

1973

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Recommended Citation

Abortion on Demand in a Post-Wade Context: Must the State Pay the Bills?, 41 Fordham L. Rev. 921 (1973).

Available at: <https://ir.lawnet.fordham.edu/flr/vol41/iss4/5>

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ABORTION ON DEMAND IN A POST-WADE CONTEXT: MUST THE STATE PAY THE BILLS?

The subject of abortions . . . is one of the most inflammatory ones to reach the [Supreme] Court. People instantly take sides and the public . . . makes up its mind one way or the other before the case is even argued.¹

[The subject] involves the most basic and volatile principles about which men can differ: life, death, liberty, privacy, our traditions, our ideals, our moral values.²

I. INTRODUCTION

Early in his technological quest to master his environment, man learned how to terminate the biological process of procreation. Society reacted in various ways to this development, in moral, philosophical and legal terms. Thus, for example, during the Persian Empire, criminal abortions were severely punished, while the Greeks and the Romans were apparently far more tolerant of the practice.³ Academicians and moral philosophers continued to debate the issues surrounding the abortion decision down through the years,⁴ and, more recently, American courtrooms became the forum as the legal profession sought to determine the lawfulness of so-called restrictive⁵ abortion statutes that began to flourish in the nineteenth century.⁶ These cases produced uncommonly conflicting results,⁷ and stoked a heated public debate.⁸ Ultimately, in January, 1973, the Supreme Court met the issues head-on in the landmark cases of *Roe v. Wade*⁹ and *Doe v. Bolton*.¹⁰ The Court held the restrictive statutes of

1. *United States v. Vuitch*, 402 U.S. 62, 79-80 (1971) (Douglas, J., dissenting).

2. *Byrn v. New York City Health & Hosps. Corp.*, 38 App. Div. 2d 316, 324, 329 N.Y.S.2d 722, 729 (2d Dep't), aff'd, 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972), noted in 41 *Fordham L. Rev.* 439 (1972).

3. *Roe v. Wade*, 93 S. Ct. 705, 715 (1973).

4. See, e.g., *Byrn*, *Abortion-on-Demand: Whose Morality?* 46 *Notre Dame Law.* 5 (1970); *Leavy & Kummer*, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 *S. Cal. L. Rev.* 123 (1962); *Comment*, *Abortion Law Reform in New York: A Study of Religious, Moral, Medical and Legal Conflict*, 31 *Albany L. Rev.* 290 (1967); sources collected in *Roe v. Wade*, 93 S. Ct. 705, 715-18 (1973).

5. "Restrictive" abortion laws are to be distinguished from "liberalized" abortion laws which allow "elective" abortions. The usual formulation of a "restrictive" statute allows abortions necessary to save the mother's life or to protect her health. See 41 *Fordham L. Rev.* 439 n.3 (1972).

6. *Roe v. Wade*, 93 S. Ct. 705, 715 (1973).

7. See cases collected in *Roe v. Wade*, 93 S. Ct. 705, 727-28 (1973).

8. A Gallup Poll conducted just prior to the Court's decisions in *Wade* and *Bolton* found that 46% of those questioned favored leaving the abortion decision to the woman and her physician during the first three months of pregnancy, while 45% opposed that idea. *Time*, Feb. 5, 1973, at 51, col. 3. The debate even reached the level of presidential politics, becoming a minor issue in the 1972 election. See *N.Y. Times*, Sept. 25, 1972, at 42, col. 2; *N.Y. Times*, May 7, 1972, § 1, at 1, col. 2.

9. 93 S. Ct. 705 (1973).

10. 93 S. Ct. 739 (1973).

Texas and Georgia unconstitutional as violative of the fourteenth amendment.¹¹ In the *Wade* decision, the seven-to-two majority held that prior to the end of the first trimester of pregnancy, the abortion decision was to be left to the woman and her physician; that during the time approximating the second trimester, the state could regulate the abortion *procedure*, and that after "viability" of the fetus, the state could regulate, or even proscribe, abortion, except where it was necessary for the preservation of the mother's life or health.¹² In *Bolton*, the Court held certain procedures restricting the availability of abortions unconstitutional,¹³ thereby establishing some guidelines for state legislatures faced with the task of redrafting their abortion statutes to conform to the Court's decisions.

The purpose of this Comment is to examine the Court's decisions, particularly that in the *Wade* case,¹⁴ so as to ascertain the nature of the right recognized therein. Thereafter, the Comment will analyze the question whether a pregnant woman has a right to abortion on demand,¹⁵ even if she is without the pecuniary means to do so.¹⁶ In this respect, the approach will be to look at possible constitutional arguments and then at statutory grounds.

11. *Id.* at 752; 93 S. Ct. at 732.

12. 93 S. Ct. at 732. Several state attorneys general have indicated they consider the *Wade* and *Bolton* decisions as limited to the statutes presented to the Court and that, therefore, their restrictive abortion laws remain in effect until specifically declared unconstitutional. See note 80 *infra*. However, the Court underscored its decisions by vacating and remanding nine cases involving challenged abortion statutes. 41 U.S.L.W. 3462 (U.S. Feb. 26, 1973); see 169 N.Y.L.J., Feb. 27, 1973, at 1, col. 6. At the same time, the Court dismissed the appeal of the case in which the liberalized New York statute had been upheld by state courts for lack of a substantial federal question. See 169 N.Y.L.J., Feb. 27, 1973, at 1, col. 6. For the time being, at least, the Court seems to have laid the issue to rest in its denial of a rehearing to the Connecticut case in which petitioners sought to raise new medical evidence. See *Markle v. Abele*, 41 U.S.L.W. 3554 (U.S. Apr. 16, 1973).

In the meantime, anti-abortion forces caught off-guard by the Court's decisions have launched efforts to mute the Court's rulings, including efforts to amend the Constitution to extend rights to the fetus. N.Y. Times, Feb. 16, 1973, at 1, col. 4. For a cursory review of legislative developments in the wake of the Court's actions, see *id.* at 46, cols. 1-3.

13. 93 S. Ct. at 752 (invalidating provisions requiring that the hospital be accredited by a special commission, that a hospital abortion committee approve the abortion decision, that there be confirmation by two independent physicians and that the patient be a Georgia resident).

14. The *Wade* case is emphasized because that decision contained the bulk of the Court's analysis as to the rights involved in the abortion decision. See *Doe v. Bolton*, 93 S. Ct. at 746.

15. During this discussion, the term "abortion on demand" will be used as a shorthand for the indigent woman's goal; viz., to obtain an abortion without payment of a fee. It should not be confused with that use of the term by some commentators during the pre-*Wade* era in reference to what more aptly is called "elective" abortion. For an example of the latter use see *Byrn*, *supra* note 4.

16. Having defined the parameters of the instant discussion, some mention of the significant issues in the law of abortion which remain unanswered in the wake of the *Wade* and *Bolton* cases—and which are beyond the scope of this analysis—is in order. Primary

II. THE NATURE OF THE *Wade* RIGHT

In analyzing whether an indigent, pregnant woman in the post-*Wade* context has a right to an abortion at public expense, determination of the "right" enunciated in *Wade* is essential. A careful perusal of the opinion yields at least three formulations of that "right."

A. *The Right To Decide To Terminate*

The first of these possible interpretations—and perhaps the dominant one—is that a woman has a fundamental right to decide to terminate her pregnancy. The majority opinion stated that prior decisions of the Court "make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in [the] guarantee of personal privacy."¹⁷ The Court then continued:

*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.*¹⁸

among these questions is that of whether the woman has the right to decide to terminate her pregnancy against the will of her husband (or the putative father). The converse of this situation also presents thorny issues for future litigation. A third area involves the question of whether a minor child needs parental consent for an abortion. Still another situation on which the Court has yet to shed light is whether a nurse or other medical professional has vested job (property) rights such that she might challenge successfully transfer from a medical station if her superiors threatened such a move following her principled refusal to take part in an abortion. In this regard New York's Code of Rules and Regulations stipulates that: "No physician or other person shall be required to perform or participate in a medical or surgical procedure which may result in the termination of a pregnancy." 18 N.Y.C.R.R. § 505.2(e)(3)(ii) (1971). A recent Senate bill would allow physicians and other medical workers to refuse to perform abortions or sterilizations if their religious beliefs or moral convictions opposed such procedures. See N.Y. Post, Mar. 28, 1973, at 16, col. 1. See also 119 Cong. Rec. S 5717-41 (daily ed. Mar. 27, 1973). Nor did the Court's opinion in *Wade* indicate whether government funds might be curtailed if the hospital or clinic declined to perform an abortion. Compare the Senate bill discussed in N.Y. Post, Mar. 28, 1973, at 16, col. 1, with the regulation discussed at note 155 *infra*. Finally, the Court's decisions do not resolve whether a woman with limited access to medical care has a right to an abortion if the physician or facilities available to her refuse to abort her. While the Court emphasized the doctor's role in the abortion decision, 93 S. Ct. at 732-33, at least one pre-*Wade* court ordered the state of Wyoming not only to provide Medicaid funds for an abortion, but also to finance the woman's trip to New York so she could obtain an abortion under New York's liberalized law. Letter from H. J. Arnieri, Law Clerk of the Attorney General of Wyoming to the Fordham Law Review, Mar. 16, 1973, on file Fordham Law Review Library.

17. 93 S. Ct. at 726 (citation omitted).

18. *Id.* at 727 (emphasis added). After explaining its holding that the right is not absolute, but subject to state regulation so as to safeguard health, maintain medical standards and protect potential life, the Court added: "We therefore conclude that the right of per-

B. *The Right To Terminate*

A second possible reading of the Court's enunciated "right," however, may be gleaned from the subsequent paragraph; namely, that a woman has a right to terminate her pregnancy. The Court entertained the contention of some amici 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 reasons she alone chooses."¹⁹ While the Court rejected the half of the argument that the right was absolute, finding instead that restrictions as to medical standards and safeguards were proper,²⁰ it did not reject the formulation of the right as that to terminate the pregnancy.

C. *The Two-Party Decisional Right*

A third interpretation of the "right" at issue emerges from the Court's assertion that, before the end of the first trimester, the woman and her doctor should be free from state restrictions. In this analysis, the Court stated:

This means . . . that . . . 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.²¹

This language would indicate that while the woman may have some form (or fraction) of a fundamental right to decide to terminate her pregnancy, unless she can find a physician who will concur in her decision, the "right" involved in the abortion decision is incomplete because it is incapable of effectuation. While the Court buttresses this interpretation with the statement that "the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician,"²² the position is illogical. If the abortion "right"—however difficult its precise articulation may be—is to derive from the right of personal privacy,²³ how can it be conditioned upon the concurrence of a physician?

The concurring and dissenting opinions in *Wade* reflect the vagueness of the Court's formulation of the "right" by their articulation of diverse views as to whether abortion on demand is encompassed by the opinion of the Court. Chief Justice Burger, concurring, stated unequivocally: "Plainly, the Court today rejects any claim that the Constitution requires abortion on demand."²⁴ The

sonal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 732.

22. *Id.* at 733 (emphasis added). See also *id.* at 732, where the Court stated: "(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."

23. See text accompanying note 18 *supra*.

24. 93 S. Ct. at 756 (concurring opinion).

language of the Court which one might construe as most directly supporting the Chief Justice's conclusion appeared in the *Bolton* case, where it was stated: "*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."²⁵ The wording, certainly, is straightforward and may indeed be used in subsequent litigation to deny indigents the abortions they demand. However, the context of the *Bolton* language is equally clear, for the following sentence of that opinion read: "What is said there is applicable here and need not be repeated,"²⁶ and what the Court had said in *Wade* on this point was that the state could restrict the factors that govern the abortion decision so as to affect medical standards and medical safeguards and to protect potential life.²⁷ Thus, given the context, reliance on the *Bolton* statement for the proposition that abortion on demand is not constitutionally mandated seems unwarranted.²⁸

Justice White, apparently taking a view of the Court's opinion diametrically opposed to the Chief Justice's, dissented in an opinion in which Justice Rehnquist joined, stating: "The Court for the most part sustains this position: . . . 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."²⁹ Finally, Justice Stewart's concurring opinion reinforced the contention that the proper formulation of the Court-held right is that of the right to decide to terminate a pregnancy. Justice Stewart cited the broad language in the Court's 1972 decision of *Eisenstadt v. Baird*³⁰ that the right of privacy included "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."³¹ From that proposition, he concluded that "[t]hat right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy."³²

In the wake of the *Wade* decision, one may say the basis of the ruling ostensibly was that the constitutionally recognized right to personal privacy

25. *Id.* at 746.

26. *Id.*

27. 93 S. Ct. at 727; note 18 supra; text accompanying note 19 supra.

28. At this juncture, it should be noted that Justice Burger's statement may reflect what the Court intended to say. Off-the-record reports indicate that the Chief Justice was in the minority when the justices voted on the case after initial argument during the 1971 term. However, after Justices Powell and Rehnquist were seated, reargument held, and the majority opinion reworked, Burger apparently was wooed to the majority. *Time*, Feb. 5, 1973, at 51. Thus, the Chief Justice's statement arguably could be taken as a reflection of how Justice Blackmun, the author of the opinion, explained the majority's position. However, the law is what the justices say it is and not what they may have intended to say it is, until, of course, they have an opportunity to clarify what was said.

29. 93 S. Ct. at 763 (White, J., dissenting) (emphasis added).

30. 405 U.S. 438 (1972).

31. *Id.* at 453.

32. 93 S. Ct. at 735 (Stewart, J., concurring).

included the abortion decision—a fundamental, albeit not an absolute, right. However, the precise nature of the right—and even the person in whom it resides—seems uncertain. These definitional matters are areas for future Court clarification. Therefore, the focus here now shifts to the alternative considerations available to the lower courts which may be called upon to interpret the Court's mandates in dealing with an indigent woman's demand for an abortion.

III. THE CONSTITUTIONAL ABSOLUTE

A. *Established Arguments*

From a litigator's point of view, the most enticing argument—the one by which, if successful, he would win the most for his indigent client—is the absolutist constitutional approach.³³ However, several constitutional arguments are unavailable.

Most notable among this group is the fashionable equal protection clause, for which the critical state action element is lacking. It has been argued³⁴ that, by licensing all physicians who may perform abortions,³⁵ state action comes into play. However, the Court has stated that not all state involvement constitutes state action sufficient to trigger the due process and equal protection analyses.³⁶ Moreover, as regards the equal protection analysis, when an indigent pregnant woman seeks an abortion, it is the doctor, not the state, that creates the money hurdle which prevents her from terminating her pregnancy.

The line of cases of which *Griffin v. Illinois*³⁷ is the primogenitor, and which extended certain rights to criminal defendants, notwithstanding their inability

33. For an analysis of the identical problem—whether the indigent has a constitutional claim for a free abortion—debarking from the same premise, but reaching a contrary conclusion to this Comment, see 36 Albany L. Rev. 794, 797-803 (1972).

34. *Id.* at 798.

35. The Wade Court stated that states could require that all those performing abortions were licensed physicians. 93 S. Ct. at 732-33.

36. *Moose Lodge v. Iris*, 407 U.S. 163, 173 (1972), noted in 41 Fordham L. Rev. 695 (1973), where the Court said: "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. . . . Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' . . . in order for the discriminatory action to fall within the ambit of the constitutional prohibition."

The instant discussion, of course, does not exhaust the universe of possible state involvements. Consideration of situations where hospitals are state-operated or heavily subsidized, and of cases where the physician's income may be derived largely from one form or another of state grant, is omitted. Such gradations of the state action question are beyond the scope of the immediate discussion. It is submitted that such problems should be resolved on a case-by-case basis. But see text accompanying notes 69-153 *infra*. For a discussion of the state action question where Hill-Burton funds are involved see *Ward v. St. Anthony Hosp.*, Civil No. 72-1611 (10th Cir., filed Apr. 4, 1973).

37. 351 U.S. 12 (1956).

to pay for transcripts or court fees,³⁸ is also inapposite. Three elements were crucial to the due process and equal protection analysis of *Griffin*: (1) a state-created "money hurdle"³⁹ which impeded (2) judicial access for a (3) criminal defendant. None of the elements is present in the post-*Wade* context under discussion.

Yet another group of cases to be distinguished from the instant hypothetical is that commencing with *Boddie v. Connecticut*.⁴⁰ There, the Court held that a state could not bar indigents from divorce court solely because they could not afford the required court costs. In a narrowly drawn,⁴¹ due process⁴² opinion, the Court emphasized the *primacy* the marital relationship enjoys in society⁴³ and the *state's monopolization* of the process for liberation "from the constraints of legal obligations that go with marriage."⁴⁴ Recently, the Burger Court has underscored the narrowness of *Boddie*. In *United States v. Kras*,⁴⁵ the Court refused to extend the *Boddie* rule to bankruptcy filing fees. The five-man⁴⁶ majority emphasized that there were alternative means of a debtor's adjusting his legal relationships with his creditors⁴⁷ (no state monopolization), and that the right to file bankruptcy was not a fundamental constitutional one.⁴⁸ More recently, when presented with a challenge to the imposition of a \$25 court fee as a prerequisite to appeals in all civil cases, the Court ruled that *Kras*, rather than *Boddie*, governed.⁴⁹

38. See, e.g., *Anders v. California*, 386 U.S. 738 (1967) (requiring court-appointed counsel to provide the indigent with effective advocacy on appeal); *Draper v. Washington*, 372 U.S. 487 (1963) (reversing a state court's determination that an appeal was frivolous for want of a sufficient record on which to base such a decision); *Lane v. Brown*, 372 U.S. 477 (1963) (invalidating procedure whereby criminal defendant was denied writ of coram nobis because of indigency); *Douglas v. California*, 372 U.S. 353 (1963) (invalidating state court's ex parte determination that indigent defendant's appeal was not so substantial as to require appointment of counsel); *Burns v. Ohio*, 360 U.S. 252 (1959) (invalidating state requirement that indigent criminal defendant pay a fee preliminary to motion for leave to appeal to higher court). These cases indicate that the Court has adopted a liberal interpretation of what constitutes a "money hurdle;" that is, it may consist not only of a fee, but also of an obstacle resulting from the indigent's inability to secure something, such as a record, by which to perfect his appeal or motion.

39. The term is Justice Frankfurter's. See 351 U.S. at 23 (Frankfurter, J., concurring).

40. 401 U.S. 371 (1971).

41. See *United States v. Kras*, 93 S. Ct. 631, 640 (1973); 401 U.S. at 383-84.

42. 401 U.S. at 378. Justice Douglas and Justice Brennan concurred separately, seeking to place the decision on equal protection grounds. See *id.* at 386 (Douglas, J., concurring); *id.* at 388 (Brennan, J., concurring).

43. 401 U.S. at 376.

44. *Id.*

45. 93 S. Ct. 631 (1973).

46. Justice Blackmun authored the opinion in which Chief Justice Burger, and Justices White, Powell and Rehnquist joined. Justices Douglas, Brennan, Stewart and Marshall dissented. *Id.*

47. 93 S. Ct. at 638.

48. *Id.*

49. *Ortwein v. Schwab*, 93 S. Ct. 1172 (1973).

The rule to be derived from these three cases, then, would seem to be that in order for a *civil* litigant to succeed in an action to require the waiver of a money hurdle there must be: (1) state monopolization of the means to adjust (2) a constitutionally recognized fundamental interest, on which process (3) the state imposes a monetary hurdle.⁵⁰

B. *The Right to Implementation*

Having negated these handy constitutional arguments, one is left with what may be called a "right to implementation." Simply stated, the proposition is: if a right is constitutionally recognized, the law will imply a corollary right of implementation of the primary constitutional right. Relative to the instant discussion, one lower New York court asserted the formula thusly:

Since the right to decide not to have a child has been held to be a fundamental one . . . the State has an obligation to provide the indigent with adequate means to exercise that right.⁵¹

The court used as a springboard from which to reach its conclusion the landmark Supreme Court case of *Gideon v. Wainwright*.⁵² Unfortunately, *Gideon* may be distinguished. First, it was a due process case.⁵³ Secondly, it resulted in the imposition of a positive burden only on the legal profession.⁵⁴ Consequently,

50. Were the Court to find sufficient state involvement in the medical care delivery system to trigger state action, cf. note 36 *supra*, then, conceivably the denial of an abortion to an indigent woman would fit more appropriately into the Boddie classification than into a Kras or Ortwein posture. Not only has the Court declared the abortion right to be within the right of personal privacy and therefore fundamental or implicit in the concept of ordered liberty, but it might well be urged that through licensing the eligible abortionists the state monopolizes the availability of the procedure. Certainly, absent a natural miscarriage or the use of an unsafe back-alley specialist, at present there is no alternative means to abort a fetus that is currently available to the indigent. It may be, however, that with technological developments such as the "morning after" pill (see N.Y. Times, Feb. 22, 1973, at 1, cols. 1-2), and the menstrual extraction procedure (see N.Y. Times, Mar. 3, 1973, at 29, cols. 2-5), alternative methods would become available at some time in the future.

51. *City of New York v. Wyman*, 66 Misc. 2d 402, 414, 321 N.Y.S.2d 695, 707 (Sup. Ct.), *aff'd* on other grounds mem., 37 App. Div. 2d 700, 322 N.Y.S.2d 957 (1st Dep't 1971), *rev'd* mem., 30 N.Y.2d 537, 281 N.E.2d 180, 330 N.Y.S.2d 385 (1972). While the argument has been made for a "right of implementation," it has not met with much success. The appellate division, in its affirmance on grounds of statutory and legislative intent, stated: "[T]he resolution of the controversy herein does not directly involve any constitutional problem." 37 App. Div. 2d at 700, 322 N.Y.S.2d at 958. The discussion following, therefore, is an analysis of why there was no constitutional problem.

52. 372 U.S. 335 (1963).

53. *Id.* at 341.

54. The Court last term extended *Gideon* to all situations where a defendant faced possible incarceration. *Argersinger v. Hamlin*, 407 U.S. 25 (1972), noted in 41 *Fordham L. Rev.* 722 (1973). The Court noted therein that it felt the estimated 355,200 American attorneys could handle the challenge of even the expanded *Argersinger* right to counsel. By contrast, the shortage of medical personnel is at least in part the reason for the spiraling cost of medical care.

on the absolutist plane, reliance on *Gideon* for the purposes at hand may be misplaced.

1. Treatment Accorded Other Fundamental Rights

The question remains, however, whether the right of implementation should be accorded to indigent pregnant women. There is one major policy consideration to be placed in juxtaposition to the assertion that the right should be recognized. That is, that even in areas where the Court has recognized rights as being of fundamental stature, or as being part of the right of personal privacy and therefore either fundamental in themselves or implicit in the concept of ordered liberty, absent a due process or equal protection argument relating to one of the judicial rights discussed above, the Court has not accorded indigents a corollary right to satisfaction of the primary right.⁵⁵ Among such fundamental rights are those to move freely among the states,⁵⁶ to enjoy marital privacy including the use of contraceptives,⁵⁷ to raise and educate children,⁵⁸ and to possess, in the privacy of one's home, obscene materials.⁵⁹ Why has the Court not accorded corollary implementation rights to these primary fundamental rights? The short answer is that the issues may not have been litigated. The better answer, however, is that such a course of action would involve the judiciary in largely legislative functions, for there is no clear constitutional mandate that all rights be accorded satisfaction. Furthermore, such a deviation from previously travelled paths would launch this democracy a long way down the road towards a new socialized society, for it would require not the waiver of a monetary hurdle, but the imposition of a positive duty on the state. It may be useful to consider several possibilities.

For example, it may well be that a legislature might determine that planned parenthood through systematic use of contraceptives was a desirable means to achieve a stability of population and available resources. But it was the legislature, not the courts, that determined that those desiring but too poor to pay for birth control devices should receive them free.⁶⁰

Assisting poor parents to raise and educate their children in certain fashions might be considered by some a worthwhile objective. But the Constitution's

55. Some of these fundamental rights are inapposite to the instant discussion, for they are self-fulfilling once recognized. E.g., the right to marry, *Loving v. Virginia*, 388 U.S. 1, 12 (1966); the right to procreate, *Skinner v. Oklahoma ex rel. Williams*, 316 U.S. 535, 541 (1942). The right to vote is another, of which it need only be added that the Court has held that states may not infringe on the right by imposition of a polling tax, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666-68 (1966).

56. *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969); *United States v. Guest*, 383 U.S. 745, 757 (1966).

57. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); see *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

58. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

59. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

60. See 42 U.S.C. §§ 300a to a-6 (1970) (Family Planning Services and Research Act).

free exercise and establishment clauses specifically interdict (and the equal protection clause does so more generally) such a possibility.

It might be argued that free movement among the states would mollify some of society's malaise by making the nation's natural beauty available to all and tend perhaps to add to the mobility of an already mobile society. But would not the providing of free transportation to indigents subvert one of the basic underpinnings of the nation—the free enterprise system with its built-in incentive mechanisms?

It may be that the first amendment requires that citizens be free to possess obscene materials.⁶¹ It would hardly seem to follow, however, that a court should accord a corollary right to indigents to obtain obscene materials free.

2. The Abortion Right: A Special Case?

The question of whether the abortion right, as encompassed in the fundamental right of personal privacy, should be extended to require that states provide poor people with free abortions,⁶² is susceptible to similar analysis. Furthermore, if such a right were accorded, would the constitutional prohibition against the deprivation of life without due process then require states to provide all indigents with full medical care? An affirmative reply seems preposterous,⁶³ for it would place an enormous financial burden on the states at a time when medical costs are extremely high and physicians in short supply. Moreover, Congress has implicitly recognized that the problem is one of statutory dimensions, rather than constitutional, by attempting to deal with part of the problem by drafting legislation to provide national health insurance.⁶⁴

On the other hand, at least one court has stated: "It is legally proper and indeed imperative that uniform medical abortion services be provided all segments of the population, the poor as well as the rich."⁶⁵ Moreover, when the issue is whether an abortion should be performed, there are special detrimental effects—which the Court has recognized—which the society may so wish to avoid that recognition of the corollary right to a free abortion may be legally proper. Among these feared possibilities are: that the potential mother suffer direct

61. The Court has held that the Stanley right does not extend to protecting the importer of obscene materials from a criminal charge. *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971). But see *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), where the Court speaks of a "right to receive."

62. Even should the Court grant a right of implementation as a corollary to the right recognized in *Wade*, only in one case would the poor thereby be able to obtain free abortions; namely, if the "right" in *Wade* was the right to terminate. If the right to be derived from *Wade* is either the two-party or the woman's decisional right, implementation of that right would not help the indigent woman to the operating room.

63. Yet, at least Chief Justice Burger seems to have considered extending the list of fundamental rights to include that of public health. See 41 U.S.L.W. 3197 (U.S. Oct. 17, 1972) (report of oral argument on school financing cases). The context of his remarks, however, suggests his non-acceptance of such a proposition.

64. See, e.g., *N.Y. Times*, Mar. 29, 1972, at 48, col. 2.

65. *United States v. Vuitch*, 305 F. Supp. 1032, 1035 (D.D.C. 1969) (dictum), rev'd, 402 U.S. 62 (1971) (deciding only that criminal abortion statute was not void for vagueness).

medical harm; that as a result of her maternity or of her bearing additional offspring the mother have a distressful life and future; that she incur mental illness or psychological harm; that the unwanted child suffer mentally or physically while being reared in a hostile environment, and that the mother or child suffer the impact of the continuing stigma attached to unwed motherhood.⁶⁶ All of these factors should weigh heavily on a court faced with the problem; they might even prove determinative.

That the present Court might accord the corollary right to a free abortion seems unlikely, especially in light of the Court's recent reluctance to add to the list of recognized fundamental rights.⁶⁷ However, if after weighing the competing interests the Court should mandate observance of such an additional right, its rule should be limited to the abortion question. The Court should be cognizant that such steps are usually better left to the legislature;⁶⁸ aware that few constitutional rights have been interpreted as spawning corollary rights of implementation, and, most importantly, honest in assessing its role and admitting that its course of action, while it may be preferable for moral or policy reasons, is not constitutionally mandated.

IV. ENTER MEDICAID

A. *Background*

Congress enacted title XIX of the Social Security Act—commonly called Medicaid—in 1965,⁶⁹ thereby making available to states federal funds to help meet the costs of providing medical assistance to certain qualified groups of poor people.⁷⁰ The Medicaid provisions were “almost overlooked,”⁷¹ according to one commentator, because of the publicity attendant the passage of enlarged Medicare (assistance to the elderly) grants in the same legislation, but have since had a major impact.⁷²

The purpose of the Medicaid statute is ascertainable from its face as well as from the legislative history leading to its passage. The statute begins:

For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent

66. 93 S. Ct. at 727.

67. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 12 (1972) [hereinafter cited as Gunther]; see *San Antonio Ind. School Dist. v. Rodriguez*, 93 S. Ct. 1278 (1973) (holding that for equal protection purposes, only those rights implicitly or explicitly incorporated in the constitution may be deemed fundamental).

68. See Gunther 3-4, discussing the “error” of the Warren Court in making inadequately reasoned pronouncements. See also sources cited at *id.* n.13.

69. Act of July 30, 1965, Pub. L. No. 89-97, tit. I, § 121(a), 79 Stat. 343 (codified at 42 U.S.C. §§ 1396-1396d (1970), as amended, 42 U.S.C.A. §§ 1396-1396d (Supp. 1973).

70. See text accompanying note 82 *infra*.

71. Werne, *Medicaid: Has National Health Insurance Entered by the Back Door?*, 18 Syracuse L. Rev. 49 (1966).

72. See 1969 U.S. Code Cong. & Ad. News 1077, 1078, estimating an expenditure of \$12 billion during fiscal 1970 for Medicare and Medicaid programs.

children and of aged, blind, or permanently and totally disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care [funds may be appropriated]⁷³

Until recently, the Act, and the regulations issued pursuant to it, asserted that a goal of the statute was the broadening of the scope of medical and remedial care and services made available through it to the end that comprehensive medical and remedial care and services be furnished all eligible individuals.⁷⁴ The target date for this full assistance to medical indigents was originally 1975.⁷⁵ As the cost of medical care skyrocketed in the late 1960's, Congress pushed the date back two years;⁷⁶ then, on October 30, 1972, the lawmakers repealed that section of the Act which mandated that states continually broaden their programs.⁷⁷ However, Congress has yet to abandon its original goals, for as late as the 1972 amendments, the history of the legislation indicated that there "are modifications which can and should be made in these programs—changes which . . . show great promise for making significant advances in accomplishing the goal of making these programs more economical and more capable of *carrying out their original purposes*."⁷⁸ Participation by the states in the Medicaid program has always been voluntary.⁷⁹

In the context of the instant discussion, the first question which presents itself is whether the abortion procedure is covered by the Medicaid statute and, secondly, if so, to what extent? Judging by the results of a survey conducted by the *Law Review*, the answer to the initial problem is unclear.⁸⁰

73. 42 U.S.C. § 1396 (1970).

74. 42 U.S.C. § 1396b(e) (repealed 1972); see 45 C.F.R. § 249.10(a)(9) (1972); 1965 U.S. Code Cong. & Ad. News 1943, 1950. One early observer of the Medicaid statute said the program "aim[ed] toward full and comprehensive coverage for all the medically indigent;" and, "what the new program really brings is a complete system of tax-supported health care for all the needy operated by the states and largely subsidized by the Federal Government." N.Y. Times, Mar. 20, 1966, § 1, at 70, col. 2.

75. Act of Jul. 30, 1965, Pub. L. No. 89-97, tit. I, § 121(a), 79 Stat. 350.

76. Act of Aug. 9, 1969, Pub. L. No. 91-56, § 2(a), 83 Stat. 99.

77. Act of Oct. 30, 1972, Pub. L. No. 92-603, tit. II, § 230, 86 Stat. 1410.

78. 1972 U.S. Code Cong. & Ad. News 4989, 4994 (emphasis added). See also *id.* at 4086; 1969 U.S. Code Cong. & Ad. News 1078 (report on two-year suspension of full coverage deadline), where Congress reasserted its dedication to the original goal that: "all persons who meet the State's test of need, whose own resources, and the resources available to them . . . are insufficient, will receive the medical care which they need . . ." *Id.* at 1081 (quoting from the Senate report on the original bill).

79. 1965 U.S. Code Cong. & Ad. News at 2014.

80. The textual discussion which follows seeks to ascertain whether an abortion procedure falls within the Medicaid coverage. An alternative argument for such coverage is also available if one considers abortions as the ultimate form of contraception. See Comment, 49 N.C.L. Rev. 487, 499 (1971). The second line of attack follows from one of the 1972 amendments to the Medicaid legislation, mandating that if a state participates in a Medicaid program, it must provide qualified indigents with family planning services and supplies if they request them. Act of Oct. 30, 1972, Pub. L. No. 92-603, tit. II, § 299E(b),

B. *The Statute's Breadth*

1. Minimal Mandated Participation

The scheme of the federal Medicaid statute is a fairly complicated one, but it should suffice for the purposes of the discussion to highlight a few features.

If a state chooses to participate in a Medicaid program, it *must*⁸¹ provide five basic services to indigents falling within four classes of categorical recipients: families with dependent children, and aged, disabled or blind individuals.⁸² The five categories of mandatory participation are: inpatient hospital services (other than for tuberculosis or mental disease); outpatient hospital services; laboratory and X-ray services; *physicians' services*; and nursing home care for certain individuals, preventive screening and diagnostic services for children and family planning materials for those requesting them.⁸³ Arguably, depending on the facts, abortions may be covered under the first two categories. But, it is submitted, in the overwhelming percentage of cases,

86 Stat. 1462, amending 42 U.S.C. § 1396(a)(4) (1970) (codified at 42 U.S.C.A. § 1396d(a)(4)(C) (Supp. 1973)). For the purposes of the Medicaid provisions, family planning services have been defined as "including drugs, supplies, and devices, when such services are under the supervision of a physician." 45 C.F.R. § 249.10(b)(15)(ii) (1972). By negative inference from the use of the word "including," the list is not exhaustive and may include abortions. By contrast, when the Congress passed the Family Planning Services and Research Act of 1970, 42 U.S.C. §§ 300a to a-6 (1970), providing funds to states which opted to participate by creating comprehensive programs of family planning services, the lawmakers specifically excluded abortion as a means of family planning to be recognized under the act. 42 U.S.C. § 300a-6 (1970); see 1970 U.S. Code Cong. & Ad. News 5068, 5070, 5078, 5081-82. However, managers of the bill in the House of Representatives stated that the legislation was "not intended to interfere with or limit programs conducted in accordance with State or local laws and regulations which are supported by funds other than those authorized under this legislation." 1970 U.S. Code Cong. & Ad. News 5082. And in the 1972 Medicaid amendments, no such negating language appears to have been attached to the family planning mandate.

In the wake of the Wade and Bolton decisions, the Law Review mailed letters to the 50 attorneys general, asking if their states were Medicaid participants, whether the plans were providing for or would cover abortions of the indigent. Of the 23 responding states with Medicaid provisions, 39.1 percent said they considered abortions within the coverage, while another 17.4 percent said they would only cover medically indicated abortions. Another 34.8 percent said they were uncertain as to whether Medicaid benefits should be extended to abortion patients, and 8.7 percent said they would not cover abortions. Arizona responded, but does not participate in Medicaid.

81. 42 U.S.C. § 1396a(13)(B) (1970); 45 C.F.R. § 249.10(a)(1) (1972); 1965 U.S. Code Cong. & Ad. News 1943, 2017.

82. 42 U.S.C. § 1396a(13)(B) (1970); see *Dimery v. Department of Social Servs.*, 344 F. Supp. 1181, 1183 (S.D. Iowa 1972); 1967 U.S. Code Cong. & Ad. News 2834, 2866-67, 3025; 1965 U.S. Code Cong. & Ad. News at 2020-21, 2246. Medicaid benefits to Aid to Families with Dependent Children recipients were altered by the 1972 amendments. See 1972 U.S. Code Cong. & Ad. News 4989, 5060-61, 5379-80. For a discussion of the changes in the AFDC plan designed to remove work disincentives see *id.* at 5144-82.

83. 42 U.S.C. § 1396(a)(1)-(3) (1970); 42 U.S.C.A. § 1396d(a)(4)-(5) (Supp. 1973).

the critical category for the purposes of the instant discussion is that of "physicians' services." The statute stipulates that such shall be covered "whether furnished in the office, the patient's home, a hospital, or a skilled nursing facility, or elsewhere."⁸⁴ The statute broadly defines "physician," to include "doctor[s] of medicine or osteopathy legally authorized to practice medicine or surgery by the state."⁸⁵ Moreover, the regulations issued pursuant to the legislation⁸⁶ qualify the definition only to the extent that they stipulate physicians' services are those "provided, within the scope of practice of his profession as defined by State law, by or under the personal supervision of an individual licensed under State law to practice medicine or osteopathy."⁸⁷ In *Wade*, the Court stated that the woman and her physicians must be free, at least during the first trimester, to decide to terminate pregnancy.⁸⁸ During that time period, the Court said the only regulation that a state might impose was that the "physician" be "currently licensed by the State."⁸⁹ Consequently, in the post-*Wade* context, the services of an aborting physician, if licensed by the state, would appear to fall squarely within the bounds of Medicaid coverage.⁹⁰

2. Optional Coverage of Medical Indigents

As a practical matter, however, a great number of women seeking abortions at state (Medicaid) expense may well be unable to qualify for one of the four

84. 42 U.S.C.A. § 1396d(a)(5) (Supp. 1973).

85. 42 U.S.C.A. § 1395x(r)(1) (Supp. 1973); see 42 U.S.C.A. § 1396d(a)(5) (Supp. 1973).

86. 42 U.S.C. § 1302 (1970) (general authorization to issue rules and regulations for entire Social Security Act).

87. 45 C.F.R. § 249.10(b)(5) (1972).

88. 93 S. Ct. at 732.

89. *Id.* at 732-33.

90. 42 U.S.C. § 1396a(10)(A)(i) (1970) mandates that if a state participates in the Medicaid program, it must make medical assistance equally available to all categorical groups. See 1965 U.S. Code Cong. & Ad. News 1943, 2017. Therefore, one might argue that since the aged will not use Medicaid funds for abortions (because it is more than improbable that a qualified aged person would conceive and thereby raise the possibility of desiring an abortion), such funds should be denied to those in the other categorical groups seeking abortions. The argument misses the point. The statute requires that Medicaid funds be made available equally. Thus, it is sufficient that, should an elderly person ever desire an abortion, the funds be made available to that person, as they may have been in the past to those qualifying from the other three categories.

It might be argued that since only medically indicated abortions were legal (and then in only about half the country's jurisdictions) at the time of the initial Medicaid legislation (see statutes collected in *Roe v. Wade*, 93 S. Ct. at 720 nn.34-37), Congress did not intend that such procedures be incorporated within the meaning of "physicians' services." However, that argument pales in the light of four factors. First, the original and continuing congressional intent was to provide broad medical care to the poor. Second, Congress has not specifically excluded abortions from Medicaid coverage. Third, the legislature has specifically excepted them from the federally funded Family Planning Services and Research Act. See note 80 *supra*. And finally, even during the time when Title XIX was initially considered, some abortions, namely, to save the life of the mother, were permissible in several jurisdictions.

categorical classes. At the same time, these individuals may be unable to pay for the abortion themselves or to pay for third-party coverage. That is, they may be "medically indigent."⁹¹ A state *may*⁹² choose to enroll this latter group in its Medicaid program. However, it must first opt for the mandatory coverage of the four categorical classes.⁹³ Thereafter, the state may provide the medical indigents with *either* at least the five basic classifications of assistance *or* seven of a longer list.⁹⁴ Thus, if the medically indigent are included in a particular state's program, they should be able to obtain an abortion even if they are without means, *provided* the state's program includes the "physicians' services" category or one of a few other broad classifications of aid.⁹⁵ On the other hand, if the state does not choose to include the medically indigent in its program, or it so tailors the medically indigent plan so as to avoid one of the broad classifications, the medically indigent may be left without a means to satisfy the right of the decision to abort.

C. State "Tampering" with Medicaid Coverage

1. Eliminating Abortion Reimbursement

Assuming that a state has a Medicaid program, the next issue for resolution is whether the state plan may be so drafted as to exclude specifically coverage of abortions. The answer, it is submitted, is in the negative for both statutory and constitutional reasons.

First, courts have interpreted the Medicaid legislation correctly as voluntary to the states.⁹⁶ However, they have said that once a state participates in the program, it must comply with federal statutes and regulations to remain eligible.⁹⁷ Thus, if the federal statutes mandate coverage of abortions under the "physicians' services" category as contended herein,⁹⁸ then a state plan may

91. It should be noted that since the Wade and Bolton decisions the Internal Revenue Service has ruled that the cost of abortion is a legitimate medical expense deduction. Rev. Rul. 73-201, 1973 Int. Rev. Bull. No. 15, at 24. See N.Y. Times, Apr. 11, 1973, at 52, cols. 5-6. For another definition of "medical indigency" see Fullington v. Shea, 320 F. Supp. 500 (D. Colo. 1970), *aff'd*, 404 U.S. 963 (1971), where the court describes the members of the group as "those who but for 'excessive income' (income or resources exceed[ing] state-set income levels for public assistance) would fit within one of the [categorical groups]." *Id.* at 503.

92. *Id.* at 504-05, construing 42 U.S.C. § 1396a(10)(B) (1970).

93. *Id.*

94. 42 U.S.C.A. § 1396a(13)(C) (Supp. 1973); see 1967 U.S. Code Cong. & Ad. News 2834, 3136.

95. See, e.g., 42 U.S.C. § 1396d(a)(6) (1970): "medical care, or any other type of remedial care recognized under State law, furnished by licensed practitioners within the scope of their practice as defined by State law;" 42 U.S.C. § 1396d(a)(9) (1970): "clinic services." See also note 80 *supra* for the argument that abortions are covered by 42 U.S.C.A. § 1396d(a)(4)(C) (Supp. 1973), one of the five classes of assistance that are mandatory if a state does not elect to choose seven of the 14 categories.

96. See note 79 *supra* and accompanying text.

97. Schaak v. Schmidt, 344 F. Supp. 99, 103 (E.D. Wis. 1971); Wilczynski v. Harder, 323 F. Supp. 509, 511 n.1 (D. Conn. 1971).

98. See notes 83-90 *supra* and accompanying text.

not excise specifically that coverage lest the state lose its eligibility for further federal assistance under the statute.

Even absent these interpretations of the statute, however, in a post-*Wade* context, it is urged that a state might not write out abortions from its Medicaid plan. The basis for this contention is the Court's language in *Wade* that, during the first trimester, "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.*"⁹⁹ State plans for the four categorical groups of indigents clearly cover obstetrical care of the pregnant woman. It has been contended that they should also cover the aborting physicians' services.¹⁰⁰ In a post-*Wade* situation, once having decided with her physician to terminate a pregnancy, the only thing that might prevent the indigent woman from aborting the fetus would be a lack of funds. Absent a specific exclusion for abortions, however, the Medicaid-covered indigent could effectuate the abortion decision. If the state should specifically except the abortion procedure from its Medicaid reimbursement plan, it interferes in the effectuation process, creating a monetary hurdle by its negative action. While this interference is not that positive kind of interference typical of the traditional restrictive abortion laws which the Court in *Wade* invalidated, it is nevertheless interference with a constitutionally recognized right which is forbidden by *Wade*.

2. Discriminating on the Need for an Abortion

A further problem consists in whether a state legislature (or the department administering a state Medicaid program) may refine the coverage it will extend to abortions under Medicaid plans, permitting reimbursement for "medically indicated" abortions, while denying it for "elective" procedures.¹⁰¹ The short

99. 93 S. Ct. at 732 (emphasis added).

100. Notes 83-90 *supra* and accompanying text. Perhaps the example of third-party payers of medical care, notably Blue Cross/Blue Shield, at least in New York, is instructive. Since New York's liberalized abortion law has been in effect, the companies have provided the same indemnity allowance for an abortion as they provide for a normal obstetrical delivery. The amounts paid depend on the policy held by the pregnant woman. See letters from Edwin R. Werner, vice president, to subscribers of Blue Cross/Blue Shield, July 27, 1970. For a post-*Wade* case restraining Connecticut officials from refusing to reimburse hospitals for abortions with Medicaid funds see *Poe v. Norton*, Civil No. 15,712 (D. Conn., filed Apr. 4, 1973). The order was "clarified" and apparently limited to "medically indicated" abortions, *Poe v. Norton*, Civil No. 15,712 (D. Conn., filed Apr. 17, 1973), although the court stated that standards for determining what is medically indicated was "not at issue in this lawsuit." *Id.* at 2.

101. "Medically indicated" abortions are those where the examining physician determines that it is an advisable procedure to preserve the life or health of the woman. "Elective" abortions are those which the pregnant woman seeks because, for any other reason, she does not desire to bear the child. *City of New York v. Wyman*, 37 App. Div. 2d 700, 322 N.Y.S.2d 957, 959 (1st Dep't 1971) (dissenting opinion), *rev'd mem.*, 30 N.Y.2d 537, 281 N.E.2d 180, 330 N.Y.S.2d 385 (1972).

answer is that the analysis applicable to the last discussion pertains here too; that is, that the state may not on its own initiative exclude from coverage physicians' services which appear to be included under the federal formula. However, since two litigations in New York, reaching opposite conclusions,¹⁰² have raised this question, the subject merits additional consideration.

a. Statutory Analysis

In the first place, the federal statute and the regulations thereunder indicate that such discrimination is violative of the enabling legislation. The statute requires that medical assistance be made equally available to all those within the four categorical classes.¹⁰³ If medical indigents are covered by state plans, the statute mandates they too shall be accorded an equal availability of medical care¹⁰⁴ (though not necessarily coextensive with that open to the categorical needy).¹⁰⁵ The law does not admit to subdivisions of medical care.¹⁰⁶ From the physician's standpoint, an elective abortion procedure is as much a physician's service as a medically indicated abortion.

These requirements of the federal statute conform to the traditional concept of the Constitution's dictate of equal protection of the laws; *viz.*, that "those

102. *Klein v. Nassau County Medical Center*, 347 F. Supp. 496 (E.D.N.Y. 1972), appeal filed sub nom. *Ryan v. Klein*, 41 U.S.L.W. 3367 (U.S. Nov. 20, 1972) (No. 745) (invalidating a directive which distinguished between "elective" and "medically indicated" abortions); *City of New York v. Wyman*, 66 Misc. 2d 402, 321 N.Y.S.2d 695 (Sup. Ct.), *aff'd mem.*, 37 App. Div. 2d 700, 322 N.Y.S.2d 957 (1st Dep't 1971), *rev'd mem.*, 30 N.Y.2d 537, 281 N.E.2d 180, 330 N.Y.S.2d 385 (1972) (upholding the same directive).

103. 42 U.S.C. § 1396a(10)(A)(i) (1970). The regulations in this area merely reinforce the statute. See 45 C.F.R. §§ 249.10(a)(6), (7) (1972).

104. 42 U.S.C. § 1396a(10)(B)(ii) (1970); see 45 C.F.R. § 249.10(a)(7) (1972).

105. Recall the medical assistance provided the medically indigent may be either at least the five basic categories or seven of the 14. It is conceivable that a state plan might provide the categorical needy with the five basic categories and the medically indigent with seven different classifications of assistance.

106. It has been urged elsewhere that language of 42 U.S.C. § 1396 (1970) supports the elective-medically indicated distinction. Jurisdictional statement of appellant at 14-15, *Ryan v. Klein*, 41 U.S.L.W. 3367 (U.S. appeal filed Nov. 20, 1972) (No. 745). The statute does not say Medicaid funds are to be used only to furnish necessary medical services; it says funds may be appropriated to furnish medical assistance for categorical recipients whose income is insufficient to meet the costs of necessary and medical services. If the poor cannot afford necessary medical care, they obviously cannot afford "elective" services. But that to which they are entitled is medical assistance as defined by 42 U.S.C.A. § 1396d (Supp. 1973), and that section does not make the "necessary medical services" distinction in the five basic classifications of medical care. Consequently, on the face of the statute, at least, persons within the four groups of categorical recipients could well be entitled to Medicaid coverage of elective surgery, even including plastic surgery. However, as a practical matter, it would be rare for these needy persons to seek such surgery. Moreover, the case for elective abortions is distinguishable from that of elective plastic surgery, especially in the light of the Court's recognition of the extenuating circumstances attending the forced birth of an unwanted child. See text accompanying note 66 *supra*.

who are similarly situated be similarly treated."¹⁰⁷ The legitimacy of the state's attempt to subdivide potential abortion patients into "elective" and "medically indicated" classifications, therefore, must be determined by juxtaposition to the equal protection clause.

b. Equal Protection Analysis: The Tests

The courts have traditionally determined equal protection problems by a bifurcated test.¹⁰⁸ If the classification is based on a "suspect" classificatory trait,¹⁰⁹ or if the classification infringes upon a fundamental interest,¹¹⁰ so-called "active review" or "strict scrutiny" will be applied and the statute or regulation upheld only if a state can show a "compelling state interest."¹¹¹ Absent such criteria, the courts require only a reasonable relationship between the classification and the purpose of the law. The test has been stated classically in this manner:

A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law.

The purpose of a law may be either the elimination of a public "mischief" or the achievement of some positive public good.¹¹²

More recently, Professor Gunther has formulated a third test which takes an intermediate approach; *i.e.*, "that legislative means must substantially further legislative ends."¹¹³ And finally, another writer has proposed a second intermediate approach, whereby the Court would balance the legislative interests in the asserted classification against the "harsh negative impact that deprivation of some non-constitutional rights and interests can have."¹¹⁴

107. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 344 (1949) [hereinafter cited as Tussman & tenBroek].

108. See generally Gunther; Tussman & tenBroek; Comment, *Equal Protection in Transition: An Analysis and a Proposal*, 41 Fordham L. Rev. 605 (1973) [hereinafter cited as *Equal Protection in Transition*]; Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 Yale L.J. 123 (1972) [hereinafter cited as *Legislative Purpose*].

109. See cases cited in *Legislative Purpose* 123 n.4.

110. See cases collected in *Legislative Purpose* 123 n.3. The Court has now determined that for equal protection purposes a right is "fundamental" only if "explicitly or implicitly guaranteed by the Constitution." *San Antonio Ind. School Dist. v. Rodriguez*, 93 S. Ct. 1278, 1297 (1973).

111. See *Equal Protection in Transition* 610-11 discussing the nature of the burden this test places on the state and concluding: "To date, application of the strict review standard has in every case resulted in a finding of unconstitutionality." *Id.* at 611.

112. Tussman & tenBroek 346.

113. Gunther 20. The author sees his test as a way of having the courts "assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture," and of avoiding an adjudication "on the basis of fundamental interests with shaky constitutional roots." *Id.* at 21. See also *Equal Protection in Transition* 633-37 for a critique of Gunther's formulation, especially at 634 indicating the key word in Gunther's model, "means," is capable of two definitions.

114. *Equal Protection in Transition* 631. In the *Rodriguez* case, the Court dealt this view

How, then, would a state's excepting elective abortions from Medicaid coverage fare against these alternative approaches? Before proceeding, an examination of the manner in which the two New York litigations treated the problem may be instructive.

c. The New York Cases

The first case to present the issue was *City of New York v. Wyman*.¹¹⁵ During the first nine months of the state's liberalized abortion law's effectiveness, Medicaid covered all abortions for qualified indigents. In April of 1971, however, State Commissioner of Social Services George Wyman issued a directive ordering the distinction between "elective" and "medically indicated" abortions be observed in considering all future requests for Medicaid abortion funds.¹¹⁶ The City of New York, joined by several indigent intervenors, sued in state court to have the directive annulled. The trial court found for the city, concluding:

The directive must be condemned when it deprives some indigents of rights which all others enjoy. It is even less tolerable when it deprives some indigents of the rights which other indigents enjoy.¹¹⁷

In reaching this result, the court relied largely on three lines of argument.¹¹⁸ First, the state was not obligated to provide medical services to the poor, but once it commenced conferring the benefit, it had to bestow it equally, lest the state be guilty of denying an indigent woman her right to terminate her pregnancy.¹¹⁹ Second, in liberalizing its abortion statute, the legislature "ex-

a serious blow—at least for the time being—in renouncing "comparisons of the relative societal significance" as a method of determining "fundamental" rights. 93 S. Ct. at 1297.

115. 66 Misc. 2d 402, 321 N.Y.S.2d 695 (Sup. Ct.), aff'd mem., 37 App. Div. 2d 700, 322 N.Y.S.2d 957 (1st Dep't 1971), rev'd mem., 30 N.Y.2d 537, 281 N.E.2d 180, 330 N.Y.S.2d 385 (1972).

116. 66 Misc. 2d at 403, 321 N.Y.S.2d at 696-97.

117. *Id.* at 422, 321 N.Y.S.2d at 715.

118. The court also found, in passing, that elective abortions were within the statutory coverage. *Id.* at 421, 321 N.Y.S.2d at 714. But see text at notes 125-28 *infra*. Finally, the court further held that the directive was defective in that it constituted a change in the state's plan and had not been first approved by the federal government. Discussion of this phase of the case is limited to noting that the applicable section of the federal statute requiring prior approval for proposed changes in Medicaid coverage was repealed in 1972. Act of Oct. 30, 1972, Pub. L. No. 92-603, tit. II, § 231, 86 Stat. 1410. The section was deleted as part of the suspension of the deadline for full medical care for the needy. See notes 74-78 *supra* and accompanying text. See also 1972 U.S. Code Cong. & Ad. News at 5086-87, 5302.

119. 66 Misc. 2d at 411-15, 321 N.Y.S.2d at 705-08. The court relied on *Boddie v. Connecticut*, 401 U.S. 371 (1971), *Douglas v. California*, 372 U.S. 353 (1963), *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *Griffin v. Illinois*, 351 U.S. 12 (1956) among other cases, in a discussion concluding that the state had failed to show a compelling state interest in the distinction made by the directive. 66 Misc. 2d at 417-18, 321 N.Y.S.2d at 710-11. For a parallel discussion see notes 33-54 *supra* and accompanying text.

pressed public policy"¹²⁰ and made it "clear that the State was embarking on a policy it deemed beneficial to indigent women confronted by an unwanted pregnancy."¹²¹ In this light, the directive was viewed as "regressive" and "tend[ing] to defeat the objective" of the legislation.¹²² Third, the federal "law mandate[d] that an indigent is entitled to physician services for medical assistance."¹²³

The appellate division affirmed by a three-to-one margin, but disavowed the constitutional argument.¹²⁴ Justice Steuer dissented in an essentially semantic argument, urging that elective abortions do not fall within the meaning of the state statute.¹²⁵ The law called for medical assistance to qualified indigents where "necessary to prevent, diagnose, correct or cure conditions . . . that cause acute suffering, endanger life, result in illness or infirmity, interfere with his capacity for normal activity, or threaten some significant handicap . . ."¹²⁶ In vivid language, the judge stated: "Pregnancy is not an abnormal condition, and abortion is not a cure any more than decapitation is a cure for a headache."¹²⁷

In a memorandum decision adopting Justice Steuer's opinion, the court of appeals reversed by a four-to-three vote.¹²⁸ The dissenters urged affirmance, emphasizing the argument that the legislative history of the abortion law liberalization underscored a policy determination to make abortions available to the indigent.¹²⁹

120. 66 Misc. 2d at 421, 321 N.Y.S.2d at 714.

121. *Id.* at 417, 321 N.Y.S.2d at 711.

122. *Id.* at 420, 321 N.Y.S.2d at 713.

123. *Id.* at 421, 321 N.Y.S.2d at 714.

124. 37 App. Div. 2d 700, 322 N.Y.S.2d 957, 958 (1st Dep't 1971), *rev'd mem.*, 30 N.Y.2d 537, 281 N.E.2d 180, 330 N.Y.S.2d 385 (1972).

125. 37 App. Div. 2d at 700-01, 322 N.Y.S.2d at 958-60 (Steuer, J., dissenting).

126. N.Y. Soc. Welfare Law § 365-a(2) (McKinney Supp. 1972-73).

127. 37 App. Div. 2d at 701, 322 N.Y.S.2d at 959-60 (Steuer, J., dissenting). By calling the directive an interpretation, rather than a reduction in the class of eligibles, Justice Steuer distinguished the directive from other situations in which, under the then existing law, approval from the federal government would have been needed. *Id.* at 701, 322 N.Y.S.2d at 959. He dismissed the policy argument by saying that if the legislature found its intent (in liberalizing the abortion law) subverted by his opinion, it could amend the Social Welfare Law so as to cover specifically elective abortions. *Id.*, 322 N.Y.S.2d at 960.

128. 30 N.Y.2d 537, 281 N.E.2d 180, 330 N.Y.S.2d 385 (1972).

129. *Id.* at 538-41, 281 N.E.2d at 181-83, 330 N.Y.S.2d at 386-89. It is interesting to note that with the exception of the trial court's passing reference, none of the opinions in the state court litigation noticed the requirement that if states participate in the Medicaid program, their laws must conform to the federal statute and regulations. See note 97 *supra* and accompanying text. In the same regard, the opinion of Justice Cardozo in an early case interpreting the Social Security Act (of which the Medicaid statute is Title XIX) bears repetition: "The issue is a closed one. It was fought out long ago. When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield." *Helvering v. Davis*, 301 U.S. 619, 645 (1937) (footnote omitted). Had the courts in New York paid greater heed to this dictate, they would have reached a contrary result and obviated the semantic battle.

Less than seven months after the court of appeals resolved the *Wyman* case, however, the validity of the same directive was litigated in *Klein v. Nassau County Medical Center*.¹³⁰ There, a three-judge federal district court held that the statute and the directive, "if interpreted as mandating the Commissioner's directive,¹³¹ would deny indigent women the equal protection of the laws to which they are constitutionally entitled."¹³² The court's reasoning is noteworthy for its recognition of the two-fold nature of the classification; *i.e.*, one based on *both* poverty and "behavioral choice" (namely, the election to abort the fetus rather than go to term with the pregnancy). Pointing out that the woman would be accorded Medicaid funds but for (a) her choice not to go to term, *and* (b) her failure to fit into a "medically indicated" category,¹³³ the court stated: "No interest of the State is served by the arbitrary discrimination . . ."¹³⁴ The court's conclusion was based on the absence of a state fiscal interest¹³⁵ in excluding elective abortions from Medicaid coverage and on a finding that a purported legislative interest in discouraging justifiable abortifacient acts may not be advanced by singling out the poor for the discouragement.¹³⁶ While the latter statement may have been debatable when *Klein* was decided, it now seems to have been prophetic, for *Wade* indicates that the state has no legitimate interest, at least during the first trimester, in discouraging abortions.¹³⁷

d. Equal Protection: Application

From this brief discussion, one sees that the two reported cases dealing with the attempt to exclude elective abortions from Medicaid coverage have been notable, if for nothing else, for their inconsistency of approach. Returning then to the question at hand, how should a court faced with such an attempt meet the subject?

Finally, it is also of interest that the compiled rules and regulations of New York relative to its Medicaid plan, and in particular the subsection under "physicians' services," make no distinction between elective and medically indicated abortion. 18 N.Y.C.R.R. § 505.2(e) (1971).

130. 347 F. Supp. 496 (E.D.N.Y. 1972), appeal filed sub nom. *Ryan v. Klein*, 41 U.S.L.W. 3367 (U.S. Nov. 20, 1972) (No. 745).

131. Earlier in the opinion, the court allowed that the *Wyman* case might be interpreted as holding that the Commissioner's directive was simply consistent with the state statute, rather than required by it. 347 F. Supp. at 500.

132. *Id.* (footnote added).

133. The state Medicaid plan covered medically indicated abortions and obstetrical care. *Id.* at 499; 18 N.Y.C.R.R. §§ 505.2(d), (e) (1971).

134. 347 F. Supp. at 500 (emphasis added).

135. The trial court in the *Wyman* case exposed the arithmetic of the problem. Outpatient abortions cost an average \$64, while inpatient operations averaged \$177. By comparison, average medical costs associated with prenatal care and delivery of a child ran to \$800. AFDC payments were calculated to cost \$624 a year. 66 Misc. 2d at 407-08, 321 N.Y.S.2d at 701.

136. 347 F. Supp. at 501.

137. See 93 S. Ct. at 732; text accompanying note 99 *supra*.

Aside from the statutory approach discussed above,¹³⁸ the answer depends on the equal protection test applied¹³⁹ and that in turn rests on the perspective in which one places the case.¹⁴⁰ If one accepts the minority view that poverty is a suspect classification,¹⁴¹ that determination would trigger active review. Alternatively, if one deems as dispositive the inclusion of the abortion right as part of the fundamental personal privacy right, then that posture too would trigger strict scrutiny¹⁴² and, most likely, the state would lose.¹⁴³ If on the other hand, one views the question as one solely of "economics and social welfare,"¹⁴⁴ then, following the lead of the Supreme Court,¹⁴⁵ the traditional, rational basis test would be the appropriate test vehicle. Even in this posture, however, the result reached by the *Klein* court would be proper, for the state may assert no justifiable interest in slicing off so small a piece of the Medicaid pie.¹⁴⁶ Denying an abortion to an indigent—a physician's service usually costing less than \$150¹⁴⁷—may result in the state's paying thousands of dollars to support a dependent child until his majority. Thus, the classification does not advance a fiscal interest. Asserting an interest in discouraging abortions, even in states without an expressed public policy such as was found in New York's legislative history,¹⁴⁸ would seem a direct contravention of the *Wade* dictate

138. See text accompanying notes 103-06 supra.

139. See text accompanying notes 107-14 supra.

140. See *San Antonio Ind. School Dist. v. Rodriguez*, 93 S. Ct. at 1289 (mandating that "threshold questions" be resolved before application of an equal protection test).

141. The *Rodriguez* Court asserted that the Supreme Court had never held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny. 93 S. Ct. at 1294. Rather, the onus of prior cases in which impecunious petitioners succeeded with equal protection claims was two-fold: (1) they were completely unable to pay for some desired benefit and, consequently, (2) they were absolutely deprived of the opportunity to enjoy the benefit. *Id.* at 1290. Justice Douglas seems to be the prime advocate of invoking strict scrutiny where wealth (poverty) is the basis of the classification. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 386 (1971) (Douglas, J., concurring).

142. See text accompanying note 110 supra.

143. See note 111 supra and accompanying text.

144. *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). The Court in the *Rodriguez* case ultimately employed the rational basis test, as well. 93 S. Ct. at 1300. Justice Marshall dissented vehemently in each of the three cases. See 93 S. Ct. at 1330; 406 U.S. at 574-76; 397 U.S. at 519-21 (Marshall, J., dissenting).

145. See, e.g., *Richardson v. Belcher*, 404 U.S. 78 (1971); *Dandridge v. Williams*, 397 U.S. 471 (1970).

146. For examples of where the state has been found to meet the rational basis test in the area of Medicaid regulation see, *Dimery v. Department of Social Servs.*, 344 F. Supp. 1181 (S.D. Iowa 1972); *Wilczynski v. Harder*, 323 F. Supp. 509, 519-21 (D. Conn. 1971).

147. While the *Wyman* court placed the average cost of an inpatient abortion at \$177, see note 135 supra, recently, competition in New York has forced the price of an abortion downward. Interview with Ira Neiger, Director of Public Information, Planned Parenthood of New York City, Inc., Mar. 23, 1973.

148. See text accompanying notes 120-21 supra.

that women be free to choose an abortion.¹⁴⁹ When these last two factors are placed into the Gunther-test¹⁵⁰ hopper, a similar finding of invalidity results. Finally, were one to make use of the second intermediate approach to equal protection,¹⁵¹ the end product would be the same, but the balance would be tipped even farther toward invalidity by the factors evincing potentially harsh impact.¹⁵² Thus, no matter which equal protection test is used,¹⁵³ such a distinction among pregnant indigents eligible for Medicaid benefits must fail as violative of the Constitution.

V. CONCLUSION

The Supreme Court in its recent decisions of *Roe v. Wade* and *Doe v. Bolton* has determined that a woman, in consultation with her physician, must be free to choose to terminate her pregnancy, at least during her first trimester. The Court based its conclusion on a right, difficult of precise articulation, which it stated was "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."¹⁵⁴ Absent a precedent-shattering Court ruling according indigents a corollary right to implementation of the abortion right, no constitutional argument by which indigents might win free abortions appears persuasive. However, if a state participates in the federal Medicaid program, abortions should be included in that coverage—at least abortions performed during the first trimester on members of the four basic categorical groups. The medically indigent *may* receive Medicaid benefits for abortions, depending on the extent of the coverage afforded them by the particular state plan.¹⁵⁵ Once a state adopts a Medicaid plan, it may not discriminate as to the types of abortions which will be covered during the first trimester. A state may, of course, rescind its Medicaid enabling legislation, for the program is entirely voluntary. But such a course of action would seem a drastic overreaction, working a severe disservice to otherwise qualified indigents. Finally, it is conceivable that Congress might specifically exempt elective abortions from coverage under the Medicaid statute, just as it excluded abortions

149. 93 S. Ct. at 732; see text accompanying note 99 supra. Thus, the purpose of the law neither achieves some public good nor eliminates a legitimate public "mischief." See text accompanying note 112 supra.

150. See note 113 supra and accompanying text.

151. See note 114 supra and accompanying text.

152. See text accompanying note 66 supra.

153. For at least the time being, the Court has declined to recognize either of the two suggested intermediate approaches to the equal protection problem, and, instead, has opted for the traditional two-tiered system. See 93 S. Ct. at 1330 (Marshall, J., dissenting).

154. 93 S. Ct. at 727.

155. See notes 91-95 supra and accompanying text. If the abortion is to be performed on an otherwise unqualified needy person in a facility receiving federal funds for hospital construction or modernization, the procedure may be covered by regulations requiring such institutions to provide "a reasonable volume of services to persons unable to pay." 42 C.F.R. § 53.111(a) (1972). But see 119 Cong. Rec. S2567-68 (daily ed. Feb. 15, 1973) (remarks of Senator Church).

from the federal Family Planning Services and Research Act.¹⁵⁶ However, such an amendment of the federal law would contravene the spirit of the initial Medicaid enactment—that full medical care be extended to as many needy people as fiscally possible. Moreover, by eliminating federal support for all classes of abortion, the Congress would impose extreme hardships on those indigent women who seek to terminate pregnancies for medical reasons. Were the Congress to delimit the abortions permissible under Medicaid to those that are medically indicated, the arguments urged against a state taking such action would apply.

Thus, in the wake of the *Wade* and *Bolton* decisions (and absent recognition of a corollary right to implement the primary right), the *right to an abortion* is limited. Many poor women seeking abortions remain outside the scope of Medicaid and other medical care coverages. This group includes all those people in the four basic categorical classes in states that have not elected Medicaid participation, and medical indigents in participating states with only limited coverage. For these people, the potential negative impact resulting from an inability to procure an abortion may be tremendous. The horror tales of back-alley abortionists are legion and need not be repeated here. Consequently, although legislators may have personal moral convictions against abortion, it is urged that those legislators should not foreclose the availability of abortions to the indigent who may have equally strong convictions on the other side. Legislation is needed which would afford poor pregnant women outside the scope of traditional Medicaid coverage the chance to effectuate the right accorded them by the *Wade* and *Bolton* decisions.¹⁵⁷ Such an act would not in and of itself encourage abortions, but it would permit indigent women the necessary freedom to make the choice which the Supreme Court has stated is a function of the woman's fundamental right to personal privacy.

156. See note 80 *supra*.

157. Dr. John H. Knowles, President of the Rockefeller Foundation, similarly has urged that government agencies and the private health sector share the responsibility of making safe and humane abortions available to women throughout the country regardless of their ability to pay. *N.Y. Times*, Mar. 15, 1973, at 31, cols. 2-4.