> uses proscribed, is necessary to accomplish its legitimate objectives. Its power to attain them is broad enough to reach these peripheral instances in which the parent's supervision may reduce but cannot eliminate entirely the ill effects of the prohibited conduct. 321 U.S. at 166-170.

The decision in Prince should be viewed as concluding the appellants in this case, which from every standpoint is an a fortiori case relative to Prince. This Court there assumed that the child had a right to life that the state had a right to protect by legislation. Once it is decided that the unborn child is a person within the meaning of the constitutional safeguards of the person, the Prince decision means that it also has a right to life that the state has a right to protect by legislation. Moreover appellants cannot rely upon First Amendment freedoms as did the appellant in Prince. Appellants do not present a case in which they are in good faith seeking to implement their own notions of what is for the welfare of their actual or future child. Instead, they seek to destroy or to obtain the right to destroy their present or future unborn child. The State of Texas has acted, as had Massachusetts, in "the interest of youth itself, and of the whole community, that children be safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens." Indeed, the state has acted to prevent the parent from acting "to expose...the child...to...death," something this Court stated a parent has no right to do. 321 U.S. at 166-167. If this Court was willing to affirm a state's power, as in Prince, to preclude by statute a parent from exposing its child to "the crippling effects of child employment" including the harmful possibilities...of emotional excitement and psychological or physical injury" involved in soliciting funds for religious tracts being distributed, 321 U.S. at 169-170, it should be moved even more strongly to affirm a state's power to preclude a parent or another at its direction from destroying the life of the former's child. Certainly, under the Prince decision, the state in enacting and retaining the traditional form of abortion statute is entitled to the presumption in enacting and maintaining it. Indeed, in view of the diffi-

cult decision problem the state faces in balancing the competitive or correlative interests of the unborn child and of its single mother or married parents, this Court should be relatively reluctant to disturb the state's choice of what seems to it to be the appropriate solution, particularly when it can be so strongly supported as to its reasonableness as will be demonstrated below.

Federal District Courts in Louisiana and Ohio have sustained the right of the state under abortion statutes substantially identical to that of Texas to protect the constitutional right of the unborn child as a person to its life. Rosen v. Louisiana State Board of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970) and Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970).

Judge Young in the Steinberg case stated:

> "Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it.
>
> "There is authority for the proposition that human life commences at the moment of conception.
>
> > "Biologically speaking, the life of a human being begins at the moment of conception in the mother's womb. ...
> >
> > "From the viewpoint of the civil law and the law of property, a child en ventre sa mere is not only regarded as human being, but as such from the moment of conception...which it is in fact.
>
> "If the law is in accord with science for the purpose of protecting property rights, how can it possibly not be in accord with science for the purpose of protecting property rights, how can it possibly not be in accord with science for the purpose

> of protecting life itself, without which no property right has any worth or value whatsoever." Id. at 746-747.

Judge Ainsworth of the Rosen case, supra, relied primarily in his opinion upon a proposition stated by Mr. Justice Holmes in Lochner v. New York, 198 U.S. 45, 76 (1905) (dissenting opinion):

> "The word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. ...We are not persuaded that the Louisiana abortion laws infringe any fundamental principle as understood by the traditions of our people. As an ethical, moral, or religious matter a woman's refusal to carry an embryo or fetus to term, both historically and today, has been condemned as wrong by a substantial, if not a dominant, body of opinion, except in very limited circumstances." Id. 318 F. Supp. at 1231.

Neither of the theories of decision employed in the Steinberg and Rosen cases is precisely the theory of decision urged by amicus upon this Court which is primarily based upon principles of constitutional interpretation and upon a judicial gloss upon the Constitution that indicate that the unborn child is a person and has a right to life protected by the Constitution. Nevertheless, amicus considers the theories of decision employed in the Steinberg and Rosen cases to be appropriate supportive theories for adoption by this Court in disposing of this case.

The courts in the Steinberg and Rosen cases also correctly anticipated the decision by this Court in United States v. Vuitch, 402 U.S. 62 (1971),

by holding the traditional type of state abortion statute not to be unconstitutionally vague. They also correctly applied this Court's decision in Griswold v. Connecticut, 381 U.S. 479 (1965) as the other federal district courts, including the lower courts, that have struck down the traditional type of state abortion statute, have not. Without any consideration of the issue of whether the unborn child was a person and without the constitutional safeguards of the person, including the Ninth Amendment, the lower court simply looked to the rights of single women and married couples and stated:

> "Plaintiffs argue as their principal contention that the Texas abortion Laws must be declared unconsitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children. We agree."
>
> "Since the Texas Abortion Laws infringe upon plaintiffs' fundamental right to choose whether to have children, the burden is on the defendant to demonstrate to the satisfaction of the Court that such an infringement is necessary to support a compelling state interest. The defendant has failed to meet this burden." Roe v. Wade, 314 F. Supp. 1217, 1221-1222 (N.D. Tex. 1970).

Similarly, the lower court in Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970) stated after referring to the Griswold case, supra:

> "For whichever reason, the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy." Id. at 1055

While the court in the Bolton case, supra, recognized that at the parent's decision to abort affects others, it is unwilling to

> "posit( ) the existence of a new being with its own identity and federal constitutional rights,.. 319 F. Supp. 1955

Taking a somewhat more cautious position than the lower court in this case, that court held that the state had a right to participate in the decision to abort and to treat the problem wholly "as a medical one," Ibid., but that the state had no right to "limit() the number of reasons for which an abortion may be sought." Id. at 1056. So far as the unborn child is concerned, the decision by the court in the Bolton case does not differ from the decision by the lower court in this case.

The position taken by the lower court below in the Bolton case has also been taken by several other courts. People v. Belous, 80 Cal. Rptr. 354,359 (S. Ct. Cal. 1969) cert. denied, 397 U.S. 915 (1970); Doe v. Scott, 321 F. Supp. 1385, 1389 (N.D. Ill. 1971) (appeal docketed sub nom. Hanrahan v. Doe, 39 U.S. L.W. 3438 (U.S. Mar. 29, 1971) (No. 1522, 1970 Term; renumbered No. 70-105, 1971 Term), stay issued (Marshall, J. Sup. Ct. Feb. 10, 1971) Doe v. Rampton, No. C-234-70 (D. Utah. 1970); and Babbitz v. McCann, 310 F. Supp 293, 301 (E.D. Wis. 1970) appeal dismissed for want of jurisd. 400 U.S. 1 (1970) (per curiam);

All of these cases, other than the Steinberg and Rosen cases, commit a fundamental error in constitutional law adjudication. They fail to confront and to decide whether the unborn child is a person within the meaning of the constitutional safeguards of the person, including the Ninth Amendment. For this reason, they also fail to confront and to decide whether the unborn child as a person protected by the Constitution has a constitutional right to life that the state may or must protect. Once these issues are confronted and resolved, as demonstrated above they must be in favor of the unborn child, then the whole framework of constitutional argumentation and decision changes. The Griswold case, supra, instead of being authority for these decisions is rather authority for their complete rejection.

The Griswold case concerned the validity of a state law that operated "directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation." 381 U.S. at 482. That law proscribed use of a drug or instrument for preventing conception as well as any action assisting or counseling this use. The defendants, an officer and a medical director of a Planned Parenthood League, had been fined for instructing and advising a married couple as to means of preventing conception. The Court held the statute invalid under the Fourteenth Amendment because it was designed "to achieve its goals by means having a maximum destructive impact" upon the above human relationship and thereby "sweeping unnecessarily broadly and thereby invading the area of protected freedoms." 381 U.S. at 485. The particular sector of the area of protected freedoms involved in this case was the right to privacy of the husband and wife in an intimate relationship--described by the Court as a "zone of privacy" created by several fundamental constitutional guarantees, including the First, Third, Fourth, Fifth, and Ninth Amendments. Id. at 484-485. The Court emphasized that each of the specific guarantees in the Bill of Rights "have penumbras, formed by emanations from those guarantees that help give them life and substance." Id. at 484. It was in this respect that the Court's reliance upon the general protective language of the Ninth Amendment took on special significance, suggesting that it might serve as the vehicle for these emanations. Its very content emphasizes that rights other than those specifically guaranteed exist and that there may be other important zones of privacy involving human relationships besides that existing between husband and wife.

The Appellants' heavy reliance upon the Griswold case, supra, could not have been a more misplaced one. Griswold is one of the principal cases supporting the position of the Appellee. It is a case which elaborates the theory of constitutional protection of privacy in human relationships. A human relationship involves human persons. One of the most vital of human relationships

is that between the parent and the child, including the unborn child, and especially the relationship between mother and child. Nature has given the father an important initiative and supportive role in the relationship between parent and child. It has given the mother, however, the role of providing the temple in which the human life process starts upon conception with the embryo and unborn child rapidly developing thereafter and then growing in an orderly and wonderful fashion to the point when it is ready for birth. The unborn child is very much a human person, as previously demonstrated, and is a very important part of the relationship between parent and child. If there ever was a "zone of privacy" in human relationships that should generate and receive respect, it is that involved in the relation between mother and unborn child. The unborn child is by nature closed off in its mother's womb from the world and provided with the protection and assistance of the mother as it grows and as its bones, nervous system, brain, and organs, which develop at a very early date in the pregnancy, continue to develop. This privacy is essential to the maturing of the child and there is still no substitute for it throughout most of its period of development in the womb. Nature "intended" this privacy.

Surely, also, this is one of the most important "zones of privacy" to political society and required to be protected by it. It involves one of the most primordial and basic of the "privacies of life". The Supreme Court recalled in Griswold that "the Fourth and Fifth Amendments were described in Boyd v. United States, 116 U.S. 616, 630 as protection against all governmental invasions of...the privacies of life." Id. at 484. It is the privacy of life that belongs to the unborn child, a human person before the law. Unless this zone of privacy--"the privacy of life" of an unborn child--is protected by either the terms of the Due Process Clauses of the Constitution which after all, directed toward protection of "life", or by its "penumbras" or those of other specific guarantees, or by the Ninth Amendment,

that child, the institution of the family, and political society itself are gravely threatened. The unborn child, in this event, cannot be born, become a citizen, enjoy the fellowship and love of the family, participate in political society by enjoying its benefits and bearing its burdens, or realize upon its potential for self-realization and contribution to others. The family institution becomes degraded through the insertion and practice of violence against itself and one of its members although this violence and destruction is wholly unnecessary. Political society becomes endangered and the common good is sacrificed to the whim and caprice of husband and wife who seek, in the name of their own privacy and convenience, another's privacy of life who cannot defend itself and who has done nothing to threaten those who destroy it. It is this kind of result--the invasion of privacy of the human person--about which Griswold was very much concerned. That case necessarily demands, if the relationship between husband and wife is protected against invasion in its intimate aspects by the state, that the relationship between parent and child--and especially between mother and child--be protected against invasion by its parent or parents or even by the state itself through an abortion.

What the lower courts failed to recognize in this and the Bolton case, supra, is the simple fact emphasized by the courts in Steinberg and Rosen, supra:

> "Contraception, which is dealt with in Griswold, is concerned with preventing the creation of a new and independent life. The right and power of a man or a woman to determine whether or not to participate in this process of creation is clearly a private and personal one with which the law cannot and should not interfere.

It seems clear, however, that the legal conclusions in Griswold as to the rights of individuals to determine without governmental

interference whether or not to enter into the processes of procreation cannot be extended to cover those situations wherein, voluntarily or involuntarily, the preliminaries have ended, and a new life has begun. Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it. 321 F. Supp. at 746.

"For the purposes of this case we assume, if we are not required to recognize, e.g.., Griswold v. Connecticut, 318 U.S. 479 (1965);.. that as a general matter women possess under our constitution a 'fundamental right' to determine whether they shall bear children before they have become pregnant. A state may interfere with this right of choice only in special circumstances. We deal in this case, however, not merely with whether a woman has a generalized right to choose whether to bear children, but instead with the more complicated question of whether a pregnant woman has the right to cause the abortion of the embryo or fetus she carries in her womb. We do not find that an equation of the generalized right of the woman to determine whether she shall bear children with the asserted right to abort an embryo or fetus is compelled by fact or logic... The basic distinction between a decision whether to bear children which is made before conception and one which is made after conception is that the first contemplated the creation of a new human organism, but the latter contemplates the destruction of such an organism already created. To some engaged in the controversy over abortion, this distinction is one without a difference....To others, however,... the difference between the decision not to conceive and the decision to abort is of fundamental, determinative

> importance. Thus the root problem in the controversy over abortion is the one of assigning value to embryonic and fetal life. 318 F. Supp. at 1222-1224.

Thus, once it is determined, as it must be that the unborn child is a person within the meaning of the constitutional safeguards of the person, the Prince and Griswold cases require this Court to sustain the good faith effort of the State of Texas to protect the life and other interest of that child by an abortion law, if that law is a reasonable one in its assessment of the competing interests of that child, its parents, and of the State itself.

> B. The State cannot reasonably leave the fate of the unborn child to be decided by private persons such as the appellants in this case either with respect to whether an abortion is to be performed or with respect to the appropriate reason for an abortion. To do so would be an unconstitutional delegation of authority and a denial of equal protection of the laws guaranteed to the unborn child as a person protected by the Fourteenth Amendment.

If the state provided no statute for regulating the performance of abortions, it would be delegating unconstitutionally its authority to regulate the subject of abortions over to private persons. If this would be the case, this fact constitutes one of the major reasons for the reasonableness of state action in seeking to protect the constitutional right to life of the unborn child by some form of regulation of the subject matter of abortion. It is particularly fitting that when a state has been held to have violated the Fourteenth Amendment and the Ninth Amendment by the enactment of an abortion statute, that that state be judged in terms of federal standards as to the reasonableness of its actions in attempting to avoid an unconstitutional delegation of power to private

persons who have challenged that statute and seek to assume the exercise of that power.

Justice Black in his dissent in Zemel v. Rusk, 381 U.S. 1 (1965) has articulated the kind of argument that is relevant to the point now being made with respect to an unconstitutional delegation of power. In that case, the question presented was whether, if the Secretary of State was statutorily authorized to refuse to validate passports of United States citizens for travel to Cuba, his authority was constitutionally permissible. Justice Black took the position that that authority was not constitutionally permissible since the subject matter was a law "restricting the liberty of our people." He stated:

> "Nor can I accept the Government's contention that the passport regulations here involved are valid 'because the Passport Act of 1926 in unequivocal words delegates to the President and Secretary a general discretionary power over passports....' That Act does provide that ' the Secretary may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries...under such rules as the President shall designate and prescribe.." Quite obviously, the Government does not exaggerate in saying that this Act 'does not provide any specific standards for the Secretary' and 'delegates to the President and Secretary a general discretionary power over passports'--a power so broad, in fact, as to be marked by no bounds except an unlimited discretion. It is plain therefore that Congress has not inself passed a law regulating passports; it has merely referred the matter to the Secretary of State and the President in words that say in effect, 'We delegate to you our constitutional power to make such laws regulating passports as you see fit.' The Secretary of State has proceeded to exercise the power to make laws regulating the

issuance of passports by declaring that he will issue them for Cuba only to 'persons whose travel may be regarded as being in the best interest of the United States,' as he views that interest. For Congress to attempt to delegate such an undefined law-making power to the Secretary, the President, or both, makes applicable to this 1926 Act what Mr. Justice Cardoza said about the National Industrial Recovery Act: 'This is delegation running riot. No such plentitude of power is susceptible of transfer.' A.L.A. Schecter Poultry Corp. v United States, 295 U.S. 495, 553 (concurring opinion)....

"Our Constitution has ordained that laws restricting the liberty of our people can be enacted by the Congress and by the Congress only. I do not think our Constitution intended that this vital legislative function could be farmed out in large blocks to any governmental official, whoever he might be, or to any governmental department or bureau. Whatever administrative expertise it might be thought to have. The Congress was created on the assumption that enactment of this free country's laws could be safely entrusted to the representatives of the people in Congress, and to no other official or government agency. The people who are called on to obey laws have a constitutional right to have them passed only in this constitutional way." Id. at 21-22. (dissenting opinion)

Mr. Justice Douglas and Mr. Justice Goldberg concurred in the dissent of Justice Black. Id. at 23, 27. The Court in an opinion by Mr. Chief Justice Warren sustained the challenged statute on the ground that regard for the recent historical context in which it had been administered before its enactment indicated that area restrictions had been utilized by the Secretary of State. It is to be noted that in the Zemel case at least the

basic statute drawn in question delegated to the Secretary of State the specific authority "to grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries..." rather than only a more general authority such as "to provide for the interests of American Citizens relative to foreign travel." Moreover, as pointed out by the majority, there had been the administrative practice of utilizing area restrictions prior to the most recent reenactment of the statute.

The situation in which the state would be clearly placed if it repealed its abortion statute, however, would be quite similar to the situation which Justices Black, Douglas, and Goldberg believed the Congress to have been in after enactment of the statute challenged in the Zemel case. It would be in the situation of simply having turned over the protection of the right of unborn children relative to their lives to the uncontrolled discretion of their parents and the physicians they employed. It would simply be the situation referred to by both Justice Black in his Zemel dissent and earlier by Justice Cardoza in the Schecter case, supra:"

> "This is delegation running riot. No such plenitude of power is susceptible of transfer." 295 U.S. 495, 553 (concurring opinion).

Moreover, the "delegation running riot" would be operating in the context not of economic regulations of prices and wages by private groups but in the context of control of the constitutional right to life of unborn children by private persons. It seems clear that Justice Black would have been moved to say in the instant case that the State of Texas acts reasonably when it refuses to turn over such control to private persons over the most important right a person possesses, his right to life.

The situation in which the State of Texas would find itself should it not have some regulation of abortion on its statute books would be much more like the situation

presented in the case of Kent v. Dulles, 357 U.S. 116 (1958). In that case it was contended that the statute authorized the Secretary of State to withhold passports to citizens because of their beliefs or associations. The same statute involved in the later Zemel case, supra, was the basis of this asserted authority. The claim of authority was challenged as an unconstitutional delegation of legislative power. Instead of reaching this constitutional issue, the Court wisely concluded that the statute did not delegate to the Secretary the kind of authority he had claimed. As in Green v. McElroy, 360 U.S. 474 (1959), this Court was at pains to point out that it was the constitutional right to travel and to freedom of speech that was affected by the action of the Secretary for which he claimed statutory authority. In the opinion for this Court, Mr. Justice Douglas stated:

> "Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it....
>
> "And, as we have seen, the right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them...Id. at 129.

In the situation we are now assuming the State of Texas to be as a result of acting to repeal its statute of abortion and replacing it with no statute, we are confronted with the right of a human person, the unborn

child, to live, the right prior to, and the necessary foundation of, all other rights he may possess, including the right to travel. It is "life" rather than "liberty" or "property" that is at stake and this makes all the difference. If that "life" is to be regulated, indeed taken (assuming that it is constitutionally possible under some limited circumstances, "it must be pursuant to the law-making functions..." of the Texas Legislature. But, by hypothesis, the Legislature has turned over the power to control the life of the unborn child to private persons. Amicus suggests that the federal doctrine concerning unconstitutional delegations of legislative power demonstrate how reasonable the State of Texas has been in refusing to turn over the matter of whether to preserve the life of unborn children to private persons.

But the hypothetical situation we have been discussing is the situation that appellants want and that others like them have been able to persuade some federal district courts to provide them. The decision of the courts that have invalidated state laws of abortion and especially those that have denied the state any right to control the reasons for which an abortion may be performed as in the Bolton case, supra, in effect are compelling the delegation of state authority to regulate the subject matter of abortions over to private persons without any standards whatsoever.

The State of Texas is acting reasonably in refraining from turning over power to regulate the subject matter of abortions to private persons for another reason, the prevention of a denial of equal protection of the laws to unborn children. If the state turned over control of the lives to unborn children to private persons in the form appellants seek and that others have obtained by the decisions such as that in the Bolton case, supra, this would permit the drawing of irrational and invidious distinctions between unborn children whose lives it permits to be destroyed by abortions with the mere consent of their parents, on the one hand, and the unborn children whose lives it protects so long as their parents have not

consented to an abortion. This irrational and invidious distinction, based upon the bare consent of the parents of these unborn children, clearly is a denial of equal protection of laws to these citizens.

This Court in Levy v. Louisiana, 391 U.S. 68 (1968) established the definitive approach to the problem of equal protection which the State of Texas has properly solved by its abortion statute. In that case a Louisiana statute was challenged as a denial of due process and equal protection of the law under the Fourteenth Amendment. That statute, which provided for a right to recover damages for injuries inflicted by another, was construed by the Louisiana courts as permitting the survival of the right to recover in favor of a child only if that child was a legitimate child. In holding this statute to be a denial of equal protection of the law, Mr. Justice Douglas in the opinion for the Court stated:

> "We start from the premise that illegitimate children are not 'nonpersons'. They are humans, live and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."

"While a State has broad power when it comes to making classifications, it may not draw a line which constitutes an invidious discrimination against a particular class. See Skinner v. State of Oklahoma, 316 U.S. 535, 541-542. Though the test has been variously stated, the end result is whether the line drawn is a rational one.

"We have been extremely sensitive when it comes to basic civil rights and have not hesitated to strike down an invidious classification even though it had history and tradition on its side. The rights asserted here involve the intimate, familial relationship between a child and his own mother. When the child's claim of damage

for loss of his mother is in issue, why, in terms of 'equal protection,' should the tort-feasors go free merely because the child is illegitimate? Why should the illegitimate child be denied rights merely because of his birth out of wedlock. He certainly is subject to all the responsibilities of a citizen, including t' payment of taxes and conscription under the selective Service Act. How under our constitution regime can he be denied correlative rights which other citizens enjoy?

"Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent upon her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.

"We conclude that it is invidious to discriminat against them when no action, conduct, or demeano of theirs is possibly relevant to the harm that was done the mother." Id. at 70-72

In the Levy case, the statutory right of illegitimate children to recover damages for an injury resulting in the death of their mother was at stake. In this case the even more important constitutional right to life of unborn children is at stake. These rights of the unborn children protected by the Texas statute also "involve the intimate, familial relationship between a child and his (or her) own mother." The rights protected by this statut also involve their relationship to the father, to other children of their parents, to the American political society, and to the whole human race. These rights also involve the relationship between the unborn child and the vast spectrum of common law, statutory, and constitutiona rights that they have long since been recognized to possess and for which they are entitled to secure protection.

Most children are legitimate and their conception simply the most normal outcome of married life of their parents who now have had a change of mind about rearing children. Why should the unborn child be denied the right to life merely because his parents do not want the child? Why should this unborn child, a perfectly healthy human being waiting to be born, be subjected to the destruction of its life while another unborn child is not so subjected, the only basis for the vast difference in treatment of the two being the consent of one set of parents to the abortion and the non-consent of the other set of parents. The consent or non-consent of the two sets of parents has no relation to the alledged wrong inflicted on the mother or the two parents of the child; indeed, there is no possibility of alledging any wrong on the part of the unborn child. The consent or non-consent of the two sets of parents does not intrinsically relate to the chils or any problem it might be creating for its parent or parents. It is wholly connected with an evaluation of the right of the unborn child to its life and objective factors that might, under narrow circumstances, warrant the destruction of the child's life.

The recent case of Shapiro v. Thompson, 394 U.S. 618 (1969) provides additional guidance for the response to this question. In that case, the Court considered appeals from decisions of three-judge District Courts relative to a state or District of Columbia statutory provision denying welfare assistance to residents of a state or district who have not resided within their jurisdictions for at least one year immediately preceding their applications for such assistance. The assistance that had been applied for included assistance for dependent children (AFDC) and several of the applicants were pregnant at the time they filed their applications for assistance. The Court held these statutory provisions to be a denial of equal protection of the laws. Mr. Justice Brennan in the opinion for the Court, stated:

> "There is no dispute that the effect of the waiting-period requirement in each case is to create

two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more , and the second of residents who have resided less than a year, in the jurisdiction. On the basis of this sole difference the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist--food, shelter, and other necessities of life. .. appellees' central contention is that the statutory prohibition of benefits to residents of less than a year creates a classification which constitutes an invidious discrimination denying them equal protection of the laws. We agree. The interests which appellants assert are promoted by the classification either may not constitutionally be promoted by government or are not compelling governmental interests." Id.at 627.

Mr. Justice Brennan also observed that the traditional criteria for determining whether equal protection of the laws had been denied were not applicable:

> "Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest. Under this standard, the waiting period requirement clearly violates the Equal Protection Clause." Id. 638

Thus, the opinion of the Court pointed out that while a certain legitimate interest of the state or of the District of Columbia might be promoted by the legislation and thus "a rational relationship between the waiting period and these four admittedly state objectives"established, this was not sufficient to justify the classification. Instead, it must be shown that the classification

is necessary to promote a compelling governmental interest. Pointing to one of the state or district interests, Mr . Justice Brennan observed:

> "Since double payments can be prevented by a letter or a telephone call, it is unreasonable to accomplish this objective by the blunderbuss method of denying assistance to all indigent newcomers for an entire year." Id. at 637.

Applying the rationale of the Levy and Shapiro cases to the instant case, it is necessary in order to justify the State of Texas turning over the control of abortions to private persons like the appellants, rather than retaining that control as it has in its present abortion law, to show that it is necessary to take the lives of unborn children in order to promote a compelling governmental interest. Otherwise, the state in turning over this control to private persons would be acting unconstitutionally by denying to unborn children equal protection of the laws. Far from the burden being on the state to demonstrate it has a compelling state interest for limiting the right of single women and married couples to determine whether to abort their unborn children, the burden under the Levy and Shapiro cases would be on the state to demonstrate the compelling interest it has should it take legislative action that would submit the lives of unborn children to the uncontrolled discretion of their parents and physicians they employ. And amicus suggests that the burden that would have been on the state in such a situation is the burden that appellants properly face in the instant case. This Court cannot deny the right of the State of Texas to comply with its standards for determining what is necessary in order to respect the right to equal protection of the laws of persons, including unborn children.

Thus, the action of the state of Texas in enacting an abortion statute is eminently reasonable because it is designed not only to avoid an unconstitutional delegation of power over one of the most fundamental of

human rights to private persons, the right of life, but also to avoid invidious and irrational distinctions being drawn between unborn children and between those children and their parents, each considered in their status as human persons with respect to this right to life. Moreover, the appellants have not discharged their burden of demonstrating a compelling interest of the state that would justify the state giving permission to appellant single mother and appellant married couple to destroy or to direct the destruction of the lives of their children. Unless that can be done, this Court is not justified in holding the state has acted unreasonably in protecting these children under its abortion statute.

C. The affirmative,particular reasons that can be adduced in behalf of the Texas law of abortion demonstrate the reasonableness of the state legislative judgment to enact and maintain that law and they counsel extreme caution on the part of federal courts in declaring that state legislative judgment to be unconstitutional.

There are eight principal, affirmative reasons for the State of Texas to adopt and to maintain its law of abortion. Most of these have already been developed and are as follows: (1) the unborn child is a person within the meaning of the constitutional safeguards of the person; (2) the unborn child, as such a person, has the constitutional right to life; (3) the state has the right, if not the duty, to protect the constitutional right to life of the unborn child; (4) for the state to turn the control over the protection of the constitutional right to life of unborn children to private persons, such as appellants, would result in an unconstitutional delegation of legislative power and in the drawing of invidio and irrational distinctions by these private persons between unborn children and between unborn children and other persons, such as the appellants; (5) the state has an interest in protecting the continuation of the body of persons and citizens forming the human element of families and of political society itself; (6) the state has ar

interest in preventing destruction of innocent human life where no adequate reason exists for that destruction in order to prevent the citizenry from becoming habituated to violence as a mode of social control and insensitivity to the value and the dignity of the human person; (7) in light of all the above reasons, the state has a compelling governmental interest in protecting the constitutional right to life of the unborn child absent a showing, in individual cases upon the basis of individual data, that there is a compelling governmental interest that overrides the former compelling governmental interest; and (8) there has been no persuasive demonstration of any compelling governmental interest by persons in the position of appellants that would warrant the state turning over to private persons the power to make decisions as to whether or not, and for what reasons, unborn children should continue to enjoy their constitutional right to life or that would warrant the state in extending the grounds upon which abortions could be secured by persons such as appellants.

Only the sixth and eighth reasons set out above for adoption and maintenance of the Texas law of abortion will be discussed here since the others have already been sufficiently developed.

The twentieth century has more and more frequently been described as a century in which violence and brutality have been promoted psychologically and as a technique for achieving social goals. For the National Socialists war became a way of life for the German government, a way of achieving national goals irrespective of the lack of justice in those goals or the methods used. Within Germany itself and in countries it occupied it addressed itself to the sordid task of destroying in gas ovens and by other means some 6,000,000 innocent men, women and children, including the unborn, of the Jewish faith on the view expressed by Hitler that the Jew deserved extermination as an "anti-man" or "unperson". Many additional millions of jews and eastern European peoples were seized in their homelands, without respect for family

units, and committed to slave labor in Germany. Even the judicial system itself was converted into a technique of violence by German judges against German citizens in which the hard-won procedural guarantees respected elsewhere throughout Western Society were cast aside and adjudication was converted into a technique of murder, false imprisonment, and extortion. This story has been thoroughly elaborated in such trials as the Nuremburg Justice Trial, United States v. Josef Alstoetter, et al., (United States Military Tribunal No. III, 1947). and in books such as that of William L. Shirer.[1] In the Soviet Union the Communist regime utilized methods of collectivization of farms and industrialization in its autonomous republics that equally thorough and ruthless. Genocide was practiced against whole peoples. National cultures were destroyed. Groups of people were forced to migrate from their home areas to other republics. Millions of persons died in the process of enforcement of a policy of starvation in farm areas while the survivors were taken from their lands and placed in slave labor camps. All who opposed the program of the Communists in the Soviet Union were destroyed or effectively disabled by arbitrary means from causing trouble.[2] In our own country, we have seen an extraordinary increase in the pervasiveness of organized crime, whose leaders have undertaken new forms of violence for the achievement of their unjust ends since World War II. Careful students of our culture, such as Max Lerner, state that "America today, as in the past, presents the picture both of a lawless society and an overlegislated one." [3] Organized crime represents a

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[1]William L. Shirer, The Rise and Fall of the Third Reich, N.Y.: Simon & Schuster, 1960.

[2]Institut zur Erforschung der USSR, Forty Years of the Soviet Regime, Munich, 1957.

[3]Max Lerner, America as a Civilization. New York: Simon & Schuster, 1957.

widespread phase of what Lerner terms the ruthlessness of our society. More recently, as a kind of disillusionment has set in among minority groups and the young following the hopes entertained in the early 1960's for solving some of our country's persistent problems, there has occurred an elaboration and action upon philosophies of violence that in their extreme forms have included kidnapping, killing, and maiming of the innocent; the destruction of property; the effort to disparage and disrupt the orderly administration of justice in our courts; and opposition to the entire system of what we have deemed to be the "free and democratic society." [1] What has been so striking about the philosophers of violence, as one able observer has stated,

> "is the extraordinary degree of certainty by which it is inspired: certainty of one's own rectitude, certainty of the correctness of one's own answers, certainty of the accuracy and profundity of one's own analysis of the problems of contemporary society, certainty as to the iniquity of those who disagree. [2]

A member of this Court was moved to observe with respect to this emerging philosophy:

> "Violence is never defensible-and it has never succeeded in securing massive reform in an open society where there were alternative methods of winning the minds of others to one's cause and securing changes in the government or its policies." [3]

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[1] See, e.g., Midge Decter, "Anti-Americanism in America," Harper's Magazine (April, 1968) 39; Lewis S. Feuer, "On Civil Disobedience", The N.Y. Times Magazine (Sept. 26, 1967) 29, 122.

[2] George F. Kennan, "Rebels Without a Program," The N.Y. Times Magazine (Jan. 21, 1968) 60.

[3] Associate Justice Abe Fortas, Concerning Dissent and Civil Disobedience: We have an Alternative to Violence. New York: Signet Books, 1938. 80.

Many have felt that the American involvement in a series of wars throughout the twentieth century, and especially in the Viet Nam war, have been contributing to a breakdown in the high regard for the value of human life amont Americans.

It would seem most evident, in the context of this violent generation, one which lives with the daily possibility of all-out nuclear warfare capable of wiping out most of mankind in a thirty minute period as we are told, the State of Texas cannot be charged with acting unreasonably when it has continued to maintain its law of abortion on its statute books for the same purposes for which it was enacted: the protection of the constitutiona right to life of innocent unborn children who are unable to defend themselves against parents who would destroy them although the life of the mother is not in danger and there are reasonable alternatives both before the conception of that child or after its birth for avoiding the burden of rearing children. The State of Texas can reasonably say of those who seek the power to control the matter of abortion, as part of their constitutional right of privacy, what Michael Novak has said of certain other groups:

> "Prophetic minorities in history commonly rectif a balance by holding to one clean line; and in doing so they cast a lovely light. But they are inclined to be inhuman, to move upon too narrow a base, and to falsify human possibilities by prematurely foreclosing them." [1]

Several typical arguments have been made in support of invalidating state statutes on abortion like that of Texas. They have been in legislative halls across the country, including those of the Texas Legislature during

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[1]Michael Novak, "The Secular Saint," The Center Magazine (May, 1968) 55-56.

its 1971 session in conjunction with the proposal of one of the most unlimited forms of liberalized abortion statutes.[1] They are far from persuasive and demonstrate the reasonableness of the Texas Legislature in adopting and continuing to maintain its present law on abortion.

The typical arguments are listed below and a sufficient comment upon them given to support the reasonableness of the Texas Legislative judgment in adopting and maintaining its present law on abortion. Amicus has relied principally upon the discussion of these arguments contained in the works of two distinguished authors, Daniel Callahan of the Institute of Society, Ethics and the Life Sciences and David Granfield, Professor of Law, Catholic University School of Law. [2]

> Argument One: The grounds for abortion should be extended to include psychiatric reasons in order to prevent the mother from carrying out a valid suicide threat which endangers her life.

Callahan reports upon numerous careful studies that indicate a consensus upon the following proposition: that suicide following rejection of an application for abortion is "very rare", "often used to blackmail psychiatrists," and "the pregnancy is not the most important cause of her emotional distress."[3] He further points out where there is

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[1] Texas Legislature, H.B. No. 1092.

[2] David Granfield, The Abortion Decision, New York: Doubleday & Co. 1969

[3] Daniel Callaghan, Abortion: Law, Choice and Morality. London: Macmillan Company, 1970. 62

a "liklihood of a severe neurosis or psychosis as a result of a pregnancy carried to term, the general opinion seems to be that only in the rarest cases would supportive therapy be totally useless."[1] He also reports that psychiatrists and many authorities feel that "there exist alternative ways of handling these difficulties other than by abortion."[2] Callaghan also records the lack of any sort of a consensus among psychiatrists "on fixed and clear norms for psychiatric indications for abortion."[3]

Dr. Theodore Lidz, Yale Professor of Psychiatry, has observed:

> "If we wish to have the laws concerning abortion changed, wishing to do away with that which seems hypocritical at present, let us be honest and seek to have the burden of such decisions left with the parents and not make judges out of doctors. The doctor is burdened enough trying to preserve life without getting involved in questions of when to terminate it. Indeed, it is a burden of modern man that so much is to be resolved by conscious choice unguided by ethical code. One may feel at times that whatever gods may be laughing in their far-off heavens at the dilemma of man who, through seeking to control nature and bring more and more out of the realm of contingency and under human control, has managed to become increasingly perplexed, confused, and self-destructive. There is a law concerning therapeutic abortion and it seems to me that, although such rigid limitation provokes us at times

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[1] Id. at 63

[2] Id.

[3] Id. at 82

> such laws are a benefit to physicians, protecting them from the need to make impossible decisions--decisions that often go beyond their knowledge."1

Clearly, in this state of knowledge about "psychiatric reasons", the Texas legislative judgment in refusing to extend the grounds for legal abortion to include "psychiatric reasons" is most reasonable. There is little evidence to show that the neuroses or psychoses of pregnant women represent a significant danger to their lives comparable to the certainty of death for unborn children in abortion. Moreover, there are modes of treatment and confinement to protect pregnant women from their own defect or illness that might lead to suicide.

> Argument Two: The grounds for abortion should be extended to include fetal indications for abortion such as "where there is a sensitization to the Rh factor, where the fetus has been exposed to a dangerous amount of radiation, where serious hereditary defects are likely to be present and cause genetic abnormalities; where harmful drugs (such as thalidomide) which have a high liklihood of producing fetal defects have been taken during pregnancy; and, finally, where the mother has contracted viral infections, particularly rubella."

Amicus has earlier pointed out the development of the new science of Fetiologyand the present ability of the science to employ exchange transfusion techniques. In addition, Callaghan indicates that there is now a gamma-globulin injection which forestalls Rh complications from the outset. With respect to radiation,Callaghan reports that data on the dangers involved from radiation are incomplete and there is no establishment of the certainty that each child born will be defective.

1Theodore Lidz, as cited in Harold Rosen, Therapeutic Abortions, Medical, Psychiatric, Legal, Anthropological, and Religious Considerations. N.Y.: Julian Press, 1954. 278

Granfield states that "the current prediction rate in the area of genetic fetal abnornalities is very limited." [1] There are a number of constructive steps that can be taker rather than legislating these children out of existence: support for the family in need of it to care for the defective child; support for medical and scientific researc' that has proved in this century its ability to deal very effectively with both childhood defects and diseases; and provision of facilities and facilities for the rehabilitation and education of defective children.

Where the child defect is feared because of the taking of a harmful drug, such as thalidomide, the obvious first answer is that government must take care through tests and experiments to assure that harmful drugs likely to cause child defects do not come on the market. Beyond this is the fact that the particular child defect resulting from a drug, such as thalidomide, does not justify destroying the life of the child. The main defect resulting from the taking of thalidomide by expectant mothers was the absence of various limbs. The defect can be dealt with through rehabilitative techniques. The child is otherwise a perfectly normal human being. Moreover, the danger of having a defective child was only considerable as result of the mother having taken thalidomide. To authorize the destruction of all children where the mother has taken such a drug is to authorize the destruction of not only an innocent life but in many cases also a perfectly sound one. Again, the same measures that were recommended with respect to genetic fetal abnormalities are good alternatives here. It is entirely defensible also that government which has failed to conduct adequate testing so as t result in harm doing drugs should be held responsible in damages to affected parents and children. Callaghan stat that the most frequent child defect most frequently urged as a basis for extension of the grounds for abortion is the situation where the mother has contracted rubella.[2]

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[1] Granfield, supra at 116.

[2] Callaghan, supra at 93.

Here, again, science has provided an adequate answer. There is now an effective vaccine against the disease and its incidence will likely drop greatly in the future.[1] Moreover, there is a strong liklihood that the mother who has contracted rubella will have a normal child or that the child will have only minor defects that can be corrected.[2] Beyond all this, no more than 15 percent of women capable of bearing children are subject to contracting rubella at all. [3] This seems scant justification, if there ever was any, for urging that grounds for abortion be extended to cover child defects in the situation where the mother has contracted rubella. Finally, the same efforts should be taken by the community to provide support for the family with defective children, and to provide facilities for the rehabilitation and education of these children.

One thing neglected in the above analysis is the viewpoint of the child with a defect at birth resulting from any of the above listed causes. That child is the person who has the constitutionally protected right to life. Its view and that of the community should be considered with respect to the worth of its life rather than the parents view as to the financial and other difficulty placed upon them of raising such a child. The burden of proof should be and is on the latter to prove that there is a compelling governmental necessity for authorizing the destruction of the child, who is after all a human person. As the Court observed in Goldberg v. Kelly, 397 U.S. 254, 264-265 (1970), where it was contended that countervailing governmental interests in conserving fiscal and administrative resources warranted terminating welfare assistance payments without a hearing:

> "The interest of the eligible recipient in uninterrupted receipt of public assistance, coupled

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[1] Callaghan, supra at 93

[2] Id. at 104

[3] Id.

with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens.

"The crucial factor in this context...is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits."

Similarly, if the principal argument that appellants can make in their own behalf against the Texas statute on abortion as being unreasonable for not permitting abortion where the child may be born with a defect from any of the previously listed causes is that caring for the child will place financial and other burdens upon them, the Texas legislative judgment must be sustained as a reasonable one. The value of human life and its continuance is too precious to warrant crediting such an argument. Children born with defects can be assisted in many ways and so can their families. Many of the causes of these defects are already controllable. When children with defects are born from these causes, they can be provided with services of rehabilitation and education.

Argument Three: The grounds for abortion should be extended to include a pregnancy resulting from forcible rape and incest.

The argument made in favor of this ground is lacking even the support that pro-abortionists can bring to bear in favor of abortion in the first two arguments. In many instances, if not most, there will be no possibility of urging that there is a psychiatric reason or a probable child defect as a justification for the abortion. The basis for urging that the Texas legislative judgment in not allowing this ground for an abortion is unreasonable must be that the child is unwanted and will create various kinds of burdens for the mother or the mother's family.

No one can fail to have the deepest sympathy for the woman or teenager who becomes pregnant as a result of forcible rape or incest. But at the center of the problem for the community is the existence of a perfectly healthy and probably normal unborn child who is innocent of any wrong doing and as a human person has the constitutional right to life. With recognition of and committment to the unborn child as a human person, there is only one answer which a reasonable political society and its government can give to this problem: the protection of the life of the unborn child.

The first pertinent observation is that life in civilized society involves some risk. Daily we experience the commission of crimes against both the person and property. We also witness the ravages which automobile accidents inflict upon the health and lives of our citizenry. And we have lived through years of large and small wars with the weekly reports of the dead and wounded among our young men. Society has not been without resources, although it has been frequently tardy in utilizing them, for overcoming these risks and dealing with the facts of death and injury. So, too, in the case of forcible rape and incest that results in pregnancy, there are societal measures that are being taken and can be taken to protect against these invasions of bodily integrity and respond to the problems which they engender for the woman or teenager who becomes pregnant as a result.

Granfield observes greater efforts by the community at providing information about birth control, sex education, and caveats about behavior in certain social and physical contexts likely to subject a woman to attack provide a first kind of alternative to destruction of the unborn child.[1] They at least are directed at the cause of the rape whereas abortion following rape will neither undo the rape nor prevent others from occuring.

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[1]Granfield, Supra at 209

While forcible rape cases represent less than one per cent of the total of nearly 3,000,000 serious crimes in the country annually, and while perhaps no more than 5% of the 23,000 forcible rape cases annually result in pregnancy, the problem is a serious one for the woman affected While there exist Child and Family Services in Texas and other states that provide special care for pregnant women in a situation of indigency or emergency, undoubtedly thes states should undertake greater measures to provide for their problems. Both counseling and financial assistance should be provided in sufficient amounts. The Texas State Department of Public Welfare already provides a wide range of services for children and their mothers which includes the unmarried mother.[2]

There apparently are medical means increasingly becoming available to prevent progress of the pregnancy by forestalling nidation or implantation such as the administration by a physician of an appropriate dosage of estrogen to the victim of forcible rape. Norbert J. Mietus has stated:

> "This procedure is not regarded as abortion and many doctors, with support from some moral theologians, argue that it is defensible because no direct attack is directed against the potentially fertilized ovum. Other observers and the author would argue that biologically and legally, if conception has occurred, only morally questionable sophistry could justify the action which thwarts the normal development of the existing life. However, it is possible that the estrogen acts somewhat in the manner assumed to be true of the IUD (intra-uterine device): to speed the journey

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[1]Federal Bureau of Investigation, "Crime in the United States, Washington D.C., U.S. Dept. of Justice, 1965. 3.

[2]Texas State Department of Public Welfare, Manual of Services, Austin: Feb. 1967

of the female ova through the Fallopian tubes too rapidly to be fertilized." 1

Amicus specifically refrains from joining in any advocacy of the use of estrogen. The purpose of mentioning its potential usage is simply to indicate that medical science is devoting its research efforts to methods of avoiding pregnancy that may be quite responsive to the problem of the woman or teenager subjected to a forcible rape. Undoubtedly, a science that could develop the "pill" can discover means of preventing pregnancy following a forcible rape.

In light of the foregoing, the Texas legislative judgment of refusing to extend the grounds for abortion to cases of pregnancy resulting from forcible rape or incest seems quite reasonable.

Since every child resulting from a forcible rape is illegitimate where, as is usually the case, its parents do not marry each other, one necessary societal steI, as Granfield suggests, is reform the existing discriminatory laws against illegitimates. In Texas, for example, there is no requirement that the father support his illegitimate child. There are also problems for the illegitimate child with respect to inheritance, name, custody, and welfare assistance laws. Rationalizing this law vis-a-vis the illegitimate will materially assist to lessen the burden upon the woman or teenager of carrying to term the unborn child who is the product of a forcible rape. 2

In light of the foregoing consideration, the Texas legislative judgment of refusing to extend the grounds for abortion to cases of pregnancy resulting from

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[1]Norbert J. Mietus, The Therapeutic Abortion Act A Statement in Opposition, Sacramento: April, 1967. 48

[2]Granfield, supra, at 210-212

forcible rape or incest seems quite reasonable.

Argument Four: Liberalized abortion laws would greatly reduce the number of illegal abortions.

The author of the California Therapeutic Abortion Act estimated that this law would legalize no more than 5 per cent of what may now be illegally performed abortions. Granfield reports upon the studies of Scandinavian-type abortion legislation which shows that instead of illegal abortions being eliminated, which was one of the purposes of the legislation, they have actually increased. This is true of all the Scandinavian countries.2 Thus, this argument seems hardly to warrant an attack upon the reasonableness of the Texas legislative judgment in maintaining its current abortion law as being the source of illegal abortions unless the position of appellants is that Texas cannot constitutionally control the reasons for which abortions are performed, the position taken concerning Georgia in the Bolton case, supra, a position that seems wholly unsupportable for reasons developed earlier.

One of the positive reasons for not extending the grounds for abortion beyond that of preserving the life of the mother is that there is considerable evidence that the performance of abortions still involves considerable danger to the mother. All of the current methods utilized for performing abortions are thoroughly reviewed by Callaghan. While most recent literature is less pessimistic about the dangers of induced abortion, there are physicians and scientists of distinction who take the position that abortions performed even by skilled physicians are more dangerous than the public and many doctors realize.

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[1]Mietus, supra at 6.

[2]Granfield, supra, at 89-90

Callaghan quotes R. R. MacDonald with respects to the dangers involved in abortions performed after the tenth week:

> "By that time the cervix has softened appreciably and the uterus is palpable abdominally, globular in shape, soft and vascular. Dilation and curre-ttage is quite likely to cause traume to the cervix and, even with drugs to make the uterus contract, there is usually a lot of bleeding, while perforation of the uterine wall is surprisingly easy. Abdominal hysterotomy may be necessary to empty the larger uterus. This can be quite difficult and there is the extra hazard of the abdominal incision. Hypertonic glucose or saline injected into the amniotic cavity kills the fetus and induces uterine contraction quite quickly. This gives the impression of being an elegant method of inducing abortion when the uterus has reached 16 weeks' size, but in fact quite a few deaths have occurred from pelvic infection and cerebral hemorrhage...A British urologist reported (Feb., 1967) after a visit to a kidney unit in Rumania that 300 patients had been admitted to the unit with renal failure following septic abortion.[1]

It would appear that Texas legislative judgment is reasonably supportable from the point of view that it confines abortion to those unavoidable situations involving the necessity for preserving the life of the mother although considerable danger may be involved for the mother from the abortion itself.

Finally, it should be observed that the Texas law of abortion is not without a reasonable scope for protecting the life and death of the mother. There has not been

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[1]Callaghan, supra, at 35 quoting R.R. MacDonald, "Complications of Abortion," Nursing Times. 63 (March 10, 1967) pp. 305-307.

extensive adjudication covering the meaning of the exception to the traditional abortion laws permitting, as in Texas, an abortion "by medical advice for the purpose of saving the life of the mother." What cases have construed such provisions are clear that these statutes give considerable scope to a physician in making a good faith judgment that an abortion is necessary in order to save the life of the mother and even to avoid a grave impairment to her health. As the Supreme Court of Iowa stated in State v. Dunklebarger, 206 Iowa 971 (1928):

> "In order to justify the act of Dr. Wallace (the defendant), it was not essential that the peril to life should be imminent. It was enough that it be potentially present, even though its full development might be delayed to a greater or less extent. Nor was it essential that the death of the patient would be otherwise certain in order to justify him in affording present relief
>
> "Inasmuch as the question of necessity can ordinarily be determined only by medical opinion, it follows naturally that a physician, who examines a patient, must form an opinion in good faith, and must act upon it in like good faith. It follows also that if a regular physician does make an examination , and does act upon it, he is entitled to the presumption of correct judgment and good faith until the contrary be proven. 221 N.W. at 596, 594.

The Supreme Court of Oregon in State v. Buck, 200 Or. 87 (1953) stated:

> "The relief of a woman whose health appears in peril because of her pregnant condition attains the same importance as the necessity 'to preserve the life of such mother'." 262 P.2d at 502.

The result reached in the Buck case was based upon the Court's construing together the state's Criminal Abortion

Act and its Medical Practice Act as if they were one act. The latter act had characterized as "unprofessional" and "dishonorable"

> "The procuring or aiding or abetting in procuring an abortion unless such is done for the relief of a woman whose health appears in peril after due consultation with another licensed medical physician and surgeon." 262 P.2d at 500.

These two cases indicate that there is considerable room for addressing the traditional abortion statute to a wide variety of situations involving the necessity of preserving the life of the mother or avoiding a grave peril to her health.

The choice that Texas has made in favor of permitting only such abortions as there seems quite reasonable in light of its proportioning the death of the unborn child to act of a physician or another on the basis of medical advice in performing an abortion deemed necessary in good faith in order to preserve the life of the mother or to avoid a grave peril to her life. Its reasonableness is based not only upon that proportion but also upon the status of both the unborn child and the mother as human persons protected by the constitutional safeguards of the person and the necessity for the state to regard the status and condition of both the mother and child. Its reasonableness is based further upon the inadequacy or lack of persuasiveness of the reasons urged for extending the grounds for abortion to those urged by appellants and others like them. It reasonableness is based finally upon the still considerable danger to the mother of abortions at various stages according to the assertions of able physicians and scientists.

POINT THREE

SINCE THE UNBORN CHILD IS A PERSON AND HAS A A RIGHT TO LIFE PROTECTED BY THE FOURTH, FIFTH, NINTH AND FOURTEENTH AMENDMENTS, IF THIS COURT SUSTAINS THE LOWER COURT DECISION THAT ARTICLES 1191-1194 AND 1196 OF THE TEXAS PENAL CODE ARE UNCONSTITUTIONAL AND TO BE GIVEN NO FURTHER OPERATION, THIS COURT MUST ALSO RENDER A DECISION STATING THE GROUNDS UPON WHICH ABORTIONS MAY CONSTITUTIONALLY BE SECURED OR PERFORMED AND PROVIDE OR DESIGNATE THE TRIBUNALS FOR ADMINISTRATION OF THOSE STANDARDS IN ACCORDANCE WITH THE REQUIREMENTS OF BOTH SUBSTANTIVE AND PROCEDURAL DUE PROCESS AND EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT, AND, SINCE IT IS FEDERAL ACTION THAT CREATES THE HAZARD FOR UNBORN CHILDREN, OF THE FOURTH, FIFTH, AND NINTH AMENDMENTS.

In Point One, amicus has demonstrated that the unborn child is a person and has a right to life protected by the Fourth, Fifth, Ninth, and Fourteenth Amendments. Amicus also has demonstrated in its Point Two that the Texas legislative judgment in establishing and continuing to maintain its law of abortion is clearly a reasonable one in light of the reasons for its adoption and the unpersuasiveness of the reasons offered by appellants and others for changing it. Should, however, this Court hold that, for some reason, the Texas law of abortion is unconstitutional and is to be given no operation, as the lower court has held, then this Court, as has the lower court, will have by federal action placed in jeopardy the rights of the unborn child to life, which, it is assumed for the purposes of this point, this Court is willing to hold is protected by the Constitution.

The federal judicial action assumed for discussion in this point would leave the right of the unborn child to life unprotected by state criminal law and, for all practical purposes, by much, if not all, of its civil law. Without this protection, the federal judicial action

would, in effect, be delegating over to private persons, such as the appellants, control over the unborn child's right to life. Unless this Court, in such event, provides standards to be observed before abortions may be performed by private persons and provides or designates tribunals for administration of those standards, it is the contention of amicus that this federal judicial action would be violative of the rights of the unborn child protected by the Fourth, Fifth, Ninth, and Fourteenth Amendments.

It is well established that the action of a court is either state or federal action that can be violative of constitutional limitations upon government. Shelley v. Kraemer, 334 U.S. 1 (1948); cf., Hurd v. Hodge, 334 U.S. 24 (1948) and Bolling v. Sharpe, 347 U.S. 497 (1954). Even though this Court is the final arbitrer of what the constitutional protections of the person are, it is, of course, obvious that it is subject to constitutional limitations with respect to the method by which it implements the last word decisionally, as in this case, with respect to the invalidity of a state statute directing itself to the protection of the constitutional right to life of a person. The Court has been faced with a similar problem earlier. In Baker v. Carr, 369 U.S. 188 (1962) this Court held that a complaint charging that a Tennessee legislative districting statute denied equal protection of the laws to voters alleged a justiciable cause of action. In Reynolds v. Sims, 377 U.S. 533 (1964) this Court held that the legislature of Alabama had been unconstitutionally apportioned. It also held that the lower court

> "in ordering into effect a reapportionment of both houses of the Alabama Legislature for purposes of the 1962 primary and general elections, by using the best parts of the two proposed plans which it had found, as a whole, to be invalid, was an appropriate and well considered exercise of judicial power." 377 U.S. at 586-587.

In discussing the problem of federal judicial rem-

edy to be dealt with once a state legislative districtin statute had been held unconstitutional, this Court had four concerns: (1) the protection of the right to vote i the absence of a valid statute; and (2) the protection of the right to vote against further elections under the invalid statutory plan; (3) recognition of the state interest in conducting elections so that, under certain circumstances, such as where an impending election is imminent and a state's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief; (4) establishment of standards for governing action by a federal district court in considering the various factors that should inform its decision-making with respect to that action: viz., "general equitable principles". Id. at 585=586.

In discussing the problem of federal judicial remedy presented in the event that this Court holds the Texas law of abortion to be unconstitutional but affirms that the unborn child is a person and has a right to life protected by the constitutional safeguards of the person, amicus suggests that a central focus of a decision about remedy must be the unborn child whose right to life is placed in danger by the federal invalidation of the Texas law. Just as its mother, father, and their physician have, under the hypothesis being here pursued, a constitutional right that serves to move this Court to invalidate the Texas law, so, too, does the unborn child have a constitutional right to life and the State of Texas a right to act to protect that right to life in a reasonable, constitutional manner. It is in this respect that the problem of remedy is a far more complex and urgent one than that presented to this Court in the legislative redistricting cases.

Under this hypothesis, not only must the Court, as in the legislative redistricting cases, act to protect the interest of the persons whose constitutional right it may hold to have been infringed, but also it must act to protect the interest of the person, viz., the unborn child, whose constitutional right to life would otherwise be in-

fringed by persons in the position of the appellants without possibility of recourse by that child and the State of Texas.

Amicus incorporates by reference the argument made under its Point Two, subpoint B, supra, with respect to the issue of unconstitutional delegation of legislative power and the issue of denial of equal protection of laws and makes that argument applicable to the action of the federal courts in not devising a remedy that will adequately safeguard the right to life of the unborn child. The thrust of the argument in Point Two was that the State of Texas had acted reasonably in enacting its law of abortion because it had thereby avoided an unconstitutional delegation of legislative power to private persons and permitting private persons to draw invidious and arbitrary distinctions constituting a denial of equal protection of the laws to unborn children. The thrust of the argument here with respect to these two issues is that the federal courts must design remedies that also avoid these two results. Amicus assumes that the federal courts are subject to limitations in delegating judicial power similar to those under which the Congress operates in delegating legislative power where a constitutional safeguard of the person, and particularly the safeguard of the right to life, is involved. Cf., Eli Lilly & Co. v. Schwegmann Bros. Giant Super Markets, 109 F.Supp. 269 (D.C. La. 1953) affirmed 205 F.2d 788 (C.A. 5, 1953), cert. denied 346 U.S. 856 (1953); United States v. United Mine Workers of America, 330 U.S. 258 (1947).

It is generally recognized that many of the grounds for abortion that have been urged by appellants and by others in their position involve vague judgmatical standards that enter into realms of decision and prediction going well beyond the medical world and its expertise, such as considerations of morals, religion, economic factors, social relationships within the family, number of children, the "socioeconomic state" of the patient, and even legal standards such as the concept of rape and incest. What standards of "rape" and "incest" shall be used? That there are considerable difficulties

in the application of these concepts by the courts is well recognized. There are serious fact-finding problems concerning the actual occurrence of intercourse, the participation by the defendant, and the lack of consent by the affected woman. With respect to incest, there are vast differences in the legal standards adopted in the various states concerning the prohibited relationship, the knowledge that is required concerning the prohibited relationship, and the element of consent.[1] It would seem utterly necessary, if the Texas law of abortion is to be invalidated, that the federal courts set up substantive standards to protect the constitutional right to life of unborn children.

Application of such substantive standards required of federal courts, under this hypothesis, must as a matter of procedural due process be done either by the federal courts or by some adequate tribunal. This Court has recently had occasion to speak of the requirements of due process of law with respect to termination, not of a person's life, but of his or her welfare assistance payments under federally assisted programs in the case of Goldberg v. Kelly, 397 U.S. 254 (1970).

In the Goldberg case the question for decision was whether a state which terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment. The New York statute in question did provide the recipient a "fair hearing" following termination of his public assistance. Prior to termination the statute required only an informal investigation without any provisions for personal appearance of the recipient before the appropriate official, for oral presentation of evidence, or for confrontation and cross-examination of adverse witnesses. This Court held that the New York statute denied recipients of public assistance payments procedural due process of law by virtue of failing to pro-

1 See, Granfield, supra at 188-193.

vide them with an evidentiary hearing prior to the termination of their payments. In the opinion for the Court, Mr. Justice Brennan stated:

> "'By hypothesis, a welfare recipient is destitute, without funds or assets. ...Suffice it to say that to cut off a welfare recipient in the face of ... brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it. Kelly v. Wyman, 294 F.Supp. 893, 899, 900 (1968).

> "The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a privilege' and not a 'right'.

> "It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing. But we agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. For qualified recipients welfare provides the means to obtain essential food, clothing, housing, and medical care. Thus the crucial factor in this context--a factor not present in the case of the blacklisted governmental contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended--is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

> "Moreover, important governmental interests are

promoted by affording recipients a pre-terminati evidentiary hearing. From its founding the Natio basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. ...Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the community. ...The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end." 397 U.S. at 261-5.

In the instant case more than the right to public assistance in the form of medical care for unborn children or assistance for their mothers is involved. It seems clear that the federal courts must, in the absence of a valid state law on abortion, provide or designate a tribunal to consider individual cases of desired abortion and provide for the appointment of a guardian ad litem to protect the life of the unborn child against unwarranted invasion due to the failure to satisfy constitutional criteria for valid abortions. If public assistance, whether of money or medical care, for the mother, including the mother of an unborn child, cannot be terminated without a prior hearing and the opportunity to know the grounds being relied upon for termination and for cross-examination of the social worker involved, it must be even more true that the life of a human person, including that of the unborn child, cannot be terminated validly, at least under standards going beyond the "medical" standards of the State of Texas and District of Columbia statutes, without a hearing of the child through a guardian ad litem before some competent tribunal. All that can be said of the recipient of welfare and his or her dependence upon it is even more true of the unborn child in its mother's womb. The child in the womb also needs "essential food, ...housing, and medical care." Termination of the life of the unborn child also deprives that child "of the very means

by which to live." Also, "(h)is situation becomes immediately desperate." Indeed, the situation for the unborn child becomes much more desperate than for the welfare recipient once the decision to terminate has been made. There is no hope of escape for the unborn child while at least the welfare recipient can hope to escape by some effort of his own or by some unforeseen course of events. Moreover, by requiring a pre-termination hearing "important governmental interests are promoted". "From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders..." including unborn children. By meeting the unborn child's basic demands for life, government generally and the federal courts, in particular, "can help bring within the reach of..." unborn children "the same opportunities that are available to others to participate meaningfully in the life of the community." Ibid.

The application of the Goldberg case rationale to the situation now envisaged is an a fortiori matter, therefore. Indeed, it may well be that the pre-termination hearing required under that rationale will not suffice with respect to the official decision to permit termination of human life by abortion. Under the New York statute the right was accorded to the welfare recipient to a fair hearing after the termination of public assistance to him. But that kind of hearing is not an available or feasible one in the instant situation. The unborn child's life is taken by the termination and not merely his right to welfare assistance. Moreover, it is life and not just public assistance that is at stake. Amicus contends that the abbreviated evidentiary hearing required by Goldberg before termination of public assistance is an insufficient protection of the constitutional right to life of unborn children before termination of that right by action or permission of a competent tribunal. The pre-termination stage is, for the unborn child, the final stage. For this reason, amicus contends that all of the due process requisites, including notice, representation by counsel, evidentiary hearing, trial, and record, must be provided the unborn child at the pre-termination proceeding before abortion is performed.

The reliance placed so far, in this question of procedural due process, upon the Goldberg case must not divert attention from the fact that the whole realm of procedural due process cases, whether involving the criminal or civil procedure in adjudication by courts, the procedure employed by administrative agencies, or the procedure utilized by other official agencies of government, support the position of amicus. It would be a mockery of the very concept of procedural due process to insist upon important procedural safeguards in criminal adjudication and in administrative decision-making in matters involving life, liberty, and property while permitting federal courts, in the situation here hypothesized, to decide upon permitting the termination or destruction of the life of a human being, an unborn child, without requiring the substance of the same important procedural safeguards absent some emergency involving the necessity of acting to save the life of the mother or avoiding a grave peril to her health. Perhaps the matter has been no better stated than by Professor Kenneth Pye:

> "The notion of a national concept of basic justice does not seem too radical for America a century after the Civil War. It is not surprising that the majority of the Court has accepted the argument that the genius of federalism does not require that states be permitted to experiment with the fundamental rights of defendants in criminal cases any more than it permits experimentation with first amendment freedoms. The mere status of being in America should confer protection broad enough to protect any man from the vagaries of a state which by inertia or design fails to keep pace with a national consensus concerning the fundamental rights of the individual in our society."[1]

But if the states cannot be permitted to experiment with the fundamental rights of the individual human person in

1 Kenneth Pye, "The Warren Court and Criminal Procedure," 67 Mich. L. Rev. 249 at 258 (1968).

our society, neither can the federal government be permitted to experiment with those rights, and especially with the right to life of defenseless, innocent unborn children.

As appellants would have it, the federal courts should simply declare the Texas law of abortion unconstitutional and enjoin its further enforcement. The disregard for the sanctity of human life involved in this position is total with respect to unborn children. There is no focus upon the interests of these children. There is left no express standard for judgment which requires either the parents, the federal courts, or any other agency of government, or physicians to consider the interests and welfare of unborn children. On the other hand, the only focus of this position is upon the interests of the mother and the father. The denial of substantive due process to which the present argument is directed is not the invidious discrimination between two human persons, the mother and her unborn child or the unborn child subjected to abortion and the one not so subjected. It is rather the denial of substantive due process involved in the total failure of the appellants and the lower court to take the human person into account whose life is to be destroyed as a result. This type of position and decision-making cannot be permitted. It contains no rational connection between the means selected and the goal pursued. Protection of the health, both physical and mental, of the mother is a legitimate goal of government. It is not a legitimate means of government to destroy the innocent human life of an unborn child in a situation in which that life bears no threat to the life of its mother or a grave peril for her health. Rather the protection of such life is a goal or end of government in free political societies. Before the life of an innocent unborn child can be destroyed as a result of a federal court decision, there must be a sufficient reason for destroying it, if this is to be allowed at all. The reason must be grounded in the nature or situation of the child and the threat it carries, if it so does, to its mother. The threat must be real and not feigned. The threat must be one that cannot be otherwise dealt with

by physicians than by the taking of the life of the unborn child. If the situation is anything short of this, there can be no rational justification for the taking of the life of an innocent unborn child. From the standpoint of substantive due process, the essential vice of the position of appellants and the decision of the lower court, is that it requires no focus upon the interests of the unborn child and whether the child is a threat to the life of or a grave peril to the health of its mother. Because that position and decision is devoid of any regard for the interests of the unborn child, the destruction of whose life they support, they are wholly arbitrary and unreasonable. They fail to insist upon a reason for destroying the life of the unborn child that is sufficient relative to the great interest that is being destroyed and that is grounded upon what is necessary to be done in order to deal with harm to the mother that is being caused by or that is traceable to that child.

The cases that most closely support the above analysis are those that view the infliction of great deprivation upon innocent persons as punishment that cannot be constitutionally justified. If it is not constitutionally permissible to make it a misdeameanor, subject to a mandatory jail term of not less than 90 days, for a person to be addicted to the use of narcotics, surely it is not constitutionally permissible to destroy an innocent unborn child, a human person also, for a reason that is not grounded in the threat to the life or the grave peril to the health of its mother which it presents, but rather for a reason grounded wholly in the interests of the mother unrelated to the interests of the child. See, e.g., Robinson v. California, 370 U.S. 660 (1962). Moreover, if it is not constitutionally permissible to impose expatriation upon a native-born citizen because of war-time desertion from the armed services or for voting in a foreign election, surely it is not constitutionally permissible to expatriate an unborn child from all human society by abortion for a reason that is not grounded in any threat to the lifeof or grave peril to the health of its mother. See, e.g., Irop v. Dulles, 356 U.S. 86 (1958). These cases were decided in part under the Eighth Amendment as involving cruel and unusual punish-

ment.

The decisions holding that Congress has no power to strip citizens of their citizenship without their consent because of the Fourteenth Amendment regulation of what persons are citizens of the United States are obviously also relevant. See, e.g., Afroyim v. Rusk, 387 U.S. 253.(1967). It is not inappropriate to point out that in the latter case the Court was talking about a person who was born in the United States. The Court specifically observed that Congress had no authority under the Fourteenth Amendment to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship. But if Congress has no such power, how can it constitutionally undercut the effect of birth by decreeing before that event the destruction of the innocent unborn child who, upon birth, would have become a citizen by virtue of the same Constitution. If this Court or Congress could permit or direct this destruction without regard for the interests of the unborn child, they could destroy its right of citizenship, which is not constitutionally permissible. For this reason, it cannot be constitutionally permissible to prevent the unborn child from becoming a citizen by birth except for reasons that can pass muster under the concept of substantive due process.

The substantive due process cases bearing the closest analogy to the instant case are those concerned with the protection of the right to free speech. The right to life is one of the most important, if not the most important of, constitutional rights. The right to free speech is also a very important constitutional right of the person. Under the Fourteenth Amendment Due Process Clause "life"is specifically protected while free speech is protected under the aegis of "liberty". Of course, the First Amendment protects free speech specifically against federal action and the Fifth Amendment protects life specifically against such action. The point here is that without protection of the life of a person there cannot be any recognition or protection of his right to liberty and to property.