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ABSTRACT

Cases and materials used in an undergraduate course, "Women and the Law," are divided to cover women and the Constitution of the U.S. (including the Equal Rights Amendment), the Supreme Court Abortion Decision, and the contemporary legal status of women including employment, education, and criminal law. Fifteen cases highlight the issues concerning women and the law. (MJM)

Cases and Materials

On

WOMEN AND THE LAW

For

GS 200: Introduction to Women's Studies

Edited by Marjorie Fine Knowles

Fall 1973

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Explanatory Note

These cases and materials were edited for use in an undergraduate, multi-disciplinary "Introduction to Women Studies" course offered for the first time at the University of Alabama in the fall of 1973. The goal was to provide the cases and other materials necessary for the teaching of the "Women and the Law" component of that course to undergraduates, and, by editing out unnecessary language, to highlight the issues that were properly our concern in a Women Studies course.

The materials were designed to be used in conjunction with Kanowitz, Women and the Law: The Unfinished Revolution (University of New Mexico Press, 1969 - paperback). Together they provide the reading for the equivalent of 9 class hours. A copy of the assignments, which also includes the lecture topics, is enclosed. The 3 weeks of the course which were allocated to "Women and the Law" were divided as follows:

I. Women and the Constitution of the U.S. (including the Equal Rights Amendment).

II. The Supreme Court Abortion Decision (we were lucky enough to get Sarah Weddington from Texas as a guest speaker; she argued the case in the Supreme Court for the plaintiffs in Roe v. Wade.)

III. Contemporary Legal Status of Women: Case Studies in Employment, Education and Criminal Law.

We did not include the older cases, (Bradwell, Minor, etc.) in the materials because of time limitations, but they were covered in the first lecture. Also covered in the lectures were such other important topics, omitted from these materials as, the position of women in the legal profession, and the evidence, scant as it is, that women are treated differently as litigants in our legal system.

An attempt was made to keep statutory materials to a minimum and to summarize the recent enactments (statutes seem to be especially hard reading for nonlawyers, particularly when they are filled with references to other statutes not readily available to the students). However, in the interest of completeness, Executive Orders 11375 and 11478 are included as Appendices A and B, for those of you who want to assign them.

This is a first, and in no way definitive effort on my part, and is offered only in the hope of saving others the time-consuming task of editing required to make legal materials accessible to those who are not initiated into its peculiar jargon and procedures.

The "Note on Supreme Court Standards of Review" was written by Ann Robertson-Kulakowski, a third year student at the University of Alabama Law School and a discussion leader in the Women Studies Course. She has helped enormously in this labor of love, as have the other discussion leaders, and Hattie Evans, of the Law School staff.

Marjorie Fine Knowles

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Assignments for GS200: Women and the Law

The assigned reading is either in Kanowitz, Women and the Law: The Unfinished Revolution (University of New Mexico Press, 1969) (hereinafter referred to as Kanowitz) or in the set of Cases and Materials on Women and the Law (hereinafter referred to as C & M) which has been distributed to you, or in Vol. 6 of the Harvard Civil Rights Civil Liberties Law Review (March 1971) which is on reserve at the library.

7 November: Women and the Constitution of the United States

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Note on Supreme Court Standards of Review

Recent constitutional challenges to sex discrimination in the law have been based on the Equal Protection Clause of the Fourteenth Amendment, which provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[1]

At the outset, it must be realized that laws usually embody classifications to some extent. Almost every statute, or governmental regulation, involves some disparity in treatment; few laws affect everyone in the country in the same manner. Such classifications are not per se violative of "equal protection of the laws."

In reviewing statutes to determine their constitutionality the Supreme Court has developed two different standards by which to decide whether a challenged statute or regulation establishes a classification violative of either the 14th or 5th Amendment guarantee that those similarly situated shall be similarly treated.

The first standard is that of reasonableness and is used in the majority of cases. Under this more lenient test the Court, in reviewing a statute, asks the question: does the classification established by the legislation bear a reasonable and just relation to the permissible objective of the legislation? Under this test, if the object of the statute is a legitimate one, and the purpose of the statutory classification bears the required reasonable relationship to that purpose, the constitutional mandate will be satisfied.

However, a second more stringent standard is applied when a statute falls into either one of two categories: (1) when a statute infringes upon a "fundamental interest", such as the right to vote, the right to travel; or, (2) when a statute embodies a classification that is "inherently suspect", such as race, alienage, or national origin. Under this standard, known as the "strict scrutiny" test, the legislation must serve "a compelling state interest" to survive a constitutional challenge. A classification which is "inherently suspect" "will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." [McLaughlin v. Florida, 379 U.S. 184, 196 (1964)].

Normally, duly-enacted legislation is accorded a presumption of constitutionality. Therefore, where neither a "fundamental interest" nor a "suspect classification" is involved, the burden is on the party challenging a statute or regulation to prove that it is violative of the Constitution. However, "the fundamental interest and suspect classification doctrines operate to cancel the normal presumption of constitutionality and to put a heavy burden on the government to justify the differential treatment. They are therefore more powerful weapons against discrimination than the 'reasonable classification' test." [Brown, et al., "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 Yale Law Journal 871, 880 (1971)].

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[1]While there is no identical provision in the Constitution applicable to the federal government, it seems clear that any act by the federal government which would be a denial of "equal protection of the laws" would constitute a "deprivation of liberty" within the meaning of the Due Process Clause of the Fifth Amendment, which provides: "No person . . . shall be deprived of life, liberty or property without due process of law."

In sex discrimination cases the argument has been made that the Court should declare sex to be a "suspect classification" so that any law which discriminates on the basis of sex would be subject to the "strict scrutiny" test, and thus have to bear this very heavy burden of justification. In both Reed v. Reed, 404 U.S. 71 (1971) and Frontiero v. Richardson, 411 U.S. 677 (1973), this argument was made, but a majority of the Court has not yet adopted this view.

FRONTIERO v. RICHARDSON, 411 U.S. 677, 93 S. Ct. 1764 (U.S. Supreme Court, 1973)*

Mr. Justice Brennan announced the judgment of the Court and an opinion in which Mr. Justice Douglas, Mr. Justice White, and Mr. Justice Marshall join.

The question before us concerns the right of a female member of the uniformed services to claim her spouse as a "dependent" for the purposes of obtaining increased quarters allowances and medical and dental benefits under 37 U.S.C. §§ 401, 403, and 10 U.S.C. §§ 1072, 1076, on an equal footing with male members. Under these statutes, a serviceman may claim his wife as a "dependent" without regard to whether she is in fact dependent upon him for any part of her support. A servicewoman, on the other hand, may not claim her husband as a "dependent" under these programs unless he is in fact dependent upon her for over one-half of his support . . . Thus, the question for decision is whether this difference in treatment constitutes an unconstitutional discrimination against servicewomen in violation of the Due Process Clause of the Fifth Amendment. A three-judge District Court for the Middle District of Alabama, one judge dissenting, rejected this contention and sustained the constitutionality of the provisions of the statutes making this distinction . . . We reverse.

I.

In an effort to attract career personnel through reenlistment, Congress established, in 37 U.S.C. § 401 et seq., and 10 U.S.C. § 1071 et seq., a scheme for the provision of fringe benefits to members of the uniformed services on a competitive basis with business and industry. Thus, under 37 U.S.C. § 403, a member of the uniformed services with dependents is entitled to an increased "basic allowance for quarters" and, under 10 U.S.C. § 1076, a member's dependents are provided comprehensive medical and dental care.

Appellant Sharron Frontiero, a lieutenant in the United States Air Force, sought increased quarters allowances and housing and medical benefits for her husband, appellant Joseph Frontiero, on the ground that he was her "dependent." Although such benefits would automatically have been granted with respect to the wife of a male member of the uniformed services, appellant's application was denied because she failed to demonstrate that her husband was dependent on her for more than one-half of his support. Appellants then commenced this suit, contending that, by making this distinction, the statutes unreasonably discriminate on the basis of sex in violation of the Due Process Clause of the Fifth Amendment. In essence,

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*[Most footnotes are omitted from the Court's opinion.]

appellants asserted that the discriminatory impact of the statutes is two-fold: first, as a procedural matter, a female member is required to demonstrate her spouse's dependency, while no such burden is imposed upon male members; and second, as a substantive matter, a male member who does not provide more than one-half of his wife's support, receives benefits, while a similarly situated female member is denied such benefits. Appellants therefore sought a permanent injunction against the continued enforcement of these statutes and an order directing the appellees to provide Lieutenant Frontiero with the same housing and medical benefits that a similarly situated male member would receive.

Although the legislative history of these statutes sheds virtually no light on the purposes underlying the differential treatment accorded male and female members, a majority of the three-judge District Court surmised that Congress might reasonably have concluded that, since the husband in our society is generally the "breadwinner" in the family -- and the wife typically the "dependent" partner -- "it would be more economical to require married female members claiming husbands to prove actual dependence than to extend the presumption of dependency to such members." Indeed, given the fact that approximately 99% of all members of the uniformed services are male, the District Court speculated that such differential treatment might conceivably lead to a "considerable saving of administrative expense and manpower."

II.

At the outset, appellants contend that classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree and, indeed, find at least implicit support for such an approach in our unanimous decision only last Term in Reed v. Reed, 404 U.S. 71 (1971).

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There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women not on a pedestal, but in a cage. Indeed, this paternalistic attitude became so firmly rooted in our national consciousness that, exactly 100 years ago, a distinguished member of this Court was able to proclaim:

> "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the ideas of a woman adopting a distinct and independent career from that of her husband . . .
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> ". . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

As a result of notions such as these, our statute books gradually became laden with gross, stereotypical distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. See generally, L. Kanowitz, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 5-6 (1969); G. Mydral, AN AMERICAN DILEMMA 1073 (2d Ed. 1962). And although blacks were guaranteed the right to vote in 1870, women were denied even that right -- which is itself "preservative of other basic civil and political rights" -- until adoption of the 19th Amendment half a century later.

It is true, of course, that the position of women in America has improved markedly in recent decades.* Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, on the job market and, perhaps most conspicuously, in the political arena.** See generally, K. Amundsen, THE SILENCED MAJORITY: WOMEN AND AMERICAN DEMOCRACY (1971); The President's Task Force on Women's Rights and Responsibilities, A MATTER OF SIMPLE JUSTICE (1970).

Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . ." Weber v. Aetna Casualty and Surety Company, 406 U.S. 164, 175 (1972). And what differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

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*See generally, The President's Task Force on Women's Rights and Responsibilities, A MATTER OF SIMPLE JUSTICE (1970); L. Kanowitz, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION (1969); A. Montague, MAN'S MOST DANGEROUS MYTH (4th ed. 1964); The President's Commission on the Status of Women, AMERICAN WOMEN (1963).

**It is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly under-represented in this Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the U. S. Senate, and only 14 women hold seats in the House of Representatives. And, as appellants point out, this underrepresentation is present throughout all levels of our State and Federal Government. See Joint Reply Brief of Appellants and American Civil Liberties Union (Amicus Curiae) 9.

We might also note that, over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications. In Tit. VII of the Civil Rights Act of 1964, for example, Congress expressly declared that no employer, labor union, or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of "race, color, religion, sex, or national origin." Similarly, the Equal Pay Act of 1963 provides that no employer covered by the Act "shall discriminate . . . between employees on the basis of sex." And § 1 of the Equal Rights Amendment passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares that "(e)quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Thus, Congress has itself concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.

With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme now before us is constitutionally invalid.

III.

The sole basis of the classification established in the challenged statutes is the sex of the individuals involved. Thus, under 37 U.S.C. §§ 401, 403, and 10 U.S.C. §§ 2072, 2076, a female member of the uniformed services seeking to obtain housing and medical benefits for her spouse must prove his dependency in fact, whereas no such burden is imposed upon male members. In addition, the statutes operate so as to deny benefits to a female member, such as appellant Sharron Frontiero, who provides less than one-half of her spouse's support, while at the same time granting such benefits to a male member who likewise provides less than one-half of his spouse's support. Thus, to this extent, at least, it may fairly be said that these statutes command "dissimilar treatment for men and women who are . . . similarly situated." Reed v. Reed, supra, at 77.

Moreover, the Government concedes that the differential treatment accorded men and women under these statutes serves no purpose other than mere "administrative convenience." In essence, the Government maintains that, as an empirical matter, wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives. Thus, the Government argues that Congress might reasonably have concluded that it would be both cheaper and easier simply conclusively to presume that wives of male members are financially dependent upon their husbands, while burdening female members with the task of establishing dependency in fact.*

*It should be noted that these statutes are not in any sense designed to rectify the effects of past discrimination against women. [citations omitted]. On the contrary, these statutes seize upon a group - women - who have historically suffered discrimination in employment, and rely on the effects of this past discrimination as a justification for heaping on additional economic disadvantages. [citations omitted].

The Government offers no concrete evidence, however, tending to support its view that such differential treatment in fact saves the Government any money. In order to satisfy the demands of strict judicial scrutiny, the Government must demonstrate, for example, that it is actually cheaper to grant increased benefits with respect to all male members, than it is to determine which male members are in fact entitled to such benefits and to grant increased benefits only to those members whose wives actually meet the dependency requirement. Here, however, there is substantial evidence that, if put to the test, many of the wives of male members would fail to qualify for benefits.* And in light of the fact that the dependency determination with respect to the husbands of female members is presently made solely on the basis of affidavits, rather than through the more costly hearing process, the Government's explanation of the statutory scheme is, to say the least, questionnable.

In any case, our prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, "the Constitution recognizes higher values than speed and efficiency." [citation omitted]. And when we enter the realm of "strict judicial scrutiny," there can be no doubt that "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality..[citations omitted]. On the contrary, any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands "dissimilar treatment for men and women who are . . . similarly situated," and therefore involves the "very kind of arbitrary legislative choice forbidden by the (Constitution). . . ." Reed v. Reed, supra, at 77, 76. We therefore conclude that, by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband.

Reversed.

Mr. Justice Stewart concurs in the judgment, agreeing that the statutes before us work an invidious discrimination in violation of the Constitution. Reed v. Reed, 404 U.S. 71.

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*In 1971, 43% of all women over the age of 16 were in the labor force, and 18% of all women worked full-time 12 months per year. See U.S. Women's Bureau, Dept. of Labor, Highlights of Women's Employment and Education 1 (W. B. Pub. No. 71-191, March 1972). Moreover, 41.5% of all married women are employed. See U. S. Bureau of Labor Statistics, Department of Labor, Work Experience of the Population in 1971 4 (Summary Special Labor Force Report, August 1972). It is also noteworthy that, while the median income of a male member of the armed forces is approximately $3686, see The Report of the President's Commission on an All Volunteer Armed Force 51, 181 (1970), the median income for all women over the age of 14, including those who are not employed, is approximately $2,237. See U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States Table No. 535 (1972). Applying the statutory definition of "dependency" to these statistics, it appears that, in the "median" family, the wife of a male member must have personal expenses of approximately $4,474, or about 75% of the total family income, in order to qualify as a "dependent."

Mr. Justice Rehnquist dissents for the reasons stated by Judge Rives in his opinion for the District Court, Frontiero v. Laird, 341 F. Supp. 201 (1972).

Mr. Justice Powell, with whom The Chief Justice and Mr. Justice Blackmun join, concurring in the judgment.

I agree that the challenged statutes constitute an unconstitutional discrimination against service women in violation of the Due Process Clause of the Fifth Amendment, but I cannot join the opinion of Mr. Justice Brennan, which would hold that all classifications based upon sex, "like classifications based upon race, alienage, and national origin," are "inherently suspect and must therefore be subjected to close judicial scrutiny." . . . . It is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding. Reed v. Reed, 404 U.S. 71 (1971), which abundantly supports our decision today, did not add sex to the narrowly limited group of classifications which are inherently suspect. In my view, we can and should decide this case on the authority of Reed and reserve for the future any expansion of its rationale.

There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted, will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.

There are times when this Court, under our system, cannot avoid a constitutional decision on issues which normally would be resolved by the elected representatives of the people. But democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.

REED v. REED, 404 U.S. 71 (U.S. Supreme Court, 1971)

[This was the first case in which the Supreme Court declared unconstitutional a state statute providing for sex-based classifications on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court did not, however, accept the argument advanced in briefs filed on behalf of Ms. Reed and amici curiae, that sex was a "suspect classification," but ruled on the narrower ground.

The Fourteenth Amendment provides, in pertinent part:

"Section 1. 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."

The following definitions may assist you in reading this opinion:

Administratrix/administrator of an estate -- person with authority to manage the estate of a deceased person.
Intestate -- without making a will
Issuance of letters of administration -- appointment by the proper court to be the administrator of the estate of a deceased person.]

Mr. Chief Justice BURGER delivered the opinion of the Court.

Richard Lynn Reed, a minor, died intestate in Ada County, Idaho, on March 29, 1967. His adoptive parents, who had separated some time prior to his death, are the parties to this appeal. Approximately seven months after Richard's death, his mother, appellant Sally Reed, filed a petition in the Probate Court of Ada County, seeking appointment as administratrix of her son's estate.[1] Prior to the date for a hearing on the mother's petition, appellee Cecil Reed, the father of the decedent, filed a competing petition seeking to have himself appointed administrator of the son's estate. The probate court held a joint hearing on the two petitions and thereafter ordered that letters of administration be issued to appellee Cecil Reed upon his taking the oath and filing the bond required by law. The court treated §§ 15-312 and 15-314 of the Idaho Code as the controlling statutes and read those sections as compelling a preference for Cecil Reed because he was a male.

Section 15-312[2] designates the persons who are entitled to administer the estate of one who dies intestate. In making these designations, that section lists 11 classes of persons who are so entitled and provides, in substance, that the order in which those classes are listed in the section shall be determinative of the relative rights of competing applicants for letters of administration. One of the 11 classes so enumerated is "[t]he father or mother" of the person dying intestate. Under this section then appellant and appellee, being members of the same entitlement class, would seem to have been equally entitled to administer their son's estate. Section 15-314 provides, however, that

> "[o]f several persons claiming and equally entitled (under § 15-312) to administer, males must be preferred to females, and relatives of the whole to those of the half blood."

In issuing its order, the probate court implicitly recognized the equality of entitlement of the two applicants under § 15-312 and noted that neither of the applicants was under any legal disability; the court ruled, however, that appellee, being a male, was to be preferred to the female appellant "by reason of Section 15-314 of the Idaho Code." In stating this conclusion, the probate judge gave no indication that he had attempted to determine the relative capabilities of the competing applicants to perform the functions incident to the administration of an estate. It seems clear the probate judge considered himself bound by statute to give preference to the male candidate over the female, each being otherwise "equally entitled."

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[1] In her petition, Sally Reed alleged that her son's estate, consisting of a few items of personal property and a small savings account, had an aggregate value of less than $1,000.

[2] Section 15-312 provides as follows:

"Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:

"1. The surviving husband or wife or some competent person whom he or she may

Sally Reed appealed from the probate court order, and her appeal was treated by the District Court of the Fourth Judicial District of Idaho as a constitutional attack on § 15-314. In dealing with the attack, that court held that the challenged section violated the Equal Protection Clause of the Fourteenth Amendment[3] and was, therefore, void; the matter was ordered "returned to the Probate Court for its determination of which of the two parties" was better qualified to administer the estate.

This order was never carried out, however, for Cecil Reed took a further appeal to the Idaho Supreme Court, which reversed the District Court and reinstated the original order naming the father administrator of the estate. In reaching this result, the Idaho Supreme Court first dealt with the governing statutory law and held that under § 15-312 "a father and mother are 'equally entitled' to letters of administration," but the preferences given to males by § 15-314 is "mandatory" and leaves no room for the exercise of a probate court's discretion in the appointment of administrators. Having thus definitively and authoritatively interpreted the statutory provisions involved, the Idaho Supreme Court then proceeded to examine and reject, Sally Reed's contention that § 15-314 violates the Equal Protection Clause by giving a mandatory preference to males over females, without regard to their individual qualifications as potential estate administrators. [citation omitted].

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request to have appointed.
"2. The children.
"3. The father or mother.
"4. The brothers.
"5. The sisters.
"6. The grandchildren.
"7. The next of kin entitled to share in the distribution of the estate.
"8. Any of the kindred.
"9. The public administrator.
"10. The creditors of such person at the time of death.
"11. Any person legally competent.
"If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate."

[3]The court also held that the statute violated Art. I, § 1 of the Idaho Constitution.

Sally Reed thereupon appealed for review by this Court and we noted probable jurisdiction. Having examined the record and considered the briefs and orals arguments of the parties, we have concluded that the arbitrary preference established in favor of males by § 15-314 of the Idaho Code cannot stand in the face of the Fourteenth Amendment's command that no State deny the equal protection of the laws to any person within its jurisdiction.[4]

Idaho does not, of course, deny letters of administration to women altogether. Indeed, under § 15-312, a woman whose spouse dies intestate has a preference over a son, father, brother, or any other male relative of the decedent. Moreover, we can judicially notice that in this country, presumably due to the greater longevity of women, a large proportion of estates, both intestate and under wills of decedents, are administered by surviving widows.

Section 15-314 is restricted in its operation to those situations where competing applications for letters of administration have been filed by both male and female members of the same entitlement class established by § 15-312. In such situations, § 15-314 provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause.

In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. [citations omitted]. The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." [citation omitted]. The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of §§ 15-312 and 15-314.

In upholding the latter section, the Idaho Supreme Court concluded that its objective was to eliminate one area of controversy when two or more persons, equally entitled under § 15-312, seek letters of administration and thereby present the probate court "with the issue of which one should be named." The court also concluded that where such persons are not of the same sex, the elimination of females from consideration "is neither an illogical nor arbitrary method devised by the legislature to resolve an issue that would otherwise require a hearing as to the relative merits *** of the two or more petitioning relatives ***." [citation omitted].

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[4]We note that § 15-312, set out in n. 2, supra, appears to give a superior entitlement to brothers of an intestate (class 4) than is given to sisters (class 5). The parties now before the court are not affected by the operation of § 15-312 in this respect, however, and appellant has made no challenge to that section.

We further note that on March 12, 1971, the Idaho Legislature adopted the Uniform Probate Code, effective July 1, 1972. Ch. 111 (1971) Idaho Session Laws 233. On that date, §§ 15-312 and 15-314 of the present code will, then, be effectively repealed, and there is in the new legislation no mandatory preference for males over females as administrators of estates.

Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether § 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the equal protection clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.

We note finally that if § 15-314 is viewed merely as a modifying appendage to § 15-312 and as aimed at the same objective, its constitutionality is not thereby saved. The objective of § 15-312 clearly is to establish degrees of entitlement of various classes of persons in accordance with their varying degrees and kinds of relationship to the intestate. Regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated with respect to that objective. By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause. [citation omitted].

The judgment of the Idaho Supreme Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

HOYT v. FLORIDA, 368 U. S. 57 (U. S. Supreme Court, 1961)

Mr. Justice HARLAN delivered the opinion of the Court.

Appellant, a woman, has been convicted in Hillsborough County, Florida, of second degree murder of her husband. On this appeal, we noted probable jurisdiction to consider appellant's claim that her trial before an all-male jury violated rights assured by the Fourteenth Amendment. The claim is that such jury was the product of a state jury statute which works an unconstitutional exclusion of women from jury service.

The jury law primarily in question is Fla.Stat., 1959, § 40.01 (1), F.S.A. This Act, which requires that grand and petit jurors be taken from "male and female" citizens of the State possessed of certain qualifications,[1] contains the following proviso:

> "provided, however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list."

Showing that since the enactment of the statute only a minimal number of women have so registered, appellant challenges the constitutionality of the statute both on its face and as applied in this case. For reasons now to follow we decide that both contentions must be rejected.

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[1] Jurors must be: "persons over the age of twenty-one years, who are citizens of this state, and who have resided in the state for one year and in their respective counties six months, and who are duly qualified electors of their respective counties***."

At the core of appellant's argument is the claim that the nature of the crime of which she was convicted peculiarly demanded the inclusion of persons of her own sex on the jury. She was charged with killing her husband by assaulting him with a baseball bat. An information was filed against her under Fla. Stat., 1959, § 782.04, F.S.A., which punishes as murder in the second degree "any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual***." As described by the Florida Supreme Court, the affair occurred in the context of a marital upheaval involving, among other things, the suspected infidelity of appellant's husband, and culminating in the husband's final rejection of his wife's efforts at reconciliation. It is claimed, in substance, that women jurors would have been more understanding or compassionate than men in assessing the quality of appellant's act and her defense of "temporary insanity." No claim is made that the jury as constituted was otherwise afflicted by any elements of supposed unfairness. [citation omitted].

Of course, these premises misconceive the scope of the right to an impartially selected jury assured by the Fourteenth Amendment. That right does not entitle one accused of crime to a jury tailored to the circumstances of the particular case, whether relating to the sex or other condition of the defendant, or to the nature of the charges to be tried. It requires only that the jury be indiscriminately drawn from among those eligible in the community for jury service, untrammelled by any arbitrary and systematic exclusions. [citation omitted] The result of this appeal must therefore depend on whether such an exclusion of women from jury service has been shown.

I.

We address ourselves first to appellant's challenge to the statute on its face.

Several observations should initially be made. We of course recognize that the Fourteenth Amendment reaches not only arbitrary class exclusions from jury service based on race or color, but also all other exclusions which "single out" any class of persons "for different treatment not based on some reasonable classification." We need not, however, accept appellant's invitation to canvass in this case the continuing validity of this Court's dictum in Strauder v. West Virginia, 100 U.S. 303, 310, 25 L.Ed. 664, to the effect that a State may constitutionally "confine" jury duty "to males." This constitutional proposition has gone unquestioned for more than eighty years in the decisions of the Court, [citation omitted] and had been reflected, until 1957, in congressional policy respecting jury service in the federal courts themselves.[2] Even were it to be assumed that this question is still open to debate, the present case tenders narrower issues.

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[2]From the First Judiciary Act of 1789, § 29, 1 Stat. 73, 88, to the Civil Rights Act of 1957, 71 Stat. 634, 638, 28 U.S.C. § 1861, 28 U.S.C.A. § 1861 -- a period of 168 years -- the inclusion or exclusion of women on federal juries depended upon whether they were eligible for jury service under the law of the State where the federal tribunal sat. [citation omitted] By the Civil Rights Act of 1957 Congress made eligible for jury service "Any citizen of the United States," possessed of specified qualifications, 28 U.S.C. § 1861, 28 U.S.C.A. § 1861, thereby for the first time making qualifications for federal jury service wholly independent of those prescribed by state law. The effect of that statute was to make women eligible for federal jury service even though ineligible under state law. [citations omitted] There is no indication that such congressional action was impelled by constitutional considerations.

Manifestly, Florida's § 40.01 (1) does not purport to exclude women from state jury service. Rather, the statute "gives to women the privilege to serve but does not impose service as a duty." [citation omitted] It accords women an absolute exemption from jury service unless they expressly waive that privilege. This is not to say, however, that what in form may be only an exemption of a particular class of persons can in no circumstances be regarded as an exclusion of that class. Where, as here, an exemption of a class in the community is asserted to be in substance an exclusionary device, the relevant inquiry is whether the exemption itself is based on some reasonable classification and whether the manner in which it is exercisable rests on some rational foundation.

In the selection of jurors Florida has differentiated between men and women in to respects. It has given women an absolute exemption from jury duty based solely on their sex, no similar exemption obtaining as to men.[3] And it has provided for its effectuation in a manner less onerous than that governing exemptions exercisable by men: women are not to be put on the jury list unless they have voluntarily registered for such service; men, on the other hand, even if entitled to an exemption, are to be included on the list unless they have filed a written claim of exemption as provided by law.[4] Fla. Stat., 1959, § 40.10, F.S.A.

In neither respect can we conclude that Florida's statute is not "based on some reasonable classification," and that it is thus infected with unconstitutionality. Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of the home and family life. We cannot say that it is consitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.

Florida is not alone in so concluding. Women are now eligible for jury service in all but three States of the Union.[5] Of the forty-seven States where women are eligible, seventeen besides Florida, as well as the District of Columbia, have accorded women an absolute exemption based solely on their sex, exercisable in one form or another. [footnote omitted] In two of these States, as in Florida, the exemption is automatic, unless a woman volunteers for such service. [footnote omitted] It is true, of course, that Florida could have limited the exemption, as some other States have done, only to women who have family responsibilities. [footnote omitted]

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[3]Men may be exempt because of age, bodily infirmity, or because they are engaged in certain occupations. Fla. Stat., 1959, § 40.08, F.S.A.

[4]Under Fla. Stat., 1959, § 40.12, F.S.A., every person claiming an exemption, other than as provided with respect to women in § 40.01 (1) must file, annually, before December 31 with the clerk of the circuit court an affidavit of exemption and the grounds on which such claim is based. The affidavit is forwarded to the jury commissioners, who, if the affidavit is found sufficient, then omit the affiant from the jury list for the succeeding calendar year. In case exemption is denied, the claim to it may be renewed in any court in which the affiant is summoned as a juror during that year. The exemption for such year is lost, however, by failure to file the required affidavit before the end of the preceding year.

[5]Alabama, Ala. Code, 1940 (Recompiled Vol. 1958), Tit. 30, § 21; Mississippi, Miss.Code Ann., 1942 (Recompiled Vol. 1956), § 1762; South Carolina, S.C. Code, 1952, § 38-52.

But we cannot regard it as irrational for a state legislature to consider preferable a broad exemption, whether born of the State's historic public policy or of a determination that it would not be administratively feasible to decide in each individual instance whether the family responsibilities of a prospective female juror were serious enough to warrant an exemption.

Likewise we cannot say that Florida could not reasonably conclude that full effectuation of this exemption made it desirable to relieve women of the necessity of affirmatively claiming it, while at the same time requiring of men an assertion of the exemptions available to them. Moreover, from the standpoint of its own administrative concerns the State might well consider that it was "impractical to compel large numbers of women, who have an absolute exemption, to come to the clerk's office for examination since they so generally assert their exemption." [citation omitted]

Appellant argues that whatever may have been the design of this Florida enactment, the statute in practical operation results in an exclusion of women from jury service, because women, like men, can be expected to be available for jury service only under compulsion. In this connection she points out that by 1957, when this trial took place, only some 220 women out of approximately 46,000 registered female voters in Hillsborough County -- constituting about 40 per cent of the total voting population of that county -- had volunteered for jury duty since the limitation of jury service to males [citation omitted] was removed by § 40.01(1) in 1949. [citation omitted].

This argument, however, is surely beside the point. Given the reasonableness of the classification involved in § 40.01(1), the relative paucity of women jurors does not carry the constitutional consequence appellant would have it bear. "Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period." [citation omitted].

We cannot hold this statute as written offensive to the Fourteenth Amendment.

[Part II of the Court's opinion, concerning Ms. Hoyt's challenge to the way the jury roll was established for her case, is omitted.]

TEXT OF THE EQUAL RIGHTS AMENDMENT

SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

SECTION 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

SECTION 3. This amendment shall take effect two years after the date of ratification.

ROE v. WADE, ___ U.S. ___, 93 S. Ct. 705, 41 U.S.L.W. 4213 (U.S. Supreme Court, 1973)

[The following definitions may help you in reading this case and the following one:

"declaratory judgment" is one which declares the rights of the parties, or expresses the conclusive opinion of the court on a question of law;
"injunction" is an order by the court directing a party not to do something (such as enforce a statute, or hold an election)].

Mr. JUSTICE BLACKMUN delivered the opinion of the Court.

This Texas federal appeal and its Georgia companion, Doe v. Bolton, post ____, present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortive procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now vindicated dissent in Lochner v. New York, 198 U.S. 45, 76 (1905):

> "It [the Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

I

The Texas statutes that concern us here are Arts. 1191-1194 and 1196 of the State's Penal Code.[1] These make it a crime to "procure an abortion," as therein

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[1]"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

defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Similar statutes are in existence in a majority of the States.[2]

Texas first enacted a criminal abortion statute in 1854. . . . . This was soon modified into language that has remained substantially unchanged to the present time. . . . . The final article in each of these compilations provided the same exception, as does the present Article 1196, for an abortion by "medical advice for the purpose of saving the life of the mother."[3]

II

Jane Roe,[4] a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy,

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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.

"Art. 1192. Furnishing the means.

"Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

"Art. 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.

"Art. 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.

"Art. 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."

The foregoing Articles, together with Art. 1195, comprise Chapter 9 of Title 15 of the Penal Code. Article 1195, not attacked here, reads:

"Art. 1195. Destroying unborn child.

"Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years."

[2][citations omitted].

[3][footnote omitted].

[4]The name is a pseudonym.

protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. By an amendment to her complaint Roe purported to sue "on behalf of herself and all other women" similarly situated.

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[Those portions of the Court's opinion discussing the two other plaintiffs in the suit, a doctor and a childless married couple, whose complaints it dismissed on grounds not relevant to this class, are omitted].

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V

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); id, at 460 (WHITE, J., concurring); or among those rights reserved to the people by the Ninth Amendment, Griswold v. Connecticut, 381 U. S., at 486 (Goldberg, J., concurring). Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.

VI

It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.

1. Ancient attitudes. These are not capable of precise determination. We are told that at the time of the Persian Empire abortifacients were known and that criminal abortions were severely punished.[8] We are also told, however, that abortion was practiced in Greek times as well as in the Roman Era,[9] and that "it was resorted to without scruple."[10] The Ephesian, Soranos, often described as the greatest of the ancient gynecologists, appears to have been generally opposed to Rome's prevailing free-abortion practices. He found it necessary to think first of the life of the mother, and he resorted to abortion when, upon this standard, he felt the procedure advisable.[11] Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a

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[8]A. Castiglioni, A History of Medicine 84 (2d ed. 1947), E. Krumbhaar, translator and editor (hereinafter "Castiglioni").

[9]J. Ricci, The Genealogoy of Gynaecology 52, 84, 113, 149 (2d ed. 1950) (hereinafter "Ricci"); L. Lader, Abortion 75-77 (1966) (hereinafter "Lader"); K. Niswander, Medical Abortion Practices in the United States, in Abortion and the Law 27, 38-40 (D. Smith, editor, 1967); G. Williams, The Sanctity of Life 148 (1957) (hereinafter "Williams"); J. Noonan, An Almost Absolute Value in History, in The Morality of Abortion 1, 3-7 (J. Noonan ed. 1970) (hereinafter "Noonan"); E. Quay, Justifiable Abortion--Medical and Legal Foundations, II, 49 Geo. L. J. 395, 406-422 (1961) (hereinafter "Quay").

violation of the father's right to his offspring. Ancient religion did not bar abortion.[12]

2. The Hippocratic Oath. What then of the famous Oath that has stood so long as the ethical guide of the medical profession and that bears the name of the great Greek (460(?)-377(?) B. C.), who has been described as the Father of Medicine, the "wisest and the greatest practioner of his art," and the "most important and most complete medical personality of antiquity," who dominated the medical schools of his time, and who typified the sum of the medical knowledge of the past?[13] The Oath varies somewhat according to the particular translation, but in any translation the content is clear: "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion,"[14] or "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy."[15]

Although the Oath is not mentioned in any of the principal briefs in this case or in Doe v. Bolton, post, it represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day. Why did not the authority of Hippocrates dissuade abortion practice in his time and that of Rome? The late Dr. Edelstein provides us with a theory:[16] The Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. See Plato, Republic, V, 461; Aristotle, Politics, VII, 1335 b 25. For the Pythagoreans, however, it was a matter of dogma. For them the embryo was animate from the moment of conception, and abortion meant destruction of a living being. The abortion clause of the Oath, therefore, "echoes Pythagorean doctrines," and "[i]n no other stratum of Greek opinion were such views held or proposed in the same spirit of uncompromising austerity."[17]

Edelstein then concludes that the Oath originated in a group representing only a small segment of Greek opinion and that it certainly was not accepted by all ancient physicians. He points out that medical writings down to Galen (130-200 A.D.) "give evidence of the violation of almost every one of its injunctions."[18] But with

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[10] L. Edelstein, The Hippocratic Oath 10 (1943) (hereinafter "Edelstein"). But see Castiglioni 227.

[11] Edelstein 12; Ricci 113-114, 118-119; Noonan 5.

[12] Edelstein 13-14.

[13] Castiglioni 148.

[14] Id., at 154.

[15] Edelstein 3.

[16] Id., at 12, 15-18.

[17] Id., at 18; Lader 76.

[18] Edelstein 63.

the end of antiquity a decided change took place. Resistance against suicide and against abortion became common. The Oath came to be popular. The emerging teachings of Christianity were in agreement with the Pythagorean ethic. The Oath "became the nucleus of all medical ethics" and "was applauded as the embodiment of truth." Thus, suggests Dr. Edelstein, it is "a Pythagorean manifesto and not the expression of an absolute standard of medical conduct."[19]

This, it seems to us, is a satisfactory and acceptable explanation of the Hippocratic Oath's apparent rigidity. It enables us to understand, in historical context, a long accepted and revered statement of medical ethics.

3. The Common Law. It is undisputed that at the common law, abortion performed before "quickening"--the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy[20]--was not an indictable offense.[21] The absence of a common law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins. These disciplines variously approached the question in terms of the point at which the embryo or fetus became "formed" or recognizably human, or in terms of when a "person" came into being, that is, infused with a "soul" or "animated." A loose consensus evolved in early English law that these events occurred at some point between conception and live birth.[22]

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[19] Id., at 64.

[20] Dorland's Illustrated Medical Dictionary 1261 (24th ed. 1965).

[21] E. Coke, Institutes III *50 (1648); 1 W. Hawkins, Pleas of the Crown c. 31, § 16 (1762); 1 Blackstone, Commentaries *129-130 (1765); M. Hale, Pleas of the Crown 433 (1778). For discussions of the role of the quickening concept in English common law, see Lader 78; Noonan 223-226; C. 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. Forum 411, 418-428 (1968) (hereinafter "Means I"); L. Stern, Abortion: Reform and the Law, 59 J. Crim. L. C. & P. S. 84 (1968) (hereinafter "Stern"): Quay 430-432; Williams 152.

[22] Early philosophers believed that the embryo or fetus did not become formed and begin to live until at least 40 days after conception for a male, and 80 to 90 days for a female. See, for example, Aristotle, Hist. Anim. 7.3.583b; Gen. Anim. 2.3.736, 2.5.741; Hippocrates, Lib. de Nat. Puer., No. 10. Aristotle's thinking derived from his three-stage theory of life: vegetable, animal, rational. The vegetable stage was reached at conception, the animal at "animation," and the rational soon after live birth. This theory, together with the 40/80 day view, came to be accepted by early Christian thinkers.

The theological debate was reflected in the writings of St. Augustine, who made a distinction between embryo inanimatus, not yet endowed with a soul, and embryo animatus. He may have drawn upon Exodus xxi, 22. At one point, however, he expresses the view that human powers cannot determine the point during fetal development at which the critical change occurs. See Augustine, De Origine Animae 4.4 (Pub. Law 44.527). See also Reany, The Creation of the Human Soul, c. 2 and 83-86 (1932); Huser, The Crime of Abortion in Common Law 15 (Catholic Univ. of America, Canon Law Studies No. 162, Washington, D. C. 1942).

Galen, in three treatises related to embryology, accepted the thinking of Aristotle and his followers. Quay 426-427. Later, Augustine on abortion was incorporated by Gratian into the Decretum, published about 1140. Decretum Magistri Gratiani 2.32.2.7 to 2.32.2.10, in 1 Corpus Juris Canonici 1122, 1123 (2d ed.

This was "mediate animation." Although Christian theology and the canon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the 19th century, there was otherwise little agreement about the precise time of formation or animation. There was agreement, however, that prior to this point the fetus was to be regarded as part of the mother and its destruction, therefore, was not homicide. Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40-80 day view, and perhaps to Acquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point. The significance of quickening was echoed by later common law scholars and found its way into the received common law in this country.

Whether abortion of a quick fetus was a felony at common law, or even a lesser crime, is still disputed. Bracton, writing early in the 13th century, thought it homicide.[23] But the later and predominant view following the great common law scholars, has been that it was at most a lesser offense. In a frequently cited passage, Coke took the position that abortion of a woman "quick with childe" is "a great misprision and no murder."[24] Blackstone followed, saying that while abortion after quickening had once been considered manslaughter (though not murder), "modern law" took a less severe view.[25] A recent review of the common law precedents argues, however, that those precedents contradict Coke and that even post-quickening abortion was never established as a common law crime.[26] This is of some importance

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Friedberg ed. 1879). Gratian, together with the decretals that followed, were recognized as the definitive body of canon law until the new Code of 1917.

For discussion of the canon law treatment, see Means I, at 411-412; Noonan, 20-26; Quay 426-430; see also Noonan, Contraception: A History of Its Treatment by the Catholic Theologians and Canonists 18-29 (1965).

[23]Bracton took the position that abortion by blow or poison was homicide "if the foetus be already formed and animated, and particularly if it be animated." 2 H. Bracton, De Legibus et Consuetudinibus Angliae 279 (Twiss ed. 1879), or, as a later translation puts it, "if the foetus is already formed or quickened, especially if it is quickened," II Bracton, On the Laws and Customs of England 341 (Thorne ed. 1968). See Quay 431; see also 2 Felta 60-61 (Book I, c. 23) (Selden Society ed. 1955).

[24]E. Coke, Institutes III *50 (1648).

[25]1 Blackstone, Commentaries *129-130 (1765).

[26]C. Means, The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?, 17 N.Y.L. Forum 335 (1971) (hereinafter "Means II"). The author examines the two principal precedents cited marginally by Coke, both contrary to his dictum, and traces the treatment of these and other cases by earlier commentators. He concludes that Coke, who himself participated as an advocate in an abortion case in 1601, may have intentionally misstated the law. The author even suggests a reason: Coke's strong feelings about abortion, coupled with his reluctance to acknowledge common law (secular) jurisdiction to assess penalties for an offense that traditionally had been an exclusively ecclesiastical or canon law crime. See also Lader 78-79, who notes that some scholars doubt the common law ever was applied to abortion; that the English ecclesiastical courts seem to have lost interest in the problem after 1527; and that the preamble to the English legislation of 1803, 43 Geo. 3, c. 58, § 1, at 203, referred to in the text, infra, states that "no adequate means have been hitherto provided for the prevention and punishment of such offenses."

because while most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law,[27] others followed Coke in stating that abortion of a quick fetus was a "misprision," a term they translated to mean "misdemeanor."[28] That their reliance on Coke on this aspect of the law was uncritical and, apparently in all the reported cases, dictum (due probably to the paucity of common law prosecutions for post-quickening abortion), makes it now appear doubtful that abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus.

4. The English statutory law. England's first criminal abortion statute, Lord Ellenborough's Act, 43 Geo. 3, c. 58, came in 1803. It made abortion of a quick fetus, § 1, a capital crime, but in § 2 it provided lesser penalties for the felony of abortion before quickening, and thus preserved the quickening distinction. This contrast was continued in the general revision of 1828, 9 Geo. 4, c. 31, § 13, at 104. It disappeared, however, together with the death penalty, in 1837, 7 Will. 4 & 1 Vic., c. 85, § 6, at 360, and did not reappear in the Offenses Against the Person Act of 1861, 24 & 25 Vic., c. 100, § 59, at 438, that formed the core of English anti-abortion law until the liberalizing reforms of 1967. In 1929 the Infant Life (Preservation) Act, 19 & 20 Geo. 5, c. 34, came into being. Its emphasis was upon the destruction of "the life of a child capable of being born alive." It made a willful act performed with the necessary intent a felony. It contained a proviso that one was not to be found guilty of the offense "unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother."

A seemingly notable development in the English law was the case of Rex v. Bourne, [1939] 1 K. B. 687. This case apparently answered in the affirmative the question whether an abortion necessary to preserve the life of the pregnant woman was excepted from the criminal penalties of the 1861 Act. In his instructions to the jury Judge Macnaghten referred to the 1929 Act, and observed, p. 691, that that Act related to "the case where a child is killed by a willful act at the time when it is being delivered in the ordinary course of nature." Id., at 91. He concluded that the 1861 Act's use of the word "unlawfully," imported the same meaning expressed by the specific proviso in the 1929 Act even though there was no mention of preserving the mother's life in the 1861 Act. He then construed the phrase "preserving the life of the mother" broadly, that is, "in a reasonable sense," to include a serious and permanent threat to the mother's health, and instructed the jury to acquit Dr. Bourne if it found he had acted in a good faith belief that the abortion was necessary for this purpose. Id., at 693-694. The jury did acquit.

Recently Parliament enacted a new abortion law. This is the Abortion Act of 1967, 15 & 16 Eliz. 2, c. 87. The Act permits a licensed physician to perform an abortion where two other licensed physicians agree (a) "that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated," or (b) "that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped." The Act also provides that, in making this determination, "account may be taken of the pregnant woman's actual or reasonably forseeable environment." It also permits a physician, without the concurrence of others, to terminate a pregnancy where he is of the good faith opinion that the abortion "is immediately necessary to save the life or to prevent

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[27] [Citations omitted].

[28] [Citations omitted].

grave permanent injury to the physical or mental health of the pregnant woman."

5. The American law. In this country the law in effect in all but a few States until mid-19th century was the pre-existing English common law. Connecticut, the first State to enact abortion legislation, adopted in 1821 that part of Lord Ellenborough's Act that related to a woman "quick with child."[29] The death penalty was not imposed. Abortion before quickening was made a crime in that State only in 1860.[30] In 1828 New York enacted legislation[31] that, in two respects, was to serve as a model for early anti-abortion statutes. First, while barring destruction of an unquickened fetus as well as a quick fetus, it made the former only a misdemeanor, but the latter second-degree manslaughter. Second, it incorporated a concept of therapeutic abortion by providing that an abortion was excused if it "shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose." By 1840, when Texas had received the common law,[32] only eight American States had statutes dealing with abortion.[33] It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening. Most punished attempts equally with completed abortions. While many statutes included the exception for an abortion thought by one or more physicians to be necessary to save the mother's life, that provision soon disappeared and the typical law required that the procedure actually be necessary for that purpose.

Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950's, a large majority of the States banned abortion, however and whenever performed, unless done to save or preserve the life of the mother.[34] The exceptions, Alabama and the District of Columbia, permitted abortion to preserve the mother's health.[35] Three other States permitted abortions that were not "unlawfully" performed or that were not "without lawful justification," leaving interpretation of those standards to the courts.[36] In the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code, § 230.3,[37] set forth as Appendix B to the opinion in Doe v. Bolton, post ____.

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[29] [footnote omitted].

[30] [footnote omitted].

[31] [footnote omitted].

[32] [footnote omitted].

[33] [footnote omitted].

[34] [footnote omitted].

[35] Ala. Code, Tit. 14, § 9 (1958); D. C. Code Ann. § 22-201 (1967).

[36] [footnote omitted].

[37] Fourteen States have adopted some form of the ALI statute. [citations omitted].

By the end of 1970, four other States had repealed criminal penalties for abortions performed in early pregnancy by a licensed physician, subject to stated

[Continued on next page]

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

6. The position of the American Medical Association. The anti-abortion mood prevalent in this country in the late 19th century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period.

An AMA Committee on Criminal Abortion was appointed in May 1857. It presented its report, 12 Trans. of the Am. Med. Assn. 73-77 (1859), to the Twelfth Annual Meeting. That report observed that the Committee had been appointed to investigate criminal abortion "with a view to its general suppression." It deplored abortion and its frequency and it listed three causes "of this general demoralization":

> "The first of these causes is a wide-spread popular ignorance of the true character of the crime--a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening.
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> "The second of the agents alluded to is the fact that the profession themselves are frequently supposed careless of foetal life. . . .
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> "The third reason of the frightful extent of this crime is found in the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors, which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowledges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it, and to its life as yet denies all protection." Id., at 75-76.

The Committee then offered, and the Association adopted, resolutions protesting "against such unwarrantable destruction of human life," calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies "in pressing the subject." Id., at 28, 78.

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procedural and health requirements. Alaska Stat. § 11.15.060 (1970); Haw. Rev. Stat. § 453-16 (Supp. 1971); N. Y. Penal Code § 125.05 (McKinney Supp. 1972-1973); Wash. Rev. Code §§ 9.02.060 to 9.02.080 (Supp. 1972). The precise status of criminal abortion laws in some States is made unclear by recent decisions in state and federal courts striking down existing state laws, in whole or in part.

In 1871 a long and vivid report was submitted by the Committee on Criminal Abortion. It ended with the observation, "We had to deal with human life. In a matter of less importance we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less." 22 Trans. of the Am. Med. Assn. 258 (1871). It proffered resolutions, adopted by the Association, id., at 38-39, recommending, among other things, that it "be unlawful and unprofessional for any physician to induce abortion or premature labor, without the concurrent opinion of at least one respectable consulting physician, and then always with a view to the safety of the child--if that be possible," and calling "the attention of the clergy of all denominations to the preverted views of morality entertained by a large class of females--aye, and men also, on this important question."

Except for periodic condemnation of the criminal abortionist, no further formal AMA action took place until 1967. In that year the Committee on Human Reproduction urged the adoption of a stated policy of opposition to induced abortion except when there is "documented medical evidence" of a threat to the health or life of the mother, or that the child "may be born with incapacitating physical deformity or mental deficiency," or that a pregnancy "resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the patient," and two other physicians "chosen because of their recognized professional competence have examined the patient and have concurred in writing," and the procedure "is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals." The providing of medical information by physicians to state legislatures in their consideration of legislation regarding therapeutic abortion was "to be considered consistent with the principles of ethics of the American Medical Association." This recommendation was adopted by the House of Delegates. Proceedings of the AMA House of Delegates, 40-51 (June 1967).

In 1970, after the introduction of a variety of proposed resolutions, and of a report from its Board of Trustees, a reference committee noted "polarization of the medical profession on this controversial issue"; division among those who had testified; a difference of opinion among AMA councils and committees; "the remarkable shift in testimony" in six months, felt to be influenced "by the rapid changes in state laws and by the judicial decisions which tend to make abortion more freely available;" and a feeling "that this trend will continue." On June 25, 1970, the House of Delegates adopted preambles and most of the resolutions proposed by the reference committee. The preambles emphasized "the best interests of the patient," "sound clinical judgment," and "informed patient consent," in contrast to "mere acquiescence to the patient's demand." The resolutions asserted that abortion is a medical procedure that should be performed by a licensed physician in an accredited hospital only after consultation with two other physicians and in conformity with state law, and that no party to the procedure should be required to violate personally held moral principles.[38] Proceedings of the AMA House of Delegates 221 (June

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[38] "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 demand; and

"Whereas, The standards of sound clinical judgment, which, together with informed patient consent should be determinative 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 an accredited hospital acting only after consultation with two other physicians chosen because of their professional competency and in conformance with standards of good medical practice and the Medical Practice Act of his State; and be it further

"RESOLVED, That no physician or other professional personnel shall be compelled

1970). The AMA Judicial Council rendered a complementary opinion.[39]

7. The position of the American Public Health Association. In October 1970, the Executive Board of the APHA adopted Standards for Abortion Services. These were five in number:

> "a. Rapid and simple abortion referral must be readily available through state and local public health departments, medical societies, or other non-profit organizations.
> "b. An important function of counseling should be to simplify and expedite the provision of abortion services; it should not delay the obtaining of these services.
> "c. Psychiatric consultation should not be mandatory. As in the case of other specialized medical services, psychiatric consultation should be sought for definite indications and not on a routine basis.
> "d. A wide range of individuals from appropriately trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors.
> "e. Contraception and/or sterilization should be discussed with each abortion patient." Recommended Standards for Abortion Services, 61 Am. J. Pub. Health 396 (1971).

Among factors pertinent to life and health risks associated with abortion were three that "are recognized as important":

> "a. the skill of the physician,
> "b. the environment in which the abortion is performed, and above all
> "c. the duration of pregnancy, as determined by uterine size and confirmed by menstrual history." Id., at 397.

It was said that "a well-equipped hospital" offers more protection "to cope with unforeseen difficulties than an office or clinic without such resources. . . . The factor of gestational age is of overriding importance." Thus it was recommended that abortions in the second trimester and early abortions in the presence of existing medical complications be performed in hospitals as inpatient procedures. For pregnancies in the first trimester, abortion in the hospital with or without overnight stay "is probably the safest practice." An abortion in an extramural facility, however, is an acceptable alternative "provided arrangements exist in advance to admit patients promptly if unforeseen complications develop." Standards for an abortion

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to perform any act which violates his good medical judgment. Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles. In these circumstances good medical practice requires only that the physician or other professional personnel withdraw from the case so long as the withdrawal is consistent with good medical practice." Proceedings of the AMA House of Delegates 221 (June 1970).

39"The Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion that is performed in accordance with good medical practice and under circumstances that do not violate the laws of the community in which he practices.

"In the matter of abortions, as of any other medical procedure, the Judicial Council becomes involved whenever there is alleged violation of the Principles of Medical Ethics as established by the House of Delegates."

facility were listed. It was said that at present abortions should be performed by physicians or osteopaths who are licensed to practice and who have "adequate training." Id., at 398.

8. The position of the American Bar Association. At its meeting in February 1972 the ABA House of Delegates approved, with 17 opposing votes, the Uniform Abortion Act that had been drafted and approved the preceding August by the Conference of Commissioners on Uniform State Laws. 58 A. B. A. J. 380 (1972). We set forth the Act in full in the margin.[40] The Conference has appended an enlightening

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"UNIFORM ABORTION ACT

[40]"SECTION 1. [Abortion Defined; When Authorized.]

"(a) 'Abortion' means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.

"(b) An abortion may be performed in this state only if it is performed:

"(1) by a physician licensed to practice medicine [or osteopathy] in this state or by a physician practicing medicine [or osteopathy] in the employ of the government of the United States or of this state, [and the abortion is performed [in the physician's office or in a medical clinic, or] in a hospital approved by the [Department of Health] or operated by the United States, this state, or any department, agency, or political subdivision of either;] or by a female upon herself upon the advice of the physician; and

"(2) within [20] weeks after the commencement of the pregnancy [or after [20] weeks only if the physician has reasonable cause to believe (i) there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother, (ii) that the child would be born with grave physical or mental defect, or (iii) that the pregnancy resulted from rape or incest, or illicit intercourse with a girl under the age of 16 years of age].

"SECTION 2. [Penalty.] Any person who performs or procures an abortion other than authorized by this Act is guilty of a [felony] and, upon conviction thereof, may be sentenced to pay a fine not exceeding [$1,000] or to imprisonment [in the state penitentiary] not exceeding [5 years], or both.

"SECTION 3. [Uniformity of Interpretation.] This Act shall be construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.

"SECTION 4. [Short Title.] This Act may be cited as the Uniform Abortion Act.

"SECTION 5. [Severability.] If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

"SECTION 6. [Repeal.] The following acts and parts of acts are repealed:

"(1)

"(2)

"(3)

"SECTION 7. [Time of Taking Effect.] This Act shall take effect _____."

Prefatory Note.[41]

VII

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously.[42] The appellants and amici contend, moreover, that this is not a proper state purpose at all and suggest that if it were, the Texas statutes are overbroad in protecting it since the law fails to distinguish between married and unwed mothers.

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman.[43] This was particularly true prior to the development of antisepsis. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur, and others first announced in 1867, but were not generally accepted and employed until about the turn of the century. Abortion mortality was high. Even after 1900, and perhaps until as late as the development of antibiotics in the 1940's, standard modern techniques such as dilation and curettage were not nearly so safe as they are today. Thus it has been argued that a State's real concern in enacting a criminal

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[41]"This Act is based largely upon the New York abortion act following a review of the more recent laws on abortion in several states and upon recognition of a more liberal trend in laws on this subject. Recognition was given also to the several decisions in state and federal courts which show a further trend toward liberalization of abortion laws, especially during the first trimester of pregnancy.

"Recognizing that a number of problems appeared in New York, a shorter time period for 'unlimited' abortions was advisable. The time period was bracketed to permit the various states to insert a figure more in keeping with the different conditions that might exist among the states. Likewise, the language limiting the place or places in which abortions may be performed was also bracketed to account for different conditions among the states. In addition, limitations on abortions after the initial 'unlimited' period were placed in brackets so that individual states may adopt all or any of these reasons, or place further restrictions upon abortions after the initial period.

"This Act does not contain any provision relating to medical review committees or prohibitions against sanctions imposed upon medical personnel refusing to participate in abortions because of religious or other similar reasons, or the like. Such provisions, while related, do not directly pertain to when, where, or by whom abortions may be performed; however, the Act is not drafted to exclude such a provision by a state wishing to enact the same."

[42][citations omitted].

[43]See C. Haagensen & W. Lloyd, A Hundred Years of Medicine 19 (1943).

abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

Modern medical techniques have altered this situation. Appellants and various amici refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth.[44] Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the area of health and medical standards do remain. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

The third reason is the State's interest--some phrase it in terms of duty--in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception.[45] The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life.[46] Pointing to the absence of legislative history to support the contention, they claim that most state laws were designed solely to protect the woman. Because medical advances have lessened this concern, at least with respect to abortion in early pregnancy, they argue that with respect to such abortions the laws can no longer be justified by any state interest. There is some scholarly support for this view of original purpose.[47] The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus.[48] Proponents of this view point out that in many States, including Texas,[49] by statute or judicial

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[44][citations omitted].

[45]See Brief of Amicus National Right to Life Foundation; R. Drinan, The Inviolability of the Right To Be Born, in Abortion and the Law 107 (D. Smith, editor, 1967); Louisell, Abortion, The Practice of Medicine, and the Due Process of Law, 16 UCLA L. Rev. 233 (1969); Noonan 1.

[46][citation omitted].

[47]See discussions in Means I and Means II.

interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another.[50] They claim that adoption of the "quickening" distinction through received common law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception.

It is with these interests, and the weight to be attached to them, that this case is concerned.

VIII

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts the Court or individual Justices have indeed found at least the roots of that right in the First Amendment, Stanley v. Georgia, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, Terry v. Ohio, 392 U. S. 1, 8-9 (1968), Katz v. United States, 389 U.S. 347, 350 (1967), Boyd v. United States, 116 U.S. 616 (1886), see Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S. 479, 484-485 (1965); in the Ninth Amendment, id., at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v. Nebraska, 262 U.S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967), procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-542 (1942), contraception, Eisenstadt v. Baird, 405 U.S. 438, 453-454 (1972); id., at 460, 463-465 (WHITE, J., concurring), family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944), and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), Meyer v. Nebraska, supra.

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

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[48] [citation omitted].

[49] [citations omitted].

[50] [citations omitted].

On the basis of elements such as these, appellants and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, is unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. Jacobson v. Massachusetts, 197 U. S. 11 (1905) (vaccination); Buck v. Bell, 274 U. S. 200 (1927) (sterilization).

We therefore conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

We note that those federal and state courts that have recently considered abortion law challenges have reached the same conclusion. A majority, in addition to the District Court in the present case, have held state laws unconstitutional, at least in part, because of vagueness or because of overbreadth and abridgement of rights. [citations omitted].

Others have sustained state statutes. [citations omitted].

Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach.

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," [citations omitted], and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. [citations omitted].

In the recent abortion cases, cited above, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interest in protecting health and potential life and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws have held that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable.

IX

The District Court held that the appellee failed to meet his burden of demonstrating that the Texas statute's infringement upon Roe's rights was necessary to support a compelling state interest, and that, although the defendant presented "several compelling justifications for state presence in the area of abortions," the statutes outstripped these justifications and swept "far beyond any areas of compelling state interest." 314 F. Supp., at 1222-1223. Appellant and appellee both contest that holding. Appellant, as has been indicated, claims an absolute right that

bars any state imposition of criminal penalties in the area. Appellee argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest. As noted above, we do not agree fully with either formulation.

A. The appellee and certain amici argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment. The appellant conceded as much on reargument.[51] On the other hand, the appellee conceded on reargument[52] that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution: in the listing of qualifications for representatives and senators, Art. I, § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3;[53] in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl. 8; in the Electors provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave cl. 3; and in the Fifth, Twelfth, and Twenty-second Amendments as well as in §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.[54]

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[51] [footnote omitted].

[52] [footnote omitted].

[53] We are not aware that in the taking of any census under this clause, a fetus has ever been counted.

[54] When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?

There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out, n. 49, supra, that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?

All this, together with our observation, supra, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today. Persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn.[55] This is in accord with the results reached in those few cases where the issue has been squarely presented. [citations omitted] . . . . .

This conclusion, however, does not of itself fully answer the contentions raised by Texas, and we pass on to other considerations.

B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary, 478-479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which Eisenstadt, Griswold, Stanley, Loving, Skinner, Pierce, and Meyer were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics.[56] It appears to be the predominant, though not the unanimous, attitude of the Jewish faith.[57] It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family.[58]

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[55]Cf. the Wisconsin abortion statute, defining "unborn child" to mean "a human being from the time of conception until it is born alive," Wis. Stat. § 940.04 (6) (1969), and the new Connecticut statute, Public Act No. 1, May 1972 Special Session, declaring it to be the public policy of the State and the legislative intent "to protect and preserve human life from the moment of conception."

[56]Edelstein 16.

[57]Lader 97-99; D. Feldman, Birth Control in Jewish Law 251-294 (1968). For a stricter view, see I. Jakobovits, Jewish Views on Abortion, in Abortion and the Law 124 (D. Smith ed. 1967).

[58]Amicus Brief for the American Ethical Union et al. For the position of the National Council of Churches and of other denominations, see Lader 99-101.

As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception or upon live birth or upon the interim point at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid.[59] Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.[60] The Aristotelian theory of "mediate animation," that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this "ensoulment" theory from those in the Church who would recognize the existence of life from the moment of conception.[61] The latter is now, of course, the official belief of the Catholic Church. As one of the briefs amicus discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substantial problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as menstrual extraction, the "morning-after" pill, implantation of embryos, artificial insemination, and even artificial wombs.[62]

In areas other than criminal abortion the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. For example, the traditional rule of tort law had denied recovery for prenatal injuries even though the child was born alive.[63] That rule has been changed in almost every jurisdiction. In most States recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few courts have squarely so held.[64] In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries.[65] Such

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[59] L. Hellman & J. Pritchard, Williams Obstetrics 493 (14th ed. 1971); Dorland's Illustrated Medical Dictionary 1689 (24th ed. 1965).

[60] Hellman & Pritchard, supra, n. 58, at 493.

[61] For discussions of the development of the Roman Catholic position, see D. Callahan, Abortion: Law, Choice and Morality 409-447 (1970); Noonan 1.

[62] See D. Brodie, The New Biology and the Prenatal Child, 9 J. Fam. L. 391, 397 (1970); R. Gorney, The New Biology and the Future of Man, 15 UCLA L. Rev. 273 (1968) Note, Criminal Law--Abortion--The "Morning-After" Pill and Other Pre-implantation Birth-Control Methods and the Law, 46 Ore. L. Rev. 211 (1967); G. Taylor, The Biological Time Bomb 32 (1968); A. Rosenfeld, The Second Genesis 138-139 (1969); G. Smith, Through a Test Tube Darkly: Artificial Insemination and the Law, 67 Mich. L. Rev. 127 (1968); Note, Artificial Insemination and the Law, U. Ill. L. F. 203 (1968).

[63] [footnote omitted].

[64] [footnote omitted].

[65] [footnote omitted].

an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians ad litem.[66] Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

X

In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling."

With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now established medical fact, . . . that until the end of the first trimester mortality in abortion is less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period except when it is necessary to preserve the life or health of the mother.

Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.

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[66] [footnote omitted].

This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness. [citation omitted].

XI

To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a life saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

2. The State may define the term "physician," as it has been employed in the proceding numbered paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.

In Doe v. Bolton, post, procedural requirements contained in one of the modern abortion statutes are considered. That opinion and this one, of course, are to be read together.[67]

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and example of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

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[67]Neither in this opinion nor in Doe v. Bolton, post, do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances. North Carolina, for example, 1B N. C. Gen. Stat. § 14-45.1 (Supp. 1971), requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age, 41 N. C. A. G. 489 (1971); if the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional.

XII

Our conclusion that Art. 1196 is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall. The exception of Art. 1196 cannot be stricken separately, for then the State is left with a statute proscribing all abortion procedures no matter how medically urgent the case.

Although the District Court granted plaintiff Roe declaratory relief, it stopped short of issuing an injunction against enforcement of the Texas statutes. The Court has recognized that different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other. [citations omitted]. We are not dealing with a statute that, on its face, appears to abridge free expression, an area of particular concern. [citations omitted].

We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional.

* * * * *

It is so ordered.

MR. JUSTICE STEWART, concurring.

In 1963, this Court, in Ferguson v. Skrupa, 372 U. S. 726, purported to sound the death knell for the doctrine of substantive due process, a doctrine under which many state laws had in the past been held to violate the Fourteenth Amendment. As Mr. Justice Black's opinion for the Court in Skrupa put it: "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." Id., at 730.[1]

Barely two years later, in Griswold v. Connecticut, 381 U. S. 479, the Court held a Connecticut birth control law unconstitutional. In view of what had been so recently said in Skrupa, the Court's opinion in Griswold understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet, the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution.[2] So it was clear to me then, and it is equally clear to me now, that the Griswold decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the "liberty" that is protected by the Due Process Clause of the Fourteenth Amendment.[3] As so understood, Griswold stands as one in a long line of pre-Skrupa cases decided under the doctrine of substantive due process, and I now accept it as such.

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[1][footnote omitted].

[2]There is no constitutional right of privacy, as such. "[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's general right to privacy--his right to be let alone by other people--is, like the protection of his property and of his very life, left largely to the law of the individual States." Katz v. United States, 389 U. S. 347, 350-351 (footnotes omitted).

[3][footnote omitted].

"In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." [citations omitted]. The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. [citations omitted].

As Mr. Justice Harlan once wrote: "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." Poe v. Ullman, 367 U. S. 497, 543 (opinion dissenting from dismissal of appeal) (citations omitted). In the words of Mr. Justice Frankfurter, "Great concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." [citations omitted].

Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. [citations omitted]. As recently as last Term, in Eisenstadt v. Baird, 405 U. S. 438, 453, we recognized "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy. "Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in Pierce v. Society of Sisters, 268 U. S. 510 (1925), or the right to teach a foreign language protected in Meyer v. Nebraska, 262 U. S. 390 (1923)." [citation omitted].

Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment.

It is evident that the Texas abortion statute infringes that right directly. Indeed, it is difficult to imagine a more complete abridgment of a constitutional freedom than that worked by the inflexible criminal statute now in force in Texas. The question then becomes whether the state interests advanced to justify this abridgment can survive the "particularly careful scrutiny" that the Fourteenth Amendment here requires.

The asserted state interests are protection of the health and safety of the pregnant woman, and protection of the potential future human life within her. These are legitimate objectives, amply sufficient to permit a State to regulate abortions as it does other surgical procedures, and perhaps sufficient to permit a State to regulate abortions more stringently or even to prohibit them in the late stages of pregnancy. But such legislation is not before us, and I think the Court today has thoroughly demonstrated that these state interests cannot constitutionally support the broad abridgment of personal liberty worked by the existing Texas law. Accordingly, I join the Court's opinion holding that that law is invalid under the Due

Process Clause of the Fourteenth Amendment.

MR. JUSTICE REHNQUIST, dissenting.

The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While its opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it which invalidate the Texas statute in question, and therefore dissent.

I

The Court's opinion decides that a State may impose virtually no restriction on the performance of abortions during the first trimester of pregnancy. Our previous decisions indicate that a necessary predicate for such an opinion is a plaintiff who was in her first trimester of pregnancy at some time during the pendency of her law suit. While a party may vindicate his own constitutional rights, he may not seek vindication for the rights of others. [citations omitted]. The Court's statement of facts in this case makes clear, however, that the record in no way indicates the presence of such a plaintiff. We know only that plaintiff Roe at the time of filing her complaint was a pregnant woman; for aught that appears in this record, she may have been in her last trimester of pregnancy as of the date the complaint was filed.

Nothing in the Court's opinion indicates that Texas might not constitutionally apply its proscription of abortion as written to a woman in that stage of pregnancy. Nonetheless, the Court uses her complaint against the Texas statute as a fulcrum for deciding that States may impose virtually no restrictions on medical abortions performed during the first trimester of pregnancy. In deciding such a hypothetical lawsuit the Court departs from the longstanding admonition that it should never "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." [citations omitted].

II

Even if there were a plaintiff in this case capable of litigating the issue which the Court decides, I would reach a conclusion opposite to that reached by the Court. I have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case. Texas by the statute here challenged bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" which the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution which the Court has referred to as embodying a right to privacy. [citation omitted].

If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with the statement of MR. JUSTICE STEWART in his concurring opinion that the "liberty," against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, but only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. [citation omitted]. The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit on legislative power to enact

laws such as this, albeit a broad one. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in Williamson, supra. But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors which the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.

The Court eschews the history of the Fourteenth Amendment in its reliance on the "compelling state interest" test. [citation omitted]. But the Court adds a new wrinkle to this test by transposing if from the legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to his case arising under the Due Process Clause of the Fourteenth Amenement. Unless I misapprehend the consequences of this transplanting of the "compelling state interest test," the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it.

While the Court's opinion quotes from the dissent of Mr. Justice Holmes in Lochner v. New York, 198 U. S. 45 (1905), the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in Lochner and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision here to break the term of pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

The fact that a majority of the States, reflecting after all the majority sentiment in those States, have had restrictions on abortions for at least a century seems to me as strong an indication there is that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," [citation omitted]. Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the "right" to an abortion is not so universally accepted as the appellants would have us believe.

To reach its result the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut legislature. Conn. Stat. Tit. 22, §§ 14, 16 (1821). By the time of the adoption of the Fourteenth Amendment in 1868 there were at least 36 laws enacted by state or territorial legislatures limiting abortion.[1] While many States have amended or updated their laws, 21 of the laws on the books in 1868 remain in effect today.[2] Indeed, the Texas statute struck down today was, as the majority notes, first enacted in 1857 and "has remained substantially unchanged to the present time." Ante, at ____.

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[1][citations omitted].

[2][citations omitted].

There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.

III

Even if one were to agree that the case which the Court decides were here, and that the enunciation of the substantive constitutional law in the Court's opinion were proper, the actual disposition of the case by the Court is still difficult to justify. The Texas statute is struck down in toto, even though the Court apparently concededs that at later periods of pregnancy Texas might impose these selfsame statutory limitations on abortion. My understanding of past practice is that a statute found to be invalid as applied to a particular plantiff, but not unconstitutional as a whole, is not simply "struck down" but is instead declared unconstitutional as applied tothe fact situation before the Court. [citations omitted].

DOE v. BOLTON, ___ U. S. ___, 93 S. Ct. 739, 41 U.S.L.W. 4233 (U. S. Supreme Court, 1973).

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In this appeal the criminal abortion statutes recently enacted in Georgia are challenged on constitutional grounds. The statutes are §§ 26-1201 through 26-1203 of the State's Criminal Code, formulated by Georgia Laws, 1968 Session, 1249, 1277-1280. In Roe v. Wade, ante ___, we today have struck down, as constitutionally defective, the Texas criminal abortion statutes that are representative of provisions long in effect in a majority of our States. The Georgia legislation, however, is different and merits separate consideration.

I

The statutes in question are reproduced as Appendix A, post ___.[1] As the appellants acknowledge,[2] the 1968 statutes are patterned upon the American Law Institute's Model Penal Code, § 230.3 (Proposed Official Draft, 1962), reproduced as Appendix B, post ___. . . . .

Section 26-1201, with a referenced exception, makes abortion a crime, and § 26-1203 provides that a person convicted of that crime shall be punished by imprisonment for not less than one nor more than 10 years. Section 26-1202 (a) states the exception and removes from § 1201's definition of criminal abortion, and thus makes noncriminal, an abortion "performed by a physician duly licensed" in Georgia when, "based upon his best clinical judgment . . . an abortion is necessary because

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[1]The portions italicized in Appendix A are those held unconstitutional by the District Court.

[2][footnote omitted].

[3][footnote omitted].

[4][footnote omitted].

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

Section 26-1202 also requires, by numbered subdivisions of its subsection (b), that, for an abortion to be authorized or performed as a noncriminal procedure, additional conditions must be fulfilled. These are (1) and (2) residence of the woman in Georgia; (3) reduction to writing of the performing physician's medical judgment that an abortion is justified for one or more of the reasons specified by § 26-1202 (a), with written concurrence in that judgment by at least two other Georgia-licensed physicians, based upon their separate personal medical examinations of the woman; (4) performance of the abortion in a hospital licensed by the State Board of Health and also accredited by the Joint Commission on Accreditation of Hospitals; (5) advance approval by an abortion committee of not less than three members of the hospital's staff; (6) certifications in a rape situation; and (7), (8), and (9) maintenance and confidentiality of records. There is provision (subsection (c) for judicial determination of the legality of a proposed abortion on petition of the judicial circuit law officer or of a close relative, as therein defined, of the unborn child, and for expeditious hearing of that petition. There is also a provision (subsection (e) giving a hospital the right not to admit an abortion patient and giving any physician and any hospital employee or staff member the right, on moral or religious grounds, not to participate in the procedure.

II

On April 16, 1970, Mary Doe,[6] 23 other individuals (nine described as Georgia-licensed physicians, seven as nurses registered in the State, five as clergymen, and two as social workers), and two nonprofit Georgia corporations that advocate abortion reform, [these are the plaintiffs/appellants], instituted this federal action in the Northern District of Georgia against the State's attorney general, the district attorney of Fulton County, and the chief of police of the city of Atlanta, [these are the defendants/appellees]. The plaintiffs sought a declaratory judgment that the Georgia abortion statutes were unconstitutional in their entirety. They also sought injunctive relief restraining the defendants and their successors from enforcing the statutes.

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[5] In contrast with the ALI model, the Georgia statute makes no specific reference to pregnancy resulting from incest. We were assured by the State at reargument that this was because the statute's reference to "rape" was intended to include incest. Tr. of Rearg. 32.

[6] Appellants by their complaint, Appendix 7, allege that the name is a pseudonym.

Mary Doe alleged:

> "(1) She was a 22-year-old Georgia citizens, married, and nine weeks pregnant. She had three living children. The two older ones had been placed in a foster home because of Doe's poverty and inability to care for them. The youngest, born July 19, 1969, had been placed for adoption. Her husband had recently abandoned her and she was forced to live with her indigent parents and their eight children. She and her husband however, had become reconciled. He was a construction worker employed only sporadically. She had been a mental patient at the State Hospital. She had been advised that an abortion could be performed on her with less danger to her health than if she gave birth to the child she was carrying. She would be unable to care for or support the new child.
>
> "(2) On March 25, 1970, she applied to the Abortion Committee of Grady Memorial Hospital, Atlanta, for a therapeutic abortion under § 26-1202. Her application was denied 16 days later, on April 10, when she was eight weeks pregnant, on the ground that her situation was not one described in § 26-1202 (a).[7]
>
> "(3) Because her application was denied, she was forced either to relinquish 'her right to decide when and how many children she will bear' or to seek an abortion that was illegal under the Georgia statutes. This invaded her rights of privacy and liberty in matters related to family, marriage, and sex, and deprived her of the right to choose whether to bear children. This was a violation of rights guaranteed her by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. The statutes also denied her equal protection and procedural due process and, because they were unconstitutionally vague, deterred hospitals and doctors from performing abortions. She sued 'on her own behalf and on behalf of all others similarly situated.'"

The other plaintiffs alleged that the Georgia statutes "chilled and deterred" them from practicing their respective professions and deprived them of rights guaranteed by the First, Fourth, and Fourteenth Amendments. These plaintiffs also purported to sue on their own behalf and on behalf of others similarly situated.

[Those portions of the Court's opinion describing the lower court's decision in the case, and discussing the issue of the standing of the parties to maintain the lawsuit, are omitted. The Court concluded that Doe and the physicians were proper parties to challenge the statute; in view of that fact the Court said it did not have to decide about the status of the other plaintiffs].

IV

The appellants attack on several grounds those portions of the Georgia abortion statutes that remain after the District Court decision: undue restriction of a right to personal and marital privacy; vagueness; deprivation of substantive and procedural due process; improper restriction to Georgia residents; and denial of equal protection.

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[7] [footnote omitted].

A. Roe v. Wade, ante, sets forth our conclusion that a pregnant woman does not have an absolute constitutional right to an abortion on her demand. What is said there is applicable here and need not be repeated.

B. The appellants go on to argue, however, that the present Georgia statutes must be viewed historically, that is, from the fact that prior to the 1968 Act an abortion in Georgia was not criminal if performed to "preserve the life" of the mother. It is suggested that the present statute, as well, has this emphasis on the mother's rights, not on those of the fetus. Appellants contend that it is thus clear that Georgia has given little, and certainly not first, consideration to the unborn child. Yet it is the unborn child's rights that Georgia asserts in justification of the statute. Appellants assert that this justification cannot be advanced at this late date.

Appellants then argue that the statutes do not adequately protect the woman's right. This is so because it would be physically and emotionally damaging to Doe to bring a child into her poor "fatherless"[10] family, and because advances in medicine and medical techniques have made it safer for a woman to have a medically induced abortion than for her to bear a child. Thus, "a statute which requires a woman to carry an unwanted pregnancy to term infringes not only on a fundamental right of privacy but on the right to life itself." [citation omitted].

The appellants recognize that a century ago medical knowledge was not so advanced as it is today, that the techniques of antisepsis were not known, and that any abortion procedure was dangerous for the woman. To restrict the legality of the abortion to the situation where it was deemed necessary, in medical judgment, for the preservation of the woman's life was only a natural conclusion in the exercise of the legislative judgment of that time. A State is not to be reproached, however, for a past judgmental determination made in the light of then-existing medical knowledge. It is perhaps unfair to argue, as the appellants do, that because the early focus was on the preservation of the woman's life, the State's present professed interest in the protection of embryonic and fetal life is to be downgraded. That argument denies the State the right to readjust its views and emphases in the light of the advanced knowledge and techniques of the day.

C. Appellants argue that § 26-1202 (a) of the Georgia statute, as it has been left by the District Court's decision, is unconstitutionally vague. This argument centers in the proposition that, with the District Court's having stricken the statutorily specified reasons, it still remains a crime for a physician to perform an abortion except when, as § 26-1202 (a) reads, it is "based upon his best clinical judgment that an abortion is necessary." The appellants contend that the word "necessary" does not warn the physician of what conduct is proscribed; that the statute is wholly without objective standards and is subject to diverse interpretation; and that doctors will choose to err on the side of caution and will be arbitrary.

The net result of the District Court's decision is that the abortion determination, so far as the physician is concerned, is made in the exercise of his professional, that is, his "best clinical" judgment in the light of all the attendant circumstances. He is not now restricted to the three situations originally specified. Instead, he may range farther afield wherever his medical judgment, properly and professionally exercised, so dictates and directs him.

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[10] [footnote omitted].

The vagueness argument is set at rest by the decision in United States v. Vuitch, 402 U.S. 62, 71-72 (1971), where the issue was raised with respect to a District of Columbia statute making abortions criminal "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." That statute has been construed to bear upon psychological as well as physical well-being. This being so, the Court concluded that the term "health" presented no problem of vagueness. "Indeed, whether a particular operation is necessary for a patient's physical or mental health is judgment that physicians are obviously called upon to make routinely whenever surgery is considered." 402 U. S., at 72. This conclusion is equally applicable here. Whether, in the words of the Georgia statute, "an abortion is necessary," is a professional judgment that the Georgia physician will be called upon to make routinely.

We agree with the District Court, 319 F. Supp., at 1058, that the medical judgment may be exercised in the light of all factors--physical, emotional, psychological, familial, and the woman's age--relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.

D. The appellants next argue that the District Court should have declared unconstitutional three procedural demands of the Georgia statute: (1) that the abortion be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals:[11] (2) that the procedure be approved by the hospital staff abortion committee; and (3) that the performing physician's judgment be confirmed by the independent examinations of the patient by two other licensed physicians. The appellants attack these provisions not only on the ground that they unduly restrict the woman's right of privacy, but also on procedural due process and equal protection grounds. The physician-appellants also argue that, by subjecting a doctor's individual medical judgment to committee approval and to confirming consultations, the statute impermissibly restricts the physician's right to practice his profession and deprives him of due process.

1. JCAH Accreditation. The Joint Commission on Accreditation of Hospitals is an organization without governmental sponsorship or overtones. No question whatever is raised concerning the integrity of the organization or the high purpose of the accreditation process.[12] That process, however, has to do with hospital standards

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[11]We were advised at reargument, . . . 10, that only 54 of Georgia's 159 counties have a JCAH accredited hospital.

[12]Since its founding, JCAH has pursued the "elusive goal" of defining the "optimal setting" for "quality of service in hospitals." JCAH, Accreditation Manual for Hospitals, Foreward (Dec. 1970). The Manual's Introduction states the organization's purpose to establish standards and conduct accreditation programs that will afford quality medical care "to give patients the optimal benefits that medical science has to offer." . . .

generally and has no present particularized concern with abortion as a medical or surgical procedure.[13] In Georgia there is no restriction of the performance of non-abortion surgery in a hospital not yet accredited by the JCAH so long as other requirements imposed by the State, such as licensing of the hospital and of the operating surgeon, are met. [citations omitted]. Furthermore, accreditation by the Commission is not granted until a hospital has been in operation at least one year. The Model Penal Code, § 230.3, Appendix B hereto, contains no requirement for JCAH accreditation. And the Uniform Abortion Act (Final Draft, August, 1971),[14] approved by the American Bar Association in February 1972, contains no JCAH accredited hospital specification.[15] Some courts have held that a JCAH accreditation requirement is an overbroad infringement of fundamental rights because it does not relate to the particular medical problems and dangers of the abortion operation. [citations omitted].

We hold that the JCAH accreditation requirement does not withstand constitutional scrutiny in the present context. It is a requirement that simply is not "based on differences that are reasonably related to the purposes of the Act in which it is found." [citation omitted].

This is not to say that Georgia may not or should not, from and after the end of the first trimester, adopt standards for licensing all facilities where abortions may be performed so long as those standards are legitimately related to the objective the State seeks to accomplish. The appellants contend that such a relationship would be lacking even in a lesser requirement that an abortion be performed in a licensed hospital, as opposed to a facility, such as a clinic, that may be required by the State to possess all the staffing and services necessary to perform an abortion safely (including those adequate to handle serious complications or other emergency, or arrangements with a nearby hospital to provide such services). Appellants and various amici have presented us with a mass of data purporting to demonstrate that some facilities other than hospitals are entirely adequate to perform abortions if they possess these qualifications. The State, on the other hand, has not presented persuasive data to show that only hospitals meet its acknowledged interest in insuring the quality of the operation and the full protection of the patient. We feel compelled to agree with appellants that the State must show more than it has in order to prove that only the full resources of a licensed hospital, rather than those of some other appropriately licensed institution, satisfy these health interests. We hold that the hospital requirement of the Georgia law, because it fails to exclude the first trimester of pregnancy, see Roe v. Wade, ante, p. ____, is also invalid. In so holding we naturally express no opinion on the medical judgment involved in any particular case, that is, whether the patient's situation is such that an abortion should be performed in a hospital rather than in some other facility.

2. Committee Approval. The second aspect of the appellants' procedural attack relates to the hospital abortion committee and to the pregnant woman's asserted lack of access to that committee. Relying primarily on Goldberg v. Kelly, 397 U. S. 254 (1970), concerning the termination of welfare benefits, and Wisconsin v. Constantineau, 400 U. S. 433 (1971), concerning the posting of an alcoholic's name,

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[13] "The Joint Commission neither advocates nor opposes any particular position with respect to elective abortions." Letter dated July 9, 1971, from John L. Brewer, M.D., Commissioner, JCAH, to the Rockefeller Foundation. Brief for amici, American College of Obstetricians and Gynecologists, et. al. p. A-3.

[14] See Roe v. Wade, ante ____, n. 40.

[15] Some state statutes do not have the JCAH accreditation requirement. [citations omitted]. Others contain the specification. [citations omitted].

Doe first argues that she was denied due process because she could not make a presentation to the committee. It is not clear from the record, however, whether Doe's own consulting physician was or was not a member of the committee or did or did not present her case, or, indeed, whether she herself was or was not there. We see nothing in the Georgia statute that explicitly denies access to the committee by or on behalf of the woman. If the access point alone were involved, we would not be persuaded to strike down the committee provision on the unsupported assumption that access is not provided.

Appellants attack the discretion the statute leaves to the committee. The most concrete argument they advance is their suggestion that it is still a badge of infamy "in many minds" to bear an illegitimate child, and that the Georgia system enables the committee members' personal views as to extramarital sex relations, and punishment therefor, to govern their decisions. This approach obviously is one founded on suspicion and one that discloses a lack of confidence in the integrity of physicians. To say that physicians will be guided in their hospital committee decisions by their predilections on extramarital sex unduly narrows the issue to pregnancy outside marriage. (Doe's own situation did not involve extramarital sex and its product.) The appellants' suggestion is necessarily somewhat degrading to the conscientious physician, particularly the obstetrician, whose professional activity is concerned with the physical and mental welfare, the woes, the emotions, and the concern of his female patients. He, perhaps more than anyone else, is knowledgeable in this area of patient care, and he is aware of human frailty, so-called "error," and needs. The good physician--despite the presence of rascals in the medical profession, as in all others, we trust that most physicians are "good"--will have a sympathy and an understanding for the pregnant patient that probably is not exceeded by those who participate in other areas of professional counseling.

It is perhaps worth noting that the abortion committee has a function of its own. It is a committee of the hospital and it is composed of members of the institution's medical staff. The membership usually is a changing one. In this way its work burden is shared and is more readily accepted. The committee's function is protective. It enables the hospital appropriately to be advised that its posture and activities are in accord with legal requirements. It is to be remembered that the hospital is an entity and that it, too, has legal rights and legal obligations.

Saying all this, however, does not settle the issue of the constitutional propriety of the committee requirement. Viewing the Georgia statute as a whole, we see no constitutionally justifiable pertinence in the structure for the advance approval by the abortion committee. With regard to the protection of potential life, the medical judgment is already completed prior to the committee stage, and review by a committee once removed from diagnosis is basically redundant. We are not cited to any other surgical procedure made subject to committee approval as a matter of state criminal law. The woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it are substantially limited by this statutorily imposed overview. And the hospital itself is otherwise fully protected. Under § 26-1202(e) the hospital is free not to admit a patient for an abortion. It is even free not to have an abortion committee. Further, a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital. Section 26-1202(e) affords adequate protection to the hospital and little more is provided by the committee prescribed by § 26-1202(b)(5).

We conclude that the interposition of the hospital abortion committee is unduly restrictive of the patient's rights and needs that, at this point, have already been medically delineated and substantiated by her personal physician. To ask more serves

neither the hospital nor the State.

3. Two-Doctor Concurrence. The third aspects of the appellants' attack centers on the "time and availability of adequate medical facilities and personnel." It is said that the system imposes substantial and irrational roadblocks and "is patently unsuited" to prompt determination of the abortion decision. Time, of course, is critical in abortion. Risks during the first trimester of pregnancy are admittedly lower than during later months.

The appellants purport to show by a local study[16] of Grady Memorial Hospital (serving indigent residents in Fulton and DeKalb Counties) that the "mechanics of the system itself forced . . . discontinuation of the abortion process" because the median time for the workup was 15 days. The same study shows, however, that 27% of the candidates for abortion were already 13 or more weeks pregnant at the time of application, that is, they were at the end of or beyond the first trimester when they made their application. It is too much to say, as appellants do, that these particular persons "were victims of [a] system over which they [had] no control." If higher risk was incurred because of abortions in the second rather than the first trimester, much of that risk was due to delay in application, and not to the alleged cumbersomeness of the system. We note, in passing, that appellant Doe had no delay problem herself; the decision in her case was made well within the first trimester.

It should be manifest that our rejection of the accredited hospital requirement and, more important, of the abortion committee's advance approval eliminates the major grounds of the attack based on the systems's delay and the lack of facilities. There remains, however, the required confirmation by two Georgia-licensed physicians in addition to the recommendation of the pregnant woman's own consultant (making under the statute, a total of six physicians involved, including the three on the hospital's abortion committee). We conclude that this provision, too, must fall.

The statute's emphasis, as has been repetitively noted, is on the attending physician's "best clinical judgment that an abortion is necessary." That should be sufficient. The reasons for the presence of the confirmation step in the statute are perhaps apparent, but they are insufficient to withstand constitutional challenge. Again, no other voluntary medical or surgical procedure for which Georgia requires confirmation by two other physicians has been cited to us. If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure or deprivation of his license are available remedies. Required acquiescence by co-practitioners has no rational connection with a patient's needs and unduly infringes on the physician's right to practice. The attending physician will know when a consultation is advisable--the doubtful situation, the need for assurance when the medical decision is a delicate one, and the like. Physicians have followed this routine historically and know its usefulness and benefit for all concerned. It is still true today that "[r]eliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he [the physician] possesses the requisite qualifications." [citations omitted].

E. The appellants attack the residency requirement of the Georgia law, §§ 26-1202(b)(1) and (b)(2), as violative of the right to travel stressed in Shapiro v. Thompson, 394 U. S. 618, 629-631 (1969), and other cases. A requirement of this

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[16] [citation omitted].

kind, of course, could be deemed to have some relationship to the availability of post-procedure medical care for the aborted patient.

Nevertheless, we do not uphold the constitutionality of the residence requirement. It is not based on any policy of preserving state-supported facilities for Georgia residents, for the bar also applies to private hospitals and to privately retained physicians. There is no intimation, either, that Georgia facilities are utilized to capacity in caring for Georgia residents. Just as the Privileges and Immunities Clause, Const. Art. IV, § 2, protects persons who enter other States to ply their trade, [citations omitted], so must it protect persons who enter Georgia seeking the medical services that are available there. [citation omitted]. A contrary holding would mean that a State could limit to its own residents the general medical care available within its borders. This we could not approve.

F. The last argument on this phase of the case is one that often is made, namely, that the Georgia system is violative of equal protection because it discriminates against the poor. The appellants do not urge that abortions should be performed by persons other than licensed physicians, so we have no argument that because the wealthy can better afford physicians, the poor should have non-physicians made available to them. The appellants acknowledged that the procedures are "nondiscriminatory in . . . express terms" but they suggest that they have produced invidious discriminations. The District Court rejected this approach out of hand. 319 F. Supp., at 1056. It rests primarily on the accreditation and approval and confirmation requirements, discussed above, and on the assertion that most of Georgia's counties have no accredited hospital. We have set aside the accreditation, approval, and confirmation requirements, however, and with that, the discrimination argument collapses in all significant aspects.

V

The appellants complain, finally, of the District Court's denial of injunctive relief. A like claim was made in Roe v. Wade, ante. We declined decision there insofar as injunctive relief was concerned, and we decline it here. We assume that Georgia's prosecutorial authorities will give full recognition to the judgment of this Court.

In summary, we hold that the JCAH accredited hospital provision and the requirements as to approval by the hospital abortion committee, as to confirmation by two independent physicians, and as to residence in Georgia are all violative of the Fourteenth Amendment. Specifically, the following portions of § 26-1202(b), remaining after the District Court's judgment, are invalid:

(1) Subsections (1) and (2).
(2) That portion of Subsection (3) following the words "such physician's judgment is reduced to writing."
(3) Subsections (4) and (5).

The judgment of the District Court is modified accordingly and, as so modified, is affirmed. Costs are allowed to the appellants.

APPENDIX A

Criminal Code of Georgia

(The italicized portions are those held unconstitutional by the District Court)

CHAPTER 26-12. ABORTION.

26-1201. Criminal Abortion. Except as otherwise provided in section 26-1202,

a person commits criminal abortion when he admisters any medicine, drug or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion

26-1202. Exception. (a) Section 26-1201 shall not apply to an abortion performed by a physician duly licensed to practice medicine and surgery pursuant to Chapter 84-9 or 84-12 of the Code of Georgia of 1933, as amended, based upon his best clinical judgment that an abortion is necessary because:

(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or

(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or

(3) The pregnancy resulted from forcible or statutory rape.

(b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met;

(1) The pregnant woman requesting the abortion certifies in writing under oath and subject to the penalties of false swearing to the physician who proposes to perform the abortion that she is a bona fide legal resident of the State of Georgia.

(2) The physician certifies that he believes the woman is a bona fide resident of this State and that he has no information which should lead him to believe otherwise.

(3) Such physician's judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery pursuant to Chapter 84-9 of the Code of Georgia of 1933, as amended, who certify in writing that based upon their separate personal medical examinations of the pregnant woman, the abortion is, in their judgment, necessary because of one or more of the reasons enumerated above.

(4) Such abortion is performed in a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals.

(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.

(6) If the proposed abortion is considered necessary because the woman has been raped, the woman makes a written statement under oath, and subject to the penalties of false swearing, of the date, time and place of the rape and the name of the rapist, if known. There must be attached to this statement a certified copy of any report of the rape made by any law enforcement officer or agency and a statement by the solicitor general of the judicial circuit where the rape occurred or allegedly occurred that, according to his best information, there is probable cause to believe that the rape did occur.

(7) Such written opinions, statements, certificates, and concurrences are maintained in the permanent files of such hospital and are available at all reasonable times to the solicitor general of the judicial circuit in which the hospital is located.

(8) A copy of such written opinions, statements, certificates, and concurrences is filed with the Director of the State Department of Public Health within ten (10) days after such operation is performed.

(9) All written opinions, statements, certificates, and concurrences filed and maintained pursuant to paragraphs (7) and (8) of this subsection shall be confidential records and shall not be made available for public inspection at any time.

(c) Any solicitor general of the judicial circuit in which an abortion is to be performed under this section, or any person who would be a relative of the child within the second degree of consanguinity, may petition the superior court of the county in which the abortion is to be performed for a declaratory judgment whether the performance of such abortion would violate any constitutional or other legal rights of the fetus. Such solicitor general may also petition such court for the purpose of taking issue with compliance with the requirements of this section. The physician who proposes to perform the abortion and the pregnant woman shall be respondents. The petition shall be heard expeditiously and if the court adjudges that such abortion would violate the constitutional or other legal rights of the fetus, the court shall so declare and shall restrain the physician from performing the abortion.

(d) If an abortion is performed in compliance with this section, the death of the fetus shall not give rise to any claim for wrongful death.

(e) Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b) (5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinery or recriminatory action against such person.

26-1203. Punishment. A person convicted of criminal abortion shall be punished by imprisonment for not less than one nor more than 10 years.

APPENDIX B

American Law Institute

MODEL PENAL CODE

Section 230.3. Abortion.

(1) Unjustified Abortion. A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.

(2) Justifiable Abortion. A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection.

Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable. [Additional exceptions from the requirement of hospitalization may be incorporated here to take account of situations in sparsely settled areas where hospitals are not generally accessible.]

(3) Physicians' Certificates; Presumption from Non-Compliance. No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any of the requirements of the Subsection gives rise to a presumption that the abortion was unjustified.

(4) Self-Abortion. A woman whose pregnancy has continued beyond the twenty-sixth week commits a felony of the third degree if she purposely terminates her own pregnancy otherwise than by a live birth, or if she uses instruments, drugs or violence upon herself for that purpose. Except as justified under Subsection (2), a person who induces or knowingly aids a woman to use instruments, drugs or violence upon herself for the purpose of terminating her pregnancy otherwise than by a live birth commits a felony of the third degree whether or not the pregnancy has continued beyond the twenty-sixth week.

(5) Pretended Abortion. A person commits a felony of the third degree if, representing that it is his purpose to perform an abortion, he does an act adapted to cause abortion in a pregnant woman although the woman is in fact not pregnant, or the actor does not believe she is. A person charged with unjustified abortion under Subsection (1) or an attempt to commit that offense may be convicted thereof upon proof of conduct prohibited by this Subsection.

(6) Distribution of Abortifacients. A person who sells, offers to sell, possesses with intent to sell, advertises, or displays for sale anything specially designed to terminate a pregnancy, or held out by the actor as useful for that purpose, commits a misdemeanor, unless:

(a) the sale, offer or display is to a physician or druggist or to an intermediary in a chain of distribution to physicians or druggists; or
(b) the sale is made upon prescription or order of a physician; or
(c) the possession is with intent to sell as authorized in paragraphs (a) and (b); or
(d) the advertising is addressed to persons named in paragraph (a) and confined to trade or professional channels not likely to reach the general public.'

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

Nos. 70-18 AND 70-40

[ROE v. WADE & DOE v. BOLTON]

MR. CHIEF JUSTICE BURGER, concurring.

I agree that, under the Fourteenth Amendment to the Constitution, the abortion statutes of Georgia and Texas impermissibly limit the performance of abortions

necessary to protect the health of pregnant women, using the term health in its broadest medical context. See Vuitch v. United States, 402 U. S. 62, 71-72 (1971). I am somewhat troubled that the Court has taken notice of various scientific and medical data in reaching its conclusion; however, I do not believe that the Court has exceeded the scope of judicial notice accepted in other contexts.

In oral argument, counsel for the State of Texas informed the Court that early abortive procedures were routinely permitted in certain exceptional cases, such as nonconsensual pregnancies resulting from rape and incest. In the face of a rigid and narrow statute, such as that of Texas, no one in these circumstances should be placed in a posture of dependence on a prosecutorial policy or prosecutorial discretion. Of course, States must have broad power, within the limits indicated in the opinions, to regulate the subject of abortions, but where the consequences of state intervention are so severe, uncertainty must be avoided as much as possible. For my part, I would be inclined to allow a State to require the certification of two physicians to support an abortion, but the Court holds otherwise. I do not believe that such a procedure is unduly burdensome, as are the complex steps of the Georgia statute, which require as many as six doctors and the use of a hospital certified by the JCAH.

I do not read the Court's holding today as having the sweeping consequences attributed to it by the dissenting Justices; the dissenting views discount the reality that the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortion on demand.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court,[1] I add a few words.

The questions presented in the present cases go far beyond the issues of vagueness, which we considered in United States v. Vuitch, 402 U. S. 62. They involve the right of privacy, one aspect of which we consider in Griswold v. Connecticut, 381 U. S. 479, 484, when we held that various guarantees in the Bill of Rights create zones of privacy.[2]

The Griswold case involved a law forbidding the use of contraceptives. We held that law as applied to married people unconstitutional:

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[1][footnote omitted].

[2]There is no mention of privacy in our Bill of Rights but our decisions have recognized it as one of the fundamental values those amendments were designed to protect. The fountainhead case is Boyd v. United States, 116 U. S. 616, holding that a federal statute which authorized a court in tax cases to require a taxpayer to produce his records or to concede the Government's allegations offended the Fourth and Fifth Amendments. Justice Bradley, for the Court, found that the measure unduly intruded into the "sanctity of a man's home and the privacies of life." Id., 630. Prior to Boyd, in Kilbourn v. Thompson, 103 U. S. 168, 195, Mr. Justice Miller held for the Court that neither House of Congress "possesses the general power of making inquiry into the private affairs of the citizen." Of Kilbourn Mr. Justice Field later said, "This case will stand for all time as a bulwark against the invasion of the right of the citizen to protection in his private affairs against the

> "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." Id., 486.

The District Court in Doe held that Griswold and related cases "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." 319 F. Supp., at 1054.

The Supreme Court of California expressed the same view in People v. Belous,[3] [citation omitted].

The Ninth Amendment obviously does not create federally enforceable rights. It merely says, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." But a catalogue of these rights includes customary, traditional, and time-honored rights, amenities, privileges, and immunities that come within the sweep of "the Blessings of Liberty" mentioned in the preamble of the Constitution. Many of them in my view come within the meaning of the term "liberty" as used in the Fourteenth Amendment.

First is the autonomous control over the development and expression of one's intellect, interests, tastes, and personality.

These are rights protected by the First Amendment and in my view they are absolute, permitting of no exceptions. [citations omitted]. The Free Exercise Clause of the First Amendment is one facet of this constitutional right. The right to remain silent as respects one's own beliefs, [citation omitted], is protected by the First and the Fifth. The First Amendment grants the privacy of first-class mail, [citation omitted]. All of these aspects of the right of privacy are "rights retained by the people" in the meaning of the Ninth Amendment.

Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children.

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unlimited scrutiny of investigation by a congressional committee." In re Pacific Ry. Comm'n, 32 F. 231, 253 (cited with approval in Sinclair v. United States, 279 U. S. 263, 293). Mr. Justice Harlan, also speaking for the Court, in Interstate Commerce Comm'n v. Brimson, 154 U. S. 447, 478, thought the same was true of administrative inquiries, saying the Constitution did not permit a "general power of making inquiry into the private affairs of the citizen." In a similar vein were Harriman v. Interstate Commerce Comm'n, 211 U. S. 407; United States v. Louisville & Nashville R. R., 236 U. S. 318, 335; and Federal Trade Comm'n v. American Tobacco Co., 264 U. S. 298.

[3] [footnote omitted].

These rights, unlike those protected by the First Amendment, are subject to some control by the police-power. Thus the Fourth Amendment speaks only of "unreasonable searches and seizures" and of "probable cause." These rights are "fundamental" and we have held that in order to support legislative action the statute must be narrowly and precisely drawn and that a "compelling state interest" must be shown in support of the limitation. [citations omitted].

The liberty to marry a person of one's own choosing. Loving v. Virginia, 388 U. S. 1; the right of procreation Skinner v. Oklahoma, 316 U. S. 535; the liberty to direct the education of one's children. Pierce v. Society of Sisters, 268 U. S. 510, and the privacy of the marital relation. Griswold v. Connecticut, supra, are in this category.[4] Only last Term in Eisenstadt v. Baird, 405 U. S. 438, another contraceptive case, we expanded the concept of Griswold by saying:

> "It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

This right of privacy was called by Mr. Justice Brandeis the right "to be let alone." Olmstead v. United States, 277 U. S. 438, 478. That right includes the privilege of an individual to plan his own affairs, for, "outside of areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases." Kent v. Dulles, 357 U. S. 116, 126.

Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf,

These rights, though fundamental, are likewise subject to regulation on a showing of "compelling state interest." We stated in Papachristou v. City of Jacksonville, 405 U. S. 156, 164, that walking, strolling, and wandering "are historically part of the amenities of life as we have known them." As stated in Jacobson v. Massachusetts, 197 U. S. 11, 29

> "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."

In Union Pac. Ry. Co. v. Botsford, 141 U. S. 250, 252, the Court said,

> "The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow."

In Terry v. Ohio, 392 U. S. 1, 8-9, the Court in speaking of the Fourth Amendment stated

> "This inestimable right of personal security belongs

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[4] [footnote omitted].

> as much to the citizen on the streets of our cities as to the Governor closeted in his study to dispose of his secret affairs."

Katz v. United States, 389 U. S. 347, 350, emphasizes that the Fourth Amendment

> "protects individual privacy against certain kinds of governmental intrusion."

In Meyer v. Nebraska, 262 U. S. 390, 399, the Court said:

> "Without doubt it [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, 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 at common law as essential to the orderly pursuit of happiness by free men."

The Georgia statute is at war with the clear message of these cases--that a woman is free to make the basic decision whether to bear an unwanted child. Elaborate argument is hardly necessary to demonstrate that child birth may deprive a woman of her preferred life style and force upon her a radically different and undesired future. For example, rejected applicants under the Georgia statute are required to endure the discomforts of pregnancy; to incur the pain, higher mortality rate, and aftereffects of childbirth; to abandon educational plans; to sustain loss of income; to forgo the satisfactions of careers; to tax further mental and physical health in providing childcare; and, in some cases, to bear the lifelong stigma of unwed motherhood, a badge which may haunt, if not deter, later legitimate family relationships.

Such a holding is, however, only the beginning of the problem. The State has interests to protect. Vaccinations to prevent epidemics are one example, as Jacobson holds. The Court held that compulsory sterilization of imbeciles afflicted with hereditary forms of insanity or imbecility is another. Buck v. Bell, 274 U. S. 200. Abortion affects another. While childbirth endangers the lives of some women, voluntary abortion at any time and place regardless of medical standards would impinge on a rightful concern of society. The woman's health is part of that concern; as is the life of the fetus after quickening. These concerns justify the State in treating the procedure as a medical one.

One difficulty is that this statute as construed and applied apparently does not give full sweep to the "psychological as well as physical well-being" of women patients which saved the concept "health" from being void for vagueness in United States v. Vuitch, supra, at 72. But apart from that, Georgia's enactment has a constitutional infirmity because, as stated by the District Court, it "limits the number of reasons for which an abortion may be sought." I agree with the holding of the District Court, "This the State may not do, because such action unduly restricts a decision sheltered by the Constitutional right to privacy." 319 F. Supp., at 1056.

The vicissitudes of life produce pregnancies which may be unwanted, or which may impair "health" in the broad Vuitch sense of the term, or which may imperil the life of the mother, or which in the full setting of the case may create such suffering, disclocations, misery, or tragedy as to make an early abortion the only civilized step to take. These hardships may be properly embraced in the "health"

factor of the mother as appraised by a person of insight. Or they may be part of a broader medical judgment based on what is "appropriate" in a given case, though perhaps not "necessary" in a strict sense.

The "liberty" of the mother, though rooted as it is in the Constitution, may be qualified by the State for the reasons we have stated. But where fundamental personal rights and liberties are involved, the corrective legislation must be "narrowly drawn to prevent the supposed evil," [citation omitted], and not be dealt with in an "unlimited and indiscriminate" manner. [citations omitted]. Unless regulatory measures are so confined and are addressed to the specific areas of compelling legislative concern, the police power would become the great leveller of constitutional rights and liberties.

There is no doubt that the State may require abortions to be performed by qualified medical personnel. The legitimate objective of preserving the mother's health clearly supports such laws. Their impact upon the woman's privacy is minimal. But the Georgia statute outlaws virtually all such operations--even in the earliest stages of pregnancy. In light of modern medical evidence suggesting that an early abortion is safer healthwise than childbirth itself,[5] it cannot be seriously urged that so comprehensive a ban is aimed at protecting the woman's health. Rather, this expansive proscription of all abortions along the temporal spectrum can rest only on a public goal of preserving both embryonic and fetal life.

The present statute has struck the balance between the woman and the State's interests wholly in favor of the latter. I am not prepared to hold that a State may equate, as Georgia has done, all phases of maturation preceding birth. We held in Griswold that the States may not preclude spouses from attempting to avoid the joinder of sperm and egg. If this is true, it is difficult to perceive any overriding public necessity which might attach precisely at the moment of conception. As Mr. Justice Clark has said:[6]

> "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

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[5]Many studies show that it is safer for a woman to have a medically induced abortion than to bear a child. In the first 11 months of operation of the New York abortion law, the mortality rate associated with such operations was six per 100,000 operations. Abortion Mortality, 20 Morbidity and Mortality 208, 209 (1971) (U. S. Department of Health, Education, and Welfare, Public Health Service). On the other hand, the maternal mortality rate associated with childbirths other than abortions was 18 per 100,000 live births. Tietze, Mortality with Contraception and Induced Abortion, 45 Studies in Family Planning 6 (1969). See also C. Tietze & H. Lehfeldt, Legal Abortion in Eastern Europe 175 J.A.M.A. 1149, 1152 (1961); V. Kolblova, Legal Abortion in Czechoslovakia, 196 J.A.M.A. 371 (1966); Mehland, Combating Illegal Abortion in the Socialist Countries of Europe, 13 World Med. J. 84 (1966).

[6]Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loy. U. (L. A.) L. Rev. 1, 10 (1969).

> 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. No prosecutor has ever returned a murder indictment charging the taking of the life of a fetus.[7] This would not be the case if the fetus constituted human life."

In summary, the enactment is overbroad. It is not closely correlated to the aim of preserving pre-natal life. In fact, it permits its destruction in several cases, including pregnancies resulting from sex acts in which unmarried females are below the statutory age of consent. At the same time, however, the measure broadly proscribes aborting other pregnancies which may cause severe mental disorders. Additionally, the statute is overbroad because it equates the value of embryonic life immediately after conception with the worth of life immediately before birth.

III

Under the Georgia Act the mother's physician is not the sole judge as to whether the abortion should be performed. Two other licensed physicians must concur in his judgment.[8] Moreover, the abortion must be performed in a licensed hospital;[9] and the abortion must be approved in advance by a committee of the medical staff of that hospital.[10]

Physicians, who speak to us in Doe through an amicus brief, complain of the Georgia Act's interference with their practice of their profession.

The right of privacy has no more conspicuous place than in the physician-patient relationship, unless it be in the priest-penitent relation.

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[7]In Keeler v. Superior Court, 2 Cal. 3d 619, 470 P. 2d 617, the California Supreme Court held in 1970 that the California murder statute did not cover the killing of an unborn fetus, even though the fetus be "viable" and that it was beyond judicial power to extend the statute to the killing of an unborn. It held that the child must be "born alive before a charge of homicide can be sustained." 2 Cal. 3d, at 639.

[8][citation omitted].

[9][citation omitted].

[10][citation omitted].

It is one thing for a patient to agree that her physician may consult with another physician about her case. It is quite a different matter for the State compulsorily to impose on that physician-patient relationship another layer or, as in this case, still a third layer of physicians. The right of privacy--the right to care for one's health and person and to seek out a physician of one's own choice protected by the Fourteenth Amendment--becomes only a matter of theory not a reality, when a multiple physician approval system is mandated by the State.

The State licenses a physician. If he is derelict or faithless, the procedures available to punish him or to deprive him of his license are well known. He is entitled to procedural due process before professional disciplinary sanctions may be imposed. [citation omitted]. Crucial here, however, is state-imposed control over the medical decision whether pregnancy should be interrupted. The good-faith decision of the patient's chosen physician is overridden and the final decision passed on to others in whose selection the patient has no part. This is a total destruction of the right of privacy between physician and patient and the intimacy of relation which that entails.

The right to seek advice on one's health and the right to place his reliance on the physician of his choice are basic to Fourteenth Amendment values. We deal with fundamental rights and liberties, which, as already noted, can be contained or controlled only by discretely drawn legislation that preserves the "liberty" and regulates only those phases of the problem of compelling legislative concern. The imposition by the State of group controls over the physician-patient relation is not made on any medical procedure apart from abortion, no matter how dangerous the medical step may be. The oversight imposed on the physician and patient in abortion cases denies them their "liberty", viz, their right of privacy, without any compelling, discernable state interest.

Georgia has constitutional warrant in treating abortion as a medical problem. To protect the woman's right of privacy, however, the control must be through the physician of her choice and the standards set for his performance.

The protection of the fetus when it has acquired life is a legitimate concern of the State. Georgia's law makes no rational, discernible decision on that score.[11] For under the Act the developmental stage of the fetus is irrelevant when pregnancy is the result of rape or when the fetus will very likely be born with a permanent defect or when a continuation of the pregnancy will endanger the life of the mother or permanently injure her health. When life is present is a question we do not try to resolve. While basically a question for medical experts, as stated by Mr. Justice Clark,[12] it is, of course, caught up in matters of religion and morality.

In short, I agree with the Court that endangering the life of the woman or seriously and permanently injuring her health are standards too narrow for the right of privacy that are at stake.

I also agree that the superstructure of medical supervision which Georgia has erected violates the patient's right of privacy inherent in her choice of her own physician.

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[11] [citation omitted].

[12] [citation omitted].

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, dissenting.

At the heart of the controversy in these cases are those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are nevertheless unwanted for any one or more of a variety of reasons--convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc. The common claim before us is that for any one of such reasons, or for no reason at all, and without asserting or claiming any threat to life or health, any woman is entitled to an abortion at her request if she is able to find a medical advisor willing to undertake the procedure.

The Court for the most part sustains this position: During the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim or caprice of the putative mother more than the life or potential life of the fetus; the Constitution, therefore, guarantees the right to an abortion as against any state law or policy seeking to protect the fetus from an abortion not prompted by more compelling reasons of the mother.

With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weight the relative importance of the continued existence and development of the fetus on the one hand against a spectrum of possible impacts on the mother on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review which the Constitution extends to this Court.

The Court apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life which she carries. Whether or not I might agree with that marshalling of values, I can in no event join the Court's judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States. In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.

It is my view, therefore, that the Texas statute is not constitutionally infirm because it denies abortions to those who seek to serve only their convenience rather than to protect their life or health. Nor is this plaintiff, who claims no threat to her mental or physical health, entitled to assert the possible rights of those women whose pregnancy assertedly implicates their health. This, together with United States v. Vuitch, 402 U. S. 62 (1971), dictates reversal of the judgment of the District Court.

Likewise, because Georgia may constitutionally forbid abortions to putative mothers who, like the plaintiff in this case, do not fall within the reach of § 26-1202 (a) of its criminal code, I have no occasion, and the District Court has none, to consider the constitutionality of the procedural requirements of the Georgia

statute as applied to those pregnancies posing substantial hazards to either life or health. I would reverse the judgment of the District Court in the Georgia case.

No. 70-40

[DOE v. BOLTON]

MR. JUSTICE REHNQUIST, dissenting.

The holding in Roe v. Wade, ante, that state abortion laws can withstand constitutional scrutiny only if the States can demonstrate a compelling state interest apparently compels the Court's close scrutiny of the various provisions in Georgia's abortion statute. Since, as indicated by my dissent in Wade, I view the compelling state interest standard as an inappropriate measure of the constitutionality of state abortion laws, I respectfully dissent from the majority's holding.

EMPLOYMENT: STATUTES INVOLVED

The major statute, Title VII of the Civil Rights Act of 1964, is reprinted in Kanowitz, Appendix A. Executive Order 11246 -- "Equal Employment Opportunity" is reprinted in Kanowitz, Appendix B. Subsequent Executive Orders, Numbers 11375 and 11478, are reprinted in Appendices A and B to these materials.

Title VII was amended in 1972 in several significant ways. Its coverage was expanded to include state and local governments, and their employees, as well as employees of educational institutions. Jurisdiction was extended to employers with 15 or more employees, and unions with 15 or more members (the previous minimum had been 25). Perhaps most importantly, the 1972 act gave the Equal Employment Opportunity Commission (EEOC) authority to go to court to sue an employer or union if conciliation efforts fail; previously EEOC's role ended if conciliation failed, and the complainant had to pursue the case alone thereafter.

The Equal Pay Act of 1963 added a new provision to the Fair Labor Standards Act of 1938. It provides, in pertinent part:

"No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage of any employee."

In 1972, the Act was extended to cover executive, administrative, and professional employees.

PHILLIPS v. MARTIN MARIETTA CORPORATION 400 U. S. 542 (U. S. SUPREME COURT, 1971)

Per Curiam.

Petitioner Mrs. Ida Phillips commenced an action in the United States District Court for the Middle District of Florida under Title VII of the Civil Rights Act of 1964 alleging that she had been denied employment because of her sex. The District Court granted summary judgment* for Martin Marietta Corporation (Martin) on the basis of the following showing: (1) in 1966 Martin informed Mrs. Phillips that it was not accepting job applications from women with pre-school-age children; (2) as of the time of the motion for summary judgment, Martin employed men with pre-school-age children; (3) at the time Mrs. Phillips applied, 70-75% of the applicants for the position she sought were women; 75-80% of those hired for the position, assembly trainee, were women, hence no question of bias against women as such was presented.

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*[The granting of summary judgment indicates that the Court made a decision on the papers filed by each side, and did not hold a hearing or trial. It is only to be granted when there is no triable issue of fact presented by the papers before the Court. The footnote by the Court setting out the text of the statute has been omitted].

Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men -- each having pre-school-age children. 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 Act. But that is a matter of evidence tending to show that the condition in question "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." The record before us, however, is not adequate for resolution of these important issues. [citation omitted]. Summary judgment was therefore improper and we remand for fuller development of the record and for further consideration.

Vacated and remanded.

Mr. Justice Marshall, concurring, [most footnotes omitted].

While I agree that this case must be remanded for a full development of the facts, I cannot agree with the Court's indication that a "bona fide occupational qualification reasonably necessary to the normal operation of" Martin Marietta's business could be established by a showing that some women, even the vast majority, with pre-school-age children have family responsibilities that interfere with job performance and that men do not usually have such responsibilities. Certainly, an employer can require that all of his employees, both men and women, meet minimum performance standards, and he can try to insure compliance by requiring parents, both mothers and fathers, to provide for the care of their children so that job performance is not interfered with.

But the Court suggests that it would not require such uniform standards. I fear that in this case, where the issue is not squarely before us, the Court has fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination. Congress, however sought just the opposite result.

By adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress intended to prevent employers from refusing "to hire an individual based on stereotyped characterizations of the sexes." [citations omitted]. Even characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunities. The exception for a "bona fide occupational qualification" was not intended to swallow the rule.

That exception has been construed by the Equal Employment Opportunity Commission, whose regulations are entitled to "great deference," Udall v. Tallman, 380 U. S. 1, 16 (1965), to be applicable only to job situations that require specific physical characteristics necessarily possessed by only one sex.[3]

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[3]The Commission's regulations provide:

"Sex as a bona fide occupational qualification.

"(a) The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels--'Men's jobs' and 'Women's jobs'--tend to deny employment opportunities unnecessarily to one sex or the other.

"(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

"(i) The refusal to hire a woman because of her sex, based on assumptions of the comparative employment characteristics of women in general. For example, the

Thus the exception would apply where necessary "for the purpose of authenticity or genuineness" in the employment of actors or actresses, fashion models, and the like. If the exception is to be limited as Congress intended, the Commission has given it the only possible construction.

When performance characteristics of an individual are involved, even when parental roles are concerned, employment opportunity may be limited only by employment criteria that are neutral as to the sex of the applicant.

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assumption that the turnover rate among women is higher than among men.

"(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

"(iii) The refusal to hire an individual because of the preferences of co-workers workers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.

"(iv) The fact that the employer may have to provide separate facilities for a person of the opposite sex will not justify discrimination under the bona fide occupational qualification exception unless the expense would be clearly unreasonable.

"(2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

"(b)(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, or for more than a specified number of hours per day or per week.

"(2) The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception." 29 CFR § 1604.1.

DIAZ v. PAN AMERICAN WORLD AIRWAYS, 442 F.2d 385 (5th Cir., 1971)

TUTTLE, Circuit Judge:

This appeal presents the important question of whether Pan American Airlines' refusal to hire appellant and his class of males solely on the basis of their sex violates § 703(a)(1) of Title VII of the 1964 Civil Rights Act. Because we feel that being a female is not a "bona fide occupational qualification" for the job of flight cabin attendant, appellee's refusal to hire appellant's class solely because of their sex, does constitute a violation of the Act.

The facts in this case are not in dispute. Celio Diaz applied for a job as flight cabin attendant with Pan American Airlines in 1967. He was rejected because Pan Am had a policy of restricting its hiring for that position to females. He then filed charges with the Equal Employment Opportunity Commission (EEOC) alleging that Pan Am had unlawfully discriminated against him on the grounds of sex. The Commission found probable cause to believe his charge, but was unable to resolve the matter through conciliation with Pan Am. Diaz next filed a class action in the United States District Court for the Southern District of Florida on behalf of himself and others similarly situated, alleging that Pan Am had violated Section 703 of the 1964 Civil Rights Act by refusing to employ him on the basis of his sex; he sought an injunction and damages.

Pan Am admitted that it had a policy of restricting its hiring for the cabin attendant position to females. Thus, both parties stipulated that the primary issue for the District Court was whether, for the job of flight cabin attendant, being a female is a "bona fide occupational qualification (hereafter BFOQ) reasonably necessary to the normal operation" of Pan American's business.

The trial court found that being a female was a BFOQ. [citation omitted]. Before discussing its findings in detail, however, it is necessary to set forth the framework within which we view this case.

Section 703(a) of the 1964 Civil Rights Act provides, in part:

(a) It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin ***.

The scope of this section is qualified by § 703(e) which states:

(e) Notwithstanding any other provision of this subchapter,

(1) it shall not be an unlawful employment practice for an employer to hire and employ employees *** on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise ***.

Since it has been admitted that appellee has discriminated on the basis of sex, the result in this case, turns, in effect, on the construction given to this exception.

We note, at the outset, that there is little legislative history to guide our interpretation. The amendment adding the word "sex" to "race, color, religion and

national origin" was adopted one day before House passage of the Civil Rights Act. It was added on the floor and engendered little relevant debate. In attempting to read Congress' intent in these circumstances, however, it is reasonable to assume, from a reading of the statute itself, that one of Congress' main goals was to provide equal access to the job market for both men and women. Indeed, as this court in Weeks v. Southern Bell Telphone and Telegraph Co., 5 Cir., 408 F.2d 228 at 235 clearly stated, the purpose of the Act was to provide a foundation in the law for the principle of nondiscrimination. Construing the statute as embodying such a principle is based on the assumption that Congress sought a formula that would not only achieve the optimum use of our labor resources but, and more importantly, would enable individuals to develop as individuals.

Attainment of this goal, however, is, as stated above, limited by the bona fide occupational qualification exception in section 703(e). In construing this provision, we feel, as did the court in Weeks, supra, that it would be totally anomalous to do so in a manner that would, in effect, permit the exception to swallow the rule. Thus, we adopt the EEOC guidelines which state that "the Commission believes that the bona fide occupational qualification as to sex should be interpreted narrowly." 29 CFR 1604.1(a). Indeed, close scrutiny of the language of this exception compels this result. As one commentator has noted:

"The sentence contains several restrictive adjectives and phrases: it applies only 'in those certain instances' where there are 'bona fide' qualifications 'reasonably necessary' to the operation of that 'particular' enterprise. The care with which Congress has chosen the words to emphasize the function and to limit the scope of the exception indicates that it had no intention of opening the kind of enormous gap in the law which would exist if (for example) an employer could legitimately discriminate against a group solely because his employees, customers, or clients discriminated against that group. Absent much more explicit language, such a broad exception should not be assumed for it would largely emasculate the act." (emphasis added) 65 Mich. L. Rev. (1966).

Thus, it is with this orientation that we now examine the trial court's decision. Its conclusion was based upon (1) its view of Pan Am's history of the use of flight attendants; (2) passenger preference; (3) basic psychological reasons for the preference; and (4) the actualities of the hiring process.

Having reviewed the evidence submitted by Pan American regarding its own experience with both female and male cabin attendants it has hired over the years, the trial court found that Pan Am's current hiring policy was the result of a pragmatic process, "representing a judgment made upon adequate evidence acquired through Pan Am's considerable experience, and designed to yield under Pan Am's current operating conditions better average performance for its passengers than would a policy of mixed male and female hiring." (emphasis added) The performance of female attendants was better in the sense that they were superior in such non-mechanical aspects of the job as "providing reassurance to anxious passengers, giving courteous personalized service and, in general, making flights as pleasurable as possible within the limitations imposed by aircraft operations."

The trial court also found that Pan Am's passengers overwhelmingly preferred to be served by female stewardesses. Moreover, on the basis of the expert testimony of a psychiatrist, the court found that an airplane cabin represents a unique environment in which an air carrier is required to take account of the special psychological needs of its passengers. These psychological needs are better attended to by females. This is not to say that there are no males who would not have the necessary qualities to perform these non-mechanical functions, but the trial court found that the actualities of the hiring process would make it more difficult to find these few males. Indeed, "the admission of men to the hiring process, in the

present state of the art of employment selection, would have increased the number of unsatisfactory employees hired, and reduced the average levels of performance of Pan Am's complement of flight attendants. ***" In what appears to be a summation of the difficulties which the trial court found would follow from admitting males to this job the court said "that to eliminate the female sex qualification would simply eliminate the best available tool for screening out applicants likely to be unsatisfactory and thus reduce the average level of performance." (emphasis added)

Because of the narrow reading we give to section 703(e), we do not feel that these findings justify the discrimination practiced by Pan Am.

We begin with the proposition that the use of the word "necessary" in section 703(e) requires that we apply a business necessity test, not a business convenience test. That is to say, discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively.

The primary function of an airline is to transport passengers safely from one point to another. While a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide, as well as, according to the findings of the trial court, their apparent ability to perform the non-mechanical functions of the job in a more effective manner than most men, may all be important, they are tangential to the essence of the business involved. No one has suggested that having male stewards will so seriously affect the operation of an airline as to jeopardize or even minimize its ability to provide safe transportation from one place to another. Indeed the record discloses that many airlines including Pan Am have utilized both men and women flight cabin attendants in the past and Pan Am, even at the time of this suit, has 283 male stewards employed on some of its foreign flights.

We do not mean to imply, of course, that Pan Am cannot take into consideration the ability of individuals to perform the non-mechanical functions of the job. What we hold is that because the non-mechanical aspects of the job of flight cabin attendant are not "reasonably necessary to the normal operation" of Pan Am's business, Pan Am cannot exclude all males simply because most males may not perform adequately.

Appellees argue, however, that in so doing they have complied with the rule in Weeks. In that case, the court stated:

We conclude that the principle of non-discrimination requires that we hold that in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved. [citation omitted]

We do not agree that in this case "all or substantially all men" have been shown to be inadequate and, in any event, in Weeks, the job that most women supposedly could not do was necessary to the normal operation of the business. Indeed, the inability of switchman to perform his or her job could cause the telephone system to break down. This is of an entirely different magnitude than a male steward who is perhaps not as soothing on a flight as a female stewardess.

Appellees also argue, and the trial court found, that because of the actualities of the hiring process, "the best available initial test for determining whether a particular applicant for employment is likely to have the personality characteristics conducive to high-level performance of the flight attendant's job

as currently defined is consequently the applicant's biological sex." Indeed, the trial court found that it was simply not practicable to find the few males that would perform properly.

We do not feel that this alone justifies discriminating against all males. Since, as stated above, the basis of exclusion is the ability to perform non-mechanical functions which we find to be tangential to what is "reasonably necessary" for the business involved, the exclusion of all males because this is the best way to select the kind of personnel Pan Am desires simply cannot be justified. Before sex discrimination can be practiced, it must not only be shown that it is impracticable to find the men that possess the abilities that most women possess, but that the abilities are necessary to the business, not merely tangential.

Similarly, we do not feel that the fact that Pan Am's passengers prefer female stewardesses should alter our judgment. On this subject, EEOC guidelines state that a BFOQ ought not be based on "the refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers. ***" 29 CFR § 1604.1 (iii).

As the Supreme Court stated in Griggs v. Duke Power Company, 400 U. S. 424, 91 S. Ct. 849, 28 L.Ed.2d 158 (1971), "the administration interpretation of the Act by the enforcing agency is entitled to great deference." [citation omitted]. While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.

Of course, Pan Am argues that the customer's preferences are not based on "stereotyped thinking," but the ability of women stewardesses to better provide the non-mechanical aspects of the job. Again, as stated above, since these aspects are tangential to the business, the fact that customers prefer them cannot justify sex discrimination.

The judgment is reversed and the case is remanded for proceedings not inconsistent with this opinion.

WEEKS v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, 408 F.2d 228 (5th Circuit, 1969).

[Mrs. Lorena Weeks, an employee of Southern Bell for 19 years, brought this suit after the company rejected her bid for the job of switchman. The company refused to give Mrs. Weeks the job because it did not want to assign women to be switchmen. Mrs. Weeks filed a complaint with the Equal Employment Opportunity Commission, charging that the company's action violated Title VII of the Civil Rights Act of 1964. The Commission investigated the case and concluded that there was reasonable cause to believe that the company had violated the act. After conciliation attempts failed, Mrs. Weeks filed this suit asking that she be given the job of switchman as well as damages, and that the company be enjoined from such unlawful employment practices.

In its opinion, written by Judge Johnson, the Court first disposed of a procedural issue and then turned to the substantive one. (Footnotes have been omitted from the Court's opinion.)]

Turning to the merits we observe that there is no dispute that Mrs. Weeks was denied the switchman's job because she was a woman, not because she lacked any qualifications as an individual. The job was awarded to the only other bidder for the job, a man who had less seniority than Mrs. Weeks. Under the terms of the contract between Mrs. Weeks' Union and Southern Bell, the senior bidder is to be awarded the job if other qualifications are met. Southern Bell, in effect, admits a prima facie violation of Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-2(a), which provides in pertinent part:

"(a) Employer practices.
It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex * * *; or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's * * * sex, * * *."

Southern Bell's answer, however, asserts by way of affirmative defense that the switchman's position fits within the exception to the general prohibition of discrimination against women set forth in Section 703(e)(1), 42 U.S.C. Sec. 2000e-2(e)(1), which provides in pertinent part:

"(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, * * * on the basis of his * * * sex, * * * in those certain instances where * * sex, * * * is a <u>bona fide occupational qualification</u> reasonably necessary to the normal operation of that particular business or enterprise, * * *" (Emphasis added.)

The job description of the post of switchman reads as follows:

"Engaged in the maintenance and operation of dial central office equipment, test, power, frame, switch, and other telephone equipment, including the locating and correcting of faults; making adjustments, additions, repairs, and replacements; performing routine operation tests, etc., and working with test-desk, field, and other forces connected with central office work. Also operates and maintains, including adjusting and making repairs to or replacement of, air conditioning equipment, and performing other work as assigned in accordance with local circumstances and the current needs of the business."

We think it is clear that the burden of proof must be on Southern Bell to demonstrate that this position fits within the "bona fide occupational qualification" exception. The legislative history indicates that this exception was intended to be narrowly construed. This is also the construction put on the exception by the Equal Employment Opportunity Commission. Finally, when dealing with a humanitarian remedial statute which serves an important public purpose, it has been the practice to cast the burden of proving an exception to the general policy of the statute upon the person claiming it. [citation omitted].

The more important question that must be decided here, however, is the extent of the showing required to satisfy that burden. In the court below, Southern Bell contended that a bona fide occupational qualification was created whenever reasonable state protective legislation prevented women from occupying certain positions. Southern Bell relied upon Rule 59, promulgated by the Georgia Commissioner of Labor pursuant to Section 54-122(d) of the Georgia Code, which provides:

"<u>Lifting</u>. For women and minors, not over 30 pounds. Less depending on physical condition of women or minors. Minor as used here means anyone under 18 years of age,

male or female."

The Commission has recognized that reasonable state protective legislation may constitute a bona fide occupational qualification. . . . .

Mrs. Weeks does not dispute on appeal that the position of switchman occasionally requires lifting of weights in excess of 30 pounds. She has consistently contended that the Georgia limit is unreasonably low and that the Georgia Commissioner of Labor's Rule 59 does not have the intent or effect of protecting women from hazard. She also contends that the rule is arbitrary in violation of the equal protection clause of the Fourteenth Amendment and that it is contrary to Title VII and thus in violation of the supremacy clause, article 6, clause 2 of the Constitution. . . .

We need not decide the reasonableness or the constitutionality of Rule 59, however, because effective August 27, 1968, Georgia repealed Rule 59. In its place, the Georgia Commissioner of Labor has promulgated a rule which reads:

"Manual loads limited. Weights of loads which are lifted or carried manually shall be limited so as to avoid strains or undue fatigue."

The decision to repeal the specific weight limit seems to have been at least partially motivated by, and is in conformity with, the recommendations of the Task Force on Labor Standards of the Citizens' Advisory Council on the Status of Women. The President's Commission pointed out:

"Restrictions that set fixed maximum limits upon weights women are allowed to lift do not take account of individual differences, are sometimes unrealistic, and always rigid. They should be replaced by flexible regulations applicable to both men and women and set by appropriate regulatory bodies."

Because the new, flexible rule does not in terms necessarily prevent all women from performing the duties of switchman, the issue of protective state legislation disappears from the case. We are left with the question whether Southern Bell, as a private employer, has satisfied its burden of proving that the particular requirements of the job of switchman justify excluding women from consideration.

In ruling for Southern Bell, the District Court relied primarily on the effect of Rule 59. It did, however, make some additional findings of fact which Southern Bell contends are sufficient to satisfy its burden:

"At the trial of the case, the evidence established that a switchman is required to routinely and regularly lift items of equipment weighing in excess of thirty (30) pounds. ** Additionally, the evidence established that there is other strenuous activity involved in this job. * * *

"The evidence established that a switchman is subject to call out 24 hours a day and is, in fact, called out at all hours and is sometimes required to work alone during late night hours, including the period from midnight to 6 a.m. In the event of an emergency or equipment failure, the switchman would be required to lift items of equipment weighing well in excess of thirty (30) pounds."

Southern Bell puts principal reliance on the fact that the District Court found the job to be "strenuous." That finding is extremely vague. We note, moreover, that Southern Bell introduced no evidence that the duties of a switchman were so strenuous that all, or substantially all, women would be unable to perform them. Nor did the District Court make a finding on this more concrete and meaningful statement of the issue. The Commission in its investigation, on the other hand, rejected

Southern Bell's contention "that the switchman job at this location requires weight lifting or strenuous exertion which could not be performed by females." In addition, Mrs. Weeks produced testimony to the effect that she was capable of performing the job, that a woman in New York had been hired as a switchman and that seven others were performing the job of frameman, the duties of which were essentially indistinguishable from those of a switchman.

In examining the record carefully to interpret the finding that the duties of a switchman were "strenuous," we have observed that although Southern Bell attempted to connect a switchman's duties with various pieces of heavy equipment, only a 31 pound item called a "relay timing test set" was used "regularly and routinely" by a switchman. The testimony at trial and the Commission's investigation reveal that in actually using the set the normally accepted practice is to place the test set on the floor or on a rolling step-ladder and that very little lifting of it was required. Thus, while there would be a basis for finding that a switchman's job would require lifting technically in excess of a 30 pound weight limitation, the infrequency of the required lifting would permit quibbling over just how "strenuous" the job is. But we do not believe courts need engage in this sort of quibbling. Labeling a job "strenuous" simply does not meet the burden of proving that the job is within the bona fide occupational qualification exception.

[The portion of the Court's opinion discussing another case involving the bona fide occupational qualification, and the EEOC guidelines on the subject is omitted].

We conclude that the principle of nondiscrimination requi · that we hold that in order to rely on the bona fide occupational qualification e tion an employer has the burden of proving that he had reasonable cause to believ , that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.

Southern Bell has clearly not met that burden here. They introduced no evidence concerning the lifting abilities of women. Rather, they would have us "assume," on the basis of a "stereotyped characterization" that few or no women can safely lift 30 pounds, while all men are treated as if they can. While one might accept, arguendo, that men are stronger on the average than women, it is not clear that any conclusions about relative lifting ability would follow. This is because it can be argued tenably that technique is as important as strength in determining lifting ability. Technique is hardly a function of sex. What does seem clear is that using these class stereotypes denies desirable positions to a great many women perfectly capable of performing the duties involved.

Southern Bell's remaining contentions do not seem to be advanced with great seriousness. The emergency work which a switchman allegedly must perform consists primarily in the handling of a 34 pound extinguisher in the event of fire. A speculative emergency like that could be used as a smoke screen by any employer bent on discriminating against women. It does seem that switchmen are occasionally subject to late hour call-outs. Of course, the record also reveals that other women employees are subject to call after midnight in emergencies. Moreover, Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing. We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renege on that promise.

Having concluded that Southern Bell has not satisfied its burden of proving that the job of switchman is within the bona fide occupational qualification exception,

we must reverse the District Court on this issue and hold that Southern Bell has violated 42 U.S.C. Sec. 2000e-2(a). This case is remanded to the District Court for determination of appropriate relief. . . .

EDUCATION: STATUTES INVOLVED

In addition to the statutes which affect educational institutions as employers, Title IX of the Education Amendments of 1972, provides in relevant part [Title 20 EDUCATION U.S.C.A. § 1681, 1686].

§ 1681. Sex-Prohibition against discrimination; exceptions

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

Classes of educational institutions subject to prohibition

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

Educational Institutions commencing planned change in admissions

(2) in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

Educational Institutions of Religious Organizations with Contrary Religious Tenets

(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organizations;

Educational Institutions Training Individuals for Military Services or Merchant Marine

(4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine; and

Public Educational Institutions with Traditional and Continuing Admissions Policy

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex.

Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

(b) Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number of percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: Provided, That this subsection shall not be construed to prevent

the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

Educational Institution defined

(c) For purposes of this chapter an educational institution means any public or private pre-school, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department. Pub. L. 92-318, Title IX, § 901, June 23, 1972, 86 Stat. 373.

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§ 1686. Interpretation with respect to living facilities

Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.
Pub. L. 92-318, Title IX, § 907, June 23, 1972, 86 Stat. 375.

WILLIAMS v. MCNAIR, 316 F. Supp. 134 (D.S.C., 1970) (three-judge court)* affirmed without opinion, 401 U.S. 951 (U.S. Supreme Court, 1971)

Donald Russell, District Judge: This is an action instituted by the plaintiffs, all males, suing on behalf of themselves and others similarly situated, to enjoin the enforcement of a State statute which limits regular admissions to Winthrop College, a State supported college located at Rock Hill, South Carolina, to "girls." They assert that, except for their sex, they fully meet the admission requirements of the college.

The defendants are the present members of the Board of Trustees of Winthrop College, as constituted under its enabling legislation.

(The Court discussed the jurisdictional basis of the suit and then continued as to the substantive issues).

The parties have stipulated the facts involved in the controversy and have submitted the cause to the Court on their respective motions for judgment. The stipulation of facts is adopted as the Findings of Fact herein.

It is clear from the stipulated facts that the State of South Carolina has established a wide range of educational institutions at the college and university level consisting of eight separate institutions, with nine additional regional campuses. The several institutions so established vary in purpose, curriculum, and location. Some are limited to undergraduate programs; others extend their offerings into the graduate field. With two exceptions, such institutions are co-educational. Two, by law, however, limit their student admissions to members of one sex. Thus the Citadel restricts its student admission to males and Winthrop, the college involved in this proceeding, may not admit as a regular degree candidate males. There is an historical reason for these legislative restrictions upon the admission standards of these two latter institutions. The first, the Citadel, while offering a full range of undergraduate liberal arts courses and granting degrees in engineering as well, is designated as a military school, and apparently, the Legislature deemed it appropriate for that reason to provide for an all-male student body. Winthrop, on the other hand, was designed as a school for young ladies, which, though offering a liberal arts program, gave special attention to many courses thought to be specially helpful to female students.[3]

The Equal Protection Clause of the Fourteenth Amendment does not require "identity of treatment" for all citizens, or preclude a state, by legislation, from making classifications and creating differences in the rights of different groups. It is only when the discriminatory treatment and varying standards, as created by the legislative or administrative classification are arbitrary and wanting in any rational justification that they offend the Equal Protection Clause. Specifically, a legislative classification based on sex, has often been held to be constitutionally permissible. See West Coast Hotel Company v. Parrish (1937) 300 U. S. 379, 394-

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[*Most footnotes in the court's opinion have been omitted].

[3] See Section 401, Title 22, Code of South Carolina (1962):
"There shall be established an institution for the practical training and higher education of white girls which shall be known as Winthrop College ***." In Section 408, Title 22, the purpose of Winthrop College was stated to be: "The establishment, conduct and maintenance of a first-class institution for the thorough education of the white girls of this State, the main object of which shall be (1) to give to young women such education as shall fit them for teaching and (2) to give instruction to young women in stenography, typewriting, telegraphy, bookkeeping, draw-

395, 57 S. Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330 (statute providing minimum wages for women but not men); Radice v. New York (1924) 264 U.S. 292, 296-298, 44 S. Ct. 325, 68 L.Ed. 690 (special statute limiting hours of night work of women in cities with a particular population); Goesaert v. Cleary (1948) 335 U.S. 464, 69 S. Ct. 198, 93 L.Ed. 163 (proscribing use of women as licensed bartenders); Hoyt v. Florida (1961) 368 U.S. 57, 82 S. Ct. 159, 7 L.Ed. 2d 118 (jury duty voluntary for women but compulsory for men);[8] Miskunas v. Union Carbide Corporation (7th Cir. 1968 399 F.2d 847, 850, cert. denied 393 U.S. 1066, 89 S. Ct. 718, 21 L.Ed. 2d 709 (de .al to wife, but not to husband, of right to recover for loss of consortium); Gruenwald v. Gardner (2nd Cir. 1968) 390 F.2d 591, cert. denied 393 U.S. 982, 89 S. Ct. 456, 21 L.Ed. 2d 445 (women given more favorable treatment in social security benefits than men); United States v. St. Clair (D.C.N.Y. 1968) 291 F. Supp. 122 (men subject, women not, under Selective Service Act); Clarke v. Redeker (D.C. Iowa 1966) 259 F. Supp. 117 (fixing wife's residence by husband's but not the reverse); Heaton v. Bristol (Tex. Civ.App. 1958) 317 S.W.2d 86, cert. denied 359 U.S. 230, 79 S.Ct. 802, 3 L.Ed.2d 765 and Allred v. Heaton (Tex.Civ.App. 1960) 336 S.W.2d 251, cert. denied 364 U.S. 517, 81 S.Ct. 293, 5 L.Ed.2d 265 (both involving denial of right of women to attend an all-male state-supported college).[10]

Thus, the issue in this case is whether the discrimination in admission of students, created by the statute governing the operation of Winthrop and based on sex, is without rational justification.

It is conceded that recognized pedagogical opinion is divided on the wisdom of maintaining "single-sex" institutions of higher education but it is stipulated that there is a respectable body of educators who believe that "a single-sex institution can advance the quality and effectiveness of its instruction by concentrating upon areas of primary interest to only one sex." The idea of educating the sexes separately, the plaintiffs admit, "has a long history" and "is practiced extensively throughout the world." It is no doubt true, as plaintiffs suggest, that the trend in this country is away from the operation of separate institutions for the sexes, but there is still a substantial number or private and public institutions, which limit their enrollment to one sex and do so because they feel it offers

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ing (freehand, mechanical, architectural, etc.), designing, engraving, sewing, dress making, millinery, art, needlework, cooking, housekeeping and such other industrial arts as may be suitable to their sex and conducive to their support and usefulness. Said trustees may add, from time to time, such special features to the institution and may open such new departments of training and instruction therein as the progress ot the times may require."

[8]On the other hand, a complete proscription of women jurors is violative of constitutional rights. White v. Crook (D.C. Ala. 1966) 251 F.Supp. 401, 408.

[10]Of course, if there is no rational basis for the classification by sex, the legislation must fall. An instance of such a classification is involved in United States ex rel. Robinson v. York (D.C. Conn. 1968) 281 F. Supp. 8, in which it was held that differences in authorized sentences between males and females in a criminal statute was "invidious discrimination" and invalid. However, the Court prefaced its decision with the statement: "This deference to legislative classifications can extend to classifications based on sex." p. 13.

better educational advantages. While history and tradition alone may not support a discrimination, the Constitution does not require that a classification "keep abreast of the latest" in educational opinion, especially when there remains a respectable opinion to the contrary; it only demands that the discrimination not be wholly wanting in reason. Any other rule would mean that courts and not legislatures would determine all matters of public policy. It must be remembered, too, that Winthrop is merely a part of an entire system of State-supported higher education. It may not be considered in isolation. If the State operated only one college and that college was Winthrop, there can be no question that to deny males admission thereto would be impermissible under the Equal Protection Clause. But, as we have already remarked, these plaintiffs have a complete range of state institutions they may attend. They are free to attend either an all-male or, if they wish, a number of co-educational institutions at various locations over the State. There is no suggestion that there is any special feature connected with Winthrop that will make it more advantageous educationally to them than any number of other State-supported institutions. They point to no courses peculiar to Winthrop in which they wish to enroll. It is true that, in the case of some, if not all, of the plaintiffs, Winthrop is more convenient geographically for them than the other State institutions. They, in "being denied the right to attend the State college in their home town, are treated no differently than are other students who reside in communities many miles distant from any State supported college or university. The location of any such institution must necessarily inure to the benefit of some and to the detriment of others, depending upon the distance the affected individuals reside from the institution." [citation omitted].

Under these circumstances, this Court cannot declare as a matter of law that a legislative classification, premised as it is on respectable pedagogical opinion, is without any rational justification and violative of the Equal Protection Clause. It might well be that if the members of this Court were permitted a personal opinion on the question, they would reach a contrary conclusion. Moreover, it may be, as plaintiffs argue, that the experience of the college in admitting in its summer and evening classes male students, has weakened to some extent the force of the legislative determination that the maintenance of at least one all-female institution in the state system has merit educationally. The evaluation of such experience, however, is not the function or prerogative of the Courts; that falls within the legislative province and the plaintiffs must address their arguments to that body and look to it for relief. After all, flexibility and diversity in educational methods, when not tainted with racial overtones, often are both desirable and beneficial; they should be encouraged, not condemned.

It is suggested by the plaintiffs that this conclusion is contrary to the ruling in Kirstein v. Rector and Visitors of University of Virginia (D.C. Va. 1970) 309 F. Supp. 184. The Court there very pointedly remarked, however, that "We are urged to go further and to hold that Virginia may not operate any educational institution separated according to the sexes. We decline to do so." Page 187, 309 F. Supp. There the women-plaintiffs were seeking admission to the University of Virginia and it was conceded that the University occupied a preeminence among the State-supported institutions of Virginia and offered a far wider range of curriculum. No such situation exists here. It is not intimated that Winthrop offers a wider range of subject matter or enjoys a position of outstanding prestige over the other State-supported institutions in this State whose admission policies are co-educational.

Let judgment be entered for the defendants.

KIRSTEIN V. RECTOR AND VISITORS OF UNIVERSITY OF VIRGINIA 309 F. Supp. 184 (E. D. Va., 1970) (three-judge court)

CRAVEN, Circuit Judge:

This is a suit brought by four young women to compel their admission to the College of Arts and Sciences of the University of Virginia at Charlottesville. It is also brought as a class action for the benefit of other persons similarly situated. All of the individual defendants, except the Governor and the State Superintendent of Public Instruction, are officers and trustees of the University of Virginia at Charlottesville. The officers and trustees of other Virginia educational institutions are not parties.

From oral testimony, voluminous doctumentary evidence, pleadings, and statements of counsel in open court, we find the controlling facts to be:

The following colleges and universities are operated by the Commonwealth of Virginia (all are presently coeducational to some extent except as indicated):

The University of Virginia at Charlottesville (the admission of women is more fully discussed below)

Patrick Henry College of the University of Virginia

The Eastern Shore Branch of the School of General Studies of the University of Virginia

George Mason College

Clench Valley College

Mary Washington College of the University of Virginia (women only)

Radford College (women only)

Virginia Military Institute (men only)

Virginia Polytechnic Institute

Longwood College (women only)

Madison College

Norfolk College

Old Dominion College

Virginia Commonwealth University

Virginia State College at Petersburg

William and Mary College

Christopher Newport College

Richard Bland College

Thirteen coeducational community colleges are also operated by the Commonwealth of Virginia.

Until recently the University of Virginia at Charlottesville was substantially an all-male institution. It is difficult to evaluate the quality of education. Without attempting to do so, we think it fair to say from the evidence that the most prestigious institution of higher education in Virginia is the University of Virginia at Charlottesville, despite the apparent high quality of education offered at other Virginia institutions. The University of Virginia at Charlottesville is by far the largest educational institution, and its diversity of instruction is not paralleled in Virginia.

At the first hearing of this case we indicated our reluctance to interfere with the internal operation of any Virginia college or university, and particularly that of the University of Virginia at Charlottesville. We expended our best efforts to encourage the litigants to agree upon a consent judgment that might satisfactorily implement the Board of Visitors' contemplated changes in structure and nature of the University of Virginia at Charlottesville. We were impressed with the so-called Woody Commission report and its strong recommendation that sex barriers to admission to any Virginia institution of higher education be removed. In the context of long established separation by sex in institutions of learning, we were most favorably impressed with the willingness of the authorities controlling Virginia higher education to innovate and favorably entertain the relatively new idea that there must be no discrimination by sex in offering educational opportunity.

Since the Richmond hearing, there has been submitted to the court the University Board of Visitors' resolution of October 3, 1969, which adopts a plan for the admission of women on an equal basis with men to the University of Virginia at Charlottesville. In order to smoothly adjust the dislocations to be caused by increased numbers of women on a campus that has been substantially all-male, the plan provides for a three-stage change in admission policies: (1) 450 women will be admitted in September 1970, (2) an additional 550 women will be admitted in September 1971, and (3) women will be admitted on precisely the same basis as men beginning in September 1972 with no limitations thereafter on the number of women admitted.

Plaintiffs have filed objections to the plan, but it is quite significant that their objections do not relate to the merits or even to the speed of the plan with respect to the University of Virginia at Charlottesville. Instead, plaintiffs insist that there is no assurance that the plan will ever be permanently effectuated because final authority rests with the Legislature of Virginia and because the plan may be undone by future boards of visitors. Plaintiffs' other ground of objection is that the plan does not solve the question of sex discrimination at other institutions of higher education and is limited to the University of Virginia at Charlottesville.

The pattern of separation by sex of educational institutions is a long established one in America and a system widely and generally accepted until the last decade. Despite this history, it seems clear to us that the Commonwealth of Virginia may not now deny to women, on the basis of sex, educational opportunities at the Charlottesville campus that are not afforded in other institutions operated by the state.[1] Unquestionably the facilities at Charlottesville do offer courses of in-

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[1] We need not decide on the facts of this case whether the now discountenanced principle of "separate but equal" may have lingering validity in another area--for the facilities elsewhere are not equal with respect to these plaintiffs.

struction that are not available elsewhere. Furthermore, as we have noted, there exists at Charlottesville a "prestige" factor that is not available at other Virginia educational institutions. These particular individual plaintiffs are not in a position, without regard to the type of instruction sought, to go elsewhere without harm to themselves and disruption of their lives. Two of the plaintiffs are married to graduate students who must remain at the University of Virginia at Charlottesville. A pattern of continued sex restriction would present these plaintiffs with the dilemma of choosing between the marriage relationship and further education. We think the state may not constitutionally impose upon a qualified young woman applicant the necessity of making such a choice.

The plain effect of the Equal Protection Clause of the Fourteenth Amendment is "to prohibit prejudicial disparities before the law. This means prejudicial disparities for all citizens--including women." White v. Crook, 251 F. Supp. 401, 408 (M. D. Ala. 1966) (holding that women may not be denied the right to jury service). Abbott v. Mines, 411 F.2d 353 (6th Cir. 1969) (women's right to jury service); United States ex rel. Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968) (women's right to sentencing on equal basis with men). We hold, and this is all we hold, that on the facts of this case these particular plaintiffs have been, until the entry of the order of the district judge,[2] denied their constitutional right to an education equal with that offered men at Charlottesville and that such discrimination on the basis of sex violates the Equal Protection Clause of the Fourteenth Amendment.

We are urged to go further and to hold that Virginia may not operate any educational institution separated according to the sexes. We decline to do so. Obvious problems beyond our capacity to decide on this record readily occur. One of Virginia's educational institutions is military in character. Are women to be admitted on an equal basis, and, if so, are they to wear uniforms and be taught to bear arms? [citations omitted]. Some of Virginia's educational institutions have thus far been attended only by persons of the female sex. We think that <u>these</u> plaintiffs lack standing to challenge discrimination in such institutions. They are not harmed by the operation of an all-female institution that they do not wish to attend. Whether women attending such an institution are harmed by the absence of male students is, on this record, hypothetical. This and similar questions can better be determined in a case involving male applicants who sincerely wish to enter an all-female school, or female students at the school who believe it should be co-educational, and the governing authorities of the school, who may present the opposing viewpoint. . . . . .

The Board of Visitors of the University of Virginia at Charlottesville has made easy for us the proper disposition of this case. Within the limited constitutional duty which we have adjudged, it is beyond argument that the plan to implement the right of women applicants to attend the University of Virginia at Charlottesville is constitutionally adequate. Substantial numbers of women are to be admitted next fall and an even greater number the year following, with no limitation whatsoever thereafter. Any change in the method of operation of an institution as large as the University of Virginia at Charlottesville is bound to take some time. "It is not uncommon for courts, when declaring constitutional rights not previously recognized and declared, to delay for a reasonable time, in consideration of practical problems

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[2]By preliminary order on September 8, 1969, U. S. District Judge Robert R. Merhige, Jr., ordered the University at Charlottesville to consider without regard to sex plaintiffs' applications for admission.

incident to the implementation of those rights, the actual exercise of the newly declared right." White v. Crook, 251 F. Supp. 401, n. 16 (M. D. Ala. 1966), citing Reynolds v. Sims, 377 U. S. 533, 84 S. Ct. 1362, 12 L.Ed.2d 506 (1964), and Brown v. Board of Education of Topeka, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). This time schedule seems to us far more than deliberate and, indeed, reflects a genuine intent and purpose on the part of the authorities to make the University of Virginia at Charlottesville coeducational as soon as is reasonably feasible. The plan as a whole is in keeping with the trend toward coeducation now apparent among many colleges and universities that once admitted only one sex, but now admit both. We approve the plan as proposed by the Board of Visitiors.

[The Court concluded its opinion with a discussion of plaintiffs' requests for the award of damages and an injunction, which it denied.]

IN THE MATTER OF PATRICIA A., PERSON ALLEGED TO BE IN NEED OF SUPERVISION v. CITY OF NEW YORK, 31 N. Y. 2d 82, 335 N.Y.S. 2d 33 (N.Y. Court of Appeals, 1972)*

FULD, Chief Judge.

The appellant Patricia A. has been adjudicated a person in need of supervision (referred to at times as PINS) pursuant to section 712 (subd. [b]) of the Family Court Act. Such a person is there defined as "a male less than sixteen years of age and a female less than eighteen years of age who does not attend school in accord with the provisions of part one of article sixty-five of the education law (relating to truancy or other nonattendance) or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority." The appellant, 16 years old at the time of her PINS adjudication, contends first . . . that the statute offends against the requirements of due process in that it is unconstitutionally vague and, second, that it discriminates against the 16 and 17 year old female in violation of the Equal Protection Clause of the State and Federal Constitutions. We treat each claim separately.

[That portion of the Court's opinion dealing with Patricia A.'s claim that the statute was unconstitutionally vague is omitted.]

Concluding, then, that the statute is sufficiently definite, we turn to the charge that it unconstitutionally discriminates against females.

Discrimination by the State between different classes of citizens must, at the very least, "have some relevance to the purpose for which the classification is made." [citations omitted] Phrased somewhat differently, the classification "'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be . . . treated alike.'" (Reed v. Reed, 404 U. S. 71, 76, 92 S. Ct. 251, 254, ...)

The object of the PINS statute is to provide rehabilitation and treatment of young persons who engage in the sort of conduct there proscribed. This affords no reasonable ground, however, for differentiating between males and females over 16 and under 18. Girls in that age bracket are no more prone than boys to truancy, disobedience, incorrigible conduct and the like, nor are they more in need of rehabilitation and treatment by reason of such conduct.

The argument that discrimination against females on the basis of age is justified because of the obvious danger of pregnancy in an immature girl and because of out-of-wedlock births which add to the welfare relief burdens of the State and city is without merit. It is enough to say that the contention completely ignores the fact that the statute covers far more than acts of sexual misconduct. But, beyond that, even if we were to assume that the legislation had been prompted by such considerations, there would have been no rational basis for exempting, from the PINS definition, the 16 and 17-year-old boy responsible for the girl's pregnancy or the out-of-wedlock birth. As it is, the conclusion seems inescapable that lurking behind the discrimination is the imputation that females who engage in misconduct, sexual or otherwise, ought more to be censured, and their conduct subject to greater control and regulation, than males.

[*A footnote by the Court has been omitted.]

Somewhat similar moral presumptions have been squarely rejected as a basis or excuse for sexually discriminatory legislation. (See Stanley v. Illinois, 405 U. S. 645, 92 S. Ct. 1208, 31 L.Ed.2d 551 . . . .). Thus, in the Stanley case, the Supreme Court reversed a determination of the Illinois high court upholding a statute which made the children of unwed fathers wards of the State upon the death of the mother. It was a denial of equal protection, the court decided, to refuse a hearing to unmarried fathers as to their fitness to have custody of their children and, in effect, to presume that such fathers, as opposed to unwed mothers and other parents, are unsuitable and neglectful parents. [citation omitted]. If an unwed father may not lose the custody of his children without the hearing to which unmarried mothers and other parents would be entitled, by a parity of reasoning, a girl of 16 or 17 may not be subject to a possible loss of liberty for conduct which would be entirely licit for 16 and 17-year-old boys.

Consequently, since there is no justification for the age-sex distinction, so much of section 712 (subd. [illegible] of the Family Court Act as encompasses females between the ages of 16 and [illegible]t be stricken as unconstitutional.

The order appealed from should be reversed, without costs, and the petition dismissed.

BURKE, BERGAN, BREITEL AND GIBSON, JJ., concur with FULD, C.J.

SCILEPPI and JASEN, Judges, dissent and vote to affirm in the following memorandum:

We dissent and vote to affirm on the ground that there is a rational basis for the distinction made between male and female offenders. The additional protection afforded females as provided for in the statute is realistic and reasonable and since the age differential applies to all females alike, there is no denial of equal protection.

WARK v. STATE OF MAINE, 266 A.2d 62 (Supreme Judicial Court of Maine, 1970) cert. denied 400 U.S. 952 (U.S. Supreme Court, 1970).

[This was an appeal from a denial of post-conviction relief. In 1965, Burton A. Wark had pleaded guilty to a charge of escape from a prison farm. In his petition he raised a number of procedural issues, which are not relevant here, but he also raised an important constitutional question involving different treatment of men and women in the criminal law. That portion of Justice Webber's opinion which deals with Wark's other claims is omitted, as are the footnotes.]

Petitioner contends that he was denied due process of law and equal protection of the law in that he received a sentence longer than the maximum sentence which could have been imposed upon a female who escaped from her place of incarceration while serving an identical State Prison sentence for an identical offense. Petitioner's argument is that under the statutes applicable on August 1, 1965, the day his escape occurred, a male prisoner escaping from the State Prison was punishable by imprisonment for "any term of years," whereas a female serving a State Prison sentence but confined pursuant to 34 M.R.S.A. Sec. 852 at the "Reformatory for Women" would have been punishable for escapt therefrom "by additional imprisonment in said reformatory for not more than 11 months." Assuming arguendo but without deciding that the female prisoner under these circumstances would have been punishable under 34 M.R.S.A. Sec. 859, we approach the problem as to whether the disparity in maximum sentences violates petitioner's constitutional rights. The petitioner's sentence for escape was for a term of not less than six or more than twelve years.

We have had no previous occasion to consider the precise issue. In Gosselin, Petr. (1945) 141 Me. 412, 44 A.2d 882, cert. den. Gosselin v. Kelley, 328 U.S. 817, 66 S. Ct. 982, 90 L.Ed. 1599, the equal protection issue was raised by a woman who complained that the maximum limit of an indeterminate sentence to the Reformatory for Women as for a misdemeanor was three years whereas the maximum limit for confinement at the Reformatory for Men under like circumstances was only two years. Our Court concluded that a legislative determination that a classification as between the sexes for purposes of "reform" was neither unreasonable nor improper. We are aware that in some recent cases, courts faced with the same problem have reached contrary results. United States ex rel. Robinson v. York (1968) D.C.D. Conn., 281 F. Supp. 8; United States ex rel. Sumrell v. York (1968) D.C.D. Conn., 288 F. Supp. 955; Liberti v. York (1968) 28 Conn. Sup. 9, 246 A.2d 106; Commonwealth v. Daniel (1968) 430 Pa. 642, 243 A.2d 400. Whether or not in the light of these cases and their reasoning we would reconsider our holding in Gosselin if the same facts were again presented need not concern us here. In the instant case we are dealing with the subject of escape and the distinctive attributes of the sexes become relevant and in our view controlling.

It is universally recognized that classifications based upon sex can properly be made if they meet certain standards. . . . In our leading case of State v. King (1936) 135 Me. 5, 19, 188 A. 775, 783, the test was stated in these terms, "It must be borne in mind that discrimination alone is not sufficient to render the Act unconstitutional under the Fourteenth Amendment. In order thus to void it, its provisions must either bear no actual relation between the means and the end considering the purpose of the Act or create a discrimination, unwarranted by actual differences, so that the statute is purely arbitrary and effects legislation which unreasonably and without proper distinction favors some persons or classes over others in like circumstances. Either such lack of relationship or the presence of arbitrariness spells unconstitutionality." . . .

When we apply this test to the present circumstances, it is apparent that there is a validating relationship as between the varying behavioral patterns of the two sexes and the statutory distinction as between the sexes. It must be noted at the outset that the statutes have long provided for an exclusively male population at the State Prison, a maximum security institution. Women sentenced to the State Prison have been automatically transferred to and confined in the "Reformatory for Women" (now the Women's Correctional Center) in execution of such sentences. The Legislature could on the basis of long experience conclude that women, even those sentenced to the State Prison for serious offenses, tend for the most part to be more amenable to discipline and custodial regulation than their male counterparts and can therefore be effectively confined in an institution which lacks the high walls, armed guards and security precautions of a prison. By the same token the Legislature could reasonably conclude that the greater physical strength, aggressiveness and disposition toward violent action so frequently displayed by a male prisoner bent on escape from a maximum security institution presents a far greater risk of harm to prison guards and personnel and to the public than is the case when escape is undertaken by a woman confined in an institution designed primarily for reform and rehabilitation. Viewing statutory provisions for punishment as in part a deterrent to criminal conduct, the Legislature could logically and reasonably conclude that a more severe penalty should be imposed upon a male prisoner escaping from the State Prison than upon a woman confined at the "Reformatory" while serving a State Prison sentence who escapes from that institution. We conclude that a classification based on sex under these circumstances is neither arbitrary nor unreasonable but is a proper exercise of legislative discretion which in no way violates the constitutional right to equal protection of the law. The logical basis for such classification is far clearer than was the case in Gosselin.

Appeal denied.

APPENDIX A

Executive Order 11375

AMENDING EXECUTIVE ORDER NO. 11246,
RELATING TO EQUAL EMPLOYMENT OPPORTUNITY

It is the policy of the United States Government to provide equal opportunity in Federal employment and in employment by Federal contractors on the basis of merit and without discrimination because of race, color, religion, sex or national origin.

The Congress, by enacting Title VII of the Civil Rights Act of 1964, enunciated a national policy of equal employment opportunity in private employment, without discrimination because of race, color, religion, sex or national origin.

Executive Order No. 11246 of September 24, 1965, carried forward a program of equal employment opportunity in Government employment, employment by Federal contractors and subcontractors and employment under Federally assisted construction contracts regardless of race, creed, color or national origin.

It is desirable that the equal employment opportunity programs provided for in Executive Order No. 11246 expressly embrace discrimination on account of sex.

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered that Executive Order No. 11246 of September 24, 1965, be amended as follows:

(3) Paragraphs (1) and (2) of the quoted required contract provisions in section 202 of Part II, concerning nondiscrimination in employment by Government contractors and subcontractors, are revised to read as follows:

> "(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.
>
> "(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin."

(4) Section 203(d) of Part II is revised to read as follows:

> "(d) The contracting agency or the Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any

agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, religion, sex or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the contracting agency or the Secretary of Labor may require."

The amendments to Part I shall be effective 30 days after the date of this order. The amendments to Part II shall be effective one year after the date of this order.

LYNDON B. JOHNSON

THE WHITE HOUSE,
October 13, 1967

APPENDIX B

Executive Order 11478

EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT

It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin. All recent Presidents have fully supported this policy, and have directed department and agency heads to adopt measures to make it a reality.

As a result, much has been accomplished through positive agency programs to assure equality of opportunity. Additional steps, however, are called for in order to strengthen and assure fully equal employment opportunity in the Federal Government.

NOW, THEREFORE, under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

Section 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

Sec. 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1. It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer such a program in a positive and effective manner; assure that recruitment activities reach all sources of job candidates; utilize to the fullest extent the present skills of each employee; provide the maximum feasible opportunity to employees to enhance their skills so they may perform at their highest potential and advance in accordance with their abilities; provide training and advice to managers and supervisors to assure their understanding and implementation of the policy expressed in this Order; assure participation at the local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability; and provide for a system within the department or agency for periodically evaluating the effectiveness with which the policy of this Order is being carried out.

Sec. 3. The Civil Service Commission shall provide leadership and guidance to departments and agencies in the conduct of equal employment opportunity programs for the civilian employees of and applicants for employment within the executive departments and agencies in order to assure that personnel operations in Government departments and agencies carry out the objective of equal opportunity for all persons. The Commission shall review and evaluate agency program operations periodically, obtain such reports from departments and agencies as it deems necessary, and report to the President as appropriate on overall progress. The Commission will consult from time to time with such individuals, groups, or organizations as may be of assistance in improving the Federal program and realizing the objectives of this Order.

Sec. 4. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, color, religion, sex, or national origin. Agency systems shall provide access to counseling for employees who feel aggrieved and shall encourage the resolution of employee problems on an informal basis. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission.

Sec. 5. The Civil Service Commission shall issue such regulations, orders, and instructions as it deems necessary and appropriate to carry out this Order and assure that the executive branch of the Government leads the way as an equal opportunity employer, and the head of each executive department and agency shall comply with the regulations, orders, and instructions issued by the Commission under this Order.

Sec. 6. This Order applies (a) to military departments as defined in section 102 of title 5, United States Code, and executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, and to the employees thereof (including employees paid from nonappropriated funds), and (b) to those portions of the legislative and judicial branches of the Federal Government and of the Government of the District of Columbia having positions in the competitive service and to the employees in those positions. This Order does not apply to aliens employed outside the limits of the United States.

Sec. 7. Part I of Executive Order No. 11246 of September 24, 1965, and those parts of Executive Order No. 11375 of October 13, 1967, which apply to Federal employment, are hereby superseded.

RICHARD NIXON

THE WHITE HOUSE,
August 8, 1969