertinent in this case, provides that no person who has successfully completed the sixth primary grade in a public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of his inability to read or write English. Appellees, registered voters in New York City, brought this suit to challenge the constitutionality of § 4(e) insofar as it *pro tanto* prohibits the enforcement of the election laws of New York[2] requiring an ability to read and write English as a condition of voting. Under these laws many of the several hundred thousand New York City residents who have migrated there from the Commonwealth of Puerto Rico had previously been denied the right to vote, and appellees attack § 4(e) insofar as it would enable many of these citizens to vote.[3] Pursuant to § 14(b) of the Voting Rights Act of 1965, appellees commenced this proceeding in the Distrct Court for the District of Columbia seeking a declaration that § 4(e) is invalid and an injunction prohibiting appellants, the Attorney General of the United States and the New York City Board of Elections, from either enforcing or complying with § 4(e).[4] A three-judge dstrict court was designated. 28 U.S.C. §§ 2282, 2284 (1964 ed.). Upon cross motions for summary judgment, that court, one judge dissenting, granted the declaratory and injunctive relief appellees sought. The court held that in enacting § 4(e) Congress exceeded the powers granted to it by the Constitution and therefore usurped powers reserved to the States by the Tenth Amendment. 247 F. Supp. 196. Appeals were taken directly to this Court, 28 U.S.C. §§1252, 1253 (1964 ed.), and we noted probable jurisdiction. 382 U.S. 1007. We reverse. We hold that, in the application challenged in this case, § 4(e) is a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment[5] and that by force of the Supremacy Clause, Article VI, the New York English literacy requirement cannot be enforced to the extent that it is inconsistent with § 4(e).

Under the distribution of powers effected by the Constitution, the States establish qualifications for voting for state officers, and the qualifications established by the States for voting for members of the most numerous branch of the state legislature also determine who may vote for United States Representatives and Senators, Art. I, § 2; Seventeenth Amendment; *Ex parte Yarbrough*, 110 U.S. 651, 663. But, of course, the States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment, or any other provision of the Constitution. Such exercises of state power are no more immune to the limitations of the Fourteenth Amendment than any other state action. The Equal Protection Clause itself has been held to forbid some state laws that restrict the right to vote.[6]

The Attorney General of the State of New York argues that an exercise of congressional power under § 5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce. More specifically, he urges that § 4(e) cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides—even with the guidance of a congressional judgment—that the application of the English literacy requirement prohibited by § 4(e) is forbidden by the Equal Protection Clause itself. We disagree. Neither the language nor history of § 5 supports such a construction.[7] As was said with regard to § 5 in *Ex parte Virginia*, 100 U.S. 339, 345, "It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective." A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment.[8] It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment. See *Fay* v. *New York*, 332 U.S. 261, 282–284.

Thus our task in this case is not to determine whether the New York English literacy requirement as applied to deny the right to vote to a person who successfully completed the sixth grade in a Puerto Rican school violates the Equal Protection Clause. Accordingly, our decision in *Lassiter* v. *Northampton Election Bd.*, 360 U.S. 45, sustaining the North Carolina English literacy requirement as not in all circumstances prohibited by the first sections of the Fourteenth and Fifteenth Amendments, is inapposite. Compare also *Guinn* v. *United States*, 238 U.S. 347, 366; *Camacho* v. *Doe*, 31 Misc. 2d 692, 221, N.Y.S. 2d 262 (1958), aff'd 7 N.Y. 2d 762, 163 N.E. 2d 140 (1959); *Camacho* v. *Rogers*, 199 F. Supp. 155 (D.C.S.D.N.Y. 1961). *Lassiter* did not present the question before us here: Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment? In answering this question, our task is limited to determining whether such legislation is, as required by § 5, appropriate legislation to enforce the Equal Protection Clause.

By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18.[9] The classic formulation of the reach of those powers was established by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Ex parte Virginia, 100 U.S., at 345–346 decided 12 years after the adoption of the Fourteenth Amendment, held that congressional power under § 5 had this same broad scope:

"Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion if not prohibited, is brought within the domain of congressional power."

Strauder v. *West Virginia*, 100 U.S. 303, 311; *Virginia* v. *Rives*, 100 U.S. 313, 318. Section 2 of the Fifteenth Amendment grants Congress a similar power to enforce by "appropriate legislation" the provisions of that amendment; and we recently held in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326, that "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserve powers of the States." That test was identified as the one formulated in *McCulloch* v. *Maryland*. See also *James Everard's Breweries* v. *Day*, 265 U.S. 545, 558–559 (Eighteenth Amendment). Thus the *McCulloch* v. *Maryland* standard is the measure of what constitutes "appropriate legislation" under § 5 of the Fourteenth Amendment. Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.

We therefore proceed to the consideration whether § 4(e) is "appropriate legislation" to enforce the Equal Protection Clause, that is, under the *McCulloch* v. *Maryland* standard, whether § 4(e) may be regarded as an enactment to enforce the Equal Protection Clause, whether it is "plainly adapted to that end" and whether it is not prohibited by but is consistent with "the letter and spirit of the constitution."[10]

There can be no doubt that § 4(e) may be regarded as an enactment to enforce the Equal Protection Clause. Congress explicitly declared that it enacted § 4(e) "to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English." The persons referred to include those who have migrated from the Commonwealth of Puerto Rico to New York and who have been denied the right to vote because of their inability to read and write English, and the Fourteenth Amendment rights referred to include those emanating from the Equal Protection Clause. More specifically, § 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement.

Section 4(e) may be readily seen as "plainly adapted" to furthering these aims of the Equal Protection Clause. The practical effect of § 4(e) is to prohibit New York from denying the right to vote to large segments of its Puerto Rican community. Congress has thus prohibited the State from denying to that community the right that is "preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370. This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community.[11] Section 4(e) thereby enables the Puerto Rican minority better to obtain "perfect equality of civil rights and the equal protection of the laws." It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have succesfully completed the sixth grade in a Puerto Rican school. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. There plainly was such a basis to support § 4(e) in the application in question in this case. Any contrary conclusion would require us to be blind to the realities familiar to the legislators.[12]

The result is no different if we confine our inquiry to the question whether § 4(e) was merely legislation aimed at the elimination of an invidious discrimination in establish-

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ing voter qualifications. We are told that New York's English literacy requirement originated in the desire to provide an incentive for non-English speaking immigrants to learn the English language and in order to assure the intelligent exercise of the franchise. Yet Congress might well have questioned in light of the many exemptions provided,[13] and some evidence suggesting that prejudice played a prominent role in the enactment of the requirement,[14] whether these were actually the interests being served. Congress might have also questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise.[15] Finally, Congress might well have concluded that as a means of furthering the intelligent exercise of the franchise, an ability to read or understand Spanish is as effective as ability to read English for those to whom Spanish-language newspapers and Spanish-language radio and television programs are available to inform them of election issues and governmental affairs.[16] Since Congress undertook to legislate so as to preclude the enforcement of the state law, and did so in the context of a general appraisal of literacy requirements for voting, see *South Carolina* v. *Katzenbach, supra,* to which it brought a specially informed legislative competence,[17] it was Congress' prerogative to weigh these competing considerations. Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote ot a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause.

There remains the question whether the congressional remedies adopted in § 4(e) constitute means which are not prohibited by, but are consistent "with the letter and spirit of the constitution." The only respect in which appelles contend that § 4(e) fails in this regard is that the section itself works an invidious discrimination in violation of the Fifth Amendment by prohibiting the enforcement of the English literacy requirement only for those educated in American-flag schools (schools located within United States jurisdiction) in which the language of instruction was other than English, and not for those educated in schools beyond the territorial limits of the United States in which the language of instruction was also other than English. This is not a complaint that Congress, in enacting § 4(e), has unconstitutional denied or diluted anyone's right to vote but rather that Congress violated the Constitution by not extending the relief effected in § 4(e) to those educated in non-American-flag schools. We need not pause to determine whether appelles have a sufficient personal interest to have § 4(e) invalidated on this ground, see generally *United States* v. *Raines,* 362 U.S. 17, since the argument, in our view, falls on the merits.

Section 4(e) does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law. Thus we need not decide whether a state literacy law conditioning the right to vote on achieving a certain level of education in an American-flag school (regardless of the language of instruction) discriminates invidiously against those educated in non-American-flag schools. We need only decide whether the challenged limitation on the relief effected in § 4 (e) was permissible. In deciding that question, the principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights, see n. 15, *supra,* is inapplicable; for the distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise. Rather, in deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a "statute is not invalid under the Constitution because it might have gone farther than it did," *Roschen* v. *Ward,* 279 U.S. 337, 339, that a legislature need not "strike at all evils at the same time," *Semler* v. *Dental Examiners,* 294 U.S. 608, 610, and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489.

Guided by these principles, we are satisfied that appellees' challenge to this limitation in § 4(e) is without merit. In the context of the case before us, the congressional choice to limit the relief effected in § 4(e) may, for example, reflect Congress' greater familiarity with the quality of instruction in American-flag schools,[18] a recognition of the unique historic relationship between the Congress and the Commonwealth of Puerto Rico,[19] an awareness of the Federal Government's acceptance of the desirability of the use of Spanish as the language of instruction in Commonwealth schools,[20] and the fact Congress has fostered policies encouraging migration from the Commonwealth to the States.[21] We have no occasion to determine in this case whether such factors would justify a similar distinction embodied in a voting-qualification law that denied the franchise to persons educated in non-American-flag schools. We hold only that the limitation on relief effected in § 4(e) does not constitute a forbidden discrimination since these factors might well have been the basis for the decision of Congress to go "no farther than it did."

We therefore conclude that § 4(e), in the application challenged in this case, is appropriate legislation to enforce the Equal Protection Clause and that the judgment of the District Court must be and hereby is

Reversed.

MR. JUSTICE DOUGLAS joins the Court's opinion except for the discussion, at pp. 656–658, of the question whether the congressional remedies adopted in § 4(e) constitute means which are not prohibited by, but are consistent with "the letter and spirit of the constitution." On that question, he reserves judgment until such time as it is presented by a member of the class against which that particular discrimination is directed.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.[22]

Worthy as its purposes may be thought by many, I do not see how §4(e) of the Voting Rights Act of 1965, 79 Stat. 439, 42 U.S.C. §)1973b(e) (1964 ed. Supp. I), can be sustained except at the sacrifice of fundamentals in the American constitutional system—the separation between the legislative and judicial function and the boundaries between federal and state political authority. By the same token I think that the validity of New York's literacy test, a question which the Court considers *only* in the context of the federal statute, must be upheld. It will conduce to analytical clarity if I discuss the second issue first.

The Cardona Case (No. 673).

This case presents a straightforward Equal Protection problem. Appellant, a resident and citizen of New York, sought to register to vote but was refused registration because she failed to meet the New York English literacy qualification respecting eligibility for the franchise.[23] She maintained that although she could not read or write English, she had been born and educated in Puerto Rico and was literate in Spanish. She alleges that New York's statute requiring satisfaction of an English literacy test is an arbitrary and irrational classification that violates the Equal Protection Clause at least as applied to someone who, like herself, is literate in Spanish.

Any analysis of this problem must begin with the established rule of law that the franchise is essentially a matter of state concern, *Minor* v. *Happersett,* 21 Wall. 162; *Lassiter* v. *Northampton Election Bd.,* 360 U.S. 45, subject only to the overriding requirements of various federal constitutional provisions dealing with the franchise, *e.g.,* the Fifteenth, Seventeenth, Nineteenth, and Twenty-fourth Amendments,[24] and, as more recently decided, to the general principles of the Fourteenth Amendment. *Reynolds* v. *Sims,* 377 U.S. 533; *Carrington* v. *Rash,* 380 U.S. 89.

The Equal Protection Clause of the Fourteenth Amendment, which alone concerns us here, forbids a State from arbitrarily discriminating among different classes of persons. Of course it has always been recognized that nearly all legislation involves some sort of classification, and the equal protection test applied by this Court is a narrow one: a state enactment or practice may be struck down under the clause only if it cannot be justified as founded upon a rational and permissible state policy. See, *e.g., Powell* v. *Pennsylvania,* 127 U.S. 678; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61; *Walters* v. *City of St. Louis,* 347 U.S. 231.

It is suggested that a different and broader equal protection standard applies in cases where "fundamental liberties and rights are threatened," see *ante,* p. 655, note 15; dissenting opinion of DOUGLAS, J., in *Cardona, post,* pp. 676–677, which would require a State to show a need greater than mere rational policy to justify classifications in this area. No such dual-level test has ever been articulated by this Court, and I do not believe that any such approach is consistent with the purposes of the Equal Protection Clause, with the overwhelming weight of authority, or with well-established principles of federalism which underlie the Equal Protection Clause.

Thus for me, applying the basic equal protection standard, the issue in this case is whether New York has shown that its English-language literacy test is reasonably designed to serve a legitimate state interest. I think that it has.

In 1959, in *Lassiter* v. *Northampton Election Bd., supra,* this Court dealt with substantially the same question and resolved it unanimously in favor of the legitimacy of a state literacy qualification. There a North Carolina English literacy test was challenged. We held that there was "wide scope" for State qualifications of this sort. 360 U. S., at 51. Dealing with literacy tests generally, the Court there held:

"The ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot. . . . Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. . . . It was said last century in Massachusetts that a literacy test was designed to insure an 'independent and intelligent' exercise of the right of suffrage. *Stone* v. *Smith,* 159 Mass. 413–414, 34 N. E. 521. North Carolina agrees. We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards." 360 U.S., at 51–53.

I believe the same interests recounted in *Lassiter* indubitably point toward upholding the rationality of the New York voting test. It is true that the issue here is not so simply drawn between literacy *per se* and illiteracy. Appellant alleges that she is literate in Spanish, and that she studied American history and government in United States Spanish-

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speaking schools in Puerto Rico. She alleges further that she is "a regular reader of the New York City Spanish-language daily newspapers and other periodicals, which . . . provide proportionately more coverage of government and politics than do most English-language newspapers," and that she listens to Spanish-language radio broadcasts in New York which provide full treatment of governmental and political news. It is thus maintained that whatever may be the validity of literacy tests *per se* as a condition of voting, application of such a test to one literate in Spanish, in the context of the large and politically significant Spanish-speaking community in New York, serves no legitimate state interest, and is thus an arbitrary classification that violates the Equal Protection Clause.

Although to be sure there is a difference between a totally illiterate person and one who is literate in a foreign tongue, I do not believe that this added factor vitiates the constitutionality of the New York statute. Accepting appellant's allegations as true, it is nevertheless also true that the range of material available to a resident of New York literate only in Spanish is much more limited than what is available to an English-speaking resident, that the business of national, state, and local government is conducted in English, and that propositions, amendments, and offices for which candidates are running listed on the ballot are likewise in English. It is also true that most candidates, certainly those campaigning on a national or statewide level, make their speeches in English. New York may justifiably want its voters to be able to understand candidates directly, rather than through possibly imprecise translations or summaries reported in a limited number of Spanish news media. It is noteworthy that the Federal Government requires literacy in English as a prerequisite to naturalization, 66 Stat. 239, 8 U.S.C. § 1423 (1964 ed.), attesting to the national view of its importance as a prerequisite to full integration into the American political community. Relevant too is the fact that the New York English test is not complex,[26] that it is fairly administered,[27] and that New York maintains free adult education classes which appellant and members of her class are encouraged to attend.[28] Given the State's legitimate concern with promoting and safeguarding the intelligent use of the ballot, and given also New York's long experience with the process of integrating non-English-speaking residents into the mainstream of American life, I do not see how it can be said that this qualification for suffrage is unconstitutional. I would uphold the validity of the New York statute, unless the federal statute prevents that result, the question to which I now turn.

II.

The Morgan Cases (Nos. 847 and 877).

These cases involve the same New York suffrage restriction discussed above, but the challenge here comes not in the form of a suit to enjoin enforcement of the state statute, but in a test of the constitutionality of a federal enactment which declares that "to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant, classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language," Section 4(e) of the Voting Rights Act of 1965. Section 4(e) declares that anyone who has successfully completed six grades of schooling in an "American-flag" school, in which the primary language is not English, shall not be denied the right to vote because of an inability to satisfy an English literacy test.[29] Although the statute is framed in general terms, so far as has been shown it applies in actual effect only to citizens of Puerto Rican background, and the Court so treats it.

The pivotal question in this instance is what effect the added factor of a congressional enactment has on the straight equal protection argument dealt with above. The Court declares that since § 5 of the Fourteenth Amendment[30] gives to the Congress power to "enforce" the prohibitions of the Amendment by "appropriate" legislation, the test for judicial review of any congressional determination in this area is simply one of rationality; that is, in effect, was Congress acting rationally in declaring that the New York statute is irrational? Although § 5 most certainly does give to the Congress wide powers in the field of devising remedial legislation to effectuate the Amendment's prohibition on arbitrary state action, Ex parte Virginia, 100 U.S. 339, I believe the Court has confused the issue of how much enforcement power Congress possesses under § 5 with the distinct issue of what questions are appropriate for congressional determination and what questions are essentially judicial in nature.

When recognized state violations of federal constitutional standards have occurred, Congress is of course empowered by § 5 to take appropriate remedial measures to redress and prevent the wrongs. See *Strauder* v. *West Virginia*, 100 U.S. 303, 310. But it is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the § 5 power into play at all. Thus, in *Ex parte Virginia, supra*, involving a federal statute making it a federal crime to disqualify anyone from jury service because of race, the Court first held as a matter of constitutional law that "the Fourteenth Amendment secures, among other civil rights, to colored men, when charged with criminal offences against a State, an impartial jury trial, by jurors indifferently selected or chosen without discrimination against such jurors because of their color." 100 U.S., at 345. Only then did the Court hold that to enforce this prohibition upon state discrimination, Congress could enact a criminal statute of the type under consideration. See also *Clyatt* v. *United States*, 197 U.S. 207, sustaining the constitutionality of the antipeonage laws, 14 Stat. 546, now 42 U.S.C. § 1994 (1964 ed.), under the Enforcement Clause of the Thirteenth Amendment.

A more recent Fifteenth Amendment case also serves to illustrate this distinction. In *South Carolina* v. *Katzenbach*, 383 U.S. 301, decided earlier this Term, we held certain remedial sections of this Voting Rights Act of 1965 constitutional under the Fifteenth Amendment, which is directed against deprivations of the right to vote on account of race. In enacting those sections of the Votings Rights Act the Congress made a detailed investigation of various state practices that had been used to deprive Negroes of the franchise. See 383 U.S., at 308–315. In passing upon the remedial provisions, we reviewed first the "voluminous legislative history" as well as judicial precedents supporting the basic congressional finding that the clear commands of the Fifteenth Amendment had been infringed by various state subterfuges. See 383 U.S., at 309, 329–330, 333–334. Given the existence of the evil, we held the remedial steps taken by the legislature under the Enforcement Clause of the Fifteenth Amendment to be a justifiable exercise of congressional initiative.

Section 4(e), however, presents a significantly different type of congressional enactment. The question here is not whether the statute is appropriate remedial legislation to cure an established violation of a constitutional command, but whether there has in fact been an infringement of that constitutional command, that is, whether a particular state practice or, as here, a statute is so arbitrary or irrational as to offend the command of the Equal Protection Clause of the Fourteenth Amendment. That question is one for the judicial branch ultimately to determine. Were the rule otherwise, Congress would be able to qualify this Court's constitutional decisions under the Fourteenth and Fifteenth Amendments, let alone those under other provisions of the Constitution, by resorting to congressional power under the Necessary and Proper Clause. In view of this Court's holding in *Lassiter, supra*, that an English literacy test is a permissible exercise of state supervision over its franchise, I do not think it is open to Congress to limit the effect of that decision as it has undertaken to do by § 4(e). In effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the *substantive* scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 "discretion" by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court. In all such cases there is room for reasonable men to differ as to whether or not a denial of equal protection or due process has occurred, and the final decision is one of judgment. Until today this judgment has always been one for the judiciary to resolve.

I do not mean to suggest in what has been said that a legislative judgment of the type incorporated in § 4(e) is without any force whatsoever. Decisions on questions of equal protection and due process are based not on abstract logic, but on empirical foundations. To the extent "legislative facts" are relevant to a judicial determination, Congress is well equipped to investigate them and such determinations are of course entitled to due respect.[31] In *South Carolina* v. *Katzenbach, supra*, such legislative findings were made to show that racial discrimination in voting was actually occurring. Similarly, in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, and *Katzenbach* v. *McClung*, 379 U.S. 294, this Court upheld Title II of the Civil Rights Act of 1964 under the Commerce Clause. There again the congressional determination that racial discrimination in a clearly defined group of public accommodations did effectively impede interstate commerce was based on "voluminous testimony," 379 U.S., at 253, which had been put before the Congress and in the context of which it passed remedial legislation.

But no such factual data provide a legislative record supporting § 4(e)[32] by way of showing that Spanish-speaking citizens are fully as capable of making informed decisions in a New York election as are English-speaking citizens. Nor was there any showing whatever to support the Court's alternative argument that § 4(e) should be viewed as but a remedial measure designed to cure or assure against unconstitutional discrimination of other varieties, *e.g.*, in "public schools, public housing and law enforcement," *ante*, p. 652, to which Puerto Rican minorities might be subject in such communities as New York. There is simply no legislative record supporting such hypothesized discrimination of the sort we have hitherto insisted upon when congressional power is brought to bear on constitutionally reserved state concerns. See *Heart of Atlanta Motel, supra; South Carolina* v. *Katzenbach, supra.*

Thus, we have here not a matter of giving deference to a congressional estimate, based on its determination of legislative facts, bearing upon the validity *vel non* of a statute, but rather what can at most be called a legislative announcement that Congress believes a state law to entail an unconstitutional deprivation of equal protection. Although this kind of declaration is of course entitled to the most respectful considera-

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tion, coming as it does from a concurrent branch and one that is knowledgeable in matters of popular political participation, I do not believe it lessens our responsibility to decide the fundamental issue of whether in fact the state enactment violates federal constitutional rights.

In assessing the deference we should give to this kind of congressional expression of policy, it is relevant that the judiciary has always given to congressional enactments a presumption of validity. *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443, 457–458. However, it is also a canon of judicial review that state statutes are given a similar presumption, *Butler* v. *Commonwealth*, 10 How. 402, 415. Whichever way this case is decided, one statute will be rendered inoperative in whole or in part, and although it has been suggested that this Court should give somewhat more deference to Congress than to a state legislature,[33] such a simple weighing of presumptions is hardly a satisfying way of resolving a matter that touches the distribution of state and federal power in an area so sensitive as that of the regulation of the franchise. Rather it should be recognized that while the Fourteenth Amendment is a "brooding omnipresence" over all state legislation, the substantive matters which it touches are all within the primary legislative competence of the States. Federal authority, legislative no less than judicial, does not intrude unless there has been a denial by state action of Fourteenth Amendment limitations, in this instance a denial of equal protection. At least in the area of primary state concern a state statute that passes constitutional muster under the judicial standard of rationality should not be permitted to be set at naught by a mere contrary congressional pronouncement unsupported by a legislative record justifying that conclusion.

To deny the effectiveness of this congressional enactment is not of course to disparage Congress' exertion of authority in the field of civil rights; it is simply to recognize that the Legislative Branch like the other branches of federal authority is subject to the governmental boundaries set by the Constitution. To hold, on this record, that § 4 (e) overrides the New York literacy requirement seems to me tantamount to allowing the Fourteenth Amendment to swallow the State's constitutionally ordained primary authority in this field. For if Congress by what, as here, amounts to mere *ipse dixit* can set that otherwise permissible requirement partially at naught I see no reason why it could not also substitute its judgment for that of the States in other fields of their exclusive primary competence as well.

I would affirm the judgments in each of these cases.[34]

FOOTNOTES

[1] The full text of § 4(e) is as follows:

"(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

"(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English." 79 Stat. 439, 42 U.S.C. § 1973b(e) (1964 ed., Supp. I).

[2] Article II, § 1, of the New York Constitution provides, in pertinent part:

"Notwithstanding the foregoing provisions, after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English."

Section 150 of the New York Election Law provides, in pertinent part:

". . . In the case of a person who became entitled to vote in this state by attaining majority, by naturalization or otherwise after January first, nineteen hundred twenty-two, such person must, in addition to the foregoing provisions, be able, except for physical disability, to read and write English. A 'new voter,' within the meaning of this article, is a person who, if he is entitled to vote in this state, shall have become so entitled on or after January first, nineteen hundred twenty-two, and who has not already voted at a general election in the state of New York after making proof of ability to read and write English, in the manner provided in section one hundred sixty-eight."

Section 168 of the New York Election Law provides, in pertinent part:

"1. The board of regents of the state of New York shall make provisions for the giving of literacy tests.

"2. . . . But a new voter may present as evidence of literacy a certificate or diploma showing that he has completed the work up to and including the sixth grade of an approved elementary school or of an approved higher school in which English is the language of instruction or a certificate or diploma showing that he has completed the work up to and including the sixth grade in a public school or a private school accredited by the Commonwealth of Puerto Rico in which school instruction is carried on predominantly in the English language or a matriculation card issued by a college or university to a student then at such institution or a certificate or a letter signed by an official of the university or college certifying to such attendance."

Section 168 of the Election Law as it now reads was enacted while § 4(e) was under consideration in Congress. See 111 Cong. Rec. 18664 (Aug. 4, 1965). The prior law required the successful completion of the eighth rather than the sixth grade in a school in which the language of instruction was English.

[3] This litigation on appellees' challenge to § 4(e), and thus on the scope of our inquiry, does not distort the primary intent of § 4(e). The measure was sponsored in the Senate by Senators Javits and Kennedy and in the House by Representatives Gilbert and Ryan, all of New York, for the explicit purpose of dealing with the disenfranchisement of large segments of the Puerto Rican population in New York. Throughout the congressional debate it was repeatedly acknowledged that § 4(e) had particular reference to the Puerto Rican population in New York. That situation was the almost exclusive subject of discussion. See 111 Cong. Rec. 10643–10644 (May 19, 1965), 10675–10689 (May 20, 1965), 15101–15102 (July 6, 1965), 15665–15676, 15712–15713 (July 9, 1965), 18490–18499 (Aug. 3, 1965), 18663–18665 (Aug. 4, 1965); see also Voting Rights, Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 6400, 89th Cong., 1st Sess., 100–101, 420–421, 508–517 (1965). The Solicitor General informs us in his brief to this Court, that in all probability the practical effect of § 4(e) will be limited to enfranchising those educated in Puerto Rican schools. He advises us that, aside from the schools in the Commonwealth of Puerto Rico, there are no public or parochial schools in the territorial limits of the United States in which the predominant language of instruction is other than English and which would have generally been attended by persons who are otherwise qualified to vote save for their lack of literacy in English.

[4] Section 14(b) provides, in pertinent part:

"No court other than the District Court for the District of Columbia . . . shall have jurisdiction to issue . . . any restraining order or temporary or permanent injunction against the . . . enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto." 79 Stat. 445. 42 U. S. C. § 1973*l*(b) (1964 ed., Supp. I).

The Attorney General of the United States was initially named as the sole defendant. The New York City Board of Elections was joined as a defendant after it publicly announced its intention to comply with § 4(e); it has taken the position in these proceedings that § 4(e) is a proper exercise of congressional power. The Attorney General of the State of New York has participated as *amicus curiae* in the proceedings below and in this Court, urging § 4(e) be declared unconstitutional. The United States was granted leave to intervene as a defendant, 28 U.S.C. § 2403 (1964 ed.); Fed. Rule Civ. Proc. 24(a).

[5] "SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

It is therefore unnecessary for us to consider whether § 4(e) could be sustained as an exercise of power under the Territorial Clause, Art. IV, § 3; see dissenting opinion of Judge McGowan below, 247 F. Supp., at 204; or as a measure to discharge certain treaty obligations of the United States, see Treaty of Paris of 1898, 30 Stat. 1754, 1759; United Nations Charter, Articles 55 and 56; Art. I, § 8, cl. 18. Nor need we consider whether § 4(e) could be sustained insofar as it relates to the election of federal officers as an exercise of congressional power under Art. I, § 4, see *Minor* v. *Happersett*. 21 Wall. 162, 171; *United States* v. *Classic*, 313 U.S. 299, 315; Literacy Tests and Voter Requirements in Federal and State Elections, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on S. 480, S. 2750, and S. 2979, 87th Cong., 2d Sess., 302, 306–311 (1962) (brief of the Attorney General); nor whether § 4(e) could be sustained, insofar as it relates to the election of state officers, as an exercise of congressional power to enforce the clause guaranteeing to each State a republican form of government, Art. IV, § 4; Art. I, § 8, cl. 18.

[6] *Harper* v. *Virginia Board of Elections*, 383 U.S. 663; *Carrington* v. *Rash*, 380 U.S. 89. See also *United States* v. *Mississippi*, 380 U.S. 128; *Louisiana* v. *United States*, 380 U.S. 145, 151; *Lassiter* v. *Northampton Election Bd.*, 360 U.S. 45; *Pope* v. *Williams*, 183 U.S. 621, 632–634; *Minor* v. *Happersett*, 21 Wall. 162; cf. *Burns* v. *Richardson*, *ante*, pp. 73, 92; *Reynolds* v. *Sims*, 377 U.S. 533.

[7] For the historical evidence suggesting that the sponsors and supporters of the Amendment were primarily interested in augmenting the power of Congress, rather than the judiciary, see generally Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 Yale L. J. 1353, 1356–1357; Harris, The Quest for Equality, 33–56 (1960); tenBroek, The Anti-slavery Origins of the Fourteenth Amendment 187–217 (1951).

[8] Senator Howard, in introducing the proposed Amendment to the Senate, described § 5 as "a direct affirmative delegation of power to Congress," and added:

"It casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no State infringes the

rights of persons or property. I look upon this clause as indispensable for the reason that it thus imposes upon Congress this power and this duty. It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment." Cong. Globe, 39th Cong., 1st Sess., 2766, 2768 (1866).

This statement of § 5's purpose was not questioned by anyone in the course of the debate. Flack, The Adoption of the Fourteenth Amendment 138 (1908).

[9] In fact, earlier drafts of the proposed Amendment employed the "necessary and proper" terminology to describe the scope of congressional power under the Amendment. See tenBroek, The Antislavery Origins of the Fourteenth Amendment 187–190 (1951). The substitution of the "appropriate legislation" formula was never thought to have the effect of diminishing the scope of this congressional power. See. *e.g.*, Cong. Globe, 42d Cong., 1st Sess., App. 83 (Representative Bingham, a principal draftsman of the Amendment and the earlier proposals)

[10] Contrary to the suggestion of the dissent, *post*, p. 668, § 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by § 5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.

[11] Cf. *James Everard's Breweries* v. *Day*, *supra*, which held that, under the Enforcement Clause of the Eighteenth Amendment, Congress could prohibit the prescription of intoxicating malt liquor for medicinal purposes even though the Amendment itself only prohibited the manufacture and sale of intoxicating liquors for beverage purposes. Cf. also the settled principle applied in the *Shreveport Case* (*Houston, E. & W. T. R. Co.* v. *United States*, 234 U. S. 342), and expressed in *United States* v. *Darby*, 312 U. S. 100, 118, that the power of Congress to regulate interstate commerce "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end . . ." Accord, *Atlanta Motel* v. *United States*, 379 U. S. 241, 258.

[12] See, *e.g.*, 111 Cong. Rec. 10676, 10680 (May 20, 1965), 15671 (July 9, 1965); Literacy Tests and Voter Requirements in Federal and State Elections, Senate Hearings, n. 5, *supra*, 507–508.

[13] The principal exemption complained of is that for persons who had been eligible to vote before January 1, 1922. See n. 2, *supra*.

[14] This evidence consists in part of statements made in the Constitutional Convention first considering the English literacy requirement, such as the following made by the sponsor of the measure: "More precious even than the forms of government are the mental qualities of our race. While those stand unimpaired, all is safe. They are exposed to a single danger, and that is that by constantly changing our voting citizenship through the wholesale, but valuable and necessary infusion of Southern and Eastern European races. . . . The danger has begun. . . . We should check it." III New York State Constitutional Convention 3012 (Rev. Record 1916).

See *also id.*, at 3015–3017, 3021–3055. This evidence was reinforced by an understanding of the cultural milieu at the time of proposal and enactment, spanning a period from 1915 to 1921—not one of the enlightened eras of our history. See generally Cafee, Free Speech in the United States 102, 237, 269–282 (1954 ed.). Congress was aware of this evidence, See, *e.g.*, Literacy Tests and Voter Requirements in Federal and State Elections, Senate Hearings, n. 5, *supra*, 507–513; Voting Rights, House Hearings, n. 3, *supra*, 508–513.

[15] Other States have found ways of assuring an intelligent exercise of the franchise short of total disenfranchisement of persons not literate in English. For example, in Hawaii, where literacy in either English or Hawaiian suffices, candidates' names may be printed in both languages, Hawaii Rev. Laws § 11–38 (1963 Supp.); New York itself already provides assistance for those exempt from the literacy requirement and are literate in no language, N. Y. Election Law § 169; and, of course, the problem of assuring the intelligent exercise of the franchise has been met by those States, more than 30 in number, that have no literacy requirement at all, see *e.g.*, Fla. Stat. Ann. §§ 97.061, 101.061 (1960) (form of personal assistance); New Mexico Stat. Ann. §§ 3–2–11, 3–3–13 (personal assistance for those literate in no language), §§ 3–3–7, 3–3–12, 3–2–41 (1953) (ballots and instructions authorzed to be printed in English or Spanish). Section 4 (e) does not preclude resort to these alternative methods of assuring the intelligent exercise of the franchise. True, the statute precludes, for a certain class, disenfranchisement and thus limits the States' choice of means of satisfying a purported state interest. But our cases have held that the States can be required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties and rights are threatened, see *e.g.*, *Carrington* v. *Rash*, 380 U.S. 89, 96; *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 670; *Thomas* v. *Collins*, 323 U. S. 516, 529–530; *Thornhill* v. *Alabama*, 310 U. S. 88, 95–96; *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152–153, n. 4; *Meyer* v. *Nebraska*, 262 U.S. 390; and Congress is free to apply the same principle in the exercise of it. powers.

[16] See, *e.g.*, 111 Cong. Rec. 10675 (May 20, 1965), 15102 (July 6, 1965), 15666 (July 9, 1965). The record in this case includes affidavits describing the nature of New York's two major Spanish-language newspapers, one daily and one weekly, and its three full-time Spanish-language radio stations and affidavits from those who have campaigned in Spanish-speaking areas.

[17] See, *e.g.*, 111 Cong. Rec. 10676 (Senator Long of Louisiana and Senator Young), 10678 (Senator Holland) (May 20, 1965), drawing on their experience with voters literate in a language other than English. See also an affidavit from Representative Willis of Louisiana expressing the view that on the basis of his thirty years' personal experience in politics he has "formed a definite opinion that French-speaking voters who are illiterate in English generally have as clear a grasp of the issues and an understanding of the candidates, as do people who read and write the English language."

[18] See, *e.g.*, 111 Cong. Rec. 10675 (May 20, 1965).

[19] See Magruder, The Commonwealth Status of Puerto Rico, 15 U. Pitt. L. Rev. 1 (1953).

[20] See *e.g.*, 111 Cong. Rec. 10675, 10680, 10688 (May 20, 1965), 15666 (July 9, 1965). See Osuna, A History of Education in Puerto Rico (1949).

[21] See, *e.g.*, 111 Cong. Rec. 15666 (July 9, 1965); Voting Rights, House Hearings, n. 3, *supra*, 362. See also Jones Act of 1917, 39 Stat. 953, conferring United States citizenship on all citizens of Puerto Rico.

[22] [This opinion applies also to *Cardona* v. *Power*, *post*, p. 672.]

[23] The pertinent portions of the New York Constitution, Art. II, § 1, and statutory provisions are reproduced in the Court's opinion, *ante*, pp. 644–645, n. 2.

[24] The Fifteenth Amendment forbids denial or abridgment of the franchise "on account of race, color, or previous condition of servitude"; the Seventeenth deals with popular election of members of the Senate; the Nineteenth provides for equal suffrage for women; the Twenty-fourth outlaws the poll tax as a qualification for participation in federal elections.

[25] The test is described in McGovney; The American Suffrage Medley 63 (1949) as follows: "The examination is based upon prose compositions of about ten lines each, prepared by the personnel of the State Department of Education, designed to be of the level of reading in the sixth grade . . . . These are uniform for any single examination throughout the state. The examination is given by school authorities and graded by school superintendents or teachers under careful instructions from the central authority, to secure uniformity of grading as nearly as is possible." The 1943 test, submitted by the Attorney General of New York as representative, is reproduced below:

NEW YORK STATE REGENTS LITERACY TEST

(To be filled in by the candidate in ink)

Write your name here (First name) (Middle initial) (Last name)

Write your address here.

Write the date here (Month) (Day) (Year)

Read this and then write the answers to the questions.

Read it as many times as you need to.

The legislative branch of the National Government is called the Congress of the United States. Congress makes the laws of the Nation. Congress is composed of two houses. The upper house is called the Senate and its members are called Senators. There are 96 Senators in the upper house, two from each State. Each United States Senator is elected for a term of six years. The lower house of Congress is known as the House of Representatives. The number of Representatives from each state is determined by the population of that state. At present there are 435 members of the House of Representatives. Each Representative is elected for a term of two years. Congress meets in the Capitol at Washington.

The answers to the following questions are to be taken from the above paragraph.

1 How many houses are there in Congress?

2 What does Congress do?

3 What is the lower house of Congress called?

4 How many members are there in the lower house?

5 How long is the term of office of a United States Senator?

6 How many Senators are there from each state?

7 For how long a period are members of the House of Representatives elected?

8 In what city does Congress meet?

[27] There is no allegation of discriminatory enforcement, and the method of examination, see n. 3, *supra*, makes unequal application virtually impossible. McGovney has noted, *op. cit. supra*, at 62, that "New York is the only state in the Union that both has a reasonable reading requirement and administers it in a manner that secures uniformity of application throughout the state and precludes discrimination, so far as is humanly possible." See *Camacho* v. *Rogers*, 199 F. Supp. 155, 159–160.

[28] See McKinney's Consolidated Laws of New York Ann., Education Law § 4605. See generally Handbook of Adult Education in the United States 455–465 (Knowles ed. 1960).

[29] The statute makes an exception to its sixth-grade rule so that where state law "provides that a different level of education is presumptive of literacy," the applicant must show that he has completed "an equivalent level of education" in the foreign-language United States school.

[30] Section 5 of the Fourteenth Amendment states that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[31] See generally Karst, Legislative Facts in Constitutional Litigation, 1960 The Supreme Court Review 75 (Kurland ed.); Alfange, The Relevance of Legislative Facts in Constitutional Law, 114 U. Pa. L. Rev. 637 (1966).

[32] There were no committee hearings or reports referring to this section, which was introduced from the floor during debate on the full Voting Rights Act. See 111 Cong. Rec. 10643 (daily ed., May 19, 1965); *id.*, at 15101 (July 6, 1965); *id.*, at 15665 (July 9, 1965).

[33] See Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 154–155 (1893).

[34] A number of other arguments have been suggested to sustain the constitutionality of § 4(e). These are referred to in the Court's opinion, *ante*, pp. 646–647, n. 5. Since all of such arguments are rendered superfluous by the Court's decision and none of them is considered by the majority, I deem it unnecessary to deal with them save to say that in my opinion none of those contentions provides an adequate constitutional basis for sustaining the statute.

Supreme Court of the United States—Nos. 43, 44, 46, 47 Origl.—October Term, 1970

On Bills of Complaint.

State of Oregon, Plaintiff, 43 v. John N. Mitchell, Attorney General of the United States.

State of Texas, Plaintiff, 44 v. John N. Mitchell, Attorney General of the United States.

United States, Plaintiff, 46 v. State of Arizona.

United States, Plaintiff, 47 v. State of Idaho.

December 21, 1970.

Mr. Justice Black, announcing the judgments of the Court in an opinion expressing his own view of the cases.

In these suits the States resist compliance with the Voting Rights Act Amendments of 1970, Pub. L. 91–285, 84 Stat. 314, because they believe that the Act takes away from them powers reserved to the States by the Constitution to control their own elections.[1] By its terms the Act does three things. First: It lowers the minimum age of voters in both state and federal elections from 21 to 18. Second: Based upon a finding by Congress that literacy tests have been used to discriminate against voters on account of their color, the Act enforces the Fourteenth and Fifteenth Amendments by barring the use of such tests in all elections, state and national. Third: The Act forbids States presidential and vice presidential electors because they have not met state residency requirements.

For the reasons set out in Part I of this opinion, I believe Congress can fix the age of voters in national elections, such as congressional, senatorial, Vice-Presidential and Presidential elections, but cannot set the voting age in state and local elections. For reasons expressed in separate opinions, my Brothers DOUGLAS, BRENNAN, WHITE, and MARSHALL join me in concluding that Congress can enfranchise 18-year-old citizens in national elections, but dissent from the judgment that Congress cannot extend the franchise to 18-year-old citizens in state and local elections. For reasons expressed in separate opinions, my Brothers THE CHIEF JUSTICE, HARLAN, STEWART, and BLACKMUN join me in concluding that Congress cannot interfere with the age for voters set by the States for state and local elections. They, however, dissent from the judgment that Congress can control voter qualifications in federal elections. In summary, it is the judgment of the Court that the 18-year-old vote provisions of the Voting Rights Act Amendments of 1970 are constitutional and enforceable insofar as they pertain to federal elections and unconstitutional and unenforceable insofar as they pertain to state and local elections.

For the reasons set out in Part II of this opinion, I believe that Congress, in the exercise of its power to enforce the Fourteenth and Fifteenth Amendments, can prohibit the use of literacy tests or other devices used to discriminate against voters on account of their race in both state and federal elections. For reasons expressed in separate opinions, all of my Brethren join me in this judgment. Therefore the literacy test provisions of the Act are upheld.

For the reasons set out in Part III of this opinion, I believe Congress can set residency requirements and provide for absentee balloting in elections for presidential and vice presidential electors. For reasons expressed in separate opinions, my Brothers THE CHIEF JUSTICE, DOUGLAS, BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN concur in this judgment. My Brother HARLAN, for the reasons stated in his separate opinion, considers that the residency provisions of the statute are unconstitutional. Therefore the residency and absentee balloting provisions of the Act are upheld.

I

The Framers of our Constitution provided in Art. I, § 2, that members of the House of Representatives should be elected by the people and that the voters for Representatives should have "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Senators were originally to be elected by the state legislatures, but under the Seventeenth Amendment Senators are also elected by the people, and voters for Senators have the same qualifications as voters for Representatives. In the very beginning the responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations if it deemed advisable.[2] This was done in Art. I, § 4, of the Constitution which provides:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; *but the Congress may at any time by Law make or alter such Regulations*, except as to the Place of Chusing Senators." (Emphasis supplied.)

Moreover, the power of Congress to make election regulations in national elections is augmented by the Necessary and Proper Clause. See *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819). In *United States* v. *Classic*, 313 U.S. 299 (1941), where the Court upheld congressional power to regulate party primaries, Mr. Justice Stone speaking for the Court construed the interrelation of these clauses of the Constitution, stating:

"While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, . . . this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.' " 313 U.S., at 315.

See also *Ex parte Siebold*, 100 U.S. 371 (1879); *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Swafford* v. *Templeton*, 185 U.S. 487 (1902); *Wiley* v. *Sinkler*, 179 U.S. 58 (1900).

The breadth of power granted to Congress to make or alter election regulations in national elections, including the qualifications of voters, is demonstrated by the fact that the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of the congressional districts. In the ratifying conventions speakers "argued that the power given Congress in Art. 1, § 4, was meant to be used to vindicate the people's right to equality of representation in the House," *Wesberry* v. *Sanders*, 376 U.S. 1, 16 (1964), and that Congress would "most probably . . . lay the state off into districts." And in *Colgrove* v. *Green*, 328 U.S. 549 (1946), no Justice of this Court doubted Congress' power to rearrange the congressional districts according to population; the fight in that case revolved about the judicial power to compel redistricting.

Surely no voter *qualification* was more important to the Framers than the *geographical qualification* embodied in the concept of congressional districts. The Framers expected Congress to use this power to eradicate "rotten boroughs,"[3] and Congress has in fact used its power to prevent States from electing all Congressmen at large.[4] There can be no doubt that the power to alter congressional district lines is vastly more significant in its effect than the power to permit 18-year-old citizens to go to the polls and vote in all federal elections.

Any doubt about the powers of Congress to regulate congressional elections, including the age and other qualifications of the voters should be dispelled by the opinion of this Court in *Smiley* v. *Holm*, 285 U.S. 355 (1932). There, Chief Justice Hughes writing for a unanimous Court discussed the scope of congressional power under § 4 at some length. He said:

"The subject matter is the 'times, places and manner' of holding elections for Senators and Representatives." It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. . . .

"This view is confirmed by the second clause of Article I, section 4, which provides that 'the Congress may at any time by law make or alter such regulations,' with the single exception stated. The phrase 'such regulations' plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regulations or may substitute its own. . . . It 'has a general supervisory power over the whole subject.' " *Id.*, at 366–367.

In short, the Constitution allotted to the States the power to make laws regarding national elections, but provided that if Congress became dissatisfied with the state laws, Congress could alter them.[5] A newly created national government could hardly have been expected to survive without the ultimate power to rule itself and to fill its offices under its own laws. The Voting Rights Act Amendments of 1970 now before this Court evidence dissatisfaction of Congress with the voting age set by many of the States for national elections. I would hold, as have a long line of decisions in this Court, that Congress has ultimate supervisory power over congressional elections.[6] Similarly, it is the prerogative of Congress to oversee the conduct of presidential and vice presidential elections and to set the qualifications for voters for electors for those offices. It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections.[7]

On the other hand, the Constitution was also intended to preserve to the States the power that even the Colonies had to estab-

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Footnotes at end of article.

lish and maintain their own separate and independent governments, except insofar as the Constitution itself commands otherwise. My Brother HARLAN has persuasively demonstrated that the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment,[8] the power to regulate elections. My major disagreement with my Brother HARLAN is that, while I agree as to the States' power to regulate the elections of their own officials, I believe, contrary to his view, that Congress has the final authority over federal elections. No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices. *Pope* v. *Williams*, 193 U.S. 621 (1904); *Minor* v. *Happersett*, 21 Wall. 162 (1874). Moreover, Art. I, § 2,[9] is a clear indication that the Framers intended the States to determine the qualifications of their own voters for state offices, because those qualifications were adopted for federal offices unless Congress directs otherwise under Art. I, § 4. It is a plain fact of history that the Framers never imagined that the national Congress would set the qualifications for voters in every election from President to local constable or village alderman. It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States. Amendments Fourteen, Fifteen, Nineteen, and Twenty-Four, each of which has assumed that the States had general supervisory power over state elections, are examples of express limitations on the power of the States to govern themselves. And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty Fourth Amendments superfluous. My Brother BRENNAN'S opinion, if carried to its logical conclusion, would, under the guise of insuring equal protection, blot out all state power, leaving the 50 States little more than impotent figureheads. In interpreting what the Fourteenth Amendment means, the Equal Protection Clause should not be stretched to nullify the States' powers over elections which they had before the Constitution was adopted and which they have retained throughout our history.

Of course, the original design of the Founding Fathers was altered by the Civil War Amendments and various other amendments to the Constitution. The Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments have expressly authorized Congress to "enforce" the limited prohibitions of those amendments by "appropriate legislation." The Solicitor General contends in these cases that Congress can set the age qualifications for voters in state elections under its power to enforce the Equal Protection Clause of the Fourteenth Amendment.

Above all else, the Framers of the Civil War Amendments intended to deny to the States the power to discriminate against persons on account of their race. *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Slaughter House Cases*, 16 Wall. 36, 71–72 (1872). While this Court has recognized in some instances that the Equal Protection Clause of the Fourteenth Amendment protects against discriminations other than those on account of race,[10] See *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Hadley* v. *Junior College District*, 397 U.S. 50 (1970); see also *Kotch* v. *Board of River Port Pilots*, 330 U.S. 552 (1947), and cases cited therein, it cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves. The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people. On the other hand, the Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race.

To fulfill their goal of ending racial discrimination and to prevent direct or indirect state legislative encroachment on the rights guaranteed by the amendments, the Framers gave Congress power to enforce each of the Civil War Amendments. These enforcement powers are broad. In *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968), the Court held that § 2 of the Thirteenth Amendment "clothed 'Congress with the power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.'" In construing § 5 of the Fourteenth Amendment, the Court has stated:

"It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of government shall be authorized to declare void any action of a State in violation of the prohibitions. *It is the power of Congress which has been enlarged.*" *Ex parte Virginia*, 100 U. S. 339, 345 (1879). (Emphasis added.)

And in *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966) (MR. JUSTICE BLACK dissenting on other grounds), the Court upheld the literacy test ban of the Voting Rights Act of 1965 under Congress' Fifteenth Amendment enforcement power.

As broad as the congressional enforcement power is, it is not unlimited. Specifically, there are at least three limitations upon Congress' power to enforce the guarantees of the Civil War Amendments. First, Congress may not by legislation repeal other provisions of the Constitution. Second, the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation. Third, Congress may only "enforce" the provisions of the amendments and may do so only by "appropriate legislation." Congress has no power under the enforcement sections to undercut the Amendments' guarantees of personal equality and freedom from discrimination see *Katzenbach* v. *Morgan*, 384 U. S. 641, 651 n. 10 (1966), or to undermine those protections of the Bill of Rights which we have held the Fourteenth Amendment made applicable to the States.[11]

Of course, we have upheld congressional legislation under the Enforcement Clauses in some cases where Congress has interfered with state regulation of the local electoral process. In *Katzenbach* v. *Morgan*, *supra*, the Court upheld a statute which outlawed New York's requirement of literacy in English as a prerequisite for voting as this requirement was applied to Puerto Ricans with certain educational qualifications. The New York statute overridden by Congress applied to all elections. And in *South Carolina* v. *Katzenbach*, *supra* (MR. JUSTICE BLACK dissenting on other grounds), the Court upheld the literacy test ban of the Voting Rights Act of 1965. That Act proscribed the use of the literacy test in all elections in certain areas. But division of power between state and national governments, like every provision of the Constitution, was expressly qualified by the Civil War Amendments' ban on racial discrimination. Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the Framers of the Thirteenth, Fourteenth and Fifteenth Amendments. Cf. *Harper* v. *Virginia Board of Elections*, 383, U. S. 663, 670 (1966) (dissenting opinion of MR. JUSTICE BLACK).

In enacting the 18-year-old vote provisions of the Act now before the Court, Congress made no legislative findings that 21-year-old vote requirements were used by the States to disenfranchise voters on account of race. I seriously doubt that such a finding, if made, could be supported by substantial evidence. Since Congress has attempted to invade an area preserved to the States by the Constitution without a foundation for enforcing the Civil War Amendments' ban on racial discrimintaion, I would hold that Congress has exceeded its powers in attempting to lower the voting age in state and local elections. On the other hand, where Congress legislates in a domain not exclusively reserved by the Constitution to the States, its enforcement power need not be tied so closely to the goal of eliminating discrimination on account of race.

To invalidate part of the Voting Rights Act Amendments of 1970, however, does not mean that the entire Act must fall or that the constitutional part of the 18-year-old vote provision cannot be given effect. In passing the Voting Rights Act Amendments of 1970, Congress recognized that the limits of its power under the Enforcement Clauses were largely undetermined, and therefore included a broad severability provision:

"If any provision of this Act or the application of any provision thereof to any person or circumstance is judicially determined to be invalid, the remainder of this Act or the application of such provision to other persons or circumstances shall not be affected by such determination."

In this case, it is the judgment of the Court that Title III, lowering the voting age to 18, is invalid as applied to voters in state and local elections. It is also the judgment of the Court that Title III is valid with respect to national elections. We would fail to follow the express will of Congress in interpreting its own statute if we refuse to sever these two distinct aspects of Title III. Moreover, it is a longstanding canon of statutory construction that legislative enactments are to be enforced to the extent that they are not inconsistent with the Constitution, particularly where the valid portion of the statute does not depend upon the invalid part. See, *e.g.*, *Watson* v. *Buck*, 313 U.S. 387 (1941); *Marsh* v. *Buck*, 313 U.S. 406 (1941). Here, of course, the enforcement of the 18-year-old vote in national elections is in no way dependent upon its enforcement in state and local elections.

II

In Title I of the Voting Rights Act Amendments of 1970 Congress extended the provisions of the Voting Rights Act of 1965 which ban the use of literacy tests in certain States upon the finding of certain conditions by the United States Attorney General. The Court upheld the provisions of the 1965 Act over my partial dissent in *South Carolina* v. *Katzenbach*, *supra*, and *Gaston County* v. *United States*, 395 U. S. 285 (1969). The constitutionality of Title I is not raised by any of the parties to these suits.[12]

In title II of the Amendments Congress prohibited the use of any test or device resembling a literacy test in any national, state, or local election in any area of the United States where such test is not already proscribed by the Voting Rights Act of 1965. The State of Arizona maintains that Title II cannot be enforced to the extent that it is inconsistent with Arizona's literacy test requirement. Ariz. Rev. Stat. Ann. §§ 16–101. A.4, 16–101.A.5 (1956). I would hold that the

Footnotes at end of article.

literacy test ban of the 1970 Amendments is constitutional under the Enforcement Clause of the Fifteenth Amendment and that it supersedes Arizona's conflicting statutes under the Supremacy Clause of the Federal Constitution.

In enacting the literacy test ban of Title II Congress had before it a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race. Congress could have found that as late as the summer of 1968, the percentage registration of nonwhite voters in seven Southern States was substantially below the percentage of registration of white voters.[13] Moreover, Congress had before it striking evidence to show that the provisions of the 1965 Act had in the span of four years had a remarkable impact on minority group voter registration.[14] Congress also had evidence to show that voter registration in areas with large Spanish-American populations was consistently below the state and national averages. In Arizona, for example, only two counties out of eight with Spanish surname populations in excess of 15% showed a voter registration equal to the statewide average.[15] Arizona also has a serious problem of deficient voter registration among Indians. Congressional concern over the use of literacy test to disfranchise Puerto Ricans in New York State is already a matter of record in this Court. *Katzenbach* v. *Morgan, supra.* And as to the Nation as a whole, Congress had before it statistics which demonstrate that voter registration and voter participation are consistently greater in States without literacy tests.[16]

Congress also had before it this country's history of discriminary educational opportunities in both North and the South. The children who were denied an equivalent education by the "separate but equal" rule of *Plessy* v. *Ferguson,* 163 U.S. 537 (1896), overruled in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), are now old enough to vote. There is substantial, if not overwhelming, evidence from which Congress could have concluded that it is a denial of equal protection to conditions the political participation of children educated in a dual school system upon their educational achievement. Moreover, the history of this legislation suggests that concern with educational inequality was perhaps uppermost in the minds of the congressmen who sponsored the Act. The hearings are filled with references to educational inequality. Faced with this and other evidence that literacy tests reduce voter participation in a discriminatory manner not only in the South but throughout the Nation, Congress was supported by substantial evidence in concluding that a nationwide ban on literacy tests was appropriate to enforce the Civil War Amendments.

Finally, there is yet another reason for upholding the literacy test provisions of this Act. In imposing a nationwide ban on literacy tests, Congress has recognized a national problem for what it is—a serious national dilemma that touches every corner of our Land. In this legislation Congress has recognized that discrimination on account of color and racial origin is not confined to the South, but exists in various parts of the country. Congress has decided that the way to solve the problems of racial discrimination is to deal with nationwide discrimination with nationwide legislation. Compare *South Carolina* v. *Katzenbach, supra,* and *Gaston County* v. *United States, supra.*

III

In Title II of the Voting Rights Act Amendments Congress also provided that in presidential and vice presidential elections, no voter could be denied his right to cast a ballot because he had not lived in the jurisdiction long enough to meet its residency requirements. Furthermore, Congress provided uniform national rules for absentee voting in presidential and vice presidential elections. In enacting these regulations for national elections Congress was attempting to insure a fully effective voice to all citizens in national elections. What I said in Part I of this opinion applies with equal force here. Acting under its broad authority to create and maintain a national government, Congress unquestionably has power under the Constitution to regulate federal elections. The Framers of our Constitution were vitally concerned with setting up a national government that could survive. Essential to the survival and to the growth of our national government is its power to fill its elective offices and to insure that the officials who fill those offices are as responsive as possible to the will of the people whom they represent.

Our judgment today gives the Federal Government the powers the Framers conferred upon it, that is, the final control of the elections of its own officers. Our judgment also saves for the States the power to control state and local elections which the Constitution originally reserved to them and which no subsequent amendment has taken from them.[17] The generalities of the Equal Protection Clause of the Fourteenth Amendment were not designed or adopted to render the States impotent to set voter qualifications in elections for their own local officials and agents in the absence of some specific constitutional limitations.

FOOTNOTES

[1] In Nos. 43 and 44 Oregon and Texas respectively invoke the original jurisdiction of this Court to sue the United States Attorney General seeking an injunction against the enforcement of Title III (18-year-old vote) of the Act. In No. 46 the United States invokes our original jurisdiction seeking to enjoin Arizona from enforcing its laws to the extent that they conflict with the Act, and directing the officials of Arizona to comply with the provisions of Title II (nationwide literacy test ban) and Title III (18-year-old vote) of the Act. In No. 47 the United States invokes our original jurisdiction seeking to enjoin Idaho from enforcing its laws to the extent that they conflict with Title II (abolition of residency requirements in presidential and vice presidential elections) and Title III (18-year-old vote) of the Act. No question has been raised concerning the standing of the parties or the jurisdiction of this Court.

[2] Article I, § 4 was a compromise between those delegates to the Constitutional Convention who wanted the States to have final authority over the election of all state and federal officers and those who wanted Congress to make laws governing national elections, 2 Story, Commentaries on the Constitution of the United States 280–292 (1st ed. 1883). The contemporary interpretation of this compromise reveals that those who favored national authority over national elections prevailed. Six States included in their resolutions of ratification the recommendation that a constitutional amendment be adopted to curtail the power of the Federal Government to regulate national elections. Such an amendment was never adopted.

A majority of the delegates to the Massachusetts ratifying convention must have assumed that Art. I, § 4 gave very broad powers to Congress. Otherwise that convention would not have recommended an amendment providing:

"That Congress do not exercise the powers vested in them by the 4th section of the 1st Article, but in cases where a state shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress, agreeably to the Constitution." 2 Elliot's Debates on the Federal Constitution 177 (1876).

The speech of Mr. Cabot, one delegate to the Massachusetts convention, who argued that Art. I, § 4, was "to be as highly prized as any in the Constitution," expressed a view of the breadth of that section which must have been shared by most of his colleagues.

"[I]f the State Legislatures are suffered to regulate conclusively the election of the democratic branch, they may . . . finally annihilate, that control of the general government which the people ought always have . . . *Id.,* at 26.

And Cabot was supported by Mr. Parsons, who added:

". . . They might make an unequal and partial division of the states into districts for election of representatives, or they might even disqualify one third of the electors. Without these powers in Congress, the people can have no remedy; but the fourth section provides a remedy, a controlling power in a legislature, composed of senators and representatives of twelve states, without the influence of our commotions and factions, who will hear impartially, and preserve and restore to the people their equal and sacred rights of election." *Id.,* at 27.

[3] See *Wesberry* v. *Sanders,* 376 U.S. 1, 14–16 (1964).

[4] See, *e.g.,* Act of August 8, 1911, c. 5, 37 Stat. 13.

[5] My Brother STEWART has cited the debates of the Constitutional Convention to show that Oliver Ellsworth, George Mason, Madison, and Franklin successfully opposed granting Congress the power to regulate federal elections, including the qualifications of voters, in the original Constitution. I read the history of our Constitution differently. Mr. Madison, for example, explained Art. I, § 4, to the Virginia ratifying convention follows:

"[I]t was thought that the regulation of the time, place and manner, of electing Representatives, should be uniform throughout the continent. Some States might regulate the elections on the principles of equality, and others might regulate them otherwise. This diversity would be obviously unjust. . . . Should the people of any State by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government." 3 Elliot's Debates on the Federal Constitution 367 (1876).

And Mr. Mason, who was supposedly successful in opposing a broad grant of power to Congress to regulate federal elections, still found it necessary to support an unsuccessful Virginia proposal to curb the power of Congress under Art. I, § 4. *Id.,* at 403.

[6] See, *e.g., Ex parte Siebold,* 100 U.S. 371 (1879); *Ex parte Yarbrough,* 110 U.S. 651 (1884); *United States* v. *Mosley,* 238 U.S. 383 (1915); *United States v. Classic,* 313 U.S. (1941).

[7] With reference to the selection of the President and Vice President, Art. II, § 1 provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress. . . ." But this Court in *Burroughs* v. *United States,* 290 U.S. 534 (1934), upheld the power of Congress to regulate certain aspects of elections for presidential and vice-presidential electors, specifically rejecting a construction of Art. II, § 1, that would have curtailed the power of Congress to regulate such elections. Finally, and most important, inherent in the very concept of a supreme national government with national officers is a residual power in Congress to insure that those officers represent their national constituency as responsively as possible. This power arises from the nature of our constitutional system of government and from the Necessary and Proper Clause.

[8] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X.

[9] "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

[10] My Brother BRENNAN relies upon *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969); and *Evans* v. *Cornman*, 398 U.S. 419 (1970). These typical equal protection cases in which I joined are not relevant or material to our decision in the cases before us. The establishment of voter age qualifications is a matter of legislative judgment which cannot be properly decided under the Equal Protection Clause. The crucial question here is not who is denied equal protection, but rather which political body, state or federal, is empowered to fix the minimum age of voters. The Framers intended the States to make the voting age decision in all elections with the provision that Congress could override state judgments concerning the qualifications of voters in federal elections.

[11] See: the First Amendment, *e.g.*, *Gitlow* v. *New York*, 268 U.S. 652 (1925); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); the Fourth Amendment, *Mapp* v. *Ohio*, 367 U.S. 643 (1961); the Fifth Amendment, *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226 (1897); *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Benton* v. *Maryland*, 395 U.S. 784 (1969); the Sixth Amendment, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); and the Eighth Amendment, *Robinson* v. *California*, 370 U.S. 660 (1962).

[12] Yuma County, Arizona, is presently subject to the literacy test ban on the Voting Rights Act of 1965 pursuant to a determination of the Attorney General under § 4(a) of the 1965 Act. I do not understand Arizona to contest the application of the 1965 Act or its extension to that county. Arizona "does not question" Congress' authority to enforce the Fourteenth and Fifteenth Amendments when Congress possesses a 'special legislative competence'; and cites *South Carolina* v. *Katzenbach*, 383 U. S. 641 (1966), with approval. Answer and Brief for Arizona, No. 46 Orig., O. T. 1970.

[13] Hearings on H. R. 4249, H. R. 5538, and Similar Proposals before Subcommittee No. 5 of the House Committee on the Judiciary, pt. 3, at 14 (1969).

[14] *Id.*, at 93.

[15] Hearings on S. 818, S. 2456, S. 2507, and Title IV of S. 2029 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, at 406 (1969–1970).

[16] *Id.*, at 401.

[17] That these views are not novel is demonstrated by Mr. Justice Story in his Commentaries on the Constitution of the United States, vol. II, at 284–285 (1st ed. 1833).

"There is, too, in the nature of such a provision [Article I, § 4], something incongruous, if not absurd. What would be said of a clause introduced into a national constitution to regulate the state elections of the members of the state legislatures? It would be deemed a most unwarrantable transfer of power, indicating a premeditated design to destroy the state governments. It would be deemed so flagrant a violation of principle, as to require no comment. It would be said, and justly, that the state governments ought to possess the power of self-existence and self-organization, independent of the pleasure of the national government. *Why does not the same reasoning apply to the national government?* What reason is there to suppose, that the state governments will be more true to the Union, than the national government will be to the state governments?" (Emphasis added.) (Footnote omitted.)

Supreme Court of the United States—Nos. 43, 44, 46, 47 Orig.—October Term, 1970

ON BILLS OF COMPLAINT

State of Oregon, Plaintiff, 43 *v.* John N. Mitchell, Attorney General of the United States.

State of Texas, Plaintiff, 44 *v.* John N. Mitchell, Attorney General of the United States.

United States, Plaintiff, 46 *v.* State of Arizona.

United States, Plaintiff, 47 *v.* State of Idaho.

December 21, 1970.

Mr. Justice Douglas.

I dissent from the judgment of the Court insofar as it declares § 302 unconstitutional as applied to state elections and concur in the judgment as it affects federal elections but for different reasons. I rely on the Equal Protection Clause and on the Privileges and Immunities Clause of the Fourteenth Amendment.

I

The grant of the franchise to 18-year-olds by Congress is in my view valid across the board.

I suppose that in 1920, when the Nineteenth Amendment was passed giving women the right to vote, it was assumed by most constitutional experts that there was no relief by way of the Equal Protection Clause of the Fourteenth Amendment. In *Minor* v. *Happersett*, 21 Wall. 162, the Court held in the 1874 Term that a State could constitutionally restrict the franchise to men. While the Fourteenth Amendment was relied upon, the thrust of the opinion was directed at the Privileges and Immunities Clause with a subsidiary reference to the Due Process Clause. It was much later, indeed not until the 1961 Term—nearly a century after the Fourteenth Amendment was adopted—that discrimination against voters on grounds *other than race* was struck down.

The first case in which this Court struck down a statute under the Equal Protection Clause of the Fourteenth Amendment was *Strauder* v. *West Virginia*, 100 U.S. 303, decided in the 1879 Term.[1] In the 1961 Term we squarely held that the manner of apportionment of members of a state legislature raised a justiciable question under the Equal Protection Clause, *Baker* v. *Carr*, 369 U.S. 186. That case was followed by numerous others, *e.g.*: that one person could not be given twice or 10 times the voting power of another person in a statewide election merely because he lived in a rural area or in the smallest rural county;[2] that the principle of equality applied to both Houses of a bicameral legislature;[3] that political parties receive the protection under the Equal Protection Clause just as voters do.[4]

The reapportionment cases, however, are not quite in point here, though they are the target of my Brother HARLAN's dissent. His painstaking review of the history of the Equal Protection Clause leads him to conclude that "political" rights are not protected though "civil" rights are protected. The question of what questions are "political" has been a recurring issue in this Court from the beginning, and we recently reviewed them all in *Baker* v. *Carr*, *supra*, and in *Powell* v. *McCormack*, 395 U.S. 486. *Baker* v. *Carr* was a reapportionment case and *Powell* v. *McCormack* involved the exclusion from the House of Representatives of a Congressman. The issue of "political" question versus "justiciable" question was argued *pro* and *con* in those cases; and my Brother HARLAN stated in *Baker* v. *Carr*, 369 U.S., at 330 *et seq.*, and on related occasions (*Gray* v. *Sanders*, 372 U.S. 368, 382; *Westbury* v. *Sanders*, 376 U.S. 1, 20; *Reynolds* v. *Sims*, 377 U.S. 533, 589) his views on the constitutional dimensions of the "political" question in the setting of the reapportionment problem.

Those cases involved the question whether legislatures must be so structured as to reflect with approximate equality the voice of every voter. The ultimate question was whether absent a proper apportionment by the legislature a federal court could itself make an apportionment. That kind of problem raised issues irrelevant here. Reapportionment, as our experience shows, presented a tangle of partisan politics in which geography, economics, urban life, rural constituencies, and numerous other nonlegal factors play varying roles. The competency of courts to deal with them was challenged. Yet we held the issues were justiciable. None of those socalled "political" questions are involved here.

This case, so far as equal protection is concerned, is no whit different from a controversy over a state law that disqualifies women from certain types of employment, *Goesaert* v. *Cleary*, 335 U. S. 464, or that imposes a heavier punishment on one class of offender than on another whose crime is not intrinsically different. *Skinner* v. *Oklahoma*, 316 U. S. 535. The right to vote is, of course, different in one respect from the other rights in the economic, social, or political field which as indicated in the Appendix to this opinion are under the Equal Protection Clause. The right to vote is a civil right deeply embedded in the Constitution. Art. I, § 2, provides that the House is composed of members "chosen . . . by the people" and the electors "shall have the qualifications requisite for electors of the most numerous Branch of the State Legislature." The Seventeenth Amendment states that Senators shall be "elected by the people." The Fifteenth Amendment speaks of the "right of citizens of the United States to vote"—not only in federal but in state elections. The Court in *Ex parte Yarbrough*, 110 U.S. 651, 665, stated:

"This new constitutional right was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination."

It was in that tradition that we said in *Reynolds* v. *Sims*, *supra*, at 555, "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restriction on that right strikes at the heart of representative government."

This "right to choose, secured by the Constitution," *United States* v. *Classic*, 313 U.S. 314, 315, is a civil right of the highest order. Voting concerns "political" matters; but the right is not "political" in the constitutional sense. Interference with it has given rise to a long and consistent line of decisions by the Court; and the claim has always been upheld as justiciable.[5] Whatever distinction may have been made, following the Civil War, between "civil" and "political" rights, has passed into history. In *Harper* v. *Virginia Board*, 383 U.S. 663, 669, we stated: "Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change." That statement is in harmony with my view of the Fourteenth Amendment, as expressed by My Brother BRENNAN: "We must therefore conclude that its framers understood their Amendment to be a broadly worded injunction capable of being interpreted by future generations in accordance with the vision and needs of those generations." *Post*, at —. Hence the history of the Fourteenth Amendment tendered by my Brother HARLAN is irrelevant to the present problem.

Since the right is civil and not "political," it is protected by the Equal Protection Clause of the Fourteenth Amendment which in turn by § 5 of that Amendment can be "enforced" by Congress.

In *Carrington* v. *Rash*, 380 U.S. 89, we held that Texas could not bar a person, other-

Footnotes at end of article.

wise qualified, from voting merely because he was a member of the armed services. Occupation, we held, when used to bar a person from voting, was that invidious discrimination which the Equal Protection Clause condemns. In *Evans* v. *Cornman*, 398 U.S. 419, we held that a State could not deny the vote to residents of a federal enclave when it treated them as residents for many other purposes. In *Harper* v. *Virginia Board*, 383 U.S., at 666, we held a State could not in harmony with the Equal Protection Clause keep a person from voting in state elections because of "the affluence of the voter or payment of any fee." In *Kramer* v. *Union School District*, 395 U.S. 621, we held that a person could not be barred from voting in school board elections merely because he was a bachelor. So far as the Equal Protection Clause was concerned, we said that the line between those qualified to vote and those not qualified turns on whether those excluded have "a distinct and direct interest in the school meeting decisions." *Id.*, at 632. In *Cipriano* v. *City of Houma*, 395 U.S. 701, we held that a state law which gave only "property taxpayers" the right to vote on the issuance of revenue bonds of a municipal utility system violated equal protection as "the benefits and burdens of the bond issue fall indiscriminately on property owner and non-property owner alike." *Id.*, at 705. And only on June 23, 1970, we held in *Phoenix* v. *Kolodziejski*, 399 U.S. 204, that it violates equal protection to restrict those who may vote on general obligation bonds to real property taxpayers. We looked to see if there was any "compelling state interest" in the voting restrictions. We held that "nonproperty owners" are not "substantially less interested in the issuance of these securities than are property owners," *id.*, at 212, and that presumptively "when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise."[6] *Id.*, at 209. And as recently as November 9, 1970, we summarily affirmed a district court decision (310 F. Supp. 72) on the basis of *Kolodziejski. Parish School Board of St. Charles* v. *Stewart*, 400 U.S. ——, where Louisiana gave a vote on municipal bonds issued only to "property taxpayers."

The powers granted Congress by § 5 of the Fourteenth Amendment to "enforce" the Equal Protection Clause are "the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18." *Katzenbach* v. *Morgan*, 384 U.S. 641, 650. As we stated in that case, "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."

Congress might well conclude that a reduction in the voting age from 21 to 18 was needed in the interests of equal protection. The Act itself brands the denial of the franchise to 18-year-olds as "a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed" on them. Section 301(a)(1), Voting Rights Act of 1970, 84 Stat. 314, 42 U.S.C. § 1973. The fact that only males are drafted while the vote extends to females as well is not relevant, for the female component of these families or prospective families is also caught up in war and hit hardest by it. Congress might well believe that men and women alike should share the fateful decision.

It is said, why draw the line at 18? Why not 17? Congress can draw lines and I see no reason why it cannot conclude the 18-year-olds have that degree of maturity which entitles them to the franchise. They are "generally considered by American law to be mature enough to contract, to marry, to drive an automobile, to own a gun, and to be responsible for criminal behavior as an adult."[7] Moreover, we are advised that under state laws, mandatory school attendance does not, as a matter of practice, extend beyond the age of 18. On any of these items the States, of course, have leeway to raise or lower the age requirements. But voting is "a fundamental matter in a free and democratic society," Reynolds v. Sims, 377 U.S. 533, 561. Where "fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confirmed." Harper v. Virginia Board, 383 U.S. 663, 670. There we were speaking of state restrictions on those rights. Here we are dealing with the right of Congress to "enforce" the principles of equality enshrined in the Fourteenth Amendment. The right to "enforce" granted by § 5 of that Amendment is, as noted, parallel with the Necessary and Proper Clause whose reach Chief Justices Marshall described in McCulloch v. Maryland, 5 Wheat. 316, 421: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Equality of voting by all who are deemed mature enough to vote is certainly consistent "with the letter and spirit of the constitution." Much is made of the fact that Art. 1, § 4 of the Constitution[8] gave Congress only the power to regulate the "manner of holding elections," not the power to fix qualifications for voting in elections. But *the* Civil War Amendments—the Thirteenth, Fourteenth, and Fifteenth—made vast inroads on the power of the States. Equal protection became a standard for state action and Congress was given authority to "enforce it. See *Katzenback* v. *Morgan*, 384 U.S. 641, 647. The manner of enforcement involves discretion; but that discretion is largely entrusted to the Congress, not to the courts. If racial discrimination were the only concern of the Equal Protection Clause, then across-the-board voting regulations set by the States would be of no concern to Congress. But it is much too late in history to make that claim, as the cases listed in the Appendix to this opinion show. Moreover, election inequalities created by state laws and based on factors other than race may violate the Equal Protection Clause, as we have held over and over again. The reach of § 5 to "enforce equal protection by eliminating election inequalities would seem quite broad. Certainly there is not a word of limitation in § 5 which would restrict its applicability to matters of race alone. And if, as stated in *McCulloch* v. *Maryland*, the measure of the power of Congress is whether the remedy is consistent "with the letter and spirit of the constitution," we should have no difficulty here. We said in *Gray* v. *Sanders*, 372 U.S. 368, 381: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."

It is a reasoned judgment that those who have such a large "stake" in modern elections as 18-year-olds, whether in times of war or peace, should have political equality. As the dissent in *Colegrove* v. *Green*, 328 U.S. 549, 566, made plain, the Equal Protection Clause does service to protect the right to vote in federal as well as in state elections.

I would sustain the choice which Congress has made.

II

I likewise find the objections which Arizona and Idaho make to the literacy and residence requirements of the 1970 Act to be insubstantial.

Literacy. We held in *Lassiter* v. *Northampton Election Board*, 360 U.S. 44, that a State could apply a literacy test in selecting qualified voters provided the test is not "discriminatory" and does not contravene "any restriction that Congress, acting pursuant to its constitutional powers, has imposed." *Id.*, at 51. The question in these cases is whether Congress has the power under § 5 of the Fourteenth Amendment to bar literacy tests in all federal, state, or local elections.

Section 201 bars a State from denying the right to vote in any federal, state, or local election because of "any test or device" which is defined, *inter alia*, to include illiteracy.[9] We traveled most of the distance needed to sustain this Act in *Katzenbach* v. *Morgan*, 384 U.S. 641, where we upheld the constitutionality of an earlier Act which prohibited the application of English literacy tests to persons educated in Puerto Rico. The power of Congress in § 5 to "enforce" the Equal Protection Clause was sufficiently broad, we held, to enable it to establish voting requirements which might pass muster under the Equal Protection Clause, absent an Act of Congress. *Id.*, 648–651.

The question, we said, was whether the Act of Congress was "appropriate legislation to enforce the Equal Protection Clause":

"It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." *Id.*, at 653.

We also held that the Act might be sustained as an attack on the English language test as a device to discriminate. *Id.*, at 654. And we went on to say that Congress might have concluded that "as a means of furthering the intelligent exercise of the franchise, an ability to read or understand Spanish is as effective as ability to read English for those to whom Spanish-language newspapers and Spanish-language radio and television programs are available to inform them of election issues and governmental affairs." *Id.*, at 655.

We took a further step toward sustaining the present type of law in *Gaston County* v. *United States*, 395 U.S. 285. That decision involved a provision of the Voting Rights Act of 1965 which suspended the use of any "test or device," including illiteracy, as a prerequisite to registration in a State which was found by the Attorney General and Director of the Census to have used it in any election on November 1, 1964, and in which less than 50% of the residents of voting age were registered and had voted.[10] Gaston County, North Carolina, was so classified and its literacy test was thereupon suspended. In a suit to remove the ban we sustained it. We noted that Congress had concluded that "the County deprived its black residents of equal educational opportunities, which in turn deprived them of an equal chance to pass the literacy test." *Id.*, at 291. Congress, is was argued, should have employed a formula based on educational disparities between the races or one based on literacy rates. *Id.*, at 292. But the choice of appropriate remedies is for Congress and the range

Footnotes at end of article.

of available ones is wide. It was not a defect in the formula that some literate Negroes would be turned out by Negro schools.

"It is only reasonable to infer that among black children compelled to endure a segregated and inferior education, fewer will achieve any given degree of literacy than will their better-educated white contemporaries. And on the Goverment's showing it was certainly proper to infer that Gaston County's inferior Negro schools provided many of its Negro residents with a subliterate education, and gave many others little inducement to enter or remain in school." *Id.*, at 295–296.

By like reasoning Congress in the present legislation need not make findings as to the incidence of literacy. It can rely on the fact that most States do not have literacy tests, that the tests have been used at times as a discriminatory weapon against some minorities—not only Negroes but Americans of Mexican ancestry, and American Indians; that radio and television have made it possible for a person to be well informed even though he may not be able to read and write. We know from the legislative history that these and other desiderata influenced Congress in the choice it made in the present legislation; and we certainly cannot say that the means used were inappropriate.

Residence. The residence requirements of § 202 relate only to elections for President and Vice President. Section 202 abolishes durational residency [11] and provides for absentee voting provided that registration may be required 30 days prior to the election. The effect of § 202 is to reduce all state durational residency requirements to 30 days.

In presidential elections no parochial interests of the state, county, or city are involved. Congress found that a durational residency requirement "in some instances has the impermissible purpose or effect of denying citizens the right to vote." § 202(a)(4). It found in § 202(a)(3) that a durational residency requirement denies citizens their privileges and immunities.[12]

The Seventeenth Amendment states that Senators shall be "elected by the people." Article I, § 2, provides that the House shall be chosen "by the People of the several States." The right to vote for national officers is a privilege and immunity of national citizenship. Ex parte Yarbrough, 110 U.S. 651; In re Quarles, 158 U.S. 523, 534; Twining v. New Jersey, 211 U.S. 78, 97; Burroughs v. United States, 290 U.S. 534; United States v. Classic, 313 U.S. 299, 315.[13]

The Fourteenth Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Durational residency laws of the States had such effect, says Congress. The "choice of means" to protect such a privilege presents "a question primarily addressed to the judgment of Congress." *Burroughs* v. *United States, supra,* at 547. The relevance of the means which Congress adopts to the condition sought to be remedied, the degree of their necessity, and the extent of their efficacy are all matters for Congress. *Id.*, at 548.

The judgment which Congress has made respecting the ban of durational residency in presidential elections is plainly a permissible one in its efforts under § 5 to "enforce" the Fourteenth Amendment.

APPENDIX TO OPINION OF DOUGLAS, J.

Cases which have struck down state statutes under the Equal Protection Clause other than statutes which discriminate on the basis of race.

Statutes which discriminated against certain business

Gulf, C. & S. F. Co. v. *Ellis,* 165 U.S. 150; *Atchison & Santa Fe Ry.* v. *Vosburg,* 238 U.S. 56 (railroad must pay attorney fees if loses suit, but other businesses need not). *Kentucky Finance Co.* v. *Paramount Auto Exchange,* 262 U.S. 544; *Power Co.* v *Saunders,* 274 U.S. 490 (burdens placed upon out-of-state corporations in litigation).

Statutes which favored certain business

Connolly v. *Union Sewer Pipe Co.;* 184 U.S. 540 (exemption from state antitrust law for agricultural goods); *Smith* v. *Cahoon,* 283 U.S. 553 (act exempting certain motor vehicles from insurance requirements); *Mayflower Farms* v. *Ten Eyck,* 297 U.S. 266 (act allowing certain milk dealers to sell at lower than the regulated price); *Hartford Co.* v. *Harrison,* 301 U.S. 459 (statute permitting mutual, but not stock, insurance companies to act through salaried representatives), and *Morey* v. *Dowd,* 354 U.S. 457 (American Express exempted from licensing requirements applied to "currency exchanges").

Taxing statutes struck down

Concordia Ins. Co. v. *Illinois,* 292 U.S. 535; *Iowa-Des Moines Bank* v. *Bennett,* 284 U.S. 239; *Cumberland Coal* v. *Board,* 284 U.S. 23; *Quaker City Cab. Co.* v. *Pennsylvania,* 277 U.S. 389; *Louisville Gas* v. *Coleman,* 277 U.S. 32, *Hanover Fire Ins. Co.* v. *Harding,* 272 U.S. 494; *Schlesinger* v. *Wisconsin,* 270 U.S. 230; *Sioux City Bridge* v. *Dakota County,* 260 U.S. 441; *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, and *Southern Railway* v. *Greene,* 216 U.S. 400.

Treatment of convicted criminals

Rinaldi v. *Yeager,* 384 U.S. 305 (statute requiring unsuccessful criminal appellants who were in jail to pay cost of trial transcript); *Baxstrom* v. *Herold,* 383 U.S. 107 (statute denying convict a sanity hearing before a jury prior to civil commitment); and *Skinner* v. *Oklahoma,* 316 U.S. 535 (sterilization of some convicts).

Indigents

Douglas v. *California,* 372 U.S. 353 (Rule of Criminal Procedure which did not provide counsel for appeal to indigents); and *Shapiro* v. *Thompson,* 394 U.S. 618 (denial of welfare benefits based on residency requirement).

Legitimacy

Glona v. *American Guarantee,* 391 U. S. 73 (mother denied right to sue for wrongful death of illegitimate child); and *Levy* v. *Louisiana,* 391 U.S. 68 (illegitimate children denied recovery for wrongful death of mother).

Aliens

Truax v. *Raich,* 239 U.S. 33 (statute limiting the number of aliens that could be employed to 20%); and *Takahashi* v. *Fish & Game Commission,* 334 U.S. 410 (denial of fishing rights to aliens ineligible for citizenship).

FOOTNOTES

[1] Strauder was tried for murder. He had sought removal to federal courts on the ground that "by virtue of the laws of the State of West Virginia no colored man was eligible to be a member of the grand jury or to serve on the petit jury in the State. *Id.*, at 304. He was convicted of murder and the West Virginia Supreme Court affirmed. This Court held the West Virginia statute limiting jury duty to whites only unconstitutional:

"We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations . . . [The aim of the Fourteenth Amendment] was against discrimination because of race or color." 100 U. S., at 310.

[2] *Gray* v. *Sanders,* 372 U. S. 368; *Davis* v. *Mann,* 377 U.S. 678; *Swann* v. *Adams,* 385 U. S. 440; *Kilgarn* v. *Hill,* 386 U. S. 120; *Avery* v. *Midland County,* 390 U. S. 474; *Moore* v. *Ogilvie,* 394 U. S. 814; *Hadley* v. *Junior College,* 397 U. S. 50.

[3] *Reynolds* v. *Sims,* 377 U.S. 533; *WMCA* v. *Lorenzo,* 377 U.S. 633; *Roman* v. *Sincock,* 377 U.S. 695.

[4] *Williams* v. *Rhodes,* 393 U.S. 23. We also held in federal elections that the command of Art. I, § 2 of the Constitution that representatives be chosen "by the People of the several States" means that "as nearly as practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry* v. *Sanders,* 376 U.S. 1, 7–8, and that that meant "vote-diluting discrimination" could not be accomplished "through the device of districts containing widely varied numbers of inhabitants." *Id.*, at 8; *Lucas* v. *Colorado General Assembly,* 377 U.S. 713; *Kirkpatrick* v. *Preisler,* 394 U.S. 526; *Wells* v. *Rockefeller,* 394 U.S. 542.

[5] *Ex parte Siebold,* 100 U.S. 371; *Ex parte Yarbrough,* 110 U.S. 651; *Guinn* v. *United States,* 238 U.S. 347; *United States* v. *Mosley,* 238 U.S. 383; *Lane* v. *Wilson,* 307 U.S. 268; *United States* v. *Classic,* 313 U.S. 299; *United States* v. *Saylor,* 322 U.S. 385.

[6] We noted that general obligation bonds may be satisfied not from real property taxes but from revenues from other local taxes paid by nonproperty owners as well as those who own realty. Moreover, we noted that property taxes paid initially by property owners are often passed on to tenants or customers, 399 U.S., at 209–211.

[7] Engdahl, Constitutionality of the Voting Age Statute, 39 Geo. Wash. L. Rev. 1, 36 (1970).

[8] Art. 1, § 4 provides: "[1] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chosing Senators.

"[2] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day."

[9] Section 201(b) defines "test or device" as "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

[10] The constitutionality of that procedure has been sustained in *South Carolina* v. *Katzenbach,* 383 U.S. 301.

[11] This Court upheld durational residency requirements as applied in presidential and vice presidential elections absent an Act of Congress. See *Drueding* v. *Devlin,* 234 F. Supp. 721 (D. Md. 1964), aff'd 380 U.S. 125. Subsequently we vacated as moot a case presenting the same question. *Hall v. Beals,* 396 U.S. 45. The district courts have been faced with the issue of durational residency requirement as they would be applied to congressional elections. Two have concluded the requirement is constitutional. *Sirak* v. *Brown,* —— F. Supp. —— (ED Ohio 1970); *Cocanower* v. *Marston,* —— F. Supp. —— (D. Ariz. 1970). Additionally one other court has refused a preliminary injunction in a case presenting the issue. *Piliavine* v. *Hoel,* —— F. Supp. —— (WD Wis. 1970). Some district courts, however, believe that *Drueding* cannot stand (absent an Act of Congress) after *Carrington* v. *Rash,* 380 U.S. 89; *Kramer* v. *Union School District,* 395 U.S. 621; *Cipriano* v. *City of Houma,* 395 U.S. 701, and *Phoenix* v. *Kolodziejski,* 399 U.S. 204. Accordingly they have held durational residency requirements for congressional elections (and by implication presidential elections) violate the Equal Protection Clause. See *Burg* v. *Canniffee,* 315 F. Supp. 380 (D. Mass. 1970); *Ellington* v. *Blumstein,* —— F. Supp. (MD Tenn. 1970); *Hadnott* v. *Amos,* —— F. Supp. —— (MD Ala. 1970); *Bufford* v. *Holton,* —— F. Supp. —— (ED Vir. 1970).

In none of these cases was an Act of Congress involved.

[12] Article IV, § 2 of the Constitution provides:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The Fourteenth Amendment provides in § 1 that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

[18] The cases relied on by my Brother HARLAN, *post*, at —, are not to the contrary. *Snowden* v. *Hughes*, 321 U. S. 1, 6–7, states "The right to become a candidate for *state* office, like the right to vote for the election of *state* officers, . . . is a right or privilege of state citizenship." (Emphasis added.) Arguably *Minor* v. *Happersett*, 21 Wall. 162, is to the contrary, but to the extent its dicta indicated otherwise, it was limited in *Ex parte Yarbrough*. *Breedlove* v. *Suttles*, 302 U. S. 277, overruled by *Harper* v. *Virginia Board*, 383 U. S. 663, involved a poll tax applied in both federal and state elections; it erroneously cited *Yarbrough* for the proposition voting is not a privilege and immunity of national citizenship. *Pope* v. *Williams*, 193 U. S. 621, involved durational residency requirements, but expressly reserved the question of their application to presidential and vice presidential elections. Our holdings concerning privileges and immunities of national citizenship were analyzed less than five years ago by my Brother HARLAN. After referring to *Ex parte Yarbrough*, and *United States* v. *Classic*, he stated that those cases "are essentially concerned with the vindication of important relationships with the Federal Government—*voting in federal elections*, involvement with federal law enforcement, communicating with the Federal Government." *United States* v. *Guest*, 383 U. S. 745, 772 (concurring opinion) (emphasis added).

Contrary to the suggestion of my Brother HARLAN, *post*, at —, we need not rely on the power of Congress to declare the meaning of § 1 of the Fourteenth Amendment. This Court had determined that voting for national officers is a privilege and immunity of national citizenship. No congressional declaration was necessary. Congressional power under § 5 of the Fourteenth Amendment is, as stated, buttressed by congressional power under the Necessary and Proper Clause. Thus even if the durational residency requirements do not violate the Privileges and Immunities Clause, Congress can determine that it is necessary and proper to abolish them in national elections to effectuate and further the purpose of § 1 as it has been declared by this Court.

[Supreme Court of the United States—Nos. 43, 44, 46, 47 Orig.—October Term, 1970]

ON BILLS OF COMPLAINT

State of Oregon, Plaintiff, 43 *v.* John N. Mitchell, Attorney General of the United States.

State of Texas, Plaintiff, 44 *v.* John N. Mitchell, Attorney General of the United States.

United States, Plaintiff, 46 *v.* State of Arizona.

United States, Plaintiff, 47 *v.* State of Idaho.

December 21, 1970. Mr. Justice Harlan, concurring in part and dissenting in part.

From the standpoint of this Court's decisions during an era of judicial constitutional revision in the field of the suffrage, ushered in eight years ago by *Baker* v. *Carr*, 369 U.S. 186 (1962), I would find it difficult not to sustain all three aspects of the Voting Rights Act Amendments of 1970, Pub. L. 91–285, 84 Stat. 314, here challenged. From the standpoint of the bedrock of the constitutional structure of this Nation, these cases bring us to a crossroad that is marked with a formidable "Stop" sign. That sign compels us to pause before we allow those decisions to carry us to the point of sanctioning Congress' decision to alter state-determined voter qualifications by simple legislation, and to consider whether sound doctrine does not in truth require us to hold that one or more of the changes which Congress has thus sought to make can be accomplished only by constitutional amendment.

The four cases require determination of the validity of the Voting Rights Act Amendments in three respects. In Nos. 43 and 44, Oregon and Texas have sought to enjoin the enforcement of § 302 of the Act as applied to lower the voting age in those States from 21 to 18.[1]

In Nos. 46 and 47 the United States seeks a declaration of the validity of the Act and an injunction requiring Arizona and Idaho to conform their laws to it. The Act would lower the voting age in each State from 21 to 18. It would suspend until August 6, 1975, the Arizona literacy test, which requires that applicants for registration be able to read the United States Constitution in English and write their names. It would require Idaho to make several changes in its laws governing residency, registration, and absentee voting in presidential elections. Among the more substantial changes, Idaho's present 60-day state residency requirement will in effect be lowered to 30 days; its 30-day county residency requirement for intrastate migrants will be abolished; Idaho will have to permit voting by citizens of other States formerly domiciled in Idaho who emigrated too recently to register in their new homes; and it must permit absentee registration and voting by persons who have lived in Idaho for less than six months. The relevant provisions of the Act and of the constitutions and laws of the four States are set out in an Appendix to this opinion.

Each of the States contests the power of Congress to enact the provisions of the Act involved in its suit.[2] The Government places primary reliance on the power of Congress under § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment by appropriate legislation. For reasons to follow, I am of the opinion that the Fourteenth Amendment was never intended to restrict the authority of the States to allocate their political power as they see fit and therefore that it does not authorize Congress to set voter qualifications, in either State or Federal elections. I find no other source of congressional power to lower the voting age as fixed by State laws, or to alter State laws on residency, registration, and absentee voting, with respect to either State or Federal elections. The suspension of Arizona's literacy requirement, however, can be deemed an appropriate means of enforcing the Fifteenth Amendment, and I would sustain it on that basis.

I

It is fitting to begin with a quotation from one of the leading members of the 39th Congress, which proposed the Fourteenth Amendment to the States in 1866:

"Every Constitution embodies the principles of its framers. It is a transcript of their minds. If its meaning in any place is open to doubt, or if words are used which seem to have no fixed signification, we cannot err if we turn to the framers; and their authority increases in proportion to the evidence which they have left on the question." Cong. Globe, 39th Cong., 1st Sess. 677 (1866) (Senator Sumner).

Believing this view to be undoubtedly sound, I turn to the circumstances in which the Fourteenth Amendment was adopted for enlightenment on the intended reach of its provisions. This, for me, necessary undertaking has unavoidably led to an opinion of more than ordinary length. Except for those who are willing to close their eyes to constitutional history in making constitutional interpretations or who read such history with a preconceived determination to attain a particular constitutional goal, I think that the history of the Fourteenth Amendment makes it clear beyond any reasonable doubt that no part of the legislation now under review can be upheld as a legitimate exercise of congressional power under that Amendment.

A. Historical setting[3]

The point of departure for considering the purpose and effect of the Fourteenth Amendment with respect to the suffrage should be, I think, the pre-existing provisions of the Constitution. Article I, § 2, provided that in determining the number of Representatives to which a State was entitled, only three-fifths of the slave population should be counted.[4] The section also provided that the qualifications of voters for such Representatives should be the same as those established by the States for electors of the most numerous branch of their respective legislatures. Article I, § 4, provided that, subject to congressional veto, the States might prescribe the times, places, and manner of holding elections for Representatives. Article II, § 1, provided that the States might direct the manner of choosing electors for President and Vice President, except that Congress might fix a uniform time for the choice.[5] Nothing in the original Constitution controlled the way States might allocate their political power except for the Guaranty of a Republican Form of Government, which appears in Article IV, § 4.[6] No relevant changes in the constitutional structure were made until after the Civil War.

At the close of that war, there were some four million freed slaves in the South, none of whom were permitted to vote. The white population of the Confederacy had been overwhelmingly sympathetic with the rebellion. Since there was only a comparative handful of persons in these States who were neither former slaves nor Confederate sympathizers, the place where the political power should be lodged was a most vexing question. In a series of proclamations in the summer of 1865, President Andrew Johnson had laid the groundwork for the States to be controlled by the white populations which had held power before the war, eliminating only the leading rebels and those unwilling to sign a loyalty oath.[7] The Radicals, on the other hand, were ardently in favor of Negro suffrage as essential to prevent resurgent rebellion, requisite to protect the freedmen, and necessary to ensure continued Radical control of the government. This ardor cooled as it ran into northern racial prejudice. At that time, only six States—Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and New York—permitted Negroes to vote, and New York imposed special property and residency requirements on Negro voters.[8] In referenda late that year, enfranchising proposals were roundly beaten in Connecticut, Wisconsin, Minnesota, the Territory of Colorado, and the District of Columbia. Gillette, *supra*, n. 3, at 25–26. Such popular rebuffs led the Radicals to pull in their horns and hope for a protracted process of reconstruction during which the North could be educated to the advisibility of Negro suffrage, at least for the South. In the meantime, of course, it would be essential to bar southern representation in Congress lest a combination of southerners and Democrats obtain control of the government and frustrate Radical goals.

The problem of congressional representation was acute. With the freeing of the slaves, the Three-Fifths Compromise ceased to have any effect. While predictions of the precise effect of the change varied with the person doing the calculating, the consensus was that the South would be entitled to at least 15 new members of Congress, and, of course, a like number of new presidential electors. The Radicals had other rallying cries which they kept before the public in

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Footnotes at end of article.

the summer of 1865, but one author gives this description of the mood as Congress convened: [9]

"Of all the movements influencing the Fourteenth Amendment which developed prior to the first session of the Thirty-ninth Congress, that for Negro suffrage was the most outstanding. The volume of private and public comment indicates that it was viewed as an issue of prime importance. The cry for a changed basis of representation was, in reality, subsidiary to this, and was meant by Radicals to secure in another way what Negro suffrage might accomplish for them: removal of the danger of Democratic dominance as a consequence of Southern restoration. The danger of possible repudiation of the national obligations, and assumption of the rebel debt, was invariably presented to show the need for Negro suffrage or a new basis of representation. Sentiment for disqualification of ex-Confederates, though a natural growth, well suited such purposes. The movement to guarantee civil rights, sponsored originally by the more conservative Republicans, received emphasis from Radicals only when state elections indicated that suffrage would not serve as a party platform."

When Congress met, the Radicals, led by Thaddeus Stevens, were successful in obtaining agreement for a Joint Committee on Reconstruction, composed of 15 members, to "inquire into the condition of the States which formed the so-called confederate States of America, and report whether they, or any of them, are entitled to be represented in either House of Congress . . . ." Cong. Globe, 39th Cong., 1st Sess. 30, 47 (1865) (hereafter Globe).

All papers relating to representation of the southern States were to be referred to the Committee of Fifteen without debate. The result, which many had not foreseen, was to assert congressional control over Reconstruction and at the same time to put the congressional power in the hands of a largely Radical secret committee.

The Joint Committee began work with the beginning of 1866, and in due course reported a joint resolution, H.R. No. 51, to amend the Constitution. The proposal would have based representation and direct taxes on population, with a proviso that

"whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation." Globe 351.

The result, if the southern States did not provide for Negro suffrage, would be a decrease in southern representation in Congress and the Electoral College by some 24 seats from their pre-war position instead of an increase of 15. The House, although somewhat balky, approved the measure after lengthy debate. Globe 538. The Senate proved more intractable. An odd combination of Democrats, moderate Republicans, and extreme Radicals combined to defeat the measure, with the Radicals basing their opposition largely on the fear that the proviso would be read to authorize racial voter qualifications and thus prevent Congress from enfranchising the freedmen under powers assertedly granted by other clauses of the Constitution. See, *e.g.*, Globe 673–687 (Senator Sumner).

At about this same time the Civil Rights Bill and the Second Freedmen's Bureau Bill were being debated. Both bills provided a list of rights secured, not including voting.[10] Senator Trumbull, who reported the Civil Rights Bill on behalf of the Senate Judiciary Committee, stated "I do not want to bring up the question of negro suffrage in the bill." Globe 606. His House counterpart exhibited the same reluctance. Globe 1162 (Cong. Wilson of Iowa). Despite considerable uncertainty as to the constitutionality of the measures, both ultimately passed. In the midst of the Senate debates on the basis of representation, President Johnson vetoed the Freedmen's Bureau Bill, primarily on constitutional grounds. This veto, which was narrowly sustained, was followed shortly by the President's bitter attack on Radical Reconstruction in his Washington's Birthday speech. These two actions, which were followed a month later by the veto of the Civil Rights Bill, removed any lingering hopes among the Radicals that Johnson would support them in a thoroughgoing plan of reconstruction. By the same token they increased the Radicals' need for an articulated plan of their own to be put before the country in the upcoming elections as an alternative to the course the President was taking.

The second major product of the Reconstruction Committee before the resolution which became the Fourteenth Amendment was a proposal to add an equal rights provision to the Constitution. This measure, H.R. No. 63, which foreshadowed § 1 of the Fourteenth Amendment, read as follows:

"The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment)." Globe 428.

It was reported by Congressman Bingham of Ohio, who later opposed the Civil Rights Bill because he believed it unconstitutional. Globe 1292–1293. The amendment immediately ran into serious opposition in the House and the subject was dropped.[11]

Such was the background of the Fourteenth Amendment. Congress, at loggerheads with the President over Reconstruction, had not come up with a plan of its own after six months of deliberations; both friends and foes prodded it to develop an alternative. The Reconstruction Committee had been unable to produce anything which could even get through Congress, much less obtain the adherence of three-fourths of the States. The Radicals, committed to Negro suffrage, were confronted with widespread public opposition to that goal and the necessity for a reconstruction plan that could do service as a party platform in the elections that fall. The language of the Fourteenth Amendment must be read with awareness that it was designed in response to this situation.

B. The language of the amendment and reconstruction measures

Sections 1 and 2 of the Fourteenth Amendment as originally reported read as follows: [12]

"Sec. 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Sec. 2. Representatives shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever, in any State, the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age, or in any way abridged except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age." Globe 2286.

In the historical context, no one could have understood this language as anything other than an abandonment of the principle of Negro suffrage, for which the Radicals had been so eager. By the same token, the language could hardly have been understood as affecting the provisions of the Constitution placing voting qualifications in the hands of the States. Section 1 must have been seen as little more than a constitutionalization of the 1866 Civil Rights Act, concededly one of the primary goals of that portion of the Amendment.[13]

While these conclusions may, I think, be confidently asserted, it is not so easy to explain just how contemporary observers would have construed the three clauses of § 1 to reach this result.[14] No doubt in the case of many congressmen it simply never occurred to them that the States' longstanding plenary control over voter qualifications would be affected without explicit language to that effect. And since no speaker during the debates on the Fourteenth Amendment pursued the contention that § 1 would be construed to include the franchise, those who took the opposite view rarely explained how they arrived at their conclusions.

In attempting to unravel what was seldom articulated, the appropriate starting point is the fact that the Framers of the Amendment expected the most significant portion of § 1 to be the clause prohibiting state laws "which shall abridge the privileges and immunities of citizens of the United States." These privileges were no doubt understood to include the ones set out in the first section of the Civil Rights Act. To be prohibited by law from enjoying these rights would hardly be consistent with full membership in a civil society.

The same is not necessarily true with respect to prohibitions on participation in the political process. Many members of Congress accepted the jurisprudence of the day, in which the rights of man fell into three categories: natural, civil, and political. The privileges of citizens, being "civil" rights, were distinct from the rights arising from governmental organization, which were political in character.[15] Others no doubt relied on the experience under the similar language of Article IV, § 2, which had never been held to guarantee the right to vote. The remarks of Senator Howard of Michigan, who as spokesman for the Joint Committee explained in great detail than most why the Amendment did not reach the suffrage, contain something of each view. See Globe 2766, quoted at p. —, *post;* nn. 56 and 57, *post;* cf. *Baker* v. *McClung,* 172 U.S. 239, 256 (1898) (dictum).

Since the Privileges and Immunities Clause was expected to be the primary source of substantive protection, the Equal Protection and Due Process Clauses were relegated to a secondary role, as the debates and other contemporary materials make clear.[16] Those clauses, which appear on their face to correspond with the latter portion of § 1 of the Civil Rights Act, see n. 13, *supra,* and to be primarily concerned with person and property, would not have been expected to enfranchise the freedmen if the Privileges and Immunities Clause did not.

Othe members of Congress no doubt saw § 2 of the proposed Amendment as the Committee's resolution of the related problems of suffrage and representation. Since that section did not provide for enfranchisement, but simply reduced representation for disfranchisement, any doubts about the effect of the broad language of § 1 were removed. Congressman Bingham, who was privarily responsible for the language of § 1, stated this view. Globe 2542, quoted at p. ——, post. Finally, characterization of the Amendment by such figures as Stevens and Bingham in the House and Howard in the Senate, not contested by the Democrats except in passing remarks, was no doubt simply accepted by many members of Congress; they, repeating it, gave further force to the interpretation, with the result that, as will appear below, not one speaker in the debates

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on the Fourteenth Amendment unambiguously stated that it would affect state voter qualifications, and only three, all opponents of the measure, can fairly be characterized as raising the possibility.[17] Further evidence of this original understanding can be found in later events.

The Thirty-ninth Congress, which proposed the Fourteenth Amendment, also entered the First Reconstruction Act, c. 153, 14 Stat. 428 (1867). This Act required, as a condition precedent of readmission of the southern States, that they adopt constitutions providing that the elective franchise should be enjoyed by all male citizens over the age of 21 who had been residents for more than one year and were not disfranchised for treason or common-law felony; even so, no State would be readmitted until a legislature elected under the new Constitution had ratified the proposed Fourteenth Amendment and that Amendment had become part of the Constitution.

The next development came when the ratification drive in the North stalled. After a year had passed during which only one northern State had ratified the proposed Fourteenth Amendment, Arkansas was readmitted to the Union by the Act of June 22, 1868, c. 69, 15 Stat. 72. This readmission was based on the "fundamental condition" that the state constitution should not be amended to restrict the franchise, except with reference to residency requirements. Three days later the Act of June 25, 1868, c. 70, 15 Stat. 73, held out a promise of similar treatment to North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida if they would ratify the Fourteenth Amendment. By happy coincidence, the assent of those six States was just sufficient to complete the ratification process. It can hardly be suggested, therefore, that the "fundamental condition" was exacted from them as a measure of caution lest the Fourteenth Amendment fail of ratification.

The Fortieth Congress, not content with enfranchisement in the South, proposed the Fifteenth Amendment to extend the suffrage to northern Negroes. See Gillette, *supra*, n. 3, at 46. This fact alone is evidence that they did not understand the Fourteenth Amendment to have accomplished such a result. Less well known is the fact that the Fortieth Congress considered and very nearly adopted a proposed amendment which would have expressly prohibited not only discriminatory voter qualifications but discriminatory qualifications for office as well. Each House passed such a measure by the required two-thirds margin. Cong. Globe, 40th Cong., 3d Sess., 1318, 1428 (1869). A conference committee, composed of Senators Stewart and Conkling and Representatives Boutwell, Bingham, and Logan, struck out the office-holding provision, *id.*, at 1563, 1593, and with Inauguration Day only a week away, both Houses accepted the conference report. *Id.*, at 1564, 1641. See generally Gillette 58–77. While the reasons for these actions are unclear, it is unlikely that they were provoked by the idea that the Fourteenth Amendment covered the field; such a rationale seemingly would have made the enfranchising provision itself unnecessary.

The Forty-first Congress readmitted the remaining three States of the Confederacy. The admitting act in each case recited good-faith ratification of the Fourteenth and Fifteenth Amendments, and imposed the fundamental conditions that the States should not restrict the elective franchise[18] and "That it shall never be lawful for the said State to deprive any citizen of the United States, on account of his race, color, or previous condition of servitude, of the right to hold office under the constitution and laws of said State." Act of Jan. 26, 1870, c. 10, 16 Stat. 63 (Virginia); Act of Feb. 23, 1870, c. 19, 16 Stat. 68 (Mississippi); Act of Mar. 30, 1879, c. 39, 16 Stat. 81 (Texas).

These materials demonstrate not only that § 1 of the Fourteenth Amendment is susceptible of an interpretation that it does not reach suffrage qualifications, but that this is the interpretation given by the immediately succeeding Congresses. Such an interpretation is the most reasonable reading of the section in view of the background against which it was proposed and adopted, particularly the doubts about the constitutionality of the Civil Rights Act, the prejudice in the North against any recognition of the principle of Negro suffrage, and the basic constitutional structure of leaving suffrage qualifications with the States.[19] If any further clarification were needed, one would have thought it provided by the second section of the same Amendment, which specifically contemplated that the right to vote would be denied or abridged by the States on racial or other grounds. As a unanimous Court once asked, "Why this, if it was not in the power of the [state] legislature to deny the right of suffrage to some male inhabitants?" *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162, 174 (1874).

The Government suggests that the list of protected qualifications in § 2 is "no more than descriptive of voting laws as they then stood." Brief for the United States, Nos. 46 and 47, Original, at 75. This is wholly inaccurate. Aside from racial restrictions, all States had residency requirements and many had literacy, property, or taxation qualifications. On the other hand, several of the western States permitted aliens to vote if they had satisfied certain residency requirements and had declared their intention to become citizens.[20] It hardly seems necessary to observe that the politicians who framed the Fourteenth Amendment were familiar with the makeup of the electorate. In any event, the congressional debates contain such proof in ample measure.[21]

Assuming, then, that § 2 represents a deliberate selection of the voting qualifications to be penalized, what is the point of it? The Government notes that "it was intended—although it has never been used—to provide a remedy against exclusion of the newly freed slaves from the vote." Brief for the Defendant, Nos. 43 and 44, Original, at 20. Undoubtedly this was the primary purpose. But the Framers of the Amendment, with their attention thus focused on racial voting qualifications, could hardly have been unaware of § 1. If they understood that section to forbid such qualifications, the simple means of penalizing this conduct would have been to impose a reduction of representation for voting discrimination in violation of § 1. Their adoption instead of the awkward phrasing of § 2 is therefore significant.

To be sure, one might argue that § 2 is simply a rhetorical flourish, and that the qualifications listed there are merely the ones which the Framers deemed to be consistent with the alleged prohibition of § 1. This argument is not only unreasonable on its face and untenable in light of the historical record; it is fatal to the validity of the reduction of the voting age in § 302 of the Act before us.

The only sensible explanation of § 2, therefore, is that the racial voter qualifications it was designed to penalize were understood to be permitted by § 1 of the Fourteenth Amendment. The Amendment was a half-way measure, adopted to deprive the South of representation until it should enfranchise the freedmen, but to have no practical effect in the North. It was politically acceptable precisely because of its regional consequences and its avoidance of an explicit recognition of the principle of Negro suffrage. As my Brother BLACK states, "it cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves." *Ante*, p. —. The detailed historical materials make this unmistakeably clear.

C. The Joint Committee

The first place to look for the understanding of the Framers of the Fourteenth Amendment is the Journal of the Joint Committee on Reconstruction.[22] The exact sequence of the actions of this Committee presumably had little or no effect on the members of Congress who were not on the Committee, for the Committee attempted to keep its deliberations secret,[23] and the Journal itself was lost for nearly 20 years.[24] Nevertheless the Journal, although only a record of proposals and votes, illustrates the thoughts of those leading figures of Congress who were members and participated in the drafting of the Amendment.

Two features emerge from such a review with startling clarity. First the Committee regularly rejected explicitly enfranchising proposals in favor of plans which would postpone enfranchisement, leave it to congressional discretion, or abandon it altogether. Second, the abandonment of Negro suffrage as a goal exactly corresponded with the adoption of provisions to reduce representation for discriminatory restrictions on the ballot.

This correspondence was present from the start. Five plans were proposed to deal with representation. One would have prohibited racial qualifications for voters and based representation on the whole number of citizens in the State; the other four proposals contained no enfranchising provision but in various ways would have reduced representation for States where the vote was racially restricted. Kendrick 41–44. A subcommittee reduced the five proposals to two, one prohibiting discrimination and the other reducing representation where it was present. On Stevens' motion the latter alternative was accepted by a vote of 11 to 3; Kendrick 51; with minor changes it was subsequently reported as H. R. No. 51.

The subcommittee also proposed that whichever provision on the basis of representation was adopted, the Congress should be empowered to legislate to secure all citizens "the same political rights and privileges" and also "equal protection in the enjoyment of life, liberty and property." Kendrick 51. After the Committee reported H. R. No. 51, it turned to consideration of this proposal. At a meeting attended by only 10 members, a motion to strike out the clause authorizing Congress to legislate for equal political rights and privileges lost by a vote of six to four. Kendrick 57. At a subsequent meeting, however, Bingham had the subcommittee proposal replaced with another which did not mention *political* rights and privileges, but was otherwise quite similar. Kendrick 61; see the opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL, *ante*, p. —, for the text of the two provisions. The Committee reported the substitute as H. R. No. 63. In the House so much concern was expressed over the centralization of power the amendment would work—a few said it would even authorize Congress to regulate the suffrage—that the matter was dropped. *Ante*, p. —.

The Fourteenth Amendment had as its most direct antecedent a proposal drafted by Robert Dale Owen, who was not a member of Congress, and presented to the Joint Committee by Stevens.[25] Originally the plan provided for mandatory enfranchisement in 1876 and for reduction of representation until that date. Kendrick 82–84. However, Stevens was pressured by various congressional delegations who wanted nothing to do with Negro suffrage, even at a remove of 10 years.[26] He therefore successfully moved to strike out the enfranchising provision and correspondingly to abolish the 10-year limitation on reduction of representation for racial discrimina-

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tion. The motion carried by a vote of 12 to 2. Kendrick 101.

Bingham was then successful in replacing § 1 of Owen's proposal, which read

"No discrimination shall be made by any State, or by the United States, as to the civil rights of persons, because of race, color or previous condition of servitude"

with the following now-familiar language:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Kendrick 106.

The summary style of the Journal leaves unclear the reasons for the change. However, Bingham himself had rather consistently voted against proposals for direct and immediate enfranchisement,[27] and on the face of things it seems unlikely that the other members of the Joint Committee understood his provision to be an enfranchising proposal.[28] That they did not so understand is demonstrated by the speeches in the debates on the floor.[29]

Before I examine those debates, a word of explanation is in order. For obvious reasons, the discussions of voter qualifications in the Thirty-nineth Congress and among the public were cast primarily in terms of racial disqualifications. This does not detract from their utility as guides to interpretation. When an individual speaker said that the Amendment would not result in the enfranchisement of Negroes, he must have taken one of two views: either the Amendment did not reach voter qualifications at all; or it set standards limiting state restrictions on the ballot, but those standards did not prohibit racial discrimination. I have already set out some of the reasons which lead me to conclude that the former interpretation is correct, and that it is the understanding shared by the Framers of the Amendment, as well as by almost all of the opponents. The mere statement of the latter position appears to me to be a complete refutation of it. Even on its wholly unsupportable assumptions (1) that certain Framers of the Amendment contemplated that the privileges and immunities of citizens included the vote, (2) that they intended to permit state laws to abridge the privileges and immunities of citizens whenever it was rational to do so, and (3) that they agreed on the rationality of prohibiting the freed slaves from voting, this remarkable theory still fails to explain why they understood the Amendment to permit racial voting qualifications in the free States of the North.

D. In Congress

On May 8, 1866, Thaddeus Stevens led off debate on H.R. No. 127, the Joint Resolution proposing the Fourteenth Amendment. After explaining the delay of the Joint Committee in coming up with a plan of reconstruction, he apologized for his proposal in advance:

"This proposition is not all that the committee desired. It falls far short of my wishes, but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion. Not only Congress but the several States are to be consulted. Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal States could be induced to ratify any proposition more stringent than this." Globe 2459.

In the climate of the times, Stevens could hardly have been understood as referring to anything other than the failure of the measure to make some provision for the enfranchisement of the freedmen. However, lest any mistake be made, he recounted the history of the Committee's prior effort in the field of representation and sufrage, H.R. No. 51, which "would surely have secured the enfranchisement of every citizen at no distant period." That measure was dead, "slaughtered by a puerile and pedantic criticism," and "unless this (less efficient, I admit) shall pass, its death has postponed the protection of the colored race perhaps for ages." *Ibid.*

With this explanation made, Stevens turned to a section-by-section study of the proposed resolution. The results to be achieved by § 1, as he saw it, would be equal punishment for crime, equal entitlement to the benefits of "[w]hatever law protects the white man," equal means of redress, and equal competence to testify. *Ibid.* If he thought the section provided equal access to the polls, despite his immediately preceding apology for the fact that it did not, his failure to mention that application is remarkable.[30]

Turning then to § 2, Stevens again discussed racial qualifications for voting. He explained the section as follows:

"If any State shall exclude any of her adult male citizens from the elective franchise, or abridge that right, she shall forfeit her right to representation in the same proportion. The effect of this provision will be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national Government, both legislative and executive." *Ibid.*

Stevens recognized that it might take several years for the coercive effect of the Amendment to result in Negro suffrage, but since this would give time for education and enlightenment of the freedmen, "That short delay would not be injurious." *Ibid.* He did not indicate that he believed it would be unconstitutional. He admitted that § 2 was not so good as the proposal which had been defeated in the Senate, for that, by reducing representation by all the members of a race if any one was discriminated against, would have hastened full enfranchisement. Section 2 allowed proportional credit. "But it is a short step forward. The large stride which we in vain proposed is dead . . . ." Globe 2460.

I have dealt at length with Stevens' remarks because of his prominent position in the House and in the Joint Committee. The remaining remarks, except for Bingham's summation, can be treated in more summary fashion. Of the supporters of the Amendment, Garfield of Ohio,[31] Kelley of Pennsylvania,[32] Boutwell of Massachusetts (a member of the Joint Committee),[33] Eliot of Massachusetts,[34] Beaman of Michigan,[35] and Farnsworth of Illinois,[36] expressed their regret that the Amendment did not prohibit restrictions on the franchise. As the quotations set out in the margin indicate, the absence of such a prohibition was generally attributed to prejudice in the Congress, in the States, or both, to such an extent that an enfrachising amendment could not pass. This corresponds with the first part of Stevens' introductory speech.

Other supporters of the Amendment obviously based their remarks on their understanding that it did not affect state laws imposing discriminatory voting qualifications, but did not indicate that the omission was a drawback in their view. In this group were Thayer of Pennsylvania,[37] Broomall of Pennsylvania,[38] Raymond of New York,[39] McKee of Kenucky,[40] Miller of Pennsylvania,[41] Banks of Massachusetts,[42] and Eckley of Ohio.[43]

The remaining members of the House who supported the Fourteenth Amendment either did not speak at all or did not address themselves to the suffrage issue in any very clear terms. Those in the latter group who gave speeches on the proposed Amendment included Spalding of Ohio,[44] Longyear of Michigan,[45] and Shellabarger of Ohio.[46] The remaining Republican members of the Joint Committee—Washburne of Illinois, Morrill of Vermont, Conkling of New York, and Blow of Missouri—did not participate in the debates over the Amendment.

In the opposition to the Amendment were only the handful of Democrats. Even they, with one seeming exception, did not assert that the Amendment was applicable to suffrage, although they would have been expected to do so if they thought such a reading plausible. Finck of Ohio and Shanklin of Kentucky did not even mention Negro suffrage in their attacks on the Amendment, although Finck discussed the reasons why the southern States could not be expected to ratify it, Globe 2460–2462, and Shanklin characterized the Amendment as "tyrannical and oppressive." Globe 2501. Eldridge of Wisconsin[47] and Randall of Pennsylvania[48] affirmatively indicated their understanding that with the Amendment the Radicals had at least temporarily abandoned their crusade for Negro suffrage, as did Finck when the measure returned from the Senate with amendments.[49]

The other two Democrats to participate in the three days of debate on H.R. No. 127, Boyer of Pennsylvania and Rogers of New Jersey, have been a source of great comfort to those who set out to prove that the history of the Fourteenth Amendment is inconclusive on this issue. Each, in the course of a lengthy speech, included a sentence which, taken out of context, can be read to indicate a fear that § 1 might prohibit racial restrictions on the ballot. Boyer said, "The first section embodies the principles of the civil rights bill, and is intended to secure ultimately, and to some extent indirectly, the political equality of the negro race." Globe 2467. Rogers, commenting on the uncertain scope of the Privileges and Immunities Clause, observed "The right to vote is a privilege." Globe 2538.

While these two statements are perhaps innocuous enough to be left alone, it is noteworthy that each speaker had earlier in the session delivered a tirade against the principle of Negro suffrage;[50] if either seriously believed that the Fourteenth Amendment might enfranchise; the freedmen, he was unusually calm about the fact. That they did not seriously interpret the Amendment in this way is indicated as well by other portions of their speeches.[51]

Two other opponents of the Fourteenth Amendment, Phelps of Maryland and Niblack of Indiana, made statements which have been adduced to show that there was no consensus on the applicability of the Fourteenth Amendment to suffrage laws. Phelps voiced his sentiments on May 5, three days before the beginning of debate.[52] In the course of a speech urging a soft policy on reconstruction, he expressed the fear that the Amendment would authorize Congress to define the privileges of citizens to include the suffrage—or indeed that it might have that effect *ex proprio vigore*. Globe 2398. Phelps did not repeat this sentiment after he was contradicted by speaker after speaker during the debates proper; indeed, he did not take part in the debates at all, but simply voted against the Amendment, along with most of his Democratic colleagues. Globe 2545.[53]

As for Niblack, on the first day of debate he made the following remarks:

"I give notice that I will offer the following amendment if I shall have the opportunity:

"Add to the fifth section as follows:

"*Provided*, That nothing contained in this article shall be so construed as to authorize Congress to regulate or control the elective franchise within any State, or to abridge or restrict the power of any State to regulate or control the same within its own jurisdiction, except as in the third section hereof prescribed." Globe 2465.

Like Phelps, Niblack found it unnecessary to participate in the debates. He was not heard from again until the vote on the call for the previous question. As Garfield ascer-

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tained at the time, the only opportunity to amend H.R. No. 127 would arise if the demand was voted down. Niblack voted to sustain it. Globe 2545.

Debate in the House was substantially concluded by Bingham, the man primarily responsible for the language of § 1. Without equivocation, he stated:

"The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States.

"The second section excludes the conclusion that by the first section suffrage is subjected to congressional law; save, indeed, with this exception, that as the right in the people of each State to a republican government and to choose their Representatives in Congress is of the guarantees of the Constitution, by this amendment a remedy might be given directly for a case supposed by Madison, where treason might change a State government from a republican to a despotic government, and thereby deny suffrage to the people." Globe 2542.

Stevens then arose briefly in rebuttal. He attacked Bingham for saying in another portion of his speech that the disqualification provisions of § 3 were unenforceable. He did not contradict—or even refer to—Bingham's interpretation of §§ 1 and 2. Globe 2544. The vote was taken and the resolution passed immediately thereafter. Globe 2545.

To say that Stevens did not contradict Bingham is to minimize the force of the record. Not once, during the three days of debate, did any supporter of the Amendment criticize or correct any of the Republicans or Democrats who observed that the Amendment left the ballot "exclusively under the control of the States." Globe 2542 (Bingham). This fact is tacitly admitted even by those who find the debates "inconclusive." The only contrary authority they can find in the debates is the pale remarks of the four Democrats already discussed.[54]

In the Senate, which did not have a gag rule, matters proceeded at a more leisurely pace. The introductory speech would normally have been given by Senator Fessenden of Maine, the Chairman of the Joint Committee on behalf of the Senate, but he was still weak with illness and unable to deliver a lengthy speech. The duty of presenting the views of the Joint Committee therefore devolved on Senator Howard of Michigan.[55]

Howard minced no words. He stated that "the first section of the proposed amendment does not give to either of the classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by this Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a depotism [sic]." Globe 2766.

"The second section leaves the right to regulate the elective franchise still with the States, and does not meddle with that right." *Ibid.* Howard stated that while he personally would have preferred to see the freedmen enfranchised, the Committee was confronted with the necessity of proposing an amendment which could be ratified.

"The committee were of opinion that the States are not yet prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race. We may as well state it plainly and fairly, so that there shall be no misunderstanding on the subject. It was our opinion that three fourths of the States of this Union could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race." *Ibid.*

Howard's forthright attempt to prevent misunderstanding was completely successful insofar as the Senate was concerned; at least, no one has yet discovered a remark during the Senate debates on the proposed Fourteenth Amendment which indicates any contrary impression.[56] For some, however, time has muddied the clarity with which he spoke.[57]

The Senate, like the House, made frequent reference to the fact that the proposed amendment would not result in the enfranchisement of the freedmen. The supporters who expressed their regret at the fact were Wade of Ohio,[58] Poland of Vermont,[59] Stewart of Nevada,[60] Howe of Wisconsin,[61] Henderson of Missouri,[62] and Yates of Illinois.[63] The remarks of Senator Sherman of Ohio, whose support for the amendment was lukewarm, see Globe 2986, seems to have been based on the common interpretation.[64]

Doolitle of Wisconsin, whose support for the President resulted in his virtually being read out of the Republican Party, proposed to base representation on adult male voters. Globe 2942. In a discussion with Senator Grimes of Iowa, a member of the Joint Committee, about the desirability of this change, Doolittle defended himself by pointing out that "Your amendment proposes to allow the States to say who shall vote." Globe 2943. Grimes did not respond. Among the Democrats, no different view was expressed. Those whose remarks are informative are Hendricks of Indiana,[65] Cowan of Pennsylvania,[66] Davis of Kentucky,[67] and Johnson of Maryland.[68]

Senator Howard, who had opened debate, made the last remarks in favor of the Amendment. He said:

"We know very well that the States retain the power, which they have always possessed, of regulating the right of suffrage in the States. It is the theory of the Constitution itself. That right has never been taken from them; no endeavor has ever been made to take it from them; and the theory of this whole amendment is, to leave the power of regulating the suffrage with the people or Legislatures of the States, and not to assume to regulate it by any clause of the Constitution of the United States." Globe 3039.

Shortly thereafter the Amendment was approved. Globe 3041–3042.

In the House, there was a brief discussion of the Senate amendments and the measure generally, chiefly by the Democrats. Stevens then concluded the debate as he had begun it, expressing his regret that the Amendment would not enfranchise the freedom.[69] The House accepted the Senate changes and sent the measure to the States. Globe 3149.

E. Collateral evidence of congressional intent

It has been suggested that despite this evidence of congressional understanding, which seems to me overwhelming, the history is nonetheless inconclusive. Primary reliance is placed on debates over H.R. No. 51, the Joint Committee's first effort in the field of the basis of representation. In these debates, some of the more extreme Radicals, typified by Senator Sumner of Massachusetts, suggested that Congress had power to interfere with state voter qualifications at least to the extent of enfranchising the freedmen. This power was said to exist in a variety of constitutional provisions, including Article I, § 2, Article I, § 4, the war power, the power over territories, the guaranty of a republican form of government, and § 2 of the Thirteenth Amendment. Those who held this view expressed concern lest the Committee's proposal be read to authorize the States to discriminate on racial grounds and stated that they could not vote for the measure if such was the correct construction. They were sometimes comforted by supporters of the committee proposal, who assured them that there would be no such effect. From these statements, and the fact that some of those who took the extreme view ultimately did vote for the proposed Fourteenth Amendment, it is sought to construct a counter-argument: if H.R. No. 51, properly interpreted, would not have precluded congressional exercise of power otherwise existing under the constitutional provisions referred to, then § 2 of the Fourteenth Amendment, properly interpreted, does not preclude the exercise of congressional power under §§ 1 and 5 of that Amendment.

This argument, however, is even logically fallacious, and quite understandably none of the opinions filed today places much reliance on it. I do not maintain that the Framers of the Fourteenth Amendment took away with one hand what they had given with the other, but simply that the Amendment must be construed as a whole, and that for the reasons already given, *ante* p. ——, the inclusion of § 2 demonstrates that the Framers never intended to confer the power which my Brethren seek to find in §§ 1 and 5. Bingham, for one, distinguished between these two positions. When it was suggested in the debates over H.R. No. 51 that the proviso would remove preexisting congressional power over voting qualifications, Bingham made the response quoted by my colleagues. Globe 431–432; see pp. ——, *ante*. When it was observed during the debates over the proposed Fourteenth Amendment that § 2 demonstrated that the Amendment did not reach state control over voting qualifictaions, Bingham was the one making the observation. Globe 2542, quoted *ante*, p.——. As Bingham seems to have recognized, the sort of argument he made in connection with H.R. No. 51 is beside the point with respect to the Fourteenth Amendment.

In any event, even disregarding its analytical difficulties, the argument is based on blatant factual shortcomings. All but one of the speakers on whose statements primary reliance is placed stated, either during the debates on the Fourteenth Amendment or subsequently, that the Amendment did not enfranchise the freedmen.[70]

Finally, some of those determined to sustain the legislation now before us rely on speeches made between two and three years after Congress had sent the proposed Amendment to the States. Boutwell and Stevens in the House, and Sumner in the Senate, argued that the Fifteenth Amendment or enfranchising legislation was unnecessary because the Fourteenth Amendment prohibited racial discrimination in voter qualifications. Each had earlier expressed the opposite position.[71] Their subsequent attempts to achieve by assertion what they had not had the votes to achieve by constitutional processes can hardly be entitled to weight.

F. Ratification

State materials relating to the ratification process are not very revealing. For the most part only gubernatorial messages and committee reports have survived.[72] So far as my examination of these materials reveals, while the opponents of the Amendment were divided and sometimes equivocal on whether it might be construed to require enfranchisement,[73] the supporters of the Amendment in the States approached the congressional proponents in the unanimity of their interpretation. I have discovered only one brief passage in support of the Amendment which appears to be based on the assumption that it would result in enfranchisement.[74] These remarks, in the message of the Governor of Illinois, had to compete in the minds of the legislators with the viewpoint of the Chicago Tribune. This Radical journal repeatedly criticized the Amendment's lack of an enfranchising provision, and at one time it even expressed the hope that the South would refuse to ratify the Amendment so that the North would turn to enfranchisement of the freed men as the only means of reconstruction. June 15, 1866, quoted in James 177. In all the other States I have examined, where the materials are sufficiently full for the understanding of a supporter of the Amendment to appear, his understanding has been that enfranchisement would not result.[75]

The scanty official materials can be sup-

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plemented by other sources. There was a congressional election in the fall of the year the Fourteenth Amendment went to the States. The Radicals ran on the Amendment as their reconstruction program, attempting to force voters to choose between their plan and that of President Johnson. From the campaign speeches and from newspaper reactions, we can get some further idea of the understanding of the States.

The tone of the campaign was set by the formal report of the Joint Committee, which Fessenden openly stated he had composed as a partisan document. James 147. Indeed, it was not even submitted to Congress until the day the Senate approved the measure, and then only in manuscript form. Globe 3038. On the delicate issue of Negro suffrage, the report read as follows: [76]

"Doubts were entertained whether Congress had power, even under the amended Constitution, to prescribe the qualifications of voters in a State, or could act directly on the subject. It was doubtful, in the opinion of your committee, whether the States would consent to surrender a power they had always exercised, and to which they were attached. As the best if not the only method of surrounding the difficulty, and as eminently just and proper in itself, your committee came to the conclusion that political power should be possessed in all the States exactly in proportion as the right of suffrage should be granted, without distinction of color or race. This it was thought would leave the whole question with the people of each State, holding out to all the advantage of increased political power as an inducement to allow all to participate in its exercise. Such a provision would be in its nature gentle and persuasive, and would lead, it was hoped, at no distant day, to an equal participation of all, without distinction, in all the rights and privileges of citizenship, thus affording of citizens, since all would have, through the ballot-box, the power of self-protection.

"Holding these views, your committee prepared an amendment to carry out this idea, and submitted the same to Congress. Unfortunately, as we think, it did not receive the necessary constitutional support in the Senate, and therefore could not be proposed for adoption by the States. The principle involved in that amendment is however, believed to be sound, and your committee have again proposed it in another form, hoping that it may receive the approbation of Congress."

Newspapers expressed the same view of the reach of the Amendment. Even while deliberations were underway, predictions that Congress would come up with a plan involving enfranchisement of the freedmen had gradually ceased. James 41. When the Amendment was released to the press, Andrew Johnson was reported as seeing in it a "practical abandonment of the Negro suffrage issue." Cincinnati Daily Commercial, April 30, 1866, quoted in James 117. The New York Herald had reported editorially that the Amendment reflected an abandonment of the Radical push for Negro suffrage and acceptance of Johnson's position that control over suffrage rested exclusively with the States, May 1, 1866, reported in James 119. The Nation, a Radical organ, attributed the absence of any provision on Negro suffrage to "sheer want of confidence in the public." 2 Nation 545 (May 1, 1866), quoted in James 120. The Chicago Tribune, another Radical organ, complained that § 1 was objectionable as "surplusage," May 5, 1866, quoted in James 123, and later in the same month criticized the measure for "postponing, not settling" the matter of equal political rights for Negroes. May 31, 1866, quoted in James 146. As deliberations continued, the reporting went on in the same vein. The New York Times reported that with elections approaching, "No one now talks or dreams of forcing Negro suffrage upon the Southern States." June 6, 1866, The Cincinnati Daily Commercial and the Boston Daily Journal for June 7, 1866, commented on the Radicals' abandonment of Negro suffrage. James 145.

Much the same picture emerges from the campaign speeches. Although an occasional Democrat expressed the fear that the Amendment would or might result in political equality,[77] the supporters of the Amendment denied such effects without exception that I have discovered. Among the leading congressional figures who stated in campaign speeches that the Amendment did not prohibit racial voting qualifications were Senators Howe, Lane, Sherman, and Sumner, and Congressmen Bingham, Delano, Schenck, Stevens, and Trumbull. See James 159–168, 173, 178; Fairman, *supra*, 2 Stan. L. Rev., at 70–78.

As was pointed out above, all but a handful of northern States prohibited blacks from voting at all, and opposition to a change was intense. Between 1865 and 1869 referenda on the issue rejected impartial Negro suffrage in Colorado Territory, Connecticut, Wisconsin, Minnesota (twice), the District of Columbia, Nebraska Territory, Kansas, Ohio, Michigan, Missouri, and New York. Only Iowa and Minnesota accepted it, and that on the day Grant was elected to the Presidency.[78] It is inconceivable that those States, in that climate, could have ratified the Amendment with the expectation that it would require them to permit their black citizens to vote.

Small wonder, then, that in early 1869 substantially the same group of men who three years earlier had proposed the Fourteenth Amendment felt it necessary to make further modifications in the Constitution if state suffrage laws were to be controlled even to the minimal degree of prohib'ting qualifications which on their face discriminated on the basis of race. If the consequences for our federal system were not so serious, the contention that the history is "inconclusive" would be undeserving of attention. And, with all respect, the transparent failure of attempts to cast doubt on the original understanding is simply further evidence of the force of the historical record.

II

The history of the Fourteenth Amendment with respect to suffrage qualifications is remarkably free of the problems which bedevil most attempts to find a reliable guide to present decision in the pages of the past. Instead there is virtually unanimous agreement, clearly and repeatedly expressed, that § 1 of the Amendment did not reach discriminatory voter qualifications. In this rather remarkable situation, the issue of the bearing of the historical understanding on constitutional interpretation squarely arises.

I must confess to complete astonishment at the position of some of my Brethren that the history of the Fourteenth Amendment has become irrelevant. *Ante*, p. —. In the six years since I first set out much of this history,[79] I have seen no justification for such a result which appears to me at all adequate. With matters in this posture, I need do no more by way of justifying my reliance on these materials than sketch the familiar outlines of our constitutional system.

When the Constitution with its original Amendments came into being, the States delegated some of their sovereign powers to the Federal Government, surrendered other powers, and expressly retained all powers not delegated or surrendered. Amend. X. The power to set state voting qualifications was neither surrendered nor delegated, except to the extent that the guaranty of a republican form of government [80] may be thought to require a certain minimum distribution of political power. The power to set qualifications for voters for national office, created by the Constitution, was expressly committed to the States by Article I, § 2, and Article II, § 1.[81] By Article V, States may be deprived of their retained powers only with the concurrence of two-thirds of each House of Congress and three-fourths of the States. No one asserts that the power to set voting qualifications was taken from the States or subjected to federal control by any Amendment before the Fourteenth. The historical evidence makes it plain that the Congress and the States proposing and ratifying that Amendment affirmatively understood that they were not limiting state power over voting qualifications. The existence of the power therefore survived the amending process, and, except as it has been limited by the Fifteenth, Nineteenth, and Twenty-fourth Amendments, it still exists today.[82] Indeed, the very fact that constitutional amendments were deemed necessary to bring about federal abolition of state restrictions on voting by reason of race (Amend. XV), sex (Amend. XIX), and, even with respect to federal elections, the failure to pay state poll taxes (Amend. XXIV), is itself forceful evidence of the common understanding in 1869, 1919, and 1962, respectively, that the Fourteenth Amendment did not empower Congress to legislate in these respects.

It must be recognized, of course, that the amending process is not the only way in which constitutional understanding alters with time. The judiciary has long been entrusted with the task of applying the Constitution in changing circumstances, and as conditions change the Constitution in a sense changes as well. But when the Court gives the language of the Constitution an unforeseen application, it does so, whether explicitly or implicitly, in the name of some underlying purpose of the Framers.[83] This is necessarily so; the federal judiciary, which by express constitutional provision is appointed for life, and therefore cannot be held responsible by the electorate, has no inherent general authority to establish the norms for the rest of society. It is limited to elaboration and application of the precepts ordained in the Constitution by the political representatives of the people. When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect.[84]

As the Court is not justified in substituting its own views of wise policy for the commands of the Constitution, still less it is justified in allowing Congress to disregard those commands as the Court understands them. Although Congress' expression of the view that it does have power to alter state suffrage qualifications is entitled to the most respectful consideration by the judiciary, coming as it does from a coordinate branch of government,[85] this cannot displace the duty of this Court to make an independent determination whether Congress has exceeded its powers. The reason for this goes beyond Marshall's assertion that "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).[86] It inheres in the structure of the constitutional system itself. Congress is subject to none of the institutional restraints imposed on judicial decisionmaking; it is controlled only by the political process. In Article V, the Framers expressed the view that the political restraints on Congress alone were an insufficient control over the process of constitution-making. The concurrence of two-thirds of each House and of three-fourths of the States was needed for the political check to be adequate. To allow a simple majority of Congress to have final say on matters of constitutional interpreta-

Footnotes at end of article.

tion is therefore fundamentally out of keeping with the constitutional structure. Nor is that structure adequately protected by a requirement that the judiciary be able to perceive a basis for the congressional interpretation, the only restriction laid down in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

It is suggested that the proper basis for the doctrine enunciated in *Morgan* lies in the relative fact-finding competence of Court, Congress, and state legislatures. *Ante*, p. ——. In this view, as I understand it, since Congress is at least as well qualified as a state legislature to determine factual issues, and far better qualified than this Court, where a dispute is basically factual in nature the congressional finding of fact should control subject only to review by this Court for reasonableness.

In the first place, this argument has little or no force as applied to the issue whether the Fourteenth Amendment covers voter qualifications. Indeed, I do not understand the adherents of *Morgan* to maintain the contrary. But even on the assumption that the Fourteenth Amendment does place a limit on the sorts of voter qualifications which a State may adopt, I still do not see any real force in the reasoning.

When my Brothers refer to "complex factual questions," *ante*, p. —, they call to mind disputes about primary, objective facts dealing with such issues as the number of persons between the ages of 18 and 21, the extent of their education, and so forth. The briefs of the four States in these cases take no issue with respect to any of the facts of this nature presented to Congress and relied on by my Brothers DOUGLAS, *ante*, p —, and BRENNAN, WHITE, and MARSHALL, *ante*, p. —. Except for one or two matters of dubious relevance, these facts are not subject to rational dispute. The disagreement in these cases revolves around the evaluation of this largely uncontested factual material.[87] On the assumption that maturity and experience are relevant to intelligent and responsible exercise of the elective franchise, are the immaturity and inexperience of the average 18-, 19-, or 20-year-old sufficiently serious to justify denying such a person a direct voice in decision affecting his or her life? Whether or not this judgment is characterized as "factual," it calls for striking a balance between incommensurate interests. Where the balance is to be struck depends ultimately on the values and the perspective of the decisionmaker. It is a matter as to which men of good will can and do reasonably differ.

I fully agree that judgments of the sort involved here are beyond the institutional competence and constitutional authority of the judiciary. See, *e.g.*, *Baker* v. *Carr*, 369 U.S. 186,266–330 (1962) (Frankfurter, J., dissenting); *Kramer* v. *Union Free School District No. 15*, 395 U.S. 621, 634–641 (1969) (STEWART, J., dissenting). They are preeminently matters for legislative discretion, with judicial review, if it exists at all, narrowly limited. But the same reasons which in my view would require the judiciary to sustain a reasonable state resolution of the issue also require Congress to abstain from entering the picture.

Judicial deference is based, not on relative fact-finding competence, but on due regard for the decision of the body constitutionally appointed to decide. Establishment of voting qualifications is a matter for state legislatures. Assuming any authority at all, only when the Court can say with some confidence that the legislature has demonstrably erred in adjusting the competing interests is it justified in striking down the legislative judgment. This order of things is more efficient and more congenial to our system and, in my judgment, much more likely to achieve satisfactory results than one in which the Court has a free hand to replace state legislative judgments with its own. See *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963).

The same considerations apply, and with almost equal force, to Congress' displacement of state decisions with its own ideas of wise policy. The sole distinction between Congress and the Court in this regard is that Congress, being an elective body, presumptively has popular authority for the value judgment it makes. But since the state legislature has a like authority, this distinction between Congress and the judiciary falls short of justifying a congressional veto on the state judgment. The perspectives and values of national legislators on the issue of voting qualifications are likely to differ from those of state legislators, but I see no reason *a priori* to prefer those of the national figures, whose collective decision, applying nationwide, is necessarily less able to take account of peculiar local conditions. Whether one agrees with this judgment or not, it is the one expressed by the Framers in leaving voter qualifications to the States. The Supremacy Clause does not, as my colleagues seem to argue, represent a judgment that federal decisions are superior to those of the States whenever the two may differ.

To be sure, my colleagues do not expressly say that Congress or this Court is empowered by the Constitution to substitute its own judgment for those of the States. However, before sustaining a state judgment they require a "clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest."[88] *Ante*, p. ——; see p. ——, n. 31. I should think that if the state interest were truly "compelling" and "substantial," and a clear showing could be made that the voter qualification was "necessary" to its preservation, no reasonable person would think the qualification undesirable. Equivalently, if my colleagues or a majority of Congress deem a given voting qualification undesirable as a matter of policy, they must consider that the state interests involved are not "compelling" or "substantial" or that they can be adequately protected in other ways. It follows that my colleagues must be prepared to hold invalid as a matter of Federal constitutional law all state voting qualifications which they deem unwise, as well as all such qualifications which Congress reasonably deems unwise. For this reason, I find their argument subject to the same objection as if it explicitly acknowledged such a conclusion.

It seems to me that the notion of deference to congressional interpretation of the Constitution, which the Court promulgated in *Morgan*, is directly related to this higher standard of constitutionality which the Court intimated in *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966), and brought to fruition in *Kramer*. When the scope of federal review of state determinations became so broad as to be judicially unmanageable, it was natural for the Court to seek assistance from the national legislature. If the federal role were restricted to its traditional and appropriate scope, review for the sort of "plain error" which is variously described as "arbitrary and capricious," "irrational," or "invidious," there would be no call for the Court to defer to a congressional judgment on this score that it did not find convincing. Whether a state judgment has so exceeded the bounds of reason as to authorize federal intervention is not a matter as to which the political process is intrinsically likely to produce a sounder or more acceptable result. It is a matter of the delicate adjustment of the federal system. In this area, to rely on Congress would make that body a judge in its own cause. The role of final arbiter belongs to this Court.

III

Since I cannot agree that the Fourteenth Amendment empowered Congress, or the federal judiciary to control voter qualifications, I turn to other asserted sources of congressional power. My Brother BLACK would find that such power exists with respect to *federal* elections by virtue of Article I, § 4, and seemingly other considerations which he finds implicit in federal authority.

Art. I, § 2: "the Electors [for Representatives] in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

Art. I, § 4: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations, except as to the Places of chusing Senators."

Amend. XVII. "The electors [for Senators] in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

It is difficult to see how words could be clearer in stating what Congress can control and what it cannot control. Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress. The reason for the scheme is not hard to find. In the Constitutional Convention, Madison expressed the view that "The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution." 2 M. Farrand, Records of the Federal Convention of 1787, at 249–250 (1911). He explained further in The Federalist No. 52, at 326 (C. Rossiter ed. 1961).

"To have reduced the different qualifications in the different States to one uniform rule would probably have been as dissatisfactory to some of the States as it would have been difficult to the Convention. The provision made by the Convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every State, because it is conformable to the standard already established or which may be established by the State itself. It will be safe to the United States because, being fixed by the State constitutions, it is not alterable by the State governments; and it cannot be feared that the people of the States will alter this part of their constitutions in such manner as to abridge the rights secured to them by the Federal Constitution."

See also Federalist No. 60, at 371 (C. Rossiter ed. 1961) (Hamilton), quoted in the opinion of Mr. Justice Stewart, *ante*, p.——, which is to the same effect.

As to presidential elections, the Constitution provides:

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ." Art. II, § 1, cl. 2.

"The Congress may determine the Time of choosing Electors, and the Day on which they shall give their Vote; which Day shall be the same throughout the United States." Art. II, § 1, cl. 4.

Even the power to control the "Manner" of holding elections, given with respect to congressional elections by Article I, § 4, is absent with respect to the selection of presidential electors.[89] And, of course, the fact that it was deemed necessary to provide separately for congressional power to regulate the time of choosing presidential electors and the President himself demonstrates that the power over "Times, Places and Manner" given by Article I, § 4, does not refer to presidential elections, but only to the elections for Congressmen. Any shadow of a justification for congressional power with respect to congressional elections therefore disappears utterly in presidential elections.

IV

With these major contentions resolved, it is convenient to consider the three sections of the Act individually to determine whether

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they can be supported by any other basis of congressional power.

A. Voting age

The only constitutional basis advanced in support of the lowering of the voting age is the power to enforce the Equal Protection Clause, a power found in § 5 of the Fourteenth Amendment. For the reasons already given, it cannot be said that the statutory provision is valid as declaratory of the meaning of that clause. Its validity therefore must rest on congressional power to lower the voting age as a means of preventing invidious discrimination that is within the purview of that clause.

The history of the Fourteenth Amendment may well foreclose the possibility that § 5 empowers Congress to enfranchise a class of citizens so that they may protect themselves against discrimination forbidden by the first section, but it is unnecessary for me to explore that question. For I think it fair to say that the suggestion that members of the age group between 18 and 21 are threatened with unconstitutional discrimination, or that any hypothetical discrimination is likely to be affected by lowering the voting age, is little short of fanciful. I see no justification for stretching to find any such possibility when all the evidence indicates that Congress—led on by recent decisions of this Court—thought simply that 18-year-olds were fairly entitled to the vote and that Congress could give it to them by legislation.[90]

I therefore conclude, for these and other reasons given in this opinion, that in § 302 of the Voting Rights Act Amendments of 1970 Congress exceeded its delegated powers.

B. Residency

For reasons already stated, neither the power to regulate voting qualifications in presidential elections, asserted by my Brother Black, nor the power to declare the meaning of § 1 of the Fourteenth Amendment, relied on by my Brother Douglas, can support § 202 of the Act. It would also be frivolous to contend that requiring States to allow new arrivals to vote in presidential elections is an appropriate means of preventing local discrimination against them in other respects, or of forestalling violations of the Fifteenth Amendment. The remaining grounds relied on are the Privileges and Immunities Clause of Article IV, § 2,[91] and the right to travel across state lines.

While the right of qualified electors to cast their ballots and to have their votes counted was held to be a privilege of citizenship in *Ex parte Yarbrough*, 110 U.S. 651 (1884), and *United States* v. *Classic*, 313 U.S. 299 (1941), these decisions were careful to observe that it remained with the States to determine the class of qualified voters. It was federal law, acting on this State-defined class, which turned the right to vote into a privilege of national citizenship. As the Court has consistently held, the Privileges and Immunities Clauses do not react on the mere status of citizenship to enfranchise any citizen whom an otherwise valid state law does not allow to vote. *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162, 170–175 (1874); *Pope* v. *Williams*, 193 U.S. 621, 632 (1904); *Breedlove* v. *Suttles*, 302 U.S. 277, 283 (1937); cf. *Snowden* v. *Hughes*, 321 U.S. 1, 6–7 (1944). Minors, felons, insane persons, and persons who have not satisfied residency requirements are among those citizens who are not allowed to vote in most States.[92] The Privileges and Immunities Clause of Article IV of the Constitution is a direct descendent of Article IV of the Articles of Confederation:

"The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States. . . ."

It is inconceivable that these words when used in the Articles could have been understood to abolish state durational residency requirements.[93] There is not a vestige of evidence that any further extent was envisioned for them when they were carried over into the Constitution. And, as I have shown, when they were substantially repeated in § 1 of the Fourteenth Amendment it was affirmatively understood that they did not include the right to vote. The Privileges and Immunities Clause is therefore unavailing to sustain any portion of § 202.

The right to travel across state lines, see *United States* v. *Guest*, 383 U.S. 745, 757–758 (1966), and *Shapiro* v. *Thompson*, 394 U.S. 618, 630 (1969), is likewise insufficient to require Idaho to conform her laws to the requirements of § 202. Mr. Justice Stewart justifies § 202 solely on the power under § 5 of the Fourteenth Amendment to enforce the Privileges and Immunities Clause of § 1 which he deems the basis for the right to travel. Ante, p. ——. I find it impossible to square the position that § 5 authorizes Congress to abolish state voting qualifications based on residency with the position that it does not authorize Congress to abolish such qualifications based on race. Since the historical record compels me to accept the latter position, I must reject the former.

Mr. Justice Brennan, Mr. Justice White, and Mr. Justice Marshall do not anchor the right of interstate travel to any specific constitutional provision. Ante, p. ——. Past decisions to which they refer have relied on the two Privileges and Immunities Clauses, just discussed, the Due Process Clause of the Fifth Amendment, and the Commerce Clause. See *Shapiro* v. *Thompson*, 394 U.S., at 630 n. 8; id., 663–671 (dissenting opinion). The Fifth Amendment is wholly inapplicable to state laws; and surely the Commerce Clause cannot be seriously relied on to sustain the Act here challenged. With no specific clause of the Constitution empowering Congress to enact § 202, I fail to see how that nebulous judicial construct, the right to travel, can do so.

C. Literacy

The remaining provision of the Voting Rights Act Amendments involved in these cases is the five-year suspension of Arizona's requirement that registrants be able to read the Constitution in English and to write their names. Although the issue is not free from difficulty, I am of the opinion that this provision can be sustained as a valid means of enforcing the *Fifteenth* Amendment.

Despite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious.[94] This danger of violation of § 1 of the Fifteenth Amendment was sufficient to authorize the exercise of congressional power under § 2.

Whether to engage in a more particularized inquiry into the extent and effects of discrimination, either as a condition precedent or as a condition subsequent to suspension of literacy tests, was a choice for Congress to make.[95] The fact that the suspension is only for five years will require Congress to reevaluate at the close of that period. While a less sweeping approach in this delicate area might well have been appropriate, the choice which Congress made was within the range of the reasonable.[96] I therefore agree that § 201 of the Act is a valid exercise of congressional power to the extent it is involved in this case. I express no view about its validity as applied to suspend tests such as educational qualifications, which do not lend themselves so readily to discriminatory application or effect.

For the reasons expressed in this opinion, I would grant the relief requested in Nos. 43 and 44. I would dismiss the complaint in No. 47 for failure to state a claim on which relief can be granted. In No. 46 I would grant declaratory relief with respect to the validity of § 201 of the Voting Rights Act Amendments as applied to Arizona's current literacy test; I would deny relief in all other respects, with leave to reapply to the United States District Court for the District of Arizona for injunctive relief in the event it proves necessary, which I am confident it will not.

V

In conclusion I add the following. The consideration that has troubled me most in deciding that the 18-year-old and residency provisions of this legislation should be held unconstitutional is whether I ought to regard the doctrine of *stare decisis* as preventing me from arriving at that result. For as I indicated at the outset of this opinion, were I to continue to consider myself constricted by recent past decisions holding that the Equal Portection Clause of the Fourteenth Amendment reaches state electoral processes, I would, particularly perforce of the decisions cited in n. 84, *supra*, be led to cast my vote with those of my Brethren who are of the opinion that the lowering of the voting age and the abolition of state residency requirements in presidential elections are within the ordinary legislative power of Congress.

After much reflection I have reached the conclusion that I ought not to allow *stare decisis* to stand in the way of casting my vote in accordance with what I am deeply convinced the Constitution demands. In the annals of this Court few developments in the march of events have so imperatively called upon us to take a fresh hard look at past decisions, which could well be mustered in support of such developments, than do the legislative lowering of the voting age and, albeit to a lesser extent, the elimination of state residential requirements in presidential elections. Concluding, as I have, that such decisions cannot withstand constitutional scrutiny, I think it my duty to depart from them, rather than to lend my support to perpetuating their constitutional error in the name of *stare decisis*.

In taking this position, I feel fortified by the evident *malaise* among the members of the Court with those decisions. Despite them, a majority of the Court holds that this congressional attempt to lower the voting age by simple legislation is unconstitutional, insofar as it relates to state elections. Despite them, four members of the Court take the same view of this legislation with respect to federal elections as well; and the fifth member of the Court who considers the legislation constitutionally infirm as regards state elections relies not at all on any of those decisions in reaching the opposite conclusion in federal elections. And of the eight members of the Court who vote to uphold the residential provisions of the statute, only four appear to rely upon any of those decisions in reaching that result.

In these circumstances I am satisfied that I am free to decide these cases unshackled from a line of decisions which I have felt from the start entailed a basic departure from sound constitutional principle.

APPENDIX TO OPINION OF HARLAN, J.

Voting Rights Acts Amendments of 1970, Pub. L. 91–285, 84 Stat. 314.

Title II—Supplemental provisions

Application of Prohibition to Other States

SEC. 201. (a) Prior to August 6, 1975, no citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State as to which the provisions of section 4(a) of this Act are not in effect by reason of determinations made under section 4(b) of this Act.

(b) As used in this section, the term "test or device" means any requirement that a

Footnotes at end of article.

person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

Residence Requirements for Voting

SEC. 202. (a) The Congress hereby finds that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections—

(1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President;

(2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;

(3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1, of the Constitution;

(4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote;

(5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and

(6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.

(b) Upon the basis of these findings, Congress declares that in order to secure and protect the above-stated rights of citizens under the Constitution, to enable citizens to better obtain the enjoyment of such rights, and to enforce the guarantees of the fourteenth amendment, it is necessary (1) to completely abolish the durational residency requirement as a precondition to voting for President and Vice President, and (2) to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.

(c) No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision; nor shall any citizen of the United States be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to be physically present in such State or political subdivision at the time of such election. If such citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President and Vice President in such election; and each State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

(e) If any citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any election for President and Vice President has begun residence in such State or political subdivision after the thirtieth day next preceeding such election and, for that reason, does not satisfy the registration requirements of such State or political subdivision he shall be allowed to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election, (1) in person in the State or political subdivision in which he resided immediately prior to his removal if he had satisfied, as of the date of his change of residence, the requirements to vote in that State or political subdivision, or (2) by absentee ballot in the State or political subdivision in which he resided immediately prior to his removal if he satisfies, but for his nonresident status and the reason for his absence, the requirements for absentee voting in that State or political subdivision.

(f) No citizen of the United States who is otherwise qualified to vote by absentee ballot in any State or political subdivision in any election for President and Vice President shall be denied the right to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election because of any requirement of a registration that does not include a provision for absentee registration.

(g) Nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein.

Separability

SEC. 205. If any provision of this Act or the application of any provision thereof to any person or circumstance is judicially determined to be invalid, the remainder of this Act or the application of such provision to other persons or circumstances shall not be affected by such determination.

Title III—Reducing voting age to eighteen in Federal, State, and local elections

SEC. 301. (a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

(2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

(3) does not bear a reasonable relationship to any compelling State interest.

(b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.

Prohibition

SEC. 302. Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

Effective Date

SEC. 305. The provisions of title III shall take effect with respect to any primary or election held on or after January 1, 1971.

Arizona Constitution

Art. 7, § 2. No person shall be entitled to vote at any general election, or for any office that now is, or hereafter may be, elective by the people, or upon any question which may be submitted to a vote of the people, unless such person be a citizen of the United States of the age of twenty-one years or over, and shall have resided in the State one year immediately preceding such election, provided that qualifications for voters at a general election for the purpose of electing presidential electors shall be as prescribed by law. The word "citizen" shall include persons of the male and female sex.

Arizona Revised Statutes Annotated

§ 16–101. Qualifications of elector

A. Every resident of the state is qualified to become an elector and may register to vote at all elections authorized by law if he:

1. Is a citizen of the United States.

2. Will be twenty-one years or more of age prior to the regular general election next following his registration.

3. Will have been a resident of the state one year and of the county and precinct in which he claims the right to vote thirty days next preceding the election.

4. Is able to read the Constitution of the United States in the English language in a manner showing that he is neither prompted nor reciting from memory, unless prevented from so doing by physical disability.

5. Is able to write his name, unless prevented from so doing by physical disability.

B. At an election held between the date of registration and the next regular general election, the elector is eligible to vote if at the date of the intervening election he is twenty-one years of age and has been a resident of the state one year and the county and precinct thirty days.

C. A person convicted of treason or a felony, unless restored to civil rights, or an idiot, insane person or person under guardianship is not qualified to register.

§ 16–107. Closing of registrations

A. No elector shall be registered to vote in a primary election between five o'clock p.m. of the day which is four months preceding the date of the next general election and six o'clock p.m. of the day of the primary election.

B. No elector shall be registered between five o'clock p.m. of the seventh Monday preceding a general election and six o'clock p.m. of the day thereof. As amended Laws 1958, Ch. 48, § 1.

Idaho Constitution

Art. 6, § 2. Qualifications of electors.—Except as in this article otherwise provided, every male or female citizen of the United States, twenty-one years old, who has actually resided in this state or territory for six months, and in the country where he or she offers to vote, thirty days next preceding months, and in the county where he or the day of election, if registered as provided by law, is a qualified elector; provided however, that every citizen of the United States, twenty-one years old, who has actually resided in this state for sixty days next preceeding the day of election, if registered as required by law, is a qualified elector for the sole purpose of voting for presidential electors; and until otherwise provided by the legislature, women who have the qualifications prescribed in this article may continue to hold such school offices and vote at such school elections as provided by the laws of Idaho territory.

Idaho Code

Sec. 34—401. Qualifications of voters.—Every person over the age of twenty-one (21) years, possessing the qualifications following, shall be entitled to vote at all elections: He shall be a citizen of the United States and shall have resided in this state six (6) months immediately preceding the election at which he offers to vote, and in the county thirty (30) days: provided, that

no person shall be permitted to vote at any county seat election who has not resided in the county six (6) months, and in the precinct ninety (90) days, where he offers to vote; nor shall any person be permitted to vote at any election for the division of the county, or striking off from any county any part thereof, who has not the qualifications provided for in section 3, article 18, of the constitution; nor shall any person be denied the right to vote at any school district election, nor to hold any school district office on account of sex.

34–408. Eligibility of new residents to vote.—Each citizen of the United States, who, immediately prior to his removal to this state, was a citizen of another state and who has been a resident of this state for sixty (60) days next preceding the day of election but for less than the six (6) month period of required residence for voting prior to a presidential election, is entitled to vote for presidential and vice-presidential electors at that election, but for no other offices, if

(1) he otherwise possesses the substantive qualifications to vote in this state (except the requirements of residence and registration), and

(2) he complies with the provisions of this act.

34–409. Application for presidential ballot by new residents.—A person desiring to qualify under this act in order to vote for presidential and vice-presidential electors shall be considered as registered within the meaning of this act if on or before ten (10) days prior to the date of the general election, he shall make an application in the form of an affidavit executed in duplicate in the presence of the county auditor, substantially as follows * * *.

34–413. Voting by new residents.—(1) The applicant, upon receiving the ballot for presidential and vice-presidential electors shall mark forthwith the ballot in the presence of the county auditor, but in a manner that the official cannot know how the ballot is marked. He shall then fold the ballot in the county auditor's presence so as to conceal the markings, and deposit and seal it in an envelope furnished by the county auditor.

34–1101. Absent voting authorized.—Any qualified elector of the state of Idaho who is absent or expects to be absent from the election precinct in which he resides on the day of holding any election under any of the laws of this state in which an official ballot is required, or who is within the election precinct and is, or will be, unable, because of physical disability, or because of blindness, to go to the voting place, and if registration is required for such election, who is duly registered therefor, may vote at any such election, as hereinafter provided.

34–1105. Return of ballot.—On marking such ballot or ballots such absent or disabled or blind elector shall refold same as theretofore folded and shall inclose the same in said official envelope and seal said envelope securely and mail by registered or certified mail or deliver it in person to the officer who issued same; provided, that an absentee ballot must be received by the issuing officer by 12:00 o'clock noon on the day of the election before such ballot may be counted. Said ballot or ballots shall be so marked, folded and sealed by said voter in private and secretly. Provided, that whenever the disability or blindness makes it necessary that the voter shall be assisted in marking his ballot, such voter may have the assistance of any person of his choice in marking his ballot.

Oregon Constitution

Art. II, § 2. Every citizen of the United States is entitled to vote in all elections not otherwise provided for by this Constitution if such citizen:

(a) Is 21 years of age or older * * *.

Texas Constitution

Art. VI, § 1. Classes of persons not allowed to vote

Section 1. The following classes of persons shall not be allowed to vote in this State, to wit:

First: Persons under twenty-one (21) years of age.

Second: Idiots and lunatics.

Third: All paupers supported by any county.

Fourth: All persons convicted of any felony, subject to such exceptions as the Legislature may make.

§ 2. Qualified elector; registration; absentee voting.

Sec. 2 Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one (21) years and who shall be a citizen of the United States and who shall have resided in this State one (1) year next preceding an election and the last six (6) months within the district or county in which such person offers to vote, shall be deemed a qualified elector; provided, however, that before offering to vote at an election a voter shall have registered annually, but such requirement for registration shall not be considered a qualification of an elector within the meaning of the term "qualified elector" as used in any other Article of this Constitution in respect to any matter except qualification and eligibility to vote at an election. Any legislation enacted in anticipation of the adoption of this Amendment shall not be invalid because of its anticipatory nature. The Legislature may authorize absentee voting. And this provision of the Constitution shall be self-enacting without the necessity of further legislation.

Texas Election Code

Article 5.01. Classes of persons not qualified to vote.

The following classes of persons shall not be allowed to vote in this state:

1. Persons under twenty-one years of age.
2. Idiots and lunatics.
3. All paupers supported by the county.
4. All persons convicted of any felony except those restored to full citizenship and right of suffrage or pardoned.

Art. 5.02. Qualification and requirements for voting.

Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years and who shall be a citizen of the United States and who shall have resided in this state one year next preceding an election and the last six months within the district or county in which such persons offers to vote, and who shall have registered as a voter, shall be deemed a qualified elector. No persons shall be permitted to vote unless he has registered in accordance with the provisions of this code. The provisions of this section, as modified by Sections 35 and 39 of this code, shall apply to all elections, including general, special, and primary elections, whether held by the state, by a county, municipality, or other political subdivision of the state, or by a political party.

FOOTNOTES

[1] The Attorney General of the United States, a citizen of New York, is named as defendant. The jurisdictional basis alleged is Art. III, § 2, which gives this Court original jurisdiction over controversies between a State and a citizen of another State. We held a similar suit justiciable and otherwise within our original jurisdiction in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 307 (1966). The parties have not asked us to reexamine the validity of that ruling, and since the Court has not undertaken to do so, I am content to sustain jurisdiction on the authority of that decision.

[2] In response to inquiries from the Attorney General, Arizona, Oregon, and Texas indicated willingness to abide by § 202 of the Act, governing residency, registration, and absentee voting in presidential elections and to conform conflicting state laws.

[3] The account in the text is largely drawn from J. James, The Framing of the Fourteenth Amendment (1956) (hereafter James), and to some extent from W. Gillette, The Right To Vote: Politics and the Passage of the Fifteenth Amendment (1969) (hereafter Gillette), and B. Kendrick, The Journal of the Joint Committee of Fifteen on Reconstruction (1914) (hereafter Kendrick), as well.

[4] "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."

[5] See p. ____, *post*, for the text of these provisions, and for discussion of the contention that they empower Congress to set qualifications of voters in federal elections.

[6] "The United States shall guarantee to every State in this Union a Republican Form of Government."

[7] E. g., Proclamation of May 29, 1865, 13 Stat. 760 (North Carolina).

[8] The texts of the state constitutions are most readily available in F. Thorpe, The Federal and State Constitutions (1909). The qualifications imposed by the various States three years later, when the Fifteenth Amendment was proposed, are presented in tabular form in Hearings on the Voting Rights Bill, S. 1564, Before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 128–129 (1965).

[9] James 33.

[10] See Globe 209 (Freedmen's Bureau Bill); Globe 211 (Civil Rights Bill).

[11] While formally further consideration was postponed until a date in April, six weeks off, Globe 1095, it was generally understood that "April means indefinitely." 2 Nation 289 (March 11, 1866).

[12] The only change made in § 1 was the addition of the Citizenship Clause by the Senate. Globe 3041. The primary change made in § 2 was to condition reduction of representation on denial or abridgement of the right to vote in certain named elections, rather than to speak generally of denial or abridgement of "the elective franchise." *Ibid.* That section now reads:

"Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

[13] Section 1 of that Act provided in part that:

"all persons . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property and to full and equal benefit of all laws and proceedings for the

security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." Act of Apr. 9, 1866, c. 31, § 1, 14 Stat. 27.

[14] In this connection, Professor Fairman's admonition of 20 years ago is even more forceful than it was when he wrote:

"We know so much more about the constitutional law of the Fourteenth Amendment than the men who adopted it that we should remind ourselves not to be surprised to find them vague where we want them to prove sharp. Eighty years of adjudication has taught us distinctions and subtleties where the men of 1866 did not even perceive the need for analysis." Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 Stan. L. Rev. 5, 9 (1949).

[15] See, *e.g.*, Globe 599 (Sen. Trumbull); Globe 1117 (Cong. Wilson of Iowa, quoting Kent's Commentaries and Bouvier's Law Dictionary); Globe 1152 (Cong. Thayer). There were some, however, who considered the distinction either nonexistent or too uncertain to be a basis for legislation. *E.g.*, Globe 477 (Sen. Saulsbury); Globe 1157 (Cong. Thornton); Globe 1292–1293 (Cong. Bingham).

It hardly seems necessary to point out that the jurisprudential concept of "political" as opposed to "civil" or "natural" rights bears no relation to that class of nonjusticiable issues perhaps inappropriately known as "political questions." See the opinion of Mr. Justice Douglas, *ante*, p.——.

[16] See generally Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 Stan. L. Rev. 5 (1949), especially at 8–9.

[17] The remarks of these three Democrats, Niblack, Boyer, and Rogers, are discussed at pp. ——, *post*. Also discussed there are the remarks of a fourth Democratic Representative, Phelps, which were delivered before the start of debate on the proposed Fourteenth Amendment.

[18] While this provision might seem useless in light of the Fifteenth Amendment, it was doubtless intended to prohibit the imposition of property or literacy qualifications which, even though fairly applied, would have the effect of disfranchising most of the Negroes. The Radicals had sought to prohibit such qualifications in the Fifteenth Amendment, but were unsuccessful. See Gillette 53, 56–62, 69–72, 76.

[19] While the history indicates that the supporters of the Fourteenth Amendment would have been surprised at the suggestion that the Amendment brought qualifications for state office under federal supervision, office-holding was not the focus of attention during the consideration of the Amendment. Moreover, state power to set voter qualifications, unlike state power to set qualifications for office, is explicitly recognized not only in the original Constitution but in § 2 of the Fourteenth Amendment itself. Whether these distinctions are sufficient to justify testing state qualifications for office by the Fourteenth Amendment is a matter not presented by these cases.

Where the state action has a racial basis, see *Anderson* v. *Martin*, 375 U. S. 399 (1964), I am not prepared to assume that the Fifteenth Amendment provides no protection. Despite the statement in the opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL, *ante*, p. —, I would find it surprising if a State could undercut the right to vote by taking steps to ensure that all candidates are unpalatable to voters of a certain race. Although an explicit provision on office-holding was deleted from the proposed Fifteenth Amendment at the eleventh hour, the idea that the right to vote without more implies the right to be voted for was specifically referred to by supporters of the Fifteenth Amendment in both Houses of Congress. See Cong. Globe, 40th Cong., 3d Sess., 1425–1426 (1969) (Cong. Boutwell); *id.*, at 1426 (Cong. Butler); *id.*, at 1629 (Sen. Sawyer).

[20] Hearings, *supra* n. 8.

[21] See, *e. .g.*, *Globe* 141–142 (Cong. Blaine); Globe 2766–2767 (Sen. Howard); Globe 2769–2770 (Sens. Wade and Wilson); Globe 3033 (Sen. Henderson).

[22] The Journal is reprinted in Kendrick, *supra* n. 3, at 37–129.

[23] The attempts were not altogether successful. See James 108–109.

[24] See generally Kendrick 18–22. For reasons to be developed below, *post*, p. —, the report of the Joint Committee, H.R. Rep. No. 30, 39th Cong., 1st Sess. (1866), is less useful as an indication of the understanding of the Committee and the Congress than as an indication of the understanding of the ratifying States.

[25] Owen's account of the Fourteenth Amendment is given in Political Results from the Varioloid, 35 Atlantic Monthly 660 (June 1875).

[26] See James 109–112; Gillette 24; Owen, *supra* n. 25, at 666.

[27] See the votes on Stevens' motion to select the alternative which reduced representation rather than that which prohibited racial restrictions on the ballot, Kendrick 52; Boutwell's motion to condition readmission of Tennessee on that State's agreement not to discriminate in its voter qualifications, Kendrick 70; Stevens' motion to strike out the provision of the Owen plan enfranchising Negroes after 1876, Kendrick 101; and the motion to condition readmission of Tennessee and Arkansas on their having provided impartial male suffrage, as well as on conforming their laws and constitutions to the requirements of the proposed amendment (which included Bingham's provision when this motion was made), Kendrick 109.

Bingham was not, however, wholly opposed to Negro suffrage. As chairman of the subcommittee, he reported the equal rights provision which would have empowered Congress to provide for equal political rights and privileges, Kendrick 56, although he was the one who subsequently had that replaced with the first equal rights provision reported to Congress. Kendrick 61. As already noted, the substitute contained substantially identical language, but omitted reference to political rights and privileges. Bingham also voted for Owen's plan, which would have enfranchised Negroes in 1876, when it was first presented. Kendrick 85. In February 1867 he moved to condition readmission of the southern States on impartial male suffrage as well as on the States' ratifying the Fourteenth Amendment and conforming their laws thereto. Kendrick 123.

[28] While any guess as to the motives of Bingham and the other members of the committee is sheer speculation, it is not necessarily true that they believed they were replacing specific language with general. The author of the original plan, for one, seems to have taken the opposite view. He gave the following characterization of § 1 some years later:

"A declaration who is a citizen: unnecessary, if we had given suffrage to the negro; since there could be no possible doubt that an elector, nativeborn, is a citizen of the United States. Also a *specification* of the *particular* civil rights to be assured: out of place, I think, in a constitutional amendment, though necessary and proper in a civil rights bill." Owen, *supra*, n. 23, at 666 (emphasis added).

[29] The proceedings of the Joint Committee are examined in greater detail in the opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL. Ante, p. —. I agree with their apparent conclusion that the Journal sheds little light on the contemporary construction of the Fourteenth Amendment. One is left to do what he can with the two facts noted at the outset of this section: that of the plans considered by the Joint Committee, all provided either for reduction of representation or for enfranchisement while none provided for both at the same time; and that the Committee consistently rejected provisions to enfranchise the freedmen, with the conceivable exception of a plan which was defeated in the House largely because of the scope of the powers it transferred from the States to the Federal Government.

[30] Unless, of course, one adopts a "conspiracy theory" of the history of the Fourteenth Amendment. Thus far no one has (quite) done so in this context.

[31] "I regret more than I shall be able to tell this House that we have not found the situation [*sic*] of affairs in this country such, and the public virtue such that we might come out on the plain, unanswerable proposition that every adult intelligent citizen of the United States, unconvicted of crime, shall enjoy the right of suffrage." Globe 2462.

[32] I shall, Mr. Speaker, vote for this amendment; not because I approve it. Could I have controlled the report of the committee of fifteen, it would have proposed to give the right of suffrage to every loyal man in the country." Globe 2469.

"So far as I am individually concerned, I object to the amendment as a whole because it does not go far enough and propose to at once enfranchise every loyal man in the country." *Ibid.*

[33] "The proposition in the matter of suffrage falls short of what I desire, but so far as it goes it tends to the equalization of the inequality at present existing; and while I demand and shall continue to demand the franchise for all loyal male citizens of this country—and I cannot but admit the possibility that ultimately those eleven States may be restored to representative power without the right of franchise being conferred upon the colored people—I should feel myself doubly humiliated and disgraced, and criminal even, if I hesitated to do what I can for a proposition which equalizes representation." Globe 2508.

[34] "The second section, Mr. Speaker, is, in my judgment, as nearly correct as it can be without being fully, in full measure, right. But one thing is right, and that is secured by the amendment. Manifestly no State should have its basis of national representation enlarged by reason of a portion of citizens within its borders to which the elective franchise is denied. If political power shall be lost because of such denial, not imposed because of participation in rebellion or other crime, it is to be hoped that political interests may work in the line of justice, and that the end will be the impartial enfranchisement of all citizens not disqualified by crime. Whether that end shall be attained or not, this will be secured: that the measure of political power of any State shall be determined by that portion of its citizens which can speak and act at the polls, and shall not be enlarged because of the residence within the State of portions of its citizens denied the right of franchise. So much for the second section of the amendment. It is not all that I wish and would demand; but odious inequalities are removed by it and representation will be equalized, and the political rights of all citizens will under its operation be, as we believe, ultimately recognized and admitted." Globe 2511.

[35] "I did hope to see the rights of the freedom completely established . . . I did hope . . . that we should have the manhood and magnanimity to declare that men who have wielded the sword in defense of their country are fit to be intrusted with the ballot. But I am convinced that my expectations, hitherto fondly cherished, are doomed to some disappointment." Globe 2537.

[36] "This is a step in the right direction; and although I should prefer to see incorporated into the Constitution a guarantee of universal suffrage, as we cannot get the required two thirds for that, I cordially support this proposition as the next best." Globe 2540.

[37] "[If the free slaves had been added] to the thinking, voting men of the southern States, it would be just and proper that that addition should be represented in this body. But we all know that such is not the case. In those States themselves the late slaves do not enter into the basis of local representation. . . .

"Would it not be a most unprecedented thing that when this population are not permitted where they reside to enter into the basis of representation in their own State, we should receive it as an element of representation here. . . ." Globe 2464.

[38] "The second proposition is, in short, to limit the representation of the several States as those States themselves shall limit suffrage. . . .

". . . And why not? If the negroes of the South are not to be counted as a political element in the government of the South in the States, why should they be counted as a political element in the government of the country in the Union? If they are not to be counted as against the southern people themselves, why should they be counted against us?" Globe 2498.

[39] H.R. No. 51 "deprived [the southern States] of all inducement for [the] gradual admission [of the freedmen] to the right of suffrage, inasmuch as it exacted universal suffrage as the only condition upon which they should be counted in the basis of representation at all. . . . I voted against a proposition which seemed to me so unjust and so injurious, not only to the whites of the southern States, but to the colored race itself. Well, sir, that amendment was rejected in the Senate, and the proposition, as embodied in the committee's report, comes before us in a very different form. It is now proposed to base representation upon suffrage, upon the number of voters, instead of upon the aggregate population in every State of the Union. And as I believe that to be essentially just, and likely to remedy the unequal representation of which complaint is so justly made, I shall give it my vote." Globe 2502.

Later, in discussion of § 3, which at that time would have disfranchised certain rebels in federal elections, Raymond remarked that the effect would be to allow "one fifth, one eighth, or one tenth, as the case may be, of the people of these southern States to elect members from those States, to hold seats upon this floor." *Ibid.* It is obvious that the possibility of Negroes' voting in these elections did not cross his mind.

[40] "But this House is not prepared to enfranchise all men; the nation, perhaps, is not prepared for it to-day; the colored race are not prepared for it, probably, and I am sure the rebels are unfit for it; and as Congress has not the moral courage to vote for it, then put in this provision which cuts off the traitor from all political power in the nation, and then we have secured to the loyal men that control which they so richly deserve." Globe 2505.

[41] "This amendment will settle the complication in regard to suffrage and representation, leaving each State to regulate that for itself, so that it will be for it to decide whether or not it shall have a representation for all its male citizens not less than twenty-one years of age." Globe 2510.

[42] "I have no doubt that the Government of the United States has full power to extend the elective franchise to the colored population of the insurgent States. I mean authority; I said power. I have no doubt that the Government of the United States has the authority to do this under the Constitution; but I do not think they have the power. The distinction I make between authority and power is this: we have, in the nature of our Government, the right to do it; but the public opinion of the country is such at this precise moment as to make it impossible we should do it. It was therefore most wise on the part of the committee on reconstruction to waive this matter in deference to public opinion." Globe 2532.

[43] "If South Carolina persists in withholding the ballot from the colored man, then let her take the alternative we offer, of confining her to the white basis of representation . . . ." Globe 2535.

[44] Spalding's speeches are given at Globe 2509–2510. His only remarks addressed to §§ 1 and 2 read:

"As to the first measure proposed, a person may read it five hundred years hence without gathering from it any idea that this rebellion ever existed. The same may be said of the second proposition, for it only proposes that, the bondsmen being made free, the apportionment of Representatives in Congress shall be based upon the whole number of persons who exercise the elective franchise, instead of the population." Globe 2509.

A month later, in the debate over the Amendment when it had returned from the Senate, Spalding expressed his views more clearly:

"I say, as an individual, that I would more cheerfully give my vote if that provision allowed all men of proper age whom we have made free to join in the exercise of the right of suffrage in this country. But if I cannot obtain all that I wish, I will go heartily to secure all we can obtain." Globe 3146.

[45] Longyear's speech is published at Globe 2536–2537. He did not in terms address himself to any section except the third. However, it is not difficult to read his statement that the proposals of the Joint Committee disappointed "the expectations of the people" and his personal hopes as having reference to the absence of any provision on Suffrage.

[46] Shellabarger spoke only briefly, and this in connection with the disfranchising section. In the course of his remarks he expressed the view that congressional power to regulate voter qualifications in federal elections was granted by Article I, § 4. Globe 2512.

[47] "Why is it that the gentleman from Pennsylvania [Mr. Stevens] gives up universal suffrage? Why is it that he and other gentlemen give up universal confiscation? Why is it that other gentlemen give up universal butchery of that people? It is a compromise of what they call principle for the purpose of saving their party in the next election." Globe 2506.

[48] "Gentlemen here admit that they desire [federal control over suffrage], but that the weak kneed of their party are not equal to the issue. Your purpose is the same, and but for that timidity you would now ingraft negro suffrage upon our Constitution and force it on the entire people of this Union." Globe 2530.

[49] "While this [second] section admits the right of the States thus to exclude negroes from voting, it says to them, if you do so exclude them they shall also be excluded from all representation; and you shall suffer the penalty by loss of representation." Globe 3145.

[50] Boyer's speech was made in opposition to a proposal to enfranchise Negroes in the District of Columbia. He then thought Negro suffrage a "monstrous proposition," Globe 176, which was incompatible with "the broad general principle that this is, and of right ought to be, a white man's Government." Globe 175. One of Rogers' harangues on the subject came in connection with the same bill. There he spoke of "the monstrous doctrine of political equality of the negro race with the white at the ballot-box," Globe 198, and launched into an attack remarkable for its vitriol.

[51] Boyer viewed § 3, which at that time would have prohibited voluntary participants in the rebellion from voting in federal elections, as "the most objectionable of all the parts," Globe 2467, as it would disfranchise nine-tenths of the voting population of the South for more than four years. The second section he found objectionable as designed "to reduce the number of southern representatives in Congress and in the Electoral College; and also to operate as a standing inducement to negro suffrage." Globe 2467. These remarks indicate no awareness that the first section would increase the number of voters in the southern States and also render any "inducement" to Negro suffrage unnecessary.

Rogers later in his speech asserted:

"The committee dare not submit the broad proposition to the people of the United States of negro suffrage. They dare not to-day pass the negro suffrage bill which passed this House in the Senate of the United States because, as I have heard one honorable and leading man on the Republican side of the House say, it would sink into oblivion the party that would advocate before the American people the equal right of the negro with the white man to suffrage." Globe 2538.

When H.R. No. 127 was returned by the Senate with amendments, Rogers addressed the House and stated that when the records of the Joint Committee were made public, it would be revealed that the Committee at first agreed to recommend universal Negro suffrage, but reconsidered because of the force of public opinion. Globe Appendix 230. Rogers was himself a member of the Joint Committee, and he presumably was referring to the acceptance and then rejection of Owen's plan for enfranchisement in 1876.

[52] The Amendment, however, had been released to the press on April 28. James 115.

[53] It is not amiss to point out that whatever force Phelps' and Rogers' interpretations may have in the face of the contrary authority, even they foresaw no danger from the Equal Protection Clause as a source of federal power over the suffrage.

[54] Like my colleagues, *ante* p. —, I find it difficult to understand what Bingham meant when he said that "the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States." Globe 2542. However, I do not find this mysterious sentence to mean that the exercise of the elective franchise is exclusively under the control of the States and Congress, nor do I find it to dilute the force of his explicit statements quoted above that § 1 did not reach the right to vote. The general statements by Bingham and Stevens to the effect that the Amendment was designed to achieve equality before the law, or would be effectuated by legislation in part, likewise do not weaken the force of the statements specifically addressed to the suffrage question quoted above.

[55] Fessenden, however, was present in the Senate and participated in the discussion. See Globe 2763, 2769, 2770. He was therefore in a position to correct any gross misinterpretation of his view or of those of the Committee.

[56] My colleagues, *ante* p. —, point to Howard's reference to *Corfield* v. *Coryell*, 6 Fed. Case. 546 (No. 3230) (CCED Pa. 1823), in order to "gather some intimation of what probably will be the opinion of the judiciary" on the scope of the Privileges and Immunities Clause of § 1. Globe 2765. As the text indicates, Howard rejected Justice Washington's lengthy dictum insofar as it said that the protected privileges and immunities included "the elective franchise, as regulated and established by the laws or constitution of the State in which it is exercised." No other Senator quoted or referred to this portion of Washington's opinion during the debates over

the proposed Fourteenth Amendment. *Corfield,* which held that New Jersey could constitutionally restrict access to her oyster beds to her own residents, was the leading authority on privileges and immunities in the mind of the Thirty-ninth Congress, but it was not the only one. *Campbell* v. *Morriss,* 3 H. & McH. 535 (Md. 1797) (Samuel Chase, J.), and *Abbot* v. *Bayley,* 6 Pick. 89 (Mass. 1827) (Parker, C. J.), were also cited. See Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 Stan. L. Rev. 5, 12–15 (1949). Both specifically stated that the privileges and immunities protected by Article IV, § 2, did not include the right of suffrage or the right to hold office.

[57] Howard was a very clear-spoken man. When it was suggested, during the debates over the Fifteenth Amendment, that the freedmen were entitled to the ballot by virtue of the Privileges and Immunities Clause of the Fourteenth Amendment, he recalled his role in the framing of that Amendment and said "I feel constrained to say that this is the first time it ever occurred to me that the right to vote was to be derived from the fourteenth article. I think such a construction cannot be maintained." Cong. Globe, 40th Cong., 2d Sess. 1003 (1869). He then referred to the debates, § 2 of the Fourteenth Amendment, and the fact that "Nobody ever supposed that the right of voting or of holding office was guaranteed by the second section of the fourth article of the old Constitution" to bolster his construction of § 1 of the Fourteenth Amendment. *Ibid.*

[58] "I think our friends, the colored people of the South, should not be excluded from the right of voting, and they shall not be if my vote and the votes of a sufficient number who agree with me in Congress shall be able to carry it. I do not agree in this particular with the Senator from Michigan [Mr. Howard]. He yields to the provision in the committee's resolution on the subject reluctantly, because he does not believe three fourths of the State can be got to ratify that proposition which is right and just in itself. My own opinion is that if you go down to the very foundation of justice, so far from weakening yourself with the people, you will strengthen yourself immensely by it; but I know that it is not the opinion of many here, and I suppose we must accommodate ourselves to the will of majorities, and if we cannot do all we would, do all we can. I propose for myself to contend for all I can get in the right direction, and finally to go with those who will give us anything that is beneficial." Globe 2769.

[59] "I should be much better satisfied if the right of suffrage had been given at once to the more intelligent of ["the colored people of the South"] and such as had served in our Army. . . . Believing that this amendment probably goes as far in favor of suffrage to the negro as is practicable to accomplish now, and hoping it may in the end accomplish all I desire in this respect, I shall vote for its adoption, although I should be glad to go further." Globe 2963–2964.

[60] "It declares that all men are entitled to life, liberty, and property, and imposes upon the Government the duty of discharging these solemn obligations, but fails to adopt the easy and direct means for the attainment of the results proposed. It refuses the aid of four million people in maintaining the Government of the people. . . . [But] it furnishes a conclusive argument in favor of universal amnesty and impartial suffrage. . . . The utter impossibility of a final solution of the difficulties by the means proposed will cause the North to clamor for suffrage." Globe 2964.

[61] "I am sorry to have to put that clause [§ 2] into our Constitution, as I am sorry for the necessity which calls upon us to put the preceding clause into the Constitution. I wish there was no community and no State in the United States that was not prepared to say with my friend from Nevada [Mr. Stewart] that all men may be represented in the Congress of the United States and shall be represented and shall choose their own representatives. That is the better doctrine; that is the true doctrine. I would much prefer, myself, to unite with the people of the United States in saying that hereafter no man shall be excluded from the right to vote, than to unite with them in saying that hereafter some men may be excluded from the right of representation." Globe Appendix 219.

[62] Henderson, who had offered a direct enfranchising provision as an alternative to the Committee's first effort in the field of representation, see Globe Appendix 115, stated that he now recognized that "the country is not yet prepared" to share political power with Negroes, and he supported the Committee plan. Globe 3035.

[63] [A]lthough we do not obtain suffrage now, it is not far off, because the grasping desire of the South for office, that old desire to rule and reign over this Government and control its destinies, will at a very early day hasten the enfranchisement of the loyal blacks." Globe 3038.

[64] "There is no reason why the white citizens of South Carolina should vote the political power of a class of people whom they say are entirely unfit to vote for themselves. If there is any portion of the people of this country who are unfit to vote for themselves, their neighbors ought not to vote for them." Globe 2986.

There was no indication that Sherman considered South Carolina's disqualification on racial grounds any more improper than Massachusetts' limitations of the franchise to men, which he mentioned in the next breath.

[65] "If you think the negro ought to have the right of voting; if you are in favor of it, and intend it shall be given, why do you not in plain words confer it upon them? It is much fairer than to seek it by indirection, and the people will directly understand you when you propose such a change in the Constitution." Globe 2939.

[66] "What is to be the operation of this amendment? Just this: your whip is held over Pennsylvania and you say to her that she must either allow her negroes to vote or have one member of Congress less." Globe 2987.

[67] "[The second section's] true meaning was intended to be difficult to be reached, but when understood it is a measure which shrinks from the responsibility of openly forcing negro suffrage upon the late slave States, but attempts by a great penalty to coerce them to accept it." Globe Appendix 240.

[68] "It says that each of the southern States, and, of course, each other State in the Union, has a right to regulate for itself the franchise, and that consequently, as far as the Government of the United States is concerned, if the black man is not permitted the right to the franchise, it will be a wrong (if a wrong) which the Government of the United States will be impotent to redress." Globe 3027. Johnson was the only Democratic Senator on the Joint Committee.

[69] "With [the rebel States'] enlarged basis of representation, and exclusion of the loyal men of color from the ballot-box, I see no hope of safety unless in the prescription of proper enabling acts, which shall do justice to the freedmen and enjoin enfranchisement as a condition-precedent." Globe 3148.

[70] Kelley: see Globe 2469, quoted at n. 32, *supra.*

Farnsworth: see Globe 2540, quoted at n. 36, *supra.*

Eliot: see Globe 2511, at n. 34, *supra.*

Higby: see Globe 3978 (debate over readmission of Tennessee despite all-white electorate).

Bingham: see Globe 2542, quoted at p. ——, *supra;* see also Globe 3979 (debate over readmission of Tennessee).

Stevens: see Globe 2459–2460, quoted, at pp. ——, *supra;* Globe 3148, quoted at no. 69, *supra.*

Raymond: see Globe 2502, quoted at n. 39, *supra.*

Ashley: see Globe 2882.

Sumner: see n. 71, *infra.*

Fessenden: see H.R. Rep. No. 30, 39th Cong., 1st Sess. XIII–XIV (1866), quoted pp. ——, *infra.*

Yates: see Globe 3038, quoted at n. 63, *supra.*

Stewart: see Globe 2965, quoted at n. 60, *supra.*

Wade: see Globe 2769, quoted at n. 58, *supra.*

The exception is Senator Wilson of Massachusetts, who did not address himself to this issue. However, he participated in the debates, see Globe 2770, 2986–2987, and was therefore in a position to express disagreement with the interpretation uniformly offered in the Senate.

Secondary reliance is placed on Shellabarger, Cook, Boutwell, Julian, and Lawrence of Ohio. These Representatives, with the exception of Boutwell, see n. 33, *supra,* did not participate significantly in the debates over the Fourteenth Amendment. The substance of their earlier remarks is that Congress had some power, usually by way of the Guaranty Clause, see no. 6, *supra,* to oversee state voter qualifications. Shellabarger also relied on Article I, § 4, see n. 46, *supra;* p. ——, *post;* Julian relied on the Thirteenth Amendment; and Boutwell looked to the Declaration of Independence. The relevance of these views to the scope of § 1 of the Fourteenth Amendment is not apparent.

[71] Stevens: see Globe 2459–2460, quoted at pp. —, *supra;* Globe 3148, quoted at n. 69, *supra;* James 163 (campaign speech in fall of 1866).

Boutwell: see Globe 2508, quoted at n. 33, *supra;* Globe 3976 (debate over readmission of Tennessee).

Sumner did not actually participate in the debates on H.R. No. 127. However, after the caucus of Republican Senators had agreed on the form of the Amendment, Sumner gave notice that he intended to move to amend the bill accompanying the proposed Amendment. This bill, S. 292, provided that any Confederate State might be readmitted to representation in Congress once the proposed Amendment had become part of the Constitution and the particular State should have ratified it and modified its constitution and laws in conformity therewith. The bill is reprinted in H.R. Rep. No. 30, 39th Cong., 1st Sess. V–VI, and in Kendrick 117–119. Sumner's amendment would have provided that a State might be readmitted when it should have ratified the Fourteenth Amendment and modified its constitution and laws in conformity therewith "and shall have *further* provided that there shall be no denial of the elective franchise to citizens of the United States because of race or color, and that all persons shall be equal before the law." Globe 2869 (emphasis added).

Sumner also referred to Negro suffrage as unfinished business in speeches that fall. James 173, 178.

[72] For citations to the state materials, see Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 Stan. L. Rev. 5, 84–132 (1949).

[73] Fear that the Amendment would reach voting was expressed in Brevier Legis. Rep. [Indiana] 45–46, 80, 88–89 (1867); Tenn. H. R. J 38 (Extra Sess. 1866); Fla. S. J. 102 (1866); N. C. S. J. 96–97 (1866–1867); S. C. H. R. J. 34 (1866); and Tex. S. J. 422–423 (1866). The last four States rejected the proposed Amendment. Opponents of the Amendment stated or assumed that it would not reach voting qualifications in Ark. H. R. J. 288–289 (1866); Fla. S. J. 8–9 (1866); Report of the Joint Committee on Federal Relations, Maryland H. R. Doc. MM at 15 (Mar. 18, 1867); Mass. H.R. Doc. No. 149, at 7–9, 16–17 (1867); and Wis. S. J. 102–103 (1867). Fla. House J. 76–78 (1866); Ind.

House J. 102–103)1867); and N. H. S. J. 71–72 (1866) are equivocal.

[74] "Are not all persons born or naturalized in the United States and subject to its jurisdiction, rightfully citizens of the United States and of each State, and justly entitled to all the political and civil rights citizenship confers? and should any State possess the power to divest them of these great rights except for treason or other infamous crime?" Ill. H. R. J. 40 (1867).

[75] Ind. House J. 47–48 (1867); Kans. S. J. 45 (1867); Maine S. J 23 (1867); Mass. H. R. Doc. No. 149, at 25–26 (1867); Nev. S. J. App. 9 (1867); Vt. S. J. 28 (1866); W. Va. S. J. 19 (1867); Wis. Assembly J. 33 (1867).

[76] H. R. Rep. No. 30, 39th Cong., 1st Sess. XIII–XIV (1866).

[77] I have found references to only two such speeches, one by Senator Hendricks and the other by one George M. Morgan, a candidate for Congress in Ohio. Cincinnati Commercial, Aug. 9, 1866, at 1, col. 4, quoted in Fairman, *supra* n. —, at 72; Cincinnati Commercial, Aug. 23, 1866, at 3, col. 2, quoted in Fairman, *supra*, at 75.

[78] See Gillette, *supra* n. 3, at 25–27.

[79] *Reynolds v. Sims*, 377 U. S. 533, 589 (1964) (dissenting opinion).

[80] Art. IV, § 4. See n. 6, *supra*, for the text.

[81] The contention that Congress has power to override state judgments as to qualifications for voting in federal elections is discussed below. Pp. —, *infra*.

[82] Amend. XV: "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

Amend. XIX: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

"Congress shall have power to enforce this article by appropriate legislation."

Amend. XXIV: "Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

"Sec. 2. The Congress shall have power to enforce this article by appropriate legislation."

[83] See, *e.g.*, *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 670 (1966): "Our conclusion, like that in *Reynolds v. Sims*, [377 U.S. 533 (1964),] is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires."

[84] Most of the cases in which this Court has used the Equal Protection Clause to strike down state voter qualifications have been decided since 1965. Eight such cases have been decided by opinion. *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Louisiana* v. *United States*, 380 U.S. 145 (1965); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Kramer* v. *Union Free School Dist. No. 15*, 395 U.S. 621 (1969); *Civriano* v. *City of Houma*, 395 U.S. 701 (1969); *Evans* v. *Cornman*, 398 U.S. 419 (1970); *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970). Other cases have been summarily disposed of. In none of these cases did the Court advert to the argument based on the historical understanding.

Before 1965, although this Court had occasionally entertained on the merits challenges to state voter qualifications under the Equal Protection Clause, only two cases had sustained the challenges. *Nixon* v. *Herndon*, 273 U.S. 536 (1927), held that a Texas statute limiting participation in the Democratic Party primary to whites violated the Fourteenth Amendment. *Nixon* v. *Condon*, 286 U.S. 73 (1932), held that Texas did not avoid the reach of the *Herndon* decision by transferring to the party's Executive Committee the power to set qualifications for participation in the primary. In neither of the *Nixon* cases was the history of the Fourteenth Amendment suggested to the Court. Both cases were argued on the assumption that racial prohibition on voting in state general elections would violate the Fourteenth as well as the Fifteenth Amendment. This potential line of decision proved abortive when *United States* v. *Classic*, 313 U.S. 299 (1941), laid the groundwork for holding that participation in party primaries was included within the "right . . . to vote" protected by the Fifteenth Amendment. See *Reynolds* v. *Sims*, 377 U.S. 533, 614 n. 72 (1964) (dissenting opinion). The *Nixon* opinions were not relied on by the Court in the subsequent white-primary cases, *Smith* v. *Allwright*, 321 U.S. 649 (1944), and *Terry* v. *Adams*, 345 U.S. 461 (1953), and they were not even referred to in the recent cases on voter qualifications cited above.

[85] In this particular instance the other two branches of the Government have in fact expressed conflicting views as to the validity of Title III of the Act, the voting age provision. See H.R. Doc. No. 91–326, 91st Cong., 2d Sess. (1970).

[86] In fact, however, I do not understand how the doctrine of deference to rational constitutional interpretation by Congress, espoused by the majority in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), is consistent with this statement of Chief Justice Marshall or with our reaffirmation of it in *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958):

"[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the country as a permanent and indispensable feature of our constitutional system."

[87] Contrast *Metropolitan Cas. Inc. Co.* v. *Brownell*, 294 U.S. 580 (1935), relied on by my colleagues. In that case the crucial factual issue, on which the record was silent, was whether casualty insurance companies not incorporated in Indiana "generally keep their funds and maintain their business offices, and their agencies for the settlement of claims, outside the state." 294 U.S., at 585.

[88] It might well be asked why this standard is not equally applicable to the congressional expansion of the franchise before us. Lowering of voter qualifications dilutes the voting power of those who could meet the higher standard, and it has been held that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964) (footnote omitted). Interference with state control over qualifications for voting in presidential elections in order to encourage interstate migration appears particularly vulnerable to analysis in terms of compelling federal interests.

[89] Although Mr. JUSTICE BLACK rests his decision in part on the assumption that the selection of presidential electors is a "federal" election, the Court held in *In re Green*, 134 U.S. 377, 379 (1890), and repeated in *Ray* v. *Blair*, 343 U.S. 214, 224–225 (1952), that presidential electors act by authority of the States and are not federal officials.

[90] At the time these suits were filed only two of the 50 States, Georgia and Kentucky, allowed 18-year-olds to vote, and only two other States, Hawaii and Alaska, set the voting age below 21. In subsequent referenda, voters in 10 States declined to lower the voting age; five States lowered the voting age to 19 or 20; and Alaska lowered the age from 19 to 18. See The Washington Post, Nov. 5, 1970, at A13, col. 5.

[91] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

[92] At the time the Constitution was adopted, additional restrictions based on payment of taxes and ownership of property, as well as creed and sex, were imposed, making the proposition even clearer.

[93] See Article II: "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

[94] The legislative history of the Voting Rights Act Amendments contains sufficient evidence to this effect, if any be needed.

[95] Cf. the Voting Rights Act of 1965, 79 Stat. 438, which suspended literacy tests only in areas falling within a coverage formula and allowed reinstatement of the tests upon judicial determination that during the preceding five years no tests had been used with discriminatory purpose or effect. 42 U.S.C. (Supp. V) 1973b (a) (1970), amended by Pub. L. No. 91–285 § 3, 84 Stat. 314.

[96] I assume that reasonableness is the applicable standard, notwithstanding the fact that the instant legislation is challenged on the ground that it improperly dilutes the votes of literate Arizona citizens. But see *Kramer* v. *Union Free School Dist. No. 15*, 395 U.S. 621 (1969); n. 88 *supra*.

[Supreme Court of the United States, Nos. 43, 44, 46, 37 Oreg.—October Term, 1970]

On Bills of Complaint

State of Oregon, Plaintiff, 43 *v.* John N. Mitchell, Attorney General of the United States.

State of Texas, Plaintiff, 44 *v.* John N.. Mitchell, Attorney General of the United States.

United States, Plaintiff, 46 *v.* State of Arizona.

United States, Plaintiff, 47 *v.* State of Idaho.

December 21, 1970.

Mr. Justice Brennan, Mr. Justice White, and Mr. Justice Marshall dissent from the judgment insofar as it declares § 302 unconstitutional as applied to state and local elections, and concur in the judgment in all other respects, for the following reasons.

These cases draw into question the power and judgment of Congress in enacting Titles II and III of the Voting Rights Act Amendments of 1970, 84 Stat. 314. The State of Arizona challenges the power of Congress to impose a nationwide ban, until August 6, 1975, on the use of literacy and certain other tests to limit the franchise in any election. The State of Idaho takes issue with the asserted congressional power to find that the imposition of a durational residence requirement to deny the right to vote in elections for President and Vice President imposes a burden upon the right of free interstate migration that is not necessary to further a compelling state interest.[1] Finally, the States of Oregon, Texas, Arizona, and Idaho would have us strike down as unreasonable and beyond congressional power the findings, embodied in § 301(a) of the Amendments, that denying the vote to otherwise qualified persons 18 to 21 years of age, while granting it to those 21 years of age and older, violates the Equal Protection Clause and is, in any event, not reasonably related to any compelling state interest.[2] In Nos. 43 and 44, Oregon and Texas have invoked our original jurisdiction under Article III, § 2, of the Constitution to restrain the Attorney General of the United States, a citizen of New York, from enforcing the 18-year-old voting provisions of the Amendments, *South Carolina* v. *Katzenbach*, 383

Footnotes at end of article.

U.S. 301, 307 (1966). In Nos. 46 and 47, the United States seeks orders enjoining Arizona from enforcing age and literacy limitations on the franchise,[3] and enjoining Idaho from enforcing age, residence, and absentee voting limitations,[4] insofar as those limitations are inconsistent with the 1970 Amendments. Original jurisdiction, again, is founded upon Article III, § 2 of the Constitution. See *United States* v. *California*, 332 U.S. 19, 22 (1947). Since, in our view, congressional power to enact the challenged Amendments is found in the enforcement clauses of the Fourteenth and Fifteenth Amendments, and since we may easily perceive a rational basis for the congressional judgments underlying each of them, we would deny relief in Nos. 43 and 44, and issue the requested orders in Nos. 46 and 47.

I

The Voting Rights Act of 1965, 79 Stat. 438, 42 U.S.C. § 1973 *et seq.* (1964 ed., Supp. V), proscribed the use of any "test or device,"[5] including literacy tests, in States or their political subdivisions which fell within a coverage formula set forth in § 4(b) of the 1965 Act. 42 U.S.C. §§ 1973b (a), (b) (1964 ed., Supp. V). Although we had previously concluded that literacy tests, fairly administered, violate neither the Fourteenth nor the Fifteenth Amendments, *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45 (1959), we nevertheless upheld their selective proscription by Congress. *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966). Canvassing the "voluminous" legislative history of the 1965 Act, we found ample basis for a legislative conclusion that such a proscription was necessary to combat the "insidious and pervasive evil" of racial discrimination with regard to voting. *Id.*, at 308–315. Accordingly, we held the proscription to be well within the power of Congress granted by § 2 of the Fifteenth Amendment. *Id.*, at 327–334. Three years later, in *Gaston County* v. *United States*, 395 U. S. 285 (1969), we sustained application of the ban on literacy tests to a county where there was no evidence that the test itself was discriminatory or that—at least since 1962[6]—it had been administered in a discriminatory manner. Notwithstanding this fact, we noted that the record did contain substantial evidence that in years past, "Gaston County [had] systematically deprived its black citizens of the educational opportunities it granted to its white citizens." *Id.*, at 297. Since this "in turn deprived them of an equal opportunity to pass the literacy test," *id.*, at 291, even impartial administration of an impartial test would inevitably result in just the discrimination that Congress and the Fifteenth Amendment had sought to proscribe. *Id.*, at 296–297; see *South Carolina* v. *Kazenbach*, 383 U. S., at 308, 333–334.

No challenge is made in the present case either to the 1965 Act or to the five-year extension of its ban on "tests or devices" embodied in Title I of the 1970 Amendments. Arizona does, however, challenge §201 of the Amendments, which extends (until August 6, 1975) the 1965 Act's selective ban on the use of "tests or devices" to all States and political subdivisions in which it is not already in force by virtue of the 1965 Act. In substance, Arizona argues that it is and has been providing education of equal quality for all its citizens; that its literacy test is both fair and fairly administered; and that there is no evidence in the legislative record upon which Congress could have relied to reach a contrary conclusion. It urges that to the extent that any citizens of Arizona have been denied the right to vote because of illiteracy resulting from discriminatory governmental practices, the unlawful discrimination has been by governments other than the State of Arizona or its political subdivisions. Arizona, it suggests, should not have its laws overridden to cure discrimination on the part of governmental bodies elsewhere in the country.

We need not question Arizona's assertions as to the nondiscriminatory character, past and present, of its educational system. Congressional power to remedy the evils resulting from state-sponsored racial discrimination does not end when the subject of that discrimination removes himself from the jurisdiction in which the injury occurred. "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U.S. 511, 523 (1935), see *Edwards* v. *California*, 314 U.S. 160, 173–176 (1941). In upholding the suspension of literacy tests as applied to Gaston County under the 1965 Act, we could see "no legal significance" in the possibility that adult residents of the county might have received their education "in other counties or States also maintaining segregated and unequal school systems." *Gaston County* v. *United States*, 395 U.S., at 293 n. 9.[8]

The legislative history of the 1970 Amendments contains substantial information upon which Congress could have based a finding that the use of literacy tests in Arizona and in other States where their use was not proscribed by the 1965 Act has the effect of denying the vote to racial minorities whose illiteracy is the consequence of a previous, governmentally sponsored denial of equal educational opportunity. The Attorney General of Arizona told the Senate Subcommittee on Constitutional Rights that many older Indians in the State were "never privileged to attend a formal school."[9] Extensive testimony before both Houses indicated that racial minorities have long received inferior educational opportunities throughout the United States.[10] And interstate migration of such persons, particularly of Negroes from the Southern States, has long been a matter of common knowledge.[11]

Moreover, Congress was given testimony explicitly relating the denial of educational opportunity to inability to pass literacy tests in States not covered by the formula contained in the 1965 Act. The United States Commission on Civil Rights reported a survey of the Northern and Western States which concluded that literacy tests have a negative impact upon voter registration "which falls most heavily on blacks and persons of Spanish surname."[12] With regard specifically to Arizona, the Chairman of the Navajo Tribal Council testified that a greater percentage of Navajos are registered in New Mexico, which has no literacy test, than in Arizona.[13]

In short, there is no question but that Congress could legitimately have concluded that the use of literacy tests anywhere within the United States has the inevitable effect of denying the vote to members of racial minorities whose inability to pass such tests is the direct consequence of previous governmental discrimination in education. Almost five years ago, we found in § 2 of the Fifteenth Amendment an ample grant of legislative power for Congress to decree a selective proscription of such tests in certain portions of the country. *South Carolina* v. *Katzenbach*, 383 U.S., at 327–334. We have since held that power ample to cover the proscription of fair literacy tests, fairly administered, which nevertheless operate to disenfranchise racial minorities because of previous governmental discrimination against them in education. *Gaston County* v. *United States*, 395 U.S., at 287, 289–293. Five years of experience with the 1965 Act persuaded Congress that a nationwide ban on literacy and other potentially discriminatory tests was necessary to prevent racial discrimination in voting throughout the country. That conclusion is amply supported in the legislative record and § 201 of the 1970 Amendments is accordingly well within the scope of congressional power.

II

Section 202 of the 1970 Amendments abolishes all durational state residence requirements restricting the right to vote in presidential elections. In their place, Congress has undertaken to prescribe a uniform nationwide system of registration and absentee voting designed to allow all otherwise qualified persons to vote in such elections regardless of the length of time they have lived in a particular jurisdiction. The States are required to keep open their registration rolls for presidential elections until 30 days preceding the election. § 202(d). Persons who have changed their residence within 30 days of the election are, if otherwise qualified, entitled to vote either in person or by absentee ballot in the State of their previous residence, § 202 (e), and the States are compelled to permit the casting of absentee ballots by all properly qualified persons who have made application not less than seven days prior to the election, and returned the ballot to the appropriate officials not later than the closing of polls on election day. §§ 202 (b), (d). Provision must also be made by the States to allow absentee registration. § 202 (f).[14]

Idaho challenges the power of Congress to enact such legislation insofar as it conflicts with Idaho's statutory and constitutional provisions regarding durational residence requirements for voting; regarding absentee voting; and regarding absentee registration.[15] The State's argument in brief is that the Constitution has left to the States the power to set qualifications for voters in both state and federal elections, subject only to certain explicit limitations such as, for example, those imposed by the Fourteenth, Fifteenth, Nineteenth, and Twenty-fourth Amendments. Admitting that unreasonable residence requirements may not withstand judicial scrutiny, *Carrington* v. *Rash*, 380 U. S. 89 (1965), Idaho urges that its 60-day residence requirement is necessary for protection against fraud, and for administrative purposes. In consequence, § 202 of the 1970 Amendments is said to be of no weight against these compelling state interests.

Whether or not the Constitution vests Congress with particular power to set qualifications for voting in strictly federal elections,[16] we believe there is an adequate constitutional basis for § 202 in § 5 of the Fourteenth Amendment. For more than a century, this Court has recognized the constitutional right of all citizens to unhindered interstate travel and settlement. *Passenger Cases*, 7 How. 283, 492 (1849) (Taney, C. J.); *Crandall* v. *Nevada*, 6 Wall. 35, 43–44 (1868); *Paul* v. *Virginia*, 8 Wall. 168, 180)(1869); *Edwards* v. *California* 314 U.S. 160 (1941); *United States* v. *Guest*, 383 U.S. 745, 757 758 (1966); *Shapiro* v. *Thompson*, 394 U.S. 618, 629–631, 634 (1969). From whatever constitutional provision this right may be said to flow,[17] both its existence and its fundamental importance to our Federal Union have long been established beyond question.

By definition, the imposition of a duration residence requirement operates to penalize those persons, and only those persons, who have exercised their constitutional right of interstate migration. Of course, governmental action that has the incidental effect of burdening the exercise of a constitutional right is not *ipso facto* unconstitutional. But in such a case, governmental action may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest. *Shapiro* v. *Thompson*, 394 U.S., at 634; *United States* v. *Jackson*, 390 U.S. 570, 582–583 (1968);

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Sherbert v. *Verner*, 374 U.S. 389, 406–409 (1963). And once it be determined that a burden has been placed upon a constitutional right, the onus of demonstrating that no less intrusive means will adequately protect compelling state interests is upon the party seeking to justify the burden. See *Speiser* v. *Randall*, 357 U.S. 513, 525–526 (1958).

In the present case, Congress has explicitly found both that the imposition of durational residence requirements abridges the right of free interstate migration and that such requirements are not reasonably related to any compelling state interests. 1970 Amendments, §§ 202(a) (2), (6). The latter finding was made with full cognizance of the possibility of fraud and administrative difficulty. Senator Goldwater, testifying at Senate hearings on the bill, pointed out that 40 States presently allow registration until 30 days or less prior to the election.[18] Idaho itself allows registration by those desiring to vote as new residents in presidential elections within 10 days of balloting. Idaho Code Ann. § 34–409 (1963). And Idaho's assertion of the administrative unfeasibility of maintaining separate registration lists for fully qualified voters and for those qualified only for presidential balloting is difficult to credit in light of the fact that the Idaho Constitution, Art. 6 § 2, itself sets separate qualifications for voting in general and in presidential elections. The provisions for absentee voting, as Senator Goldwater pointed out on the floor of the Senate, were likewise "drawn from the proven practice of the States themselves." [19] Thirty-seven States allow application within a week of the election, and 40 permit the marked ballot to be returned on election day.[20] Finally, Idaho has provided no evidence beyond the mere assertion that the scheme of § 202 is inadequate to protect against fraud. But the only kind of fraud asserted is the possibility of dual voting, and Idaho has provided no explanation why the 30-day period between the closing of new registrations and the date of election would not provide, in light of modern communications, adequate time to insure against such frauds. Accordingly, we find ample justification for the congressional conclusion that § 202 is a reasonable means for eliminating an unnecessary burden on the right of interstate migration. *United States* v. *Guest*, *supra*.

III

The final question presented by these cases is the propriety of Title III of the 1970 Amendments, which forbids the States from disenfranchising persons over the age of 18 because of their age. Congress was of the view that this prohibition, embodied in § 302 of the Amendments, was necessary among other reasons in order to enforce the Equal Protection Clause of the Fourteenth Amendment. See §§ 301(a)(2), (b). The States involved in the present litigation question the assertion of congressional power to make that judgment.

It is important at the outset to recognize what is not involved in these cases. We are not faced with an assertion of congressional power to regulate any and all aspects of state and federal elections, or even to make general rules for the determination of voter qualifications. Nor are we faced with the assertion that Congress is possessed of plenary power to set minimum ages for voting throughout the States. Every State in the Union has conceded by statute that citizens over the age of 21 are capable of intelligent and responsible exercise of the right to vote. The single, narrow question presented by these cases is whether Congress was empowered to conclude, as it did, that citizens 18 to 21 years of age are not substantially less able.

We believe there is serious question whether a statute granting the franchise to citizens over 21 while denying it to those between the ages of 18 and 21 could, in any event, withstand present scrutiny under the Equal Protection Clause. Regardless of the answer to this question, however, it is clear to us that proper regard for the special function of Congress in making determinations of legislative fact compels this Court to respect these determinations unless they are contradicted by evidence far stronger than anything that has been adduced in these cases. We would uphold § 302 as a valid exercise of congressional power under § 5 of the Fourteenth Amendment.

All parties to these cases are agreed that the States are given power, under the Constitution, to determine the qualifications for voting in state elections. Art. I, § 2; *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45, 50 (1959), *Carrington* v. *Rash*, 380 U. S. 89, 91 (1965). But it is now settled that exercise of this power, like all other exercises of state power, is subject to the Equal Protection Clause of the Fourteenth Amendment. *Carrington* v. *Rash*, *supra*; *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966); *Kramer* v. *Union Free School District*, 395 U. S. 621 (1969); *Evans* v. *Cornman*, 398 U. S. 419 (1970). Although it once was thought that equal protection required only that a given legislative classification, once made, be evenly applied, see *Hayes* v. *Missouri*, 120 U. S. 68, 71–72 (1887), for more than 70 years we have consistently held that the classifications embodied in a state statute must also meet the requirements of equal protection. *Gulf, Colorado & Santa Fe R. Co.* v. *Ellis*, 165 U. S. 150, 155 (1897); see *McLaughlin* v. *Florida*, 379 U. S. 184, 189–191 (1964), and cases cited.

The right to vote has long been recognized as a "fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886); see *Reynolds* v. *Sims*, 377 U. S. 533, 562 (1964); *Williams* v. *Rhodes*, 393 U. S. 23, 31 (1968). "Any unjustified discrimination in determining who may participate in political affairs undermines the legitimacy of representative government." *Kramer* v. *Union Free School District*, 395 U. S., at 626. Consequently, when exclusions from the franchise are challenged as violating the Equal Protection Clause, judicial scrutiny is not confined to the question whether the exclusion may reasonably be thought to further a permissible interest of the State. Cf. *Metropolitan Co.* v. *Brownell*, 294 U. S. 580, 583–584 (1935). "A more exacting standard obtains." *Kramer* v. *Union Free School District*, 395 U. S., at 633. In such cases, "the Court must determine whether the exclusions are necessary to promote a compelling state interest." *Id.*, at 627; *Cipriano* v. *City of Houma*, 395 U. S. 701, 704 (1969).

In the present cases, the States justify exclusion of 18- to 21-year-olds from the voting rolls solely on the basis of the States' interests in promoting intelligent and responsible exercise of the franchise.[21] There is no reason to question the legitimacy and importance of these interests. But standards of intelligence and responsibility, however defined, may permissibly be applied only to the means whereby a prospective voter determines how to exercise his choice, and not to the actual choice itself. Were it otherwise, such standards could all too easily serve as mere epithets designed to cloak the exclusion of a class of voters simply because of the way they might vote. Cf. *Evans* v. *Cornman*, 398 U.S., at 422–423. Such a state purpose is, of course, constitutionally impermissible. *Carrington* v. *Rash*, 380 U.S., at 94. We must, therefore, examine with particular care the asserted connection between age limitations and the admittedly laudable state purpose to further intelligent and responsible voting.

We do not lack a starting point for this inquiry. Although the question has never been squarely presented, we have in the past indicated that age is a factor not necessarily irrelevant to qualifications for voting. *Lassiter* v. *Northampton County Board of Elections*, 360 U.S., at 51; *Kramer* v. *Union Free School District*, 395 U.S., at 625–626. But recognition that age is not in all circumstances a "capricious or irrelevant factor," *Harper* v. *Virginia State Board of Elections*, 383 U.S., at 668, does not insure the validity of the particular limitation involved here. *Evans* v. *Cornman*, 398 U.S., at 425–426. Every State in the Union has concluded for itself that citizens over the age of 21 are capable of responsible and intelligent voting. Accepting this judgment, there remains the question whether citizens 18 to 21 years of age may fairly be said to be less able.

State practice itself in other areas casts doubt upon any such proposition. Each of the 50 States has provided special mechanisms for dealing with persons who are deemed insufficiently mature and intelligent to understand, and to conform their behavior to, the criminal laws of the State.[23] Forty-nine of the States have concluded that, in this regard, 18-year-olds are invariably to be dealt with according to precisely the same standards prescribed for their elders.[23] This at the very least is evidence of a nearly unanimous legislative judgment on the part of the States themselves that differences in maturity and intelligence between 18-year-olds and persons over the age of 21 are too trivial to warrant specialized treatment for *any* of the former class in the critically important matter of criminal responsibility.[24] Similarly, every State permits 18-years-olds to marry, and 39 States do not require parental consent for such persons of one or both sexes.[25] State statutory practice in other areas follows along these lines, albeit not as consistently.[26]

Uniform state practice in the field of education points the same way. No State in the Union requires attendance at school beyond the age of 18. Of course, many 18-year-olds continue their education to 21 and beyond. But no 18-year-old who does not do so will be disenfranchised hereby once he reaches the age of 21.[27] Whether or not a State could in any circumstances condition exercise of the franchise upon educational achievements beyond the level reached by 18-year-olds today, there is no question but that no State purports to do so. Accordingly, that 18-year-olds as a class may be less educated than some of their elders [28] cannot justify restriction of the franchise, for the States themselves have determined that this incremental education is irrelevant to voting qualifications. And finally, we have been cited to no material whatsoever that would support the proposition that intelligence, as opposed to educational attainment, increases between the ages of 18 and 21.

One final point remains. No State seeking to uphold its denial of the franchise to 18-year-olds has adduced anything beyond the mere difference in age. We have already indicated that the relevance of this difference is contradicted by nearly uniform state practice in other areas. But perhaps more important is the uniform experience of those States—Georgia since 1943, and Kentucky since 1955—that have permitted 18-year-olds to vote.[29] We have not been directed to a word of testimony or other evidence that would indicate either that 18-year-olds in those States have voted any less intelligently and responsibly than their elders, or that there is any reasonable grounds for belief that 18-year-olds in other States are less able than those in Georgia and Kentucky. On the other hand, every person who spoke to the issue in either the House or Senate was agreed that 18-year-olds in both States were at least as interested, able, and responsible in voting as were their elders.[30]

In short, we are faced with an admitted restriction upon the franchise, supported only by bare assertions and long practice, in the face of strong indications that the States themselves do not credit the factual propositions upon which the restriction is asserted

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to rest. But there is no reason for us to decide whether, in a proper case, we would be compelled to hold this restriction a violation of the Equal Protection Clause. For as our decisions have long made clear, the question we face today is not one of judicial power under the Equal Protection Clause. The question is the scope of congressional power under § 5 of the Fourteenth Amendment. To that question we now turn.

B

As we have often indicated, questions of constitutional power frequently turn in the last analysis on questions of fact. This is particularly the case when an assertion of state power is challenged under the Equal Protection Clause of the Fourteenth Amendment. For although equal protection requires that all persons "under like circumstances and conditions" be treated alike, *Hayes* v. *Missouri*, 120 U.S. 68, 71–72 (1887), such a formulation merely raises, but does not answer the question whether a legislative classification has resulted in different treatment of persons who are in fact "under like circumstances and conditions."

Legislatures, as well as courts, are bound by the provisions of the Fourteenth Amendment. *Cooper* v. *Aaron*, 358 U.S. 1, 18–20 (1958). When a state legislative classification is subjected to judicial challenge as violating the Equal Protection Clause, it comes before the courts cloaked by the presumption that the legislature has, as it should, acted within constitutional limitations. *Kotch* v. *Board of River Pilot Commissioners*, 330 U.S. 552, 556, 563–564 (1947); see *Kramer* v. *Union Free School District*, 395 U.S. 621, 627–628 (1969). Accordingly, "[a] statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." *Metropolitan Co.* v. *Brownell*, 294 U.S. 580, 584 (1935).[31]

But, as we have consistently held, this limitation on judicial review of state legislative classifications is a limitation stemming not from the Fourteenth Amendment itself, but from the nature of judicial review. It is simply a "salutary principle of judicial decision," *Metropolitan Co.* v. *Brownell, supra*, one of the "self-imposed restraints intended to protect [the Court] and the state against irresponsible exercises of [the Court's] unappealable power." *Fay* v. *New York*, 332 U.S. 261, 282 (1947). The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication. Courts, therefore, will overturn a legislative determination of a factual question only if the legislature's finding is so clearly wrong that it may be characterized as "arbitrary," "irrational," or "unreasonable." *Communist Party* v. *Control Board*, 367 U.S. 1, 94–95 (1961); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152–154 (1938); *Metropolitan Co.* v. *Brownell*, 294 U.S., at 583–584.

Limitations stemming from the nature of the judicial process, however, have no application to Congress. Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Should Congress, pursuant to that power, undertake an investigation in order to determine whether the factual basis necessary to support a state legislative discrimination actually exists, it need not stop once it determines that some reasonable men could believe the factual basis exists. Section 5 empowers Congress to make its own determination on the matter. See *Katzenbach* v. *Morgan*, 384 U.S. 641, 654–656 (1966). It should hardly be necessary to add that if the asserted factual basis necessary to support a given state discrimination does not exist, § 5 of the Fourteenth Amendment vests Congress with power to remove the discrimination by appropriate means. *Id.*, at 656–657; *Fay* v. *New York*, 332 U.S. at 282–283; *Ex parte Virginia*, 100 U.S. 339, 347–348 (1880).

The scope of our review in such matters has been established by a long line of consistent decision. "It is not for the courts to re-examine the validity of these legislative findings and reject them." *Communist Party* v. *Control Board*, 367 U.S., at 94. "[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary . . . our investigation is at an end." *Katzenbach* v. *McClung*, 379 U.S. 294, 303–304 (1964); *Katzenbach* v. *Morgan*, 384 U.S., at 653; see *Galvan* v. *Press*, 347 U.S. 522, 529 (1954).[32]

This scheme is consistent with our prior decisions in related areas. The core of dispute over the constitutionality of Title III of the 1970 Amendments is a conflict between state and federal legislative determinations of the factual issues upon which depend decision of a federal constitutional question—the legitimacy, under the Equal Protection Clause, of state discrimination against persons between the ages of 18 and 21. Our cases have repeatedly emphasized that, when state and federal claims come into conflict, the primacy of federal power requires that the federal finding of fact control. See *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415–417 (1964); *Townsend* v. *Sain*, 372 U.S. 293, 311–312 (1963); *Tarble's Case*, 13 Wall. 397, 406–407 (1872); cf. *United States* v. *Darby*, 312 U.S. 100, 119 (1941). The Supremacy Clause requires an identical result when the conflict is one of legislative, not judicial, findings.

Finally, it is no answer to say that Title III intrudes upon a domain reserved to the States—the power to set qualifications for voting. It is no longer open to question that the Fourteenth Amendment applies to this, as to all other, exercises of state power. *Kramer* v. *Union Free School District, supra*, and cases cited. As we said in answer to a similar contention almost a century ago, "the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete." *Ex parte Virginia*, 100 U.S. 339, 347–348 (1880).

C

Our Brother HARLAN has set out in some detail the historical evidence which persuades him that the framers of the Fourteenth Amendment did not believe that the Equal Protection Clause, either through judicial action or through congressional enforcement under § 5 of the Amendment, could operate to enfranchise Negroes in States which denied them the vote. *Ante*, at ———. From this he has concluded "that the Fourteenth Amendment was never intended to restrict the right of the States to allocate their political power as they see fit and therefore that it does not authorize Congress to set voter qualifications in either state or federal elections." *Ante*, at ——. This conclusion, if accepted, would seem to require as a corollary that although States may not, under the Fifteenth Amendment, discriminate against Negro *voters*, they are free so far as the Federal Constitution is concerned to discriminate against Negro or unpopular *candidates* in any way they desire. Not surprisingly, our Brother HARLAN's thesis is explicitly disavowed by all the States party to the present litigation,[33] and has been presented to us only in the briefs *amici curiae* of Virginia and, perhaps, Mississippi.[34] We could not accept this thesis even if it were supported by historical evidence far stronger than anything adduced here today. But in our view, our Brother HARLAN's historical analysis is flawed by his ascription of 20th-century meanings to the words of 19th-century legislators. In consequence, his analysis imposes an artificial simplicity upon a complex era, and presents as universal beliefs that were held by merely one of several groups competing for political power. We can accept neither his judicial conclusion nor his historical premise that the original understanding of the Fourteenth Amendment left it within the power of the States to deny the vote to Negro citizens.

It is clear that the language of the Fourteenth Amendment, which forbids a State to "deny any person within its jurisdiction the equal protection of the laws," applies on its face to all assertions of state power, however made. More than 40 years ago, this Court faced for the first time the question whether a State could deny Negroes the right to vote in primary elections. Writing for a unanimous Court, Mr. Justice Holmes observed tartly that "[w]e find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth." *Nixon* v. *Herndon*, 273 U.S. 536, 540–541 (1927); see *Nixon* v. *Condon*, 286 U.S. 73, 83, 87–89 (1932) (Cardozo, J.); *Anderson* v. *Martin*, 375 U.S. 399 (1964); cf. *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20, 35–36 (1907). If the broad language of the Equal Protection Clause were to be read as nevertheless allowing the States to deny equal political rights to any citizens they see fit to exclude from the political process, far more is involved than merely shifting the doctrinal basis of such cases as *Nixon* v. *Herndon* from the Fourteenth to the Fifteenth Amendment. For the Fifteenth Amendment applies only to voting, not to the holding of public office; in consequence, our Brother HARLAN's view would appear to leave the States free to encourage citizens to cast their votes solely on the basis of race (a practice found to violate the Fourteenth Amendment in *Anderson* v. *Martin, supra*), or even presumably to deny Negro citizens the right to run for office at all.[35] We cannot believe that the Equal Protection Clause would permit such discrimination.

In any event, it seems to us, the historical record will not bear the weight our Brother HARLAN has placed upon it. His examination of the historical background of the Fourteenth Amendment leads him to conclude that it is "clear beyond any reasonable doubt that no part of the legislation now under review can be upheld as a legitimate exercise of congressional power under that Amendment," *ante*, at —, because the Amendment was not intended "to restrict the right of the States to allocate their political power as they see fit." *Ante*, at —. Our own reading of the historical background, on the other hand, results in a somewhat imperfect picture of an era of constitutional confusion, confusion which the Amendment did little to resolve. As the leading constitutional historian of the Civil War has observed, constitutional law was characterized during the war years by "a noticeable lack of legal precision" and by "[a] tendency toward irregularity . . . in legislation, and in legal interpretation." J. Randall, Constitutional Problems under Lincoln 515–516 (rev. ed. 1951). Nor would the postwar period of Reconstruction be substantially different.

For several decades prior to the Civil War, constitutional interpretation had been a pressing concern of the Nation's leading statesmen and lawyers, whose attention focused especially on the nature of the relationship of the States to the Federal Government. The onset of the Civil War served only to raise new problems upon which the original Constitution offered, at best, only peripheral guidance. The greatest problem of all, perhaps, was the character of the civil conflict—whether it was to be treated as a rebellion, as a war with a belligerent state,

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or as some combination of the two. Another issue concerned the scope of federal power to emancipate the slaves; even President Lincoln doubted whether his Emancipation Proclamation would be operative when the war had ended and his special war powers had expired. This particular issue was resolved by the Thirteenth Amendment, but that Amendment only raised new issues, for some men doubted the validity of even a constitutional change upon such a fundamental matter as slavery, particularly while the status of the eleven Confederate States remained unsettled. See *id.*, 12–24, 59–73, 342–404.

The end of the war did not bring an end to difficult constitutional questions. Two perplexing problems remained. The one was the relation of the former Confederate States to the Federal Government; the other was the relation of the former slaves to the white citizens of the Nation. Both were intimately related to the politics of the day, an understanding of which is essential since the Fourteenth Amendment was presented to the Nation as the Republican Party's solution for these problems. See J. James, The Framing of the Fourteenth Amendment 169–173 (1956) (hereafter James).

The starting point must be the key fact that, as of 1860, the Republicans were very much the Nation's minority party. Lincoln had won the presidency that year with less than 40% of the popular vote, while the Republicans had secured control of Congress only when southern Democrats had left Washington following the secession of their States. The compromise in the original Constitution, by which only three-fifths of the slaves in southern States were computed in determining representation in the House of Representatives and votes in the Electoral College also was a matter of critical importance in 1865; with slavery abolished, southern and hence Democratic power in the House and in the Electoral College would increase. The Republicans had calculated this matter rather carefully; as the *Chicago Tribune* had demonstrated as early as the summer of 1865, the increased southern delegation would need only 29 readily obtainable Democratic votes from the North in order to dominate the House. See James 21–23. But Republicans had no intention of permitting such a Democratic resurgence to occur; in their view, as one Republican Senator observed, Republicans would be "faithless" to their "trust," if they allowed "men who have thus proven themselves faithless" to recover "the very political power which they have hitherto used for the destruction of this Government." Cong. Globe, 39th Cong., 1st Sess. 2918 (remarks of Senator Willey) (1866) (hereafter Globe). Whether one looks upon such sentiments as a grasp for partisan political power or as an idealistic determination that the gains of the Civil War not be surrendered, the central fact remains that Republicans found it essential to bar or at least to delay the return of all-white southern delegations to Congress.

Temporarily, they proposed to do so by refusing to seat Congressmen from the seceded States. They usually justified their refusal on constitutional grounds, presenting a variety of theories as to how the former Confederate States had forfeited their rights by secession. See generally E. McKitrick, Andrew Johnson and Reconstruction 93–119 (1960). But exclusion of southern representatives could not be a permanent solution; a better solution seemed to be to elect at least some Republican representatives from the South by enfranchising the only class which could be expected to vote Republican in large numbers—the freedmen.

According to the census of 1860, Negroes had constituted some 4,200,000 out of the total population of 12,200,000 in the 15 slave States. In two States—Mississippi and South Carolina—Negroes were a substantial majority of the population, while in several other States the population was at least 40% Negro. Thus, Negro suffrage would probably result in a number of Negro and presumably Republican representatives from the South. The difficulty was with the means of bringing Negro suffrage about. Some, including Chief Justice Chase, looked back toward the Emancipation Proclamation and contended that Negro suffrage could be achieved, at least in the South, by means of a presidential proclamation. See James 5–7; 1 W. Fleming, Documentary History of Reconstruction 142 (1906). Others thought congressional legislation the appropriate vehicle for granting the suffrage, see James 13, 52–53; Van Alstyne, The Fourteenth Amendment, The "Right" to Vote, and the Understanding of the Thirty-Ninth Congress, 1965 Supreme Court Review 33, 49–51, while still others argued for a constitutional amendment. See Cincinnati Commercial, Sept. 19, 1865, in James 11–12 (reporting speech of Congressman Bingham). Disagreement over means, however, was but a minor obstacle in the path of equal suffrage; racial prejudice in the North was a far more significant one. Only five New England States and New York permitted any Negroes to vote as of 1866, see Van Alstyne, *supra*, at 70, and extension of the suffrage was rejected by voters in 17 of 19 popular referenda held on the subject between 1865 and 1868. Moreover, Republicans suffered some severe election setbacks in 1867 on account of their support of Negro suffrage. See W. Gillette, The Right to Vote 25–27, 32–38 (1969).

Meeting in the winter and spring of 1866 and facing election in the fall of the same year, the Republicans in Congress thus faced a difficult dilemma: they desperately needed Negro suffrage in order to prevent total Democratic resurgence in the South, yet they feared that by pressing for suffrage they might create a reaction among northern white voters that would lead to massive Democratic electoral gains in the North. Their task was thus to frame a policy which would prevent total southern Democratic resurgence and which simultaneously would serve as a platform upon which Republicans could go before their northern constituents in the fall. What ultimately emerged as the policy and political platform of the Republican Party was the Fourteenth Amendment.[36]

As finally adopted, relevant portions of the Fourteenth Amendment read as follows:

"Sec. 1. . . . No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Sec. 2. Representatives shall be apportioned among the several States according to their respective numbers. But when the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

"Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The key provision on the suffrage question was, of course, § 2, which was to have the effect of reducing the representation of any State which did not permit Negroes to vote. Section 1 also began, however, as a provision aimed at securing equality of "political rights and privileges"—a fact hardly surprising in view of Republican concern with the question. In their earliest versions in the Joint Congressional Committee on Reconstruction, which framed the Fourteenth Amendment, §§ 1 and 2 read as follows:

"[Section 1.] Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty and property." B. Kendrick (ed.), The Journal of the Joint Committee of Fifteen on Reconstruction 51 (1914) (hereafter Kendrick).

"[Section 2.] Representatives and direct taxes shall be apportioned among the several States, which may be included within this Union, according to their respective numbers of persons, deducting therefrom all of any race or color, whose members or any of them are denied any of the civil or political rights or privileges." *Id.*, at 43.

The question which must now be pursued is whether § 1 of the Amendment ever lost its original connection with the suffrage question.

It became evident at an early date that the Joint Committee did not wish to make congressional power over the suffrage more explicit than did the language of the original version of the future § 1. Six days after that section had been proposed by a subcommittee, the full committee refused to adopt an amendment offered by Senator Howard to make the section refer expressly to "political and *elective* rights and privileges," *id.*, at 55 (emphasis added), and refused as well to substitute for the language:

"Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States in each State the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty and property."

The following language offered by Congressman Boutwell:

"Congress shall have power to abolish any distinction in the exercise of the elective franchise in any State, which by law, regulation or usage may exist therein." *Id.*, at 54–55.

The committee did agree, however, to return the proposal to a special subcommittee, chaired by Congressman John A. Bingham, which at the next meeting of the full committee reported back the following language:

"Congress shall have power to make all laws which shall be necessary and proper to secure all persons in every state full protection in the enjoyment of life, liberty, and property; and to all citizens of the United States in any State the same immunities and also equal political rights and privileges." *Id.*, at 56.

This language, it seems clear, did not change the meaning of the section as originally proposed, but the next change in language, proposed several days later by Bingham, arguably did. Bingham moved the following substitute:

"The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment)." *Id.*, at 61.

This substitute was accepted by a committee vote of 7–6.

No record of the committee's debates have been preserved, and thus one can only guess whether Bingham's substitute was intended to change the meaning of the original proposal. The breakdown of the committee vote suggests, however, that no change in meaning was intended. The substitute was supported by men of all political views, ranging from Senator Howard and Congressman Boutwell, radicals who had earlier sought to make the section's coverage of suffrage explicit, to Congressman Rogers, a Democrat.

Footnotes at end of article.

Similarly, among the six voting against the substitute were a radical, Stevens; a moderate, Fessenden; and a Democrat, Grider. *Id.*, at 61. Thus, while one might continue to argue that Bingham meant his substitute to do away with congressional power to legislate for the preservation of equal rights to suffrage, one can, with at least equal plausibility, contend that Bingham sought to do no more than substitute for his earlier specific language more general language which had already appeared elsewhere in the Constitution.[37]

Bingham's proposed amendment to the Constitution, as modified, was next submitted to the House of Representatives, where Republicans joined Democrats in attacking it. Republican Representative Hale of New York, for example, thought the amendment "in effect a provision under which all State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, may be overridden," Globe 1963, while Representative Davis, also a New York Republican, thought it would give Congress power to establish "perfect political equality between the colored and the white race of the South." *Id.*, at 1085. Meanwhile, the *New York Times*, edited by conservative Republican Congressman Henry J. Raymond, wondered if the proposed Amendment was "simply a preliminary to the enactment of negro suffrage." Feb. 19, 1866. Even the Amendment's supporters recognized that it would confer extensive power upon the Federal Government; Representative Kelley, a Pennsylvania radical, who supported the Amendment, concluded, after a lengthy discussion of the right of suffrage, that "the proposed amendment . . . [was] intended to secure it." Globe 1063. Its proponents, however, could not secure the necessary support for the Amendment in the House and thus were compelled to postpone the matter until a later date, when they failed to bring it again to the floor. Kendrick 215.

Meanwhile, the Joint Committee had returned to work and had begun to consider the direct antecedent of the Fourteenth Amendment, a proposal by Robert Dale Owen which Representative Stevens had placed before the committee. Its relevant provisions were as follows:

"Section 1. No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.

"Sec. 2. From and after the fourth day of July, in the year one thousand eight hundred and seventy-six, no discrimination shall be made by any state, nor by the United States, as to the enjoyment by classes of persons of the right of suffrage, because of race, color, or previous condition of servitude.

"Sec. 3. Until the fourth day of July, one thousand eight hundred and seventy-six, no class of persons, as to the right of any of whom to suffrage discrimination shall be made by any state, because of race, color, or previous condition of servitude, shall be included in the basis of representation.

"Sec. 5. Congress shall have power to enforce by appropriate legislation, the provisions of this article." *Id.*, at 83–84.

Congressman Bingham had not, however, given up on his own favorite proposal, and he immediately moved to add the following new section to the Amendment:

"Sec. 5. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*, at 87.

Footnotes at end of article.

His motion was adopted on a 10-to-2 party line vote, but its adoption was only the beginning of some intricate and inexplicable maneuvering. Four days later, Senator Williams, an Oregon radical, moved to delete Bingham's section, and his motion was carried by a vote of 7 to 5, with radicals Howard and Boutwell and Democrats Grider and Johnson voting for the motion and Stevens, Bingham, and Democrat Rogers voting against. Bingham then moved to submit his proposal as a separate amendment, but he was supported only by the three Democrats on the committee. The committee then agreed to submit the Owen proposal to Congress with only slight modifications, but postponed the submission until after one further meeting to be held three days hence. *Id.*, at 98–100.

At this meeting, the proposed Fourteenth Amendment was substantially rewritten. First, the committee, by a vote of 12 to 2, deleted § 2, which had barred States from making racial discriminations in the enjoyment of the right of suffrage after 1876, and conformed § 3, so as to insure that it would remain in effect after 1876. After making numerous other changes, the committee then concluded its deliberations by replacing Owen's ban in § 1 on discrimination "as to civil rights" with Bingham's now familiar language. Here the vote was 10 to 3, with the majority again containing a full spectrum of political views. *Id.*, at 100–106. The reasons for the rewriting are not entirely clear. The only known explanation was given by Owen in 1875, when he wrote an article recalling a contemporary conversation with Stevens; Stevens had reportedly explained that the committee's original decisions had "got noised abroad," and that, is a result, several state delegations had held caucuses which decided that the explicit references to "negro suffrage, in any shape, ought to be excluded from the platform. . . ." Quoted in *id.*, 302. Thus, the provision for sufferage after 1876 had to be eliminated, but Stevens did not explain why Bingham's version of § 1 was then substituted for Owen's version. Perhaps the changes in § 1 of the Amendment were thought by the committee to be mere linguistic improvements which did not substantially modify Owen's meaning and which did not extend its coverage to political as distinguished from civil rights. But, at the very lease the committee must have realized that is was substituting for Owen's rather specific language Bingham's far more elastic language—language which, as one scholar has noted, is far more "capable of growth" and "receptive to 'latitudinarian' construction." Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 61, 63 (1955). It is, moreover, at least equally plausible that the committee meant to substitute for Owen's narrow provision dealing solely with civil rights a broader provision which had originated and been understood only two months earlier as protecting equality in the right of suffrage as well as equality of civil rights.

The purpose of § 1 in relation to the suffrage emerges out of the debates on the floor of Congress with an equal obscurity. In the search for meaning one must begin of course, with the statements of leading men in Congress such as Bingham and Howard. Bingham, for one, stated without apparent equivocation that "[t]he amendment does not give . . . the power to Congress of regulating suffrage in the several States." Globe 2542. Similarly, Senator Howard, after noting that the Amendment would accord to Negroes the same protection in the fundamental rights as the law gave to whites, explicitly cautioned that "the first section of the proposed amendment does not give to either of these classes the right of voting." Globe 2766.[38] But such statements are not as unambiguous as they initially appear to be. Thus, Howard with that "lack of legal precision" typical of the period, stated that the right of suffrage was not one of the privileges and immunities protected by the Constiution. Globe 2766, immediately after he had read into the record an excerpt from the case of *Corfield* v. *Coryell*, 6 F. Cas. 546 (No. 3230) (CCED Pa. 1823), an excerpt which listed the elective franchise as among the privileges and immunities. Globe 2765. Bingham was equally ambiguous, for he too thought that the elective franchise was a constitutionally protected privilege and immunity. Globe 2542. Indeed, at one point in the debates, Bingham made what is for us a completely incongruous statement:

"To be sure we all agree, and the great body of the people of this country agree, and the committee thus far in reporting measures of reconstruction agree, that the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States." Globe 2542.

Bingham, that is, seemed to say in one breath first, that the franchise was a constitutionally protected privilege in support of which Congress under § 5 of the Fourteenth Amendment could legislate and then, in the next breath, that the franchise was exclusively under the control of the States.

Bingham's words make little sense to modern ears; yet, when they were uttered, his words must have made some sense, at least to Bingham and probably to many of his listeners. The search for their meaning probably ought to begin with Art. IV, § 2—the Privileges and Immunities Clause of the original Constitution. In the minds of members of the Thirty-Ninth Congress, the leading case to construe that clause was *Corfield* v. *Coryell, supra*, which had listed among a citizen's privileges and immunities "the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised." 6 F. Cas., at 552. Here again is the same apparent ambiguity that later occurred in Bingham's thought—that the franchise is a federally protected right, but only to the extent it is regulated and established by state law. The ambiguity was, however, only apparent and not real, for the Privileges and Immunities Clause of the original Constitution served a peculiar function; it did not create absolute rights but only placed a noncitizen of a State "upon a perfect equality with its own citizens "as to those fundamental rights already created by state law. *Scott* v. *Sandford*, 19 How. 393, 407 (1857). Accord, *id.*, at 584 (dissenting opinion). The Privileges and Immunities Clause, that is, was a sort of equal protection clause adopted for the benefit of out-of-state citizens;[39] it required, for example, that if a State gave its own citizens a right to enter into a lawful business, it could not arbitrarily deny the same right to out-of-state citizens solely because they came from out of State. See *Ward* v. *Maryland*, 12 Wall. 418, 430 (1871). Thus, what Bingham may have meant in indicating that the franchise was included within the scope of the Privileges and Immunities Clause of the Fourteenth Amendment while remaining entirely under the control of the States was that, although the States would be free in general to confer the franchise upon whomever they chose, Congress would have power to bar them from racial or other arbitrary discriminations in making their choices. In short, the Privileges and Immunities Clause might for Bingham have meant the same as the Equal Protection Clause, as he later explained in a campaign speech, § 1 was nothing but "a simple, strong, plain declaration that equal laws and equal and exact justice shall hereafter be secured within every State of this Union . . . ." Cincinnati Commercial, Aug. 27, 1866, quoted in James 160–161.

One way, then, to reconcile the seemingly incongruous statements of Bingham is to read him as understanding that, while the Fourteenth Amendment did not take from the States nor grant to Congress plenary power to regulate the suffrage, it did give Congress power to invalidate discriminatory state legislation. In his words, the Amendment took "from no State any right which hitherto pertained to the several States of the Union, but it impose[d] a limitation upon the States to correct their abuses of power." *Ibid.* Others had a similar understanding. Thus, for Charles Sumner, "Equality of *political rights* . . . [did] not involve necessarily what is sometimes called the 'regulation' of the suffrage by the National Government, although this would be best, . . . [but] simply require[d] the abolition of any discrimination among citizens, inconsistent with Equal Rights." C. Sumner, Are We a Nation 34 (1867). Or, as Stevens explained in presenting the Amendment to the House, it merely allowed "Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all." Globe 2459 (emphasis in original). Clearest of all, perhaps was Thomas M. Cooley in the 1871 edition of his *Constitutional Limitations*, where he wrote:

"This amendment of the Constitution does not concentrate power in the general government for any purpose of police government within the States; its object is to preclude legislation by any State which shall 'abridge the privileges or immunities of citizens of the United States,' or 'deprive any person of life, liberty, or property without due process of law,' or 'deny to any person within its jurisdiction the equal protection of the laws'; and Congress is empowered to pass all laws necessary to render such unconstitutional State legislation ineffectual." T. Cooley, Constitutional Limitations 294 (3d ed. 1871).

There is also other evidence that at least some members of Congress and of the electorate believe that § 1 of the Fourteenth Amendment gave Congress power to invalidate discriminatory state regulations of the suffrage. Thus, Congressman Rogers, a Democrat who had served on the Joint Committee, agreed with Bingham and Howard that "[t]he right to vote is a privilege," Globe 2538, while Congressman Boyer, another Democrat, feared that § 1 was "intended to secure ultimately, and to some extent indirectly, the political equality of the negro race." Globe 2467. A third Democrat, Congressman Niblack, thought the section sufficiently ambiguous to warn that he might, although in fact he never did, offer the following addition to it:

"*Provided*, That nothing contained in this article shall be so construed as to authorize Congress to regulate or control the elective franchise within any State, or to abridge or restrict the power of any State to regulate or control the same within its own jurisdiction, except as in the third section hereof prescribed." Globe 2465.

Republicans also alluded on occasion to their belief that the Amendment might give Congress power to prevent discrimination in regard to the suffrage. Radical Senator Stewart, for example, while unhappy that the Amendment did not directly confer suffrage, nevertheless could "support this plan" because it did "not preclude Congress from adopting other means by a two-thirds vote,[40] when experience shall have demonstrated, as it certainly will, the necessity for a change of policy. In fact it furnishes a conclusive argument in favor of universal amnesty and impartial suffrage." Globe 2964. Likewise, the more conservative Congressman Raymond of New York supported the first section because he thought Congress should have the power to legislate on behalf of equal rights "in courts and elsewhere," Globe 2513, after the radical Congressman Wilson of Iowa had informed him that, "if we give a reasonable construction to the term 'elsewhere,' we may include in that the jury box and the ballot-box." Globe 2505. Congressman Stevens, meanwhile, was informing Congress that "if this amendment prevails you must legislate to carry out many parts of it," Globe 2544, and was looking forward to "further legislation; in enabling acts or other provisions," Globe 3148, while even the Joint Committee submitted the Amendment to the Nation "in the hope that its imperfections may be cured, and its deficiencies supplied, by legislative wisdom . . ." Report of the Joint Committee on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess., at xxi (1866). Nor did the radical Republican press disagree; as the Lansing State Republican argued in its editorial columns, even "[i]f impartial suffrage, the real vital question of the whole struggle . . . [was] postponed through the mulish obstinacy of Andrew Johnson," "freedom" would "triumph by the adoption of the proposed amendment" and would be followed by "equal rights to all. . . ." July 11, 1866. And, of course, once the Amendment had been ratified, Republicans in Congress began to make speeches in favor of legislation which would implement the Amendment by guaranteeing equal suffrage. See *e.g.*, Globe 40th Cong., 2d Sess., 1966–1967 (1868) (remarks of Congressman Stevens); 3d Sess., 1008 (1869) (remarks of Senator Sumner).

Of course, few of the above statements taken from congressional debates, campaign speeches, and the press were made with such clarity and precision that we can know with certainty that its framers intended the Fourteenth Amendment to function as we think they did. But clarity and precision are not to be expected in an age when men are confronting new problems for which old concepts do not provide ready solutions. As we have seen, the 1860's were such an age, and the men who formulated the Fourteenth Amendment were facing an especially perplexing problem—that of creating federal mechanisms to insure the fairness of state action without in the process destroying the reserved powers of the States. It would, indeed, be surprising if the men who first faced this difficult problem were possessed of such foresight that they could debate its solution with complete clarity and consistency and with uniformity of views. There is, in short, every reason to believe that different men reconciled in different and often imprecise ways the Fourteenth Amendment's broad guarantee of equal rights and the statements of some of its framers that it did not give Congress power to legislate upon the suffrage.

Some men, for example, might have reconciled the broad guarantee and the narrow language by concluding that Negroes were not yet ready to exercise the franchise and hence that a State would not act arbitrarily in denying it to them while granting it to whites. As the debates make clear, proponents of the Amendment did not understand the Equal Protection Clause to forbid States to distinguish among persons where justification for distinctions appeared. See, *e.g.*, Globe 1064 (Congressmen Stevens). At the time the Fourteenth Amendment was adopted, the overwhelming majority of Negro residents of the United States were former slaves living in the Southern States. Most of them were illiterate and uneducated. Except for those few who had been kidnaped by slave traders after reaching adulthood, they had no prior experience with the responsibilities of citizenship. Given this state of affairs, it would hardly be surprising if some of the framers of the Fourteenth Amendment felt that the Equal Protection Clause would not forbid the States from classifying Negroes as a group to be denied the right to vote. Equal protection has never been thought to require identical treatment of all persons in all respects. *Metropolitan Co.* v. *Brownell*, 294 U.S. 580, 583–584 (1935), and cases cited. It requires only that the State provide adequate justification for treating one group differently from another. *Levy* v. *Louisiana*, 391 U.S. 68 (1968). Entirely aside from any concepts of racial inequality that may have been held by some members of Congress at that time, it seems clear that many members had serious reservations about the ability of the majority of Negroes, after centuries of slavery, to cast an intelligent and responsible vote. See, for example, the debates over a proposal to enfranchise Negroes in the District of Columbia in Cong. Globe, 38th Cong., 1st Sess., 2140–2141, 2239–2243, 2248 (1864). Of course, we would not now hold that even the situation existing in 1866 would justify wholesale exclusion of Negroes from the franchise: our decisions have consistently held that a particular group may not be denied the right to vote merely because many, or even most of its members could properly be excluded. *Carrington* v. *Rash*, 380 U.S. 89, 93–96 (1965); *Kramer* v. *Union Free School District*, 395 U.S. 621, 632–633 (1969); *Evans* v. *Cornman*, 398 U.S. 419, 424–426 (1970); cf. Tussman and TenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 351–352 (1949). But mere administrative convenience was once thought to be sufficient justification for an overly broad legislative classification, so long at least as the resultant discrimination could be justified as to a majority of the class affected. *Terrace* v. *Thompson*, 263 U.S. 197, 218–222 (1923); cf. *Kotch* v. *Board of River Pilot Commissioners*, 330 U.S. 552 (1947). Rejection of this approach has been the result of a judicial development that could hardly have been known to the framers of the Amendment. Cf. *Baxstrom* v. *Herold*, 383 U.S. 107, 114–114 (1966).

Of course, many Americans in the 1860's rejected imputations that Negroes were unready for the franchise and thus concluded that distinctions between the races in regard to the franchise would constitute denials of equal protection. Congressman Stevens, for one, had no doubt that to allow a State to deny the franchise to Negroes would be to allow it "to discriminate among the same class." Globe 2460. And Negroes, of course, indignantly rejected such imputations, arguing that "[w]e are not all so illiterate as you suppose" and that "even if we were, our instincts have proved better than that 'educated class,' whose 'little learning' prompted them to attempt the impossible thing of destroying this great Republic. . . ." Letter to the Editor, N. Y. Times, Nov. 4, 1866.

Among the men who refused to regard Negroes as ill prepared for the exercise of the franchise, there may have been some who did not understand the subtle distinctions of constitutional lawyers such as Bingham and who thus accepted at face value assurances that the Fourteenth Amendment gave Congress no power over the suffrage. As a result, at least three identifiable groups may have existed within the Republican majorities which enacted and ratified the Amendment—those who thought that Congress would have power to insure to Negroes the same right to suffrage which the States gave to whites, those who thought that Congress would not have such power since Negroes and whites constituted distinct and dissimilar classes for voting purposes, and those who thought Congress would possess no power at all over the suffrage. Perhaps all three such groups did not exist in 1866 in Congress and in the Nation at large, but surely the evidence is not clear "beyond any reasonable doubt" that the only existent group was the last one, consisting of men who, despite the broad language of § 1 and the hints by speakers of its applicability to the suffrage, simply assumed

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without developing any analytical framework in support of their assumption that the section would not be so applied.

The evidence, in sum, plausibly suggests that the men who framed the Fourteenth Amendment possessed differing views as to the limits of its applicability but that they papered over their differences because those differences were not always fully apparent and because they could not foresee with precision how their amendment would operate in the future. Moreover, political considerations militated against clarification of issues and in favor of compromise. Much of the North, as already noted, opposed Negro suffrage, and many Republicans in Congress had to seek reelection from constituencies where racial prejudice remained rampant. Republicans in the forthcoming elections thus found it convenient to speak differently before different constituencies; as the Republican state chairman of Ohio wrote, in northern counties of the State "some of our Speakers have openly advocated impartial suffrage, while in other places it was thought necessary, not only to repudiate it but to oppose it." B. R. Cowan to S. P. Chase, Oct. 12, 1866, quoted in James 168. Similarly, Senator Wilson of Massachusetts, when accused shortly after the 1866 elections of misrepresenting the issues of the campaign in Delaware by saying nothing of Negro suffrage, replied that since he had been "in a State where not much progress had been made, I acted somewhat on the scriptural principle of giving 'milk to babes.' " Globe, 39th Cong., 2d Sess., 42. Apparently Congressman Ashley of Ohio acted upon similar principles, for when he was asked after the House had initially approved the Amendment whether Congress had "power to confer the right of suffrage upon negroes in the States," he responded.

"Well, sir, I do not intend to put myself on record against the right of Congress to do that. I am not prepared now to argue the point with my colleague; but I will say to him that when the time comes for the American Congress to take action on the question, I will be ready to speak. I will not say now whether I would vote for or against such a proposition." Globe 2882.

Thus, precise legal analysis and clarity of thought were both intellectually difficult and politically unwise. What Republicans needed, in the words of Wendell Phillips, the former abolitionist leader, was "a party trick to tide over the elections and save time," after which they could "float back into Congress, able to pass an act that shall give the ballot to the negro and initiate an amendment to the Constitution which shall secure it to him." Speech of Wendell Phillips, July 4, 1866, quoted in A. Harris, A Review of the Political Conflict in American, 437 (1876). Similiarly, the *New York Times*, edited by Congressman Henry J. Raymond, a conservative Republican who ultimately would support the Amendment, observed that "all the excitement that had been raised about constitutional amendments . . . has been simply dust thrown in the eyes of the public to cover the approach to the grand fundamental, indispensable principle of universal negro suffrage . . . ." April 27, 1866, quoted in A. Harris, *supra*, at 433.

Not surprisingly, the product of such political needs was an Amendment which contemporaries saw was vague and imprecise. Democratic Senator Hendricks, for example, protested that he had "not heard any Senator accurately define, what are the rights and immunities of citizenship," Globe 3039, while Congressman Boyer, another Democrat, found the first section "objectionable also in its phraseology, being open to ambiguity and admitting of conflicting constructions." Globe 2467. Republicans too were aware of the Amendment's vagueness. Thus, when he presented the Amendment to the Senate, Senator Howard noted that "[i]t would be a curious question to solve what are the privileges and immunities of citizens" and proposed not to consider the question at length, since "[i]t would be a somewhat barren discussion." Instead, like the pre-Civil War Supreme Court,[41] he "very modestly declined to go into a definition of them, leaving questions arising under the clause to be discussed and adjudicated when they should happen practically to arise." Globe 2765.

Thus, the historical evidence does not point to a single, clear-cut conclusion that contemporaries viewed the first section of the Fourteenth Amendment as an explicit abandonment of the radical goal of equal suffrage for Negroes. Rather the evidence suggests an alternative hypothesis: that the Amendment was framed by men who possessed differing views on the great question of the suffrage and who, partly in order to formulate some program of government and partly out of political expediency, papered over their differences with the broad, elastic language of § 1 and left to future interpreters of their Amendment the task of resolving in accordance with future vision and future needs the issues which they left unresolved. Such an hypothesis strikes us as far more consistent with the turbulent character of the times than one resting upon a belief that the broad language of the Equal Protection Clause contained a hidden limitation upon its operation that would prevent it from applying to state action regulating rights that could be characterized as "political."[42]

Nor is such an hypothesis inconsistent with the subsequent enactment of the Fifteenth, Nineteenth, and Twenty-fourth Amendments. Those who submitted the Fifteenth Amendment to the States for ratification could well have desired that any prohibition against racial discrimination in voting stand upon a firmer foundation than mere legislative action capable of repeal[43] or the vagaries of judicial decision.[44] Or they could merely have concluded that, whatever might be the case with other rights, the right to vote was too important to allow disenfranchisement of any person for no better reason than that others of the same race might not be qualified. At least some of the supporters of the Nineteenth Amendment believed that sex discrimination in voting was itself proscribed by the Fourteenth Amendment's guarantee of equal protection. 57 Cong. Rec. 3053 (February 10, 1919). And finally, the Twenty-fourth Amendment was not proposed to the States until this Court had held, in *Breedlove* v. *Suttles*, 302 U. S. 277 (1937),[45] that state laws requiring payment of a poll tax as a prerequisite to voting did not *ipso facto* violate the Equal Protection Clause. Accordingly, we see no reason that the mere enactment of these amendments can be thought to imply that their proponents believed the Fourteenth Amendment did not apply to state allocations of political power. At a dubious best, these amendments may be read as implying that their proponents felt particular state allocations of power a proper exercise of power under the Equal Protection Clause.

Nor do we find persuasive our Brother HARLAN'S argument that § 2 of the Fourteenth Amendment was intended as an exclusive remedy for state restrictions on the franchise, and that therefore any such restrictions are permissible under § 1. As Congressman Bingham emphatically told the House, when the same argument was made by Congressman Bromwell:

"There has not been such a construction, in my opinion, of a law which imposes only a penalty, for centuries, if ever, in any country where the common law obtains. The construction insisted upon by the gentleman amounts to this, that a law which inflicts a penalty or works a forfeiture for doing an act, by implication authorizes the act to be done for doing which the penalty is inflicted. There cannot be such a construction of the proviso. It is a penalty. It says in terms that if any of the States of the United States shall disobey the Constitution; . . . that as a penalty such State shall lose political power in this House . . . .

"You place upon your statute-book a law punishing the crime of murder with death. You do not thereby, by implication, say that anybody may, of right, commit murder. You but pass a penal law. You do not prohibit murder in the Constitution; you guaranty life in the Constitution. You do not prohibit the abuse of power by the majority in the Constitution in express terms, but you guaranty the equal right of all free male citizens of full age to elect Representatives; and by the proviso you inflict a penalty upon a State which denies or abridges that right on account of race or color. In doing that we are not to be told that we confer a power to override the express guarantees of the Constitution. We propose the penalty in aid of the guarantee, not in avoidance of it." Globe 431–432; see Van Alstyne, *supra*, at 48–68.

It may be conceivable that § 2 was intended to be the sole remedy available when a State deprived its citizens of their right to vote, but it is at least equally plausible that congressional legislation pursuant to §§ 1 and 5 was thought by the farmers of the Amendment to be another potential remedy. Section 2, in such a scheme, is hardly superfluous: it was of critical importance in assuring that, should the Southern States deny the franchise to Negroes, the Congress called upon to remedy that discrimination would not be controlled by the beneficiaries of discrimination themselves. And it could, of course, have been expected to provide at least a limited remedy in the event that both Congress and the courts took no action under § 1. Neither logic nor historical evidence compellingly suggests that § 2 was intended to be more than a remedy supplementary, and in some conceivable circumstances indispensable, to other congressional and judicial remedies available under §§ 1 and 5. See generally, Van Alstyne, *supra*.

The historical record left by the framers of the Fourteenth Amendment, because it is a product of differing and conflicting political pressures and conceptions of federalism, is thus too vague and imprecise to provide us with sure guidance in deciding the pending cases. We must therefore conclude that its framers understood their Amendment to be a broadly worded injunction capable of being interpreted by future generations in accordance with the vision and needs of those generations. We would be remiss in our duty if, in an attempt to find certainty amidst uncertainty, we were to misread the historical record and cease to interpert the Amendment as this Court has always interpreted it.

D

There remains only the question whether Congress could rationally have concluded that denial of the franchise to citizens between the ages of 18 and 21 was unnecessary to promote any legitimate interests of the States in assuring intelligent and responsible voting. There is no need to set out the legislative history of Title III at any great length here.[46] Proposals to lower the voting age to 18 had been before Congress at several times since 1942.[47] The Senate Subcommittee on Constitutional Amendments conducted extensive hearings on the matter in 1968 and again in 1970,[48] and the question was discussed at some length on the floor of both the House and the Senate.

Congress was aware, of course, of the facts and state practices already discussed.[49] It was aware of the opinion of many historians that choice of the age of 21 as the age of maturity

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was an outgrowth of medieval requirements of time for military training and development of a physique adequate to bear heavy armor.[50] It knew that whereas only six percent of 18-year-olds in 1900 had completed high school, 81 percent have done so today.[51] Congress was aware that 18-year-olds today make up a not insubstantial proportion of the adult work force,[52] and it was entitled to draw upon its experience in supervising the federal establishment to determine the competence and responsibility with which 18-year-olds perform their assigned tasks. As Congress recognized, its judgment that 18-year-olds are capable of voting is consistent with its practice of entrusting them with the heavy responsibilities of military service. See § 301(a)(1) of the Amendments.[53] Finally, Congress was presented with evidence that the age of social and biological maturity in modern society has been consistently decreasing. Dr. Margaret Mead, an anthropologist, testified that in the past century, the "age of physical maturity has been dropping and has dropped over 3 years." [54] Many Senators and Representatives, including several involved in national campaigns, testified from personal experience that 18-year-olds of today appeared at least as mature and intelligent as 21-year-olds in the congressmen's youth.[55]

Finally, and perhaps most important, Congress had before it information on the experience of two States, Georgia and Kentucky, which have allowed 18-year-old voting since 1943 and 1955, respectively. Every elected representative from those States who spoke to the issue agreed that, as Senator Talmadge stated, "young people [in these States] have made the sophisticated decisions and have assumed the mature responsibilities of voting. Their performance has exceeded the greatest hopes and expectations."[56]

In sum, Congress had ample evidence upon which it could have based the conclusion that exclusion of citizens 18 to 21 years of age from the franchise is wholly unnecessary to promote any legitimate interest the States may have in assuring intelligent and responsible voting. See *Katzenbach* v. *Morgan*, 384 U.S., at 653–656. If discrimination is unnecessary to promote any legitimate state interest, it is plainly unconstitutional under the Equal Protection Clause, and Congress has ample power to forbid it under § 5 of the Fourteenth Amendment. We would uphold § 302 of the 1970 Amendments as a legitimate exercise of congressional power.

FOOTNOTES

[1] Section 202(a) of the Amendments embodies a congressional finding that

"the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections—

"(2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;

("6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections."

[2] Section 301(a) of the Amendments provides:

"The Congress finds and declares that the imposition and application of the requirements that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

"(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

"(2) has the effect of denying citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

"(3) does not bear a reasonable relationship to any compelling State interest."

[3] Arizona Constitution Art. 7, § 2, limits the franchise to those 21 years of age and older. Ariz. Rev. Stat. Ann. § 16–101 (Supp. 1970) requires voters to be able to read the Federal Constitution (in English), and to write their names.

[4] Idaho Constitution, Art. 6, § 2, requires all voters to be 21 years of age or older, and requires 60 days' residence within the State as a precondition to voting in presidential elections. Idaho Code Ann. § 34–408 (1963), further requires that 60-day residents have been citizens of another State prior to their removal to Idaho. Provisions for absentee balloting are contained in *id.*, §§ 34–1101 to 34–1125.

[5] Section 4(c) of the 1965 Act, U.S.C. § 1973b(c) (1964 ed., Supp. V), defines a "test or device" as "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

[6] *Gaston County* was a suit by the county under § 4(a) of the 1965 Act, 42 U.S.C. § 1973b(a) (1964 ed., Supp. V), to reinstate the county's literacy test. The county would have been entitled to do so upon demonstration that, for the preceding five years, no "test or device" had been there used for the purpose or with the effect of abridging the right to vote on account of race or color.

[8] We there reserved only the question of the application of the 1965 Act to suspend literacy tests "in the face of racially disparate educational or literacy achievements *for which a government bore no responsibility.*" *Id.*, n. 8 (emphasis supplied).

[9] Hearings on Amendments to the Voting Rights Act of 1965 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 91st Cong., 1st and 2d Sess. 675 (1970) (hereafter Senate Hearings). Schooling of Indians has for some time been the responsibility of the Federal Government. See *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685, 690–691 (1965).

[10] E.g., Senate Hearings at 185–187; Hearings on the Voting Rights Act Extension before Subcommittee No. 5 of the House Judiciary Committee, 91st Cong., 1st Sess. 55–57, 223–225 (1970) (hereafter House Hearings).

[11] For example, 1960 census data indicate that from 1955 to 1960, 4,388 blacks moved from Southern States to Arizona, 74,804 to California, and 74,821 to New York. 1 Bureau of the Census, 1960 Census of the Population, pts. 4, 6, 23, 34, and Table 100.

[12] Senate Hearings, *supra* n. 9, at 399; see *id.*, at 400–407.

[13] Senate Hearings, *supra* n. 9, at 678. Tribal Chairman Nakai viewed Arizona's literacy test as the primary cause of this disparity.

[14] The States are permitted, should they desire, to adopt practices less restrictive than those prescribed by the 1970 Amendments. § 202(g).

[15] See n. 4, *supra*.

[16] See the opinion of MR. JUSTICE DOUGLAS, *ante*, at ——.

[17] See *Shapiro* v. *Thompson*, 394 U.S., at 630 and n. 8; *United States* v. *Guest*, 383 U.S., at 757–758.

[18] Senate Hearings, *supra* n. 9, at 282.

[19] 116 Cong. Rec. 3539 (daily ed., Mar. 11, 1970).

[20] *Id.* Idaho Code Ann. §§ 34–1101, 34–1102, 34–1103 appear to allow application to be made at any time. *Id.*, § 34–1121 allows application up to five days before the election for persons in United States service. The ballot may be returned any time prior to noon on election day, *id.*, § 34–1105 (Supp. 1969). Finally, effective January 1, 1971, applications may be made up to 5:00 p.m. the day before the election. *Id.*, § 34–1002 (Supp. 1970). In such circumstances, the argument of administrative impossibility from the viewpoint of Idaho seems almost chimerical.

[21] Idaho, in addition, claims that its interest in setting qualifications for voters in its own election serves without more as a compelling state interest sufficient to justify the challenged exclusion. But there is no state interest in the mere exercise of power; the power must be exercised for some reason. The only reason asserted by Idaho for the exercise of its power is that already mentioned—promotion of intelligent and responsible voting.

[22] 116 Cong. Rec. 3518 (daily ed., Mar. 11, 1970) (Library of Congress, Legislative Reference Service survey).

[23] *Ibid.*

[24] Nor does the California statute, Cal. Welf. & Inst'ns Code § 602 (West 1966), necessarily evidence a contrary conclusion. California permits its juvenile court to waive jurisdiction of persons over the age of 16 to the regular criminal courts, and state practice appears to be that very few if any felony defendants over the age of 18 are ever tried as juveniles. California Continuing Education of the Bar, California Juvenile Court Practice 85–36 (1968). This may well indicate that the California statute reflects merely a legislative conclusion that the slight burden of waiver hearings is outweighed by the possibility, however slight, that a very few individuals between the ages of 18 and 21 might in fact be more appropriately treated as juveniles.

[25] 116 Cong. Rec. 3518 (daily ed., Mar. 11, 1970).

[26] For example, in California any women 18 years old may marry without parental consent, and any man of that age may marry with the consent of one parent. Cal. Civ. Code § 4101 (West 1970). Any married person who has attained the age of 18 is treated in precisely the same way as all persons over the age of 21 with regard to all provisions of the Civil Code, Probate Code, and Code of Civil Procedure, as well as for the purposes of making contracts or entering into any agreement regarding property or his estate. Cal. Civ. Code § 25 (West Supp. 1970). The State Labor Department treats males over the age of 18 as adults. Cal. Labor Code §§ 1172, 3077 (West 1955). Persons over the age of 18 may serve civil process in the State. Cal. Civ. Proc. Code § 410 (West Supp. 1970).

[27] Some States, of course, do attempt to condition exercise of the franchise upon the ability to pass a literacy test. Presumably some 18-year-old illiterates will be literate at 21. But in light of the fact that 81 percent of the disenfranchised class are high school graduates, it would seem that the number of 18-year-old illiterates who are literate three years later is vanishingly small. See Hearings on S.J. Res. 147 and Others before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 91st Cong., 2d Sess. 133 (1970) (Senator Goldwater). Of course, for reasons that apply as well to 18-year-olds as to others, we have today upheld a nationwide suspension of all literacy tests. *Ante*, at ——. But in any event, that some 18-year-olds may be illiterate is hardly sufficient reason for disenfranchising the entire class. See *Kramer* v. *Union Free School District*, 395 U.S., at 632–633.

[28] Eighteen-year-olds as a class are better educated than some of their elders. The median number of school years completed by 18- and 19-year-olds two years ago was 12.2; it was 8.8 for persons 65 to 74. Bureau of the Census, Educational Attainment, table 1 (Current Population Reports, Series P–20, No. 182) (1969).

[29] Hawaii and Alaska have, since their ad-

mission to the Union in 1959), allowed the vote to 19-year-olds (Alaska) and 20-year-olds (Hawaii).

[30] See, *e.g.*, 116 Cong. Rec. 3214–3215 (Senator Cook), 3477 (Senators Talmadge and Ervin) (daily ed., Mar. 9, 11, 1970); Senate Hearings, *supra* n. 9, at 343 (Governor Maddox).

[31] The state of facts necessary to justify a legislative discrimination will of course vary with the nature of the discrimination involved. When we have been faced with statutes involving nothing more than state regulation of business practices, we have often found mere administrative convenience sufficient to justify the discrimination. *E.g., Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 487, 488–489 (1955). But when a discrimination has the effect of denying or inhibiting the exercise of fundamental constitutional rights, we have required that it be not merely convenient, but necessary. *Kramer* v. *Union Free School District*, 395 U.S., at 627; *Carrington* v. *Rash*, 380 U.S. 89, 96 (1965); see *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968); *United States* v. *Jackson*, 390 U.S. 570, 582–583 (1968). And we have required as well that it be necessary to promote not merely a constitutionally permissible state interest, but a state interest of substantial importance. *Kramer* v. *Union Free School District, supra; Carrington* v. *Rash, supra; Shelton* v. *Tucker*, 364 U.S. 479, 487–490 (1960); see *United States* v. *O'Brien, supra.*

[32] As we emphasized in *Katzenbach* v. *Morgan, supra*, "§ 5 does not grant Congress power to . . . enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' " 384 U.S., at 651 n. 10. As indicated above, a decision of this Court striking down a state statute expresses, among other things, our conclusion that the legislative findings upon which the statute is based are so far wrong as to be unreasonable. Unless Congress were to unearth new evidence in its investigation, its identical findings on the identical issue would be no more reasonable than those of the state legislature.

[33] Brief for the State of Oregon, at 10–13; Brief for the State of Texas, at 10–12; Brief for the State of Arizona, at 19; Brief for the State of Idaho, at 22, 28–30.

[34] Brief *amicus curiae* for the Commonwealth of Virginia, at 13–22; see Brief *amicus curiae* for the State of Mississippi, at 7–11.

[35] Indeed, since the First Amendment is applicable to the States only through the Fourteenth, our Brother Harlan's view would appear to allow a State to exclude any unpopular group from the political process solely upon the basis of its political opinions.

[36] Republicans explicitly looked upon the Fourteenth Amendment as a political platform. See 2 F. Fessenden, Life and Public Services of William Pitt Fessenden 62 (1907); B. Kendrick (ed.), The Journal of the Joint Committee of Fifteen on Reconstruction 302 (1914). See also *post*, pp. ——— – ———.

[37] The language appears earlier in Art. IV, § 2.

[38] As the statements of Bingham and Howard in the text indicate, the framers of the Amendment were not always clear whether they understood it merely as a grant of power to Congress or whether they thought, in addition, that it would confer power upon the courts, which the courts would use to achieve equality of rights. Since § 5 is clear in its grant of power to Congress and we have consistently held that the Amendment grants power to the courts, this issue is of academic interest only.

[39] According to *Paul* v. *Virginia*, 8 Wall. 168, 180 (1869), the Privileges and Immunities Clause in Art. 4, § 2, secured to citizens "in other States the equal protection of their laws."

[40] Senator Stewart's statement regarding the two-thirds requirement appears to refer to § 3 of the Fourteenth Amendment, which requires such a majority for legislation granting amnesty to former Confederate leaders.

[41] This Court had taken such an approach in *Conner* v. *Elliott*, 18 How. 591 (1856).

[42] Ironically, the same distinction, between "political" and other rights was drawn by this Court in *Plessy* v. *Ferguson*, 163 U.S. 537, 545–546 (1896). But the Court there concluded, directly contrary to our Brother HARLAN'S position, that the Fourteenth Amendment applied to "political" rights and to those rights only.

[43] As Thaddeus Stevens had pointed out in urging passage of the Fourteenth Amendment despite the fact that, he felt, some of its guarantees could be enforced by mere legislative enactment, "a law is repealable by a majority." Globe 2549.

[44] Radical disenchantment with decisions of this Court had led, prior to the Fifteenth Amendment, to the Act of March 27, 1868, 15 Stat. 44, withdrawing our appellate jurisdiction over certain habeas corpus cases. See *Ex parte McCardle*, 7 Wall. 506, 508, 514–515 (1868).

[45] *Breedlove* has been overruled by *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 669 (1966).

[46] For a full collection of the relevant materials, see Note, Legislative History of Title III of the Voting Rights Act of 1970, 8 Harv. J. Legis. —— (1970).

[47] See 88 Cong. Rec. 8312, 8316 (1942).

[48] Hearings on S. J. Res. 8, 14, and 78 before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 90th Cong., 2d Sess. (1968); Hearings on S. J. Res. 147 and Others before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 91st Cong., 2d Sess. (1970) (hereafter 1970 Hearings).

[49] *Ante*, at ——.

[50] See 116 Cong. Rec. 3503 (daily ed., Mar. 11, 1970); James, The Age of Majority, 4 Am. J. Legal History 22 (1960); Report of the Committee on the Age of Majority Presented to the English Parliament, p. 21 (1967).

[51] 116 Cong. Rec. 3216 (daily ed., Mar. 9, 1970).

[52] 16 Department of Labor, Bureau of Labor Statistics, Employment and Earnings, table A–3 (June 1970).

[53] See also Senate Hearings, *supra* n. 9, at 323 (Senator Kennedy), 116 Cong. Rec. 2938–2939 (daily ed., March 4, 1970) (Senator Mansfield); 3214 (daily ed., March 9, 1970) (Senator Cook). See generally Note, *supra* n. 46, at ——– – ———.

[54] 1970 Hearings at 223. Dr. W. Walter Menninger, a psychiatrist, and Dr. S. I. Hayakawa, agreed. *Id.*, at 23, 36.

[55] *E. g.*, 116 Cong. Rec. 2939 (daily ed., Mar. 4, 1970) (Senator Mansfield); 3214–3215 (daily ed., Mar. 9, 1970) (Senator Cook); 3216–3219 (daily ed., Mar. 9, 1970) (Senator Goldwater); 3477 (daily ed., Mar. 11, 1970) (Senator Talmadge, joined by Senator Ervin); 3497–3498 (daily ed., Mar. 11, 1970) (Senator Tydings).

[56] 116 Cong. Rec. 3477 (daily ed., Mar. 11, 1970).

[Supreme Court of the United States, Nos. 43, 44, 46, 47 Orig.—October Term, 1970]

ON BILLS OF COMPLAINT

State of Oregon, Plaintiff, 43 *v.* John N. Mitchell, Attorney General of the United States.

State of Texas, Plaintiff, 44 *v.* John N. Mitchell, Attorney General of the United States.

United States, Plaintiff, 46 *v.* State of Arizona.

United States, Plaintiff, 47 *v.* State of Idaho.

[December 21, 1970]

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, concurring in part and dissenting in part.

In these cases we deal with the constitutional validity of three provisions of the Voting Rights Act Amendment of 1970. Congress undertook in these provisions: (a) to abolish for a five-year period all literacy tests and similar voting eligibility requirements imposed by any State in the Union (§ 201); (b) to remove the restrictions imposed by state durational residency requirements upon voters in presidential elections (§ 202); and (c) to reduce the voting age to a maximum of 18 years for all voters in all elections throughout the Nation (§ 302). The Court today upholds § 201's nationwide literacy test ban and § 202's elimination of state durational residency restrictions in presidential elections. Section 302's extension of the franchise to 18-year-old voters is, by virtue of the prevailing opinion of MR. JUSTICE BLACK, upheld as applied to federal elections. I agree with the Court in sustaining the congressional ban on state literacy tests, for substantially the same reasons relied upon by MR. JUSTICE BLACK. I also agree that the action of Congress in removing the restrictions of state residency requirements in presidential elections is constitutionally valid, but I base this judgment upon grounds quite different from those relied upon by MR. JUSTICE BLACK. And finally, I disagree with the Court's conclusion that Congress could constitutionally reduce the voting age to 18 for federal elections, since I am convinced that Congress was wholly without constitutional power to alter—for the purpose of any elections—the voting age qualifications now determined by the several States.

Before turning to a discussion of my views, it seems appropriate to state that we are not called upon in these cases to evaluate or appraise the wisdom of abolishing literacy tests, of altering state residency requirements, or of reducing the voting age to 18. Whatever we may think as citizens, our single duty as judges is to determine whether the legislation before us was within the constitutional power of Congress to enact. I find it necessary to state so elementary a proposition only because certain of the separate opinions filed today contain many pages devoted to a demonstration of how beneficent are the goals of this legislation, particularly the extension of the electoral franchise to young men and women of 18. A casual reader could easily get the impression that what we are being asked in these cases is whether or not we think allowing people 18 years old to vote is a good idea. Nothing could be wider of the mark. My Brothers to the contrary, there is no question here as to the "judgment" of Congress; there are questions only of Congress' constitutional power.

I

I concur in Part II of MR. JUSTICE BLACK'S opinion, which holds that the literacy test ban of § 201 of the 1970 Amendments is constitutional under the Enforcement Clause of the Fifteenth Amendment. Our decisions establish that the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination. It is onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." *Lane* v. *Wilson*, 307 U.S. 268, 275; cf. *Gomillion* v. *Lightfoot*, 463 U.S. 339. Because literacy and illiteracy are seemingly neutral with respect to race, creed, color, and sex, we upheld a literacy requirement against a claim that it was invalid on its face under the

Fifteenth Amendment. *Lassiter* v. *Northampton Election Board*, 360 U.S. 45. But in *Gaston County* v. *United States*, 395 U.S. 285, we made it clear that Congress has ample authority under § 2 of the Fifteenth Amendment to determine that literacy requirements work unfairly against Negroes in practice because they handicap those Negroes who have been deprived of the educational opportunities available to white citizens. We construed the 1965 Voting Rights Act in light of the Report of the Senate Judiciary Committee that said, "[T]he educational differences between whites and Negroes in the areas to be covered by the prohibitions—differences which are reflected in the record before the committee—would mean that equal application of the tests would abridge 15th amendment rights." S. Rep. No. 162, pt. 3, 89th Cong., 1st Sess., 16. See also *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308–315.

Congress has now undertaken to extend the ban on literacy tests to the whole Nation. I see no constitutional impediment to its doing so. Nationwide application reduces the danger that federal intervention will be perceived as unreasonable discrimination against particular States or particular regions of the country. This in turn increases the likelihood of voluntary compliance with the letter and spirit of federal law. Nationwide application facilitates the free movement of citizens from one State to another, since it eliminates the prospect that a change in residence will mean the loss of a federally protected right. Nationwide application avoids the often difficult task of drawing a line between those States where a problem is pressing enough to warrant federal intervention and those where it is not. Such a line may well appear discriminatory to those who think themselves on the wrong side of it. Moreover the application of the line to particular States can entail a substantial burden on administrative and judicial machinery and a diversion of enforcement resources. Finally, nationwide application may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country. A remedy for racial discrimination which applies in all the States underlies an awareness that the problem is a national one and reflects a national commitment to its solution.

Because the justification for extending the ban on literacy tests to the entire Nation need not turn on whether literacy tests unfairly discriminate against Negroes in every State in the Union, Congress was not required to make state-by-state findings concerning either the equality of educational opportunity or actual impact of literacy requirements on the Negro citizen's access to the ballot box. In the interests of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records. Cf. *Lassiter* v. *Northampton Election Board*, *supra*. The findings that Congress made when it enacted the Voting Rights Act of 1965 would have supported a nationwide ban on literacy tests. Instead, at that time "Congress chose to limit its attention to the geographic areas where immediate action seemed necessary." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 328. Experience gained under the 1965 Act has now led Congress to conclude that it should go the whole distance. This approach to the problem is a rational one; consequently it is within the constitutional power of Congress under § 2 of the Fifteenth Amendment.

II

Section 202 of the Voting Rights Amendments of 1970 is a comprehensive provision aimed at insuring that a citizen will not be deprived of the opportunity to vote for the offices of President and Vice President because of a change of residence. Those who take up a new residence more than 30 days before a presidential election are guaranteed the right to register and vote in the State to which they have moved notwithstanding any durational residency requirement imposed by state law, provided, of course, that they are otherwise qualified to vote. Those who take up a new residence less than 30 days before a presidential election are guaranteed the right to vote, either in person or by absentee ballot, in the State from which they have moved, provided that they satisfied, as of the date of their change of residence, the requirements to vote in that State.

A

Congress, in my view, has the power under the Constitution to eradicate political and civil disabilities which arise by operation of state law following a change in residence from one State to another. Freedom to travel from State to State—freedom to enter and abide in any State in the Union—is a privilege of United States citizenship. *Shapiro* v. *Thompson*, 394 U.S. 618; *United States* v. *Guest*, 383 U.S. 745, 757–760; *Truax* v *Raich*, 239 U.S. 33, 39; *Twining* v. *New Jersey*, 211 U.S. 78, 97; *Crandall* v. *Nevada*, 6 Wall. 35. Section 1 of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." In discussing the privileges of citizens of the United States within the meaning of § 1, Mr. Justice Miller wrote for the Court in the *Slaughter-House Cases:*

"One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State." 16 Wall. 36, 80.

Although § 5 of the Fourteenth Amendment confers on Congress the "power to enforce, by appropriate legislation, the provisions of this article," this Court has sustained the power of Congress to protect and facilitate the exercise of privileges of United States citizenship without reference to § 5. *United States* v. *Guest*, 383 U.S., at 757–760; *United States* v. *Classic*, 313 U.S. 299; *Burroughs* v. United States, 290 U.S. 534. These cases and others establish that Congress brings to the protection and facilitation of the exercise of privileges of United States citizenship all of its power under the Necessary and Proper Clause. Consequently, as against the reserved power of the States, it is enough that the end to which Congress has acted be one legitimately within its power and that there be a rational basis for the measures chosen to achieve that end. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421.

In the light of these considerations, § 202 presents no difficulty. Congress could rationally conclude that the imposition of durational residency requirements unreasonably burdens and sanctions the privilege of taking up residence in another State. The objective of § 202 is clearly a legitimate one. Federal action is required if the privilege to change residence is not to be undercut by parochial local sanctions. No State could undertake to guarantee this privilege to its citizens. At most a single State could take steps to resolve that its own laws would not unreasonably discriminate against the newly arrived resident. Even this resolve might not remain firm in the face of discriminations perceived as unfair against those of its own citizens who moved to other States. Thus, the problem could not be wholly solved by a single State, or even by several States, since every State of new residence and every State of prior residence would have a necessary role to play. In the absence of a unanimous interstate compact, the problem could only be solved by Congress. Quite clearly, then, Congress has acted to protect a constitutional privilege which finds its protection in the Federal Government and is national in character. *Slaughter-House Cases*, 16 Wall., at 79.

B

But even though general constitutional power clearly exists, Congress may not overstep the letter or spirit of any constitutional restriction in the exercise of that power. For example, Congress clearly has power to regulate interstate commerce, but it may not, in the exercise of that power, impinge upon the guarantees of the Bill of Rights. I have concluded that, while § 202 applies only to presidential elections, nothing in the Constitution prevents Congress from protecting those who have moved from one State to another from disenfranchisement in any federal election, whether congressional or presidential.

The Constitution withholds from Congress any general authority to change by legislation the qualifications for voters in federal elections. The meaning of the applicable constitutional provisions is perfectly plain. Article I, § 2, and the Seventeenth Amendment prescribe the qualifications for voters in elections to choose Senators and Representatives: they "shall have the qualifications requisite for electors of the most numerous branch of the State Legislature." The Constitution thus adopts as the federal standard the standard which each State has chosen for itself. *Ex parte Yarbrough*, 110 U.S. 651, 663; *Wiley* v. *Sinkler*, 179 U.S. 61, 64. Accordingly, a state law which purported to establish distinct qualifications for congressional elections would be invalid as repugnant to Article I, § 2, and the Seventeenth Amendment. By the same token, it cannot be gainsaid that federal legislation which had no objective other than to alter the qualifications to vote in congressional elections would be invalid for the same reasons. What the Constitution has fixed may not be changed except by constitutional amendment.

Contrary to the submission of my Brother BLACK, Article I, § 4 does not create in the federal legislature the power to alter the constitutionally established qualifications to vote in congressional elections. That section provides that the legislatures in each State shall prescribe the "times, places and manner of holding elections for Senators and Representatives," but reserves in Congress the power to "make or alter such regulations, except as to the place of choosing Senators." The "manner" of holding elections can hardly be read to mean the *qualifications* for voters, when it is remembered that § 2 of the same Article I explicitly speaks of the "qualifications" for voters in elections to choose Representatives. It is plain in short, that when the Framers meant qualifications they said "qualifications." That word does not appear in Article I, § 4. Moreover, § 4 does not give Congress the power to do anything that a State might not have done, and, as pointed out above, no State may establish distinct qualifications for congressional elections. The States, of course, are free to pass such laws as are necessary to assure fair elections. Congressional power under § 4 is equally broad with respect to congressional elections. *United States* v. *Classic*, 313 U.S. 299. But the States are not free to prescribe qualifications for voters in federal elections which differ from those prescribed for the most numerous branch of the state legislature. And the power of Congress to do so cannot, therefore, be found in Article I, § 4.

This view is confirmed by extrinsic evidence of the interest of the Framers of the Constitution. An early draft of the Constitution provided that the States should fix the qualifications of voters in congressional elections subject to the proviso that these quali-

fications might "at any time be altered and superseded by the Legislature of the United States." [1] The records of the Committee on Detail show that it was decided to stroke the provision granting to Congress the authority to set voting qualifications and to add in its stead a clause making the qualifications "the same from Time to Time as those of the electors in the several States, of the most numerous Branch of their own Legislatures." [2] The proposed draft reported by the Committee on Detail to the Convention included the following:

"The qualifications of the electors shall be the same from time to time, as those of the electors in the several States, of the most numerous branch of their own Legislatures." Art. IV, § 1.

"The times and places and manner of holding the elections of the members of each House shall be prescribed by the Legislature of each State; but their provisions concerning them may, at any time, be altered by the Legislature of the United States." [3] Art. VI, § 1.

On August 7, Gouverneur Morris moved to strike the last clause of the proposed Article IV, § 1 and either to provide a freehold limitation on suffrage or to add a clause permitting Congress to alter the electoral qualifications.[4] This motion was opposed by Oliver Ellsworth, George Mason, Madison, and Franklin. Ellsworth protested that the proposal favored aristocracy. If the legislature could alter qualifications, it could disqualify a great proportion of the electorate.[5] George Mason voiced a similar objection. "A power to alter the qualifications would be a dangerous power in the hands of the legislature." [6] To the same effect Madison said:

"The right of suffrage is certainly one of the fundamental articles of republican Government, and ought not to be left to be regulated by the Legislature." [7]

The proposed motion was defeated by a seven-to-one vote,[8] and no substantive change in Article I, § 2 was proposed or made thereafter.

Thus, Alexander Hamilton accurately reported the intent of the Convention when he wrote in The Federalist No. 60 that the authority of the national government "would be expressly restricted to the regulation of the *times*, the *places* and the *manner* of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution and are unalterable by the legislature [*i.e.* Congress]." (Emphasis in original.)

Different provisions of the Constitution govern the selection of the President and the Vice President. Article II and the Twelfth Amendment provide for election by Electors. Article II specifies that each State shall appoint Electors "in such manner as the legislature thereof may direct." Because the Constitution does not require the popular election of members of the Electoral College, it does not specify the qualifications which voters must have when the selection of Electors is by popular election. This is left to the States in the exercise of their power to "direct" the manner of choosing Presidential Electors. *Williams* v. *Rhodes*, 393 U.S. 23, 29. When Electors are chosen by popular election, the Federal Government has the power to assure that such elections are orderly and free from corruption. *Burroughs* v. *United States*, 290 U.S. 534. But in *Burroughs* the Court noted of the Act under review: "Neither in purpose nor in effect does it interfere with the power of a state to appoint electors or the manner in which their appointment shall be made." 290 U.S., at 544. The Court quoted with approval the following passage from *Ex parte Yarbrough*, 110 U.S. 651: "[T]he importance to the general government of having the actual election—the voting for those members—free from force and fraud is not diminished by the circumstance that the qualification of the voter is determined by the law of the State where he votes." 290 U.S., at 546. And in *United States* v. *Classic*, 313 U.S. 299, the Court was careful to point out that it is the "right of *qualified* voters within a state to cast their ballots and have them counted" which is a privilege of United States citizenship amenable to congressional protection. *Id.*, at 315 (emphasis added). See also *Corfield* v. *Coryell*, 6 Fed. Cas. 546, 552 (No. 3230) (CCED Pa.).

The issue then is whether, despite the intentional withholding from the Federal Government of a general authority to establish qualifications to vote in either congressional or presidential elections, there exists congressional power to do so when Congress acts with the objective of protecting a citizen's privilege to move his residence from one State to another. Although the matter is not entirely free from doubt, I am persuaded that the constitutional provisions discussed above are not sufficient to prevent Congress from protecting a person who exercises his constitutional right to enter and abide in any State in the Union from losing his opportunity to vote, when Congress may protect the right of interstate travel from other less fundamental disabilities. The power of the States with regard to the franchise is subject to the power of the Federal Government to vindicate the unconditional personal rights secured to the citizen by the Federal Constitution. *Williams* v. *Rhodes, supra;* cf. *Shapiro* v. *Thompson, supra*. The power which Congress has exercised in enacting § 202 is not a general power to prescribe qualifications for voters in either federal or state elections. It is confined to federal action against a particular problem clearly within the purview of congressional authority. Finally, the power to facilitate the citizen's exercise of his constitutional privilege to change residence is one which cannot be left for exercise by the individual States without seriously diminishing the level of protection available. As I have sought to show above, federal action is required if this privilege is to be effectively maintained. We should strive to avoid an interpretation of the Constitution that would withhold from Congress the power to legislate for the protection of those constitutional rights which the States are unable effectively to secure. For all these reasons, I conclude that it was within the power of Congress to enact § 202.[9]

III

Section 302 of the Voting Rights Act Amendments of 1970 undertakes to enfranchise in all federal, state, and local elections those citizens 18 years of age or older who are now denied the right to vote by state law because they have not reached the age of 21. Although it was found necessary to amend the Constitution in order to confer a federal right to vote upon Negroes [10] and upon females,[11] the Government asserts that a federal right to vote can be conferred upon people between 18 and 21 years of age simply by this Act of Congress. Our decision in *Katzenbach* v. *Morgan*, 379 U.S. 294, it is said, established the power of Congress, under § 5 of the Fourteenth Amendment, to nullify state laws requiring voters to be 21 years of age or older if Congress could rationally have concluded that such laws are not supported by a "compelling state interest."

In my view, neither the *Morgan* case, nor any other case upon which the Government relies, establishes such congressional power, even assuming that all those cases were rightly decided.[12] Mr. Justice Black is surely correct when he writes, "It is a plain fact of history that the Framers never imagined that the national Congress would set the qualifications for voters in every election from President to local constable or village alderman. It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States." *Supra*, p. ——. For the reasons which I have set out in Part II of this opinion, it is equally plain to me that the Constitution just as completely withholds from Congress the power to alter by legislation qualifications for voters in federal elections, in view of the explicit provisions of Article I, Article II, and the Seventeenth Amendment.

To be sure, recent decisions have established that state action regulating suffrage is not immune from the impact of the Equal Protection Clause.[13] But we have been careful in those decisions to note the undoubted power of a State to establish a qualification for voting based on age. See, *e. g.*, *Kramer* v. *Union School District*, 395 U.S. 621, 625; *Lassiter* v. *Northampton Election Board*, 360 U.S. 45, 51. Indeed, none of the opinions filed today suggest that the States have anything but a constitutionally unimpeachable interest in establishing some age qualification as such. Yet to test the power to establish an age qualification by the "compelling interest" standard is really to deny a State any choice at all, because no State could demonstrate a "compelling interest" in drawing the line with respect to age at one point rather than another. Obviously, the power to establish an age qualification must carry with it the power to choose 21 as a reasonable voting age, as the vast majority of the States have done.[14]

Katzenbach v. *Morgan, supra*, does not hold that Congress has the power to determine what are and what are not "compelling state interests" for equal protection purposes.

In *Morgan* the Court considered the power of Congress to enact a statute whose principal effect was to enfranchise Puerto Ricans who had moved to New York after receiving their education in Spanish-language Puerto Rican schools and who were denied the right to vote in New York because they were unable to read or write English. The Court upheld the statute on two grounds: that Congress could conclude that enhancing the political power of the Puerto Rican community by conferring the right to vote was an appropriate means of remedying discriminatory treatment in public services; and that Congress could conclude that the New York statute was tainted by the impermissible purpose of denying the right to vote to Puerto Ricans, an undoubted invidious discrimination under the Equal Protection Clause. Both of these decisional grounds were far-reaching. The Court's opinion made clear that Congress could impose on the States a remedy for the denial of equal protection which elaborated upon the direct command of the Constitution, and that it could override state laws on the ground that they were in fact used as instruments of invidious discrimination even though a court in an individual lawsuit might not have reached that factual conclusion. Cf. *Swain* v. *Alabama*, 380 U.S. 202.

But it is necessary to go much further to sustain § 302. The state laws which it invalidates do not invidiously discriminate against any discrete and insular minority. Unlike the statute considered in *Morgan*, § 302 is valid only if Congress has the power not only to provide the means of eradicating situations which amount to a violation of the Equal Protection Clause, but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause, and what state interests are "compelling." I concurred in Mr. Justice Harlan's dissent in *Morgan*. That case, as I now read it, gave congressional power under § 5 the furthest possible legitimate reach. Yet to sustain the constitutionality of § 302 would require an enormous extension of that decision's rationale. I cannot but conclude that § 302 was beyond the constitutional power of Congress to enact.

Footnotes at end of article.

FOOTNOTES

[1] 2 M. Farrand, The Records of the Federal Convention (1911) 153.
[2] *Id.*, at 163–164.
[3] *Id.*, at 178–179.
[4] *Id.*, at 201, 207.
[5] *Id.*, at 201.
[6] *Id.*, at 201–202.
[7] *Id.*, at 203.
[8] *Id.*, at 206.
[9] Whether a particular State's durational residency requirement for voters may violate the Equal Protection Clause of the Fourteenth Amendment presents questions which are for me quite different from those attending the constitutionality of § 202. See *Sirak* v. *Brown*, — F. 2d — (CA6 1970); *Cocanower* v. *Marston*, — F. Supp. — (D Ariz. 1970); *Burg* v. *Canniffee*, — F. Supp. — (D Mass. 1970); *Ellington* v. *Blumstein*, — F. Supp. — (MD Tenn. 1970); *Hadnott* v. *Amos*. — F. Supp. — (MD Ala. 1970); *Bufford* v. *Holton*, — F. Supp. — (ED Va. 1970); *Lester* v. *Board of Elections*, — F. Supp. — (DC 1970).
[10] U. S. Const., Amendment XV.
[11] U. S. Const., Amendment XIX; see also *Minor* v. *Happersett*, 21 Wall. 162.
[12] *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Louisiana* v. *United States*, 380 U.S. 145 (1965); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Kramer* v. *Union Free School Dist. No. 15*, 395 U.S. 621 (1969); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969); *Evans* v. *Cornman*, 398 U.S. 419 (1970); *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970).
[13] See, *e.g.*, cases cited *supra*, n. 12.
[14] If the Government is correct in its submission that a particular age requirement must meet the "compelling interest" standard, then, of course, a substantial question would exist whether a 21-year-old voter qualification is constitutional even in the absence of congressional action, as my Brothers point out. *Ante*, p. —. Yet it is inconceivable to me that this Court would ever hold that the denial of the vote to those between the ages of 18 and 21 constitutes such an invidious discrimination as to be a denial of the equal protection of the laws. The establishment of an age qualification is not state action aimed at any discrete and insular minority. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n. 4. Moreover, so long as a State does not set the voting age higher than 21, the reasonableness of its choice is confirmed by the very Fourteenth Amendment upon which the Government relies. Section 2 of that Amendment provides for sanctions when the right to vote "is denied to any of the male inhabitants of such State, *being twenty-one years of age*, and citizens of the United States. . . ." (Emphasis added.)

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Abortion Law Reform and Repeal: Legislative and Judicial Developments

(By Ruth Roemer, J.D.)

In the three years from 1967 to 1970, a revolution has occurred in the abortion laws and practices in the United States. That revolution is still in process. Our once highly restrictive antiabortion laws have been reformed in 13 states and virtually repealed in four states. No other country has a statute which explicitly makes abortion a matter for decision by the woman and her physician. Although other countries permit abortion on request of the woman under certain circumstances, the four American states have pioneered in treating abortion, as a matter of law, like any other medical procedure.

As a result of recent developments, the United States has become a laboratory in which three different types of legal regulation of abortion can be compared and evaluated. We can also profit from the longer experience of other countries with abortion statutes of varying liberality, although account must be taken of differing family planning programs and systems of delivering health services.

Legislative developments in the United States

Three kinds of modernized abortion laws have been enacted in the United States since 1967: (1) Twelve states have enacted all or part of the Model Penal Code first proposed in 1957 by the American Law Institute (ALI), under which abortion is not a crime when performed by a licensed physician because of substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the woman or that the child would be born with grave physical or mental defect, or in cases of pregnancy resulting from rape or incest.[1] (2) One state, Oregon, has expanded the American Law Institute grounds to include a sociomedical ground proposed originally by the American College of Obstetricians and Gynecologists[2] and patterned after a provision of the British Abortion Act of 1967,[3] i.e., that in determining whether or not there is substantial risk to the woman's physical or mental health, account may be taken of her total environment, actual or reasonably foreseeable.[4] (3) Four states—Alaska,[5] Hawaii,[6] New York[7] and the State of Washington (by referendum in November 1970)—have repealed all criminal penalties for abortion, provided only that the abortion is done early in pregnancy and by a licensed physician (Alaska, Hawaii, and Washington also stipulate that the operation must take place in a licensed hospital or other approved facility). Thirty-three states, however, still have laws making abortion a crime except when performed to save the life (or, in a few instances, the health) of the woman. None of these states even requires that the abortion be performed by a licensed physician.

The details of the new laws vary in their provisions.* The key developments relate to six general aspects:

1. All 17 states require that the abortion be performed by a licensed physician.

2. All the states with new laws, except Mississippi and New York, require that the abortion be performed in hospitals, with Kansas also permitting another place designated by law.[8] New York City has recently added the requirement that abortions be performed in hospitals or clinics, and not in doctors' offices.

3. All 17 states allow abortion to save the life of the woman, and also in pregnancies resulting from sex crimes.

All these 17 states (except Mississippi, which authorizes abortion only for rape or to save life) allow abortion to preserve the physical or mental health of the woman. The sociomedical standard of the Oregon law mentioned above is a broader standard than the medical standard of the ALI-style laws.

Seven states set age limits on abortions for statutory rape. These limits may be lower than the age of consent. Thus, in California sexual intercourse with an unmarried girl below the age of 18 constitutes statutory rape; but if pregnancy results, it can be terminated only if the girl is below the age of 15.

All 17 states, except California and Mississippi, allow abortion for fetal abnormality.

4. The maximum time limits within which abortions may be performed vary from 16 weeks in Colorado, New Mexico, and Washington to 26 weeks in Maryland. In Oregon the time limit is 150 days; in Alaska and Hawaii, the fetus must be nonviable; and in New York the time limit is 24 weeks.

5. Medical approval by consultants, boards, or hospital therapeutic abortion committees is required in all states (except Mississippi) with ALI-style laws, although the Model Penal Code did not propose such procedures. In Oregon, two physicians must certify the circumstances justifying an abortion; in Alaska, Hawaii, and New York, only one physician is required.

6. New York and the following ALI-style states have no residency requirement: California, Colorado, Kansas, Maryland, Mississippi, and New Mexico. South Carolina, Hawaii, and the State of Washington have a 90-day residency requirement, and Arkansas, Delaware, North Carolina, and Virginia require four months' residency. Oregon requires that the patient be a resident, and Alaska requires 30 days' residency.

Actual practice, of course, may differ from the provisions of the statutes. In some places, doctors will not perform abortions as late as the statute allows. Nonresidents may not be welcomed even though the state has no residency requirement. Consents, consultations, and committee approvals may be required that are not specified in the statutes. It is also possible that residency requirements may not be strictly enforced and procedures may be more simple than those provided in the statute.

On the federal level, a bill introduced in Congress by Senator Packwood to legalize abortion throughout the nation made no progress. A recent policy enunciated for U.S. military hospitals, however, permits abortions and sterilizations for military personnel, active or retired, and their families, regardless of State or local laws.[9] In October, 1970, a White House task force on the mentally handicapped recommended that, in the interest of both maternal and child mental health, no woman should be forced to bear an unwanted child.

Judicial developments in the United States

Legislative developments have been accompanied by an emerging body of court decisions on the constitutionality of antiabortion laws. The picture changes almost from day to day. As of autumn, 1970, five cases were on the U.S. Supreme Court docket, more than 20 cases were before three-judge federal courts; and excluding the 20 states with federal cases, many of which also had state cases, another 11 states had cases pending in local courts.[10] The following important cases may be noted.

1. In September, 1969, the Supreme Court of California, in the first decision on the constitutionality of any antiabortion statute, invalidated the pre-1967 antiabortion law of California. In a four to three decision in *People* v. *Belous*,[11] the court held the statute unconstitutional on two principal grounds: (1) that the phrase, "necessary to preserve life," was so vague as to be violative of the due process requirements for a criminal law, and (2) that the law was in violation of a woman's fundamental rights to life and to choose whether to bear children. The latter follows from the U.S. Supreme Court's acknowledgment of a right of privacy or liberty in matters related to marriage, family, and sex.[12]

The critical issue defined by the California Supreme Court was whether the state had any legitimate interest in the regulation of abortion which would justify so deep an infringement of the fundamental rights of women. The court held that the state had no such compelling interest. The court said that it would not speak to the constitutionality of the current California Therapeutic Abortion Act, since Dr. Belous was charged under the

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Footnotes at end of article.

*The provisions of all the abortion laws in the United States are summarized in a table, "Current Status of Abortion Laws—August 1, 1970," available upon request from the National Center for Family Planning Services, Health Services and Mental Health Administration, U.S. Department of Health, Education, and Welfare, Rockville, Maryland 20852.

old law. But one might well infer from the decision that the current law may be declared unconstitutional on similar grounds. The court did express the view, however, that the decision to terminate pregnancy under the 1967 Therapeutic Abortion Act was solely a medical one, and so long as the physician follows the procedural requirements of the act his judgment may not later be challenged by a jury or prosecutor in a criminal case.

2. Following the landmark decision of the California Supreme Court, the first decision of a federal court invalidating an antiabortion statute was handed down. In *U.S.* v. *Vuitch*,[13] the U.S. District Court for the District of Columbia held unconstitutional the District of Columbia statute which made abortion a felony unless performed by a licensed physician for the preservation of the mother's life or health. The court held this phrase so uncertain and ambiguous as to invalidate the statute for want of due process, and it recommended appeal to the U.S. Supreme Court. The opinion of Judge Gerhard A. Gessell in *Vuitch* emphasized, as the *Belous* decision had done, the woman's liberty and right of privacy in matters related to family, marriage, and sex and the necessity for demonstrating affirmatively the interest of the state in infringing on such rights. The opinion pointed out the discriminatory application of the statute with respect to women who are poor. This case is now on appeal to the U.S. Supreme Court, which has raised certain jurisdictional questions concerning the propriety of direct appeal to the Supreme Court without first proceeding to the U.S. Court of Appeals for the District of Columbia.

3. In addition to these two decisions which broke new legal ground, a number of other courts have invalidated pre-ALI-style antiabortion laws. These cases have arisen in both federal and state courts.

Three-judge panels of federal district courts have held the pre-ALI-style laws of Texas[14] and Wisconsin[15] unconstitutional because of overbreadth. One court also held the statute void for vagueness, and both courts found the statutes an unconstitutional invasion of private rights and not justified by a compelling interest of the state. Contrary is one federal court which, in a two to one decision, upheld the anti-abortion statute of Louisiana.[16]

Similar suits have been brought in federal courts involving the Arizona,[17] Illinois,[18] and New Jersey laws.[19] Suits challenging the Kentucky[20] and Minnesota[21] laws were dismissed on jurisdictional grounds, and the New York case was dismissed as moot on repeal of New York's antiabortion statute.[22]

State courts have also struck down pre-ALI-style laws. In Illinois, a judge of the criminal court held the abortion statute unconstitutional on grounds of vagueness and infringement on the woman's right to control her body.[23] In Pennsylvania, a county court judge found that that state's statute impinges on constitutionally protected areas and is so broad, unlimited, and indiscriminate that it fails to meet present-day tests for constitutionality.[24] In South Dakota, a circuit court condemned the statute because it interferes with private conduct without serving any vital interest of society.[25] In Michigan, the statute was found defective as infringing on the right of privacy in the physician-patient relationship and as possibly violative of the patient's right to safe and adequate medical treatment.[26] Contra, however, is the Massachusetts Supreme Judicial Court, which upheld the constitutionality of the state's statute prohibiting "unlawful" abortion against a charge of vagueness in a case sustaining revocation of a medical license.[27] Suits challenging other pre-ALI-style laws are still pending elsewhere.[28]

Footnotes at end of article.

4. Attempts are currently being made to obtain an adjudication of the constitutionality of reformed ALI-style laws.[29] Thus far, only one reformed ALI-style law has been invalidated by a federal court—Georgia's 1968 abortion law. The U.S. District Court in Atlanta held unconstitutional those parts of the 1968 Georgia law that limited the woman's right to abortion to the three ALI grounds.[30] The basis of the court's decision was violation of the woman's right of privacy. Retained as a proper exercise of state power, however, were the requirements for medical consultation, hospital committee approval, hospital accreditation and exemption provisions, and the residency requirement.

On the state level, the California Therapeutic Abortion Act has been challenged in three cases. Two cases involving Doctors Robb and Gwynne are still pending, but preliminary decisions involving these doctors have held the California statute unconstitutional.[31] In *People* v. *Barksdale*, a municipal court in Alameda County held the current California law unconstitutional as violative of the equal protection clause of the 14th Amendment, as a vague and improper delegation of legislative authority to the Joint Commission on Accreditation of Hospitals, as discriminatory between the rich and the poor, as lacking the certainty required for a criminal statute with respect to the definition of mental illness, and as violative of the fundamental right of the woman to make a free choice whether or not to bear children.[32] In rejecting the argument that the state has a compelling interest in protecting the embryo, Judge T. L. Foley added the following poignant words:

I might say that I belong to the religion that was just referred to, and I dislike to render this opinion. I must follow the law under my oath as a Judge. I am a Catholic which makes it very, very difficult—but my oath of office calls for me to follow the law as stated and set out by the Appellate Courts of this State.[33]

The judicial picture is in constant flux as new cases are filed in federal and state courts; as the defense of unconstitutionality is raised in criminal prosecutions of doctors; as issues are raised concerning jurisdiction of courts and standing of plaintiffs to sue; and as decisions come down and appeals are taken.

On at least eight occasions, the United States Supreme Court has declined to review state court decisions that involved restrictive antiabortion laws.[34] One of these cases was the landmark decision of the California Supreme Court in *Belous*. On October 13, 1970, the court dismissed an appeal from the decision of a three-judge federal court holding the Wisconsin antiabortion statute unconstitutional.[35] Action by the court on the merits of abortion cases will be decisive, but it is possible that some of the cases will go off on questions of jurisdiction or on grounds other than the basic constitutional issues.

Although the final outcome cannot be predicted, three eventualities seem fairly certain. First, more and more states will change their laws in accordance with one or another of the three patterns now prevailing in the United States. Second, as in other nations of the world, moderately reformed laws will be amended to expand the grounds and to simplify the procedures; alternatively, antiabortion laws will be repealed. Third, in every state pressure will mount for making abortion available de facto as well as *de jure* to women, rich and poor, faced with the despair and desperation occasioned by unwanted pregnancy.

RECENT DEVELOPMENTS IN OTHER COUNTRIES

The abortion laws of the world have been described on a five-stage continuum, ranging from the most permissive to the most restrictive.[36] Recent legislative changes show that more and more countries are liberalizing their laws or the interpretation of their laws all along this continuum.

1. *Abortion on the Insistence of the Woman*—No new jurisdictions have joined this category, except the four states in the United States discussed previously. The tightening of the Bulgarian law in 1968[37] in order to encourage population growth has been eased by a 1970 interpretation that allows abortion virtually on request for unmarried women and women having at least one child.[38] The hope is that this interpretation will reduce the number of illegal abortions. In these cases, the Bulgarian law resembles once again the most liberal laws of the USSR and Hungary. Now that the German Democratic Republic has liberalized its policy on abortion, as mentioned below, the only restrictive abortion statutes remaining in eastern Europe are those of Romania and Albania.

2. *Abortion on Social Grounds*—Two Scandinavian countries, Finland and Denmark, have liberalized their statutes further to include social grounds. The 1970 law in Finland specifies, in addition to medical and humanitarian reasons and the age of the mother (under 17 or over 40 or already the mother of four children), the following social ground:

. . . when the delivery and care of the child would constitute, by reason of the conditions of existence of the woman and her family, as well as other circumstances, a change for her.[39]

A unique provision, relevant for all countries faced with expanding demand for abortions, requires the Finnish Department of Health to assure a sufficient number of qualified physicians and abortion hospitals and also impartial and uniform conduct from physicians.

The Danish law of 1970 permits abortion without authorization of a committee for reasons of life or health or in cases where the woman is over 38 or has four children under age 18 who reside with her.[40] Authorization of a committee is required if the abortion is sought for sociomedical reasons, danger of fetal abnormality, or pregnancy resulting from a sex crime.

Sweden has not yet announced changes in its abortion law which have been under consideration for three years. Various alternatives are bruited about; that abortion may be permitted on the free choice of the woman provided she consults fully with an abortion service or, possibly, that the decision-making process may be decentralized in order to reduce the current delay which drives many women to illegal abortion.

3. *Abortion on Sociomedical Grounds*—Singapore has enacted sociomedical grounds for abortion along the lines of the British Abortion Act of 1967 but with approval required by a Termination of Pregnancy Authorisation Board, except when abortion is to preserve life or health.[41] This is the first Asian country, after Japan, to enact a liberalized abortion law.

The state of South Australia has also enacted an abortion law modeled after the new British law.[42] Similar legislation is under discussion in New South Wales. A poll of general practitioners in Sydney, N.S.W., found that 957 women approached 92 general practitioners with requests for help in obtaining an abortion in a single year.[43] The fact that each general practitioner is confronted with a major dilemma of this kind ten times a year explains the high proportion of general practitioners in Sydney (76%) who favor liberalization of the law.

Since 1965, the German Democratic Republic has liberalized interpretation of its law, so that abortion is now authorized on sociomedical grounds.[44]

Legislation is still pending in India, which in the form proposed would allow abortion on sociomedical grounds and in cases of contraceptive failure.[45]

Experience in England, Wales, and Scotland during the first 18 months of the operation of the 1967 British abortion law reveals

a shift from illegal to legal abortion, a shift from the private sector to the National Health Service, a slowing down of the illegitimacy rate (47% of all abortions in the first 18 months were for single women), and a narrowing of regional discrepancies in the operation of the law.[46] With the aid of voluntary pregnancy advisory services, abortion is being made available to women in all geographic areas and income groups.[47] Attitudes of gynecologists are becoming more sympathetic to applicants for abortion, as reflected by "the granting of National Health Service abortions on an increasing scale and by bodies such as the Royal College of Obstetricians and Gynecologists taking a sincere, if belated interest in contraception and sterilisation." [48] The most serious problem appears to be the universal need for improving contraceptive services and practices.

4. *Abortion on Medical Grounds*—Canada[49] and Peru[50] have broadened their abortion laws to permit abortion on the grounds of danger to the life or health of the woman.

5. *Abortion Only to Save the Life of the Woman*—This category has lost adherents. It will continue to do so as current law reform activities in many countries, e.g., France, increase in tempo.

INSIGHTS FROM ABROAD

As the United States moves into the problems associated with providing medical care under its new abortion laws, several lessons from the experience of other nations seem relevant.

1. A liberal abortion law will transfer a number of illegal abortions to safe, clinical practice; but as long as restrictions in grounds or procedures remain, some illegal abortion will persist.[51] Initial experience under the California Therapeutic Abortion Act confirms this finding.[52] Therefore, experience in the four states that have removed virtually all restrictions will be extremely important.

2. The earlier in pregnancy that abortion is provided, the less tendency there is to resort to illegal abortion. In eastern Europe, where abortion is generally done early in pregnancy, illegal abortion has been almost eliminated. The reverse is true in Sweden, where administrative procedures delay authorization for legal abortion. The U.S. laws specify time periods within which the abortion must be performed, but in addition, women should be educated to seek abortions early and procedures should be simplified to achieve this objective.

3. On the basis of experience from eastern Europe, mortality from legal abortion can be anticipated to be low, particularly if performed early in pregnancy.[53] Complications in eastern Europe affect less than 3 per cent of patients.[54] England, as yet, has insufficient data on morbidity. One British authority has suggested that the requirement of a medical report within, seven days after the abortion is too short a time to provide accurate information on complications.[55] Accurate records and reporting are essential.

4. As the British experience indicates, the climbing rate of illegitimacy in the United States may be slowed by increased availability of abortion. With nearly 10 per cent of all U.S. births in 1967 illegitimate, the option of abortion will need to be made widely known and accessible if the risks to health and the social disabilities of births to unmarried mothers are to be lessened.[56]

5. Uneven application of the law by reason of varying attitudes on the part of physicians can be anticipated from the experience in England and Norway. California's experience is similar. Continuing education programs for the medical profession and reforms in medical education are urgent.

6. Shortages of medical and auxiliary personnel may impede full implementation of new laws. In England, however, it was found that, if evenly distributed among all gynecologists, the increased number of abortions would not constitute an excessive workload.[57] It has been suggested that in the United States the load might be distributed among a larger group of physicians than those specialized in gynecology, if the social policy expressed by the new laws is to be implemented. Residents and interns on all services might be expected to perform abortions. Nurse-midwives might also be trained and utilized to perform early abortions. Such a decision would require amendment of the licensure laws in the three states that now license nurse-midwives and enactment of such licensure laws in other states.

7. England's experience shows the bottleneck that may result from shortage of facilities. Ambulatory care, as provided in other countries and as now demonstrated in the United States, is a promising solution for early abortions. Moreover, ambulatory treatment reduces the cost of abortions.

8. Evidence from Chile, South Korea, and Taiwan indicates that, in a country with a high or increasing abortion rate, the conditions are favorable for effective family planning programs.[58] A possible hazard is that the easy solution of abortion may generate a lack of responsibility in using contraceptives. Zeal to meet a long-neglected human need should be accompanied by efforts to use abortion as a means of encouraging effective contraception. A number of European statutes prohibit abortion if an abortion has been performed in the preceding six-month period. A more effective deterrent to repeated abortion would consist in aiding every woman who has an abortion to obtain and use effective methods of contraception.

The dynamic legislative and judicial developments in the laws governing abortion in the United States have generated a ground swell of change. The action of the U.S. Supreme Court is crucial to the rate of progress, but, regardless of the outcome of cases pending before the court, the clock can never be turned back. Safe, legal abortion is now recognized as a fundamental right of women, a protection of maternal health and family welfare, and an assurance that every child is a loved and wanted child. Abortion, however, should be only one service in an array of services that should also include effective contraception, education for responsible sexual relationships, and health protection for mothers and children.

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FOOTNOTES

[1] American Law Institute, Model Penal Code, sec. 230.3(2) (Proposed Official Draft, 1962). On Aug. 4, 1970, the Commissioners on Uniform State Laws issued a Second Tentative Draft of a Uniform Abortion Act, which authorizes abortions within 24 weeks after commencement of the pregnancy without specific grounds or after 24 weeks on the grounds set forth in the code. The 12 statutes incorporating all or part of the Model Penal Code are: Ark. Stat. Ann., secs. 41–301 to 41–310 (Supp. 1969); Cal. Health & Safety Code Ann., secs. 25950–54 (Supp. 1970); Colo. Rev. Stat. Ann., secs. 40–2–50 to 40–2–53 (Supp. 1967); Del. Code Ann., tit. 11, sec. 301 (1953) and Laws 1969; Ga. Code Ann., secs. 26–9920a to 26–9925a (1969); Kan. Stat. Ann., sec. 21–3407 (Supp. 1969) and Laws 1969; Md. Ann. Code, art. 43, secs. 149E to 149G (Supp. 1969); Miss. Code Ann., sec. 2223 (Supp. 1968); N.M. Stat. Ann., secs. 40A–5–1 to 40A–5–3 (Supp. 1969); N.C. Gen. Stat., secs. 14–44 to 14–45.1 (1969 Replacement Vol. 1B); S.C. Code, secs. 16–82 to 86 (1962) and Laws 1970; Va. Code Ann., secs. 18.1–62 to 18.1–62.3 (Supp. 1970). For discussion of these laws, see Lucas, Roy, "Laws of the United States" in *Abortion in a Changing World* (Robert E. Hall, Ed.), vol. I, p. 127, Columbia Univ. Press, 1970.

[2] The American College of Obstetricians and Gynecologists has recently liberalized its position further to approve abortion on the decision of the patient and her physician without additional medical consultation. *AMA News*, Sept. 28, 1970.

[3] Elizabeth II, Ch. 87 (1967) permitting termination of pregnancy on the opinion of two registered medical practitioners that continuance of the pregnancy would involve risk to the life of the pregnant woman or injury to the physical or mental health of any existing children of her family greater than if the pregnancy were terminated.

[4] S.B. 193, amending Ore. Rev. Stat., secs. 465.110, 677.188, and 677.190 and repealing sec. 163.060 (Laws 1969).

[5] S.B. No. 527 repealing and re-enacting Alaska Stat., sec. 11.15.060 (Laws 1970).

[6] Public Law No. 1 amending Hawaii Rev. Stat., ch. 768 (Laws 1970).

[7] N. Y. Penal Law, sec. 125.05(3) (McKinney Supp. 1970–71).

[8] Many states require that the hospital be not only licensed but accredited. For discussion of the unreasonableness and probable unconstitutionality of a requirement restricting performance of abortions to hospitals accredited by the Joint Commission on Accreditation of Hospitals, see Brief *Amici Curiae*, Ass'n for the Study of Abortion, Inc., Planned Parenthood Ass'n, et al., in Vuitch v. Maryland, Court of Special Appeals of Maryland, Sept. Term, 1970, No. 32, argued Sept. 28, 1970.

[9] International Herald Tribune, p. 3, Aug. 19, 1970.

[10] Personal communication from Roy Lucas, President and Associate Counsel, The James Madison Constitutional Law Institute, N. Y., Oct. 22, 1970.

[11] 71 Cal. 2d 954, 458 P. 2d 194, 80 Cal. Rptr. 354 (1969), cert. denied, 397 U. S. 915 (1970).

[12] Id. at 963, 458 P. 2d at 199.

[13] 305 F. Supp. 1032 (D.D.C. 1969), ques. of juris. postponed to merits, 397 U.S. 1061, further juris questions propounded, 399 U.S. 923 (1970) (No. 84, Oct. 1970 Term). On the practical availability of abortion under D.C. law, see court order requiring the D.C. General Hospital to give abortions to women meeting the standards for admission to the hospital. Doe v. Gen'l Hosp. of D.C., 313 F. Supp. 1170 (D.D.C. 1970), on motions to hold hospital officials in contempt, —— F. 2d ——, No. 24011 (D.C. Cir. Mar. 20 and May 15, 1970).

[14] Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam), appeal docketed, 39 U.S.L.W. 3151 (U.S. Oct. 7, 1970) (No. 808, Oct. 1970 Term).

[15] McCann v. Babbitz, 306 F. Supp. 400 (E. D. Wis. 1969) (three-judge court convened), 310 F. Supp. 293 (1970) (per curiam) (on the merits), appeal dismissed, 400 U.S. ——, 39 U.S.L.W. 3132 (Oct. 13, 1970) (per curiam), perm. injunc. issued, —— F. Supp. —— (E.D. Wis. Nov. 18, 1970) (per curiam).

[16] Rosen v. La. State Bd. Med. Examiners, 318 F. Supp. 1217 (1970) (Cassibry, J., dissenting).

[17] Planned Parenthood Ass'n of Phoenix v. Nelson, Civ. No. 70–334 PHX (D. Ariz. Aug. 24, 1970) (per curiam).

[18] Doe v. Scott, —— F. Supp. —— (N.D. Ill. 1971) (Illinois statute held unconstitutional as impermissibly vague and unduly infringing on the woman's right of privacy in restricting abortion during the first trimester of pregnancy.

[19] YWCA v. Kugler, Civ. No. 264–70 (D.N.J., filed Mar. 5, 1970).

[20] Crossen v. Breckenridge, Civ. No. 2143 (E. D. Ky.), dismissed June 15, 1970 by U.S. Judge Swinford, Lexington (Ky.) Herald, June 16, 1970. On appeal.

[21] Doe v. Randall, 314 F. Supp. 32 (D. Minn.

1970), rehearing denied, 314 F. Supp. 36 (D. Minn. July 1, 1970) (per curiam), appeal docketed *sub nom.* Hodgson v. Randall, 39 U.S.L.W. 3115 (Sept. 21, 1970) (No. 728, Oct. 1970 Term).

[22] Hall v. Lefkowitz, 305 F. Supp. 1030 (S.D.N.Y. 1969), dismissed as moot, Op. No. 36936 (S.D.N.Y. July 1, 1970) (per curiam).

[23] People v. Anast, No. 69–3429 (Ill. Cir. Ct., Cook County, 1970) (Dolezal, J.).

[24] Commonwealth v. Page. Centre County Leg. J. at 285 (Pa. Ct. Comm. Pl., Centre County July 23, 1970).

[25] State v. Munson (S.D. 7th Jud. Cir., Pennington County, Apr. 6, 1970) (Clarence P. Cooper, J.).

[26] State v. Ketchum (Mich. Dist. Ct. Mar. 30, 1970) (Reid, J.).

[27] Kudish v. Bd. of Registration in Med., 355 Mass. ——, 248 N.E. 2d 264 (1969). Similar decisions have upheld the Iowa and Vermont statutes as not unconstitutionally vague.

[28] See, for example, Arnold v. Sendak, No. IP 70–C–217 (S.D. Ind., filed Mar. 29, 1970): Rodgers v. Danforth, Civ. No. 18360–2 (W.D. Mo., filed May 15, 1970): Steinberg v. Brown, No. C–70–289 (N.D. Ohio); Doe v. Rampton, Civ. No. 234–70 (D. Utah, Sept. 14, 1970). (Temporary restraining order against enforcement of Utah statute issued.)

[29] Corkey v. Edwards, Civ. No. 2665 (W.D. N.C., filed May 12, 1970); Gwynne v. Hicks, Civ. No. 70–1088–CC (C.D. Calif., filed May 18, 1970); Doe v. Dunbar, Civ. No. C–2402 (D. Colo., filed July 2, 1970), juris. granted —— F. Supp. —— (D. Colo. Dec. 22, 1970). (One of the attorneys in the Colorado suit challenging the first ALI-style law enacted is Richard D. Lamm, sponsor of the reformed legislation in the Colorado Legislature.)

[30] Doe v. Burton, —— F. Supp. ——, Civ. No. 13676 (N.D. Ga. July 31, 1970) (per curiam), appeal docketed, 39 U.S.L.W. 3227 (U.S. Nov. 17, 1970) (Nos. 971, 973, Oct. Term 1970).

[31] People v. Robb, Nos. 149005 & 159061 (Calif. Mun. Ct., Orange County, Jan. 9, 1970) (Mast. J.); People v. Gwynne, No. 173309 (Calif. Mun. Ct., Orange County, June 16, 1970) (Thomson, J.); People v. Gwynne, No. 176601 (Calif. Mun. Ct., Orange County, Aug. 13, 1970) (Schwab, J.).

[32] People v. Barksdale, No. 33237C (Calif. Mun. Ct., Alameda County, Mar. 24, 1970) (Foley, J.).

[33] Ibid.

[34] The Jurisdictional Statement filed in the U.S. Supreme Court on Oct. 7, 1970 by Roy Lucas et al. in Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam), No. 808, Oct. 1970 Term cites the following cases at p. 18, n. 30: Muncie v. Missouri, 398 U.S. 938 (June 1, 1970), denying cert. to 448 S.W. 2d 879 (Mo. 1970); California v. Belous, 397 U.S. 915 (Feb. 24, 1970), denying cert. to 71 Cal. 2d 954, 458 P. 2d 194, 80 Cal. Rptr. 354 (1969); Molinaro v. New Jersey, 396 U.S. 365 (Jan. 19, 1970) (per curiam), dismissing appeal from 54 N.J. 246, 254 A. 2d 792 (1969); Knight v. Louisiana Bd. of Medical Examiners, 395 U.S. 933 (June 2, 1969), denying cert. to 252 La. 889, 214 So. 2d 716 (1968) (per curiam); Morin v. Garra, 395 U.S. 935 (June 2, 1969), denying cert. to 53 N.J. 82 (1968) (per curiam); Moretti v. New Jersey, 393 U.S. 952 (Nov. 18, 1968), denying cert. to 52 N.J. 182, 244 A. 2d 499 (1968); Fulton v. Illinois, 390 U.S. 953 (Mar. 4, 1968), denying cert. to 84 Ill. App. 2d 280, 228 N.E. 2d 203 (1967); Carter v. Florida, 376 U.S. 648 (Mar. 30, 1964), dismissing appeal from 150 So. 2d 787 (Fla. 1963).

[35] McCann v. Babbitz, 310 F. Supp. 293 (E.D. Wis. 1970), appeal dismissed, 400 U.S. —, 39 U.S.L.W. 3132 (Oct. 13, 1970) (per curiam), supra note 15.

[36] Roemer, R. Abortion Law: The Approaches of Different Nations. A.J.P.H. 57, 11:1906 (Nov.), 1967; Roemer R. "Abortion Laws of the World: Recent Trends and Policy Issues" in *Abortion in a Changing World*, supra note 1 at p. 119.

[37] Bulgaria. Law of 16 Feb. 1968, Int. Dig. Health Leg., vol. 19, pp. 589–602, 1968.

[38] David, Henry P. *Family Planning and Abortion in the Socialist Countries of Central and Eastern Europe, A Compendium of Observations and Readings*, p. 69, The Population Council, New York, 1970.

[39] Finland. Law No. 239 of 24 Mar. 1970 on the interruption of pregnancy, Int. Dig. Health Leg., vol. 21, no. 4, 1970.

[40] Denmark. Law of 18 Mar. 1970, Int. Dig. Health Leg., vol. 21, no. 3, 1970.

[41] The Abortion Act of Singapore, 1969, Republic of Singapore, passed 29 Dec. 1969 and assented to by the President 31 Dec. 1969, Int. Dig. Health Leg., vol. 21, no. 4, 1970.

[42] South Australia. An Act to amend the Criminal Consolidation Act, 1935–1966, No. 109 of 1969, assented to 8 Jan. 1970.

[43] Sussman, William, and Adams, Anthony I. General Practitioners' Views on Pregnancy Termination. M. J. Australia, pp. 169–173, July 25, 1970.

[44] Supra note 38 at p. 233.

[45] India. The Medical Termination of Pregnancy Bill, 1969 (Bill No. XXII of 1969).

[46] Diggory, Peter, and Potts, Malcolm. Preliminary Assessment of the 1967 Abortion Act in Practice. Lancet, pp. 287–291, Feb. 7, 1970.

[47] Id. at p. 290.

[48] Ibid.

[49] Stats. of Canada, C. 38, sec. 18 (1968–69).

[50] Peru. Decree-Law No. 17505 of 18 Mar. 1969, Ch. 11, sec. 19, Int. Dig. Health Leg., vol. 21, p. 137 at 140, 1970.

[51] Potts, D. Malcolm. "Induced Abortion—the Experience of Other Nations" in *Population Control, Implications, Trends, and Prospects*, Proceedings of the Pakistan International Family Planning Conference at Dacca, Jan. 28–Feb. 4, 1969, p. 241, Sweden Pakistan Family Welfare Project, Lahore, West Pakistan, March 1969.

[52] See California State Department of Public Health, *A Report to the 1970 Legislature, Third Annual Report on the Implementation of the California Therapeutic Abortion Act*, p. 5, estimating that 81,600 abortions were done on California women in 1968, of which 76,600 were illegal. Even substantially increased numbers of therapeutic abortions—which have occurred since 1968—will not eliminate an illegal abortion problem of this magnitude. The source of the estimated number of illegal abortions was a carefully controlled study in North Carolina. Abernathy, James R.; Greenberg, Bernard G.; and Horvitz, Daniel G. "Estimates of Induced Abortion in Urban North Carolina." Demography, vol. 7, no. 1, p. 19, Feb., 1970.

[253] See Tietze, Christopher. "Abortion Laws and Practices in Europe," *Excerpta Medica International Congress*, Series No. 207, April, 1969; and Tietze, Christopher, "Mortality with Contraception and Induced Abortion," *Studies in Family Planning*, vol. 45, p. 6, Sept. 1969.

[54] Supra note 38 at p. 253.

[55] Supra note 46 at p. 290.

[56] On the higher risks of the unmarried mother and her child, see *Health Aspects of Family Planning*, Report of a WHO Scientific Group, World Health Organization Tech. Rep. Series, No. 442, p. 10, Geneva, 1970.

[57] Supra note 46 at p. 288.

[58] Engstrom, Lars Erik. "Abortion as a Method of Population Control," in *Population Control, Implications, Trends, and Prospects*, supra note 51 at p. 240.

Dr. Roemer is with the University of California Institute of Government and Public Affairs, Los Angeles, Calif. 90024.

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ONE HUNDRED AND TWENTY CHILDREN BORN AFTER APPLICATION FOR THERAPEUTIC ABORTION REFUSED

(By Hans Forssman and Inga Thuwe)

INTRODUCTION

The aim of the present study was to determine the mental health, social adjustment and educational level of children born after their mothers had applied for legal abortion on psychiatric grounds, and been refused. For this purpose we compared a series of children born of these pregnancies with an equally large control series, following all the subjects up to their 21st birthday.

Therapeutic abortion was first officially legalized in Sweden in 1939 and during the years of relevance to this study it was permissible on the following grounds (which are still valid):

When, because of disease, physical defect or weakness in the woman, the birth of the child would endanger her life or health.

When the pregnancy is the result of a felony, such as rape or incest, or intercourse with a girl under 15, or of the woman being made to submit to intercourse against her will because of being dependent on the man, or when it is any other way the result of gross violation of the woman's freedom of action.

When the expected child might inherit a mental disease, mental deficiency, or a severe physical disease or deformity, either from its mother or father.

On July 1, 1946, the law was broadened to include the following indication:

When, in view of the woman's living conditions or other circumstances, it can be assumed that the birth and care of the expected child will seriously undermine her mental or physical health.

This indication came too late for the mothers of the present subjects. It has led to much debate in Sweden, but the psychiatrists at our hospitals seem to have based their recommendations for or against abortion on essentially the same grounds before 1946 as they did afterwards.

Much has been written about abortion during recent years. Among Swedish studies are: *Lindberg's* (1948) What does the woman do when the psychiatrist says no to her application for abortion?; the social worker *Karin Malmfors'* (1951) follow-up study of 200 women who had applied for abortion; *Ekblad's* follow-up study (1955) of 479 women granted an abortion on psychiatric indications; *Arén & Amark's* (1957) study of the outcome in 244 cases of authorized but unperformed abortions; *Aréns* (1958) study of 100 newly delivered mothers who had a former pregnancy prematurely terminated on legal grounds; *Kerstin Höök's* (1963) follow-up study of 249 women refused a legal abortion. *Schlaug* (1952) studied the male partner in 488 cases of application for abortion. *Ekblad's* and *Höök's* publications also contained data on the men concerned.

Thus several studies have been made of the mothers and fathers involved in cases of abortion. But little has been written about the third member of the trio involved—the unwanted child. *Arén & Amark* (1967) related that 12 out of 162 children born to women who had gone through with their pregnancy were sent to a foster home for permanent care or adoption. *Malmfors* (1951) related that 7 out of 85 children born after

an application for abortion had been refused were left for adoption. These authors said nothing more about the fate of these children, and *Arén & Amark* did not check their information in the official registers. Furthermore, both these studies were made between 3 and 5 years after the children were born, when they were too young to permit any conclusion about their mental health or social adjustment. *Höök* (1963) followed a number of features in 204 children in her series until they were 8½ years old, on the average, the ages ranging from 7 to 11½; 15 were left for adoption; the rest of her data about the children cannot be compared with any of the figures from the present study. This seems to be all that is written in Sweden about the fate of these unwanted children.

The Danish author *F. B. Nielsen* (1960), refused, 2 were stillborn, 82 healthy and 8 abnormal in some respect. But his children, too, were too young to permit any conclusion on their mental health and social adjustment.

It is beyond the scope of this investigation to go into the lengthy debate that has been going on about the legislation governing premature termination of pregnancy. Extensive reviews of this are given in the publications of *Ekblad* (1955) and *Hook* (1963).

The problem of abortion was given particular attention in the December 12, 1964, issue of the Lancet, which contained articles by *Tredgold* and by *Uhrus* and a leading article on the subject. The leading article concurred with the demand made at a meeting of U.S.A. specialists in 1955 for "more research into the background, motivation, mechanisms and results" of therapeutic termination of pregnancy.

As therapeutic abortion was not regularized by law in Sweden until January of 1939, it has hardly been possible until now to determine the long-term social and psychiatric consequences for the children born after application for abortion has been refused. In 1960 we published the preliminary results of this study in Swedish.

MATERIAL

Unwanted children

The subjects studied came from Göeborg, Sweden's second largest city, with a population of about 280,000 at the time in question—1939–1942. During these years, the city had only one large general hospital, the Sahlgren Hospital. In October of 1938, a psychiatric department was opened at the hospital, and among its other activities, this department served as a counseling center for mothers seeking legal abortion. During the years of relevance to the present study, it was the only center of this kind in Göteborg. The few cases taken in hand by private practitioners during this period are not included in our series.

Thus, the material for this investigation originates from all the cases of women living in Göteborg who applied for a therapeutic abortion to the Psychiatric Department of the Sahlgren Hospital during the years 1939 to 1941, inclusive, and were refused. These included both the women coming only to the outpatient service and the ones hospitalized for observation. We took 1941 as the last year so that we could follow the children born of these pregnancies until the age of 21.

During the years 1939 to 1941, altogether 197 women living in Göteborg had 199 applications for legal abortion refused, 2 women having been refused for two pregnancies. These do not include any woman who changed her mind and took back her application. In 188 of the 199, the psychiatrist at the department decided against abortion, in 10 cases, which had been referred to the Medical Board, the Board refused to authorize the abortion, and in one case, also referred to the Medical Board, the Board authorized the abortion but the obstetrician refused to do the operation because the pregnancy had proceeded too far.

Three of the 197 women could not be traced. One was a refugee who lived only a short time in Sweden. It is impossible to explain why the other 2 could not be traced; they may have given a false name or only a temporary address. This left 194 women and 196 refused applications.

Sixty-eight of these 196 pregnancies ended in abortion, spontaneous or provoked. Sixty-eight out of 196 is a large percentage—34.7 percent—and undoubtedly many of them were illegal. Since the drop-out rate is indicative to some extent of the kind of subjects chosen for study—the narrower the indications for legal abortion, the greater the number of illegal abortions—it is interesting to compare this figure with those from other Nordic countries on the frequency of interrupted pregnancy after legal permission for abortion had been refused. There is not much point in comparing our figures with those of other than these countries because the conditions differ too much.

Lindberg (1948) found that only 50 (14.5 percent) did not give birth at the expected time out of all 344 women refused an authorized abortion after being admitted as inpatients to the Psychiatric Department of the Sahlgren Hospital between 1940 and 1946. *Hultgren* (1959) found that 14.4 percent of 4,274 women whose petitions for abortion had been turned down by the Medical Board during 1954 to 1956 did not go through with their pregnancy; 224 of the 4,274 were from Göteborg, and 35 of these 224 (15.6 percent) did not go through with their pregnancy.

Thus the percentage of prematurely terminated pregnancies, spontaneous or provoked, was smaller in these two Swedish series than in ours. It is true that all *Lindberg's* women had been under observation as inpatients, as against only 49 of our 199. One probably does not get such a good psychotherapeutic grip on patients only coming to an outpatient service as one does when they are hospitalized. On the other hand, only 83 of 136 Danish women refused legal abortion after observation at the Psychiatric Department at Frederiksberg's Hospital went through while their pregnancies, the drop-out rate in this series thus amounting to 39 percent (*Delcomyn*, 1952).

A more probable explanation for the difference is this. *Lindberg's* series comes from 1940-1946, *Hultgren's* from 1954-1956, and ours from 1939-1941. In 1939 the number of legally authorized abortions in Sweden amounted to 439, in 1946 it rose to 2,378 and in 1951 it reached a peak of 6,328; it then fell slightly, amounting to about 5,000 in 1952-1954, 4,562 in 1955, and 3,851 in 1956. Another way of following the trend is to compare the number of legal abortions with the number of livebirths during the same period. During 1939 to 1942, 0.5 pregnancies were terminated by legal abortion for every hundred livebirths. In 1946 the proportion rose to 1.8, and in 1951 to 5.7. In 1952 and 1954 it was 4.8, in 1955 it was 4.3, and in 1956 it was 3.6.

In short, many more authorized abortions were done after than during the years of relevance to our investigation. Because it was harder to get permission for therapeutic abortion in 1939–1941 than later it is reasonable to assume that more illegal abortions were performed in our series than in later series. *Delcomyn* (1952), comparing the Danish figures for 1945-1949 with those for 1950 and the first half of 1951, found that there were relatively more authorized abortions in the second period, and also that a larger percentage of the women refused a legal abortion went through with their pregnancy the second period. She gave no figures for her observation.

Thus 128 of the pregnancies in our series (representing 126 women) proceeded to term. The result was 134 children, including 6 pairs of twins. Four of the 134 were stillborn, and 8 died within a year, one before it was 2 and one before it was 3. Excluding these 14 cases of early death left 120 children. The present study is based on these 120 all of whom reached the age of 21. They include 4 pairs of twins and 2 twins whose partners had died. Table 1 shows the 120 divided by year of birth and sex.

TABLE 1.—THE 120 CHILDREN BORN AFTER THEIR MOTHER'S APPLICATION FOR LEGAL ABORTION WAS REFUSED, BY YEAR OF BIRTH AND SEX

Year of birth	Boys	Girls	Total
1939		6	15
1940	32	13	45
1941	17	22	39
1942	8	13	21
Total	66	54	120

Control children

All but 1 of the 120 unwanted children were registered in Göteborg when they were born. We chose control subjects for these 119 as follows: When the infant was born in one of the city's maternity hospitals, we took the next same-sexed child born in the same hospital for its control subject. For the 17 born elsewhere, we took the first same-sexed child registered in the city hospitals on the same day. When the control subject died before the age of 21, we replaced it with the first same-sexed child born after it in the same hospital. For control subjects for twins, we took the next pair of twins, same-sexed or bisexed as the case was, born in the same hospital. For the 2 children of twin birth, one of whose partners was stillborn and one died within 3 months, we chose control subjects as if the original children were singletons.

For the control subject of the child born outside Göteborg we took the next child of the same sex registered in the book of the same parish.

SOURCES OF DATA ANALYZED*

From the civil and parish registry offices we found out: whether the would-not-be mother had had her child after her application was turned down; the addresses of the unwanted children and their control subjects from birth until they reached the age of 21; the marital status of the children and whether they in turn had had any children. One control subject lived in another country for six months when she was 18; apart from this we were able to follow every subject from the time they were born until they were 21.

From the child welfare boards (see p. 132) in the various districts in which the subjects had lived, we learned whether they had any of the subject's names in their files, if so, why.

At the child-guidance clinics and youth psychiatry centers in the districts where the subjects lived or had lived we asked whether they had been consulted for mental deviation or illness in any of the subjects. We did the same at all the mental hospitals and psychiatric departments in general hospitals, and at all the psychiatric outpatient services in the districts where the subjects had lived after the age of 15. We also wrote to all the rural and urban psychiatric consulting bureaus run independently of the psychiatric departments in the general hospitals. We were not able to cover all the private practitioners who might have been consulted and we therefore disregarded anything we happened to hear from one of them having been consulted.

Sweden has a central penal register for the whole country, where every act of the author-

*In these analyses we have called a P value of <0.05 probably significant, of <0.01 significant and of <0.001 highly significant.

ities restricting the liberty of an individual is recorded, whether it be sentence to an adult or juvenile prison or internment in some other kind of an institution; also every instance of exemption from legal punishment because of legal irresponsibility, fines above a certain level and fines for crimes for which the alternative is penal servitude. All cases of conditional sentence are also recorded there. After receiving special permission from the government, we went through these files to see whether we could obtain any further evidence of antisocial conduct on the part of the subjects until they reached the age of 21.

We also inquired at all the official temperance boards and social agencies in the districts where the subjects lived after the age of 16. (Not until 16 are persons registered in their own names in the records of the social agencies.)

We inquired about the subjects' schooling in the various school districts to which they belonged. Whenever they proceeded to secondary schools, we inquired at these schools whether they had gone on from them to other forms of study, and about any examinations they had passed. Thus we have full information on all the examinations the subjects passed prior to university. We then learned whether they had studied at any university before the age of 21 by going through the annual lists of the students enrolled at the various Swedish universities.

The information we got from the schools and the files of the social agencies showed that there was no point in inquiring at the agencies for the education and care of the mentally retarded.

In Sweden military service is obligatory for men, but not for women. We enquired at the Swedish Institute of Military Psychology about the fitness group into which the male subjects had been classed, and, if they had completed their military service, about how they had succeeded with their duties there. As a rule the young men must enroll for military service the year they become 18, but they can put it off up to the age of 21 or more for reasons of health or education. When they did this, we sometimes extended our limit beyond the 21st birthday in this one respect.

Three subjects (1 original and 2 control subjects) were the children of leading citizens in small communities, and we felt that it would be unfair to make inquiries about them in the local agencies in their neighborhood. But we got all the information we needed about them from other sources and there being no difference between them and the other subjects in depth of penetration we have included them with the others in the various analyses.

DIFFERENCES BETWEEN ORIGINAL AND CONTROL SERIES

Age, maternal age and social group

The ages of the two series of subjects correspond almost to the day. The greatest difference amounted to 25 days (twin cases).

The unwanted children were born to mothers 30 years old on the average, the control children to mothers of 28, on the average. There is a significant difference here ($0.01 > p > 0.005$).

We also compared the two series for the social group into which they were born, using the norms from the Swedish electoral statistics for the years 1937 to 1940. We did the grouping according to the father's occupation at the time, or if the mother was unmarried according to hers. Children adopted by couples neither of whom was their real parent, were grouped according to the occupation of the adoptive father at the time. But children adopted by men their mothers married after they were born were grouped according to their mothers' occupation when they were born. The result of this comparison is seen from table 2, which also shows how the inhabitants of Göteborg were distributed by social group in 1940.

More of the control than unwanted children were born into group II, and the reverse held for group III. Combining groups I and II gave 25 for the unwanted children and 36 for the control children, against 95 and 84 for group III. Thus the two series did not differ significantly in this respect (p. $\cong$0.10), though no consideration was given to social group when choosing the control subjects.

Seventy-seven pairs, each consisting of one subject from either series, belonged to the same social group, 43 did not.

TABLE 2.—THE UNWANTED AND CONTROL CHILDREN, BY ORIGINAL SOCIAL GROUP

Social group	Number		Percentage		
	Unwanted children	Control children	Unwanted children	Control children	Whole of Goteborg in 1940
I	3	4	2.5	3.3	6.5
II	22	32	18.3	26.7	31.4
III	95	84	79.2	70.0	62.1
Total	120	120	100.0	100.0	100.0

RESULTS OF COMPARING FAMILY AND SOCIAL ENVIRONMENT OF UNWANTED AND CONTROL CHILDREN

Insecure childhood

We considered that the following circumstances in the history of the subjects pointed to an insecure childhood background.

1. Complaints to a child welfare board about the way the subjects were being treated at home.

Every local authority district in Sweden is required to set up a child welfare board whose duty is to see that all children in its district are properly cared for. Up until 1960 the boards were required to interfere whenever children under 16 were being exposed to physical or mental harm through cruelty or neglect at home, or in danger of becoming delinquent because of their parents' depravity, negligence, or inability to bring up their children.

2. The child taken into custody by a child welfare board for protective care.

If consulting with, advising or warning the parents had no effect, or if the board decided that it would be a waste of time to try to persuade the parents to mend their ways, the board had the right to take the child away from its parents for protective custody.

3. Placement in a foster home.

4. Placement in a children's home.

4. Childhood in broken home, i.e. loss of a parent through divorce or death before the child was 15, or birth out of wedlock not followed by legitimization.

Table 3 shows how many subjects in either series were brought up under each of these circumstances. As seen there, 32 (26.7 percent) of the unwanted children were born out of wedlock, against only 9 (7.5 percent) of the control children. The difference is highly significant ($p < 0.001$). Eighty-six pairs (one member from each series) agreed in regard to legitimacy; 34 did not. The parents legitimized 5 of the 32 unwanted children born out of wedlock by getting married 2 to 24 months after they were born, and the parents of 5 of the 9 illegitimately born control children did the same 2 to 33 months later. Eight of the unwanted children were adopted by others than their real parents (7 of these were illegitimate). None of the controlled subjects were adopted.

According to the criteria laid down, 72 (60 percent) of the unwanted children had an insecure childhood, as against only 34 (28.3 percent of the control children. If one disregards the stays in children's homes, many of which were for only a short while, the figures change to 65 (54.2 percent) against 26 (21.7 percent), and the difference remains highly significant ($p < 0.001$).

In short, it is obvious that the children born after an application for abortion had been refused ran a greater risk of insecurity in childhood than did their control subjects.

TABLE 3.—COMPARISON BETWEEN UNWANTED AND CONTROL CHILDREN FOR CIRCUMSTANCES IN HISTORY POINTING TO INSECURITY IN CHILDHOOD (THE SAME CHILD MAY OCCUR IN SEVERAL CATEGORIES)

Circumstances pointing to insecure childhood	Unwanted children		Control children	
Report to children's aid bureaus about unsatisfactory conditions at home	17		6	
Child removed from home by authorities	2		0	
Placement in foster home	19		4	
Placement in children's home	30		10	
Parents divorced before child was 15	23	60	13	22
Parents(s) died before child was 15	10		5	
Born out of wedlock and never legitimized	27		4	
Born out of wedlock and legitimized	5		5	

Disposition to move to other local authority districts

There being more delinquency in cities than in other regions we determined how many of either series had stayed the whole time in Göteborg. Another reason for doing so was that we had unusually good possibilities of getting complete information about these subjects since our place of work is in Göteborg. We also checked whether they differed in tendency to move from place to place.

Seventy-seven (62.2 percent) of the unwanted children stayed in Göteborg until they were 21, and 85 (70.8 percent) of the control subjects. Twenty-one (17.5 percent) of the unwanted children had lived in three or more local authority districts, and 19 (15.8 percent) of the control subjects. Thus the two series agreed well, both for permanency of residence in Göteborg, and for tendency to move from one district to another. There were 55 pairs in which both the original and control subject had lived the whole time in Göteborg.

RESULTS OF COMPARING PERSONAL DATA IN ORIGINAL AND CONTROL SERIES

Psychiatric consultation and hospitalization

Thirty-four of the unwanted children (28.3 percent) had gone to a psychiatric clinic of some kind or received psychiatric care in a hospital. The corresponding figure for the control subjects was 18, or 15 percent. The difference is probably significant ($0.025 > p > 0.01$).

Twenty-nine of the unwanted children had been under the care of a child psychiatrist, 28 only as an outpatient, and one as an inpatient as well. Six had visited a center for adult psychiatry; 3 of these had been hospitalized, one in a psychiatric department at a general hospital, one at a mental hospital, and one at both. One of the latter belonged to the 29 who had gone to an outpatient department for child and youth psychiatry.

Fifteen of the control subjects had visited a center for child psychiatry, all of them only for outpatient treatment. Four had been patients at a center for adult psychiatry, 2 as an outpatient, one at a mental hospital, and one at both a mental department in a general hospital and a mental hospital. One of these 4 belonged to the 15 who had gone to a center for child psychiatry.

The question arises: Was it because the mothers of the unwanted subjects had been in contact with psychiatrists before the children were born that so many of these children were registered at centers for child psychiatry? It may be that, having once consulted a psychiatrist, these mothers found it easier to do so again, whereas the mothers of the control subjects, who had seldom if ever consulted a psychiatrist about themselves, did not go to a psychiatrist for their children unless something was seriously wrong. Likewise, the mothers who had consulted a psy-

chiatrist about abortion might be more apt than others to seek psychiatric advice for other personal troubles afterwards, and if they then complained about their children being nervous, the child might very likely be sent to a psychiatrist while the perhaps equally nervous children of other mothers might not.

In 1959 we determined how many of the mothers up to that year had consulted a psychiatrist for matters not directly concerned with the abortion, but only among the mothers of the 57 pairs in which both partners had lived in Göteborg all the time up to then. Twenty-seven of the 57 would-not-be mothers had gone to one of the municipal psychiatric outpatient departments for complaints not directly concerned with the abortion, and 10 of their children had done so. The corresponding figures for the control series were 9 and 0. It is apparent from this that it was not because the would-not-be mothers had consulted a psychiatrist about abortion that these children went more often than the others to a child psychiatrist. When all the subjects reached the age of 21, the number of pairs living the whole time in Göteborg dropped to 55, but we did not consider it worth while to do the analysis again for this sake.

Delinquency and crime

Our figures for acts of delinquent nature reported to the child welfare boards do not cover drunken misconduct; this will be taken up in the next section.

Twenty-two (18.3 percent) of the unwanted subjects, 19 boys and 3 girls, were registered with the child welfare boards for delinquency, against 10 (8.3 percent) of the control subjects, 9 boys and one girl. The difference is probably significant ($p<0.05$).

The boards had made investigations in 12 of the first 22 subjects and in 4 of the second to determine whether formal charges brought against them should be dropped. This happened 19 times in the original series, 8 times in the control series. Three of the first series and one of the second were removed from their homes and placed in protective custody elsewhere, in accordance with the law then in force, according to which correctional measures must be undertaken when children under 18 show severe forms of maladjustment. One of these 3 unwanted children, as well as the control subject, was sent to a reformatory.

The penal register contained the names of 10 of the unwanted children (8.3 percent) and of 3 control subjects (2.5 percent). The difference is not significant ($0.10>p>0.05$). Nine of the first 10 were male, one was female. The control subjects were all male.

Drunken misconduct

The records of the official temperance boards contained the names of 19 of the unwanted children (15.8 percent) and 13 control subjects (10.8 percent) for drunken misconduct. The difference is not significant ($0.50>p>0.30$). Two of the first 19 subjects were women. The 13 control subjects were all men.

Public assistance

Seventeen of the unwanted children (14.2 percent) had received some form of public assistance between the ages of 16 and 21, and 3 of the control subjects (2.5 percent). The difference is significant ($0.005> p >0.001$).

Only one subject, a boy in the control series, received a disablement pension from the government; he was an idiot and permanently institutionalized.

Educational subnormality

Under this heading we included all the uneducable subjects, the ones taught in special schools for the mentally retarded, those whose last year at school was spent in a special class. In the last group we also included a few subjects whose educational subnormality was well documented, but who were taught in ordinary classes because there was no form of special training available to them.

The large cities have a graduated series of special classes in the ordinary schools called remedial reading classes, observation classes, extra classes and health classes, but we paid no attention to the kind of special class the subjects pupil attended, mostly because it depended on where they lived what kind of class they could choose from.

According to these criteria, 13 of the unwanted children (10.8 percent) were educationally subnormal, as against 6 of the control subjects (5.0 percent). This difference is not significant ($p=0.10$).

There was one case of well documented mental retardation both in the original and in the control series.

Theoretical studies beyond the obligatory

On drawing a line between the subjects who had done more advanced theoretical study than that required by the school law, and those who had not, we found that only 17 (14.2 percent) of the unwanted had had some form of higher education, as against 40 (33.3 percent) of the control subjects. The difference is highly significant ($p <0.001$).

Eight unwanted and 12 control children had taken university entrance examinations. Five unwanted children and 11 control children had studied at a university. Neither of these differences is significant.

As mentioned (table 2), more of the control than original subjects came from social group II and the reverse was true for social group III. As a child's education depends a great deal on the social standing of its parents, we also compared the schooling in the two series after excluding the subjects left over when the two kinds of subjects were paired according to social group. This left 77 subjects in each series. Ten of these 77 (13.0 percent) unwanted children had had some form of higher education, against 21 of the 77 control children (27.3 percent). The difference is probably significant ($p <0.05$).

One can also study the effect of social standing on the education by taking one social group at a time; for this we had to combine groups I and II, as there were too few cases in group I. Five of the 95 unwanted children (5.3 percent) coming from group III had had higher education, against 17 of the 84 control subjects (20.2 percent) coming from the same social group. The difference is significant (p 0.01). The figures for group I+II were 11 out of 25 (44.0 percent) against 28 out of 36 (77.8 percent). Here the difference is probably significant ($p <0.05$).

Continuing with these calculations, chi square amounts to 7.93 for social group III and to 5.89 for I and II combined. The sum 13.82, with 2 degrees of freedom gives a p of <0.001, showing a highly significant difference for the three social groups combined.

Thus it was not differences in proportion of different social groups that caused the difference in schooling between the unwanted and control children.

Military service

Ten of the 66 males in the original series (15.2 percent) were judged unfit for military service, either at the time of enrollment or after they had started, as opposed to 4 (6.7 percent) of the control subjects. This is not a significant difference ($0.20 >p> 0.10$). According to our information, 4 of the 10 first males were exempted for mental reasons; our information in this respect may not be complete, however. Two of the control subjects were exempted on these grounds.

When a Swedish recruit enrolls, he is classified into one of four groups according to his fitness for military service, from group 1 for a completely satisfactory condition down to group 4 who are assigned to fatigue duty. Apart from exemption from service, our two series were distributed very much alike by fitness for military service.

Marital status and parenthood

As we only followed our subjects up to the age of 21, we cannot say much about how they compare with regard to marriage and parenthood. Some differences did emerge, however.

Twenty of the unwanted children (17 women, 3 men) married before the age of 21, and 14 of the control subjects (9 women, 5 men). The difference is not significant here, either for the sexes combined or for one of them.

Two of the female subjects from the original series had also divorced before the age of 21; none of the control women had done so, and no man from either series.

We restricted our analysis of parenthood to the women, as there was no hope of getting reliable figures for the men in this respect. Fourteen out of 54 women from the original series had had 19 children before they were 21, 4 out of wedlock, and 7 of the 54 female control subjects had had 9 children, 3 out of wedlock.

It is impossible to draw any conclusions from these figures. It will be noted, however, that the control series (which had more education on the whole) contained fewer cases of early marriage and of young mothers. This tallies with the observation that the age of marriage and parenthood rise with the degree of education.

Freedom from defect in all respects studied

Sometimes the same subject will occur in more than one of the groups studied here. Thus a subject registered with the authorities for abuse of alcohol will often be found in the files of the centers for child psychiatry as well; a man who has been in a mental hospital will sometimes be exempted from military service; an uneducable subject will be registered as receiving public assistance, as being educated in a special class, and so on. It is interesting, therefore, to compare the two series for the number of subjects showing no defect in any of the respects studies, i.e., registration for antisocial behavior in the books of the child welfare boards or penal register; official registration for drunken misconduct; education in a special class or school, or uneducability; public assistance or government pension; visits to psychiatric inpatient or outpatient departments during childhood or adulthood. Fifty-eight (48.3 percent) of the unwanted children showed none of these defects against 82 (68.3 percent) of the control subjects. The difference is significant ($0.005>p>0.001$).

Taking social group III separately from I and II combined showed the following: Forty of the 95 unwanted children (42.1 percent) coming from group III showed no defect, against 54 of the 84 control subjects (64.3 percent) from the same group. The difference is significant ($0.005>p> 0.001$). The corresponding figures for group I and II combined were 19 out of 25 (76.0 percent) against 28 out of 36 (77.8 percent). Here the difference is not significant.

The same analysis of the 77 pairs concordant for social group gave 34 unwanted cases (44.2 percent) showing no defect, against 54 control (70.1 percent). The difference is significant ($0.005>p> 0.001$).

Similar analysis of the 55 pairs living in Göteborg the whole time gave (36.4 percent) showing no defect against 38 (69.1 percent). The difference is highly significant ($p <0.001$).

As children from broken homes are more apt than others to be antisocial and mentally disturbed, we compared the two series for the number of cases showing none of the aforementioned defects among the subjects who

had lived with both their real parents until they were 15. Thirty-three out of the 60 such subjects from the original series (55.0 percent) showed none of these defects, and 68 out of the 98 control subjects of this category (69.4 percent). The difference is not significant ($0.10 > p > 0.05$).

DISCUSSION

Table 4 gives a survey of the ways in which the children born after their mother had been refused a legal abortion differed from the control series of same-aged subjects chosen at random. As seen there, the unwanted children were worse off in every respect, the only exception being due to the one case of a government pension which came from the control series. The differences were often significant, and when they were not, they pointed in the same direction (except for the case just mentioned)—to a worse lot for the unwanted children.

When one looks for a reason for the differences, one is struck mostly by the greater frequency of factors tending to disrupt the stability of the home in the case of the unwanted children, such as birth out of wedlock, and death or divorce of their parents while they were still young. In other words, not as many unwanted children were brought up by both their real parents as were control subjects. Probably as a corollary of this, more of them were brought up by foster parents of in children's homes. But the latter may also have been a consequence of the greater number of complaints to the children's welfare boards about the way in which they were being treated at home.

The difference that turned up most consistently in various forms of analysis was the difference in amount of education. Whatever categories of subjects were studied—different social ranks or different subgroups of the same social rank—the unwanted children got a significantly smaller amount of education than the control subjects.

TABLE 4.—SURVEY OF IMPORTANT DIFFERENCES BETWEEN THE UNWANTED AND CONTROL CHILDREN

	Unwanted children			Control children			
	Number in resp. series	Feature present		Number in resp. series	Feature present		Level of sign. of difference
		Number	Percent		Number	Percent	
Psychiatric consultation and hospitalization	120	34	28.3	120	18	15.0	*
Registration for delinquency at children's aid bureaus	120	22	18.3	120	10	8.3	*
Registration for crime in penal register	120	10	8.3	120	3	2.5	—
Registration for drunken misconduct	120	19	15.8	120	13	10.8	—
Public assistance between age of 16 and 21	120	17	14.2	120	3	2.5	**
Subnormal educability or uneducability	120	13	10.8	120	6	5.0	—
Theoretical studies beyond the obligatory:							
Whole series	120	17	14.2	120	40	33.3	***
Subjects in pairs congruent for social group	77	10	13.0	77	21	27.3	*
Subjects from social group III	95	5	5.3	84	17	20.2	**
Subjects from social groups I + II	25	11	44.0	36	28	77.8	*
Exemption from military service	66	10	15.2	66	4	6.7	—
Freedom from inferiority in above respects:							
Whole series	120	58	48.3	120	82	68.3	**
Social group III	95	40	42.1	84	54	64.3	**
Social groups I + II	25	19	76.0	36	28	77.8	—
Subjects in pairs congruent for social group	77	34	44.2	77	54	70.1	**
Subjects living all their life in Göteborg	55	20	36.4	55	38	69.1	***
Subjects brought up by both their real parents	60	33	55.0	98	68	69.4	—

The reason the unwanted children had had so much contact with psychiatrists was probably not—as we showed—that their mothers found it easier to consult a psychiatrist about their child because they had once before consulted a psychiatrist about themselves. It was probably because these mothers were more vulnerable mentally than the others, and passed on this failing to their children, either through genes or through the effect it had on the home environment, or both.

The investigation has shown that children born after their mothers have been refused permission for legal abortion are born into a worse situation than other children. From this one may assume that the children who are not born because their mothers get authorization for abortion would have had to face still greater disadvantages, socially and mentally. Thus, the very fact that a woman seeks an authorized abortion, no matter how trivial her grounds may appear to some, means that the expected child will run a larger risk than its peers of an inferior standing in life. In our opinion, the present investigation shows that the provisions for therapeutic abortion in the law should not only aim to prevent the private tragedy; they should also aim to improve mental hygiene in a wider sense. Thus the legislation should also consider the social handicaps awaiting the unwanted child, not only, as it does now, the genetic risk in the narrow sense of the terms.

SUMMARY

The authors examined 120 children born after their mothers had applied for therapeutic abortion on psychiatric grounds had been refused, comparing them with an appropriate control series of the same size. All the subjects studied lived and were followed up until the age of 21. Data were assembled from civil and ecclesiastical registry offices, social agencies, school authorities, military authorities and all the psychiatric inpatient and outpatient departments everywhere the subjects had lived. It was ascertained how many of each series had been registered for mental ill-health, antisocial and criminal actions, drunken misconduct, and different forms of public assistance; for the men it was ascertained how they had got on during their military service; likewise the marital status, number of children, and school ability and educational level was determined.

A study of the social features revealed that many more of the unwanted than control children had not had the advantage of a secure family life during childhood. They were also registered more often in psychiatric services, and a few more of them than control subjects received psychiatric care. They were more often registered for antisocial and criminal behavior, and slightly more often for drunken misconduct, and they got public assistance more often than the control subjects. A few more of them were educationally subnormal and far fewer had pursued theoretical studies over and above what is obligatory. They were more often exempted from military service. More of the females married early and had children early than in the control series. The differences between the two series in these respects were often statistically significant, and when they were not significant they always pointed in the same direction—to the unwanted children being born into a worse situation than the control children. Table 4 gives figures for most of the features just mentioned.

The authors conclude that the very fact a woman applies for legal abortion means that the prospective child runs a risk of having to surmount greater social and mental handicaps than its peers, even when the grounds for the application are so slight that it is refused. In their opinion, the legislation of therapeutic termination of pregnancy should also consider the social risks to which the expected child will be exposed.

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Socioeconomic Outcomes of Restricted Access to Abortion

(By Charlotte Muller, Ph. D., F.A.P.H.A.)

The recent changes in the legality of abortion in the United States through repeal, reform and court action, and the various court cases and legislative movements in the current news, have changed the nature of the problem of access to a large degree. Once chiefly a matter of leveling legal barriers, the access problem now relates to financing, referral, organization of appropriate facilities for care, and patient factors influencing utilization in different social and age groups. The implications of restricted access to care, the subject of the present paper, apply, for different reasons, to post-repeal states (Alaska, Hawaii, New York and Washington), to reform ("health and life"*) states such as California, and to states with old-style laws, which still constitute the majority.

The small market for legal abortions in states with old-style laws has been restricted in access to a certain number of women of means who are able to procure private medical and psychiatric care [8] in hospitals amenities. Meanwhile, their less affluent sisters have rarely been able to receive medically equivalent care in the wards of public hospitals and as service patients in voluntary hospitals. These facts have been well-documented by Hall for hospitals in New York City, New York State, and the United States in reports showing ward/private differences in the ratio of abortions to deliveries, and similar differences between public and other hospitals.[5 6]

The far larger market for illegal abortions (and now, for out-of-state legal abortions) has also been class-structured in that it was the non-poor candidate who could afford jet travel to a service area or the attentions of a qualified physician, although without hospital protections or amenities, in an illegal abortion. The poor candidate was more likely to end up in the hands of the non-medical practitioner or to substitute crude attempts at self-induced abortion through chemical and physical means.

Imperfection in the market inheres in uneven access to knowledge of sources of supply as well as in uneven access to suppliers for economic, social class, and geographical reasons. The result of market imperfections including legal constraints on entry is a lessening of consumer welfare, and in particular, a restriction on the option of couples to choose a fertility level consistent with their total set of preferences of leisure, material goods, the company of children, and the educational package they consider normal for each produced child.[4]

Unlike some other health services, the improved accessibility of abortion (which for the poor is a matter of present concern) is evidently a service whose utilization greatly rises in the event of legal accessibility. This is shown by the experience of countries which have passed laws broadening the grounds for abortion to include health as well as life of the mother and admitting socioeconomic considerations. It is also shown in states like California and Calorado which have liberalized the law.[1] A more advanced law in Great Britain was followed by a shift in performance of abortions from private auspices to National Health Service financing, as well as an over-all rise.[16] With wider legal access, the seeking of inferior substitutes, including attempts at self-induced abortion, will doubtless decline, with direct improvement in the maternal death rate among black and Puerto Rican women.[4] It is not clear that all latent demand would be satisfied: some women are held back by the lack or privacy of official procedures, and review committees as in states where "health and life" are accepted grounds; some physicians would continue to refuse to perform the operations; and, some women would deny the reality of the pregnancy until late in its course as they now do. The price of the service would still be a factor in utilization, although it is not easy to say just how elastic the demand is where the legal barrier exists.

Barriers to legal abortion affect the ratio of unwanted children born. Low-income couples express the same family-size goals as higher income couples,[7a] but are less successful, on the whole, in the use of contraception. The leverage power of abortion in adapting actual to desired family size is thus of relatively greater importance for low-income groups.

However, it is necessary to have a limited expectation of the extent to which, based on the foregoing, reduction in unwanted birth will solve poverty problems. So long as poor couples desire 3 or 4 children—or more—available means of birth prevention would not necessarily be used to control family size and per capita income would remain low. And, independent of family size among the poor, the reduction of poverty requires a variety of specific programs to deal with low job skills, deficient labor market organization, family health needs, and income maintenance problems, to cite a few items of the national agenda.

The negative effect of unwanted births on family economic and social welfare is felt by way of defects in the timing of the first birth, defects in spacing the interval between children, which affects family capacity to accept the new child, and defects in terminating family formation. Although the reduction of welfare is really the joint result of limitations of the present arrangements for birth control (deficient access, failure to utilize and imperfections in method) and of restricted access to abortion, it is nevertheless possible to avert negative outcomes by better availability of abortion alone, and this is especially true, for the reason cited above, for low-income groups.

One of the important situations relates to the separation of the teen-age male from the educational process.

Alvin Schorr has beautifully presented the mechanism and the evidence linking the family cycle and economic life. Early marriage is generally forced marriage, the result of premature pregnancy. The younger father leaves school and cannot return. His bargaining power in the job market is poor and his first job choices are in low-opportunity situations as a result of immediate necessity, lack of information, and low skill. He may also fail to find work. The marriage of the young is less stable, statistically speaking, than that of a later age, but the probability of a large family is also associated with early age of marriage. Whether the family is separated or united, the burden of support prevents the young adult from experimenting with various types of work. And the family fails to accumulate capital for any decisive improvement in circumstances such as additional training.

Statistical support for this model includes:

1. The high percent of premarital pregnancy in school-age marriage (one-third of all school age marriages, 87% where both spouses were high school students).

2. The larger family size for both white and black mothers who marry at 18 compared with 2 or 3 years later (white, 3.7 compared with 2.8 children; black, 4.3 compared with 4.0 children). This comparison also reveals the limited success of black families at birth control, with age of marriage having less effect on family size than among whites.

3. The occupational distribution of teenage males compared with older workers.[15]

In 1966 there were 1.2 million young males aged 16 to 21 who were school dropouts and members of the labor force. Sixty-one per cent of them worked as operatives and nonfarm laborers.[21a] (This number rose to 1.6 million in 1969.)[21b]

The crucial outcome in terms of the economic history of the teen-age male is the reduced lifetime earnings of a man who has not completed high school, and again the greater earnings of the college graduate compared to the high school graduate.† Differences also show up in a cross-section. Let us compare just two educational levels within white and black groups. Money income figures for 1968 by years of school completed show 5.9 million white family heads who are college graduates with median income of $13,589, and 7.1 million who started but did not finish high school with median income of $8,525. In non-white families, where the head finished college, the family income was $12,472 (267,000 families); where he started but did not finish high school (1.0 million families), the median income was only $5,766.[21c]

The ratios implicit in the above income figures would be altered with changes in the relative supply of males at the different educational levels, and are also influenced by the structure of demand for workers at different levels. But the return on human capital added by educational processing is real, and it is estimated that four-fifths of high school dropouts are intellectually capable of additional education.[20]

Another problem for economic improvement in the family concerns job-seeking by the mature woman with children. The crucial statistics is that median family income (1968) is 30 per cent higher for families with a male head when the wife is in the paid labor force than when she is not.[21d] The presence of children under six is a deterrent to labor force participation.[22] It is true that an untrained woman may not add greatly to family resources by her employment. What this implies, perhaps, is that training programs are needed to capitalize on the economic opportunity presented to the family by the mother's freedom from pregnancy. It also calls attention to the compulsory school-leaving for girls consequent on pregnancy in many communities, a factor which adds to the effect on long-run family earning potential described above for teen-age males. Girls who started their families in their teens, in their maturity make up a portion of the group of untrained women. Finally, for married women, mothers of young children, who must work out of financial necessity—48 per cent of those who took jobs in 1963 did so for this reason [24]—unsatisfactory arrangements for child care represent a family price that is paid for their labor force participation and a possible source of fluctuating availability for work. To a considerable degree this is also true for middle-class women who wish to work for personal satisfaction and extra income.

Like the married woman returning to the labor market, the young widow is available

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Footnotes at end of article.

for employment to an extent dictated by the age of her youngest child and the number of her children. Half of widowed mothers with 3 or more children did not work at all in 1962, compared with 28 per cent with only one child, and the former group tended to work part-time, if at all. Since parttime employment is in lower-paying occupations, earning power was doubly affected. Furthermore, employment and earnings after termination of child care benefits under Social Security are found to be greatly affected by work experience in the preceding 5 years. Hence, the economic potential of young widows is greatly influenced by size and spacing of families.[29]

A third economic problem exacerbated by uncontrolled family size is present poverty. According to Mollie Arshansky,

"The family with 5 or more children was still (in 1966) 3½ times as like to be poor as the family raising only one or two, and . . . almost half the poor children were in families with 5 or more children." [12a]

She further points out that large family size (4 or more children) was found in an increasing number of poor families where the head was a fully employed worker (37% in 1965).[12b] How poor is poor? The medium income of a poor family with male head in 1966 was $3,308 for a 4-child family, $3,590 for a 5-child family, and $3,440 for a family of 6 or more children.[12c]

About one-fourth of poor families, and about one-fifth of near-poor families, had 4 or more children[12d]—or 2,214,000 out of 15,240,000 families in the poor and near-poor categories.

The family income figures for the large poor family are equivalent to per capita income of $552, $513, and $430 (or less) respectively. In sharp contrast the lowest budget standard for a 4-person urban family, as priced by the Bureau of Labor Statistics in 1967, was $5,915 or $1,479 per capita.[23]

The immediate consequence of spreading fixed family resources over more persons is fewer goods and services per capita. Transfer payments received by about one-fourth of the poor (assistance, Social Security payments, veterans' pensions, and other devices to transfer current national income between persons by the tax-spending mechanism) are already counted in current income. Even with public assistance the large poor family could not hope to consume at anywhere near the lowest budget standard of the BLS.

Children who lack a welcoming and nurturing parental home can be counted along a continuum of extrusion from the family of origin. The continuum includes adoption, foster home placement, court action for neglect and dependency and less severe but indifferent or otherwise unsatisfactory parental role performance within the family of origin. To count numbers involved is to become cognizant of the numbers of children affected by various degrees and causes of being unwanted during childhood, although one cannot infer that the child was unwanted during the pregnancy. The program costs involved, as in foster or institutional care, must be reduced by the amount of the maintenance component, which would be incurred (although not necessarily at the same level), regardless of where a child is raised. However, program costs would be higher if services such as schooling for pregnant girls were more adequate.

One measure of children with a problem related to their birth is out-of-wedlock births. The number in 1967 was 318,072, with the figure expected to reach 403,000 by 1980 without any increase in rate. (The rate was 24 births per 1,000 unmarried women ages 15–44 in 1967.) Forty-seven per cent of these births are to girls under 20 years of age.[11] Illegitimate births were 9.7 percent of total live births in 1966.[21e] Occasionally, out-of-wedlock births are not unwanted, and some are followed by marriage.[14] If this indicates that the figure overstates the problem, it should be remembered that many births in married women are undesired as well as unplanned. One even finds children placed for adoption with both parents living and together. Both in this group and in children retained in the family origin are children born after pregnancy has been followed by marriage.

Another aggregate cited is the number of children given for adoption. This group numbered 158,000 in 1967, or 82.3 per 10,000 children under 5,[21f] but only two-thirds of these were out-of-wedlock births.[18] Extra-legal but permannent adoptions add to these figures.

Many children are not adoptable because of defect or retention of parental rights by incompetent parents or for reasons of racial or religious prejudice. Yet adoptions certainly provide a minimum estimate for the occurrence of preventable births.

The unwanted child is not necessarily indicated by birth order. A wealthy family can provide for a fourth or fifth child materially, and with personal care. A poor family, or one where the mother has a health impairment, may not be able to welcome a third child. Nevertheless birth order, especially in conjunction with income level, is a useful measure of the problem of preventable births. Orshanky's figures yield a count of at least 2.2 million fourth children in birth order among the poor and near-poor, 1.3 million fifth children, and .7 million sixth children.[12e] These figures may be compared with average family size preferences of 2.9 children for non-whites and 3.3 for whites.

It may be pointed out here that in a study of cases of service parental neglect, the average family size was 8 people. The neglectful family was cited as having inadequate diet, irregular meals and poor food preparation; lack of cleanliness, absence of routine; and neglect of medical problems. Apathy was the predominant attitude. There was a lack of internal and external means for building a positive life-style. The children were often having trouble in school.[30]

The possibility of identifying unwanted children by comparing family-size goals with family size achieved depends on the time at which desired family size is ascertained, since people adapt their announced goals in the event of pregnancy (and a portion of them even succeed in adapting their attitudes and behavior).[3] Conversely, a child originally desired may become unwanted because of the likelihood of deformity, the death or disability of a parent, income change—or the breakup of the marriage. (This change in status of the child has a bearing on the question of abortion only insofar as the change occurs soon after conception.)

If correct, this comparison is a powerful measure. It reaveals between 750,000 and 1,000,000 excess births a year between 1960 and 1965. These figures are based on a reanalysis of 1965 national survey data by Charles F. Westoff. The lower estimate is based on births unwanted by both parents, and the higher, on births unwanted by at least one parent. If one uses the higher estimate, 445,000 births among the poor and near-poor are classed as excess, or 42 percent of all their births, compared with 17 percent among the non-poor. The incidence of unwanted births increases rapidly with birth order. The estimates cited are minimal in that births retrosepctively rationalized by the parents, and births representing timing failures, are omitted.[22]

Children born and living their early years under psychological rejection by mothers, social abandonment by fathers, poverty and other disadvantaged conditions, are exposed to risk of impaired development which, regardless of all other consequences, is economically important as a cause of inferior earning power at maturity. In the several aspects of this problem to be discussed, it is suggested that it is chiefly impaired educational chances which threaten future economic potential. Let us look first at mental retardation.

Seeking of prenatal care late in pregnancy, and inadequate nutrition, are typical or frequent in unwanted pregnancies. At least for high-risk mothers, late care and nutritive lacks are a factor in complications and prematurity, which in turn are found to be related to impaired learning potential. Pasamanick has pointed out that very young mothers and older women had a higher risk of producing mentally defective children, and increasing birth order also increased the risk.[13a] It has also been noted that the extra medical risks of pregnancy among the very young are complicated by the unmarried status and poverty of the adolescent girl typically involved.[17]

Although the status of being unwanted does not predict a certain incidence of mental retardation, in the sense of being either a necessary or a sufficient cause, it is pertinent that of the many births among the poor, who are exposed to the hazards which may lead to mental retardation, a large per cent appear to be unwanted.

Since mental retardation is a multi-caused phenomenon in which the nurture, educational stimulation and social opportunities of the child affect outcome, it is surmised that a mild handicap (the more typical case) is continually reinforced in the large, poor, culturally isolated family.

Furthermore, once adolescence is reached, access to higher education and to jobs with responsibility for large assets is dependent on being in the upper track of learners. The chance to increase earning power either by adding to human capital or by associating with expensive cooperating factors of production is impaired by mild mental retardation.

General mental health of the infant is said to be affected by the same considerations of the prenatal environment as applied to development of learning capacity. Pasamanick mentions 5 clinical entities in children significantly associated with complications of pregnancy and prematurity: cerebral palsy, epilepsy, mental deficiency, behavior disorders and reading disabilities.[13b] "Cases" differ from controls not in operative procedures or in long and difficult labor, but in long toxemias and bleeding—i.e., in medical rather than obstetrical features. Summing up, Pasamanick states:

"There exists a continuum of reproductive insult, at least partially socio-economically determined, resulting in a continuum of reproductive casualty extending from death through varying degrees of neuropsychiatric disability." [13c]

Acceptance by and interaction with parents continues to be an influential factor in the course of mental health throughout childhood.[10, 27]

In a study of cases of children requiring agency foster care in New York City, 10 per cent of initial placements were due to severe neglect or abuse and 33 per cent to family problems including rejection milder than the preceding category.[9] An annual figure of 154,000, 2.1 per 1,000 children, for juvenile court cases of dependency or neglect, in jurisdictions covering two-thirds of the population under 18, is said to be an understatement of the incidence of this problem.[19a]

Impaired mental health interferes with the formal educational process (for example,

Footnotes at end of article.

when there is a behavior problem in the classroom) and with socialization of the child so that he can perform in the labor market at the maximum level for his capacities. At the extreme, delinquency and punishment or other social response removes him from the conventional developmental sequence. It is noted that delinquents often come from broken homes or have many brothers and sisters. A correlation is also noted between adolescent misbehavior and the absence of the father or limited opportunity to identify with him.[28a] (We note about 700,000 children in juvenile delinquency cases in 1967, or 2.3 per cent of those between 10 and 17 years, and an upward trend in rate.)[19b]

Educational growth of the child is recognized to be handicapped in the large family where income and parental time are inadequate. (Income is a substitute for time as when the mother reads to the four-year-old while a sitter walks the baby, or when the four-year-old is sent to a private nursery school while the mother tends the baby.) This problem is broader than the case of actual retardation or diagnosed mental illness in a child.[28b]

Finally, the large poor family is less likely to secure medical attention for its children.[26] The number of school days lost because of illness is greater than for higher income groups.[25] Nutritional defects add to time of recovery after infection and are related to days of school missed. Continuous school attendance has significance for development of human capital.

SUMMARY

It is difficult to assign a weight to the importance of births in excess of desired family size, or births ill-timed in terms of family welfare, in the creation of social problems of neglect, delinquency, psychological and social incapacity to care for children, and the like. Nor is it easy to isolate the effects of this factor on the set of job *vs.* education choices made by the young father, the difficulties faced by the mature woman in planning re-entry to the labor market, and the experience of being a youthful consumer at the poverty-level of income. Equally, the underdevelopment of human capital by reason of mental retardation, physical and psychiatric health problems, and educational undernourishment defies exact division among specific causes. However well research methods for dealing with multi-caused phenomena succeed in elucidating these relationships in the future, there is in any event food for thought in the present. Ability to control family-size, including the right to abortion, must essentially seek approval on its merits. Personal freedom, equal access to care, and medical protection of the poor are all involved. Yet the discussion cannot help being influenced by observed associations between unplanned births and poverty, untimely marriage, and creation of stress on parental capacities of the more vulnerable for whatever reason.

FUTURE RESEARCH

The design of relevant research concerning access to, and financing of, abortion services calls for flexibility because of the fluid situation which now exists with respect to law and policy. If realistic, such research can be useful in guiding policy choices.

1. *Financial needs of patient groups* can be identified by studying total service costs under different marital, social, racial and medical-clinical situations of the patient. Women who have had illegal abortions appear to be more willing than it was previously assumed to reveal information bearing on incidence, prevalence, and attendant circumstances.[31] Legality should improve the information flow. This may make it possible to develop estimates for direct costs for medical care and associated travel, and for the indirect costs of lost work-time and child-care replacement, both on a per case basis, and for aggregates. The present cost of surgery, hospital days, and pregnancy tests, determined by familiar methods of medical care research, can serve as a guide to the program expenditures that would be necessary to assure economic access for the low-income woman as state laws yield to the reform movement.

2. Systematic observation of the medical and behavioral *effects of non-hospital service programs,* and of the use of manpower and facility space resources which they entail, could be carried out as such programs are mounted. Such study will aid in developing and revising standards for a non-hospital service.

3. Understanding of one and two is essential for the design of an adequate prepayment benefit: this task needs to be supported by *continuing surveillance of present coverage and gaps.* Insurance entitlements for maternity in the private sector vary widely by employment group and carrier.[33] Nevertheless, a knowledge of current practice as to waiting periods, in-hospital care requirements, payment schedule limits, and family contract conditions is needed for policy purposes. Public sector entitlements have their own sources of geographical and program variation within military dependents, welfare and OEO medical care programs.

4. Finally, *manpower needs* are crucial in view of previous unmet demand. The assessment of additional training required to prepare practicing physicians and medical students to participate in the provision of abortion service is one task, and the appraisal of the attitude of professionals focuses on an element as important as numbers with requisite preparation. The possible role of paraprofessionals is a related theme for health manpower research. This is especially interesting, because in creation of a service able to handle a mass demand, traditional guild issues may be somewhat subdued.

States which have liberalized their abortion laws constitute a natural laboratory for the trial of new approaches in regard to financing, organization, manpower, and referral. Although little advantage has yet been taken of this fact, evaluation of early experience should be encouraged to aid in the development of appropriate social mechanisms for service.

FOOTNOTES

*With account taken of present and future environment in determining the risk to health in Oregon's law.

† Data for 1968 estimate lifetime incomes for males 25 years and over by years of schooling: 1–3 years of high school, $294,000; 4 years of high school, $350,000; 4 or more years of college, $586,000. (*Statistical Abstract of the United States,* 1970, p. 111.)

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GEOGRAPHIC DISTRIBUTION OF NEED FOR FAMILY PLANNING AND SUBSIDIZED SERVICES IN THE UNITED STATES

(By Raymond C. Lerner, Ph. D.)

INTRODUCTION

A study, *Need for Subsidized Family Planning Services: United States, Each State and County, 1918*, has recently been released by the Family Planning Office of the Office of Economic Opportunity. This paper will review the purpose and design of the study, and discuss findings which relate to the distribution of women at risk, the number reported served in subsidized programs, and the number unserved, by county, for the United States.

The object of this work was to collect, for each of the 3,072 counties in the U.S., basic data on the need for subsidized family planning services, the services currently available, selected characteristics relevant to need, and resources available for the delivery of services.

The purpose in compiling and collecting such data was, for the first time, to develop a capability for estimating the level of organized family planning services in the U.S. In addition, such information could assist in planning by making it possible to examine where program inputs were going and where they were needed. A file of this nature, it was felt, would also provide baseline data useful for monitoring improvements in the distribution of program efforts overtime, and might also serve as a preliminary tool for evaluating the effectiveness of publicly financed family planning programs in reaching program objectives.

For each county in the U.S., selected variables on needs and resources have been compiled from existing sources; however, data on services required field surveys. This paper will deal with only a limited portion of the material on file; the items included in the study for each county are listed in the Appendix.

METHODOLOGY

The report, *Need for Subsidized Family Planning Services: United States, Each State and County, 1968*,[1] includes a full discussion of the methodology and the limitations of data. However, a few important points relevant to the material in this paper will be discussed here.

Population

The basic population denominator and number of women age 15–44 in this work consist of 1966 population estimates for the United States, by county, made by the State and Local Population Estimates Branch, Population Division, U.S. Bureau of the Census.[2]

Need

The total number of women age 15–44 estimated to require subsidized family planning services consist of those who can be classified as medically indigent, fertile, exposed to risk of pregnancy, not currently pregnant or seeking a desired pregnancy. This has been approximated by applying the Dryfoos-Polgar-Varky formula to the census estimates for each county for 1966. The methodology employed by the formula, which was developed at Planned Parenthood, is described in detail in the full report.

Current Services

Because there was no readily available nationwide statistics giving patient figures from which to determine how many women were currently receiving family planning service from organized programs during the period from July 1, 1967, to June 30, 1968, three mail surveys had to be conducted.

We know that health departments, hospitals, and free-standing clinics are the major channels through which subsidized family planning services are delivered, but knowledge of the level of service and the exact locations of service facilities is severely limited. In order to establish a preliminary universe of agencies providing organized family planning services to low-income women, available data from previous reports and surveys were examined for each of these three channels. The field to be surveyed included voluntary and public hospitals, health departments, Planned Parenthood clinics, OEO family planning projects, Neighborhood Health Centers, maternity and infant care projects, and other agencies known to be providing family planning.

It was decided to survey hospitals, Planned Parenthood affiliates, and state health departments—individually and directly—to determine the number of patients served in their programs, and the addresses of their clinics. Responses originating from the same locality were compared for duplications, since combined funding and sponsorship sometimes result in duplicate reporting. When necessary, responses were also edited for conversion from visits to persons served since some agencies do not have record systems which enable them to report unduplicated counts of patients served. While the service figures are probably the best available nationally, they must be regarded as approximations.

No attempt was made to obtain figures on the number of women in the target population served by private physicians at their own expense or through Medicaid. Estimates based on scanty data place this proportion at less than 10 percent of those in need. Nor could a study of this kind attempt to assess the retention rate of service programs or to evaluate their general quality. Therefore, while the term "number of women served" is employed, it would be more accurate to refer to the "number of patients enrolled" by an organized family planning service. How well or how fully the patients are served is not known, and it is probable that great variation exists from program to program. The study, therefore, could be regarded as estimating the extent to which organized programs have been successful in at least enrolling the population in need—a necessary first step toward the systematic evaluation of any program.

Footnotes at end of article.

Within the defined universe of programs and agencies from which service data were sought, the response rate was excellent, nearly 100 percent in all categories.

FINDINGS

The data to be presented now are limited to distributions of need and services by county, along with a preliminary assessment of some general characteristics of the counties containing and not containing organized services.

Table 1 provides a summary of the distribution of U.S. counties by the number reporting organized family planning services in fiscal 1968.

In the U.S., it is estimated that, in FY 1968, there were approximately 5.4 million medically indigent women in need of subsidized family planning services. Among the 3,072 U.S. counties, only 1,200 reported organized programs, while, in 1,872 counties, no family planning programs for medically indigent women were identified. One hundred and twenty-two counties reported programs, but were not able to provide figures on the number of women served; they are included among the 1,200 counties with reported programs.

The 1,200 counties reporting organized family planning programs make up 30 percent of U.S. counties; they also contain approximately 75 percent of the total U.S. population, and of women aged 15–44, as well as the same proportion of low-income women in need of subsidized family planning services. Almost 800,000 women received subsidized services within these (1,200) counties, which amounts to about 15 percent of all the women in the U.S. who are estimated to be in need of family planning services (Table 1a). At risk and remaining to be served in the counties with reported programs, were 3.2 million women, or 70 percent of the total number of women who are unserved in the U.S.

While only 15 percent of the women in need are being served nationally, there is, of course, great variation from county to county in the current service picture; a few counties were found to provide service to more than 40 percent of the group at risk, while others reported less than 1 percent. Among the 1,200 counties reporting services, 20 percent of those at risk are being served. We still have a long way to go.

The 1,872 counties without reported programs constitute 61 percent of all U.S. counties but they contain only about 25 percent of the total U.S. population, about the same proportion of women age 15–44, and 1.4 million or 27 percent of all low-income U.S. women at risk and in need of family planning. Since no programs are reported, unserved females also equal 1.4 million and unmet need equals 100 percent.

In summary, about three-fifths of U.S. counties contain one-quarter of those at risk and report no organized programs; conversely, two-fifths of U.S. counties contain three-quarters of those at risk in the entire country and report service to about one-fifth of this group (Table 1). Since the two-fifths of U.S. counties with service contain roughly three-quarters of the U.S. population, it is obvious that these include most of the major urban areas in the country, where need is more highly concentrated. On the other hand, as noted earlier, the 1,872 counties with no organized programs contain only about 1.4 million women at risk, indicating that the need is much less concentrated in these counties.

TABLE 1.—DISTRIBUTION OF U.S. COUNTIES BY NUMBER REPORTING ORGANIZED FAMILY PLANNING SERVICES FOR MEDICALLY INDIGENT WOMEN SERVED AND UNSERVED: TOTAL U.S POPULATION,[1] WOMEN AGE 15 TO 44,[1] ESTIMATED NUMBER OF WOMEN IN NEED,[2] NUMBER OF WOMEN SERVED AND UNSERVED

	Number of counties	Total population (1966 estimate)	Female population [1] age 15 to 44	Female population in need [2]	Females reported served	Unserved females
U.S. counties reporting no organized family planning services to indigent women	1,872	[3] 48,888,000	9,577,000	1,430,000	----------	1,430,000
Counties reporting organized services to indigent women	[4] 1,200	146,811,000	29,966,000	3,937,000	773,000	3,164,000
Total	3,072	195,699,000	39,543,000	5,367,000	773,000	4,594,000
Vertical percent:						
No service	60.9	25.0	24.2	26.6	0	31.1
With service	39.1	75.0	75.8	73.4	100.0	68.9
Total	100.0	100.0	100.0	100.0	100.0	100.0
Horizontal percent:						
No service	(N=48,888,000)	----------	19.6	2.9	0	2.9
With service	(N=146,811,000)	----------	20.4	2.7	.5	2.2
Total	(N=195,699,000)	----------	20.2	2.7	.4	2.3

[1] U.S. Bureau of Census, 1966 population estimates.
[2] Estimated by applying the Dryfoos-Polgar-Varky formula to female population age 15 to 44, 1966.
[3] Rounding to the nearest thousand was done after computation.
[4] 122 counties reporting service but not providing figures on the number of women served have been included; present information is that the number of women served in these counties is not significant.

TABLE 1A.—NUMBER OF MEDICALLY INDIGENT WOMEN SERVED AND UNSERVED AS PERCENT OF U.S. TOTAL ESTIMATED AT RISK FOR SUBSIDIZED FAMILY PLANNING SERVICES, FISCAL 1968

	Number	Percent
Served	800	15.4
Unserved	4,600	34.6
Total need	5,400	100.0

Table 2 shows the distribution of counties ranked by quartiles of women served in the 1,200 counties with reported organized programs. The significant finding here is the concentration of service in relatively few counties: 8 counties, or 0.3 per cent of all U.S. counties, account for the first quartile in which about 200,000 women were served (or 25 per cent of reported services). Only 23 more counties, or 0.7 per cent of all U.S. counties, account for the next quartile—200,000 women served. Expressed cumulatively, *31 or only 1 per cent of all U.S. counties account for 50 per cent of all women reported served in subsidized family planning programs throughout the United States.*

Going one step further, the next quartile adds 86 counties. Thus, 117 counties, or 4 per cent of U.S. counties, account for 75 per cent of women reported served; that is, 600,000 out of 800,000 served throughout the U.S. This obviously reflects concentration of program inputs and, as will be shown later in more detail, those service areas include nearly all of the great urban counties where population is concentrated, where needs are most obvious, and where resources for delivery of services are most readily at hand.

Finally, the last quartile of women are served in 961 counties; these are for the most part quite small programs. On an average basis, there are about 200 women per county receiving service in the latter group of counties through all delivery agencies (although in most of these counties only one agency is usually providing services).

Table 3 shows the distribution of quartiles of unmet need: that is, the number of women estimated to be in need of subsidized family planning services but not reported as receiving them, and the number of counties in each quartile. There are approximately 4.6 million women still in need of service.

TABLE 2.—QUARTILE RANGE OF WOMEN SERVED IN SUBSIDIZED FAMILY PLANNING PROGRAMS FOR UNITED STATES, FISCAL 1968; NUMBER AND PERCENT OF COUNTIES IN EACH QUARTILE

Women served			Counties			
Number (thousands)	Cumulative (thousands)	Cumulative percent	Number	Percent	Cumulative	Cumulative percent
200	200	25	8	0.3	8	0.3
200	400	50	23	.7	31	1.0
200	600	75	86	3.0	117	4.0
200	800	100	961	31.0	1,078	35.0
----------			[1] 122	4.0	1,200	39.1
----------	([2])	([2])	1,872	61.0	3,072	100.0
----------			3,072	100.0	----------	

[1] 122 counties reporting service but not providing figures on the number of women served have been included.
[2] None reported.

Here, too, great concentration is evident: relatively few counties in the U.S., 69 in all, account for 25 percent of the unmet need. The next quartile of unmet need involves 244 additional counties. Thus half of the unmet need of 2.3 million women is found in 313 counties (about 10 percent of all counties).

It can be noted at this point that most counties with the greatest need figures are also found heading the list of counties with the largest program inputs. For example, if one compares the 50 counties with the greatest need to the first 50, by numbers served, 29 appear on both lists, indicating that there is fair correspondence between location of needs and service efforts. However, the magnitude of the input relative to need is as yet grossly insufficient, inasmuch as several million women remain to be reached and over one million of these are in relatively concentrated target areas in only 69 U.S. counties.

Table 3 shows that the fourth quartile of unmet need is spread over a vast area involving 2.133 counties. While these counties include some metropolitan areas, they are for the most part rural and rural-farm areas with small and dispersed populations and with few health resources, making it difficult and costly to reach the patient.

Table 4 expands on reported services as presented initially in Table 2. In Table 4, as in the earlier table, the number of women served is the controlling variable. The eight

TABLE 3.—QUARTILE RANGE OF WOMEN ESTIMATED AT RISK FOR SUBSIDIZED FAMILY PLANNING SERVICES NOT RECEIVING SERVICE FOR UNITED STATES, FISCAL 1968, AND NUMBER AND PERCENT OF COUNTIES IN EACH QUARTILE

Women served			Counties			
Number (thousands)	Cumulative (thousands)	Cumulative percent	Number	Percent	Cumulative	Cumulative percent
1,150	1,150	25	69	2	69	2
1,150	2,300	50	244	8	313	10
1,150	3,450	75	626	20	939	31
1,150	4,600	100	2,133	69	3,072	100
Total			3,072	100	----------	

counties comprising the first quartile are detailed in Table 4 and vividly illustrate how service inputs have been concentrated in major urban areas. It was to show this that the county, state, and major city identifications were provided. Note that the East appears to be first with three New York City counties, Baltimore, and Washington, D.C. The Midwest is represented by Cook County (Chicago) and Wayne County (Detroit). Finally, in the Far West, we have Los Angeles County.

For proportion of those in need who are served, these areas represent fairly substantial program achievements when compared to the national average: in these eight counties 42 percent were served—200,000 of 471,000 in need—whereas nationally only 15 percent were served.

In the second quartile, involving 23 counties, 36 percent of those at risk were served, in the third quartile 23 percent, and in the fourth—the least densely populated countries of the U.S.—only 10 percent. The column labeled "total population" illustrates the increasing dispersion as one moves from high to low service areas. The first eight counties contain as many people as the next 23. The next 86 counties contain fewer people than the first two groups of 31 counties, and so on. The data make clear that the question of providing family planning services in those areas where population is spread thin has only begun to be examined. Indeed, this is generally true for nearly all health services, not merely family planning.

TABLE 4.—U.S. COUNTIES BY QUARTILES OF WOMEN SERVED IN SUBSIDIZED FAMILY PLANNING PROGRAMS; NUMBER OF WOMEN SERVED, ESTIMATED NEED, NUMBER UNSERVE FEMALE POPULATION AGE 15–44, TOTAL POPULATION [1]

Number of counties and rank by number served	County	State	Principal city	Thousands				
				Number served (fiscal 1968)	Estimated need	Unserved	Females 15–44 (1966)	Total population (1966)
Detailed listing of 8 counties comprising first quartile, with ranking by number served:								
1	Cook	Illinois	Chicago	38	82	44	1,029	5,400
2	Los Angeles	California	Los Angeles	33	126	94	1,375	6,814
3	New York	New York	New York City	30	49	19	305	1,540
4	Kings	do	do	22	64	42	548	2,702
5	Wayne	Michigan	Detroit	21	59	39	532	2,705
6	Bronx	New York	New York City	19	36	17	314	1,543
7	District of Columbia		Washington	18	21	2	164	805
8	Baltimore	Maryland	Baltimore	18	32	14	303	1,489
8				200	471	272	4,572	22,999
23				200	550	352	4,600	22,700
86				200	860	660	7,735	37,649
1,083 [2]				200	2,080	1,880	13,059	63,463
1,872				(3)	1,430	1,430	9,577	48,888
Total (3,072)				800	5,367	4,594	39,543	195,693

[1] Rounding to nearest thousand performed after computation. Total computed in columns or horizontals may not tally due to rounding.

[2] 122 reporting service but not providing figures on the number served have been included.

[3] No services reported.

Table 5 presents data on the population size and the range of the percentage of rural-farm population in the 1,200 counties reporting service figures, arranged again by quartiles of women served. It can be sent from the range of population size that, while in general the counties with least service in the fourth quartile must include many sparsely populated areas, they are not exclusively so. One county in this quartile contains 1.3 million people—suggesting that even in large urban areas the extent of programing for family planning services is severely deficient.

It appears that the first two quartiles, accounting for half of the women served, are comprised exclusively of high-population counties. For example, in quartile two the smallest county by population size is 320,000. Very few of these 31 counties in the first quartiles have any rural-farm population.

The third quartile contains counties that range from relatively small—25,000 population—up to quite large—1.4 million—and show a wide variation in percentage of rural-farm population.

In the fourth quartile, there is a tremendous range, both of population size—from less than 1,000 to 1.3 million—and of rurality—from zero to 59.5 per cent (an inordinately high proportion to be classified as rural-farm). These 1,083 counties are a great mixture of county types, including some highly urban areas which are in fact part of great metropolitan centers (i.e., Boston, Massachusetts; Passaic, New Jersey; Suffolk County, New York) as well as some of the most rural parts of the United States.

It is obviously not always possible to categorize counties as urban or rural-farm areas. The usual problems of classification plague the researcher on this as on so many other dimensions. For, within a single county, there may be extensive urban as well as rural-farm areas. The socioeconomic ecology of a region does not usually oblige us by observing county jurisdictional lines. This factor often results in the mixture of characteristics demonstrated in the tables.

TABLE 5.—QUARTILE RANGE OF WOMEN SERVED IN SUBSIDIZED FAMILY PLANNING PROGRAMS FOR UNITED STATES, FISCAL 1968; FOR EACH QUARTILE: THE NUMBER OF COUNTIES, RANGE OF POPULATION SIZE, AND RANGE OF PERCENT RURAL-FARM POPULATION

Range of population size [2]	Women served (thousands)	Number of counties	Percent rural-farm [3]
800 to 6,800	200	8	All less than 1.
320 to 2,000	200	23	0–2.4.
25 to 1,400	200	86	0–17.5
Less than 1–1,300	200	[1] 1,083	0–59.5
Total	800	1,200	

[1] 122 counties reporting service but not providing figures on the number of women served have been included.

[2] Bureau of Census estimate for 1966.

[3] 1960 census.

Table 6 provides an overview of the number of women unserved with respect to the rural-farm characteristics. All U. S. counties have been ranked from low to high according to per cent rural-farm, and then distributed by quarters by the number of women needing subsidized family planning service. In addition, the number of counties for each quarter with no reported programs are shown.

The 124 least rural counties contain a quarter of the number of women needing service (1.5 million). No county within this group exceeds 0.9 per cent of rural-farm population; and only 26 or one-fifth of these counties report no program. In the next group, all counties show a small proportion of rural-farm population, not less than 1 per cent and not more than 5 per cent. Here also a small number of counties, about one-eighth, report no program.

Group three moves into the middle to upper range with respect to rurality, and this includes 28.5 per cent of all U. S. counties; 500 or 57 per cent of these report no programs. Finally, in group four, we are really in the country. These are predominately rural counties and include over half of all counties in the U. S. Seventy-five per cent of these counties report no program. As rurality increases, programing decreases.

TABLE 6.—ALL U.S. COUNTIES RANKED BY PERCENT RURAL-FARM POPULATION AND DISTRIBUTED BY QUARTERS OF WOMEN UNSERVED (FISCAL 1968), RANGE OF PERCENT RURAL-FARM POPULATION PER QUARTER, NUMBER AND PERCENT OF COUNTIES, AND NUMBER AND PERCENT OF COUNTIES WITH NO PROGRAM

Range percent rural-farm population [1]	Number of women unserved (thousands)	Number of U.S. counties	Percent of U.S. counties	Counties with no subsidized programs		
				Number	Percent	N=
0–0.9	1,150	124	4.0	26	21.0	124
1–5.2	1,150	359	11.7	45	12.5	359
5.3–17.8	1,150	876	28.5	500	57.1	873
17.9–86	1,150	1,713	55.8	1,301	75.9	1,719
Total	4,600	3,072	100.0	1,872	60.9	3,072

[1] 1960 census.

Table 7 illustrates the program potential of 1,872 counties with no reported service. In this table, the distribution of all counties with no service is controlled by the range of estimated number of women in need. The total number of women in need is also presented for each group of counties.

Line two in the table shows that a total of 438, or 24 per cent of counties with no program, contain 1,000 or more women at risk; cumulatively, these counties contain a total of 819,000, or 56 per cent, of all those unserved in counties without programs. They should be regarded as areas with high program potential since they contain 1,000 or more women at risk.

The figure of 1,000 or more women per county at risk and in need is a useful measure of the service potential in these areas, since it is estimated that this number of patients is sufficient to provide minimum economy of scale in the operation of a clinic program.

The remaining two groups, totaling three-quarters of all U.S. counties without programs, are the more sparsely populated ones and account for 44 per cent of women at risk in unserved areas.

TABLE 7.—NUMBER AND PERCENT OF U.S. COUNTIES WITH NO SUBSIDIZED FAMILY PLANNING SERVICES, BY RANGE OF ESTIMATED NUMBER OF WOMEN IN NEED; NUMBER AND PERCENT OF WOMEN UNSERVED

Range, estimated number of women needing service	Counties with no service				Number unserved (thousands)	Cumulative (thousands)	Percent	Cumulative percent
	Number	Cumulative	Percent	Cumulative percent				
2,000 to 10,000	123	123	6.6	6.6	382	382	26.7	26.7
1,000 to 1,999	315	438	16.9	23.5	428	810	29.0	55.7
500 to 999	558	996	29.7	53.2	395	1,195	27.8	83.5
000 to 499	876	1,872	46.8	100.0	235	1,430	16.5	100.0
Total	1,872		100.0		1,430		100.0	

SUMMARY

This paper has presented in broad terms the distribution and concentration of needs and services in the United States by county.

Of particular note is the concentration in relatively few urban counties of both the heaviest program inputs as well as the greatest number of women unserved. Equally important, a program potential exists in 438 counties with no service provided and more than 1,000 women at risk.

The data also point up the virtual nonexistence of *organized* programs in sparsely populated and rural-farm areas of the United States. In qualitative human terms, the need for family planning programs here is undoubtedly just as great as in metropolitan communities.

Dr. Lerner is Assistant Professor, Department of Community Health, Albert Einstein College of Medicine, Bronx, N.Y.

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This work was performed at the center for Family Planning Program Development, the Technical Assistance Division of Planned Parenthood-World Population, N.Y.C., pursuant to a contract with the Office of Economic Opportunity, Washington, D.C., Contract No. B 89–4588. During the course of this work the author was director of planning of CFPPD.

APPENDIX—WHAT IS IN THE FILE—FOR EACH COUNTY IN THE UNITED STATES

a. Needs and services

Total population of U. S., 1966; women in the childbearing years, i.e., 15–44; number of women medically indigent needing subsidized family planning services; number receiving family planning services through subsidized clinic programs; number in need not receiving services, or unmet need; number of home-based migrant workers; number of American Indians under the jurisdiction of the Indian Health Service of DHEW.

Under needs we have also selected health and demographic indexes which provide greater insight into the characteristics of each county: infant mortality rate; number of infant deaths in excess of 17.8 per 1,000 for the five years 1961–1965; fertility rate per 1,000; live birth order as a per cent of all births; out-of-wedlock births per 1,000 live births (not reported for 16 states); births of 2,500 grams or less as a per cent of live births.

Each county is classified by whether it is within a Standard Metropolitan Statistical Area or State Economic Area (for New England) or a nonmetropolitan county according to total population of SMSA, SEA or county.

b. Resources

Physicians—Number of nonfederal physicians in patient care with offices in the county; ratio of M.D.'s per 100,000 population; number of general practitioners; ratio per 100,000 population; number of obstetrician-gynecologists and ratio per 100,000 population.

Hospitals—For all short-term, general-care, nonprofit hospitals reporting births, operated by private agencies, nonfederal governmental agencies, but including the Public Health Service and Indian Health Service hospitals: number in each county; total births reported for all hospitals in the county; number reporting family planning services.

Other Resources—Counties with medical schools; community action agencies: OEO-funded Family Planning Projects; OEO-funded Neighborhood Health Centers; counties with Model City Programs; Children's Bureau Maternal and Infant Care Projects; Public Health Service Neighborhood Service Projects; counties where the health department provides family planning services; and finally, counties where Planned Parenthood affiliates provide family planning services.

FOOTNOTES

[1] Available from the Family Planning Program, Office of Health Affairs, Office of Economic Opportunity, Washington, D. C., or the Center for Family Planning Program Development of Planned Parenthood-World Population, New York, N. Y. 10022.

[2] Current Population Reports Series, p. 25, Nos. 401, 404, 407 and 409, 1968, describe methodology.

ON THE HEALTHINESS OF 4,000 ABORTIONS IN A FREE STANDING ABORTION SERVICE

(By Horace Hale Harvey II, M.D., Barbara Yarnell Elizabeth Pyle)

We would first like to thank the people of New York, their legislators, and the Public Health Board for a law and a policy that allows for improvement and self-correction. This is a great moral step necessary to remove the fear of abortion.

We would next like to thank the National Clergy Consultation Service on Abortion (especially Reverend Howard Moody and Arlene Carmen) and the five hundred clergymen thoughout the United States who with their pioneering spirit have led the way in the concept of abortion reform. Planned Parenthood is likewise to be commended for its stand on this issue.

Lastly, we would like to offer a heartfelt thanks to the doctors working with us, the nurse-counselors, and to the entire staff of the Community Sex Information and Education Service. Our efforts and dreams would have come to nothing without your hard work and loyalty.

INTRODUCTION

New York is to be commended for leading the country in the repeal of abortion laws. The new law provides that a physician can perform an abortion under conditions that are healthy and safe on a consenting woman up to the twenty-fourth week of pregnancy. This law will inevitably become the model after which the rest of the country will pattern its laws when the reform becomes nationwide. As the New York law will become the model, so will New York's applications of this law. It is to the betterment of these future ends that we do hereby present this report.

The Community Sex Information and Education Service (hereinafter called CSI) is a not-for-profit incorporation devoted to developing nationwide sex education. In July of this year, the National Office of CSI recognized the need for there to be a quality control on the means whereby women in New York receive abortion. This conclusion was reached based upon the many phone calls that poured into our office and into the office of the Clergy and Lay Advocates for Hospital Abortion Performance complaining of the abusive treatment and the exploitive prices by many of the doctors, and profiteering referral agencies, and the hospitals performing abortions in the metropolitan area.

With the tripartite goal of safety, price control, and psychological health, CSI formed Women's Medical Group to act as a consumer control for women seeking abortions in the first ten weeks of pregnancy. Women's Medical Group is able to monitor the safety of the procedure by setting standards for the equipment and the methods, by supervising the participating doctors and by having a comprehensive follow up program consisting of a Women's Medical Group "hot line" telephone number making available to the women 24 hours a day, a doctor or a Registered nurse to answer any questions relating to the procedure or to their condition following the procedure. With these means, and a medical questionnaire completed and returned by the patient ten days later, Women's Medical Group is able to evaluate the participating doctors, and thereby offer the patients a safe procedure.

Women's Medical Group has been able to control abortion pricing since July 1, for slightly over 4,000 abortions by referring only to doctors who have agreed to charge a reasonable fair price, and who have also agreed to perform 25% of the procedures at no charge at all to welfare and indigent patients. The third goal of CSI, psychological health, is perhaps the factor that makes Women's Medical Group so unsual. To achieve this goal, the Group furnishes counselors who work closely with the doctors performing the abortions. The majority of these counselors are registered nurses who have had abortions themselves, and are therefore naturally sensitive to the complicated feelings and reactions that an abortion evokes in a woman. In addition, these nurses have received special training to enable them to deal with the varied psychological aspects and impacts of abortion.

To the furtherment of these three goals, and to the further help of the women of New York, we offer these satistics on the healthiness of 4,000 abortions performed by a free standing abortion service.

For operational details of Women's Medical Group, please see the attached appendix.

Abortion safety is usually measured by comparing the rates of the following medical complications which are often associated with abortions: death, shock, bleeding, infection, perforation, and incomplete abortion.

A) In four thousand abortions performed since July 1 using a local anesthetic, there have been *no deaths* and *no cases of shock or cardiac arrest*. This perfect record should be contrasted with the death rates ranging from two to five per one hundred thousand cases, which have occurred in the European and New York hospitals due to the use of general anesthesia for early abortions. The only abortion death in London last year was due to general anesthesia.

B) The *bleeding* varied from only a few drops in four to six week pregnancies to an average of about one ounce for cases eight to ten weeks pregnant. One ounce is the amount of blood loss a woman ordinarily has during a normal period. However, in our four thousand cases we also had three women who unexpectedly turned out to be ten to twelve weeks pregnant and who lost about a pint of blood during the abortion. This does not represent a serious blood loss, since one pint of blood is the usual amount of blood given during a blood donation to a blood bank. We also had one patient who was sixteen weeks pregnant and who lost about two pints of blood. No woman required a blood transfusion or intravenous fluids. It is important to note that all four of these women were found unexpectedly to be over ten weeks pregnant, thus we have every reason to believe that no woman who is less than ten weeks pregnant will bleed on an average more than she does with a normal period, and the earlier the abortion the less the blood loss. Independent research (*Obstetrics and Gynecology*, September-1970) has shown that abortions done in hospitals with general anesthesia result in about twice the blood loss of abortions done with local anesthesia. This is probably because general anesthesia prevents uterine contraction which normally would prevent bleeding.

C) *Fever and Infection*—We had four patients of the one thousand five hundred and sixty who returned our research form, who reported they had fever of 100.4 degrees or more for one day or more. In two of these cases the fever returned to normal in two days, while in two other cases the fever returned to normal in three days. None of these patients with fever required hospitalization.

(D) *Perforated Uterus*—This is the condition resulting when an abortion instrument goes through the uterine muscle wall. We have had nine such cases in four thousand abortions. However, eight of these cases occurred during the first two thousand abortions, whereas only one of these nine cases occurred during the second two thousand cases. This indicates that as the physicians gain experience and become more skilled, they are less likely to perforate a uterus. In fact, the one later perforation was by one of the newer and less experienced physicians (and in a ten and one half week pregnancy).

Thus, we have every reason to believe that uterine perforation can be eliminated as doctors gain skill at doing early abortions. Of the first eight perforations, only three were hospitalized. Two of these hospitalizations were found to be fifteen weeks pregnant. There was only one out of seven perforations in pregnancies less than ten weeks which required hospitalization. Therefore, perforations of such early pregnancies are not as serious a complication as it has been thought to be in the past, since none of these had later complications. All three of our hospitalizations were discharged without complications within three or four days.

(E) *Incomplete Abortion*—We have had one such case wherein the physician suspected in advance that he had not completed the abortion, because he found no pregnancy tissue when he examined the tissue removed from the uterus. (We require that physicians examine all tissues removed from the uterus to make certain that they have removed the entire pregnancy.) In this case, since the patient was only four or five weeks pregnant, the physician could not be sure that he completed the abortion, since in such an early pregnancy there is little or no tissue to be found. Thus, we asked this patient to have another pregnancy test done by us two weeks later. This test proved positive, so the abortion was completed immediately without complications. Let us now compare the complication rates of these 4,000 abortions with those rates of complications in New York hospitals' early abortions. This data is summarized as follows:

Complication	New York hospitals percent less than 12 weeks	WMG gross percent all cases	WMG correct percent less than 12 weeks
Hemorrhage	0.2	0.1	0
Infection	.2	.2	.2
Perforation	.2	.2	.1
Others	.4	.025	.025
Total	1.0	.525	.325

The third column above is corrected in the sense that in it we have removed all abortion cases of 12 week or more pregnancies, since this was done in the above hospital data. Comparing the above complication rates suggest that Women's Medical Group has had about one-third to one-half the overall complication rate of the New York hospitals. Since the number of these complications is so small in both Women's Medical Group and New York hospitals, the most important fact is that the New York hospitals have had deaths whereas Women's Medical Group has had none. Generally, from this data it can be concluded that early abortions (or abortions less than 12 week pregnancies) are very safe and free from serious medical complications, whether or not they are done in a free standing abortion service such as Women's Medical Group or in a hospital, just as long as no general anesthetic is used. In fact, from the point of view of medical techniques and safety, an early abortion is similar to having a tooth pulled—both usually involve the use of a local anesthetic, both usually involve very little loss of blood, both can easily be done relatively quickly on an ambulatory basis (e.g., during a lunch hour), both have similar "non-fatal" complications and dangers which occur in the range of one per each thousand cases. Thus, in view of the new evidence of the safety of abortion done in free standing abortion services, it would seem hard to justify more medical precautions for an abortion than we require for having a tooth pulled.

[From studies in Family Planning 45:6—Sept. 8, 1969]

MORTALITY WITH CONTRACEPTION AND INDUCED ABORTION

(The following paper was written by Christopher Tietze, M.D., Associate Director, Bio-Medical Division. The Population Council.)

An unwanted pregnancy can be avoided by the use of contraception; an unwanted birth, by induced abortion. Since the ultimate objectives are identical, it is appropriate to compare the two approaches in terms of the risks to the woman's life associated with their use. This can be done by means of a statistical model, based on 100,000 women of reproductive age in fertile unions and exposed to the risk of pregnancy, assuming the following rates of mortality.

1. *Maternal Mortality* from complications of, or associated with, pregnancy, childbirth, and the puerperium, excluding induced abortion: 20 deaths per 100,000 pregnancies. This rate corresponds to the current level of maternal mortality in the white population in the United States. Official statistics of maternal mortality in the United States are based only on deaths attributed to complications of pregnancy, childbirth, and the puerperium. Thus defined, the rate of maternal mortality, excluding abortion, was 18 per 100,000 live births in 1964–66.

"Associated" deaths, related to pregnancy and childbirth, but attributed to other causes, e.g., heart disease, are not available for the United States. In England, where such associated deaths are identified and shown separately, they comprise about one-third of the number of deaths attributed to complications of pregnancy, childbirth, and the puerperium. Raising the maternal mortality rate for the U.S. by one-third brings it to 24 per 100,000 live births. Since the number of spontaneous fetal deaths appears to be on the order of one-sixth of all pregnancies and since very few deaths result from spontaneous abortion, an overall risk to life, excluding induced abortion, of 20 per 100,000 pregnancies would seem to be a reasonable approximation.

2. *Mortality* associated with *illegal abortion* induced out of hospital by persons without medical training: *100 deaths per 100,000 abortions.* This is a very rough estimate, and, almost certainly conservative, since it is lower than the maternal mortality rate, excluding abortion, per 100,000 live births for white women in the United States 25 years ago. Fortunately, the precise level of this rate is not relevant to the argument.

3. *Mortality* associated with *legal abortion* performed in hospital, at an early stage of gestation: *3 deaths per 100,000 abortions,* based on current statistics from eastern Europe (73 deaths among 2,567,000 legal abortions in Czechoslovakia, Hungary, and Slovenia, 1957–67).[1]

4. *Mortality* associated with *highly effective contraception: 3 deaths per 100,000 users per year,* based on the studies recently published in Great Britain, on *excess mortality from thromboembolic disease* attributable to the use of *oral contraceptives.* According to the report by Inman and Vessey,[2] the excess mortality from pulmonary embolism, cerebral thrombosis, and coronary thrombosis was 2.2 and 4.5 per 100,000 users for women 20–34 and 35–44 years of age, respectively. A weighted average of these two figures yields an annual excess risk to life of about 3 per 100,000 users.

TABLE 1.—ILLUSTRATIVE ANNUAL RATES OF PREGNANCIES AND OF DEATHS ASSOCIATED WITH CONTRACEPTION, PREGNANCY, AND INDUCED ABORTION PER 100,000 WOMEN OF REPRODUCTIVE AGE IN FERTILE UNIONS

	Pregnancies	Deaths
1. No contraception, no induced abortion	40,000–60,000	8–12.0
2. No contraception, all pregnancies aborted out of hospital	100,000	100.0
3. Ditto, aborted in hospital	100,000	3.0
4. Highly effective contraception	100	3.0
5. Moderately effective contraception, no induced abortion	11,800–13,000	2.5
6. Ditto, all pregnancies aborted out of hospital	14,300	14.3
7. Ditto, aborted in hospital	14,300	.4

Line 1 of Table 1 illustrates the reproductive behavior of a group of women neither using contraception nor having recourse to induced abortion.

The interval between two successive conceptions consists of three segments: the period of gestation (G), the anovulatory period following confinement (A), and the average number of ovulatory cycles required for a new conception to occur (O).[3] Of these three segments, the first (G) can be estimated within narrow limits as eight months, allowing for about 15 per cent spontaneous abortions. The anovulatory period (A) is known to vary widely, depending on the extent and average duration of breastfeeding. The present model allows for a range from 4 months without breastfeeding to 14 months with universal and prolonged breastfeeding. The mean value for the third segment (O), also estimated at eight months, may be too high.

The relationship between the number of pregnancies (P and P'), the number of women (W), the time factor (T), and the duration of the three segments of the interval between conceptions (G, A, and O) is defined by the following formula:

$$P = W \times T/G + A + O$$

In our model, T equals 12 months and G, A, and O are also expressed in months. The application of the formula to the estimate described in the preceding paragraph yields the following results:

$$P = 100{,}000 \times 12/8 + 4 + 8 = 1{,}200{,}000/20 = 60{,}000$$

$$P' = 100{,}000 \times 12/8 + 14 + 8 = 1{,}200{,}000/30 = 40{,}000$$

Thus, without contraception or induced abortion, 100,000 women experience in the course of one year between 40,000 and 60,000 pregnancies, corresponding to average intervals between conceptions ranging from 30 months to 20 months. Given the level of maternal mortality, excluding abortion, assumed for this model, of 20 per 100,000 pregnancies, the 100,000 women would experience between 8 and 12 deaths associated with the reproductive process.

Line 2 assumes no contraception, but all pregnancies are aborted out of hospital. Be-

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[1] C. Tietze, "Abortion Laws and Abortion Practices in Europe," *Advances in Planned Parenthood (v.5): Proceedings of the Seventh Annual Meeting of the American Association of Planned Parenthood Physicians, San Francisco, California. 9–10 April 1969.* (In press).

[2] W.H.W. Inman and M.P. Vessey, "Investigation of Deaths from Pulmonary and Cerebral Thrombosis and Embolism in Women of Child-bearing Age," *British Medical Journal,* 2:193–199. 27 April 1968.

[3] R. R. Potter, "Birth Intervals: Structure and Change," *Population Studies,* 17:155–166. November 1963.

cause gestation and the post-gestational anovulatory period are both substantially shorter than under the assumptions of the preceding line (G=3 months, A=1 month), the number of pregnancies rises to 100,000 with 100 deaths:

$$P=100{,}000\times 12/3+1+8=1{,}200{,}000/12 \cong 100{,}000$$

In line 3, the same number of abortions is performed legally in hospitals, resulting in 3 deaths instead of 100.

Line 4 assumes a highly effective method of contraception, such as the consistent use of oral anti-ovulants under the combined regimen. The expected number of pregnancies is on the order of 100.[4] Excess deaths from thromboembolic disease equal those resulting from legal abortions in hospitals, shown on the preceding line. Because of the small number of pregnancies, mortality associated with either pregnancy and childbirth or with abortion is insignificant.

A comparison of lines 3 and 4 shows that women regulating their fertility exclusively by means of abortions performed in hospitals are exposed to a risk to life of the same order of magnitude as an equal number of women using oral contraception consistently over the same period of time.

Lines 5, 6, and 7 each assumes a less effective but completely safe type of contraception which extends the average duration of ovulatory exposure required for conception from 8 to 80 months. This level of contraceptive effectiveness was approximately achieved by urban American couples in the 1950's, using the diaphragm or condoms, mainly for child spacing, and not for family limitation.[5]

Line 5 assumes no induced abortions and the number of conceptions is computed as follows:

$$P=100{,}000\times 12/8+4+80=1{,}200{,}000/92 \cong 13{,}000$$

$$P'=100{,}000\times 12/8+14+80=1{,}200{,}000/102 \cong 11{,}800$$

The corresponding number of deaths is on the order of 2.5 per 100,000 women per year.

Line 6 assumes that all pregnancies are aborted out of hospital by lay abortionists. The number of pregnancies increase slightly, owning to the shorter gestation and post-gestational anovulatory periods.

$$P=100{,}000\times 12/3+1+80=1{,}200{,}000/84 \cong 14{,}300$$

The expected number of deaths is 14.3 per 100,000 women per year.

In line 7, the same number of abortions is performed legally in hospitals and the number of deaths drops to 0.4 per 100,000 women or approximately one-seventh of the corresponding values shown in line 3 for no contraception but legal abortion, and in line 4, for oral contraception.

On the basis of this model, the following is my conclusion: In terms of the risk to life, the most rational procedure for regulating fertility is the use of a perfectly safe, although not 100 percent effective, method of contraception and the termination of pregnancies resulting from contraceptive failure under the best possible circumstances, i.e., in the operating room of a hospital.

While comparable estimates of morbidity, associated with pregnancy and childbirth, abortion out of hospital and in hospital, and oral contraception, are not available, it is not unlikely that the pattern would be similar to that which has been demonstrated in terms of mortality.

[4] C. Tietze, "Oral and Intrauterine Contraception: Effectiveness and Safety," *International Journal of Fertility*, 13 (4):377–384. October–December 1968.

[5] P. C. Sagi, R. G. Potter, C. F. Westoff, "Contraceptive Effectiveness as a Function of Desired Family Size," *Population Studies*, 15:291–296. March 1962.

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Aspiration Abortion Without Cervical Dilation

(By Sadja Goldsmith, M.D., Alan J. Margolis, M.D.)

San Francisco, Calif.—While aspiration abortion is accepted widely as a safe and effective technique, any modification is important which will make the procedure more simple, more safe, and less time-consuming without sacrificing completeness of uterine evacuation. Also, if performed without anesthesia or only with paracervical block, an anesthesiologist need not be in attendance and the morbidity of general anesthesia is not incurred.

Although it has been customary to use a cannula whose outside diameter in millimeters is equal to the duration of pregnancy in week,[1] evacuation can often be effected without dilation.[2] Such a technique shortens the procedure, decreases discomfort in the conscious patient, and decreases risk of cervical injury.

Our study was conducted to test the efficacy of a flexible 6 mm. diameter plastic aspiration cannula* developed by Harvey Karman to remove early first-trimester products of conception. This flexible cannula has two openings at its tip which permit bending without blockage if it is applied to the uterine fundus.

PROCEDURE

Seventy-two pregnant women whose last menses had occurred 10 weeks or less earlier were selected only on the basis of their willingness to be aborted while awake.

Preliminary procedures † included a medical and psychosocial history, physical examination, routine laboratory studies, Rh-antibody screening, and cervical culture for gonorrhea. The abortions were performed on a come-and-go basis at this medical center in a small surgical room attached to an operating suite. Many patients received an oral analgesic one hour before the procedure, while others had no premedication.

A medium Graves speculum was used to expose the cervix, which was then fixed with a tenaculum. A paracervical block was performed by injecting 4 ml. of one per cent lidocaine at each of 4 sites (3, 5, 7, 9 o'clock) 1 cm. deep to the vaginal fornix. The operator cleansed the cervix and vagina with povidone-iodine solution while waiting for the block to become effective. The uterus was sounded to verify its depth and confirm its inclination. The 6 mm. cannula was then passed to the fundus and, while negative pressure (60 to 70 cm. Hg) was applied, it was moved within the uterus to aspirate all parts of the cavity. The duration of aspiration was timed and the procedure was concluded when the uterine walls seemed closely applied to the cannula.

Completeness of evacuation was checked by exploring the uterine cavity with a small curette. When aspiration through the 6 mm. cannula did not produce sufficient tissue, the cervix was dilated to 8 or 9 mm. and a larger aspirator was used to ensure total tissue removal. All specimens were examined to confirm the presence of the products of conception, then sent to the pathology laboratory. Aspirated blood and amniotic fluid were also measured. The patient was discharged within an hour, with an appointment for a 2 week postabortion visit.

During the procedure, each patient was attended by a counselor who explained the procedure and gave encouragement and support.

Footnotes at end of article.

RESULTS

Of the 72 women (Table I), aspiration abortion was completely successful in 67; 4 required cervical dilation and a larger cannula to empty the uterus. In 1 primigravida the internal os could not be identified by probe or small dilator. The procedure was stopped, and 2 weeks later abortion was performed without difficulty under general anesthesia. Mean aspiration time for the 67 successful cases was 3 minutes (range 1 to 7 minutes), and blood loss average 58 ml. (range 10 to 170 ml).

No patient presented any evidence of a morbid, febrile postabortal course. One patient was observed in the hospital after abortion because products of conception were not positively identified in the pathology laboratory and a diagnosis of ectopic pregnancy was considered but not confirmed. Another patient was seen 7 days postabortion in the emergency ward with the sudden onset of uterine bleeding. She was sent home with a diagnosis of nonsignificant bleeding from the organizing placental site. Five patients telephoned with minor questions which required reassurance only.

Seventy of the 72 women were seen at the 2 week postabortion checkup; the other 2 verified by telephone that they had no problems.

COMMENT

Abortions performed on healthy women, many of whom are young primigravidas, require meticulous scrutiny and safeguards to minimize early as well as late morbidity and death. There are several obvious advantages in performing early abortions without general anesthesia or cervical dilation. By avoiding general anesthesia, a small but definite risk is eliminated and the procedure is more economical of medical personnel and cost. Without cervical dilation, the conscious patient experiences primarily the cramps of terminal uterine spasm of short duration as the products of conception are completely removed. For this, the patient is amenable to verbal support and the encouragement of being able to leave the unit promptly and in full possession of her faculties.

TABLE I.—RESULTS OF EARLY ABORTION WITH THE USE OF THE 6 MM. FLEXIBLE CANNULA

	Total cases	Cases by weeks of gestation from last menstrual period			
		7	8	9	10
Abortions performed	72	2	15	32	23
Primigravidas (age range 16 to 36)	43	1	7	17	18
Multigravidas (age range 17 to 39)	29	1	8	15	5
Cases requiring larger cannula (8 or 9 mm.)	4	0	0	0	4

Avoidance of cervical dilation eliminates the risk of perforation with a dilator. It may also decrease the incidence of premature delivery in subsequent pregnancies, an abortion sequela discussed by Klinger.[3]

At our institution,[4] the most significant morbidity in a large series of first-trimester induced abortions was related to occasional uterine perforation and possible bowel complications. The ease with which the 6 mm. cannula tip bends without blocking aspiration diminishes this risk of perforation.

Early abortion without cervical dilation appears to be a safe and simple enough procedure to be used on a mass basis for early interruption of unwanted pregnancy. With well-qualified personnel who are careful to accept only pregnancies early in the first trimester, and who perform the aspiration technique skillfully, out-of-hospital abortion in well-equipped, licensed facilities seems feasible.

FOOTNOTES

*Supplied as Vacurette F–6mm by Berkeley Bio-Engineering Company, Berkeley, Calif.

† Approval of patients for abortion was in accord with the revised California statute.

[1] Kerslake, D., and Casey, D.: Obstet. Gynec. 30: 35, 1967.

[2] Papazov, B., Atanasov, A., and Mikhneva, O.: Akush. Ginek. (Sofiia) 4: 45, 1965.

[3] Klinger, A.: Int. J. Gynaec. Obstet. 8: 680, 1970.

[4] Stewart, G.: Personal communication.

THE HONORABLE J. EDGAR HOOVER

The SPEAKER. Under a previous order of the House, the gentleman from Maryland (Mr. HOGAN) is recognized for 60 minutes.

Mr. HOGAN. Mr. Speaker, I requested this Special Order today to eulogize J. Edgar Hoover and to give other Members an opportunity to include their remarks concerning his passing and his service to the country. One of the most important experiences of my life has been the years from 1948 to 1958 when I served with the FBI under Mr. Hoover's leadership. While the reputation of the FBI is outstanding in the eyes of an overwhelming majority of Americans, unless one has had the actual opportunity to see its workings from the inside, it is impossible to be able to really measure the efficient operations, the dedicated service to the American people, and the zealous concern with protecting individual liberty.

It has been a source of deep regret to me that in the past few years, Mr. Hoover and the FBI have been subjected to so much unfair and unjustified criticism. My colleagues know that I have taken the floor of the House to defend Mr. Hoover and the FBI against erroneous, unfair charges on a number of occasions. Because of his unblemished record in service to the country, some of our colleagues, for reasons best known to them, have joined in this cacophony of unwarranted abuse and criticism.

J. Edgar Hoover has had a tremendous influence on the history of this country and on those of us who had the privilege of serving with him. His 48 years of public service are unparalleled. At the age of 29 on May 10, 1924, Mr. Hoover was named Director of the scandal-ridden Bureau of Investigation. At that time Attorney General Harlan Fiske Stone told the young man:

I want you to take over as Acting Director of the Bureau of Investigation.

Young J. Edgar Hoover, who had worked in the Department since 1917 and had served as Assistant Director of the Bureau for 3 years, replied that he would take the job on conditions that it be divorced from politics, that appointments and promotions be based on merit and that the Bureau be responsible to the Attorney General only. The Attorney General replied:

I wouldn't give it to you under any other conditions.

Since that time, Mr. Hoover molded the FBI into the modeled law enforcement agency that it is today. Mr. Hoover set a rigid standard of personal behavior and performance for himself and all employees of the FBI. He has never tolerated any compromise with excellence or integrity in service or personal behavior.

By taking the FBI out of the sphere of political influence, Mr. Hoover built it into an organization which earned public respect and gratitude. He served under eight Presidents of both political parties and 16 Attorney Generals. As a lifelong resident of the District of Columbia, he has never been affiliated with either political party. One of the keys to J. Edgar Hoover's successful administration of the FBI has been the personal conduct standards which he has insisted upon.

From my personal experience, I know that the FBI credentials generally were an instant entree to complete cooperation from the average citizen because they had confidence in Mr. Hoover and the organization which he built. Any enumeration of his accomplishments with his 48 years with the FBI would take more time than I have in this 1 hour Special Order, but some of the highlights are: the nationwide centralization of criminal fingerprint records in the FBI Identification Division in 1924; the establishment in 1932 of the FBI Laboratory; the establishment in 1935 of the FBI National Academy which provided advance training for select law enforcement officers from all over the country; the establishment of the FBI National Crime Information Center.

These are landmarks, not only in the FBI's evolution, but in the history of law enforcement. But as far as I am concerned, Mr. Speaker, the No. 1 accomplishment of J. Edgar Hoover was that he transferred hero worship from the criminal element to the law enforcement officer. In the early years of his directorship notorious criminals such as John Dillinger, Alvin Karpis, Ma Barker, Pretty Boy Floyd, Machine Gun Kelly, et cetera, were the scourge of the country. In those depression years when so many of our citizens were out of work a great many people hero worshipped these criminals who were robbing banks all over the Nation.

The feeling was prevalent that only rich people had money in banks so many people applauded what this criminal element was accomplishing. J. Edgar Hoover, by attracting intelligent, dedicated, fearless young men to the FBI's service, declared an all-out war on these public enemies and with daring and courage captured the imagination of the American people. The FBI agent and all law enforcement then became the heroes, replacing the criminal heroes in the public's admiration.

Mr. Hoover believed in the supremacy of the law. He was a man of integrity, honesty, and fair mindedness. All throughout his career he urged the American people to respect the law. He emphasized that the law is the archway through which men and women achieve justice and security. He warned that if you take away that archway the Government will crumble into anarchy and chaos. It is appropriate that his passing came on May 1 which we commemorate in this country as Law Day.

One of the secrets of J. Edgar Hoover's success and that of the FBI was that he was able to instill in his employees the necessity for excellence in performance and integrity in personal behavior. He imposed his own high standards on all employees and, as I said, that is the reason that cooperation was so promptly and fully accorded to FBI agents by American citizens.

The achievements of the FBI would not have been possible were it not for the dedication and discipline of the FBI's longtime Director. We, as Americans, will be forever in his debt. The monument to his time on earth is not only the great organization which we know as the FBI, but the respect for the law which is so essential for the survival of our democracy. J. Edgar Hoover's passing is a loss of incalculable magnitude but the legacy he leaves behind for us must most assuredly have given him the satisfaction which comes from having lived a life of accomplishment and unselfish, dedicated service.

Mr. Speaker, at this time I include herein the remarks of other Members who will join with me in this Special Order and one of J. Edgar Hoover's last major addresses which he gave before the 25th anniversary dinner of the Washington Chapter of the Society of Former Special Agents of the FBI on October 22, 1971, as well as an interview with him which appeared in Nation's Business magazine in January of this year:

REMARKS OF J. EDGAR HOOVER

It is a pleasure to be able to participate this evening in the festivities marking the 25th Anniversary of the Washington Chapter of the Society of Former Special Agents of the FBI. It is particularly fitting that such a significant event is being commemorated in this superb setting.

As you are aware, a new Headquarters for the Bureau is very gradually emerging from the ground on Pennsylvania Avenue across the street from the Justice Building. One local newsman has compared it to the building of a "Great Pyramid." I feel I must disagree with his observation . . . I am convinced that the ancient Egyptians were able to build their pyramids in far less time than it is taking to erect our new building.

There are some who maintain that the only reason I am staying on as Director of the FBI is to be present at the dedication. This is absolute nonsense. At the rate the building is going up, *none* of us will be around by the time it is completed.

This, of course, is the fervent wish of some of my more virulent critics. One of them . . . his name escapes me for the moment . . . has apparently fallen off his merry-go-round once too often.

Last spring he spent considerable time sifting through my garbage. I'm not complaining, mind you. In fact, my only reason for mentioning it is that I understand he is becoming increasingly confused between the trash he examines and the trash he writes.

Remarkably consistent in his disregard for the truth, my personal garbage sorter recently alleged that I had censured and transferred an FBI Agent because he was not properly attired at the time he killed an armed hijacker holding a stewardess hostage at the Kennedy Airport in New York.

You may be sure that no such censure

has ever included anything like the commendation and the $500 check that this cool-headed young man received for averting what could have been a real tragedy. Under the circumstances, is it any wonder that there are some who question the accuracy, no less the integrity and motives of some so-called news scavengers?

Maybe those of us in the FBI are narrow-minded when we frown on indiscretions involving unmarried couples . . . Maybe we are intolerant when we refuse to permit our personnel to participate in the activities of groups and organizations that are hostile to our government . . . Maybe we are old-fashioned when we frown upon extreme hair styles and wearing apparel. If we are, I am confident that you and the majority of the American people share our views.

The Bureau's achievements over the years have been the direct result of the kind of men and women who have served in the FBI . . . people like you . . . clean-cut, highly intelligent, dedicated Americans of the finest moral character who are totally loyal to their country and to the organization for which they work.

We have exacting standards in the FBI and we apologize to no one for them. We have no intention of arbitrarily compromising these standards to accommodate kooks, misfits, drunks, and slobs . . . Were we to do so, you may be sure we would eventually merit the unwarranted criticism we now receive.

Over the years, law enforcement, including the FBI, has borne the brunt of criminal violence. Twenty-three Special Agents, whose memories we revere, made the supreme sacrifice. I am sure there are some in this room who may have known or worked with one or several of these heroic men. All of you have shared their hardships and dangers and we can be grateful that the toll in human life hasn't been greater.

The hazards of being a law enforcement officer . . . an FBI Agent . . . continue to increase at an alarming rate as certain elements in our society are determined to defy lawful authority and are encouraged in it by some vituperative segments of the news media.

Despite the fact that FBI Agents act in self-defense and use firearms only as a last resort . . . armed criminals, displaying shocking contempt for authority and human life, have engaged our personnel in 67 gun battles since 1966. In addition . . . during a recent 12-month period, no less than 105 Bureau Agents were assaulted while fulfilling their official responsibilities.

Disregard for law and order is encouraged by hate-mongers, extremists, and others who assert that revolution against society is justified and necessary . . . and that men should be permitted to murder, rob, loot, and pillage with impunity to achieve their goals.

Some of us are old enough to remember the hoarse, terrifying, mindless roars of Hitler Youth; and though it is a frightful thing to say, it must nevertheless be said: A thing not too dissimilar from Hitler Youth has been abroad upon the campuses, and elsewhere in this country.

They have twisted and perverted rights into license of intellectual terrorism, into a conscious subversion of lawful national purposes constitutionally arrived at.

The U.S. Supreme Court has said, "Civil government cannot let any group ride roughshod over others simply because their 'consciences' tell them to do so."

Disregard for law and order is the anarchistic banner of those who want the rule of no rule . . . who profanely proclaim that all of the values of the past have failed mankind and that real progress can only be achieved by discarding tradition, demolishing our democratic institutions, and ultimately destroying our existent society.

Disregard for law and order is the stock-in-trade of vicious hoodlums who are encouraged to think and act as if they are without fault, but who suffer from spiritual malnutrition.

It is the end product of a chaotic philosophy which maintains that there is no such thing as right or wrong, guilt or innocence, and which accuses responsible authority of violating rights and restricting freedom when it responds to protect society from vile depredations.

Society, to survive, must protect itself from the lawbreaker. Of course, there are some who maintain that to imprison a criminal, to place him behind bars, is to dehumanize him.

Incarceration for the lawbreaker is certainly no more dehumanizing than a rationale that would have us believe that man is without fault and should not be held responsible for his deeds . . . that he is a helpless victim of forces that he can neither master nor control . . . that he is in effect a mindless brute who, while he walks erect, is really no different from the savage beast.

Warped and distorted concepts such as these only serve to encourage the lawless and erode the moral and spiritual strength of our Nation.

Too long we have concerned ourselves with the plight of the criminal. We have coddled him, we have shown him our compassion, our mercy and our leniency and, unrepentant, he has shown us his contempt.

Justice is not served when innocent victims and society suffer while the vicious criminal goes free.

Justice cannot be served when the rights of society are trampled in our courts by over-indulgent judges and misguided attorneys whose overriding concern for the criminal and obsession with legal technicalities have all too often distorted the true meaning and purpose of our constitutional guarantees.

Justice cannot be served as long as penal institutions fail to rehabilitate and conditions continue to exist in our revolving-door systems of parole and probation whereby convicted felons are unleashed on society, more eminently qualified to resume a life of crime than when they were imprisoned.

It is time we stopped coddling the hoodlums and the hippies who are causing so much serious trouble these days. Let us treat them like the vicious enemies of society that they really are regardless of their age. Let the punishment fit the crime, not the age.

Justice is not a separate thing—it is inherent in law and order.

Nor can justice be served as there are some who suggest and others who believe that law enforcement itself is a sinister threat to our free society. There are a few journalistic prostitutes who in their jaundiced outlook upon realities and truth attribute the increase in crime as somehow the fault of the FBI or the result of inadequate performance by it. They do not merely skirt but ignore completely the fact that the overwhelming part of the increase in crime has been in areas where the FBI has neither the authority nor jurisdiction, namely at the local and State level.

As Abraham Lincoln once said, "When you see a lot of different people all popping off to the same effect at the same time, you have very good reason to believe that a concerted campaign is afoot."

While intemperate voices raise cries of police brutality and police repression with little to support their contention, there are others who regard the use of science, the computer, and other technical advances as a potential threat to their freedom.

To serve the public properly in a society that grows ever more complex, to contend with the criminal who becomes ever more mobile, law enforcement, to succeed, must continue to seek improvement in its training, methods, and techniques.

I would be less than candid if I were to maintain that there are no longer incompetent policemen and abuses of police power, for the record shows otherwise. Unfortunately, the one bad police officer, the one who commits that isolated act of brutality, turns up among thousands of outstanding men, and becomes the symbol of all policemen rather than the exception that he is.

Extremists and hate groups which are committed to violence use allegations of police brutality and repression as an excuse for their malicious activities and to discredit the entire law enforcement profession.

Incredible as it may seem, there have been instances in which the news media, particularly television, have accepted without question wildly improbable allegations made by hate groups against the police and, even when the facts have been readily accessible, certain segments of the media have, for whatever reason, chosen to ignore and disregard them. Unfortunately, the truth never seems to catch up with the "big lie," and even if it does, it is too late to undo the harm that has been done in denigrating the forces of law enforcement.

The publication of drivel, while admittedly a right—is not the best way of discharging the precious responsibilities of a free press.

Criticism, of course, is essential in our democratic society. . . but criticism, to be valid, must be based on knowledge and a desire to correct deficiencies. The foundation of any news media should be truth, objectivity, and justice.

Criticism without basis is demoralizing and serves the interests of those subversives and criminals who seek to serve only themselves and not democracy. No man has the inherent right to place himself above and beyond the law, even though he may personally consider that law to be onerous.

It is time for the voices of logic and decency to be heard and to make their influence felt.

People of goodwill must rededicate themselves to building greater public respect for and confidence in law enforcement in the crucial role it plays in our survival.

We are citizens of the greatest nation on the face of the earth. We enjoy the most envied way of life known to man. If we are to survive as a nation, we must challenge the attitude of those who have been selling America short . . . who want to destroy, who want rights without responsibilities, and who encourage disrespect for law and order.

We live in a period of stress and turmoil . . . in times that demand spiritual strength and moral fortitude. If this country is going to wage an effective war against crime, it cannot be done by lessening the severity of the present laws but by enforcing them.

This nation's greatness and our freedom are based solidly on respect for the law.

Difficult and trying days lie ahead. The FBI, undaunted and ever mindful of its obligations to the American people, faces the uncertain future with confidence and determination. This is our pledge to you who have given us your loyal support and made important contributions to the success of the FBI.

The going will be tough . . . however, when the going *gets* tough, the *tough* get going.

J. EDGAR HOOVER SPEAKS OUT

About Presidents he has known; Attorneys General he has known; Crooks he has known; Organized crime in business; The FBI—past, present and future; and Demands that he retire.

Almost 48 years ago, a hard-working young Justice Department lawyer was called into the office of then Attorney General Harlan Fiske Stone and told: "I want you to take

over as acting director of the Bureau of Investigation."

J. Edgar Hoover reflected for a moment. A Justice Department employee since 1917, he had been assistant director of the Bureau for three years, agonizing all the time as it became increasingly a product of the political spoils system.

"I'll take the job, Mr. Stone," he replied, "on certain conditions":

The Bureau must be divorced from politics. Appointments and promotions must be based on merit, and the Bureau must be responsible to the Attorney General only.

"I wouldn't give it to you under any other conditions," the Attorney General said. "That's all. Good day."

In the years since then, John Edgar Hoover has seldom been out of the public eye as he has molded the Federal Bureau of Investigation into a model law enforcement agency and kept it that way. (The word "federal" was added to the Bureau's title in 1935. The word "acting" was dropped from Mr. Hoover's own title a few months after his appointment.)

"FBI" became an abbreviation that commanded the respect and cooperation of citizens.

"G-Man" became a nickname feared by criminals and subversives.

Mr. Hoover set a rigid standard of personal behavior for himself and for the people of the FBI. To attain a goal of excellence, he believes there is one essential: integrity of self and deed. With absolutely no compromise.

A lifelong bachelor whose work is his first love, he does find time for other interests, too. In the evenings at his two-story house in a pleasant Northwest Washington neighborhood (a housekeeper oversees the establishment), he relaxes in front of the television set and in the company of his two cairn terriers. ("Naturally, they're spoiled. They boss me around.")

He loves gardening and is proud of his roses. And now that he's put down artificial turf in his spacious back yard, "I can forget about seeding grass every year. This stuff is wonderful."

His favorite sport is horse racing. A big reason is that "you can relax completely. I love to watch the horses run." The Ex-Agent Association recently gave him a statue of a stallion—"the first I've ever owned, though I've supported many of them."

He was also a fan of the Washington Senators before the franchise was moved to Texas last fall, and frequently went to games with Richard Nixon when he was Vice President. (Mr. Nixon "knew all the players by name and everything about them—batting, fielding, everything.")

His favorite vacation spot is La Jolla, Calif., and if he were an agent in the field, that's where he'd most like to be assigned. His second choice would be Butte, Mont.

"I've been accused of using Butte as a kind of Siberia for agents that displease me," he says with a chuckle. "When that allegation was made, I checked up and found we actually had 144 requests from agents to be assigned there. You know why? It's close to Glacier National Park, and some of the best hunting and fishing in the world is around there."

Mr. Hoover, 77 this New Year's Day, has been warmly lauded for his performance as director of the FBI. An inner corridor leading to his office is lined with plaques and citations from scores of organizations and with mementoes from notables he has known.

In recent years, he also has been the target of criticism, a fact he accepts as inevitable in light of the position he holds.

In this interview with editors Jack Wooldridge and Wilbur Martin of NATION'S BUSINESS, Mr. Hoover talks over many of the highlights of his career, taking note of achievements for which he has won praise as well as matters for which he's been criticized, and discussing other subjects ranging from Presidents and Attorneys General he has known to crooks he has known.

You have served under eight Presidents. Were you closer to some than others?

President Coolidge I only knew officially. I became very, very close personal friends with Herbert Hoover, but really this was after he left office. He was chairman of the board of the Boys' Clubs of America and I was a board member. I got to know him quite well.

I didn't know until he told me years after he left office that he was responsible for my being named director of the FBI. As a young lawyer in the Justice Department, I had worked with the Senate Foreign Relations Committee on an investigation of whether we should restore recognition to Russia. I had come to the attention of Mr. Hoover, who was then Secretary of Commerce.

Attorney General Stone mentioned to him that he was looking for someone to put in charge of the Bureau and Mr. Hoover recommended me.

I always felt President Hoover was terribly wronged. Everyone blamed him alone for the Depression. He was a very shy man, you know, very human. We used to walk down the street in New York City after he had been President and no one recognized him. I thought, "How terrible, to be forgotten."

I was so pleased that in his later years he was recognized for the great man that he was.

I was very close to Franklin Delano Roosevelt, personally and officially. We often had lunch in his office in the Oval Room of the White House. During his Presidency and afterwards, at Gettysburg, I was close with Gen. Eisenhower. He was a great man and a great President.

I lived across the street from Lyndon Johnson for 19 years. We were very close friends and this friendship continued during his Presidency and to this day. I hear from him regularly.

When he was in the Senate, and we were neighbors, he had a little dog he called Little Beagle Johnson. Every few days he would come over in the evening and say, "Edgar, Little Beagle Johnson's gone again. Let's go find him."

And we would go off looking all over the neighborhood.

When he was President, two of LBJ's beagles died. One swallowed a stone and the other one was run over by a Secret Service car.

I got a little beagle from a kennel in Atlanta and gave it to him. One day, I was visiting at the White House and he said, "Let's go look at the dogs." We were walking along when all of a sudden he hollered, in his big, Texas voice right in my ear, "Edgar, where are you?"

Well, I was right beside him and I didn't know what he meant. "I'm here, Mr. President," I said.

"Oh, I don't mean you," he answered. "I mean the dog, the beagle. I call him Edgar."

I had a letter from President Johnson just a few weeks ago and he told me Edgar was doing just fine on the ranch in Texas.

Of course, I have been friends with President Nixon for a long time. I first met him on the Alger Hiss case. A lot of hatred for President Nixon stems from this case, from some of the liberals and pseudoliberals who've never gotten over this case. I think much of the hatred for me stems from this case, too.

[Mr. Nixon, then a Congressman, played an active role in the case, in which Hiss, a former State Department official accused of having passed on secrets to the communists, was convicted of perjury.]

President Nixon has changed materially. He's much more extroverted today than when I first met him. That's good. I think he's doing an excellent job as President, despite the brickbats he gets thrown at him from some of the media. He never loses his cool. He's done an excellent job on economic matters and I think his coming trips to China and Moscow will turn out well. He knows how to negotiate with people without giving up principles.

You have also served under 16 Attorneys General and once termed Ramsay Clark the least effective. Who was the best?

Oh, that's hard to say. There are a half dozen that stand out, those I was very close to.

There was Harlan Fiske Stone who served under President Coolidge. He appointed me and we were very close. After he became Chief Justice of the Supreme Court he often would stop by. He'd say, "Edgar, I've come by to get an account of your stewardship." He considered me the steward of the FBI.

Then there was John G. Sargent [who also served under President Coolidge]. He was a big man, 6 feet 6 or 7, and wore a size 15 shoe. His feet always hurt and sometimes when I went home with him to lunch, he'd take his shoes off. He was like the mountains of Vermont—solid, very solid.

Herbert Brownell [under President Eisenhower] is a great lawyer, a great administrator. And Bill Rogers [William P. Rogers, now Secretary of State]. We were very close. When he was Attorney General and President Nixon was Vice President, we would frequently spend the Christmas holidays in Miami Beach together.

Frank Murphy [who served under President Roosevelt] was a very close personal friend. I don't know why. In the beginning, we were so opposite philosophically. Murphy was very shy and stiff in public. But in private he was the life of the party. After he was named to the Supreme Court, I would go up and we would walk from the Court to the Washington Hotel, where he lived.

Of course, there's John Mitchell, the present Attorney General. He is a very able man, a very down-to-earth individual, very unlike those Herblock cartoons in *The Washington Post*.

And I'm completely fascinated by his wife. Martha is a wonderful person. She speaks her mind. She has integrity in thought. I like that.

I was very close to the wives of some of the other Attorneys General. Mrs. Homer Cummings [her husband served under President Roosevelt], Mrs. Brownell, Mrs. Rogers.

What, in your mind, has made you successful in your administration of the FBI?

Principally, instilling in every FBI employee the absolute need for excellence in performance.

A law enforcement agency is only as good as the support it receives from the public. Over the long run, the public cannot be fooled. Only demonstrated performance produces the respect and cooperation necessary to achieve the results FBI responsibilities demand—and which the public has every right to expect.

This attention to a goal of excellence requires its sacrifices. It means long, often grueling hours of work on the part of our special agents. It means they must maintain personal conduct standards that raise no question as to our capacity to discharge FBI duties with skill and integrity, strict impartiality in conducting investigations, and self-discipline to withstand the frequent taunts and abusive manners of those who would impede the performance of our lawful obligations.

Some of my critics have charged me with being a harsh and autocratic administrator, but they fail to recognize the trust that must be generated from the proper discharge of FBI responsibilities. This fact leaves little room for error. An enforcement agency, by the very nature of its duties, is an easy and natural target for criticism.

You spoke of critics. In recent years, the most persistent criticism concerning you, Mr. Hoover, has been that you should retire and hand over the reins of the FBI to a younger man. What is your reaction to this?

I don't consider my age a valid factor in assessing my ability to continue as director of the FBI—any more than it was when, at the youthful age of 29, I was appointed to this position. I was criticized then as "the Boy Scout." Now, I'm called "that senile old man."

My appointment to head the FBI was based on performance and I believe that same standard should apply to any evaluations of my fitness to continue in this post.

Years are only a guide to a person's age and have little meaning when attempting to equate them with ability, vigor and demonstrated performance.

This is what I believe many young people are talking about today when, in spite of their youth, they demand a more active role in our society commensurate with the many obligations they are required to shoulder. And they are right.

Many of our great artists and composers did their best work in their 80s. They were judged on performance, not age. Other leaders, too.

Look at Bernard Baruch; he was brilliant in his 90s—and Herbert Hoover and Douglas MacArthur in their 80s.

That is my policy. I judge a man on the quality of his performance. So long as I am blessed with good health and enthusiasm for my work, I would hope that I may be judged in this same manner.

How much has the FBI grown since you assumed its leadership?

When Attorney General Stone appointed me on May 10, 1924, to head what was simply called the Bureau of Investigation, the Bureau had 441 special agents.

Compared with today, the Bureau's jurisdiction was quite limited. Through the years Congressional enactments, Presidential directives and orders of the Attorney General have substantially increased our jurisdiction to some 185 federal investigative matters.

We have 59 field offices located throughout the U.S. and Puerto Rico. In addition to these major offices, there are hundreds of resident agencies or suboffices. All told, the Bureau now has approximately 19,000 employees, and over 8,000 of these are special agents.

I might say here that the average agent works overtime 2½ hours every day, but gets paid only for one hour and 49 minutes, the legal limit. I think the amount of overtime is grossly excessive, but it's necessary because of the vastly expanded duties given the Bureau.

Has the nature of your own work changed as the Bureau has grown?

In the early days, I could get out and visit the field offices every year, personally see the agents in action, and spot those with potential, those who did more—or less—than their duty.

I can't do that now. I have to stay here.

I spend a lot of time in preparation for testimony before Congressional committees, and in testifying.

But the FBI inspection division reports to me on what you might call "the blood pressure of the service." It makes inspections of every field office—not to get somebody, but to find the soft spots, if any. We can't afford these.

Another difference is that in the early days, I could get out on cases. I wish I could do that now, but somebody has to run things here. I still sweat the hard cases out, though, here at headquarters.

The plane hijackings, for example.

What were some of the cases you went on?

Some were publicized, some were not. There was one involving John Henry Seadlund, in the '30s. He was wanted for the kidnaping and murder of Charles S. Ross [a wealthy St. Paul, Minn., businessman]. Seadlund was arrested at the Santa Anita race track in California and I flew out there to get his confession.

In the FBI, we have never countenanced any rough stuff, never any "third degree." I believe psychology plays a large part in dealing with criminals. Psychology and integrity, even with criminals. This case makes that point.

I talked all day to Seadlund and I hadn't had any sleep. Or food. I asked him if he wanted something to eat.

"What do you want to know for?" Seadlund snapped at me. "You won't get it for me." I asked him pretty bluntly, "What do you want to eat?"

He said, "Steak, potatoes, and pie à la mode." I told an agent, "Just double that order."

The next day Seadlund asked to see me. He told me, "Well, you kept your word and got me my steak. Now get your steno and I'll tell you what you want to know." I got a full confession.

So psychology and integrity are tremendously important. FBI agents were warning suspects of their constitutional rights long before it was required by law.

We had to take Seadlund to St. Paul. When we left Los Angeles it was 78 degrees and when we got to St. Paul it was zero. We had to hide out from the press in the woods for two or three days, looking for the bodies of Ross and Seadlund's partner, whom he had also killed.

I asked one of the agents to get me some warm clothing. He brought me a suit of red woolen underwear. He could have at least gotten white, but it was a gag and it was appreciated.

Weren't you also personally in on the Alvin Karpis affair?

Of course, there was Karpis. He was part of the Ma Barker gang, and kept sending me postcards from all over the country, saying he was going to kill me like Ma Barker and her son [Fred] were killed in a gun battle in Florida. I passed the word that whenever we spotted him, I wanted to make the capture personally.

Well, we tracked him to New Orleans [in April, 1936] and I flew down there.

We try to make an arrest at dawn, or some other time when there aren't many people on the street. But we had to do this one at 5 in the afternoon. Karpis had been holed up in an apartment on Jeff Davis Parkway and it was the rush hour and there were people everywhere.

Karpis and a companion suddenly walked out of the house and got into a car. I ran up on one side and grabbed him. Another agent went to the other side and grabbed the other fellow.

I said, "Bring the handcuffs," but everybody had forgotten to bring handcuffs. So an agent who had grown up on a cattle ranch said, "I can tie him up so he can't move." And he did, tying his hands behind him with a necktie.

When we got into the car, Karpis called me by name. I asked him how he knew who I was and he said, "Oh, I saw your picture in the paper in Miami." I'd had my picture taken when I caught that sailfish on the wall over there, the only one I've ever caught. Karpis said that my luck was better than his, that he'd been trying to catch one for three years.

On the way downtown, the agent driving the car got lost.

Karpis spoke up, wanting to know where we were going. I asked him why he cared and he said, "Well, if it's to the post office building, I can tell you how to get there. I was planning to rob it." So he directed us.

The agent who was driving heard from me later.

You have always shown particular interest in kidnaping cases, haven't you?

Yes. Every case is important, but kidnapings strike me as being extremely vicious crimes against society. Often they involve young children or other family members. I don't think there is anything worse than the kidnaping of a child and the agony of the family. I look with a great deal of personal satisfaction on our accomplishments in these cases.

We first got the name "G-man" on a kidnaping, the Urschel case. [Oklahoma oilman Charles F. Urschel, kidnaped in 1933 by the George "Machine Gun" Kelly gang. Caught in a house in Memphis, Tenn., Kelly cringed and cried, "Don't shoot, G-men, don't shoot, G-men!"]

The federal kidnaping statute, passed in 1932 after the Lindbergh baby kidnaping, as well as a series of other special "crime bills" in the early '30s, greatly expanded our responsibilities in that field.

Do you have any advice on how to keep in good health?

I try to stay in good health by avoiding excesses. Moderation in everything you do is a good rule. I take a physical every year and the last one showed I was in better shape than when I took the first one, in 1938. I had to lose a little weight after that one.

All of our agents must be in top physical condition. They can be a little underweight, but they can't be overweight. When I put that rule in, some men groaned a little. But the wives all think it is great.

I exercise every morning on an exercycle.

I try to get enough sleep each night, but not too much.

In the evening I relax and watch television. I usually have a highball, maybe two. But never more than two. Jack Daniels black label—on the rocks, with a dash of soda. I never drink martinis. Martinis are poison. Nobody can drink four and be sober.

I never take work home with me Monday through Friday. But I take a lot of work home with me on the weekend when I have time to think.

Of course, I watch my diet. Again, you have to do everything in moderation.

I have two little cairn terriers. One is 17, blind and deaf, and the other is four. She's a little hussy, bosses the older one around. At breakfast, they get my bacon and eggs. I get the fruit juice and black coffee.

I always have the same thing for lunch: grapefruit, cottage cheese and black coffee. And usually I eat at the same place [the Mayflower Hotel].

I like to relax at lunch. One of the things that irritates me is for people to come up and ask, "You don't know me, do you?" I always say, "If you were ever in Alcatraz, I know you. We'd have a record on you."

My dinner at home is always moderate. I'd love to have a piece of chocolate cream pie. But I don't. Moderation in what you do, integrity in what you do. I believe in that absolutely.

Horse racing is your favorite sport. Have you seen any of the great winners?

Yes. I saw Whirlaway, for example.

As a matter of fact, I was at Aqueduct and asked a friend with me to get a ticket on him. He came back with a ticket on the wrong horse, Tola Rose I think it was, a 20–1 shot. Whirlaway was something like 2–5. And Tola Rose won. I told him I should let him pick the horses every time.

One fellow I wouldn't let ever pick a horse is George Allen [a friend of Presidents Roosevelt, Truman and Eisenhower]. He always bets three horses in the same race—to win.

President Eisenhower used to give George $5 to bet for him every now and then. I told President Eisenhower, "I'd never let George bet for me. He's the worst at picking horses I ever saw."

George said that if I'd told that to anybody else but the President, he'd have sued for slander. We're very good friends.

What are your 10 most important accomplishments as director of the FBI?

It's difficult to pick out any specific number of accomplishments. Certainly among the most important was cleaning up the Bureau, cleaning out the political hacks. This was the mandate given to me by Attorney General Stone when he appointed me. Also, winning the support the FBI has consistently received over the years from the law-abiding and concerned public.

Without these, it is doubtful the FBI could have realized many other accomplishments. I am particularly proud that FBI performance during my tenure has merited the public's support.

Other accomplishments which were important in the development of the FBI include the nationwide centralization of criminal fingerprint records in the FBI Identification Division in 1924; establishment in 1932 of the FBI Laboratory; and establishment in 1935 of the FBI National Academy, which provided a university-level advanced training program for select law enforcement officers throughout the nation.

Also, the capture of the Nazi saboteurs landed on our shores by submarine during World War II; the convictions of top communist leaders following the war; the successful investigations into the Rosenberg and Col. Rudolf Ivanovich Abel spy cases in the 1950s; the convictions resulting from investigations of the murders of a number of civil rights workers during the 1960s; and the beginning of the FBI National Crime Information Center.

There are many more, of course, but these stand out in my mind.

What about your own politics?

You know, when I took over with the mandate to clean out the political hacks and straighten out the Bureau and did, I was accused of being a Democrat because the Republicans were in office. Then I was accused of being a Republican when the Democrats took over.

I grew up in and live in the District of Columbia. I have never voted in my life. I don't like labels and I am not political. My feeling about politics is that both parties should nominate for all offices the very best qualified man—unfortunately, that isn't always the case—and that the people should vote for the man whom they believe is the best qualified.

You have been quoted as saying the FBI's National Crime Information Center is a real breakthrough in fighting crime. Why so?

The NCIC provides what was long urgently needed, a comprehensive and swiftly efficient informational exchange system of national scope.

This computerized index of documented crime data is now tied to all states and Canada by a vast telecommunications network. The total number of NCIC active records concerning stolen property and persons wanted for crimes has climbed to over three million, with daily transactions sometimes well over 75,000.

I'll give you an example of why I think this gives our nation's law enforcement community an essential tool to meet the challenge of crime.

Recently, two state troopers in New York State stopped a car. They radioed for a check on it and within two minutes—two minutes—they knew that the car had been stolen and that its two occupants were wanted for murder in California.

Some have charged that federal computer systems are leading to a huge national data bank that could strip the individual of his privacy. Could you comment?

As far as the FBI is concerned, those fears are groundless.

The National Crime Information Center is the principal FBI computer system and it contains only documented data concerning criminals and stolen property. Its information is available only to authorized law enforcement agencies and the system was designed to prevent any abuse or misuse of its data.

Any allegations that this could lead to a "big brother is looking at you" operation are completely false.

The FBI has been accused of engaging in unauthorized wiretapping. What are the facts?

The facts are that the FBI has not used wiretaps without the authority of the Attorney General, and then only to a limited extent in cases involving our nation's security.

Also, under the Omnibus Crime Control and Safe Streets Act of 1968, federal judges may authorize the FBI to use electronic surveillance techniques in some cases involving organized crime. The Attorney General has to approve each instance, and a written affidavit establishing probable cause for action must be presented to the judge.

Assertions that FBI wiretapping is widespread are absurd. If the FBI engaged in wiretapping to just a fraction of what its critics suggest, it would have no time for anything else.

These critics who accuse the FBI of this practice can never produce any proof.

Congressman Boggs [Rep. Hale Boggs (D.-La.), majority leader in the House] made a wild statement that his telephone had been tapped. That charge was simply not true. No telephone of any Congressman has ever been tapped since I became Bureau director in 1924. He was put in the position of having to "put up or shut up" on that charge and he shut up.

Another accusation against the FBI is that of snooping on campuses.

Completely false. I believe this is only a scare tactic to inflame the academic community against the FBI.

Yes, the FBI does conduct investigations on college campuses—or anywhere else in the nation. But only if there is a violation within its investigative jurisdiction.

If, for example, an ROTC building has been destroyed by a fire or explosion, we will investigate to see if there is evidence of sabotage or destruction of government property. Many campuses have government research or other government facilities. If government property is damaged or stolen, the FBI investigates.

We do not snoop on campuses, or in any way treat the campus different from any other area of society. The FBI has the highest respect for academic freedom.

American business is making great use of computer technology, particularly in records management. What steps has the FBI taken along this line?

One of the first actions I took upon becoming director was the establishment of a centralized national file of arrest records on fingerprints. This led to formation of the FBI Identification Bureau in 1924, the year of my appointment.

From 800,000 fingerprint records, this has now grown to nearly 200 million, including many civilian and military fingerprints that are kept separately from those filed as a result of arrests. I have always felt strongly that fingerprints for identification purposes are a protection for the public. I remember I personally took the fingerprints of John D. Rockefeller Jr. and his family in 1924 to encourage the public to take advantage of this protection, and to show there was no stigma in having your fingerprints recorded. Nelson was a little boy then.

As far back as 1934, the FBI installed a punch card system of searching fingerprints. However, because of the rising volume of fingerprint records this proved inadequate and, by necessity, the Identification Division had to return to manual searching. Presently, development contracts are nearing completion to computerize fingerprint files and to electronically read, classify and retrieve—within seconds.

In 1954, we had in operation the first automated payroll system in the federal government.

What are some of the major problems the FBI has run into in combating organized crime, especially in the field of legitimate business?

There is no question the two most serious problem areas are the complexity and size of the investigations themselves, and the general apathy of citizens directly or indirectly affected.

On one series of gambling raids we used over 200 FBI agents. In another series, we had to call upon over 400 agents. In one major hoodlum international bankruptcy case alone, we had investigations being conducted by 31 offices in 28 states, ranging from New York to California and from Minnesota to Alabama.

Many hoodlums, unfortunately, have acquired a facade of semirespectability in their communities. People find it hard to believe that these so-called "businessmen" can possibly be involved in illegal activities.

Even more disturbing, from a law enforcement view, is the seeming indifference of otherwise responsible citizens to the acknowledged existence of specific phases of organized crime in their communities.

What they are overlooking, of course, is that hoodlum-connected major thefts increase their insurance rates, that labor racketeering increases consumer costs, that gambling and narcotics corrupt youth, and that bribery of civic and police officials undermines good government and deprives the public of the protection to which it is entitled.

Is there a law which particularly helps the FBI to fight infiltration of business by criminals?

Under the Organized Crime Control Act of 1970, which the President signed into law in October, 1970, Title IX bans the investment of underworld funds in legitimate business ventures. This provides for severe criminal penalties, as well as forfeitures.

Successful businessmen place great emphasis upon personnel training. What is the FBI doing in this area?

I certainly agree with the importance of personnel training, and effective personnel training has been a keystone of FBI operations since I became director. In fact, the FBI pioneered advanced law enforcement training with the establishment of the National Academy in 1935.

In addition to the Academy, the FBI has some 1,500 specially trained special agent police instructors who go out where requested and give a wide variety of training. For example, this FBI Field Police Training Program just this past year conducted more than 9,000 training schools, attended by more than 300,000 people. And this involved over 83,000 hours of classroom instruction by Bureau personnel.

The new facility for our Academy at Quantico, Va., when we move in later this year, will enable us to increase the number of officers to be trained from 200 to 2,000 annually. It will also provide specialized courses for 1,000 others. These will be management courses, and I'm quite proud that we will be able to do this. I believe it will certainly strengthen local law enforcement.

Do you think the United States should have a national police force?

I am vigorously opposed to a national police force, or any trend toward one. I want to make one point clear, and it is one that critics of the FBI seem to want to overlook.

The FBI does not decide what it will investigate. It is given responsibilities by Congress, by the President, by the Attorney General. It is charged by law to carry out certain functions. And we will do that.

I might also say that I opposed our being given some of these responsibilities. For instance, we are charged with investigating

an illegal gambling case if it involves five or more persons, remains in business 30 days, or has a daily $2,000 gross. I believe this is a function of local law enforcement.

The FBI has a relatively small number of Negro special agents. What is its policy with respect to employing members of minorities?

The FBI is unequivocally dedicated to the principles of equal employment opportunity. I insist that all appointments and other personnel actions be based on merit and fitness.

Let me say that nothing would please me more than to have a greater number of special agents from minority groups. We have a very real need for them, and they would be a most welcome asset. We will continue to make every effort to attract those qualified.

But I have not, and will not, relax the high standards which the FBI has traditionally demanded of special agents without favor or exception.

Attorney General [Robert F.] Kennedy became very angry with me over this.

I would not yield.

The standards for a special agent of the FBI are stringent. Applicants must be of outstanding appearance and outstanding character, and have the required education in law, accounting, languages or sciences, or three years of executive, professional or investigative experience.

We demand of FBI employees a standard of morality which can be approved by the majority of the American people. Some say we are too strict, but I submit to public judgment that discipline is an absolute necessity. An undisciplined law enforcement agency is a menace to society.

We do have exacting standards in the FBI and we apologize to no one for them. We have no intention of arbitrarily compromising these standards to accommodate kooks, misfits or slobs.

As I have said publicly, disregard for law and order is encouraged by hatemongers, extremists and others who say that revolution against society is justified and necessary.

A number of terrorist or revolutionary groups seem to have sprung up in recent years. Would you comment?

Terrorist-extremist sentiment is on the rise in the nation today, especially in the so-called New Left. The Students for a Democratic Society was formed in 1962 and by 1967 this group had developed a revolutionary, violent posture, urging destruction of our democratic institutions. In 1969, it was torn by factionalism and its extremist wing became the Weatherman.

The Weatherman, which went underground in 1970, believes in violence. Its adherents have collected explosives and set up bomb factories. They have carried out acts of violence not only against police facilities, but against military and government buildings and even private buildings which happen to house the offices of companies these extremists don't like.

Small terror groups, operating from underground, represent a great danger. Unfortunately, the Weatherman type of extremist mentality seems to have spread to some other young people and even some adults.

You have black nationalist terror organizations such as the Black Panther Party. The Panthers are hoodlum-type revolutionaries, and their true nature must be exposed.

Currently the Panther Party is doing everything possible to show a "humanitarian face"—to show that it is interested, for example, in the welfare of children through its so-called Breakfast for Children program.

This is a public relations gimmick. Part of the reason for this feigned emphasis on humanitarianism is to encourage contributions from wealthy white liberals, who have given thousands of dollars to the Panthers.

What is the FBI's role concerning protests, such as those against the Viet Nam War?

In America, we have freedom of expression. Individuals have a right on their own to oppose the war or say anything else they desire about Viet Nam.

There are a number of antiwar groups and they have the right to voice their viewpoints. The FBI does not in any way attempt to stifle groups or individuals who speak out against the Viet Nam War. Charges that we do are completely false.

The FBI becomes concerned only when members of these or any other groups violate laws within its investigative jurisdiction. Or when the activities of these groups become violent or terroristic and pose a threat to the internal security of the country.

You mentioned what you consider your most important accomplishments as FBI director. What would you consider the most important cases the FBI has investigated?

I like to think that all of our investigations are important. But in terms of their impact on FBI operations or the events of the time, a few stand out.

The successful investigation of the kidnaping of Charles Lindbergh's son in 1932 led to the passage that same year of the federal kidnaping statute, giving the FBI added jurisdiction over this despicable crime.

John Dillinger had become a full-blown American folk hero by the time our agents were forced to shoot while moving in to arrest him in Chicago during 1934. I saw an ad the other day that they were making another movie about Dillinger. I suppose this one will make him a hero again. I can't understand this. The worst movie ever made was that one about Bonnie and Clyde. They were nothing but a couple of bum criminals, the worst kind.

Just a few months prior to the Japanese bombing of Pearl Harbor in 1941, FBI agents arrested 33 members of the network of the German spy, Frederick Duquesne. This case, together with the FBI capture of the Nazi saboteurs landed secretly in this country, I am sure, stopped serious enemy attempts to sabotage our war effort. Those Nazi saboteurs were tried in Classroom No. 1 of this building [the Justice Department building].

In 1949 our investigations resulted in the conviction of 11 top leaders of the Communist Party, U.S.A. We were only a few years removed from working with the world's leading communist power, the Soviet Union, as an ally. It was hard for some to realize the conspiratorial nature of the Communist Party in those circumstances.

The trial in which the leaders were convicted galvanized public opinion to the fact the communists were attempting to subvert our democratic form of government. The Rosenberg atom bomb spy case the following year left little doubt of these motives.

The six-year-long FBI investigation of the 1950 robbery of Brink's, Inc., at Boston demonstrated the virtue of investigative persistence and hard work.

The FBI investigation of the assassination of President Kennedy at Dallas resulted in the interviewing of approximately 25,000 persons and the submission of more than 2,000 reports to the Warren Commission.

As a result of the assassination and the investigation, Congress passed legislation, approved by the President, providing for federal criminal penalties in instances involving Presidential assassination, kidnaping and assault. The FBI was charged to investigate such violations, which were previously the responsibility of the local jurisdiction in which the crime occurred.

The FBI investigation of the murder of three civil rights workers in Mississippi in 1964, as well as investigations of other similar instances of violence and brutality, helped to hasten the passage of broader civil rights legislation.

Mr. Hoover, is there one crook you remember most vividly?

Gaston B. Means. I think he was the worst crook I ever knew. I fired him from the Bureau the first thing when I took over and he became mixed up in all sorts of things. He was a scoundrel.

Evalyn Walsh McLean [the wealthy Washington socialite] knew he was a crook, but she thought because he was, he could help in the Lindbergh kidnaping. She gave him $100,000 to try to get the baby back, and would have given him more. She was going to pawn her jewels, but I stopped that.

We never did find the money Means got from Mrs. McLean and which he said he had buried. We had divers searching the Potomac. When he was convicted and in the hospital at Leavenworth, I flew out there and saw him.

"Why did you lie to our men about where the money is?" I asked him.

He put his hand over his heart and said, "Oh, Edgar. That wounds me."

He was a complete scoundrel. But he was the type some people liked—a sort of lovable scoundrel.

A headquarters building for the FBI is being constructed across the street. When will it be completed?

There are some who maintain that the only reason I am staying on as director of the FBI is to be present at the dedication of this new building. I say this is absolute nonsense. In a recent speech, I facetiously noted that at the rate it is going up, none of us will be around by the time it is completed.

Hopefully, it will be ready for occupancy in 1974. We have shared space with the Department of Justice since 1934 and during that period our staff and that of the Department have multiplied many times. It's been necessary to relocate many phases of our operations in seven other sites in the capital.

This new headquarters will bring everything under one roof and vastly improve our administration and efficiency.

Would you take a look ahead at the FBI's role in the years to come?

I would hope the FBI's role in the future will be identical with its role in the past and at the present. That is, being a servant of the people.

The FBI's success has been built on one vital base—the confidence of the people. If we knock on a citizen's door, he does not have to talk to us or give our special agents information. This is a decision he must make. We can solve cases only if citizens furnish information.

We want to maintain the confidence and support of citizens in all walks of life, in all areas of the country. If we don't, we simply cannot do the job for which we are responsible.

I want the FBI's work in the future to continue to merit the approval of the people. This means, on our part, top quality investigations. Efficient, loyal and responsible personnel. A willingness to work hard.

One last question, Mr. Hoover. You've spent your life fighting crime. Have you, as a person, ever been victimized?

Yes. Once by a fellow who came door-to-door. I bought a load of fertilizer from him for my roses. The stuff turned out to be black sawdust.

And then, once by the fellow they called "The Birdman of Alcatraz." He had two cells—one in which he lived, and another where he kept his birds.

My mother was alive then and she always liked to keep a few birds, so I bought a canary from him. Only it turned out to be just a sparrow, dyed yellow.

So I've been conned at least twice in my life. I guess that proves I'm human.

Mr. GROSS. Mr. Speaker, the death of J. Edgar Hoover leaves this Nation and its people immeasureably poorer for we have lost a truly great patriot and a man

who was his country's servant in every meaning of the word.

In my lifetime, and in the lifetime of this Republic there have been few men who could equal his devotion to the principles upon which the United States of America was founded.

It is my prayerful hope that those who will walk in his footsteps will measure up to the task he did so well for so long.

Mr. KUYKENDALL. Mr. Speaker, I was deeply saddened to learn this morning that the much respected Director of the Federal Bureau of Investigation, J. Edgar Hoover, had passed away.

Mr. Hoover's dedication to the FBI, to the Department of Justice, and to the cause of freedom in this country has been an inspiration throughout these many years. J. Edgar Hoover was a tough taskmaster who demanded superlative performance and a high level of loyalty from those who worked for him in the Bureau. In my judgment this toughness was a credit to him. I wish more of our agency and bureau directors in the Federal Government had as firm a grasp on their organizations.

The Federal Bureau of Investigation has been known for its efficiency, thoroughness, and effectiveness during the years that Mr. Hoover has been at the helm. He will no longer be at that helm and he will be missed.

Mr. YOUNG of Florida. Mr. Speaker, America and the free world are diminished today by the death of J. Edgar Hoover, one of the greatest defenders of human rights and freedom of our times.

Mr. Hoover died at the age of 77 after more than 47 years as Director of the Federal Bureau of Investigation, an organization he built into the most effective law enforcement agency in the world. Fittingly, he was on the job until the end. The FBI was his life, and it is hard to imagine the FBI without J. Edgar Hoover.

Mr. Hoover was a patriotic, dedicated public servant, a man above petty partisan considerations, a man who served all Americans, regardless of race, creed, or color. He served Presidents of both parties; he was a friend and trusted confidant of many of the great leaders of our times.

Because of his untiring efforts, America is a safer nation today. He has been a relentless foe of those who would subvert this Nation from within—a foe to those who would break our country's laws.

While J. Edgar Hoover was held in contempt by enemies of our country and those who would change America by any means to serve their own ends; he was revered by the vast majority of his fellow citizens, who love their country and are pledged to its continued preservation.

In future years, others will take up the banner J. Edgar Hoover has carried so gloriously. He will be succeeded—but in our hearts, he will never be replaced. He holds a very special and most unique place in the history of our great America.

Mr. McCOLLISTER. Mr. Speaker, 48 years ago this month, the Attorney General of the United States summoned a 29-year-old subordinate to his office and told him he wanted him to be Acting Director of the Federal Bureau of Investigation.

The young man said he would take the job—but only under certain conditions.

He said:

The Bureau must be divorced from politics. It must no longer be a catchall for political hacks. We must base every appointment on merit. We should make promotions on proved ability only, and the Bureau should be responsible to no one but the Attorney General.

To which the Attorney General said:

I would not give it to you under any other conditions.

The day was May 10, 1924, a day that will go down in history as the start of an era marked by dedication and leadership in the fight of crime in the United States.

Mr. Speaker, that inimitable era ended last night with the death of J. Edgar Hoover. We mourn his passing as a Nation, realizing the great debt we, as Americans owe him.

Under his direction, the FBI has become world-renowned as the best law enforcement agency ever established. A remarkable man, he built a remarkable institution. Year after year, the efficiency, productivity, and effectiveness of his leadership have been manifested by reports to Congress and the almost unchallenged review of his appropriations requests. In addition, any one who has ever had any contact with Mr. Hoover's management ability has realized another key factor in this success. He was able to instill in his employees a real sense of purpose and a dedication to the accomplishment of a job in the most expedient way possible without sacrificing the quality work which has become a trademark of the FBI.

Mr. Speaker, Mr. Hoover has left a legacy we are grateful to inherit, a debt we can never repay, and a record that will be difficult—maybe impossible—to duplicate or surpass. I know I speak for all Americans in expressing my gratitude.

Mr. HUTCHINSON. Mr. Speaker, the death of J. Edgar Hoover closes a truly historic career in law enforcement in the United States. Called by President Coolidge in 1924 to head the fledgling Federal Bureau of Investigation, Mr. Hoover built it into an institution equaling the famous Scotland Yard. Under his leadership the FBI achieved its high reputation and popularity as the most effective law enforcement organization in the country. His successor, whoever he may be, will have an unequaled record to match. We have lost a leader of highest integrity, patriotism, honesty, and courage.

Mr. BAKER. Mr. Speaker, today we mourn the death of one of America's greatest leaders, J. Edgar Hoover.

Mr. Hoover would have marked his 48th year as head of the Federal Bureau of Investigation later this month. He guided the FBI for more than four decades, serving his country with distinction under eight Presidents.

Under J. Edgar Hoover's leadership, the Federal Bureau of Investigation became synonymous with top-quality law enforcement. It became a model for law enforcement officials in other countries.

A man of unquestionable integrity and character, Mr. Hoover molded the FBI to his own high ideals. His influence in establishing the FBI as a bastion against activities of those who break the law will live for generations to come.

The internal security of this country is stronger, because of the vigilance of the FBI under J. Edgar Hoover. Not only we but future generations of Americans, owe him a great debt of gratitude.

At an age when he could have been enjoying a leisurely retirement, Mr. Hoover continued to serve his country. It is tragic his death has come before he could enjoy a well-earned rest. J. Edgar Hoover will never occupy offices in the new Bureau Headquarters, now under construction. But this imposing edifice will reflect the great heritage and legacy he leaves behind. America has lost a great patriot and a great public servant.

Last year, I was proud to place in the CONGRESSIONAL RECORD a joint resolution adopted unanimously by the Tennessee General Assembly and signed by Gov. Winfield Dunn commending this great American. For the record, I would like to have that resolution reprinted:

HOUSE JOINT RESOLUTION No. 64

A resolution to honor J. Edgar Hoover:

Whereas, J. Edgar Hoover has served this country well in law enforcement and fighting subversion; and

Whereas, There are all too few men today willing to stand up and be counted as loyal Americans dedicated to the principles of freedom; and

Whereas, Mr. Hoover as director of the Federal Bureau of Investigation has been a bulwark of solidity for the United States of America; and

Whereas, Mr. Hoover has always answered the call of duty immediately; and

Whereas, The forces of the radical left have sought to discredit Mr. Hoover with false and misleading statements; now, therefore,

Be it resolved by the House of Representatives of the Eighty-Seventh General Assembly of the State of Tennessee, the Senate concurring, That the General Assembly expresses its deep appreciation for the years of untiring service J. Edgar Hoover has rendered to the United States and wish him well and Godspeed in the days ahead.

Be it further resolved, That we express our full confidence in his ability, integrity and leadership.

Be it further resolved, That copies of this Resolution be sent Mr. J. Edgar Hoover, Director of the Federal Bureau of Investigation; President Richard M. Nixon; Attorney General John Mitchell; and all eleven members of the Tennessee Congressional delegation.

Adopted: March 10, 1971.

JAMES R. McKINNEY,
Speaker of the House of Representatives.

JOHN S. WILDER,
Speaker of the Senate.

Approved March 12, 1971.

WINFIELD DUNN,
Governor.

Mr. WYLIE. Mr. Speaker, last night one of America's finest and most dedicated public servants passed away. The news of the death of J. Edgar Hoover has come as a profound shock to the people he so capably served as the Director of the Federal Bureau of Investigation.

His record of service began almost 48 years ago on May 10, 1924, when Mr. Hoover assumed the directorship of the Bureau of Investigation. Thus began the public service career of a man who would eventually become an honored and

uniquely American folk hero. Under his brilliant leadership, the Bureau was transformed from a scandal-plagued agency into the most respected law enforcement agency in the free world. Mr. Hoover demanded the highest of standards of all FBI agents and recruited men of moral, ethical, and professional competence for the demanding and often delicate job of investigating violations of Federal law and protecting the national security against foreign and domestic subversive elements. In fulfilling this most difficult task. Mr. Hoover always acted with restraint and never abused the immense power of his position. In fact, he always insisted that the FBI function only as an investigative agency for the Department of Justice and made certain that it would never become a national secret police while he was Director.

Since his appointment in 1924, he has served every President elected by the American people and they in turn have expressed their total confidence in his ability and integrity. Of more importance however, is the fact that he has served the American people with not only a brilliant record in his chosen field, but as an inspirational example of how a government agency should and can function efficiently in the public interest.

We have lost a great American, but beyond that I truly feel that his record in the service and defense of the Republic in which he so deeply believed and loved will be the ultimate, fitting, historical euology for J. Edgar Hoover. The cause of freedom in the United States of America has lost one of its greatest champions.

Mr. RUTH. Mr. Speaker, a year ago this month Members of Congress who were pleased with the leadership J. Edgar Hoover had given the Federal Bureau of Investigation had the opportunity to rise on the House floor and say so.

I am proud to say today that I was among the Members who chose to counter some of the criticisms of that time about this great American public servant.

There is good evidence everywhere of this man's leadership in law enforcement. The agency that he headed for so many years is the model for police agencies all over the world. The men of the FBI are model law enforcement officers, and their principles and dedication to duty are respected everywhere.

Perhaps his job required controversy and critics. If it did, then he was a remarkable man to have continued to serve his agency and his country in the finest tradition possible.

Mr. Speaker, I stand in respect of this great man and am entirely confident that the agency he directed for 48 years will continue in the Hoover tradition.

Mr. MIZELL. Mr. Speaker, I rise at this time to join my colleagues and the Nation in mourning the death of J. Edgar Hoover. As Director of the Federal Bureau of Investigation, he was a living example of the Bureau's principles of fidelity, bravery, and integrity. Mr. Hoover's contribution to America, a half-century of devoted and talented service, left this Nation immeasurably richer, and our loss today is great indeed. I deeply regret his passing, but I hope his deep sense of patriotism and his abiding devotion to the law will live as his legacy to a grateful nation.

Mr. HARVEY. Mr. Speaker, I was truly saddened this morning to learn of the passing of J. Edgar Hoover, one of the greatest public servants our Nation has ever known. Mr. Hoover dedicated his life to preserving our democratic system, and his accomplishments as Director of the Federal Bureau of Investigation will be remembered as long as Americans are free. As President Nixon said today:

> It can truly be said of him that he was a legend in his own lifetime. For millions he was the symbol and embodiment of the values he cherished most: courage, patriotism, dedication to his country, and a granite-like honesty and integrity.

Mr. Hoover cherished the principles of freedom and democracy, and he used his remarkable ability to see that all Americans were guaranteed the basic rights of our Constitution. For more than 45 years he directed the most efficient and the most sophisticated crime fighting organization in the world, and in this capacity he became, as President Johnson so aptly said in 1964, "a household word, a hero to millions of citizens and an anathema to evil men." Through his skill and his ability, J. Edgar Hoover built the FBI from a disorganized, inefficient section of the Justice Department to one of the most widely respected organizations in the world. His life closely paralleled the history of our Nation in the 20th century, and it would be impossible not to recognize the tremendous impact he has left on our way of life.

As a law enforcement official, Mr. Hoover was respected by everyone in his profession. It is only fitting, then, that one of the most moving tributes to his memory should have been issued by Chief Justice Warren Burger. In part, the Chief Justice said:

> In dedicating his life to building the FBI, J. Edgar Hoover did so without impinging on the liberties guaranteed by the Constitution and by our traditions. His passing leaves a large gap in the American structure, but his remarkable ability and talent for leadership have also left an enduring organization that will continue to serve all the people as it did for nearly a half century under his guidance. This country owes Mr. Hoover a great debt.

I think it is fitting and proper that this Congress, in recognition of the service that J. Edgar Hoover performed for our Nation, has instructed that his body lie in state in the rotunda of the Capitol so that all Americans can pay tribute to this great American. We should all pause to be thankful for his many achievements. America will miss one of her finest citizens.

Mr. TERRY. Mr. Speaker, last night a man who has become an institution in law enforcement during his long and illustrous career died quietly in his sleep at the age of 77.

In 1924, J. Edgar Hoover, at the age of 29, took the reins of the new Federal Bureau of Investigation. During the past 48 years, he molded it into the most effective streamlined investigative machine in the world.

Mr. Hoover weathered much criticism during his years as Director of the FBI, a great deal of it unwarranted. But that criticism never overshadowed the accomplishments of this truly dedicated public servant.

Under his tutelage, the FBI solved the great Brinks Robbery in 1950 during which more than $2.7 million was stolen, broke up the Duquesne spy ring of the late 1930's and early 1940's, and was instrumental in the arrest and conviction of Julius and Ethel Rosenberg.

Over the years, Mr. Hoover was instrumental in the FBI's development of the National Crime Information Center which contains vast amounts of information on the crime world which is available to all law enforcement agencies across the country. Without this central location of records, the solution of crimes would be greatly hampered.

J. Edgar Hoover has rightly become an institution in organized law enforcement. His contribution has been unequaled and will never be forgotten. There is no better epitaph than to simply say: "He was a great man."

Mr. NELSEN. Mr. Speaker, Americans are saddened today by the death of FBI Director J. Edgar Hoover. We have lost a champion safeguarder of this Nation's internal security. We have lost the country's No. 1 gangbuster.

Mr. Hoover was the archfoe of the Communists and other subversives working to overthrow the Government of the United States just as he was the archfoe of the domestic criminal element in this country. So his death is a tragic loss to the Nation and to the law enforcement community of the world.

Mr. Hoover created the FBI and he molded it into the finest professional and scientific criminal investigation agency in the world. In my own estimation, one of the best things he ever did for America was to remove any taint of politics from the FBI. He knew that if the FBI were to function successfully in behalf of all Americans, it would have to be entirely free of politics. He succeeded in this task where many lesser men might have failed.

All in all, Mr. Hoover was a remarkable man whose devotion to the Republic has set an outstanding example. He dedicated his long and colorful career to the service of America, and we are grateful for the many contributions he made.

Mr. HALL. Mr. Speaker, the death of J. Edgar Hoover, the Director of the Federal Bureau of Investigation, will come as a great shock to all Americans. In my opinion, no man in recent memory has been held in higher esteem by the law-abiding citizens of this Nation, or been feared more by the criminal element of our society.

It was J. Edgar Hoover who, in 1924, organized the FBI into what was to become the most efficient and able investigative instrument in the world. Its reputation for competence and honesty is already legendary.

J. Edgar Hoover's dedication to the principles that have made this Republic great, is a model that should be copied by all who believe that justice is the very "keystone" of this Nation, and that the judiciary must support the constabulary.

Mr. Hoover was a believer that law en-

forcement was everybody's responsibility. He once wrote:

Much of the crime and violence in our society occurs, I am sure, because not enough Americans pull their weight, and not enough Americans devote measurable parts of their lives to further the existence of their homes and their Nation. They need to break from the "what's in it for me" syndrome, and help protect and preserve the freedoms which they take for granted.

J. Edgar Hoover will be greatly missed by the freedom-loving people of this Nation. It is not the ken of mortal men to understand God's sometimes apparently devious scheme of things on earth and among men, but faith is the answer. His commendable efforts to apprehend the criminal and seek out those who would threaten our national security has earned the Federal Bureau of Investigation the trust and respect of all Americans. Under our lamented departed's aegis it will persevere and grow until the representative Republic is saved in fact, and free men can again pursue their pursuits void of fear.

Mr. ROUSSELOT. Mr. Speaker, I appreciate the gentleman from Maryland (Mr. HOGAN) most appropriately taking time today to pay a tribute to one of the few men in history, John Edgar Hoover, who has been able to live up to the high ideals and goals which were not only expected of him but also which his profession demanded. John Edgar Hoover was outstanding and a great man not only because he excelled in his profession in investigative and police work, but also because he constantly worked to raise the standard for all others to follow. More important, he never allowed his detractors or critics to improperly drag him into the slime of mudslinging politics but continued to exercise his responsibility under the law of the land and in keeping with the expectations of the American people.

Some in this House have seen fit to be critical and, in some cases, actually misrepresent J. Edgar Hoover's record. Even with this unwarranted harassment and sometimes unfair criticism, John Edgar Hoover remained on the highly principled record of the law, good faith, and meritorious performance. J. Edgar Hoover will indeed be missed, but his high standard and unswerving purpose will be an example for all of us to remember and emulate.

Mr. McCLURE. Mr. Speaker, there are no words eloquent enough to do justice to the career of J. Edgar Hoover. Likewise, there is no way of adequately expressing our gratitude for his service.

The Bible says that "it is required in stewards, that a man be found faithful." And, indeed, it would be hard to think of another man who gave so much of himself to his country.

On behalf of the people of my district, I wish to express the great sorrow we feel at this time.

Mr. SMITH of California. Mr. Speaker, the untimely passing of Mr. J. Edgar Hoover, Director of the Federal Bureau of Investigation, is certainly a tremendous loss, not only to all law-abiding people in the United States but to all law-abiding people throughout the world. My father lived to be 85 years of age. During my entire lifetime we were very, very close. Outside of my father, Mr. Hoover was the finest man that I have ever known.

Forty-eight years ago Mr. Hoover, as a young Justice Department attorney, was called into the office of the then Attorney General Harlan Fiske Stone. Mr. Stone spoke abruptly, saying:

Young man, I want you to be the Acting Director of the Bureau of Investigation.

Mr. Hoover agreed to accept the position under certain conditions—that the Bureau must be divorced from politics and not be a catch-all for political hacks; that appointments must be based on ability; and that the Bureau would be responsible only to the Attorney General of the United States. Mr. Stone agreed. Mr. Hoover has directed the Bureau ever since, and always under the conditions stated.

When Mr. Hoover took over the operation at the age of 29 it was a floundering, ineffectual, politically controlled organization. He built it into the most respected, most effective, and most efficient investigative agency in the world. Only a dedicated, self-sacrificing, unselfish man could have accomplished this tremendous feat which has given our Nation a feeling of great security for 48 years.

It was my privilege to serve under Mr. Hoover as a special agent of the FBI for some 7 years. Every agent receives the same training. All must be able to handle every activity over which the Bureau has jurisdiction. Mr. Hoover demanded that each agent have a thorough knowledge of the law, be efficient, honest, courageous, courteous, abide by the rules and regulations, and at all times be completely loyal to the Bureau. Every agent knows this from the day that he is sworn in. And almost without exception, every agent performs in accordance therewith.

One of the reasons for the success of the Bureau is that all agents are held accountable for their mistakes. They all know that. But by the same token, Mr. Hoover was always as fair and human in his attitude toward each agent as any person could possibly be. He followed a policy of personally opening and reading every letter when the envelope was marked "personal and confidential." Any agent who had a personal problem could direct such a communication to Mr. Hoover and it would receive his personal attention which was always straightforward, human, honest, and in the best interests of the agent and the Bureau.

Ever since I was sworn in as an agent in 1935 I have been proud of the Bureau. I have been proud of Director J. Edgar Hoover and I have been proud of the tremendous accomplishments which the Bureau has made under his leadership. During the past 15 years in Congress I have been privileged to meet and talk with Mr. Hoover on many occasions. He has always been direct, forthright, honest, and fair in all his statements to me during these years, the same as he had been during the time I was in the Bureau. He was always just as interested in proving an individual to be innocent as he was to have the agents prove that the individual was guilty of a Federal offense within the jurisdiction of the Bureau.

He has always been mentally alert, and physically well qualified. His life has been the Bureau and the welfare of the honest citizens of the United States of America. The Bureau has been his home. The only extracurricular activity that I know of was an occasional visit to Del Mar racetrack. I saw him and talked with him there on several occasions. He did not engage in card playing, golf, or other activities which many of us participate in on occasion. In other words, his entire life was devoted to operating the Federal Bureau of Investigation in the highest of tradition and efficiency.

Only last Friday he was in great spirits, talking about the future of the Bureau and the welfare of the United States. He repeated a statement that he has made on a number of occasions:

I have no thought of leaving my present position and intend to remain as Director of the FBI as long as I can be of service to the country and my health permits.

Mr. Hoover always believed in selecting assistant directors, supervisors, agents in charge, assistant agents in charge, and other administrative personnel from those within the Bureau. He believed in promoting agents from within the FBI and those who were most qualified. I talked with Mr. Hoover on occasion regarding a possible successor when the time might come. I am sorry that that time has now come.

Mr. Hoover stated that he hoped his successor would be someone from the Bureau, an individual presently in the Bureau, or one who has not been out of the Bureau for more than a few years. In that way, the person would know the operation of the Bureau and would have a reasonable chance of carrying on its success.

There are many who will be able to carry on, but not with the respect and ability that Mr. Hoover possessed. If some politician or bureaucrat is appointed to replace him, the Bureau could well return to the chaotic condition that it was in when Mr. Hoover took over. If so, it will be a catastrophe so far as the future of America is concerned.

I am pleased that the President and the Congress are making certain that Mr. Hoover is accorded the fullest honors that any American can receive for his long, loyal service to our country. I hope that the President will appoint the most qualified individual available, with the hope in mind that he will have some chance of carrying on the traditions of the Bureau as promulgated by Mr. Hoover.

I am grateful to you, Mr. Hoover, for the tremendous influence you have had upon my life in helping to make me a better American. I am certain that every honest, loyal American joins me in saluting you for your many years of devoted public service. We are indeed most grateful for your lifetime of devoted efforts in our behalf.

Mr. DORN. Mr. Speaker, J. Edgar Hoover built the Federal Bureau of Investigation into the greatest law enforcement agency in the history of the world. Presidents have come and gone since Mr. Hoover assumed direction of the Bureau in 1924, but he remained stead-

fast in his devotion to democratic institutions. Nothing could have been worse for the Nation during this 48-year period than to have had a weak-willed or politically inclined Director constantly snooping on and harassing political opponents. A lesser man than J. Edgar Hoover might not have had the personal prestige and integrity to say no to political pressures. Mr. Hoover was a man of great power who was deeply concerned with the protection of individual freedom.

Because of his extreme dedication to real Americanism he established in the Federal Bureau of Investigation an unsurpassed esprit de corps. His own absolute integrity, fairness, and intelligence are reflected in the splendid personnel of the Bureau. Their esprit de corps and effectiveness are a model for all law enforcement. In becoming acquainted with any of his agents at the local level one is impressed by the loyalty, fairness, and high principles exemplified so well by the Director. Never did Mr. Hoover allow this organization to be used as a political tool. He taught his agents respect for our democratic institutions, for the Congress, for the Chief Executive, and the courts. He was in favor of maintaining the traditional police powers of State and local government, for he realized far more than others the potential dangers that a national police force would pose to our democratic institutions. He advocated that the Bureau remain a highly disciplined, relatively small force assigned to crimes particularly under the jurisdiction of National Government.

Mr. Hoover, like the outstanding men selected for membership in the Bureau, was the personification of good judgment, discretion, coolness, skill, and determination. During a period in history when other nations were victimized by gestapos, and other dread, terroristic secret police, Mr. Hoover's institution grew into a great bulwark of freedom. The American people believed in him. They gave J. Edgar Hoover the full measure of confidence and trust so necessary to the preservation of our democratic way of life.

Mr. Hoover was a lifelong leader in the fight for law and order with justice. In 1935, the FBI National Academy under his leadership, was founded to offer training in law enforcement techniques to officers from local and State police forces. The academy typifies the excellent rapport that was developed between the Bureau and local law enforcement officials. We have met many times with our local law officers who are graduates of the FBI National Academy and we are especially proud of their skill and performance. Through the Academy, the most advanced techniques are made available to local officials without the dangers inherent in setting up a national police force. It has become the West Point of law enforcement training. Agencies such as South Carolina's splendid State Law Enforcement Division—SLED—have greatly benefitted through close cooperation with the FBI.

Mr. Hoover was one of the first to speak out against a growing climate of crime, deliquency, and moral decay. Twenty five years ago he predicted that crime and disorder would become a national crisis.

From the 1930's to the present, the FBI has been the Nation's major instrument in the fight against organized crime. In incidents involving John Dillinger, "Pretty Boy" Floyd, and Alvin "Old Creepy" Karpis, Mr. Hoover became a well-known figure for law and order. The Bureau's efforts against today's crime syndicates continues with ever-increasing success.

During World War II, President Roosevelt designated the FBI as the agency primarily responsible for the internal security of the Nation. Mr. Hoover and the Bureau met this responsibility with great skill and distinction in protecting the homefront from the machinations of the Nazi and Fascist spy rings. The Bureau was able to meet this challenge, because Mr. Hoover had seen the danger and was prepared to meet it after Pearl Harbor.

In the same manner, J. Edgar Hoover was one of the first in American public life to recognize the dangers of the international Communist conspiracy. He began his study of Communist methods and terror techniques shortly after World War I and was a lifelong advocate of constant vigilance against this menace. When after World War II many were blind to communism he was constantly aware of its antidemocratic nature.

Mr. Hoover was an outstanding leader in protecting the civil rights of all our people, and played a crucial role in protecting the legitimate rights of all minority groups.

Yes, Mr. Speaker, it will be extremely difficult to replace this public servant whose service to Nation and the cause of freedom spanned two generations of American life. From the time in 1924 when then Secretary of Commerce Herbert Hoover recommended him to the then Attorney General and later Chief Justice Harlan Fiske Stone, J. Edgar Hoover was a name linked to dedication to the law. He was respected by young and old. John Edgar Hoover was a dedicated public servant who ranks with the all time great leaders of American history. He gave an entire lifetime of service to country. The complete integrity of Mr. Hoover's tenure is best indicated by his response to Attorney General Stone's offer of the directorship of the Bureau in 1924. Mr. Hoover said:

> The Bureau must be divorced from politics and not be a catch-all for political hacks. Appointments must be based on merit. Second, promotions will be made on proved ability and the Bureau will be responsible only to the Attorney General.

Mr. RARICK. Mr. Speaker, with the passing of J. Edgar Hoover, a noble and gallant leader in the cause of law and order and the security of our country, is removed from our midst at a time when his services and experience will be sorely missed.

As the Representative of the people of the Sixth District of Louisiana, I join with the multitudes of liberty loving and patriotic Americans in mourning the great loss which we have all sustained.

Mr. BOLAND. Mr. Speaker, I want to join my colleagues in paying tribute to J. Edgar Hoover. Long a symbol of the lawman, as much a tradition in American folklore as the western sheriff, Hoover almost singlehandedly built the FBI into a law enforcement agency unparalleled anywhere else in the world. The FBI was still a fledgling agency, known to the public only by talk of ineptitude and rumors of corruption, when Hoover became its Director. Under his tutelage, the Bureau shook itself out of its lethargy and freed itself of even the slightest taint of corruption. The G-man's role was no longer one of the humble civil servant, but one of glamour and prestige: Sam Spade and Sherlock Holmes rolled up into one. J. Edgar Hoover made the cop's job more significantly respectable. As the FBI's celebrity grew, the image of police everywhere brightened.

Within the past few years, of course, Hoover was at sword's point with much of the political world's liberal community. His sulfurous controversies with the New Left are still smoking. Often attacked for his blunt and outspoken manner—even for what his critics charged was a kind of lofty moral dogmatism—Hoover steadfastly refused to surrender his responsibilities.

The merits of these disputes, Mr. Speaker, remain debatable.

What is not debatable, however, is Hoover's contribution to law enforcement—a contribution acknowledged even by his most ardent foes, however grudgingly. Still the lengthened shadow of J. Edgar Hoover, the FBI is the finest law enforcement agency in the world. It is as tough and as dogged and an incorruptible as Hoover himself. The Bureau's work with local police forces—its training programs, its publications, its pioneer research in crime detection—has been of immeasurable value to communities throughout the United States.

J. Edgar Hoover's fame in American law enforcement will long outlive the controversies that clouded his declining years.

UTOPIANISM—A THREAT TO THE CREDIBILITY OF GOVERNMENT

The SPEAKER. Under a previous order of the House, the gentleman from New York (Mr. KEMP) is recognized for 10 minutes.

Mr. KEMP. Mr. Speaker, St. Thomas Aquinas once warned that for a society to dig a ditch in front of its youth and leave it unfilled is to court disaster. He knew that to pursue the unattainable goal—to forever seek and never find—was, when carried to an extreme, the enemy of both education and progress. Indeed, it is the unanswered questions, the unfulfilled promises, more than anything else, which has tended to polarize this Nation and has reduced the credibility of government in the eyes of its people. Affirming a utopian ideal cannot and does not lead to ready solutions; in fact, the very quest for an ultimate, a perfection, defies the easy answer.

St. Thomas Aquinas reminds us that while asking the right questions is important, we have an obligation to provide answers as well—and answers that are rational and realistic rather than

subjective and utopian. It is a lesson of history we should not forget.

If one really wants to effect positive change, one does not start with the ideal and work toward the reality. Rather, one starts with what exists and progresses toward the ideal. To attempt the former disregards logic and practical wisdom. But to proceed from the reality allows one not only to view where he is going, but also to see from where he has come. That is perspective and it is in short supply these days among those running for high office.

This country has made great strides, in the context of our brief 200-year history and in the context of this generation—a span of time which has seen ignited long-smoldering areas of national concern. Racism, rural poverty, urban blight, and environmental protection are all newly recognized problems. Seen in this context, we as a people have made remarkable progress. But, as with the accumulation of knowledge, progress affirms only that there is so much more that needs to be done.

It is time for some plain talk to our young people—they must hear the good as well as the bad, the successes as well as the failures. The ability to ask the right questions must be preserved, but to that must be added the commitment to search for the answers.

This country is at one of its most crucial junctures in history—we are wrestling with issues that will effect the lives of countless generations. As Counsel General David Rivlin of Israel said in Buffalo on the occasion of Israel's 24th anniversary:

A nation that forgets its past is doomed to destruction.

This appraisal of Israel is applicable to the United States as well.

We in government have a major responsibility to help lead the way in bringing to the attention of the American people the historical perspective so desperately needed to understand the scope and complexity of our problems, and to weigh and analyze, with reasonableness, understanding, and objectivity, their proposed solutions. To be imprisoned by the present and seduced by the latest opinion poll is to neglect the lessons of history and the long range best interests of the Nation.

Our youth will not inherit a perfect country—the imperfection of man and society will be with us long after we are gone. Ending war, eradicating poverty, and eliminatiing prejudice are all issues that defy easy solution. But a sense of perspective will insure that we never lose sight of the progress that has been made. Only a utopian vision of man and society undermines the capacity of this Nation to rise to the challenges of this less than perfect world.

Irving Kristol has written a compelling article which addresses itself to this topic: "A Foolish American Ism—Utopianism." Seldom have I heard articulated with more precision and clarity, the threat to progress that emanates from utopianism. I include it in the RECORD on behalf of the many fine young people in my district and this country whose idealism we very much need to help us meet our common goal of a better community and a better country for all:

A FOOLISH AMERICAN ISM—UTOPIANISM

(By Irving Kristol)

(NOTE.—Irving Kristol is co-editor of The Public Interest and Henry Luce Professor of Urban Values at New York University.)

Let us suppose that we have provided the President of the United States with two imaginary speeches, both of which he is dutifully prepared to deliver. They deal, in a highly general way, with the goals of American foreign policy. The first speech goes somewhat as follows:

"Our American nation, ever since its foundation, has pursued the ideal of a world without war. This ideal—the abolition of war—has been the ultimate foundation of our foreign policy, despite all circumstantial changes of strategy and tactics. The ideal is as alive today, in our hearts and minds, as it ever was. This Administration is dedicated to pursuing it with the utmost vigor, and with all the patience and skill that is necessary. We seek, by our policies, to create a world in which man's inhumanity to man will become but a horrible memory, in which men will, under the conditions of a just and secure peace, live harmoniously and creatively together. We seek a world without war, without bloodshed, without poverty, without oppression or discrimination. Such a world, I am convinced, is within our reach if only the statesmen of all nations are sufficiently farsighted to seize the opportunity. I am confident, moreover, that they will display such farsightedness, and will not let the opportunity for a universal and enduring peace slip from their grasp. The people of the world—the people of all nations—demand such a peace. We shall betray their aspirations, and shall certainly be held to account, if we fail to resolve our quarrels and conflicts so as to make man's dreams of permanent peace a reality in our own time."

What would happen if the President gave this speech (in a considerably lengthier version, of course)? It is fair to predict—it is indeed absolutely certain—that nothing would happen. It is a perfectly conventional speech, of a kind that many Presidents have given many times. The press corps would yawn over the familiar clichés; the citizenry would scan the headline ("President Reaffirms Goal of World Peace") and then turn to the sports or financial pages; the heads of all nations would formally indicate their approval of these noble sentiments; and "informed sources" in Washington would explain that it is too early to tell what significance, if any, the speech had for any particular area of American foreign policy. As I said: nothing would happen.

Now, let us have the President deliver a rather different speech—our second version. And let it proceed somewhat as follows:

"This American nation, ever since its foundation has for the most part pursued its national interests in a moderate and prudent way. This Administration is determined to continue on this path of moderation and prudence. However, we are well aware that there is no guaranteed path to peace with justice. True, men have always dreamed of perpetual peace, and presumably always will. This dream is a noble one, and a man must be deficient in humanity not to have felt its appeal. But let us remember. It is a dream, whereas we live out our lives in a real and material world that is governed, not by dreams, but by limited possibilities. In this real and material world, conflict between men and war between nations appear to be permanent features of the human condition. It has always been so; we must, if we are to be responsible statesmen, assume that it always will be so. I shall minimize our chances of experiencing war; if war is unavoidable. I shall do my best to limit its extent and the mischief it is bound to create; and whether I am able to limit it or not, I shall always do my utmost to ensure that the war we shall be engaged in will be a just war, and will be justly conducted. I cannot promise you a world without war, but such a promise is inherently fraudulent. But I can promise that we shall conduct our foreign affairs in a responsible and honorable fashion, that we shall make every effort to achieve a reasonable compromise of our differences with other nations, and that whatever calamities befall us will be as little as possible of our own making."

What would happen if the President gave *this* speech? One's imagination is inadequate to the prospect. It is fair to predict, however, that after a shorter or longer period of stunned silence, a storm of censure would gather round the President's head. The press corps would explode with moral indignation, and the headlines this time would be eye-catching ("President Denounces Peace as Impossible Dream"); the citizenry would be alarmed; the heads of all nations would express concern at "the new American belligerency"; only the "informed sources" in Washington would remain steady, explaining that it is too early to tell what significance, if any, the speech had for any particular area of American foreign policy.

And yet—what is wrong with the second speech? I submit that there is nothing wrong with it. It is, in every respect, superior to the meaningless banalities of the first speech. It reads 5,000 years of human experience truthfully and sagaciously, and it announces the results of this reading with a pleasing directness and candor. It is a statesman's speech—whereas the first version was nothing more than a politician's speech. True, it is an American statesman's speech; not everyone would agree that this nations' foreign policy has always displayed such moderation and prudence. But that sort of bias is comprehensible, easily discountable and even justifiable—after all, Presidents of the United States are not supposed to be objective and neutral political philosophers.

So the question arises: If the second speech is so much superior to the first, why is it that no President would ever dare to make it? Why is it that, if the President were to say that no reasonable man can expect enduring peace on earth until the day that our Redeemer cometh, this would be regarded as a terrible, cynical blasphemy—even though it is recognizably one of the most venerable platitudes of the Judaeo-Christian tradition? What is it about our political condition that constrains our leaders to define politics as the pursuit of impossible dreams? Are we the most high-minded people who ever lived, or the most hypocritical?

To that last question, the answer is: If you are extraordinarily high-minded in your political pronouncements, you are bound in the nature of things to be more than ordinarily hypocritical. But it is only in the last half century or so that high-minded hyprocrisy has completely driven statesmanlike reasonableness out of the American public forum. The point is important and not at all self-evident to our smog-beclouded eyes, so it is worth a bit of elaboration.

The United States has always had, by historical standards, quite ambitious ideological ends of a timeless and universal nature. George Santayana, echoing the worldly wisdom of Old Europe, could dismiss the Declaration of Independence as "a salad of illusions." But these "illusions" represented a deep emotional commitment by a new national community to the idea that government—all government, everywhere—should be subservient to the citizen's individual life, his personal liberty and his pursuit of happiness. True, and inevitably, this fundamental document of the American credo was involved in hypocrisy from the outset: It

carefully refrained from saying anything about "the peculiar institution" of slavery which then flourished in this country. Nevertheless, one cannot begin to understand the American people and its history unless one appreciates the extent to which our literature, our journalism, our philosophy, our politics was shaped by this powerful ideological commitment. One does not exaggerate when one calls it a kind of Messianic commitment to a redemptive mission: The United States was to be "a city . . . set on an hill," "a light unto the nations," exemplifying the blessings of liberty to the common man in less fortunate countries, and encouraging him to establish a liberal and democratic regime like unto ours.

So, in a sense, the United States can be said to be the most ideological of all nations—far more ideological than the Soviet Union, for instance, whose official political orthodoxy has never been able to sink deep roots, has never become a popular civil religion, a consensual orthodoxy, as has happened here. But, in another sense, the United States can also be said to have been one of the least ideological of nations. For, in addition to the philosophy of the Enlightment, as incarnated in the Declaration of Independence, there was another and, for a long time, equally powerful political tradition that prevailed in the United States. This political tradition, rooted in centuries of British political experience and in British constitutional-juridical thought, found expression in the Constitution—a document that (unlike the contemporary French Revolutionary constitutions) was far more a lawyer's job of work than a social philosopher's. There is nothing particularly grand or visionary or utopian in the language of the Constitution. Its eloquence, where it exists, is the eloquence of British jurists as carried over and preserved in American legal education. And it proceeds to establish a mundane government based on a very prosaic estimate of men's capacities to subordinate passion to reason, prejudice to benevolence, self-interest to the public good.

For more than a century, these two traditions coexisted amiably if uneasily in American life. The exultant prophetic-utopian tradition was always the more popular, it represented, as it were, the vernacular of American political discourse. It was, and is, the natural rhetoric of the journalist and the political candidate, both of whom instinctively seek to touch the deepest springs of American sentiment. In contrast, the constitutional-legal tradition supplied the rhetoric for official occasions and for the official business of government—for Presidential messages, debates in Congress, Supreme Court decisions and the like.

Andrew Jackson, for example, was a radical populist in his time, and when he vetoed the bank bill in 1832, his followers celebrated this as "driving the money changers from the temple." He himself, however, in sending his message to the Senate, began it as follows:

"The bill 'to modify and continue' the act entitled 'An Act To Incorporate the Subscribers to the Bank' was presented to me on the 4th July instant. Having considered it with that solemn regard to the principles of the Constitution which the day was calculated to inspire, and come to the conclusion that it ought not to become a law, I herewith return it to the Senate, in which it originated, with my objections.

"A bank of the United States is in many respects convenient for the Government and useful to the people. Entertaining this opinion, and deeply impressed with the belief that some of the powers and privileges possessed by the existing bank are unauthorized by the Constitution, subversive of the rights of the states, and dangerous to the liberties of the people, I felt it my duty at an early period of my Administration to call the attention of Congress to the practicability of organizing an institution continuing all its advantages and obviating these objections. I sincerely regret that in the act before me I can perceive none of those modifications of the bank charter which are necessary, in my opinion, to make it compatible with justice, with sound policy, or with the Constitution of our country."

This "high" mode of discourse—without cant, without demagogy, without bombast—was then thought to be the normal way in which the American Government should engage in public conversation with its own people or with the world at large. Concurrently, the political vernacular was infused with a declamatory passion. John L. O'Sullivan, a Jacksonian Democrat journalist who subsequently became a leading popular exponent of the United States' "Manifest Destiny" to expand over the entire continent, composed an endless stream of demagogic-prophetic editorials. They are perfect specimens of their type. Thus he wrote in 1839:

"The far-reaching, the boundless future, will be the era of American greatness. In its magnificent domain of space and time, the nation of many nations is destined to manifest to mankind the excellence of divine principles, to establish on earth the noblest temple ever dedicated to the worship of the Most High—the Sacred and the True. Its floor shall be a hemisphere. . . ."

And so on and so forth. The public lapped it up, and the Fourth of July orations continued to serve it up. But if one turns to the official statements of American foreign policy—statements by Presidents and Secretaries of State—one finds almost nothing of this sort. From George Washington to William McKinley, practically all such statements are sober and measured formulations of "sound policy," composed by constitutional lawyers who felt the need to argue the merits of their cases before the bar of rational and informed opinion. It is rare for any kind of breathless utopian or shrill prophetic notes to be sounded. Even at the outbreak of the Spanish-American War, when jingoistic rhetoric was deafening in its persistence and intensity, President McKinley's War Message to Congress was a lawyer's brief, arguing the legality of American actions, emphasizing their moderate and prudent qualities, outlining the material issues involved, and offering only a minimum of that "high idealism" that has since become obligatory in Presidential prose.

Sometime around the turn of the century, the impact of the Populist and Progressive movements combined to establish the vernacular utopian-prophetic rhetoric as the official rhetoric of American statesmen. It happened gradually, and it was not until the nineteen-thirties that the victory of the vernacular was complete and unchallengeable. But it also happened with a kind of irresistible momentum, as the egalitarian, "democratic" temper of the American people remorselessly destroyed the last vestiges of the neo-Whiggish, "republican" cast of mind. By now, we no longer find it in any way odd that American Presidents should sound like demagogic journalists of yesteryear. Indeed, we would take alarm and regard them as eccentric if they sounded like anything else.

The effects of this transformation have been momentous, though not much noticed or commented upon. High-flown double-talk has become the normal jargon of American Government. This flatters and soothes the citizenry, but at the same time engenders a permanent credibility gap; instead of paying attention to what the Government literally says—a waste of anyone's time—we expend much energy trying to figure out what the Govenment really means. Official or quasi-official state documents, for the historian of today, have become trivial, superficial and unreliable sources of information. No historian of Abraham Lincoln's period would dare minimize the importance of what he said during his debates with Douglas or in his two inaugural addresses; no historian of the nineteen-sixties would bother paying nearly as close attention to the public words of John F. Kennedy, Lyndon B. Johnson or Richard M. Nixon. Our public rhetoric has become largely ritualistic—resounding utopian clichés that obfuscate a presumed "inside story" our reporters are always snuffling after.

The kinds of dangers this situation creates in the area of American foreign policy have been noted by some critics. Hans J. Morgenthau has pointed out that the closer we get to the Founding Fathers, the more sensible, the more forthright, the more realistic are our official statements of foreign policy. Conversely, the more we approach the present, the windier and more meaningless they become. Even our vocabulary becomes corrupted. The countries of Asia and Africa and South America used to be "poor"; in the course of the past 20 years they became first "underdeveloped," and now "less-developed." Plain language that accords with reality has become positively offensive to our sensibilities.

The corruption of plain language has been accompanied by—one might even say it has resulted in—the corruption of plain speaking. No Secretary of State can today describe the Governments of Greece or Peru or Bolivia or Spain or Argentina or Egypt as what they obviously are: military dictatorships. It would cause a diplomatic row; these nations have become so accustomed to our hypocritical double-talk that they would sense some sinister intentions in any deviation from it. Similarly, no Secretary of State could ever say that a particular regime—for example, the Communist Government of China—is abhorrent to our own political values but that we are nevertheless prepared to have diplomatic relations with it and do business with it, since it suits our national interests at this time to do so. No, he has to announce the dawn of a new diplomatic era, a giant step to world peace, and all the rest of that nonsense. It is nonsense because he has no grounds whatever for believing this, and it is altogether possible that a United States-China *rapprochement* could heighten the possibility of war in some parts of the world—on the Russian-Chinese border, for instance, or the India-Pakistan frontier.

A particularly striking instance of how impossible it is for simple and incontestable truths to be uttered in high places is provided by the rhetoric in which our foreign aid programs are cocooned. Never mind, for the moment, whether these programs are good or bad, overly generous or terribly niggardly. The one certain fact about these programs is that they cannot even begin to do what they promise: Namely, in our lifetime to bring the standard of living of the "less-developed" countries closer to the American-West European standard. *Nothing* can do that. If we allow that India's economy might grow at an uninterruptedly rapid rate (say, 10 per cent) for the next 29 years, and assume that the American growth rate will sustain itself at the modest level of 5 per cent during that period, then—because of the initial huge disparity—by the magic year 2000 the gap between the Indian and American per capita income will, in absolute terms, be *greater* than it is today. The notion, therefore, that any significant portion of the "third world" can even begin to "catch up" to the West in the next generation is an absurdity. Indeed, given the fact that "less-developed" countries are dependent on fairly high growth rates in the United States and Europe for their own economic growth, the probability is that they will not "catch up" anytime in the next several generations, and there is a good chance they may never "catch up" at all.

Yet, who can say this? No United States

Government official can—he would be denounced as a sour pessimist and driven from office. No official or political leader in a "less-developed" country can—he would be denounced as a traitor and driven from office. So, no one says it. Instead we talk grandly about "economic development" in a deceitful and misleading way. The inevitable result is that the economic growth which does take place in poorer lands—and many of them are doing quite well, by historical standards—is universally denounced as "inadequate." A more perfect recipe for permanent political instability in these nations cannot be imagined.

Worst of all, the corruption of language and speech results in the corruption of thought. One has only to observe the hearings before the Senate or House Foreign Relations Committees to realize that, once you surrender the liberty to speak plainly, you lose the capacity to think clearly. Sustained hypocrisy is one of the most intolerable regimens for the mind: In the end, you find yourself believing yourself and taking your own empty rhetoric seriously.

Thus, it is one of the oldest and truest proverbs in international relations that, under certain circumstances, the enemy of your enemy becomes your friend—even if, had you a freer choice, you would never want such a friend at all. All nations operate on this essential principle, and the United States is no exception. Yet one can read the testimony of Government officials and "expert witnesses" for years on end without coming across a clear enunciation of it as the rationale for some aspect of American policy. We have a terrible time explaining to ourselves that, while we have an instinctive, democratic (and healthy) dislike for dictatorships, we have precious little control over the way other peoples govern or misgovern themselves. Our relations with other nations, and theirs with us, are determined for the most part by calculations of mutual advantage. One gets the distinct impression that our Government is not only ashamed to admit it engages in such calculations—it actually is reluctant to engage in them, except under the random pressure of necessity which it then perceives as an "emergency." We have been telling ourselves for so long that our foreign policy proceeds on quite other principles that we have lost the art and skill of coping with the principles that do, in fact, prevail. Our statesmen are always reacting to reality as an "emergency," in an *ad hoc* fashion, and having at the same time to invent a fancy, "idealistic" motive for the most prosaic and practical actions.

Witness the typically American fuss and furor in recent months over whether the elections in South Vietnam were truly democratic—and if they were not, what we should then be doing about it. The assumption seems to be that the original purpose of our intervention in Vietnam was to establish parliamentary government there, and that the absence of such government presents us with a crisis. But this is a childish assumption. We did not intervene for any such purpose. (At least I hope we didn't—can't bring myself to believe that the men who make our foreign policy were quite that idiotic.) Our intervention was to help establish a friendly, relatively stable regime which could coexist peacefully with the other nations of Southeast Asia. If such a regime prefers corrupt elections to the kind of overt military dictatorship that more usually prevails in that part of the world, this is its own affair. It constitutes no problem for us—any more than does the fact that Communist China prefers to manage with no elections at all. Our relations with both of these Asian nations are based mainly on considerations of international stability and world peace, not on how they go about governing themselves.

To be sure, being an American I am keenly aware of the merits of representative government, and I do hope that the Vietnamese (South and North) will at some time recognize these merits. But I am also aware that these merits do not automatically commend themselves to all nations, at all times, everywhere. Our foreign relations, therefore, must of necessity be more concerned with the external policies of any particular nation than with its internal form of government. This is as true for South Vietnam as it is for China or Russia or Cuba. We are perfectly free, as Americans, to be critical of, or even to have contempt for, their systems of government. But, as Americans, we are also free not to live there, and we are therefore bound to be more interested in their behavior to others than in their behavior to themselves. I think most Americans would subscribe to this common-sense proposition. But it is not a proposition we would permit our spokesman at the United Nations to enunciate. And there do seem to be many eminent Americans—notably, an entire class of liberal journalists—who have been utterly bewitched by our official platitudes. These men and women, after traveling freely throughout South Vietnam, heap scorn upon its "corrupt" democracy. They then make a strictly guided tour of China to return aglow with admiration! One can only assume that such men and women think it natural to judge our allies by quite utopian standards, but are ready to give unfriendly nations the benefit of every possible doubt.

But it is not only in foreign affairs that our Government proceeds by utopian promises of future benefits and hypocritical explanations of actual performance. Our entire domestic policy is suffused with this same self-defeating duality. Thus, as a domestic counterpart to a "war to end all wars," we have in the past decade launched a "war to end poverty." The very title of that crusade reveals a mindless enthusiasm which could only lead to bitter disillusionment.

There are two ways of defining poverty: in absolute terms or relative terms. The absolute definition, involving estimates by Government agencies of an adequate diet, adequate shelter, adequate clothing for an average family, is relatively easy to make. It is also largely meaningless in a context of "the abolition of poverty." To see just how meaningless it is, one has only to report that the majority of welfare families in New York City are now above the officially determined "poverty line." Have we ceased regarding them—have they ceased regarding themselves—as poor? Of course not. If you take a family with an annual income of $3,800 and, one way or another, increase this income to $4,500, you have helped them somewhat—but you certainly have not abolished their poverty, as grandly promised. The consequence is that the modest but real improvement is obliterated by an exacerbated sense of "relative deprivation."

Most people, when they hear talk of "abolishing poverty," inevitably and immediately have in mind a susbtantial relative improvement, not merely a modest absolute one. They think in terms of elevating all those below the United States median family income—approximately $9,500 a year—to the vicinity of this level. That does not look like such an unreasonable goal. After all, families that make $9,500 a year have to watch their nickels and dimes if they are to make ends meet. (Ask them, and they'll tell you—and they'll be telling the truth.) But this is one of those cases where appearances are deceptive, and what looks like a reasonable goal is in fact utopian. To achieve it would require either the creation of new income or the redistribtuion of existing income to the tune of perhaps $200-billion a year.*

This is simply impossible, there is no policy, however "racial," that could come close to accomplishing this. We may be an "affluent" society by historical standards, but we are not nearly that affluent. (Total corporate profits last year, after taxes, were a little less than $50-billion). Yet who dares to say so? Instead, our politicians (and our journalists and professors, too) persist in holding up this impossible ideal, with the quite predictable effect of making people intensely dissatisfied with social policies that achieve (though never easily) smaller increments to their income or smaller improvements of their condition.

The upshot of this state of affairs is that any American who, today, passes his working life in moving from $4,000 a year to an ultimate $9,500 is regarded as a pathetic victim of circumstances, a prisoner in a "dead-end job." Yet just about half of all Americans pass their working lives in this way, and are going to do so regardless of anything said or done in Washington. All that our utopian rhetoric can do is to convince them that the normal working-class experience—the *inevitable* working-class experience, which would be as common in a socialist United States as in a capitalist United States—is a fate akin to degradation.

Or take our "welfare problem." Welfare policy in the United States is based on a very simple—and enormously flattering—thesis about American human nature. The thesis consists of the following propositions: (1) all Americans are highly motivated to work as a means of improving their material condition; (2) those Americans who seem not to be so motivated are suffering from temporary "psychological deprivation" as a result of poverty, bad housing, bad health and so on; (3) improve their material environment and the "normal" impulse to self-betterment will automatically assert itself. It is a plausible thesis to our American ears. Moreover, there is enough historical experience behind it to suggest it is not entirely false. Only, when applied indiscriminately, it turns out to be more false than true. Some people, whether in the United States or elsewhere, respond according to this formula. A great many others, however, do not. It turns out there are lots of people in the world, including a great many Americans, who do not fill the American prescription for "human nature."

Once you think about it, this is not really surprising. For what our high expectations and our high-flown rhetoric overlook—are bound to overlook, because they are so high-flying—is that we are for the most part talking about motivation directed toward small improvements. You can motivate almost anyone to become a millionaire, if the possibility is offered; but that possibility rarely is. And it is another thing entirely to motivate people to move from a badly paying situation (say, casual laborer) to a slightly better-paying but also more arduous one (say, laundry worker or drill-press operator). That is the kind of grim motivation you need to get "self-sustained" economic growth, whether among nations or among individuals. Not all human beings are born with this kind of grim motivation—which is just as well, I'd say, since the earth would then be a pretty dreary, if industrious, place.

In the absence of such ingrained motivation, the usual way we motivate people—even in America—has been by adding the spur of

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*One must remember: If you establish a guaranteed minimum family income of, say, $8,000 a year, you are then faced with the problems of those who work to earn $9,000 or $10,000. Are they to labor for a measly $1,000 or $2,000 a year? You cannot ask that, and they would not tolerate it if you did. So you have to make some kind of supplementary payments to those families, too. And *then* you are faced with the problem of those who work to earn $12,000 a year—and so on, and on. It is this "ripple effect" that makes the guaranteed income, at any level above a ludicrously low one, such a fantastically expensive proposition.

necessity to the offer of modest opportunity. That small improvement has to make a real difference: the difference between squalor and poverty, or between poverty and minimum comfort. These "little" differences—almost invisible to the middle-class eye, and never taken seriously by middle-class reformers—are absolutely crucial to the self-discipline and self-respect of ordinary working people. They need to be very much aware of the costs of not achieving them, if the achievement is to have any merit or meaning in their eyes.

I suspect that all of this sounds petty, and sordid, and mean-spirited. We are accustomed to thinking about poor people, and about ways of helping poor people, in more elevated terms than these. And so we introduce something like our present welfare policies. The policies, at one swoop, abolish all those important little differences in achievement. They generously offer all poor people more in the way of welfare than they can get for their unskilled labor on the open market—more, often, than they would earn at the legal minimum wage. Naturally, these people not being fanatics about work, move onto the welfare rolls in very large numbers. To be precise, the wives and children are pushed onto welfare. The men themselves drift away from their homes, demoralized by the knowledge that their function as breadwinner has been pre-empted by welfare. These men then merge into the shadows of street-corner society—superfluous men, subsisting by casual labor or casual crime, men whose families are materially no worse off for their absence and would be no better off for their presence. Has there ever been a more ingenious formula for the destruction of poor families? Indeed, one can fairly speculate how many middle-class families would hang together if the family suffered no financial inconvenience as a result of the husband's vanishing.

Welfare is wreaking devastation on the American poor—making the child fatherless, the wife husbandless, the husband useless. We see this "welfare explosion" happening and, disconcerted, turn this calamity of our own creation into an indictment of our social order.

Once you have put people on welfare, it is a nasty business getting them off. You can either (1) cut welfare rates so as to make it distinctly worth their while to go to work, or (2) keep welfare rates high for those truly unable to work—the aged, the sick, the disabled, the unemployed—but have a severe, suspicious welfare bureaucracy that defines its mission as getting as many of the rest off the rolls as is possible. Neither alternative is attractive, though the latter seems to me considerably more humane. (Its social consequences are also likely to be beneficial, since we know that families on welfare tend to develop social pathologies: they produce relatively more criminals, drug addicts, alcoholics, illegitimate children, etc.) But the second option does involve our taking a more realistic view of human nature and of human motivation—and this we are most unlikely to do. So we shall either veer toward the first course, indiscriminately penalizing all welfare recipients in the name of "economy," or, more probably, we shall simply stagger on until some kind of social explosion takes place.

It really is a curious phenomenon we are witnessing: a nation preferring to live under a perpetual, self-inflicted indictment of "social injustice," and amidst an ever-swelling and ever-more-demoralized population on the dole, rather than revise its utterly fanciful and utopian idea of human nature. There cannot have been many instances in history of such high-minded masochism. We may even be the first.

What is true of welfare is even more blatantly true of our other social problems. Our utopian illusions always are preferred to realistic assessments of human beings, and to the world in which real human beings live.

In no area are the ravages of American utopianism more visible than in education. Here intellectual fads and fashions reign supreme, all of them exultant in promise, all of them negligible in accomplishment. Our professional educators today are perpetually and enthusiastically engaged in deception and self deception, in part out of necessity, in part because they actually feel this is their "responsibility." We know a great deal about the relationship between schools and academic achievement. But it is the rare educator who dares to say what we know, to challenge the sovereign platitudes as to what a school can do to the young people who enter it.

We know from the Coleman Report and other studies, for instance, that there is practically no correlation between the physical plant of our schools and the academic achievement of our students. We may desire new, well-equipped schools for all sorts of reasons. They may be good reasons; they may even, in some vague sense, qualify as "educational" reasons; but they are not academic reasons. Students learn as well in old, decrepit school buildings as in new, shiny ones; or they learn as little in the latter as in the former. Middle-class parents who think they are improving their children's academic potential by sending them to a brand-new school with a fine library, a sumptuous gymnasium, a lovely lunchroom are kidding themselves. So are slum parents who think that their children's academic potential is weakened by old buildings, cramped gymnasiums (or no gymnasium), shabby lunchrooms, paltry libraries (or no library). What determines a child's academic achievement is his genetic endowment plus the values and motivation he acquires at home. All the rest may have significant consequences for a child's life-style, his appearance, perhaps (and I myself regard this as the most important function of schools) what we call his "character." But it will have little to do with his academic achievement.

Even class size turns out to have nothing to do with academic achievement. There are, in my view, good reasons—having to do with the role of the teacher as an "adult model" in the process of "character formation"—for preferring smaller classes to larger ones. But they are not academic reasons. Whether a class has 20 pupils or 30 or even 40 simply doesn't matter. Students who do well in small classes will do well in large ones. Students who do poorly in large classes will do no better in small ones. This subject has been studied to death by generations of educational researchers, and the results are conclusive.

Nevertheless, the educator who dares to utter these truths publicly is instantly classified as, at best, an eccentric. His opinions are marked as "controversial"—though they are not—whereas an educator who stresses the academic importance of new schools and small classes is simply seen as tediously "sound." Every year, in New York City, a furious debate breaks out when the statistics on the reading levels in the city schools are made available. These statistics always show that the average reading levels in New York's schools are lower than the national average—and they usually show that, with each year, they are steadily falling further below the national average. The publication of these figures always shocks, always provokes front-page news stories. But far from being shocking. these statistics aren't even newsworthy, since they are perfectly predictable. The reason that reading scores in New York's schools are falling away from the national average is that an ever-increasing percentage of our students come from very low-income families that are also broken, transient and generally problem-ridden families. The children in these families show low academic motivation and low academic aptitude. We insist that our schools "do something" about increasing the academic ability of these youngsters, and our educational leaders furiously institute every gimmick they can think of with the assurance that this time they will turn the trick.

Our insistence is as unreasonable as their assurances are worthless. The schools cannot perform this sociological miracle—which, if it is to take place at all, will happen in the family, at home, over a period of time that is rarely shorter than a couple of generations. As such poor families move up the economic and social ladder, as their home life becomes more stable and the family concern for education becomes more emphatic, the student's academic performance improves. In individual cases, "miracles' 'do certainly occur. But in the mass, statistical probability reigns supreme—and the schools play no role in the calculations. If you want to estimate the chances of a student doing well or badly in school, give him a physical examination, look at his home, and give him an intelligence test. But don't bother him with questions about his school—it is of no importance for *this* purpose.

And how do we react to this fact? With furious indignation, usually. So, as the schools' impotence to satisfy our unrealistic demands becomes ever more clear, we shall—it is already beginning to happen—abolish reading scores and reading tests on the grounds that they are irrelevant to eventual academic achievement. This monumental act of self-deception will, of course, fool nobody and change nothing. But it will certainly be hailed by professional educators as a marvelous innovation.

Of late, many educators have waxed enthusiastic over the educational possibilities of small mixed classes, with the older students helping to instruct the younger, and with every student proceeding "at his own pace." This is, of course, exactly what used to happen in the "little red schoolhouse." I have always been fond of the little red schoolhouse and was unhappy that, after a determined campaign over many decades, our professional educators succeeded in outlawing it. If they now wish to reinstitute it, I certainly have no objections. But I find it more than a little nauseating that they should now present it as a brilliant educational innovation which will solve all our educational problems. And I find it unconscionable that these educators can be so easy in mind and spirit about their newest fad when the huge educational parks which—only yesterday—they insisted were absolutely necessary, are just now coming into existence.

A good principal can always make a *small* difference in the academic power of a school—and a small difference is surely better than none at all. A dedicated teacher may make a big difference to a *few* students—and this difference is to be treasured. But none of this satisfies us. We insist that our schools fulfill impossible dreams—and so they pretend to be able to do this (given a larger budget, of course). As a result, the world of American education is at the moment suffused with charlatanism, and anyone with a sober word to say is encouraged to go elsewhere.

The consequences of this public insistence on a utopian vision of man, history and society is that our public life is shot through with a permanent streak of hysteria. We are constantly indicting ourselves, denouncing our nation, lamenting our fate. Indeed, an entire profession has emerged—we call it "the media"—which has taken up on itself the responsibility for leading this chorus. Just imagine what our TV commentators and our "news" analysts" would do with a man who sought elected office with the promise that, during his tenure, he hoped to effect some small improvements in our condition. They would ridicule him into oblivion.

In contrast, they are very fond of someone like John Lindsay, who will settle for only the finest and most glowing goals. Public figures in our society get credit for their utopian rhetoric—for their "charisma," as we now say—and only demerits if they emphasize their (necessarily modest) achievements.

Every society needs ideals and self-criticism and some prophetic admonition. It needs these to correct its "natural" tendency toward smugness, intertia and parochial self-satisfaction. But when the countertendency toward insistent self-dissatisfaction becomes overwhelming, then such a society is in grave trouble. The capacity for contentment is atrophied. So is the willingness to see things as they really are, and then to improve them in a matter-of-fact way. We certainly do have it in our power to make improvements in the human estate. But to think we have it in our power to change people so as to make the human estate radically better than it is, radically different from what it is, and in very short order, is to assume that this generation of Americans can do what no other generation in all of human history could accomplish. American though I be, I cannot bring myself to accept this arrogant assumption. I think, rather, that by acting upon this assumption we shall surely end up making our world worse than it need have been.

MOBILE HOME SAFETY LEGISLATION

The SPEAKER. Under a previous order of the House, the gentleman from Florida (Mr. FREY) is recognized for 10 minutes.

Mr. FREY. Mr. Speaker, I am today introducing the National Mobile Home Safety Act of 1972 which, if enacted, will remedy a serious gap in State and Federal regulation by providing assurance to the potential mobile home buyer that the mobile home he purchases meets certain minimum safety standards.

More than 7 million Americans live in mobile homes. Half of the one-family houses built in the United States today are mobile homes and 95 percent of the houses sold for under $15,000 are mobile homes.

And, the demand is growing; 500,000 mobile homes were manufactured last year alone. In my own State of Florida which is the largest mobile home market in the Nation, there are 1,271 mobile home parks and over 165,000 individual lots.

While there has been a phenomenal increase in the manufacturing, sale, and purchase of mobile homes, there has been an alarming lack of effort by the States and the Federal Government to assure that the homes sold meet certain basic safety standards. And, with the rising demand, there have been and are bound to be a few manufacturers who utilize unsafe construction materials and techniques.

Mobile homes are not subject to local building codes. The distinction between standard homes and mobile homes is oftentimes meaningless as some of the newer mobile home models are not really mobile at all. The most common size is 12 feet wide and 60 feet long, but they can be purchased in double or even triple width. The only time such homes are ever mobile is for the trip between the factory and the mobile home park. Even then they must be moved by tractor or heavy-duty truck.

Furthermore, only about half of the States have adopted standards directly or as a guideline. The standards were developed by the American National Standards Institute. Five out of the 10 top manufacturing States have no code whatsoever: New York, Pennsylvania, Illinois, Michigan, and Ohio.

These same standards, it should be noted, are utilized for membership in the Mobile Home Manufacturers Association. But, like most self-regulatory activities, it lacks teeth.

Criticism has also been made of the code itself. The final report of the National Commission on Product Safety concluded as follows concerning the mobile home code:

> Although the limited space in mobile homes calls for special consideration in their design, exigencies are largely unheeded. The standard does not provide exits opening on either side at opposite ends, in the event of fire or upset; safety glazing; or braking to prevent fishtailing. It permits use of gas, fire floor heaters (which generate excessive grate service temperatures). It does not require that the heater vent be constructed to preclude blocking, nor that the operator be informed of the importance of an electrical ground.

Moreover, those States which have adopted the code for the most part only apply it to homes manufactured in the State and sold in the State. Thus, mobile homes manufactured in a State without one and sold in a State with a code and homes manufactured in a State with a code but sold in a State without one are in most cases not regulated at all.

More importantly, however, is the lack of enforcement in those States which have adopted the code. For instance, in my own State of Florida which is the largest manufacturer of mobile homes in the country—38,000 last year—and has the largest number of mobile home parks—1,271—and lots—165,023—there are three inspectors to handle all complaints against the manufacturers of mobile homes and recreational vehicles and also the construction of all vehicles. Since they handle all recreational vehicles—campers, motorhomes, and so forth—and receive on the average 20 complaints per month on mobile homes only, and 17 new applications daily from mobile home dealers, they must resort to random spot checks of manufacturers. They inform me that every time they inspect they find violations of the code. Florida, it should be noted, has just decided to add three inspectors which should improve the situation.

And Florida has one of the better enforcement programs in the country.

There is no formal regulation at the Federal level either, although both the FHA and VA require that before mortgage money is lent on a mobile home, it must meet the ANSI standard. The FHA employs a "self-certification" process which in reality means no regulation at all. The VA, on the other hand, has just inaugurated a quarterly inspection of manufacturing plants by a person from each of their State offices. Experts in the industry tell me that a great deal of expertise is required to adequately inspect a mobile home and they are skeptical of the VA's capabilities in this regard. So am I.

The Federal Home Loan Bank Board has just recently authorized Federal Savings and Loan Associations to make loans for the purchase of mobile homes. But, they do not require that the mobile home financed meet any safety standards whatsoever.

Since the FHA and VA are insuring the financing of mobile homes and the Federal Home Loan Bank issues deposit insurance for Federal Savings and Loan Associations, fiscal responsibility alone would seem to require adherence to uniform Federal standards.

The lack of effective regulation of this rapidly expanding form of living is resulting in property damage, financial ruin, human suffering, and, in some cases, death.

It should be clearly understood, however, that there are only a few manufacturers who fail to adhere to minimum safety standards in order to cut corners. Most violations of the code are due to deficiencies in construction caused by a workman who does not know the code or the proper procedure for installing the materials as they were designed to be installed.

Let us look at some recent facts. A leading mobile home insurance company estimated that the average mobile home fire loss in 1971 was $1,529, as compared to $350, for a conventional home. The average mobile home fire loss increased from $889 in 1966 to $1,529 today. An analysis made by one insurance company of 5,543 mobile homes fires in 1971 estimated that damage due to such fires amounted to $6,780,972.34. The State of Oregon estimates that the average loss to a mobile home as compared to its value is 3.80 times as great as the same ratio for a standard home. The average age of a mobile home that has a fire is 7½ years as compared to 40 years for a conventional home.

Because of the lack of exits and high flammability of the construction materials used, the mortality rate in mobile home fires has been estimated in the State of Arizona as eight times that of ordinary dwellings and 3.29 times greater in the State of Oregon. In one fire in Syracuse, N.Y., this past winter five people died within minutes of a mobile home catching fire. A 2-year-old baby died in an Indianapolis, Ind., mobile home fire; 19.2 percent of all mobile home fires were due to faulty electrical wiring. The primary cause was the extensive use made of aluminum wiring and heat tape. Heat tape has a life expectancy of about 3 years and eventually failure usually takes the form of an electrical short. When placed around the water pipe adjacent to the inflammable insulation in the flooring of a mobile home, the short can ignite a fire very early; 13 percent of such fires are due to faulty furnaces and flues. The area surrounding furnaces, gas water heaters, stoves, and so forth, should be but are not protected with fire retardant material. Insulation used in mobile homes should also be fire retardant.

Furthermore, the windows in mobile homes are small and they do not have a

means of emergency escape in case of fire as required by other types of housing.

The second most pressing safety problem relates to wind damage. Most States do not require that mobile homes be tied down at the site. Without foundations they are particularly vulnerable to being blown over in windstorms. In January, a tornado swept through a mobile home park at Fort Rucker, Ala., killing five and injuring 80. The worst damage to nearby houses, a few roofs lifted but no personal injury.

And, in Boulder, Colo., recently, where the ANSI code has been adopted, but apparently not enforced, 35 mobile homes were destroyed during a windstorm of 65 miles per hour—$800,000 worth of damage was done. The cause of the destruction was threefold:

The turnbuckles used to fasten the cables were not adequate—they were three-eighths of an inch instead of five-eighths of an inch—the cable clamps which attach the cable to the turnbuckles were not properly tightened; and the ends of the cable were put 2½ inches into concrete rods which had no holding power.

Since the vast majority of mobile homes owners are either retired or young persons just getting started who have put their life savings and personal possessions in the mobile home, any fire or loss imposes quite a hardship—97 percent of the mobile homeowners in Florida are retired and the average income for a Florida mobile homeowner including social security is $5,702.

Most losses, moreover, are not covered by warranties. The warranties are oftentimes of very short duration and hard to comply with. Some companies, for instance, require that the mobile home be returned to the point of purchase.

In addition, insurance companies have become more and more reluctant to insure certain models of mobile homes due to the high risk of loss involved. Consequently, insurance rates for mobile homes are considerably higher than those for standard homes. The insurance on the average $6,000 mobile home is approximately $100 which is equivalent to the insurance on a $40,000 conventional home.

The legislation I am introducing today will authorize the establishment of enforceable uniform national safety standards that should provide protection to the elderly and very young who purchase mobile homes, and will also, undoubtedly, result in the expanded use of mobile homes as a low cost, enjoyable form of living.

The high water table and warm climate of Florida have made mobile home living highly desirable for many of our senior citizens. If my legislation is enacted, I am confident that the mobile home industry will expand even more rapidly as prospective purchasers will be more assured that the home they purchase meets certain basic safety standards. The loss rate will undoubtedly, reflect the use of safer construction materials and techniques.

The mobile home industry is concerned about the problem of safety as evidenced by the attempts at self-policing. But, their efforts are just not sufficient. Significant progress will not be achieved until Federal legislation is enacted.

Also, one uniform standard and one enforcement procedure will enable each manufacturer to know precisely what is required of him. At the present time, 26 States have adopted different versions of the ANSI standard and the VA and FHA have their own standard and enforcement procedure.

The legislation which I offer today is modeled to a certain extent on the Motor Vehicle Safety Act of 1970, although there are significant variations. It is, I emphasize, a balanced, fair approach to the problem. The thrust of it is to establish minimum, uniform, safety standards while at the same time promoting the use of the mobile home as a low-cost, desirable form of housing.

Under my bill, the Secretary of HUD shall through a National Mobile Home Safety Bureau establish Federal mobile home safety standards. In prescribing standards the Secretary shall consider: First, all relevant mobile home safety data; second, consult with the States; and third, consider whether any proposed standard is reasonable, practicable and will not place undue financial burden on the manufacturer or dealer or result in a substantial increase in the retail price of mobile homes.

The standards would be established no earlier than 180 days after enactment with revised standards at least 180 days later. A National Mobile Home Safety Advisory Council will be established. The majority will be representatives of the general public, including representatives of State and local governments, and the remainder shall include representatives of the American National Standards Institute Committee on Mobile Homes and Recreational Vehicles and representatives of the mobile home manufacturers, dealers, and insurers. The Secretary must consult with the Advisory Council before establishing or amending any standards. These standards shall not apply to the sale, offer for sale, or introduction or delivery for introduction in interstate commerce of any mobile home after the first purchase of it in good faith for purposes other than resale.

Once the standards have been promulgated, no person shall manufacture for sale, offer for sale, or introduce or deliver for introduction in interstate commerce or import into the United States, any mobile home manufactured unless it conforms to such standards.

The Secretary is further authorized to conduct research testing, development, and training for the development of new standards and to determine the relationship between mobile home performance characteristics and accidents involving mobile homes and the occurrence of death or injury from such accidents.

The Secretary is also authorized to conduct with the advisory council a thorough study of standards for used mobile homes and recommend additional legislation if he feels such is necessary within 1 year after this legislation is enacted.

Each violation of the prohibited acts outlined in section 108 of the bill are subject to the civil penalty of $1,000. Injunctive relief is also available in the U.S. district courts. In addition, if a mobile home does not conform to applicable Federal mobile home safety standards and it is prior to a sale by a distributor or dealer, the manufacturer or distributor shall either repurchase the home at his cost or furnish the parts and costs of installation to the distributor or dealer.

Provision is made for judicial review for any person adversely affected by an order—standard—issued by the Secretary.

Inspection and investigation is authorized as may be necessary to enforce the standards established. Designated employees may enter at reasonable times factories or warehouses for prompt inspection. Each manufacturer, distributor, and dealer shall establish and maintain such records and reports as the Secretary may require. The Secretary may also require each manufacturer to give performance and technical data to each prospective purchaser. Finally, each manufacturer shall furnish to each first purchaser and all dealers notification of any defect in a mobile home produced that relates to mobile home safety which he has discovered after manufacturing such home or which has been discovered through testing or inspection by the National Mobile Home Safety Bureau.

Certification that each mobile home conforms to the Federal safety standards shall also be given by each manufacturer to each distributor or dealer at the time of delivery.

Section 120 of the bill allows any State to assume responsibility for the development and enforcement of mobile home safety standards if the plan they submit to the Secretary for such provides for the development and enforcement of mobile home safety standards which are at least as effective in providing safe mobile homes as is the Federal program. Detailed reports would still be made by manufacturers, distributors, and dealers to the Secretary. And, the State agency will make such reports as the Secretary may require. The Secretary shall make a continuing evaluation of the way each State is carrying out its plan. Approval may be withdrawn at any time.

Grants will be made to States that have designated a State agency to assist them in identifying their needs and responsibilities in the area of mobile home safety standards or in developing State plans. The Federal share shall not exceed 90 percent. Grants of up to 50 percent can also be made to assist the States in administering and enforcing State plans for mobile home safety. Title II in the bill amends existing law to provide that loans made by the FHA, VA or a Federal Savings and Loan Association for the purchase of a mobile home may only be made for a home that meets or exceeds the mobile home safety standards established by this legislation.

Following is the complete text of the bill:

H.R. 14716

A bill to provide for the establishment of safety standards for mobile homes in interstate commerce, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress declares that the purpose of this Act is to reduce the amount of insurance costs, property damage, personal injury, and death resulting from mobile home accidents without any substantial increase in the retail price of mobile homes. Therefore, Congress determines that it is necessary to establish practical Federal safety standards for mobile homes in interstate commerce; to authorize mobile home safety research and development; to encourage and provide financial assistance for the development of State mobile home safety programs; and to provide that for the purposes of any Federal guarantee of a loan for the purchase of a mobile home or the making or investing in any such loan by a Federal savings and loan association, each such mobile home shall meet or exceed such Federal safety standards.

TITLE I—MOBILE HOME SAFETY STANDARDS

SHORT TITLE

SEC. 101. This Act may be cited as the "National Mobile Home Safety Standards Act of 1972".

DEFINITIONS

SEC. 102. As used in this title, the term—

(1) "dealer" means any person who is engaged in the sale and distribution of new mobile homes, primarily to persons who in good faith purchase any such mobile home for purposes other than resale;

(2) "defect" includes any defect in the performance, construction, components, or materials of a mobile home;

(3) "distributor" means any person who is engaged in the sale and distribution of mobile homes for resale;

(4) "interstate commerce" means commerce between any place within a State and any place within another State, or between places within the same State through another State;

(5) "manufacturer" means any person engaged in manufacturing or assembling mobile homes, including any person engaged in importing mobile homes for resale;

(6) "mobile home" means a factory-assembled structure designed primarily for use as a dwelling unit without a permanent foundation and manufactured and equipped with the necessary service connections so as to be readily movable as a unit on its own running gear;

(7) "mobile home safety" means the performance of a mobile home in such a manner that the public is protected against any unreasonable risk of the occurrence of accidents due to the design or construction of such mobile home, or any unreasonable risk of death or injury to the public if such accidents do occur;

(8) "mobile home safety standard" means a minimum, practicable standard for mobile home performance which meets the need for mobile home safety;

(9) "Secretary" means the Secretary of Housing and Urban Development;

(10) "State" includes each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Canal Zone, and America Samoa; and

(11) "United States district courts" means the Federal District Courts of the United States and the United States courts of the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Canal Zone, and American Samoa.

FEDERAL MOBILE HOME SAFETY STANDARDS

SEC. 103. (a) The Secretary shall establish by order appropriate Federal mobile home safety standards. Each such Federal mobile home safety standard shall be practicable, shall meet the need for mobile home safety, and shall be stated in objective terms.

(b) The provisions of sections 551 through 559 of title 5, United States Code, shall apply to all orders establishing, amending, or revoking a Federal mobile home safety standard under this title.

(c) Each order establishing a Federal mobile home safety standard shall specify the date such standard is to take effect, which shall not be sooner than one hundred and eighty days or later than one year from the date such order is issued, unless the Secretary finds, for good cause shown, that an earlier or later effective date is in the public interest, and publishes his reasons for such finding.

(d) Whenever a Federal mobile home safety standard established under this title is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any mobile home, any safety standard applicable to the same aspect of performance of such mobile home which is not equal to or greater than the Federal standard.

(e) The Secretary may by order amend or revoke any Federal mobile home safety standard established under this section. Such order shall specify the date on which such amendment or revocation is to take effect, which shall not be sooner than one hundred and eighty days or later than one year from the date the order is issued, unless the Secretary finds, for good cause shown, that an earlier or later effective date is in the public interest, and publishes his reasons for such finding.

(f) In prescribing standards under this section, the Secretary shall—

(1) consider relevant available mobile home safety data, including the results of the research, development, testing, and evaluation activities conducted pursuant to this title, and those activities conducted by the American National Standards Institute Committee on Mobile Homes and Recreational Vehicles; to determine how to best protect the public;

(2) consult with such State or interstate agencies (including legislative committees) as he deems appropriate;

(3) consider whether any such proposed standard is reasonable, practicable, and appropriate for the particular type of mobile home for which it is prescribed;

(4) consider whether any such standard will place an undue financial burden upon manufacturers and distributors of mobile homes;

(5) consider whether any such standard will result in a substantial increase in the retail price of mobile homes; and

(6) consider the extent to which any such standard will contribute to carrying out the purpose of this title.

(g) The Secretary shall issue initial Federal mobile home safety standards upon the expiration of the one hundred eighty-day period which begins on the date of enactment of this Act. The Secretary shall issue new and revised Federal mobile home safety standards upon this title upon the expiration of the three hundred sixty-day period which begins on the date of enactment of this Act.

NATIONAL MOBILE HOME SAFETY ADVISORY COUNCIL

SEC. 104. (a) The Secretary shall establish a National Mobile Home Safety Advisory Council, a majority of which shall be representatives of the general public, including representatives of State and local governments, and the remainder shall include members of the American National Standards Institute Committee on Mobile Homes and Recreational Vehicles and representatives of mobile home manufacturers and dealers, and insurers.

(b) The Secretary shall consult with the Advisory Council before establishing, amending, or revoking any mobile home safety standard pursuant to the provisions of this title.

(c) Members of the National Mobile Home Safety Advisory Council may be compensated at a rate not to exceed $100 per diem (including traveltime) when engaged in the actual duties of the Advisory Council. Such members, while away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence as authorized by section 5703(b) of title 5, United States Code, for persons in the Government service employed intermittently. Payments under this section shall not render members of the Advisory Council employees or officials of the United States for any purpose.

JUDICIAL REVIEW OF ORDER

SEC. 105. (a)(1) In a case of actual controversy as to the validity of any order under section 103, any person who will be adversely affected by such order when it is effective may at any time prior to the sixtieth day after such order is issued file a petition with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary or other officer designated by him for that purpose. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based his order, as provided in section 2112 of title 28 of the United States Code.

(2) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Secretary, and to be adduced upon the hearing, in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(3) Upon the filing of the petition referred to in paragraph (1) of this subsection, the court shall have jurisdiction to review the order in accordance with the provisions of sections 701 through 706 of title 5, United States Code, and to grant appropriate relief.

(4) The judgment of the court affirming or setting aside, in whole or in part, any such order of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28 of the United States Code.

(5) Any action instituted under this subsection shall survive, notwithstanding any change in the person occupying the office of Secretary of any vacancy in such office.

(6) The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law.

(b) A certified copy of the transcript of the record and proceedings under this section shall be furnished by the Secretary to any interested party at his request and payment of the costs thereof, and shall be admissible in any criminal, exclusion of imports, or other proceeding arising under or in respect of this title, irrespective of whether proceedings with respect to the order have previously been initiated or become final under subsection (a).

RESEARCH, TESTING, DEVELOPMENT, AND TRAINING

SEC. 106. (a) The Secretary shall conduct research, testing, development, and training necessary to carry out the purposes of this title, including, but not limited to—

(1) collecting data from any source for the purpose of determining the relationship between mobile home performance characteristics and (A) accidents involving mobile homes, and (B) the occurrence of death, or personal injury resulting from such accidents;

(2) procuring (by negotiation or otherwise) experimental and other mobile homes for research and testing purposes;

(3) selling or otherwise disposing of test mobile homes and reimbursing the proceeds of such sale or disposal into the current appropriation available for the purpose of carrying out this title.

(b) The Secretary is authorized to conduct research, testing, development, and training as authorized to be carried out by subsection (a) of this section by making grants for the conduct of such research, testing, development, and training to States, interstate agencies, and nonprofit institutions.

(c) Whenever the Federal contribution for any research or development activity authorized by this title encouraging mobile home safety is more than minimal, the Secretary shall include in any contract, grant, or other arrangement for such research or development activity, provisions effective to insure that all information, uses, processes, patents, and other developments resulting from that activity will be made freely and fully available to the general public. Nothing herein shall be construed to deprive the owner of any background patent of any right which he may have thereunder.

COOPERATION WITH PUBLIC AND PRIVATE AGENCIES

SEC. 107. The Secretary is authorized to advise, assist, and cooperate with, other Federal departments and agencies, and State and other interested public and private agencies, including the American National Standards Institute Committee on Mobile Homes and Recreational Vehicles, in the planning and development of—

(1) mobile home safety standards; and

(2) methods for inspecting and testing to determine compliance with mobile home safety standards.

PROHIBITED ACTS

SEC. 108. (a) No person shall—

(1) manufacture for sale, sell, offer for sale, or introduce or deliver for introduction in interstate commerce, or import into the United States, any mobile home manufactured on or after the date any applicable Federal mobile home safety standard takes effect under this title unless it is in conformity with such standard, except as provided in subsection (b) of this section;

(2) fail or refuse access to or copying of records, or fail to make reports or provide information, or fail or refuse to permit entry or inspection, as required under section 112;

(3) fail to issue a certificate required by section 114, or issue a certificate to the effect that a moblie home conforms to all applicable Federal mobile home safety standards, if such person in the exercise of due care has reason to know that such certificate is false or misleading in a material respect; or

(4) fail to furnish notification of any defect as required by section 113

(b)(1) Paragraph (1) of subsection (a) shall not apply to the sale, the offer for sale, or the introduction or delivery for introduction in interstate commerce of any mobile home after the first purchase of it in good faith for purposes other than resale. In order to assure a continuing and effective national mobile home safety program, it is the policy of Congress to encourage the adoption of State inspection of used mobile homes. Therefore, to that end the Secretary shall conduct a thorough study and investigation to determine the adequacy of mobile home safety standards and mobile home inspection requirements and procedures applicable to used mobile home vehicles in each State, and the effect of programs authorized by this title upon such standards, requirements, and procedures used for mobile homes, and report to Congress as soon as practicable, but not later than one year after the date of enactment of this Act, the results of such study, and recommendations for such additional legislation as he deems necessary to carry out the purposes of this title. As soon as practicable after the submission of such report, but no later than one year from the date of submission of such report, the Secretary, after consultation with the Council and such interested public and private agencies and groups as he deems advisable, shall establish uniform Federal mobile home safety standards applicable to all used mobile homes. Such standards shall be expressed in terms of mobile home safety performance. The Secretary is authorized to amend and revoke such standards pursuant to this Act.

(2) Paragraph (1) of subsection (a) shall not apply to any persons who establishes that he did not have reason to know in the exercise of due care that such mobile home is not in conformity with applicable Federal mobile home safety standards, or to any person who, prior to such first purchase, holds a certificate issued by the manufacturer or importer of such mobile home, to the effect that such mobile home conforms to all applicable Federal mobile home safety standards, unless such person knows that such mobile home does not so conform.

(3) A mobile home offered for importation in violation of paragraph (1) of subsection (a) shall be refused admission into the United States under joint regulations issued by the Secretary of the Treasury and the Secretary; except that the Secretary of the Treasury and the Secretary may, by such regulations, provide for authorizing the importation of such mobile home into the United States upon such terms and conditions (including the furnishing of a bond) as may appear to them appropriate to insure that any such mobile home will be brought into conformity with any applicable Federal mobile home safety standard prescribed under this title, or will be exported or abandoned to the United States.

(4) The Secretary of the Treasury and the Secretary may, by joint regulations, permit the temporary importation of any mobile home after the first purchase of it in good faith for purposes other than resale.

(5) Paragraph (1) of subsection (a) shall not apply in the case of a mobile home intended solely for export, and so labeled or tagged on the mobile home itself and on the outside of the container, if any, which is exported.

(c) Compliance with any Federal mobile home safety standard issued under this title does not exempt any person from any liability under common law.

CIVIL PENALTY

SEC. 109. (a) Whoever violates any provision of section 108, or any regulation issued thereunder, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. Such violation of a provision of section 108, or regulations issued thereunder, shall constitute a separate violation with respect to each mobile home or with respect to each failure or refusal to allow or perform an act required thereby, except that the maximum civil penalty shall not exceed $400,000 for any related series of violations.

(b) Any such civil penalty may be compromised by the Secretary. In determining the amount of such penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged.

JURISDICTION AND VENUE

SEC. 110. (a) The United States district courts shall have jurisdiction, for cause shown and subject to the provisions of rule 65 (a) and (b) of the Federal Rules of Civil Procedure, to restrain violations of this title, or to restrain the sale, offer for sale, or the introduction or delivery for introduction, in interstate commerce, or the importation into the United States, of any mobile home which is determined, prior to the first purchase of such mobile home in good faith for purposes other than resale, not to conform to applicable Federal mobile home safety standards prescribed pursuant to this title, upon petition by the appropriate United States attorney or the Attorney General on behalf of the United States. Whenever practicable, the Secretary shall give notice to any person against whom an action for injunctive relief is contemplated and afford him an opportunity to present his views, and, except in the case of a knowng and willful violation, shall afford him reasonable opportunity to achieve compliance. The failure to give such notice and afford such opportunity shall not preclude the granting of appropriate relief.

(b) In any proceeding for criminal contempt for violation of an injunction or restraining order issued under this section, which violation also constitutes a violation of this Act, trial shall be by the court or, upon demand of the accused, by a jury. Such trial shall be conducted in accordance with the practice and procedure applicable in the case of proceedings subject to the provisions of rule 42(b) of the Federal Rules of Criminal Procedure.

(c) Actions under subsection (a) of this section and section 109(a) may be brought in the district wherein any act or transaction constituting the violation occurred, or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

(d) In any actions brought under subsection (a) of this section and section 109(a), subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(e) It shall be the duty of every manufacturer offering a mobile home for importation into the United States to designate in writing an agent upon whom service of all administrative and judicial processes, notices, orders, decisions and requirements may be made for and on behalf of such manufacturer, and to file such designation with the Secretary, which designation may from time to time be changed by like writing, similarly filed. Service of all administrative and judicial processes, notices, orders, decisions and requirements may be made upon such manufacturer by service upon such designated agent at his office or usual place of residence with like effect as if made personally upon such manufacturer, and in default of such designation of such agent, service of process, notice, order, requirement or decision in any proceeding before the Secretary or in any judicial proceeding for enforcement of this title or any standards prescribed pursuant to this title may be made by posting such process, notice, order, requirement or decision in the Office of the Secretary.

NONCOMPLIANCE WITH STANDARDS

SEC. 111. (a) If any mobile home is determined not to conform to applicable Federal mobile home safety standards, or contains a defect which relates to mobile home

safety, after the sale of such mobile home by a manufacturer or a distributor to a distributor or a dealer and prior to the sale of such mobile home by such distributor or dealer—

(1) the manufacturer or distributor, as the case may be, shall immediately repurchase such mobile home from such distributor or dealer at the price paid by such distributor or dealer, plus all transportation charges involved and a reasonable reimbursement of not less than 1 per centum per month of such price paid prorated from the date of notice of such noconformance to the date of repurchase by the manufacturer or distributor; or

(2) the manufacturer or distributor, as the case may be, at his own expense, shall immediately furnish the purchasing distributor or dealer the required conforming part or parts or equipment for installation by the distributor or dealer on or in such mobile home, and for the installation involved the manufacturer shall reimburse such distributor or dealer for the reasonable value of such installation plus a reasonable reimbursement of not less than 1 per centum per month of the manufacturer's or distribtuor's selling price prorated from the date of notice of such nonconformance to the date such vehicle is brought into conformance with applicable Federal standards, so long as the distributor or dealer proceeds with reasonable diligence with the installation after the required part or equipment is received.

(b) In the event that any manufacturer or distributor refuses to comply with the requirements of paragraphs (1) and (2) of subsection (a), then the distributor or dealer, as the case may be, to whom such nonconforming mobile home has been sold may bring suit against such manufacturer or distributor in any district court of the United States in the district in which such manufacturer or distributor resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damage by him sustained, as well as all court costs plus reasonable attorneys' fees. Any action brought pursuant to this section shall be forever barred unless commenced within three years after the cause of action shall have accrued.

(c) The value of such installations and such reasonable reimbursements as specified in subsection (a) of this section shall be fixed by mutual agreement of the parties, or failing such agreement, by the court pursuant to the provisions of subsection (b) of this section.

INSPECTION OF MOBILE HOMES AND RECORDS

SEC. 112 (a) The Secretary is authorized to conduct such inspection and investigation as may be necessary to enforce Federal mobile home safety standards established under this title. He shall furnish the Attorney General and, when appropriate, the Secretary of the Treasury any information obtained indicating noncompliance with such standards, for appropriate action.

(b) For purposes of enforcement of this title, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are authorized—

(1) to enter, at reasonable times, any factory, warehouse, or establishment in which mobile homes are manufactured, or held for introduction into interstate commerce or are held for sale after such introduction; and

(2) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory, warehouse, or establishment.

Each such inspection shall be commenced and completed with reasonable promptness.

(c) Every manufacturer, distributor and dealer of mobile homes shall establish and maintain such records, make such reports, and provide such information as the Secretary may reasonably require to enable him to determine whether such manufacturer has acted or is acting in compliance with this title and mobile home safety standards prescribed pursuant to this title and shall, upon request of an officer or employee duly designated by the Secretary, permit such officer or employee to inspect appropriate books, papers, records, and documents relevant to determining whether such manufacturer has acted or is acting in compliance with this title and mobile home safety standards prescribed pursuant to this title.

(d) Every manufacturer of mobile homes shall provide to the Secretary such performance data and other technical data related to performance and safety as may be required to carry out the purposes of this Act. The Secretary is authorized to require the manufacturer to give such notification of such performance and technical data that the Secretary determines necessary to carry out the purposes of this Act, to—

(1) each prospective purchaser of a mobile home before its first sale for purposes other than resale at each location where any such manufacturer's mobile homes are offered for sale by a person with whom such manufacturer has a contractual, proprietary, or other legal relationship in a manner determined by the Secretary to be appropriate, which may include, but is not limited to, printed matter (A) available for retention by such prospective purchaser and (B) sent by mail to such prospective purchaser upon his request; and

(2) the first person who purchases a mobile home for purposes other than resale, at the time of such purchase, or in printed matter placed in the mobile home.

(e) All information reported to or otherwise obtained by the Secretary or his representative pursuant to subsection (b) or (c) which contains or relates to a trade secret or other matter referred to in section 1905 of title 18 of the United States Code, shall be considered confidential for the purpose of that section, except that such information may be disclosed to other officers or employees concerned with carrying out this title or when relevant in any proceeding under this title. Nothing in this section shall authorize the withholding of information by the Secretary or any officer or employee under his control, from the duly authorized committees of the Congress.

NOTIFICATION OF DEFECTS

SEC. 113. (a) Every manufacturer of mobile homes shall furnish notification of any defect in any mobile home produced by such manufacturer which he determines, in good faith, relates to mobile home safety, to the purchaser of such mobile home, within a reasonable time after such manufacturer has discovered such defect.

(b) The notification required by subsection (a) shall be accomplished—

(1) by certified mail to the first purchaser (not including any dealer of such manufacturer) of the mobile home containing such a defect, and to any subsequent purchaser to whom has been transferred any warranty on such mobile home; and

(2) by certified mail or other more expeditious means to the dealer or dealers of such manufacturer to whom such mobile home was delivered.

(c) The notification required by subsection (a) shall contain a clear description of such defect, an evaluation of the risk to mobile home safety reasonably related to such defect, and a statement of the measures to be taken to repair such defect.

(d) Every manufacturer of mobile homes, shall furnish to the Secretary a true or representative copy of all notices, bulletins, and other communications to the dealers of such manufacturer or purchasers of mobile homes of such manufacturer regarding any defect in such mobile home sold or serviced by such dealer. The Secretary shall disclose so much of the information contained in such notice or other information obtained under section 112(a) to the public as he deems will assist in carrying out the purposes of this title, but he shall not disclose any information which contains or relates to a trade secret or other matter referred to in section 1905 of title 18 of the United States Code, unless he determines that it is necessary to carry out the purposes of this Act.

(e) If through testing, inspection (investigation, or research carried out pursuant to this title, or examination of reports pursuant to subsection (d) of this section, or otherwise, the Secretary determines that any mobile home—

(1) does not comply with an applicable Federal mobile home safety standard prescribed pursuant to section 103; or

(2) contains a defect which relates to mobile home safety;

then he shall immediately notify the manufacturer of such mobile home of such defect or failure to comply. The notice shall contain the findings of the Secretary and shall include all information upon which the findings are based. The Secretary shall afford such manufacturer an opportunity to present his views and evidence in support thereof, to establish that there is no failure of compliance or that the alleged defect does not affect mobile home safety. If after such presentation by the manufacturer the Secretary determines that such mobile home does not comply with applicable Federal safety standards, or contains a defect which relates to mobile home safety, the Secretary shall direct the manufacturer to furnish the notification specified in subsection (c) of this section to the purchaser of such mobile home as provided in subsections (a) and (b) of this section.

(f) Every manufacturer of mobile homes shall maintain a record of the name and address of the first purchaser, other than a dealer or distributor, of each mobile home produced by that manufacturer. The Secretary may establish, by order, procedures to be followed by manufacturers in establishing and maintaining such records, including procedures to be followed by distributors and dealers to assist manufacturers to secure the information required by this subsection which will not affect the obligation of manufacturers under this subsection. Such procedures shall be reasonable for the particular type of mobile home for which they are prescribed.

CERTIFICATION OF CONFORMITY WITH SAFETY STANDARDS

SEC. 114. Every manufacturer or distributor of a mobile home shall furnish to the distributor or dealer at the time of delivery of each such mobile home by such manufacturer, the certification that each such mobile home conforms to all applicable Federal safety standards. Such certification shall be in the form of a label or tag permanently affixed to each such mobile home.

NATIONAL MOBILE HOME SAFETY BUREAU

SEC. 115. The Secretary shall carry out the provisions of this title through a National Mobile Home Safety Bureau (hereinafter referred to as the "Bureau"), which he shall establish in the Department of Housing and Urban Development. The Bureau shall be headed by a Mobile Home Safety Director who shall be appointed by the President, by and with the advice and consent of the Senate. The Director shall be a citizen of the United States, and shall be appointed with due regard for his fitness to discharge efficiently the powers and the duties delegated to him pursuant to this title. The Director shall perform such duties as are delegated to him by the Secretary.

EFFECT UPON ANTITRUST LAWS

SEC. 116. Nothing contained in this title shall be deemed to exempt from the anti-

trust laws of the United States any conduct that would otherwise be unlawful under such laws, or to prohibit under the antitrust laws of the United States any conduct that would be lawful under such laws.

USE OF RESEARCH AND TESTING FACILITIES OF PUBLIC AGENCIES

SEC. 117. The Secretary, in exercising the authority under this title, shall utilize the services, research and testing facilities of public agencies to the maximum extent practicable in order to avoid duplication.

RULES AND REGULATIONS

SEC. 118. The Secretary is authorized to issue, amend, and revoke such rules and regulations as he deems necessary to carry out this title.

ANNUAL REPORT TO CONGRESS

SEC. 119. (a) The Secretary shall prepare and submit to the President for transmittal to the Congress on March 1 of each year a comprehensive report on the administration of this title for the preceding calendar year. Such report shall include but not be restricted to (1) a thorough statistical compilation of the accidents and injuries occurring in such year; (2) a list of Federal mobile home safety standards prescribed or in effect in such year; (3) the degree of observance of applicable Federal mobile home standards; (4) a summary of all current research grants and contracts together with a description of the problems to be considered by such grants and contracts; (5) an analysis and evaluation, including relevant policy recommendations, of research activities completed and technological progress achieved during such year; (6) a statement of enforcement actions including judicial decisions, settlements, or pending litigation during such year; (7) the extent to which technical information was seminated to the scientific community and consumer-oriented information was made available to mobile home owners; and (8) a list of all State plans in effect pursuant to section 120 and an evaluation of each such plan.

(b) The report required by subsection (a) of this section shall contain such recommendations for additional legislation as the Secretary deems necessary to promote cooperation among the several States in the improvement of mobile home safety and to strengthen the national mobile home program.

STATE PLANS

SEC. 120. (a) Nothing in this title shall prevent any State agency or court from asserting jurisdiction under State law over any mobile home safety issue with respect to which, no standard has been established pursuant to the provisions of section 103.

(b) Any State which, at any time, desires to assume responsibility for development and enforcement of mobile home safety standards relating to any safety issue with respect to which a Federal standard has been established under section 103, shall submit to the Secretary a State plan for the development of such standards and their enforcement.

(c) The Secretary shall approve the plan submitted by a State under subsection (b), or any modification thereof, if such plan in his judgment—

(1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State;

(2) provides for the development and enforcement of mobile home safety standards which are or will be at least as effective in providing safe mobile homes as the standards promulgated under section 103;

(3) provides for a right of entry and inspection of all factories, warehouses, or establishments in such State in which mobile homes are manufactured, and which is at least as effective as that provided in section 112;

(4) contains satisfactory assurances that such agency has or will have the legal authority and quality personnel necessary for the enforcement of such standards;

(5) give satisfactory assurances that such State will devote adequate funds to the administration and enforcement of such standards;

(6) requires manufacturers, distributors, and dealers in such State to make reports to the Secretary in the same manner and to the same extent as if the State plan were not in effect; and

(7) provides that the State agency will make such reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require.

(d) If the Secretary rejects a plan submitted under subsection (b), he shall afford the State submitting the plan due notice and opportunity for a hearing before so doing.

(e) After the Secretary approves a State plan submitted under subsection (b), he may, but shall not be required to, exercise his authority under sections 106, 108, 109, 112, and 113 with respect to comparable standards established under section 103 for the period specified in the next sentence. The Secretary may exercise the authority referred to above until he determines, on the basis of actual operations under the State plan, that the criteria set forth in subsection (c) are being applied, but he shall not make such determination for at least three years after the plan's approval under subsection (c). Upon making the determination referred to in the preceding sentence, the provisions of sections 108, 109, 111, 112, and 113, and standards promulgated under section 103 of this title, shall not apply with respect to any mobile home safety issues covered under the plan, but the Secretary may retain jurisdiction under the above provisions in any proceeding commenced under section 108 or 109 before the date of determination.

(f) The Secretary shall, on the basis of reports submitted by the State agency and his own inspections, make a continuing evaluation in the manner in which each State having a plan approved under this section is carrying out such plan. Whenever the Secretary finds, after affording due notice and opportunity for a hearing, that in the administration of the State plan there is a failure to comply substantially with any provision of the State plan, he shall notify the State agency if his withdrawal of approval of such plan. Upon receipt of such notice by such State agency such plan shall cease to be in effect, but the State may retain jurisdiction in any case commended before the withdrawal of the plan in order to enforce mobile home standards under the plan whenever the issues involved do not relate to the reasons for the withdrawal of the plan.

(g) Each State may obtain a review of each decision of the Secretary withdrawing approval of or rejecting its plan by filing in the United States court of appeals for the circuit in which such State is located within thirty days following receipt of notice of such decision, a petition to modify or set aside in whole or in part the action of the Secretary. A copy of such petition shall forthwith be served upon the Secretary, and thereupon the Secretary shall certify and file in the court the record upon which the decision complained of was issued as provided in section 2112 of title 28, United States Code. Unless the court finds that the Secretary's decision in rejecting a proposed State plan or withdrawing his approval of such a plan is not supported by substantial evidence the court shall affirm the Secretary's decision. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

GRANTS TO THE STATES

SEC. 121. (a) The Secretary is authorized to make grants to the States which have designated a State agency under section 120 to assist them—

(1) in identifying their needs and responsibilities in the area of mobile home safety standards; or

(2) in developing State plans under section 120.

(b) The Governor of each such State shall designate the appropriate State agency for receipt of any grant made by the Secretary under this section.

(c) Any State agency designated by the Governor of the State desiring a grant under this section shall submit an application therefor to the Secretary. The Secretary shall review and either accept or reject such application.

(d) The Federal share for each State grant under subsection (a) of this section may not exceed 90 per centum of the total cost of the application. In the event the Federal share for all States under such subsection is not the same, the differences among the States shall be established on the basis of objective criteria.

(e) The Secretary is authorized to make grants to the States to assist them in administering and enforcing programs for mobile home safety contained in State plans approved by the Secretary pursuant to section 120 of this title. The Federal share for each State grant under this subsection may not exceed 50 per centum of the total cost to the State of such a program. The last sentence of subsection (d) shall be applicable in determining the Federal share under this subsection.

AUTHORIZATION OF APPROPRIATIONS

SEC. 122. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this title.

EFFECTIVE DATE

SEC. 213. The provisions of this title shall take effect upon the expiration of the one hundred eighty-day period which begins on the date of the enactment of this Act.

TITLE II—CHANGES IN EXISTING LAW

HOME OWNERS' LOAN ACT OF 1933

SEC. 201. The third paragraph of section 5 (c) of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464(c)) is amended by striking out clause (B) and inserting in lieu thereof the following:

"(B) any loan made for the purchase of a mobile home which meets or exceeds the mobile home safety standards established under the National Mobile Home Safety Standards Act of 1972."

NATIONAL HOUSING ACT

SEC. 202. The last sentence of the second paragraph of section 2(a) of the National Housing Act (12 U.S.C. 1703 (a)) is amended by—

(1) striking out "the livability and durability of the mobile home and" in clause (i);

(2) striking out "and" after the semicolon at the end of clause (i); and

(3) striking out the period at the end of clause (ii) and adding in lieu thereof "; and (iii) require that the mobile home meets or exceeds the mobile home safety standards established under the National Mobile Home Safety Standards Act of 1972."

TITLE 38, UNITED STATES CODE

SEC. 203. Section 1819 of title 38, United States Code, is amended by—

(1) striking out subsection (i) and inserting in lieu thereof the following:

"(i) No loan for the purchase of a mobile home shall be guaranteed under this section unless—

"(1) the mobile home meets or exceeds the mobile home safety standards established under the National Mobile Home Safety Standards Act of 1972; and

"(2) the lot, if any, meets or exceeds standards prescribed by the Administrator for the planning, maintenance, and development of mobile home sites which are attractive residential areas and which are free from, and do not substantially contribute to, adverse scenic or environmental conditions.

For the purpose of assuring compliance with such mobile home safety standards, the Administrator shall from time to time inspect the manufacturing process of mobile homes to be sold to veterans and conduct random onsite inspections of mobile homes purchased with assistance under this chapter."; and

(2) striking out "standards precsribed by the Administrator" in clause (1) of subsection (i) and inserting in lieu therof "safety standards required".

EFFECTIVE DATE

SEC. 204. The provisions of this title shall apply with respect to any loan application filed, pursuant to the provisions of the Home Owners' Loan Act of 1933, the National Housing Act, or section 1819 of title 38, United States Code, as the case may be, after the effective date of title I of this Act.

COST OF LIVING COUNCIL EXEMPTS SMALL BUSINESS

The SPEAKER. Under a previous order of the House, the gentleman from Ohio (Mr. BROWN) is recognized for 5 minutes.

Mr. BROWN of Ohio. Mr. Speaker, the decision of the Cost of Living Council announced yesterday to exempt small businesses, small governments, and other employees from wage and price controls was designed to eliminate unnecessary redtape in stabilization, service and compliant activities in a manner that is equitable and noninflationary. It will enable the economic stabilization program to better allocate its resources, and provide closer supervision of and service for the large economic units remaining under controls.

The action taken by the Cost of Living Council affects 5 million small companies and 19 million employees in these small businesses.

Direct control of small units have created administrative difficulties for those units in excess of the anti-inflationary value of the controls. Small units, those with an employee force of 60 or less, typically are not as well equipped as large units to comply with record-keeping, exemption and exception information demands, and compliance response data required by the controls.

C–5A COST OVERRUNS

The SPEAKER. Under a previous order of the House, the gentleman from Wisconsin (Mr. ASPIN) is recognized for 10 minutes.

Mr. ASPIN. Mr. Speaker, the Air Force is planning to cover up at least $20 million in cost overruns in the problem-plagued C–5A jet transport.

I received from the Air Force a letter that I believe demonstrates that the Air Force hopes to juggle its books so that potentially hundreds of millions of dollars that will be spent to correct the serious technical foulups on the C–5A will not be considered cost overruns. I have been informed by the Air Force today that the C–5A project office estimates an additional $113 million will be needed to correct all deficiences on the C–5A. Hence, if these estimates are accurate, the Air Force plans to cover up $133 million in cost overruns.

The Air Force book juggling will be made easy by declaring the C–5A program complete while these serious technical difficulties remain unsolved. The Air Force has already announced that this year's budget of $207 million for the C–5A will be the last budget request specifically for that program. But beginning next year, the Air Force plans to hide all additional costs in other accounts.

The Air Force already plans to spend at least an additional $20 million tucked away in a modification/update budget account in an attempt to untangle this incredible mess. According to the information provided by the Air Force today, an additional $133 million will be needed and that money will also be tucked away in a modification/update budget.

Hence, the $20 million is a minimum cost overrun that the Air Force hopes to hide from the public. No one knows how much ultimately will be hidden from the public view through this technique.

As my colleagues may know, additional funds will probably be needed to iron out other technical difficulties, including faulty landing gears, weak wings and radars that do not work.

I originally wrote to the Air Force, asking for their assurance that $107 million contained in this year's budget would be enough to correct all deficiencies in the C–5A.

The Air Force response was a flat "no." The Air Force said that it will take at least $20 million more, but the fact is that no one yet knows how big these new overruns will be. They could total hundreds of millions of dollars.

The Air Force has formed a special team to estimate the final cost of eliminating all technical deficiencies on the C–5A. When that committee reports, we will finally know how much money the taxpayer has been bilked for on the C–5A.

Unfortunately, cost overruns on the C–5A have already totaled $2 billion. Mr. Speaker, when will these cost overruns stop?

DEPARTMENT OF THE AIR FORCE,
Washington, April 25, 1972.

DEAR MR. ASPIN: This is in response to your April 5, 1972, letter concerning a recent General Accounting Office report on the C–5A aircraft.

To date, the C–5 has flown over 47,000 hours in test, training and cargo airlift missions. As of January 1972, the aircraft had flown 430 regularly scheduled cargo missions which involved 45,350 tons of cargo. These missions produced 245,172,000 ton miles of airlift. In addition, 93 special assignment airlift missions have been flown which involved 4,360 tons of cargo. These special missions produced 46,320,000 ton miles of airlift. Based upon these accomplishments, we feel that the C–5 is providing an unmatched strategic airlift capability for DOD forces on a global basis.

Of the $207M cited in your letter, as contained in the Fiscal 1973 budget for the C–5A, only approximately $55M of this amount is for modifications to correct aircraft deficiencies. The balance of this funding is required to complete production of the 81 aircraft program.

Approximately $104M in modifications has been validated to date by the Systems Program Office and approved for incorporation into the C–5A fleet. Of this total, $29.0M will be financed from prior year funds; $55M is contained in the fiscal 1973 budget request and $20.0M of funding will be requested through the Air Force's modification/update budget account presented and justfied to the Congress annually. With the exception of the latter $20.0M, all of the above funding is included within the $4.5 billion estimated cost to complete the C–5A program.

However, a number of additional modifications could be validated and approved for incorporation into the C–5A during the next several years. If approved, funding for these modifications would be requested through the normal modification/update budget account in the out years, as in other Air Force programs.

The program for incorporation of these modifications into the C–5A fleet has been carefully planned in an effort to reduce costs and minimize the impact on our airlift capability. Incorporation of modifications began in December 1970 simultaneously at the contractor's facility and in the field. Some work has also been performed within the Air Force Logistics Command at the San Antonio Air Materiel Area depot. After July 1972, all modifications will be incorporated during regularly scheduled depot level maintenance programs. This will enable the Air Force to maintain the maximum amount of airlift capability while completing our modificaiton requirements in a cost-effective manner.

All modification effort will continue to receive top management attention within the Air Force to insure that we achieve maximum capability from our C–5A airlift force as soon and as efficiently as possible.

I trust this information will be helpful.

Sincerely,

THOMAS G. MCCONNELL,
Colonel, U.S. Air Force, Chief, Congressional Investigations Division, Office of Legislative Liaison.

CONGRESSMAN RODINO'S EFFORTS TO COMBAT DRUG ABUSE

The SPEAKER. Under a previous order of the House, the gentleman from New Jersey (Mr. RODINO) is recognized for 10 minutes.

Mr. RODINO. Mr. Speaker, in the 92d Congress, we have made notable progress in the war on drug abuse. This progress has been a long time in coming, and I would like to review for the people of New Jersey's 10th District my efforts over the past 2 years to solve this country's drug problem.

In April 1970, I introduced a bill which would place all known addicts under the medical supervision and control of the Public Health Service. As a result, law enforcement officers would then be free to conduct vigorous crackdowns on the real criminal—the drug pusher.

In June 1970, I was the first Congressman to introduce a measure to authorize the President to cut off foreign aid to countries which did not cooperate with us in curbing the international traffic in hard drugs. In an effort to obtain quick

passage of this measure, I also offered it as an amendment to another bill on June 4, 1970. Although it received the widespread support of many Congressmen, it was not adopted at that time.

In July 1970, I introduced another bill which would provide financial aid to those countries which agree to assist us in stemming the flow of heroin, morphine, and cocaine to this country.

In October 1970, I wrote to President Nixon urging him to support this legislation which would give him emergency powers to deal effectively with the drug problem. However, it was not until June of 1971—8 months later—that the President responded by requesting Congress to enact a comprehensive narcotics control plan, similar to the one I had proposed.

In November 1970, I attended an international conference in the Netherlands and urged all NATO nations to join in our effort to eliminate the widespread traffic in hard drugs. At this meeting, my proposal to establish a "Working Group on Narcotics Control," composed of representatives from several NATO countries, was unanimously adopted.

In December 1970, the House of Representatives recognized the urgent need for effective action to control the flow of hard drugs to this country and passed my proposal to cut off foreign aid to uncooperative countries. Because the 91st Congress was rapidly drawing to a close, the Senate did not have sufficient time to consider my proposal.

Therefore, in January 1971—on the first day of the 92d Congress—I reintroduced the bills comprising the Rodino narcotics control plan.

In May 1971, in behalf of the United States, I submitted a detailed report on the drug problem in this country to NATO's "Working Group on Narcotics Control." In this report, I stressed the need for urgent action by our NATO allies to halt the illegal production of opium. I was therefore very pleased when Turkey, one of the members of the "Working Group," announced 1 week later that it had banned all opium production after 1972.

In June, I also sponsored a bill to provide that drug-addicted servicemen be medically discharged and civilly committed for medical treatment. In the summer of 1971, I also appeared before two committees of Congress and testified in support of the Rodino plan.

In August 1971, the foreign aid bill passed the House containing my program on the international control of narcotics. I was extremely gratified when this program was signed into law by the President on February 7, 1972.

In September 1971, I was elected to chair the annual meeting of the Scientific Committee of NATO's North Atlantic Assembly. This committee unanimously adopted my formal recommendation that all NATO countries cooperate in curtailing the illegal production and distribution of dangerous drugs and in developing programs for the treatment and rehabilitation of narcotic addicts.

In February 1972, I vigorously supported passage of a bill to create a Special Action Office for Drug Abuse Prevention, proposed by President Nixon in response to repeated calls by myself and other Democratic Congressmen for an agency to coordinate and evaluate all existing narcotic treatment programs. Hopefully, this bill, which was enacted into law on March 21, 1972, will go a long way toward making medical care and treatment facilities available to all known addicts.

The fight to wipe out the horror of drug addiction is not an easy one, but I am totally committed to support every effort that can help in ending this terrible epidemic that has so devastated our youth.

FREEDOM FROM FEAR

The SPEAKER. Under a previous order of the House, the gentleman from New York (Mr. ROSENTHAL) is recognized for 10 minutes.

Mr. ROSENTHAL. Mr. Speaker, there is no denying that many of our citizens are never free from fear for their safety. Public transportation, stores, parks, streets and even homes are not safe. A recently completed poll of my constituents reveals that concern about crime is the number one priority issue.

I am convinced that a giant step toward alleviating their fears and curbing crime is eliminating handguns from our society. Accordingly, I am introducing legislation to outlaw the ownership of handguns by individual citizens. The key provision of the bill requires that all handguns be delivered to appropriate authorities within 1 year from the enactment of the law. The penalty for possession after this 1-year grace period will be a $1,000 fine or 30 days' imprisonment or both. Anyone who turns in his handgun will receive $25 or the worth of his gun, whichever is more.

Handguns are at best useless in deterring crime while at the same time they have caused or facilitated half of all homicides in recent years. Statistic after sad statistic demonstrates that homes without handguns are safer than those with them—only one victim in 2,000 of a householder's handgun will be a burglar while the other 1,999 victims will be innocent relatives or friends.

We must rid ourselves of our now-antiquated frontier heritage which requires a side-gun for protection. Today, the net effect of this thinking has been to make the United States the clear leader among modern, stable, and democratic nations in homicide, assault, rape, and robbery.

Objections will certainly be raised to this bill, but we simply can no longer afford the insanity of 25 million handguns in civilian hands. We must act forcefully and quickly to protect all our citizens, including our policemen, from the dangers that those millions of guns represent. Ninety-three policemen were murdered in the United States in 1971 by criminals using handguns. As New York City's Police Commissioner Patrick Murphy said:

> The widespread use of firearms in our society today offers freedom for violent and wanton self-destruction. There are few more urgent domestic problems for Congress to address than the reduction in the senseless slaughter our current national firearms policy permits.

ADDICTION AND CRIME

Yet, handguns are only the means for carrying out violent crimes. Dr. Milton Halpern, chief medical examiner in New York City identified the "enormous rise in drug abuse" as the prime component which combined with "the easy availability of handguns" to produce the high crime rate in recent years.

I am committed to the strongest possible measures to totally eradicate drug abuse. I am repelled and distressed by the agonies the abusers themselves suffer, but at the same time deeply disturbed by the costs society bears as the addicts try to support their habits. It has been estimated that 50 percent of the prisoners in New York City jails are addicts, and that 80 percent of feloneous crimes in the city are drug related. Obviously, most addicts must steal and rob to support their habits.

In an effort to find solutions to this problem, I have introduced the GI drug abuse bill. This legislation provides for the honorable discharge of GI drug addicts and their rehabilitation at civilian treatment centers. We exposed these young men to conditions that led so many of them to become addicts, and we must now recognize our responsibility to treat them. We cannot allow them to return to this country untreated only to become reluctant criminals struggling to support a horrible habit.

Drug abuse will only be eradicated to the extent there are no more illegal drugs in this country and no more people willing to use them. Accordingly, as chairman of the Europe Subcommittee of the House Foreign Affairs Committee, I have held hearings to determine the best method of shortcircuiting the illegal importation of drugs from abroad. We cannot permit any people, anywhere, to profit from the agony of addicts and the plight of the victims of their crimes.

We must also prepare our young people to resist the temptations of drug experimenting. If, through drug education programs, we can arm them with the facts and the strength they need, they can avoid the sorry road to addiction and crime. The cutbacks in drug education programs in the New York State Legislature, which I have protested since February, strike me as the cruelest and most unsound decision that body has made in recent years. Their error cannot be over-emphasized. As long as addiction ruins the lives of children as young as 12 years old, our responsibility is to expand drug education programs and certainly not to cut them back.

PARA-POLICE BILL

Expert criminologists agree that one way of reducing crime is to increase the likelihood that criminals will be apprehended and punished. I have introduced the para-police bill to provide civilian employees for many functions that

highly-trained policemen now perform, thus freeing the policemen from direct crime prevention duties.

Big city police departments expend far too much manpower and resources on functions totally unrelated to fighting serious crime. All too often, due to shortages of funds, policemen operate animal pounds, register autos, bicycles, and pets, and serve as display artists and speech writers. Many police departments devote more attention to controlling automobile traffic and other noncrime related activities than to protecting the American public from serious, violent crimes.

My bill would provide $100 million over an initial 4-year period for the recruitment, training and utilization of para-police personnel. Enactment of this legislation would contribute substantially toward making our police forces much more efficient as a first line of defense against the ravages of violent crime.

Mr. Speaker, we must always be vigilant in protecting individual rights, but always balance that protection with concern for individual safety. In addition to promoting the social changes ultimately necessary for a drastic reduction in crime, we must make every possible constructive attempt to free our citizens from the fear of crime.

TAX EQUITY FOR SINGLE TAXPAYERS AND MARRIED WORKING COUPLES

(Mr. KOCH asked and was given permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

Mr. KOCH. Mr. Speaker, yesterday, the Ways and Means Committee held its second day of hearings on the inequities that exist for single taxpayers and working couples. Under consideration was my bill, H.R. 850, as amended, that would remove these inequities by establishing a single graduated tax rate to be applied to the taxable income of all individuals, regardless of whether they are married, single, widowed, or divorced. My bill is now cosponsored by 172 Members of the House; it has been introduced in the Senate by Senator ABRAHAM RIBICOFF.

Presently, some 29 million unmarried taxpayers pay up to 20 percent more in taxes because they are not allowed to use the lower rates of the joint return. This means that a single taxpayer whose taxable income is $12,000 pays $370 more in taxes than a married person of the same taxable income. Similarly, the tax penalty for being single at $16,000 is $570; at $20,000, $850; and, at $50,000, $3,130.

Unfortunately, the inequities caused by the proliferation of different tax rates for different categories of taxpayers have now been extended to working couples. With the new rates having gone into effect in 1971, married couples, where both the husband and wife work, find they would be paying less tax if they were not married and could file as two single individuals. This problem affects some 18 million married couples. In 1971, the "cost" of being married with two $6,000 incomes was $156; two $10,000 incomes, $344; and two $16,000 incomes, $1,229.

I realize that many people feel that, if both the husband and wife work, they can afford to pay higher taxes than two single individuals maintaining separate homes. Aside from the consideration of equity, I would like to point out that for most couples a wife's income is not a luxury, it is a necessity. The majority of working wives come from lower and middle income families, and they are working, often at personal sacrifices to their families, to meet today's high cost of living. Furthermore, women's median earnings are only about three-fifths of those of men. Women are already victimized by a labor market that underpays them; they should not be further penalized by a tax structure that extracts higher taxes from them.

I believe that taxes should reflect differences in taxpayers' responsibilities for dependent support, but the way to do this is through exemptions for dependents, not through different tax schedules. I have introduced legislation to increase the personal exemption and exemptions for dependents to $1,200.

Mr. Speaker, our tax code contains a number of tax preferences. What we are asking for here is not another preference but simple equity for the unmarried taxpayer and the working couples.

BRANDT'S PYRRHIC VICTORY

(Mr. GROSS asked and was given permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

Mr. GROSS. Mr. Speaker, the results of last week's "no confidence" vote in the administration of West German Chancellor Willy Brandt by the Bundestag may be misleading to many Americans who were told that it was a victory for Brandt and his policy of courting Communist East Germany and Russia.

It may well have been a Pyrrhic victory for the Social Democrats, since, in one important way, the vote was a rigged one.

The voting was carried out under a parliamentary procedure whereby all members of the Chancellor's party were instructed to remain seated. Since any member of the Bundestag who wished to cast a ballot had to rise and walk to the ballot box, Social Democrats who otherwise might have voted against Brandt would have been highly conspicuous in exercising this right under such conditions.

Having thus intimidated the members of his own political party, Brandt scraped through the no-confidence vote by the skin of his teeth.

The next day, however, on a relatively insignificant budget proposal, Chancellor Brandt was beaten by virtue of a tie vote.

Mr. Speaker, it has come to my attention that certain public figures in West Germany have been employing the tactic of fear in urging the adoption of the treaties which are the keystone of the Brandt ostpolitik.

I am told that the magazine Der Spiegel last month quoted the West German Ambassador to the United States, Rolf Pauls, as saying that his country would, in effect, be abandoned by the Americans if the Bundestag failed to ratify the treaties. This, in my opinion, has absolutely no basis in fact.

I am advised that Chancellor Brandt himself said on April 7 that rejection of the treaties would damage West Germany in the eyes of the other nations of the West and would be a "rebellion against the Western community of interests."

What the Bundestag does is, of course, its own business, but I fail to see how the rejection of Brandt's ostopolitik could be viewed by the rest of the free world as anything but salutory.

INTRODUCTION OF CHILD DEVELOPMENT PERSONNEL TRAINING ACT OF 1972

(Mr. HANSEN of Idaho asked and was given permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

Mr. HANSEN of Idaho. Mr. Speaker, today with 21 of my colleagues, I have introduced H.R. 14717, the Child Development Personnel Training Act of 1972. This legislation will enable us to move a major step forward in meeting the critical shortage of trained and qualified professional and para-professional personnel to staff child care programs.

Mr. Speaker, the last 5 years has seen a tremendous upward trend in the number of children receiving child care and child development services, in their own homes, in neighbor's homes or in organized day-care centers and nursery schools, in both licensed and unlicensed settings. This trend has resulted from the constantly increasing percentages of mothers of young children who are entering the job market as full-time employees outside the home. It has also happened because of the growing realization of parents and educators that the first years of a child's life are the most significant for the development and attainment of his potential.

Child care programs vary in quality from program to program, day-care center to day-care center. Quality can be measured in various ways. Certainly the Federal, State, and local standards regulating day-care centers represent one way of determining the quality of programs—by looking at such things as the student/teacher ratio, the amount of classroom space per pupil, the attention given to nutrition and health, and similar measures.

But one of the most important measures of the quality of any child development program, whether conducted in fancy or plain surroundings, is the kind of people interacting with the children. Anyone who has visited child care programs has sensed the difference that certain teachers or aides can make in the environment—they are warm, sensitive, obviously enjoy being with small children. These qualities are very difficult to

define in quantitative terms, but we certainly know them when we see them.

While the quality of personnel coming in contact with the children is certainly of paramount importance, it is also crucial to provide enough personnel to staff child development programs. Judging from available statistics, we are heading for disaster, as far as quantity is concerned.

The estimated additional numbers of children who need child care services nationally are:

Kindergarten	1,300,000
Nusery schools	3,000,000
Daycare	1,310,000
Miniprograms	1,890,000

To care for these additional numbers of children, an estimated 456,000 additional professionals and 529,000 additional paraprofessionals will be required. If national program capacity grew by 250,000 child slots a year, it would take some 24 years to complete growth to the projected maximum capacity. But even at this rate, some 19,000 professionals and 22,000 paraprofessionals would have to be added every year. This contrasts rather sadly with our estimated present rates of 5,000 professionals and 10,000 paraprofessionals.[1]

To make matters even worse, the only Federal program making a systematic attempt to stimulate the development of professional personnel for early childhood programs will, for all intents and purposes, cease functioning in June, at the end of the fiscal year. I am speaking of part D of the Educational Personnel Development Act which for the past 3 fiscal years has provided $5 million, $5.9 million, and $4.3 million respectively to train some 11,500 professional early childhood personnel. Another important contribution of this program was the training of many trainers of teacher trainers. Three steps removed from the actual classroom these are nevertheless the personnel who form the backbone of any long-term personnel development capacity. No funds have been budgeted for this program for fiscal year 1973, which means that existing projects will terminate in August 1973, and no new projects will be begun. Funds currently being used for this program to train early childhood personnel will be channeled into the renewal program.

The Headstart program has made a significant contribution to training early childhood personnel and exposing large numbers of volunteers and parents to the principles of child development. In fiscal year 1970, for example, some 7,000 people were reached—2,000 in 6- to 8-week leadership development skill training courses, and 7,000 in college level courses in child development. In addition, some 60,000 people received short summer orientation and inservice training.

The Department of Labor's manpower programs trained some 1,500 nursemaids and child care attendants in fiscal year 1970.

These two programs will be augmented by title IV–C of the Social Security Act—the Talmadge amendment—which will increase the work incentive program's training component. It is still too early to determine how many early childhood paraprofessional personnel will be trained through this effort.

One thing is certain, however, our existing training efforts are just not reaching enough people to keep pace with the rapidly expanding need for child care and child development services.

Further exacerbating this numbers problem is the fact that several already passed or still pending pieces of Federal legislation will bring still more children into early childhood programs. Among these are the Talmadge amendment which liberalizes the Federal support program for child care services for welfare recipients enrolled in work training programs. The family assistance plan, passed by the House and still pending in the Senate will provide for some 875,000 children to receive services. The Headstart program continues to expand, this year receiving more funding than ever before in its history. In effect for the first time this tax year are substantial child care deductions for expenses incurred by working mothers—this is expected to result in more children being placed in daycare centers and programs. The comprehensive child development legislation vetoed in December would have added still more thousands of children to those receiving child development services. Private sector activity continues to increase in response to growing demands, as well.

What this all adds up to, quite simply, is a personnel shortage of near-crisis proportions. This holds true both from the standpoint of sheer numbers as well as from the standpoint of the quality and caliber of personnel staffing the program. Programs are now expanding and will continue to do so throughout the decade. We will be hard-pressed simply to find enough people to work in these programs, to recruit and train the kind of people we want to staff these programs will be even more difficult.

THE EARLY CHILD DEVELOPMENT PERSONNEL TRAINING BILL

The legislation I am introducing today, H.R. 14717, the child development personnel training bill, approach these problems through a variety of strategies.

First is the realization that although child development and child care programs are highly labor-intensive, it is not necessary, or even desirable, to require every person who cares for or comes in contact with the child to be a college graduate with training in child development. To do so would be wasteful of human resources and would raise the costs of early childhood programs to astronomical levels. A far more appropriate arrangement is to have a professional early childhood specialist who supervises the child care workers who actually work with the children. This is equally true whether the child caretakers are grouped in a daycare center or nursery school or work singly in their own homes caring for children from the surrounding neighborhood. For this reason, the bill specifies that at least half the funds appropriated will be devoted to preparing paraprofessional child care workers.

One of the most significant developments in some time is the concept of an entirely new middle-level profession of child care workers being developed by the Office of Child Development. These new professionals will be called child development associates—CDA's. Working with a consortium of national early childhood organizations, community colleges, training programs, child development centers, the Office of Child Development will facilitate the establishment of several kinds of programs and work with the States to see that CDA's are certified. Certification is perhaps the most important part of this new profession. All too often a person working in a child development program succeeds in climbing a few rungs on the career ladder only to find that this newly attained status cannot be transferred to programs operated by a different agency or to a different city. The CDA status, once earned, will be valued anywhere in the Nation and will enable its holder to find employment in any situation needing certified, trained midlevel personnel. Roughly equivalent to the associate in arts college degree, the CDA's will be certified on the basis of the demonstrated abilities and skills, not on the basis of the number of courses they have taken. As the CDA career becomes established, it is possible that specialized CDA's will be trained to work with infants, handicapped children, disadvantaged children, or in children's homes. The early childhood personnel development bill specifically authorizes the expenditure of funds for the development of training programs for CDA's.

The development and acceptance of appropriate credentials is the key to a successful buildup of our supply of trained personnel at every level and is not limited to just the CDA program. A person certified by one State as a qualified nursery schoolteacher may not be able to find employment in another State without first taking certain college courses required by the second State. In a different vein, a person who has passed all the required courses and fulfilled all the specified requirements may nevertheless not be well suited to working with young children, and may not perform well in the position for which he has been certified. A promising means of coping with both of these situations would be the development of performance-based credentials for the early childhood professions which would be accepted by all the States. The bill provides funds to assist in the development and refining of certification criteria and techniques for both professional and paraprofessional early childhood personnel.

Although it is true that most child services are and probably will continue

[1] Sugarman, Jule, "Joint Hearings Before the Subcommittee on Employment, Manpower, and Poverty, and the Subcommittee on Children and Youth of the Committee on Labor and Public Welfare, U.S. Senate," on S. 1512, part 1, May 13 and 20, 1971, pages 236–348.

to be provided in home settings, the number of large-scale child care centers and schools is continuing to grow at a rapid pace. The provision of services in these large settings requires a great deal of organization and management expertise to see that resources are organized in a manner to provide the best care at the least possible cost. But frequently a person whose specialty is curriculum development is pressed into service as the senior staff member in charge of a day-care center caring for several hundred children, and finds that the complexities of budgeting, personnel, supervision, scheduling, food planning, supply ordering and so forth are an overwhelming task. What is sorely needed is a supply of people who have been trained to organize and manage child development and child care programs so as to squeeze the greatest possible benefit from every dollar and thereby stretch our limited resources, while still maintaining high quality programs. The bill provides for the establishment of programs to train child care administrators.

Recruitment of the kinds of people best suited to working with young children is almost as much a problem as training them. One clear-cut example is the need for men in early childhood programs which have traditionally been almost exclusively the domain of women. A few years ago witnessed increasing numbers of young men being employed in early childhood programs, during a time when these positions meant draft exemption. With the alteration of our draft system and removal of much of the uncertainty the old system carried with it, we are not seeing as many men in positions where they work with young children. This is unfortunate because the children—both boys and girls—need environments where they can be exposed to both male and female adults. This is especially important for the almost 2 million children under age 6 who do not have a father living with them. It is widely said that the most important job in America is raising the future generation; I would challenge those men who give lipservice to this idea to take some of these most important jobs. The early childhood personnel development bill provides for attracting and recruiting men as well as women into training and subsequent employment in early childhood programs.

We have heard a great deal about the over supply of teachers in the United States. In many areas this is true, but early childhood is definitely not one of them. My bill addresses this imbalance by providing for the retraining of personnel who were originally trained and or experienced in another level of education. A person who once taught elementary school, for example, might need very little additional training to be able to work effectively on the preschool level. To the extent that we can make use of these people, we will be doing both them and the early childhood programs a service.

As with many Federal programs, one asks the question: "When the Federal funds stop flowing, will this effort continue?" It is the intention of this legislation to stimulate the development of a permanent capacity for training early childhood personnel, not to merely train the personnel. Priority is placed on the development of personnel development programs which promise to become self-sustaining after Federal assistance has ceased. To do otherwise would create an artificial supply of personnel entirely dependent on continued Federal support. This may mean augmenting existing schools of education as well as establishing new training programs and facilities. It will definitely mean that efforts must continue to prepare the trainers of teacher trainers whose work is so essential to the long-term success of our objective.

The training programs will utilize a wide variety of institutions. Trainers of teacher trainers will study at a handful of graduate schools specializing in this program. Colleges and universities will prepare professionals and management personnel needed to guide and supervise the early childhood programs. Community colleges, teachers colleges, private training corporations, and child development centers in every community will provide the inservice and preservice training needed by paraprofessionals.

Although taking advantage of many diverse training institutions is a valuable approach, it nevertheless carries with it the possibility that within a given community or State there may be a serious lack of coordination among all these efforts. At a conference I sponsored earlier this month in Boise, Idaho, I heard about an example of this in my own State. A group of day care workers had been trained through a vocational education program but could find no subsequent employment; at the same time, child development services in the area were growing apace, operated by people who had had neither preservice nor inservice training of any type in many cases. For this reason, the bill provides that the Secretary of Health, Education, and Welfare will take steps to achieve the coordination of all federally sponsored early childhood personnel training programs already in operation with the program to be established under this act. It also authorizes him to work to coordinate training programs with employment opportunities.

No matter how many children receive development and day care services, it will always be the parents who are the most influential educators of children in this country. Intervention programs can compensate to some extent for the effects of ineffective parenting, but the benefits that can come from good parenting can scarcely be provided through early childhood programs. Thus, the most important group of personnel to reach is the parents themselves.

There are a variety of ways to help parents provide their children with what is needed. One is to work with high school students who will in only a few years become parents themselves. Another is to include parents in the activities of child development programs so that they can observe effective techniques in operation. Several successful programs have been built around visits by trained child care workers to parents either in their own homes or in small neighborhood groups. The child care workers, themselves generally residents of the local neighborhood, demonstrate to the mothers different ways in which they can meet their children's needs and help develop in the mothers an awareness of the importance of what they do—or do not do for their children. Television is a valuable tool in reaching large numbers of parents with advice on such important child development principles as good nutrition, health care, reading and talking with children, providing toys for children to play with, and so forth. Finally, many of the people trained as early childhood workers will be or become parents themselves, thereby providing an extra dividend to the personnel training effort.

This legislation provides for funds for working with parents, and high school students, and the development of television programing and accompanying materials aimed at development of early childhood personnel.

This bill which follows is directed at a purpose too important to be overlooked. As a Nation, we are moving, step by step, into situations that require the care of children in large or small groups during all or a portion of the day. But as President Nixon pointed out when he vetoed the comprehensive child development legislation, we do not know the answer to "the crucial question of who the qualified people are, and where they would come from, to staff the child development centers." This bill is intended to provide an answer to that question.

Mr. Speaker, I include as a part of my remarks the text of my talk at Teachers College, Columbia University, yesterday on the subject of this legislation, together with relevent statistical information indicating the requirement for trained personnel, the full text of H.R. 14717, and the list of cosponsors:

A CALL TO LEADERSHIP

(Remarks by Hon. ORVAL HANSEN)

I feel honored to be asked to speak here today, in part because I am aware of the leadership position which Teachers College has held for so long in American education, and also because of the great names threaded through its history—teachers who have made such great contributions to our society through new insights and innovations in education. I don't know of any way in which to measure—perhaps evaluate is the correct word—such intangibles. But it would be interesting to know how much our world was affected by George Counts' mile-long question: *Dare the Schools Build A New Social Order?* We might not use the term "social order" in these days, but surely we are trying to reconstruct our society, to establish new priorities, and, as ever, we seek to do so in large part through our schools.

George Counts' book was written in 1932—40 years ago. My generation was in elementary school, with no fore-knowledge that a dreadful war lay in our path, to say nothing of the generation's new born and unborn which would fight in Korea and in Vietnam. We've hardly had time to think about the question that George Counts asked, which is being asked again, rephrased, by many men and from many platforms. And if we are to reform and reconstruct our society, underpin and shore-up, to cut loose its bindings and the bindings which hold the hu-

man spirit prisoner, we have no other way to go, no other help to seek save that of the teacher. We are committed to education in this country, it is the Great American Dream Machine; free, universal, compulsory, public education. I serve on the House Education and Labor Committee and I am chairman of the House Republican Task Force on Education and Training. It is exhilarating and encouraging to see the wide spectrum and the vigor of innovations in education which are underway, and the depth of much fresh educational philosophy and theory. It may well be, as the President said in a message to Congress on Education, that "Mankind has witnessed a few great ages when understanding of a social or scientific process has expanded and changed so quickly as to revolutionize the process itself. The time has come for such an era in education." But it is the teachers who must bring that revolution about. And so I have come to Teachers College today to talk about a new bill, The Child Development Personnel Training Act of 1972, which I and 21 of my colleagues will introduce tomorrow, an act I hope will serve as a benchmark for those who follow into this critical area at whose frontiers we now stand.

Another benchmark in legislation, The Higher Education Amendments of 1972, major portions of which I was privileged to co-sponsor, is now in conference. I expect we will spend long hours there before we resolve our differences, but when we are done, an historic bill will have emerged. That measure will mark the first time that unrestricted federal financial assistance will be offered to the nation's colleges and universities.

In addition, the National Institute for Education will have been established. In many ways, the establishment of the Institute holds as great a potential for the future of education as the rest of the Higher Education Amendments put together. We now spend 5 percent of our health budget on research and development, 10 percent of our defense budget—and about 0.3 percent of the education budget. The effectiveness of this small amount is probably limited because of the lack of a central focus that the NIE will provide. Less than one twentieth of our education funds are earmarked for the field of early childhood. Yet it is our exploding knowledge of the critical importance of the early years—the discovery, for example, that about half of the intellectual development takes place before age 4—that has suggested how we might reverse what Dean Corrigan of the University of Vermont has called the "spiral toward futility."

The Higher Education Amendments, and with it, the new Child Development Personnel Training Act, will, I hope, be the first steps toward a significant change in the direction of that spiral—a change in the social order if you will—the real fruits of which may not be seen for half a century. We are talking today about a legislative effort to affect the training of teachers of young children. As we move forward in learning how to develop these programs, as the impact is felt on young children and as they become parents, perhaps a couple of generations will be required before we see the real impact on the quality of life in this country. This emphasizes the importance of losing no time getting started.

"In earlier days when poverty was far greater than it is now and taxes were even harder to bear, people were willing to sacrifice almost anything rather than obstruct the door to education," Dean Corrigan told the Association for Early Childhood Education International last summer. "We are" he continued, "a far more affluent society, in spite of our high taxes and inflationary woes, but this affluence appears to have blinded us to the necessity of educating those who do not share its bounties. We are locking the poor into their poverty and will doubtless blame them for their state. Any system of universal education is ultimately tested at its margins. What is or is not done for the education of the physically, socially and educationally handicapped, those who have hitherto stood on the periphery of our concerns, will determine the effectiveness of the entire system. The education of other people's children is now and always has been as important as the education of our own; the reason, there are so many more of them. The future of a nation that evades the responsibility of educating its young is bleak, indeed. The greatest challenge facing education in the days ahead is to *reverse* the spiral toward futility. We must turn this country around, we must prepare our students and their parents to walk into the future forward, and not backward."

But if we are to prepare our students and their parents to walk into the future, if our schools are, finally, to dare design new social perspectives, if we are to reach our young as early as our new knowledge now tells us we must, then we must first prepare their teachers.

President Nixon stated, when he vetoed the Comprehensive Child Development Act, "There has yet to be an adequate answer provided to the crucial question of who the qualified people are, and where they would come from, to staff the child centers."

The Child Development Personnel Training Act will provide that answer.

Let me digress, at this point, to say that I hope that this will not be a one way talk. I am anxious to have your suggestions and comments on the newly proposed legislation. We in Congress need what I suppose in this computer-mediated world has to be called the "input" of the entire academic community. It is especially important that we hear from teachers and that teachers participate in the legislative process. I have frequently been astonished to find so many who have so little understanding of what the legislative process is and how it works. With so much financial support coming from the Federal government, with more likely, with so many regulations and standards being established, with new knowledge exploding in the field in which they are the professionals, some understanding of how a bill is developed, researched, what hearings are held, and the road it has to travel, should be a part of every teacher's general education. We in Congress will listen to what you have to say, but you have to tell us.

LEADERSHIP NEEDED IN THREE AREAS

I hope the new Child Development Personnel Training Act will provide a signal to teacher training institutions—a signal to provide a leadership that is badly needed in the field. A leadership which they, perhaps, are best qualified to provide, in three areas in which they have not previously been asked to provide leadership: One, the training of paraprofessionals; two, the training of parents; and three, the training of the teenagers and the older Americans who have so much to offer to our nation's youngest.

If our teacher training institutions fail, now, to provide this leadership they will do so at their own peril.

LACK OF EARLY CHILDHOOD PERSONNEL

I will return to this question. Let us turn, first, to that much vaunted question of the oversupply of teachers.

We have all heard a great deal about that oversupply. Given the number of children for whom we must plan in the future, in the area of early childhood education it is not true. A crisis in staffing now exists, and we do not, as yet, have the answer to that crucial question of who the qualified people are, and where they would come from, to staff the child care centers.

It is true that both the birth rate and the numbers of children born have been declining in recent years. The current emphasis on family planning will probably further reduce the birth *rate*. But during the next few years, the number of women in the child-bearing ages will increase sharply. Because of this, the Census Bureau estimates a reversal of the trend in terms of *numbers* of births. Averaging the Census Bureau's most conservative estimates, we must still estimate a 40 percent increase in the numbers of young children for whom we must plan in the future.

Jerome Kagan, professor of Human Development at Harvard, in a memorandum to the Education and Labor Committee as far back as November, 1969, stated:

"One of the major obstacles blocking the rapid expansion of early childhood services is the lack of qualified, trained personnel. This shortage of personnel in the early childhood area has been well documented."

Headstart statistics showed that of the professional staff, almost a third had had less than two full years of college work, nearly 80 percent had had practically no experience with primary education, and 80 percent had had little experience, if any, with disadvantaged children. This, at a time when new understanding of the critical importance of the early years was reaching us at a blinding rate.

Our colleges and universities have been graduating only about 5,000 early childhood personnel annually. New knowledge is of little use if there are none who can apply it.

The staffing problem at the professional level has been met largely with short term training drawing on a pool of already trained people with experience in other professional fields.

Such limited resources cannot begin to meet the future staffing needs of early childhood programs. One in every three mothers with children under six is working today—nearly six million preschool children whose mothers are in the work force. There is every indication that this trend will continue.

IMPORTANCE OF EARLY INTERVENTION

Many different reasons lead a family to seek early childhood programs for its youngest members. The family may wish to provide advantages the child cannot find at home, or, if it is an advantaged home, to add the additional advantages research shows pre-school experience provides for the child, or a working mother may be unable to be with her child and need a full day's care for him. If she is able to secure nothing more than custodial care, her child's development may be retarded while she watches helplessly.

Whatever the family's reason, one out of every five of the nation's three and four year olds was enrolled in a pre-school program in 1970, as compared with one out of ten in 1965. And almost without exception, the people who work with Headstart children tell us that this is too late to begin.

John Dewey, at the turn of the century, long before educators spoke of "economically deprived" or "educationally disadvantaged" children, first observed that the age of five or six was too late for effective intervention in the education and development of young children. It is the new knowledge we have been acquiring in the past decade, however, that has finally convinced us that all later learning is likely to be influenced by the very basic learning which has taken place in the first fifty months of life. It has also convinced us, in the words of Dr. Benjamin Bloom, that "if the intellective training of the young child cannot be done adequately by the home and by the parents, it is the responsibility of the schools." This position, Dr. Bloom suggests, may be taken in the interest of the individual child, or it may be taken to insure that the work of the schools for the next ten years will not be largely wasted because of what has taken place in the previous two or three years."

Some researchers believe that a critical

period for the development of a child's potential occurs as early as between the ages of 8 months and 18 months. Others are beginning to wonder whether early environments can actually affect the organic neurological development of the human brain.

Let us take a moment for a brief look at some of the new research that is pouring in on us as man's knowledge doubles every ten years. It will help us to understand the pressing need for new legislation for the training of child development personnel, personnel who can reach—and teach—our nation's youngest children—and their parents.

J. McVicker Hunt, in his now famous "Intelligence and Experience", challenged the concept of fixed intelligence and predetermined development. That was in 1961, and he thought the average level of intelligence might be raised by as much as 30 points. He had attempted in his book to summarize all that was then known of the influence of experience on intelligence. But that was over 10 years ago, and the world's knowledge has doubled since then. Dr. Willard Gaylin, professor of Psychiatry and Law at Columbia Law School, writing in the New York Times last March 5, had this to say:

"The psychologist and psychiatrist have been aware that early imprinting on the mind and emotions has a profound a hold on an organism, and is as inflexible a determinant of adult behavior as any genetic trait or physiological endowment. Now research is confirming that beyond even this, early environmental conditioning will actually produce organic neurological changes in the brain."

In the February, 1972, *Scientific American*, Drs. Mark Rosenzweig, Edward Bennett and Marian Cleeves Diamond ask, "Does experience produce any observable changes in the brain?" and concludes that "there can now be no doubt that many aspects of brain anatomy and brain chemistry are changed by experience."

The researchers placed young laboratory rats, whose genetic background is completely known, in an enriched environment, filled with interesting objects and patterns to play with and explore. Each of the young animals in this enriched environment had a littermate, who grew up during *its* critical days in a barren, deprived environment.

The brains of the animals in the enriched environment grew faster than the brains of their littermates in the deprived environment. Among other evidences, the enriched animals' brains showed an increase in total weight of the cortex, and in the total amounts of the important enzymes which facilitate the transmission of impulse from neuron to neuron, along with a better blood supply and larger brain cells.

These significant changes in the anatomical and chemical composition of the brain, the Berkeley researchers believe, underlie and help to explain the changes in learning ability that seem to be brought about by enriching experiences.

It is obviously risky to extrapolate from the young rat to the young human, but the results of such animal studies, they suggest in February, 1972, "can serve as a guide, and investigators can look more penetratingly for the anatomical and chemical changes in the human brain that are correlated with experience and learning."

Dr. David Krech, Professor of Psychology at the University of California at Berkeley, who for almost two decades has participated in the rat experiments, told the 101st annual meeting of The American Association of School of Administrator's:

"By manipulating the environment of the young, one can truly create a "lame brain"—with lighter cortex, shrunken brain cells, fewer glia cells, smaller blood vessels, and lower enzymatic activity levels—or one can create a more robust, a healthier, a more metabolically active brain. If what is true for the rat brain should turn out to be also true for the human brain—if by careful manipulation of this or that group's early environment we can develop among them bigger and better brains or smaller and meaner ones—then the wondrous promises of a glorious future or the monstrous horrors of a Huxleian Brave New World are fairly self-evident."

We may well wonder what we have already been doing in our ignorance.

Dr. Krech hypothesized that *for each species there exists a set of species—specific experiences that are maximally enriching* and maximally efficient in developing its brain.

"Man's brain, and his alone, is a language supporting brain," Dr. Krech stated, and suggested that perhaps in language development might be found the species specific enrichment that could affect the human brain.

Here at Columbia, Dr. Thomas Bever, in the Department of Psychology, is working with language development in the human child, and the development of left hemisphere dominance in the human child's brain.

Enriching the environment, Dr. Bever has concluded, is critical in stimulating the emergence of cerebral dominance for the human child. A psychologically enriched environment for a two to five year old can help to create a brain that will be more capable of human speech and thought.

Of course the results are not all in yet on studies such as these—and much must still be highly *speculative*—but exciting new avenues of understanding have been opened to us. Justifiably, those concerned with the plight of our nation's children are urging that we can no longer afford to wait.

As early as 1965, Dr. Bloom was venturing the proposition that "a characteristic can be more drastically affected by the environment in its most rapid period of growth than in its least rapid period of growth." (If approximately 50 percent of future intelligence is reached by the age of four, the meaning of that proposition becomes clear.)

The pressure is now clear. But if we go rushing into new programs with inadequately trained personnel to carry them out, we can do more harm than good. As Erik Erikson has said, "the deadliest of all possible sins is the mutilation of a child's spirit." Who will care for and teach our youngest children?

This is not the place for the poorly trained amateur, or the lowest paid help. The young child is plastic and helpless in the face of his environment. The proper training of those to whom we entrust these youngest is a solemn responsibility. During the years when a child's body, brain and psyche are developing most rapidly, and when his experiences can so profoundly influence his future development, to entrust our most vulnerable young to the least trained, the most poorly educated, because they are available, or the cheapest, would be an educational disaster. No country in the world can do that if it wishes to march tomorrow with the leaders of mankind.

MAIN POINTS CONTAINED IN THIS BILL

We have to ask ourselves, where *are* the qualified people to come from? The Child Development Personnel Training Act is taking the first steps toward the answers. Let me describe briefly the main points contained in this legislation.

The bill will provide support for the development of seven specific types of learning efforts. The legislation is aimed at developing the *capacity* to continue these programs rather than merely to support them for a period of time and then see further efforts come to naught when federal funds are withdrawn. The programs are:

1. Postgraduate level training for teachers of professional and paraprofessional early childhood personnel and for teachers of teacher trainers—the triple T level.

2. Recruitment of personnel, both male and female, including students and older Americans, to training for and subsequent employment in child development programs.

3. Retraining of elementary and secondary school teachers and other educational personnel so that they can work effectively in early childhood programs.

4. Preservice and inservice training of professional and paraprofessional personnel for teaching. We will also try to begin some new programs geared specifically toward training management and administrative people for early childhood programs.

5. Development and refinement of certification criteria and techniques for professional and paraprofessional early childhood personnel.

6. Helping parents and high school students to understand and practice sound child development techniques.

7. Developing educational television programs and accompanying materials for training early childhood personnel, parents, and high school students in the principles of child development.

The bill authorizes 40 million for fiscal '73, 60 million for '74 and 75 million for the succeeding fiscal years through fiscal 1979. It is my hope that by 1980, therefore, sufficient early childhood training capacity will be in place and this act will no longer be necessary.

Five years ago, according to a U.S. Office of Education 1967–68 survey, only five doctorates were awarded in the field of Early Childhood Education, and 100 in the field of nursery or kindergarten education. Yet it is the Ph.D.'s and the Ed.D.'s who are the teachers of teachers, and who are needed to build up teacher training programs. Hopefully, five years from now, that picture will be very different. Hopefully, too, the picture will be very different as regards the number of men who are early childhood teachers and supervisors. The disadvantaged child particularly, who so often comes from a home in which the head of the household is female, is in great need of strong male role models with whom he can identify. This new legislation seeks to help encourage men to enter the field, and correct the current imbalance among teachers of young children, where teachers, and assistant teachers and all other personnel tend to be overwhelmingly female—an imbalance that is as much in need of correction in this field, as its opposite is in other fields.

It seeks also to correct the problem that has made many existing programs fall short of their real potential—the lack of supporting supervision and guidance at the local, state and regional levels. The act seeks to facilitate the development of a network of supervisors and trainees at all levels.

But it is the problems at the lower levels of the profession which this new legislation especially seeks to correct, and where the leadership of the teacher training institutions is now of such tremendous importance.

Some early childhood programs, hurriedly mounted and staffed in disadvantaged areas, have found that paraprofessionals, recruited with no previous training from the areas served, often viewed their involvement more as job opportunities for the poor than as educational programs for young children. Others, who did receive on-the-job training, found the same "lessons" repeated time after time, with no opportunity to progress towards positions of greater responsibility no matter how long they had served. The role of the paraprofessional and of the Child Development Associate must now be clearly defined.

The Child Development Associate, or mid-level professional, can be a great asset to both teacher and children, relieving the teacher of many unnecessary burdens and freeing him to guide more closely the learning process. The use of latent community talent at the paraprofessional level encourages the greater participation of parents and neighbors in the total educational proc-

ess and motivates the child to overcome difficulties and frustrations as well. The paraprofessional who has lived in disadvantaged environments often speaks to the disadvantaged child in a way that is neither strange nor threatening. He can help the child adjust to the unfamiliar world of the school. His presence says to the child, "It is important to be here, it is worth trying, you can succeed here." This cultural bridge would be important even if there were no need to provide jobs for the poor, which, of course, there is.

But the guarantee of equal employment opportunity will be meaningless unless there is also a guarantee of equal opportunity for advancement. Eligibility for career mobility *cannot* be limited only to holders of higher educational degrees. We must be able to draw upon the relevance of experience as well as the tradition of degrees.

I am not suggesting the sacrifice of competence. Parents are now, themselves, demanding competence. For a while we saw a great pressure to give jobs to everybody. Many saw federally sponsored preprimary educational efforts as a lever with which to eradicate the social problems of poverty, or to provide political leverage and power for the disadvantaged. In the crush of conflicting objectives, the child often seemed to be a minor concern.

But parents soon realized that with untrained personnel the child's opportunities for learning are meager. Such experience soon degenerates into an emphasis on classroom control and behavior management. Here is where the teacher training institutions must make their contribution.

If we are to demand competence, then we must offer career mobility where competence has been proven. Early childhood programs cannot employ underpaid, poorly trained, poorly utilized aides who offer young children models of hopelessness. Neither can they place in positions of responsibility those who have not yet proven their ability nor been properly trained. For many paraprofessionals and Child Development Associates, as for many teachers, the classroom experience at its current level will prove deeply satisfying and endlessly challenging. But paraprofessionals and mid-level professionals who wish to secure further training and competencies, and additional experience, and have proven ability, must find a legitimate, defined route upon which they can proceed. Higher level competencies must be recognized with higher credentials and commensurate job responsibilities.

Professionals and Paraprofessionals

It is my belief that the training of paraprofessionals and Child Development Associates must become a primary responsibility of the teacher training institutions, as well as of the community colleges and other community institutions seeking to renew our educational system. The teacher training institutions must provide the innovative leadership that will help us to find the new ways, and the new places, in which those on the beginning steps of a career ladder can acquire the understandings, the skills and the experience that will permit our children to fulfill their true potential. The concept of classrooms without walls is a meaningful one, here. The arm of the institution must reach to where the need is felt and deal with that need imaginatively. An institution that ignores the felt needs of the community cannot survive.

Colleges and professional schools must, in addition, provide the needed courses in the supervision of paraprofessionals, and help to develop meaningful relationships between professionals and paraprofessionals. In a poll of teachers taken in 1968 to determine needs for in-service training, the teachers responded that they needed training most in learning to work with aides. Those supervising paraprofessionals must be able to provide the personal development, motivation and confidence, and knowledge and skills paraprofessionals need. What better way to train professionals to relate better to paraprofessionals, and to utilize them more effectively, than to train them together? There must be, as Professor Urie Bronfenbrenner has urged, a "close working relationship of mutual respect between workers from within and outside the child's own milieu. Mutual respect is essential in these relationships not merely for the purpose of maintaining a viable learning atmosphere, but more importantly to further the constructive development of the child's own sense of identity and worth as a person and as a member of society." I am aware that much thought is now being given to the training problems I have presented here, and I am confident that the pioneering leadership needed to meet the challenge will soon be forthcoming.

AN IMPORTANT ROLE FOR PARENTS

A second area where leadership is badly needed, is in the training of parents, and, especially, in the training of those who can teach parents.

Who is being taught to teach parents?

Dr. Bloom, as well as others, told us seven years ago that "The research makes it clear that there is a curriculum and a teaching style in each home, and that it is the variations in this home curriculum and teaching which accounts for much of the differences in children's preparation for the learning tasks of the school."

It is pleasant to point out that one of the pioneers in the research that revealed the influence of the home environment was Dr. Richard Wolf, of Teachers College. The original studies have now been replicated by investigators in Mexican American homes, Black inner-city homes, Puerto Rican homes, Navaho and Pueblo Indian homes and in Trinidad and Israel as well as the United States.

We now know that there is a very high correlation, +.80, between what happens in the home and school achievement. Almost two thirds of the variability in school achievement is attributable to what is, or is not, done in the home.

The current failure rate in our nation's schools has been compared to the mortality rate that once existed in the city of Chicago, where 40 percent of the newborn infants were dead before their first birthday.

A group of outstanding Chicago medical specialists worked out a systematic program to reduce this terrible rate of infant mortality. Among other measures, they provided parents with a short list of rules of sanitation and food preparation which, if followed, would help to keep their children alive. The infant mortality rates were markedly changed within a few years. Through new knowledge and education we have been able to change the entire nation's infant mortality rate. It has dropped 25 percent in only the last 10 years. We must now change the failure rate of the children in our nation's schools.

The new knowledge is available. We now know what it is that parents do—or do *not* do—that makes it possible for children to achieve, or *not* to achieve, in school. Our rates of failure, like our mortality rates, *can* be changed—*if* we educate the parents.

We must reach—and teach—the parent along with the child. Parents can be taught such behaviors as setting a model of language expected from the child—encouraging the toddler to use words, not just to point at desired objects, correcting the child if he names the object incorrectly. They can be taught the importance of encouraging aspiration by applauding small achievements, encouraging intellectual growth by talking with the child about problems to be solved—"what are the things Johnny needs to do today?"—and encouraging the child to think and to plan. Parents can be taught to support the child when he encounters temporary learning difficulties, to find an older child or neighbor, if necessary, who can help, and not permit the child to sink under a sense of failure. Parents can be taught the importance of providing a child with a sense of time and place—a time to eat, and a time to sleep, and a time to study—helping the child to gain a sense of control of himself and his life, and not act solely on impulse.

These are as simple as were the rules for how to keep young infants alive—and they are some of the behaviors that researchers have discovered make the difference in whether or not a child can achieve in school.

The important point, and it has now been proven over and over again, is that *any appreciable, enduring improvement in the child's development can be effected only through an appreciable and enduring change in the behavior of the persons intimately associated with that child.*

Lest you jump to the conclusion that there is a direct relationship between the socio-economic status of the parents and the development of the child, let me at once refer to the work of Drs. Dave and Wolf, and their landmark studies of the effects of home environment on intelligence and school learning. Their research demonstrated that it is what the parents *do* in the home, rather than their *status* characteristics, which are the powerful determinants in the home environment. They also found that the relationship between these home environment process variables and the parent's status was relatively low.

Clearly, parents with even relatively low levels of education or occupational status *can* provide stimulating home environments for educational achievement. But the parents must be taught how!

If our child development programs are to have any lasting effects, we must recognize the impact of the home environment on the developing child, and take the necessary steps to deal with it. We must reach the parents.

The training of teachers must now mean the training of those who will be qualified to teach parents as well as children.

Older Americans and Students

Our teacher training institutions must provide leadership in still a third area as well. We now know that older children and adolescents can serve as models for younger children, and, at the same time, learn some of the principles of child development which will help them become better parents in future years. Older Americans also, serving as foster grandparents, can, when properly trained, provide the stimulating environment so badly needed by our youngest Americans, and discover how much they are needed in one of the nation's most urgent social efforts.

But who will teach the old and the young to teach the nation's youngest, if not the teachers? And who is now teaching the teachers?

The few demonstration models we have had have proven how fruitful a field this can be. The time has come, now, to sow the seeds we wish to reap. Our retired teachers have a unique contribution to make here, for they, especially, are suited to assist in the training of older Americans. But they, too, must first be trained. It is the institutions who trained them, first, who must now offer them the opportunity to revitalize old skills and retain new ones.

The opening chapter of AACTE's *Teachers For the Real World* begins: "No more intolerable condition can be imposed on a human being than to render him useless." Our older teachers can discover that in their

oldest years they may perhaps make their greatest contributions to society.

TELEVISION

There is one last area in which vision and imagination is called for. It is, perhaps, the most important one.

John Dewey said "Start where the child is." Today's child, and his parents and his grandparents, too, are in front of a TV set. Over 98 percent of America's homes are now reached by the most powerful communications tool ever known in the history of man. But its potential lies largely unused.

TV touches every American. It is available *and in use* in virtually every American home. Homes which literally have nothing else—no plumbing, no furnishings, no books or newspapers, no hope—have a television set.

The American Association of Colleges for Teacher Education, along with The American Association of School Administrators and The Laboratory for Research in Relevant Education *have* taken a leadership role here, and have proposed LEARNING AND GROWING, a television series which seeks the re-education and strengthening of America's parents, teachers, and all of the "gatekeepers" who influence the growth and development of the nation's children. The proposed TV series will use the sophisticated production techniques that have proven to hold audiences of millions to bring to America's families and schools the new knowledge now exploding at the frontiers of research about how children grow and develop. It seeks to change the failure rate of the nation's children, just as, through new knowledge, the mortality rate of the nation's infants has been changed.

No project is more important, or has a more exciting potential.

We must use the powerful techniques of the television medium to help our audience understand all we have come to know about human growth and development, and, how, using our new knowledge—parents and teachers and all of us everywhere—may help to produce a generation of children better able to fulfill their human potential than any generation in all the history of man. The Child Development Personnel Training Act encourages the use of television for this purpose.

HUMANITY'S BASIC INVENTORY—OUR CHILDREN

It will do us little good to save the quality of life in this world, and to fight to save our environment for our children, if we have not saved the children.

The Child Development Personnel Training Act is the first of many steps that our generation must take for theirs. For three thousand years man used the yoke meant for a team of oxen on his horses before he developed a harness for his horse. Our first automobiles had a place for a horse whip. We are now in the position of a people who are attempting to solve the problems of the children who must live in the 21st century with the tools of an age long dead—while the most powerful communications tools and the most meaningful new knowledge man has ever had, lie waiting.

What we do—or do not do—about this will tell us what kind of a people we are.

A few short years ago we did not know how the lack of proper nutrition in the critical early years could affect the growth of the human brain, and deny to millions of children, all over the world, the potential they were born with. Millions of children, today, are growing to adulthood less intelligent than they might have been. All of humanity must suffer in their loss.

Now, as we are faced with the awesome evidence of what the lack of adequate educational fare may mean as well, we, who are responsible for the next generation of our nation's children, must ask ourselves one question: Dare we wait any longer?

Humanity has only one basic inventory in this world—the very young. All the rest is remedial.

EARLY CHILDHOOD PROFESSIONAL PERSONNEL: EARNED DEGREES CONFERRED 1969–70

According to the just-issued report, *Earned Degrees Conferred: 1969–1970,* (National Center for Educational Statistics, U.S. Office of Education) the following numbers of professional personnel were trained in the 1969–70 school year for early childhood areas:

	B.A.'s			M.A.'s			Ph. D.'s		
	Total	Men	Women	Total	Men	Women	Total	Men	Women
Education:									
Nursery or kindergarten education	897	6	891	20	1	19			
Early childhood education	5,041	65	4,976	629	28	601	13	3	10
Home economics: Child development, family relations	1,710	43	1,667	270	35	235	37	20	17
Total (all fields—8,617)	7,648			919			50		

Note: Contrast these figures with the total B.A.'s prepared in elementary education: 84,846; or with the total number of B.A.'s prepared in all education fields: 166,423.

H.R. 14717

A bill to improve the quality of child development programs by attracting and training personnel for those programs

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Child Development Personnel Training Act of 1972".

STATEMENT OF FINDINGS AND PURPOSE

SECTION 1. The Congress recognizes that one of the major barriers hindering the development of quality child development services at the present time is the lack of sufficiently trained and prepared professional and paraprofessional staff; further that the number of children being placed in child development and child care will increase significantly in the next decade because of the impact of Federal welfare and child development programs and the continued entry of mothers of young children into full-time employment outside the home, and that this increase will, in the future, place an intolerable strain on the already limited numbers of personnel qualified for work in early childhood programs; that the development of quality early childhood programs depends, therefore, on the availability of trained personnel in far greater numbers than present training programs can respond to; and finally, that parents can be helped effectively to use child development techniques for their own children that will lessen or prevent the need for compensatory education programs for older children.

SEC. 2. It is the purpose of this Act to respond to the demonstrated need for child development personnel in the 1970's; by stimulating the development of sufficient training and educational programs in every State and region of the United States to assure an adequate supply of personnel to meet the staffing requirements of early childhood programs.

EARLY CHILDHOOD PERSONNEL DEVELOPMENT PROGRAMS

SEC. 3. The Secretary of Health, Education, and Welfare is authorized to make grants to or enter into contracts with institutions of higher education, State and local child development agencies, State and local educational agencies, child development programs, private companies and organizations engaged in teacher training, teacher training institutions, national child development organizations, and producers of television programming, for the purpose of establishing, developing, or upgrading early childhood personnel training programs which shall include, but shall not be limited to, the development of programs to—

(A) provide postgraduate level training for teachers of professional and paraprofessional early childhood personnel and for teachers of teachers of such personnel;

(B) attract and recruit personnel, both male and female, including students and older Americans to training for and subsequent employment in child development programs;

(C) retrain personnel prepared for and/or experienced in education at levels other than early childhood so as to enable them to function effectively in early childhood programs;

(D) provide preservice and inservice training of professional and paraprofessional personnel for teaching, management and supervisory, and administrative posts in early childhood programs, including the training and certification of Child Development Associates;

(E) help parents and high school students understand and practice sound child development techniques;

(F) develop educational television programs and accompanying materials for training early childhood personnel, parents, and high school students in the principles of child development;

(G) develop and refine certification criteria and techniques for professional and paraprofessional early childhood personnel.

APPROPRIATIONS

SEC. 4. There are hereby authorized to be appropriated to carry out this Act $40,000,000 for the fiscal year ending June 30, 1973, $60,000,000 for the fiscal year ending June 30, 1974, and $75,000,000 for each of the succeeding fiscal years ending prior to July 1, 1979.

DISTRIBUTION

SEC. 5. At least 50 per centum of the funds appropriated pursuant to section 4 shall be used for the development of programs to attract, train, retrain, or certify paraprofessional personnel and shall be apportioned among the States. Half of such 50 per centum shall be allotted among the States so that the amount allotted for each State bears the same ratio to such half as the number of economically disadvantaged children, as determined by the Secretary, in the State bears to the number of such children in all the States; and the other half of such 50 per centum shall be allotted among the States so that the amount allotted for each State bears the same ratio to such half as the number of children younger than age six with mothers who work full-time outside the home

in that State bears to the number of such children in all the States.

SEC. 6. The remaining 50 per centum of the funds appropriated pursuant to section 4 shall be used for the other purposes enumerated in section 3 and for such related purposes as the Secretary may deem appropriate to carrying out the purposes of the Act.

SEC. 7. Priority shall be placed on the development of those personnel development programs which promise to become self-sustaining after Federal assistance has ceased.

COORDINATION

SEC. 8. The Secretary shall take whatever steps he deems appropriate to achieve the coordination of all federally sponsored early childhood personnel training programs already in operation with the programs to be established under this Act and to assure the coordination of training programs with employment opportunities for early childhood personnel.

DEFINITIONS

SEC. 8. As used in this Act, the term—

(a) "State" means the several States and the District of Columbia, Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands,

(b) "Early childhood programs" and "child development programs" mean programs in children's homes or in day-care homes, schools, day-care centers, neighborhood centers which provide day care and/or educational services for children younger than age seven, or who have not reached the first grade.

(c) "Early childhood personnel" means any person working or volunteering in an early childhood program.

(d) "Professional early childhood personnel" means persons trained, either by attaining the A.A., B.A., M.A. or Ph.D. level through academic study, or on the basis of a credentialed combination of education and work experience that has been assessed as providing the person with specific competencies required to perform professional early childhood duties.

(e) "Paraprofessional early childhood personnel" means persons trained to less than A.A. degree level for service in early childhood programs.

(f) "State and local child development agencies" mean any State or local government agencies responsible for the operation and/or supervision of early chilhood programs.

COSPONSORS OF H.R. 14717

Mr. Hansen of Idaho.
Mr. Begich of Alaska.
Mr. Bell of California.
Mr. Dellenback of Oregon.
Mr. Eilberg of Pennsylvania.
Mr. Esch of Michigan.
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Mr. O'Hara of Michigan.
Mr. Quie of Minnesota.
Mr. Scheuer of New York.
Mr. Steiger of Wisconsin.
Mr. Thone of Nebraska.

PERSONAL ANNOUNCEMENT

Mr. MIKVA asked and was given permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

Mr. MIKVA. Mr. Speaker, yesterday I had the privilege of appearing before a legislative committee of the Illinois State Legislature which is considering legislation to protect Lake Michigan from further pollution and decay.

Regrettably I was absent from the floor and was unable to be recorded on three roll call votes which took place on May 1. Had I been present I would have voted as follows:

Aye on roll 130, final passage of S. 2713 authorizing the Attorney General to provide care for narcotics addicts who are on probation or parole;

Aye on roll 132, final passage of H.R. 9676 transferring Federal land to the State of Tennessee for use by the University of Tennessee;

Aye on roll 133, final passage of H.R. 13334 authorizing new executive positions in the Treasury Department.

LEAVE OF ABSENCE

By unanimous consent, leave of absence was granted as follows:

To Mr. FOUNTAIN (at the request of Mr. BOGGS), for Monday, May 1 and the balance of the week, on account of official business.

SPECIAL ORDERS GRANTED

By unanimous consent, permission to address the House, following the legislative program and any special orders heretofore entered, was granted to:

(The following Members (at the request of Mr. ROUSSELOT) and to revise and extend their remarks and include extraneous matter:)

Mr. HOGAN, for 1 hour, today.
Mr. KEMP, for 10 minutes, today.
Mr. FREY, for 10 minutes, today.
Mr. BROWN of Ohio, for 5 minutes today.

(The following Members (at the request of Mr. DENHOLM) and to revise and extend their remarks and include extraneous matter:)

Mr. GONZALEZ, for 10 minutes, today.
Mr. ASPIN, for 10 minutes, today.
Mr. RODINO, for 10 minutes, today.
Mr. ALEXANDER, for 30 minutes, today.
Mr. ROSENTHAL, for 15 minutes, today.

EXTENSION OF REMARKS

By unanimous consent, to revise and extend remarks was granted to:

Mr. ALBERT (at the request of Mr. BOGGS) to extend his remarks following Mr. GERALD R. FORD.

All Members (at the request of Mr. ROUSSELOT) to revise and extend their remarks on the subject of the special order of Mr. HOGAN, today.

Mr. HALL and Mr. GROSS, to extend their remarks in the body of the RECORD during Mr. HOGAN'S special order today.

(The following Members (at the request of Mr. ROUSSELOT) and to revise and extend their remarks and include extraneous matter:)

Mr. ROBISON of New York.
Mr. BELL.
Mr. SANDMAN.
Mr. FINDLEY.
Mr. KEMP in two instances.
Mr. STEIGER of Arizona.
Mr. DUNCAN.
Mr. FRELINGHUYSEN.
Mr. NELSEN.
Mr. MINSHALL.
Mr. STEIGER of Wisconsin.
Mr. SHOUP in two instances.

(The following Members (at the request of Mr. DENHOLM) and to include extraneous matter:)

Mr. CASEY of Texas.
Mr. ROSENTHAL in five instances.
Mrs. HICKS of Massachusetts in two instances.
Mr. CORMAN in six instances.
Mr. PUCINSKI in 10 instances.
Mr. HAMILTON.
Mr. TIERNAN.
Mr. EILBERG in 10 instances.
Mr. HAGAN in three instances.
Mr. RARICK in 10 instances.
Mr. ABOUREZK in five instances.
Mr. BRASCO in two instances.
Mr. PICKLE in five instances.
Mr. BEGICH in three instances.
Mr. PURCELL.
Mr. BOLAND in three instances.

SENATE ENROLLED BILL SIGNED

The SPEAKER announced his signature to an enrolled bill of the Senate of the following title:

S. 2713. An act to amend title 18 of the United States Code to authorize the Attorney General to provide care for narcotic addicts who are placed on probation, released on parole, or mandatorily released.

JOINT RESOLUTION PRESENTED TO THE PRESIDENT

Mr. HAYS, from the Committee on House Administration, reported that that committee did on May 1, 1972, present to the President, for his approval, a joint resolution of the House of the following title:

H.J. Res. 1029. A joint resolution to authorize the President to issue a proclamation designating the month of May of 1972 as "National Arthritis Month."

ADJOURNMENT

Mr. DENHOLM. Mr. Speaker, I move that the House do now adjourn.

The motion was agreed to; accordingly (at 12 o'clock and 44 minutes p.m.) the House adjourned until tomorrow, Wednesday, May 3, 1972, at 12 o'clock noon.

EXECUTIVE COMMUNICATIONS, ETC.

1922. Under clause 2 of rule XXIV, a letter from the president, National Academy of Sciences, transmitting a report on interim 1975 motor vehicle emission standards, pursuant to section 202 (b) (5) (A) of the Clean Air Amendments of 1970, was taken from the

Speaker's table and referred to the Committee on Interstate and Foreign Commerce.

REPORTS OF COMMITTEES ON PUBLIC BILLS AND RESOLUTIONS

Under clause 2 of rule XIII, reports of committees were delivered to the Clerk for printing and reference to the proper calendar, as follows:

Mr. EDWARDS of California: Committee on the Judiciary. H.R. 7375. A bill to remove the statutory ceiling on salaries payable to U.S. magistrates; with amendments (Rept. No. 92–1037). Referred to the Committee of the Whole House on the State of the Union.

Mr. MANN: Committee on the Judiciary. H.R. 12179. A bill for the relief of Swift-Train Co.; with an amendment (Rept. No. 92–1038). Referred to the Committee of the Whole House.

PUBLIC BILLS AND RESOLUTIONS

Under clause 4 of rule XXII, public bills and resolutions were introduced and severally referred as follows:

By Mrs. ABZUG:

H.R. 14715. A bill to enforce the constitutional right of females to terminate pregnancies that they do not wish to continue; to the Committee on the Judiciary.

By Mr. FREY:

H.R. 14716. A bill to provide for the establishment of safety standards for mobile homes in interstate commerce, and for other purposes; to the Committee on Banking and Currency.

By Mr. HANSEN of Idaho (for himself, Mr. BELL, Mr. DELLENBACK, Mr. ESCH, Mrs. HICKS of Massachusetts, Mr. MEEDS, Mr. O'HARA, Mr. QUIE, Mr. SCHEUER, Mr. STEIGER of Wisconsin, Mr. BEGICH, Mr. EILBERG, Mr. FRELINGHUYSEN, Mr. FUQUA, Mr. GARMATZ, Mr. GIBBONS, Mr. GUDE, Mr. HALPERN, Mr. HEINZ, Mr. MCCLORY, Mr. NIX, and Mr. THONE):

H.R. 14717. A bill to improve the quality of child development programs by attracting and training personnel for those programs; to the Committee on Education and Labor.

By Mr. MCMILLAN (for himself, Mr. CABELL, Mr. NELSEN, and Mr. BROYHILL of Virginia):

H.R. 14718. A bill to provide public assistance to mass transit bus companies in the District of Columbia, and for other purposes; to the Committee on the District of Columbia.

By Mr. MIKVA:

H.R. 14719. A bill to provide for the compensation of innocent victims of violent crime in need; to make grants to States for the payment of such compensation; to authorize an insurance program and death and disability benefits for public safety officers; to provide civil remedies for victims of racketeering activity; and for other purposes; to the Committee on Ways and Means.

By Mr. MORGAN:

H.R. 14720. A bill to amend the Internal Revenue Code of 1954 with respect to lobbying by certain types of exempt organizations; to the Committee on Ways and Means.

By Mr. STUBBLEFIELD (for himself, Mr. MCMILLAN, Mr. DORN, Mr. VIGORITO, Mr. JONES of North Carolina, Mr. SISK, Mr. ALEXANDER, Mr. JONES of Tennessee, Mr. BERGLAND, Mr. LINK, Mr. DENHOLM, Mr. ABOUREZK, Mr. ASPIN, Mr. BEGICH, Mr. EDMONDSON, Mr. HENDERSON, Mr. HILLIS, Mr. KASTENMEIER, Mr. MCFALL, Mr. QUILLEN, Mr. ROY and Mr. STEED):

H.R. 14721. A bill to provide price support for milk at not less than 85 percent of the parity price therefor; to the Committee on Agriculture.

PRIVATE BILLS AND RESOLUTIONS

Under clause 1 of rule XXII,

Mr. HAWKINS presented a bill (H.R. 14722) for the relief of Hilarion Ngayan, Jr., which was referred to the Committee on the Judiciary.

EXTENSIONS OF REMARKS

PROF. G. I. SANCHEZ—EDUCATOR, LEADER, HUMANITARIAN

HON. J. J. PICKLE

OF TEXAS

IN THE HOUSE OF REPRESENTATIVES

Tuesday, May 2, 1972

Mr. PICKLE. Mr. Speaker, a few days ago The University of Texas, the State of Texas, and this country lost a great education leader with the death of Prof. George Sanchez.

Even before Professor Sanchez had completed his own education, this Government was calling on him to help in its work in inter-American relations and education fields. He has served well the cause of Spanish-speaking peoples in this country and abroad. And in so doing he has served well his country and his fellow man everywhere.

His loss will be sorely felt.

I would like at this time to place in the RECORD an article from an Austin, Texas, newspaper describing the life and works of Professor Sanchez.

The article follows:

UT PROF. G. I. SANCHEZ DIES

Dr. George Isadore Sanchez y Sanchez, 65, of 2201 Scenic Dr., professor of Latin American Education at the University of Texas, died at St. David's hospital Wednesday night after an illness.

Funeral is pending at the Cook-Walden Funeral Home.

Sanchez had been a faculty member at UT since 1940. He had also taught short terms at the University of Mexico, University of Alaska, University of Southern California, University of New Mexico and others.

Sanchez was born in Albuquerque, N.M., on Oct. 4, 1906, and was educated in elementary and secondary schools in Arizona and New Mexico. He received his bachelor of arts degree from the University of New Mexico in 1930, his master of science degree in education from UT in 1931 and his doctorate from the University of California in 1934.

Dr. Sanchez taught elementary school in New Mexico from 1923–30 and was director of research for the New Mexico Department of Education, 1931–35. From 1935–37 he was a research associate for the Julius Rosenwald Fund in Chicago and the chief technical consultant and director of the National Teachers College for the Venezuelan Ministry of Education from 1937–38.

He worked as a research associate at the University of New Mexico 1938–40. He also served as Education Specialist to the Coordinator of Inter-American Affairs in Washington, D.C. from 1933–34.

In 1961 Sanchez was named to the board of directors of the newly formed Peace Corps by President John F. Kennedy and also served on Kennedy's 50-member Citizen's Committee for a New Frontier Policy in the Americas.

He has also held government appointments with the U.S. Bureau of Indian Affairs and Office of Education.

Sanchez was a government witness in the Austin School desegregation case last year, during which he called prohibiting speaking of Spanish by children in public schools "virtually criminal."

He also spoke out against segregation of black and Mexican-American students calling for a "unitary" school where all children attended without reference to ethnic background.

Sanchez was the author of numerous books, articles, monographs and bulletins. Some of his principal books were "Mexico—A Revolution in Education," 1936; "Forgotten People," 1940; "The Development of Higher Education in Mexico," 1944; "The People—A Study of the Navajos," 1948; "Arithmetic in Maya," 1961; and "The Development of Education in Venezuela," 1963.

Sanchez is survived by his wife, Dr. Luisa G. Sanchez of Austin; one daughter, Mrs. Consuelo Sprague of Austin; a son-in-law, Nelson R. Sprague of Austin; and a son, George E. Sanchez, of Albuquerque, New Mexico.

THE INDEPENDENCE OF THE FEDERAL JUDICIARY

HON. ROBERT TAFT, JR.

OF OHIO

IN THE SENATE OF THE UNITED STATES

Tuesday, May 2, 1972

Mr. TAFT. Mr. President, the Honorable Frank J. Battisti, Chief Judge of the U.S. District Court for the Northern District of Ohio, has recently written an article entitled, "The Independence of the Federal Judiciary." This article appeared in the February 1972 issue of the Boston College Industrial and Commercial Law Review.

Because of the stresses which are placed on the independence of our judicial system in turbulent times, I commend this article to my colleagues and ask unanimous consent that it be inserted at this point in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

THE INDEPENDENCE OF THE FEDERAL JUDICIARY †

(Hon. Frank J. Battisti*)

It is indeed an honor to speak at the Boston College Law School. As you are probably aware, there has been some criticism directed at judges who deliver speeches and write articles on matters which may subsequently come before them in the course of litigation. The subject of my remarks is one that will likely not be part of any litigation that may come before me, and it is a subject of the highest interest to members of the bench and bar alike. I address myself today to the current congressional attempt to infringe upon the independence of what Professor Alexander Bickel calls "the least dangerous branch."

Footnotes at end of article.