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Anne T. Vitale

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INMATE ABORTIONS—THE RIGHT TO GOVERNMENT FUNDING
BEHIND THE PRISON GATES

INTRODUCTION

The Supreme Court in Roe v. Wade\(^1\) established that a woman has the absolute right to obtain an abortion in the first trimester and a qualified right to obtain one thereafter.\(^2\) Courts\(^3\) and legislatures\(^4\) have subsequently deliberated the parameters of that right.\(^5\) Several states have recently enacted statutes that

2. Id. at 154, 165-64. This landmark decision expectedly precipitated both thunderous acclaim and cries of betrayal from the media, the pulpit, and judicial chambers. E.g., N.Y. Times, Jan. 23, 1973, at 1, col. 1; id. at 1, col. 2; id. at 20, col. 1; Catholic News, Jan. 25, 1979, at 1, col. 1. Furthermore, challenges to that right continue to surface in Congress. Proposing an Amendment to the Constitution of the United States for the Protection of Unborn Children and Other Persons: Hearings on S.J. Res. 119 & 130 Before the Subcomm. on Constitutional Amendments, 93rd Cong., 2d Sess. (1974); Proposed Constitutional Amendments on Abortion: Hearings Before the Subcomm. on Civil and Constitutional Rights, 94th Cong., 2d Sess. (1976).
5. When focusing on the question of whether the government must fund abortions, courts and legislatures must, as a threshold matter, define the meaning of medical necessity. In Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court held that the decision to abort during the first trimester was
deny state funding of abortion except in cases in which the life of the mother is threatened, and have relied on these statutes to deny state funding of inmates' abortions. Although these statutes have been held constitutional as applied to a
to be left solely to the woman and her physician. _Id._ at 163. In _Beal v. Doe_, 432 U.S. 438 (1977), however, the state's medicaid statute required pregnant women, seeking eligibility for funding, to submit documented evidence of medical necessity from three physicians. In addition, the state required that abortions be performed at an accredited hospital. _Id._ at 441 n.3. Both requirements were upheld. _Id._ at 447. This contradicted the Court's holding in _Doe v. Bolton_, 410 U.S. 179, 192 (1973), which established that all factors—physical, psychological, and social—were to be considered by a woman and her doctor only in deciding whether abortion was necessary. Furthermore, an accreditation requirement was held not to meet constitutional scrutiny. _Id._ at 194.

6. E.g., 1977 Ga. Laws 234 § 16 (limiting state medicaid funding to those abortions qualifying for federal funding—when the life of the mother would be endangered, when severe, long-lasting physical health damage would result to the mother, or when the mother was a victim of rape or incest and promptly reported the occurrence); Ind. Code Ann. § 16-10-3-3 (Burns Supp. 1979) (limiting state funding to those situations where the life of the mother would be endangered); 1979 Mass. Adv. Legis. Serv. ch. 268 (same); Minn. Stat. Ann. § 256B.02 (West Supp. 1979) (limiting state funding to those situations where the life or health of the mother would be endangered or where the mother was a victim of rape or incest); Pa. Stat. Ann. tit. 35, § 6607 (Purdon Supp. 1979) (limiting state funding to those situations where the life of the mother would be endangered); S.D. Codified Laws Ann. § 28-6-4.5 (Supp. 1979) (same). According to one study of state medicaid funding for abortions, several other states refuse to fund. The Alan Guttmacher Institute, State Medicaid Policies (Aug. 29, 1979). In addition to the aforementioned, states restricting abortions to situations where the life of the mother would be endangered are: Connecticut, Florida, Illinois, Kentucky, Louisiana, Nebraska, New Jersey, North Dakota, Rhode Island, Utah, Virginia, West Virginia and Wyoming. See _id._ Other states restrict abortions to situations where the life or health of the mother would be endangered or where the woman is a victim of rape or incest: Alabama, Arkansas, Delaware, Maine, Maryland, Mississippi, Missouri, Montana, Nevada, New Hampshire, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Vermont, and Wisconsin. See _id._ Kansas and New Mexico will fund abortions when a woman's life is endangered or when a woman is a victim of rape or incest. See _id._ Iowa's provision is the same except for the additional grant of funds when the fetus is deformed. See _id._ Eight of these states, however, are under court order to provide funding of medically necessary abortions: Georgia ( _Doe v. Busbee_, 471 F. Supp. 1326 (N.D. Ga. 1979)), Louisiana ( _Emma G. v. Edwards_, No. 77-1342 (E.D. La. Nov. 27, 1978), _appeal filed_, No. 79-1144 (5th Cir. Dec. 22, 1978)), New Jersey ( _Right to Choose v. Byrne_, No. 3817-77 (Super. Ct. N.J. July 2, 1979)), Ohio ( _Planned Parenthood Affiliates v. Rhodes_, 477 F. Supp. 529 (N.D. Ohio 1979)), Pennsylvania ( _Roe v. Casey_, 464 F. Supp. 487 (E.D. Pa. 1979)), Virginia ( _Doe v. Kenley_, 584 F.2d 1362 (4th Cir. 1978)), West Virginia ( _Smith v. Ginsberg_, No. 75-0380 (S.D.W. Va. May 9, 1978)), Wisconsin ( _Doe v. Percy_, No. 79-367 (W.D. Wis. Sept. 13, 1979)). Utah is under a court order to provide funding according to the standard of the Hyde Amendment. _D. R. v. Mitchell_, No. 78-1675 (10th Cir. Oct. 25, 1979); see note 4 _supra_. Additionally, the constitutionality of three state statutes restricting funds for abortion has been questioned: Connecticut ( _Women's Health Servs. v. Maher_, No. 79-405 (D. Conn. Jan. 7, 1980)), Illinois ( _Zbaras v. Quern_, 469 F. Supp. 1212, 1218 (N.D. Ill.), _vacated_, 596 F.2d 196 (7th Cir.), _review granted_, 48 U.S.L.W. 3356 (U.S. Nov. 26, 1979) (No. 79-5)), Missouri ( _Reproductive Health Servs. v. Freeman_, No. 79-1275 (8th Cir. Jan. 9, 1980)). The Eighth Circuit's decision concerning Missouri's law also casts doubt on Minnesota's statute restricting funding. _Hodgson v. Board of County Comm'n's_, No. 79-1665 (8th Cir. Jan. 9, 1980). Furthermore, the state of California has continued to fund medically necessary abortions pursuant to a court order. _Comision Femenil Mexicana v. Cory_, No. 24053 (Cal. Sup. Ct. Aug. 6, 1979).

free woman, at least when limited to nontherapeutic abortions, the issue of an inmate’s right to a government funded abortion remains unresolved.

Both the free woman’s and the prisoner’s right to abortion is grounded in the constitutional right of privacy and may not be unduly burdened by the government. Due to this identity of interest, an inmate’s right to a government funded abortion may not be recognized as a separate issue, for it may be assumed that the prisoner would at least be subject to the same limitations as the free person. More acute analysis, however, suggests that the policy considerations underlying the funding of abortions for incarcerated women are quite distinct from the constitutional underpinnings of funding abortions for incarcerated women.

Because alternative sources of funding are available to the free woman, denying government funds for an indigent free woman’s abortion may be acceptable. For the indigent prisoner, however, the state is the only source of financing, and its refusal to aid the inmate may create an unconstitutional, undue burden. In addition, although states are not constitutionally obligated to fund abortions

or furnish any other medical services for indigent persons, they are obligated by the eighth amendment to provide all prisoners with medical treatment. Furthermore, the state's denial of an inmate's request for an abortion creates an impermissible classification violating equal protection.

This Note explores the nature of an inmate's right to a state funded abortion and contends that, regardless of the Supreme Court's decision on the issue of government funded, medically necessary abortions for free women, the Constitution mandates that prisoners be granted abortions at government expense. This conclusion might seem anomalous in the sense that the inmate, who has brought about her own detention through some culpable conduct, would be eligible for a social benefit that a free woman would not be able to secure. Constitutional guarantees, however, cannot be stripped from an individual regardless of her situation. Part I of this Note examines the foundation of the inmate's rights to abortion and the prohibition against government creation of an undue burden. The state's constitutional obligation under the eighth amendment to provide all inmates with state funded medical care is discussed in Part II. Finally, in Part III, the limitations on the inmate's access to a state funded abortion are discussed in terms of an equal protection analysis.

I. PRIVACY, ABORTION, AND UNDUE BURDEN

A woman is not wholly stripped of her constitutional rights when she is imprisoned. Even though incarcerated, "no iron curtain" separates an inmate from the constitutional guarantee not to "be deprived of life, liberty, or property without due process of law." The Supreme Court has held that a woman's right to abortion is a liberty interest to be protected from undue government interference by the due process clauses of the fifth and fourteenth amendments. The

12. Id. at 469.
13. U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").
14. Estelle v. Gamble, 429 U.S. 97, 103-04 (1976). In Estelle, the Court enunciated the basis of an inmate's constitutional right to medical care and formulated the standard of medical care that the prison is obligated to provide. See notes 61-65 infra and accompanying text.
16. Wolff v. McDonnell, 418 U.S. 539, 555 (1974); see Procunier v. Martinez, 416 U.S. 396, 405-06 (1974) ("When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."); cf. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (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 embody them conflicting with the Constitution of the United States").
genesis of this right is the individual's right to privacy. The right to privacy enjoys an honorable and impressive history. It has long been acknowledged as an area of tort law and has been described as "a right of complete immunity; to be let alone." T. Cooley, A Treatise on the Law of Torts 29 (2d ed. 1888). Warren and Brandeis first articulated the basis for the existence of the right to privacy. Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). The authors concluded that the broader principle of privacy underlying defamation and invasion of property cases deserved recognition as a sufficient basis for a separate cause of action. Id. at 219-20; see Prosser, Privacy, 48 Cal. L. Rev. 383, 384 (1960); Comment, Employee Privacy Rights: A Proposal, 47 Fordham L. Rev. 155, 160-64 (1978). Since the initial exposition of Warren and Brandeis, the right of privacy has been viewed as encompassing the protection of an individual's interest in being free from intrusion in private affairs, from public disclosure of embarrassing private facts, from publicity placing her in a false light, and from appropriation of her name or likeness for another's benefit. Prosser, supra, at 389. Although earlier Supreme Court opinions had alluded to the right of privacy, Palko v. Connecticut, 302 U.S. 319, 327 (1937), overruled, 395 U.S. 784 (1969); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), overruled, 389 U.S. 347 (1967). The phrase the "new liberty" attests to privacy's late acknowledgement as a constitutionally protected right. P. Freund, A. Sutherland, M. Howe, & E. Brown, Constitutional Law 1112 (4th ed. 1977). Though no express doctrinal phraseology exists, the right of privacy is constitutionally based in the penumbra of the Bill of Rights. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (privacy is founded in the penumbra of the first amendment's guarantee of the right of association, the third amendment's prohibition of the quartering of soldiers, the fourth amendment's prohibition of unlawful searches and seizures, the fifth amendment's creation of a zone of privacy, and the ninth amendment's preservation of rights of the people). It also derives support from the restrictions imposed by the fourteenth amendment on state interference with individual liberty. Roe v. Wade, 410 U.S. 113, 153 (1973). The due process clause of the fifth amendment protects an individual from federal interference with fundamental rights in the same way that the fourteenth amendment prohibits state interference. Thus, privacy is recognized as a fundamental right "‘implicit in the concept of ordered liberty’ " and human dignity, protected against both federal and state infringement. Id. at 152-53 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

20. Id. The right to privacy enjoys an honorable and impressive history. It has long been acknowledged as an area of tort law and has been described as "a right of complete immunity; to be let alone." T. Cooley, A Treatise on the Law of Torts 29 (2d ed. 1888). Warren and Brandeis first articulated the basis for the existence of the right to privacy. Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). The authors concluded that the broader principle of privacy underlying defamation and invasion of property cases deserved recognition as a sufficient basis for a separate cause of action. Id. at 219-20; see Prosser, Privacy, 48 Cal. L. Rev. 383, 384 (1960); Comment, Employee Privacy Rights: A Proposal, 47 Fordham L. Rev. 155, 160-64 (1978). Since the initial exposition of Warren and Brandeis, the right of privacy has been viewed as encompassing the protection of an individual's interest in being free from intrusion in private affairs, from public disclosure of embarrassing private facts, from publicity placing her in a false light, and from appropriation of her name or likeness for another's benefit. Prosser, supra, at 389. Although earlier Supreme Court opinions had alluded to the right of privacy, Palko v. Connecticut, 302 U.S. 319, 327 (1937), overruled, 395 U.S. 784 (1969); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), overruled, 389 U.S. 347 (1967). The phrase the "new liberty" attests to privacy's late acknowledgement as a constitutionally protected right. P. Freund, A. Sutherland, M. Howe, & E. Brown, Constitutional Law 1112 (4th ed. 1977). Though no express doctrinal phraseology exists, the right of privacy is constitutionally based in the penumbra of the Bill of Rights. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (privacy is founded in the penumbra of the first amendment's guarantee of the right of association, the third amendment's prohibition of the quartering of soldiers, the fourth amendment's prohibition of unlawful searches and seizures, the fifth amendment's creation of a zone of privacy, and the ninth amendment's preservation of rights of the people). It also derives support from the restrictions imposed by the fourteenth amendment on state interference with individual liberty. Roe v. Wade, 410 U.S. 113, 153 (1973). The due process clause of the fifth amendment protects an individual from federal interference with fundamental rights in the same way that the fourteenth amendment prohibits state interference. Thus, privacy is recognized as a fundamental right "‘implicit in the concept of ordered liberty’ " and human dignity, protected against both federal and state infringement. Id. at 152-53 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).


state's interests in maternal health, medical standards, and potential life become compelling at the various stages of pregnancy.\(^{25}\) Conversely, a woman's right to terminate pregnancy is improperly limited when the government imposes an undue burden on that right.\(^{26}\) Notwithstanding the legitimate interests of the state in the protection of health and potential life, the state creates such a burden when it interferes with a woman's fundamental right to abortion during the first trimester of pregnancy,\(^{27}\) or when it prohibits abortion of a viable fetus if the abortion is necessary to preserve the life or health of the mother.\(^{28}\)

An inmate's fundamental right to an abortion cannot justifiably be limited based on the government's penological interests. When an inmate is deprived of her right to terminate pregnancy, she is effectively divested of a protected liberty interest.\(^{29}\) This contradicts an inmate's constitutional guarantee to the full exercise of all fundamental rights not essential to the realization of legitimate penological purposes—retribution, deterrence, protection of society, and rehabilitation.\(^{30}\) As would be the case with a threatened infringement of any of her other fundamental rights, the courts must weigh a woman's right to abortion against the considerations of the penal system.\(^{31}\) The government's interest in "the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners,"\(^{32}\) must be balanced against the constitutional rights of inmates, including the constitutional right of abortion.

Although some privacy rights, most notably those concerning searches\(^{34}\) and

\(^{25.}\) Roe v. Wade, 410 U.S. 113, 153-55 (1973). The state's interest is based on the theory that "[t]he pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus . . . . [I]t 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." \textit{Id.} at 159. Similarly, a state's interest in the protection of maternal health enables the state to promulgate "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." \textit{Id.} at 163.

\(^{26.}\) Maher v. Roe, 432 U.S. 464, 472 (1977); Roe v. Wade, 410 U.S. 113, 155, 162, 164-65 (1973). Undue burden has been described as an absolute or arbitrary veto of the right. \textit{See} note 39 \textit{infra} and accompanying text.


\(^{28.}\) \textit{Id.}

\(^{29.}\) \textit{See} notes 17-22 \textit{supra} and accompanying text.

\(^{30.}\) United States v. Lilly, 576 F.2d 1240, 1244 (5th Cir. 1978); Newman v. Alabama, 559 F.2d 283, 286 (5th Cir. 1977); cert. denied, 438 U.S. 915 (1978); Sostre v. Preiser, 519 F.2d 763, 764 (2d Cir. 1975); Bonner v. Coughlin, 517 F.2d 1311, 1315 (7th Cir. 1975); cert. denied, 435 U.S. 932 (1978); United States v. Savage, 482 F.2d 1371, 1372 (9th Cir. 1973); cert. denied, 415 U.S. 932 (1974).


\(^{32.}\) \textit{Cf.} Pell v. Procunier, 417 U.S. 817, 823 (1974) ("It is in the light of these legitimate penal objectives that a court must assess challenges to prison regulations based on asserted constitutional rights of prisoners.").


\(^{34.}\) Bell v. Wolfish, 441 U.S. 520, 558-60 (1979).
the reading of mail,\textsuperscript{35} are minimized by the exigencies of prison security,\textsuperscript{36} the privacy right encompassing a woman's right to abortion does not detract in any respect from legitimate penological purposes or other government interests. Society is no less protected, crime is no less deterred, retribution is not undermined, and rehabilitation is not hindered by the exercise of a prisoner's right to have an abortion.\textsuperscript{37}

Because a state clearly cannot deprive an inmate of her right to abortion, it appears that the state may also have an affirmative duty to secure the protection of that right by providing access to, as well as funding for, an abortion. Statutes restricting government funds for abortion\textsuperscript{38} must be analyzed to determine whether they create an undue burden when applied to an inmate. In all situations, an absolute or arbitrary veto of the decision to abort constitutes an undue burden and is unconstitutional.\textsuperscript{39} An inmate who chooses to terminate pregnancy must rely totally on the department of correctional services to arrange for her abortion and provide access to the health facility where it is to be performed.\textsuperscript{40} Denial of access is an absolute interdiction: the state's refusal to facilitate the exercise of the inmate's decision to terminate pregnancy is the equivalent of an absolute veto. If the state were allowed to deny a prisoner access to abortion, the inmate would then retain only a hollow right, incapable of fulfillment because of state restriction.


36. Cell searches, body searches, and reading of mail are necessitated by the fact that "[s]nuggling of money, drugs, weapons and other contraband is all too common an occurrence" in prisons, thus posing a threat to prison security. Bell v. Wolfish, 441 U.S. 520, 559 (1979).


38. See note 9 supra and accompanying text.

39. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976). In that case, the Supreme Court refused to uphold a state statute requiring parental or spousal consent for abortion. "[W]e cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right." Id. at 70. No state interest in preserving a family member's rights could justify such a statutory requirement. "[T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." Id. at 74. In Bellotti v. Baird, 428 U.S. 132 (1976), the Court stated that state regulation of abortion "is not unconstitutional unless it unduly burdens the right to seek an abortion." Id. at 147. The Court, reasoning that a state statute requiring parental consent would constitute an undue burden, id. at 148-51, remanded the case to the district court for proceedings consistent with its decision. The district court declared the statute unconstitutional. 450 F. Supp. 997 (1978), aff'd, 99 S. Ct. 3035 (1979). In affirming, the Supreme Court stated that the requirement of parental consent might be justified if the state would "provide an alternative procedure whereby authorization for the abortion can be obtained." 99 S. Ct. 3035, 3048 (1979) (footnote omitted). A procedure for judicial determination of the minor's maturity or best interests, without parental notice, consultation, or consent, would fulfill the alternative procedure mandate. Id. at 3050.

Access in the context of the prison system, however, might require the state to do more than simply arrange for a doctor and a hospital. If the state were not to fund the abortion of an inmate lacking the financial resources necessary to pay for it, the inmate might be precluded from terminating her pregnancy. The indigent inmate could be compared to the indigent free women in *Maher v. Roe*, who also could not procure abortions because of their financial condition. In *Maher*, the Court held that a state's refusal to fund nontherapeutic abortions for indigent free women is permissible. It might similarly be concluded that a state does not create an undue burden when it refuses to fund an indigent inmate's abortion because the state is not necessarily imposing an absolute veto: it would allow the prisoner to have an abortion if she could pay for it. Because the state did not create the inmate's indigency in the first instance, some would claim that it need not alleviate that hardship. Moreover, it could be argued that alternatives to state funding are not barred; the inmate may seek private sources of funding for

42. *Id.* at 473-74. Neither an arbitrary veto nor government compulsion is imposed by the state's decision to deny the funding of nontherapeutic abortions of indigent women. Abortion is not barred; private sources of funding are available. For example, the Justice Fund was established by National Planned Parenthood to provide financial aid for indigent women who were precluded from medicaid funding. Planned Parenthood Federation of America, The Justice Fund (undated pamphlet). Women's groups have funded abortions for indigent women on an ad hoc basis. Additionally, some clinics adopt sliding scale fees for those unable to pay for abortions. Telephone Interview with Amelia Zalcman, National Abortion Federation (Feb. 5, 1980) (transcript on file with the Fordham Law Review). An alternative, private financing, though made difficult by indigency, nevertheless exists. "The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the (regulation denying funding)." *Maher v. Roe*, 432 U.S. at 474.

In Beal v. Doe, 432 U.S. 438, 447 (1977), the Supreme Court held that the state's refusal to provide medicaid funds for nontherapeutic abortions did not violate Title XIX of the Social Security Act §§ 1901-11, 42 U.S.C. §§ 1396-1396j (1976). The Court was cognizant of the fact that a state is not obligated to provide funding for medical treatment of needy persons. 432 U.S. at 441. Although states choosing to participate in medicaid programs are required by statute to establish "reasonable standards . . . for determining . . . the extent of medical assistance," *id.* at 441, 444 (quoting 42 U.S.C. § 1396a(a)(17) (1976)), the Court noted that there is nothing in Title XIX suggesting that participating states must fund every medical procedure. *Id.* at 444. It acknowledged, however, that the exclusion of necessary medical treatment from a state's medical plan may present serious statutory questions. *Id.; see note 9 supra.* The Court reemphasized that states were not constitutionally obligated to pay for pregnancy-related, or indeed any, medical expenses of indigents in *Maher v. Roe*, 432 U.S. at 469. The Supreme Court's decisions upholding the right of a state to refuse to fund nontherapeutic abortions have received much criticism. The strong dissenting opinions, *id.* at 482 (Brennan, J., dissenting); *Beal v. Doe*, 432 U.S. 438, 448, 454 (Brennan, J. dissenting); *id.* at 454 (Marshall, J., dissenting), and law review articles have noted their disapproval, examined the scope of the decisions, and have suggested novel approaches in circumventing their force. Canby, *Government Funding, Abortions, and the Public Forum*, 1 Ariz. St. L.J. 11 (1979); Perry, *The Abortion Funding Cases: A Comment On The Supreme Court's Role in American Government*, 66 Geo. L.J. 1191 (1978); Comment, *Beal v. Doe*, *Maher v. Roe*, and *Non-Therapeutics Abortions: The State Does Not Have To Pay The Bill*, 9 Loyola U.L.J. 288 (1977); Note, *Beal, Maher and Poelker: The End of An Era*, 17 J. Fam. L. 49 (1978). It is not the purpose of this article to add to the criticisms but rather to distinguish the issues pertaining to free indigent women from the issues pertaining to imprisoned women.

43. *But see* notes 44-48 infra and accompanying text.
the service she desires. It could therefore be contended that it is the inmate's lack of money, rather than the state's denial of funding, that is the cause of her inability to terminate pregnancy.

A closer analysis, however, suggests an opposite conclusion. The comparison of an indigent free woman to an indigent inmate is seriously flawed for several reasons. First, the indigent inmate, unlike her free counterpart, is completely dependent on the state for all medical treatment; "if the authorities fail to [meet her medical needs], those needs will not be met." In addition, the inmate's employment opportunities are controlled by the state. If she is permitted to work at all, she works within the prison, for limited time periods, and at minimal prison wages. Thus, her ability to earn enough money to pay for an abortion is virtually nonexistent while she is incarcerated. Furthermore, outside sources of income, most notably welfare payments and medicaid services, are not available to the inmate. Even if private sources were willing to fund the inmate's abortion, her constitutional guarantee to medical care should not be dependent on the whim of an individual. It is evident, therefore, that although the state might not have created the inmate's indigency, it shackles her to indigent status for as long as she is imprisoned.

Moreover, when a state incarcerates an individual, it assumes the responsibility to provide for her care. This duty requires the state to protect the inmate's constitutional rights by supporting several programs that it would not be obligated to fund outside prison and that, in fact, it might be constitutionally prohibited from funding outside the prison gates. For example, the first amendment prohibits the establishment of religion. The use of government funds to employ chaplains might be said to violate the establishment clause, yet chaplains for prisoners are lawfully supported by federal and state funds.

45. N.Y.S. Dep't of Correctional Services, Incentive Allowance Change Memorandum (Aug. 1. 1978). The highest rate of daily wages is between $1.15 and $1.25. Id.
46. 42 U.S.C. § 1396d(a)(17) (A) (inmates of public institutions are ineligible to receive medicaid and welfare funds).
49. U.S. Const. amend. I.
prohibition of the free exercise of religion would most likely result if inmates were not provided the opportunity for religious practice. Similarly, prisoners have a constitutional right to meaningful access to the courts, which is secured at the considerable expense of the state—the state must provide them with law libraries or assistance from persons trained in the law regardless of the inmate’s financial status. Analogously, the fact that the government need not fund the exercise of a free woman’s right to abortion does not lead to the conclusion that the state need not fund the inmate’s exercise of that right. This assertion has gained acceptance on the federal level and in some states. Despite the annual passage by Congress of the Hyde Amendment, which restricts the disbursement of government funds for abortion, the policy of the federal prison system has been not only to arrange for an inmate’s abortion, but also to pay for it. The Department of Justice reiterated this policy as recently as last year.

It is important to note that the right to state funding derives not from the inmate’s indigence but from her status as a ward of the state. Therefore, the state must fund those services required for the exercise of the inmate’s constitutionally protected liberties, one of which is the right to terminate pregnancy. At the very least, this requires that the state arrange for the abortion, as well as finance the procedure for those inmates who cannot afford to pay for it themselves.

II. ABORTION, MEDICAL NEEDS, AND THE EIGHTH AMENDMENT

No person, whether rich or poor, must pay for the treatment of her “medical needs” while incarcerated, even if those needs do not rise to the level of medical necessity. The eighth amendment’s prohibition of cruel and unusual punishment...
ment entitles all inmates to receive state funded medical treatment. Although this provision was originally interpreted as a proscription of torture and barbaric methods of punishment, its meaning has been extended to encompass "the unnecessary and wanton infliction of pain" resulting from the failure to treat the medical needs of prisoners. The government is obligated to prevent "pain and suffering which no one suggests would serve any penological purpose." Deliberate indifference on the part of prison doctors toward the medical needs of inmates as well as denial or even intentional delay by prison officials in providing medical care violates this constitutional mandate.

A serious medical need has been defined as "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." Courts have further established that a prisoner's eligibility for state funded medical treatment is not limited to life-threatening situations. Indeed, dental hygiene, psychological care, sinus conditions, varicose veins, ulcers, broken bones, fevers and high blood pressure have been held to meet the standard of serious medical need, thereby requiring the delivery of medical care at state expense.

Unwanted pregnancy arguably poses no less a serious medical need than does sinus congestion. In Roe v. Wade, the Supreme Court recognized that the decision to secure an abortion involved a consideration of the physical and mental health of the mother. Pregnancy, even under the most desirable circumstances, involves physical pain. Nausea, back pain, hyperventilation, bladder injuries, and labor pains are well-recognized concomitances of pregnancy.

a medical judgment that "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." Doe v. Bolton, 410 U.S. 179, 192 (1973); see note 5 supra.


Id. at 104-05.


Massey v. Hutto, 545 F.2d 45, 47 (8th Cir. 1976).

Lue v. Armistead, 582 F.2d 1291, 1296 (4th Cir. 1978).


410 U.S. 113 (1973).

Id. at 153; see notes 78-88 infra and accompanying text.

L. Hellman & J. Pritchard, Williams Obstetrics 248-86 (14th ed. 1971). "Increased retention of water has long been regarded as a characteristic biochemical alteration of late pregnancy," id. at 248; the bladder is "easily traumatized, and more susceptible to infection," id. at 266; "pregnancy induces a certain degree of hyperventilation," id. at 260; it causes an "alteration of maternal posture, which, in turn, may cause discomfort in the lower portion of the back, especially late in pregnancy."
Moreover, the mortality rate among women during childbirth is higher than that occurring during abortions performed in the early stages of pregnancy.  

Unwanted pregnancy also has serious implications for a woman’s mental health. Medical testimony demonstrates that unwanted pregnancy is a “source of stress” and can lead to “psychiatric symptoms” such as “severe mental disturbance, including suicidal ideation.” The “detriment” of unwanted pregnancy has been found to be especially serious in cases of women in “trying life” situations. Pregnancies of indigent women, psychologically disturbed women, and adolescents, as well as those occurring in circumstances in which women experience feelings of “helpless insecurity,” frequently become “unendurably stressful and emotionally destructive.” Imprisonment is one additional circumstance that exacerbates the detriment of unwanted pregnancy. A number of objective factors indigenous to the prison setting contribute to this: the limited prenatal medical care and supervision, the high starch-low protein diet, and the isolation from family and other support services. Furthermore, the anxiety attendant upon not only bearing an unwanted child but also upon eventually losing custody of that infant, constitutes a further reason for classifying an inmate’s abortion as a serious medical need.

During the last trimester of pregnancy, aching, numbness, and weakness are occasionally noted in the upper extremities. . . .” Id. at 269. Finally, “pregnancy is frequently characterized by disturbances of the digestive system, particularly nausea and vomiting.” Id. at 286.

Id. at 153. “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 childcare. 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 . . . 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.” Id.


McRae v. Secretary, HEW, No. 76-1804, slip op at 116 (E.D.N.Y. Jan. 15, 1980), appeal docketed sub nom. Harris v. McRae, 48 U.S.L.W. 3535 (U.S. Feb. 19, 1980) (No. 79-1268). “Trying life” situations were described as those which were marked by poverty, mental distress, pressures of adolescence, or physical complications. Id. at 116-24.

Id. at 123.

Id. at 121; see, e.g., Bushman v. Burns Clinic Medical Center, 83 Mich. App. 453, 268 N.W.2d 683 (1978).


Id. at 123.

Id.
Moreover, from the point of view of medical treatment, the unwanted pregnancy presents a unique problem in terms of alternative therapeutic solutions: there are none. It is unlike most other ailments for which the attending physician may elect any one of a number of treatments to relieve a prisoner's pain and suffering. In a case where a prisoner complains of back pain, for example, the available procedures are numerous—bed rest, exercise, muscle relaxers, traction, or surgery. No one method is guaranteed to alleviate pain and suffering. If one treatment proves unsuccessful, another is available. In the case of unwanted pregnancy, however, only one medical procedure—abortion—will alleviate the potential for serious physical and psychological pain and suffering of the inmate. In the same way that an absolute refusal to treat the inmate's back pain would constitute deliberate indifference to or an intentional denial of a prisoner's medical needs, so too failure to provide abortion services would violate the eighth amendment's proscription of cruel and unusual punishment. Providing prenatal medical care and childbirth services would not constitute an alternative solution, because this approach would not fulfill the prison's responsibility to supply treatment alleviating the pain and suffering inherent in bearing an unwanted child.

A second comparison will serve to sharpen the distinction between possibly frivolous or questionable psychological harm and the documented evidence of psychological injury that is likely to be incurred by a woman, especially an imprisoned one, bearing an unwanted child. The state is required, for example, to treat a prisoner's complaint of pain and suffering resulting from a broken nose. It may not be required, however, to perform cosmetic surgery. In the latter case, the psychological pain and suffering that an inmate might suffer from the disfigurement cannot be objectively measured and is not a socially recognized injury. Further, because cosmetic surgery can be performed even years after

90. Id.
94. Interview with Dr. Thomas Krizek, Professor of Surgery (Plastic), Columbia University College of Physicians and Surgeons, and Chief, Division of Plastic Surgery, Columbia Presbyterian Medical Center (Feb. 7, 1980) (transcript on file with the Fordham Law Review) [hereinafter cited as Krizek Interview]. At least three states, Maryland, New York, and Texas, have voluntarily provided inmates with cosmetic surgery. Id. New York State funds any treatment that is "medically founded." Barton Interview, supra note 54. New York City, for instance, funded reconstructive surgery for inmate William Morales, who had lost both hands in the explosion that led to his arrest. Morales had already been sentenced when he escaped from Bellevue Hospital, where he was being fitted for artificial hands before being transferred to a state prison. N. Y. Times, May 22, 1979, § A, at 1, col. 5.
95. Krizek Interview, supra note 94. Insurance companies, for example, generally will pay for cosmetic surgery performed on tissue altered by disease, illness, or accident, but will not pay for cosmetic surgery performed on normal tissue for the sole purpose of improving appearance. In the latter instance, the companies refuse reimbursement because the procedure is not recognized as a medical need. Id.
the injury, the prisoner has a complete medical remedy once she is released from the institution. In sharp contrast, medical treatment at childbirth, even when coupled with adoption, does not alleviate the trauma of unwanted pregnancy. The pregnant woman only has up to nine months to receive the necessary medical treatment. Once that period of time has elapsed, no alternatives remain—the pain and suffering has not been alleviated, and it no longer can be.

III. FINANCING, CLASSIFICATIONS, AND EQUAL PROTECTION

Under the foregoing analysis, it is apparent that the state is constitutionally obligated to provide an inmate access to an abortion by arranging for the doctors and facilities, and by financing the abortion if the inmate is unable to pay. It remains to be determined whether the state may refuse to fund the abortions of those inmates who can afford them, or whether the state is obligated to finance the abortions of all inmates who desire them. A strong argument can be made to support each view. On the one hand, it has been recognized that the state has an interest sufficient to justify its refusal to fund nontherapeutic abortions for indigent free women. Although this rationale is untenable when applied to indigent inmates, it nevertheless could be argued that the state should not be required to fund abortions for nonindigent inmates.

On the other hand, the state does not have the right to put conditions on its obligation to provide an inmate with needed medical treatment. Withholding access to medical treatment pending payment by the inmate creates impermissible physical and psychological burdens and might be tantamount to denying the medical care required under the eighth amendment. The risks and illnesses accompanying unwanted pregnancy, aggravated by state inaction, are penalties additional to those imposed upon the inmate by the prison sentence. The woman is forced to bear punishment “which no one suggests would serve any penological purpose.” By excluding women who might be able to afford an abortion from receiving state funded medical care, the state is limiting the purview of the eighth amendment. Instead, it is establishing, in abortion cases, an exception to the inmate’s constitutional right to state funded medical treatment.

Given the constitutional mandate to provide for the medical needs of prisoners, denial of some medical services by the state should be subject to the strict

96. Id.
98. Maher v. Roe, 432 U.S. 464, 474 (1977). The Supreme Court in Maher found that the state’s interest was to promote childbirth. It weighed this interest against the pregnant woman’s right to be free from state action burdening her right to abortion and upheld the state restriction on funds for abortion.
100. Cf. Houchins v. KQED, Inc., 438 U.S. 1, 37 (1978) (Stevens, J., dissenting) (“While a ward of the State and subject to its stern discipline, [the inmate] retains constitutional protections against cruel and unusual punishment . . . .”).
102. See notes 61-65 supra and accompanying text.
This rigorous standard is applied only when a statute creates a classification affecting either a suspect class—race, religion, or alienage—or the exercise of a fundamental right, such as the inmate's right to a state funded abortion. Strict scrutiny requires a state to justify its classification by showing that it has a compelling interest in the right it seeks to regulate. By denying public funding for a prisoner's abortion the state would restrict that right. It would also create two impermissible distinctions: first, between the rights of all inmates seeking general medical care and the rights of those women seeking abortions, and second, between those inmates seeking childbirth services and those seeking abortions. When legislation establishes a classification that limits fundamental rights, the Supreme Court will not sustain the classification merely on the bare showing of a rational relationship between the statute and the ends it is purported to

103. See San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973). In determining whether state action violates equal protection, the Supreme Court has formulated a two tier analysis: strict scrutiny and rational basis. The Court "must decide, first, whether [state action] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not, the [action] must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination . . . ." Id. at 17. In Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion), the Court suggested a third tier of equal protection review, more stringent than the rational basis analysis and less demanding than strict scrutiny. At least for classifications based on gender, the statute in question must be substantially related to an important governmental interest. Orr v. Orr, 440 U.S. 268, 279 (1979); Califano v. Webster, 430 U.S. 313, 316-17 (1977); see Nowak, Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications, 62 Geo. L.J. 1071 (1974). The demonstrable basis standard suggested by Professor Nowak is roughly equivalent to the "intensified means scrutiny" described by Professor Gunther. "In the context of fundamental interests or suspect classifications, the Court would continue to demand that the means be more than reasonable—e.g., that they be 'necessary,' or the 'least restrictive' ones." Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 24 (1972). According to Professor Gunther, one can expect the Court in cases such as these to be "less willing to strain for conceivable justifications, less ready to hypothesize imaginable facts that might underlie questionable classifications, less inclined to tolerate substantial over- and underinclusiveness in deference to legislative flexibility." Id. at 33; see Comment, Equal Protection in Transition: An Analysis and a Proposal, 41 Fordham L. Rev. 605 (1973).

serve.110 Because a classification has been made and because fundamental rights are involved, the state must meet the strict scrutiny standard of the equal protection analysis.

It appears that the government would not be able to establish a compelling state interest sufficient to justify application of a statutory prohibition of state funded abortions to inmates.111 The state's interest in the protection of unborn life only becomes compelling after the fetus has attained viability.112 Though a state may encourage childbirth, it cannot make childbirth the sole treatment of pregnancy.113 Furthermore, the state's possible interest in fiscal control cannot justify the application of the questioned statute to inmates, because it is considerably less expensive to fund an abortion than it is to underwrite childbirth and aftercare services.114 Additionally, no penological purpose is furthered by forcing a prisoner to bear an unwanted child.115 In fact, the penal goal of rehabilitation might be impeded by the negative effect on an inmate's life of unwanted pregnancy and the stigma attached thereto.116

Although the Supreme Court in *Maher v. Roe*117 held that failure to fund an indigent woman's nontherapeutic abortion was not a violation of the equal protection clause, that decision was based on a finding that the government does not have an obligation to provide any medical services to indigent women.118 Under this analysis, the question of a state funded abortion for a free woman does not impinge on the issue of a fundamental right and thus does not call for the application of the strict scrutiny standard. In *Maher*, the Court applied the rational basis standard to determine whether a state may subsidize childbirth while refusing to subsidize nontherapeutic abortions.119 Rational basis requires a state to justify its regulation by showing only that a legitimate state interest is involved.120 The Court recognized such a legitimate interest in the state's desire...
to encourage childbirth and protect potential life. The fundamental right to be free from state restriction of abortion, which was judicially recognized in Roe v. Wade, is not inhibited by the state's refusal to fund a free woman's nontherapeutic abortion. Other sources of funding are available, and the free woman may still be able to procure an abortion. The Maher Court found that the statute in question did not "[penalize] the woman's decision to have an abortion by refusing to pay for it." Refusing to fund an abortion for an inmate, however, is in effect an unconstitutional penalty on the exercise of that right. Because the inmate is "otherwise entitled to [medical] benefits, . . . strict scrutiny might be appropriate under . . . the penalty analysis." Subsequent to Maher, several courts have considered whether state refusals to fund medically necessary abortions of free women might constitute a violation of equal protection. In such cases, it is necessary to evaluate the different weight to be given the state's interest in encouraging childbirth and protecting the fetus, and potential dangers to the health of the mother. These courts have reasoned that the health of the woman is the paramount concern and takes precedence over the state's interests in preserving the life of the fetus. Therefore, the state's interests would not meet even the minimal requirements of the rational basis test. Similarly, state refusal to fund an inmate's abortion while it funds childbirth service creates a classification that affects an inmate's fundamental right to medical care and unduly burdens her decision to terminate pregnancy. As such, the classification cannot be justified under any standards. The inmate's appearance of city's French Quarter sustains regulation banning some street vendors); Village of Belle Terre v. Boraas, 416 U.S. 1, 7-8 (1974) (state interest in preserving residential neighborhoods sustains regulation restricting land use to one family dwellings). 

121. 432 U.S. at 478.
123. 432 U.S. at 475-77.
124. Id. at 474. The dissenting opinion, however, noted that the "stark reality for too many, not just 'some,' indigent pregnant women is that indigency makes access to competent licensed physicians not merely 'difficult' but 'impossible."
125. 432 U.S. at 474 n.8 (citing Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969)).
126. Id.
128. E.g., Reproductive Health Servs. v. Freeman, No. 79-1275, slip op. at 25-26 (8th Cir. Jan. 9, 1980); Women's Health Servs., Inc. v. Maher, No. 79-405 (D. Conn. Jan. 7, 1980); Zbaraz v. Quern, 469 F. Supp. 1212, 1218 (N.D. Ill.), vacated, 596 F.2d 196 (7th Cir.), review granted, 48 U.S.L.W. 3356 (U.S. Nov. 26, 1979) (No. 79-5). In Maher v. Roe, 432 U.S. 464 (1977), the Court considered only the need to fund nontherapeutic abortions. Subsequently, courts have distinguished Maher on this basis when they have considered the question of medically necessary abortions. See cases cited note 9 supra.
serious medical need for abortion outweighs the state's interest in promoting childbirth to such an extent as to render that interest illegitimate. 129

Regardless of the standard applied, recognition of the personal and fundamental rights involved is determinative. "[W]hen state statutory classifications approach sensitive and fundamental personal rights, [the Supreme] Court exercises a stricter scrutiny." 130 The inmate's fundamental right to abortion, a sensitive and personal right, cannot be restricted by denying state funding without violating equal protection of the law. This is true whether the inmate seeking an abortion is indigent, or whether she has independent financial resources.

CONCLUSION

It is within the purview of state legislatures to enact laws having a direct impact on prisoners' lives. Nevertheless, these laws, to the extent that they affect fundamental rights, are subject to constitutional scrutiny. Although opinions are sharply divided on the sensitive issue of public funding of abortions, the Constitution remains the final arbiter when fundamental rights, such as the right to abortion, are jeopardized. The eighth amendment obligates states to provide needed medical treatment to all inmates. The guarantee of equal protection of the law reaches every inmate, rich or poor. Legitimate state interests must yield to constitutional mandates: the incarcerated pregnant woman has a right to a state funded abortion.

Anne T. Vitale

129. See Reproductive Health Servs. v. Freeman, No. 79-1275, slip op. at 28-29 (8th Cir. Jan. 9, 1980).