where the transfusion was necessary to save her life. The adamant mother had a seven-month-old child at the time the terrible dilemma arose. In resolving this Hobson's choice, Judge Wright said:

> "The child cases point up another consideration. The patient, 25 years old, was the mother of a seven-month-old child. The state, as *parens patriae*, will not allow a parent to abandon a child, and so it should not allow this most ultimate of voluntary abandonment. The patient had a responsibility to the community to care for her infant. Thus the people had an interest in preserving the life of this mother."[43]

Other crucial decisions bearing directly on the unborn child's right to life have been handed down during the past decade. In one such case, where there was a possibility that a child might be born with a possibly fatal blood condition, a New Jersey juvenile court held that the state, in the interests of the child's welfare, had a right to authorize the hospital to give life-saving transfusions, even though the parents objected on religious grounds.[44] The court made it clear that the state, pursuant to its *parens patriae* jurisdiction, not only had a right but also a duty to protect children within its jurisdiction—including an unborn child—notwithstanding the wishes of his parents.

More precisely in point is *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964), *cert. den.*, 377 U.S. 985 (1964). There, a court was asked to decide whether the rights of a child in the mother's womb were violated by her refusal, on religious grounds, to submit to a blood transfusion necessary to preserve the lives of both. The New Jersey court found it unnecessary to decide whether an adult may be compelled to submit to medical treatment necessary to save his own life. However, the court had no difficulty, after finding a parity of rights possessed by both unborn and after born

[43] 331 F.2d, at 1008.

[44] *Hoener v. Bertinato*, 67 N.J.S. 517, 171 A.2d 140 (1961).

children, in deciding that the unborn child was entitled to the law's protection and ordering the transfusion. In sustaining the unborn child's right to life, even over his mother's right to practice her religion, the court said:

> "In State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1963), we held that the State's concern for the welfare of an infant justified blood transfusions notwithstanding the objection of its parents who were also Jehovah's Witnesses, and in Smith v. Brennan, 31 N.J. 533, 157 A.2d 497 (1960), we held that a child could sue for injuries inflicted upon it prior to birth. .We are satisfied that the *unborn child is entitled to the law's protection* and that an appropriate order should be made to insure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge at the time." (201 A.2d, at 538)[45]

Also worthy of note in the context of a claim of a mother's right to freedom over the use of her body is *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967). In that case, the plaintiffs sought damages against doctors who had attended the mother during pregnancy. They alleged their child had been born with birth defects and that the defendants had negligently failed to warn the child's mother and father that an attack of German measles which she suffered during pregnancy might result in such defects. The failure to give the warning, it was alleged, deprived the parties of the opportunity of terminating the pregnancy. In affirming the trial court's dismissal of the

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[45] An Illinois court recently followed the rationale of the *Raleigh Fitkin* case in ordering that doctors may give an emergency blood transfusion to a pregnant Chicago mother who had refused such treatment on religious grounds. *Chicago Sun-Times*, May 6, 1971, p. 12. This Court too has had no trouble in sustaining as superior a state's interest in, and authority with respect to, children over their parents' free exercise of religion rights, noting that the "right to practice religion freely does not include liberty to expose . . . the child . . . to ill health or death." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1943).

complaint, the majority of the New Jersey Supreme Court emphasized the child's right not to be aborted, saying:

> "The right to life is inalienable in our society . . . . We are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of the single human life is the decisive factor in this suit in tort. Eugenic considerations are not controlling. We are not talking here about the breeding of prize cattle. *It may have been easier for the mother and less expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of a single human life to support a remedy in tort.* Cf. Jonathan Swift, 'A Modest Proposal' in Gulliver's Travels and Other Writings, 488-496 (Modern Library ed. 1958).
>
> "Though we sympathize with the unfortunate situation in which these parents find themselves, we firmly believe the right of their child to live is greater than and precludes their right not to endure emotional and financial injury."[46]

The line of cases discussed in this section of the *amicus'* brief, all of which are based either impliedly or expressly on the findings of modern medical science concerning the nature of the fetus, is a recognition of the right of a child in the womb to the protection of the law. From this, a learned commentator has gone on to reason that:

> ". . . it seems established by analogy that to remove the protection of the criminal law from the child in the womb would be itself an unconstitutional act. The civil rights cases have established that for the Government to fail to protect a class is itself an unconstitutional denial of civil rights."[47]

In point of fact, if the issue had been raised in these cases, this *amicus* would be arguing that *both* due process

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[46] 227 A.2d, at 693.

[47] Noonan, *Amendment to the Abortion Law: Relevant Data and Judicial Opinion,* 15 The Catholic Lawyer, No. 2 (Spring 1969).

and equal protection of law should prevent a state from permitting the abortion of a live fetus, except when necessary to save the life of the mother.[48] "Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it." *Steinberg v. Rhodes, et al.*, 321 F. Supp. 741 (N.D. Ohio, 1970). At the minimum, NRLC would contend, as suggested by several scholars in the field, that the unborn child is entitled to the traditional protections of due process, including representation by counsel at some type of adversarial hearing, before he is doomed to death either at his mother's whim or upon her physician's unreviewable moral-medical judgment that his life is less important than his mother's state of mind.[49] Some doctors might balk at that suggestion because of the technicalities and delays which observance of due process of law sometimes entails. The same argument is often made by prosecutors faced with claims of Fourth, Fifth or Sixth Amendment rights, but in neither case is the position a valid one. The legitimacy of an abortion operation is more than merely a medical decision; it involves legal, moral, ethical, philosophical, theological, sociological and psychological considerations. These realities cannot be brushed aside merely by calling the problem "medical". Moreover, the primary training and function of physicians is to diagnose and heal, not to adjudicate.[50] And if war is too important to be entrusted solely to the generals, the ultimate issues of life and death are too important to be entrusted solely to the surgeons. Both logic and experience warrant the presumption that the unborn child would want his chance at life.[51] Surely, the ingenuity of Ameri-

[48]Under this analysis the Texas, but not the Georgia, statute would be constitutional.

[49]Noonan, *supra* n. 28, at 254-57.

[50]Hellegers, *Law and the Common Good*, 86 Commonweal 418 (1967).

[51]As Artur Rubenstein put it: "My mother did not want a seventh child, so she decided to get rid of me before I was born. Then a marvelous thing happened. My aunt dissuaded her, and so I was permitted to

can law for fashioning procedural protections when constitutional rights are threatened justifies optimism that our legal system could be utilized to provide such protections for the unborn child faced with destruction, but who, at the present time, has no voice to plead his case and no forum in which to make it.

However, as we have said, the due process argument need not be pressed in the instant litigation since the issue has not been raised by any of the parties. Nevertheless, the point has relevancy. It serves to emphasize that in evaluating the legitimacy of any alleged right to privacy on the part of a pregnant woman to destroy her unborn child the Court must take into countervailing account the fundamental right of that child to be protected by the State from arbitrary and capricious destruction of its existence merely because it is unwanted.

F. *Life Should Take Constitutional Precedence over Privacy.* In this section of its brief, the *amicus* discusses the judicial balancing which necessarily is involved in weighing competing claims of an unborn child's right to life and the alleged right of privacy which appellants and their allies in these cases assert is possessed by all pregnant women. In deciding the relative priority which the Constitution should afford, on the one hand, to a woman's right to destroy her unborn child and, on the other, to the right of that child to live, certain relevant facts are beyond argument. First, the medical evidence is unchallengeable–life begins at conception, and from that point on the fetus has a living existence, including a heart and a brain, separate and independent from his mother. Secondly, as NRLC previously has shown, the common law has not been impervious to the findings of modern science in changing and adjusting its concepts and rules regarding the legal rights possessed by a child in the womb. *Supra*, pp. 32-36.

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be born. Think of it! It was a miracle! Time Magazine, Feb. 25, 1960. p. 86.

We might also add at this point that the approach taken by American law in recognizing important legal rights of an unborn child is not some national aberration explained, perhaps, by some latent puritanical instincts in American society alone. For example, in 1959 the United Nations adopted a "Declaration of the Rights of the Child" which supplemented the United Nations' statement entitled the "Universal Declaration of Human Rights". One reason for this supplementary declaration, as stated in its Preamble, was because, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." General Assembly of the United Nations, "Declaration of the Rights of the Child", adopted unanimously in the plenary meeting of November 20, 1959, *Official Records of the General Assembly*, 14th Session, pp. 19-20. Thus, the representatives of most of the civilized nations of the world recognized that the being before birth deserved recognition as a "child". They further recognized that a child, so defined, needed special legal protection. The committee report on this declaration noted that "representatives of the most diametrically-opposed social systems find common ideals in discussing the privileges of childhood". *Report of the Third Committee of the General Assembly, Official Records*, 14th Session, p. 593. The committee thus underlined that the rights asserted by the United Nations as applicable to the fetus represented a commitment which had commended itself to all of the various social systems represented within that worldwide body.

If, then, an unborn child can inherit by will and by intestacy, be the beneficiary of a trust, be tortiously injured, be represented by a guardian seeking present support from the parent, be preferred to the religious liberties of his parents, be protected by the criminal statutes on parental neglect, and enjoy the specific concern of the United Nations' General Assembly, are there not interests here which the State may guard from intentional extinction? If not, then all of these rights are meaningless, capable of being destroyed through the exercise of an unrestrictable right simply to destroy their possessor—the unborn fetus.

Let us then address ourselves specifically to the question of balancing the two rights which may appear to be in conflict in these cases. That question must be: To what extent can the State protect the right of an unborn infant to continue its existence as a living being in the face of a claim of right of privacy on the part of a woman to decide whether or not she wishes to remain with child?

This Court has decided that the Constitution protects certain rights of privacy on the part of a woman arising from the marital relationship which cannot be unjustifiably interferred with by the State. NRLC believes that the genesis of such rights, to the extent such rights may exist, must be found among the "penumbral" personal liberties protected by the Due Process Clause of the Fifth Amendment. Yet equally unchallengeable is the proposition that an unborn child's right not to "be deprived of life", to quote the words of the the Due Process Clause itself, is also a fundamental personal right or liberty protected by that same amendment and entitled to the traditional searching judicial scrutiny and review afforded when basic personal liberties are threatened by state action, whether legislative or judicial in character. Therefore, it is very clear that this case is not one, as the appellants would portray it, which involves merely the balancing of a right of personal liberty (i.e., a married woman's privacy) against some competing, generalized state interest of lower priority or concern in an enlightened scheme of constitutional values, such as the state's police power.[52] Here, the Court must choose between a nebulous and undefined legal "right" of privacy on the part of a woman with respect to the use of her body and the State's right to prevent the destruction of a human life. That election involves the determination as to whether the State's judgment that human life is to be preferred is a prohibited exercise of legislative power.

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[52] Even in this area the Court, by closely divided vote, has held that a "dependent child's needs are paramount" and rarely are to be placed in "a position secondary to what the mother claims as her rights". *Wyman v. James*, 400 U.S. 309, 318 (1971).

There would be no question of the answer, of course, if the choice were between a woman's "right to privacy" and the destruction of an unwanted *after* born child. Yet abortion is distinguishable from infanticide only by the event of birth. The recent findings of medical science now suggest that any distinction, at least from a medical if not a legal point of view, disappears very early in a woman's pregnancy and in the life of the unborn child within the womb. Contrary to the appellants' assumption in these cases, a state's interest in regulating abortion is not bottomed exclusively on concern for the health of the mother, a concern which admittedly would be of less than persuasive effect, since it cannot be successfully established that abortions during the early period of pregnancy performed by competent physicians in hospital surroundings represent a substantially high medical risk to the life and health of the mother.[53] The state interest which justifies what Texas and Georgia have done rests on a concern for human life, even though that life be within the womb of the mother. Such an interest on the part of the State has existed since the common law of England. Now the separate, early and independent existence of fetal life has been conclusively proven by medical science. While it may be impossible for the State to insist on maintaining such a life under all circumstances, can it seriously be maintained that the Government is powerless to insist on protecting it from intentional destruction, absent danger to the mother's life.

Under the analysis set out above, the appellant's argument in support of a woman's "sovereignty . . . over the use of her

[53]The *amicus* has one reservation here, however. Evolving research into the complications that may follow abortion indicates a 2% sterility rate with an approximate 10% rate of moderate or severe psychic sequelae. Hellegers, *Abortion, the Law, and the Common Good,* 3 Medical Opinion and Review, No. 5 (May 1967). Indeed, respectable studies raise the question of whether the guilt complex evoked by an abortion may itself constitute a more severe psychiatric problem than any pre-existing mental health problem serving to justify the abortion in the first instance. Rosen, Therapeutic Abortion, Medical, Psychiatric, Anthropological and Legal Considerations (1954).

body" cannot stand. Either (1) the argument means that she has a "private right" or personal freedom which permits her to decide, for any reason whatsoever, whether to sustain and support, or whether to eliminate, a life which she alone may decide is unwanted; or (2) it means that she has some kind of right to bodily integrity which permits her and her alone to decide under all circumstances whether to retain, or permit to be destroyed, a human life contained within her own body.

In all fairness we doubt that the first is the correct understanding of the basis of the "private right of personal freedom" for which the appellants contend. For, were that principle ever to be accepted as the law, there would have crept into the Constitution a potentially terrifying principle that, with very little more logic than the appellants have relied upon to sustain their position in these cases, would equally justify infanticide and euthanasia, at least if the victims were those in a relationship of dependence with the person or persons who wished to destroy them. Nor would the laws which forbid abandonment, failure of support and child neglect be immune from attack.

If the appellants and their supporting *amici* are maintaining that a woman has a right to the integrity of her body sufficient to permit her alone to decide, for whatever reason, whether to terminate a pregnancy, the proposition cannot prevail.[54] If a woman has sovereignty over her body of the degree suggested by the appellants, how could the States ban prostitution, outlaw suicide or prohibit the use of harmful drugs?

However, in the *amicus* brief filed by the American Association of University Women and other women's organizations, the "sovereignty of the body" argument is made in a disguised and superficially more plausible form. These *amici* assert a woman's right of "reproductive autonomy". This they define as the "personal, constitutional right of a woman

[54]See also the *Georgetown College* and *Raleigh Fitkin* cases discussed *supra*, pp. 37-39; *cf. Babbitz v. McCann*, 306 F. Supp. 400 (E.D. Wisc., 1969), *app. dism.*, 400 U.S. 1 (1970).

to determine the number and spacing of her children, and thus to determine whether to bear a particular child . . . ." Such a right, those *amici* argue, evolves inevitably from the recognition which this Court has afforded to those human interests "which relate to marriage, sex, the family and the raising of children". It is true that the Court has upheld the right of a married couple to plan their offspring prior to contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965), a case which, as we show in the next section of this brief, has no applicability to the issues presented in these cases. Parents may have a constitutional right to plan for the number and spacing of children. Still, that right cannot be extended to permit the destruction of a living human being absent a threat to the life of the mother carrying the unborn baby. Family planning, including the contraceptive relationship, is a matter between a man and a woman alone. The abortion relationship, on the other hand, is between the parents and the unborn child. "This additional party changes the whole structure of the situation. The freedom of the parents is limited by the rights of the child." Granfield, The Abortion Decision 184-85 (1969); see also *Gleitman v. Cosgrove*, *supra*, at 30-31. Thus, while a man and woman may have the right to plan their family free from interference by the State, which the Court upheld in *Griswold*, surely such a right cannot be projected, indeed distorted and debased, to serve as justification for the destruction of a third party, the unborn but living child. The right to plan a family no more encompasses the right to intentionally destroy a 2, 3, 4, 5, 6, 7 or 8 month unborn child than it would encompass the right to destroy a one-day-old baby. We do not believe, therefore, that it can successfully be maintained that the Texas and Georgia abortion statutes, and the balancing between any alleged constitutional right to plan a family and the right of an unborn child to life which they attempt to effect, should be struck down as unconstitutional.[55] To reach the contrary result

[55]We show in the next subsection of this brief that the one decision on which appellants might rely, at least by attenuated analogy, to support a claim of the unfettered right of a married woman to termi-

would require this Court's unabashed return to the long-repudiated concept of substantive due process which plagued its decisions for several generations, albeit in another context, *i.e.*, economic and social legislation. The fact that a law might not impress the judiciary as a good law, or might appear to them as futile or unworkable, no longer can serve as a basis for its invalidation.[56] Moreover, even though many doctors, representatives of women's organizations and well known public figures may claim that these abortion statutes are illiberal, outmoded and restrictive of women's rights, this is not the general viewpoint of the American people. A recent careful analysis of abortion and public opinion by demographer Judith Blake indicates that 78% of the population disapproved legalization of abortion when the parents desired no more children.[57] In any event, at this stage of American constitutional development there is no need to remind the Court that the predilections of the populace, much less the individual preferences of judges, cannot serve as a basis to strike down legislation within the competence of the state to enact, especially where the laws so challenged are aimed at protecting the most fundamental of personal liberties protected by the Due Process Clause, *i.e.*, the right not to "be deprived of life".

G. *The Right to Life Has Not Been Undermined by Judicial Decision.* The *amicus* has demonstrated the persuasive medical basis supporting the compelling substantial state interests which justify the Texas and Georgia abortion laws. Beyond that, and contrary to the contentions of the appellants and the *amici* who have filed briefs in their support,

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nate a pregnancy does not support the proposition in behalf of which it is summoned.

[56]Compare *Lochner v. New York*, 198 U.S. 45 (1905), with *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

[57]Blake, *Abortion and Public Opinion: The 1960-1970 Decade*, 171 Science 540, 544 (1971). The same study shows that there are wide disparities in American attitudes toward abortions. Women, for example, disapprove of it more than men. *Ibid.*

NRLC disputes the assertion that a woman enjoys any right of privacy, as yet undefined in American law, which vests in her alone the absolute authority to terminate a pregnancy for any reason whatsoever. No precedents of this Court have gone so far. Nevertheless, the proponents of abortion on demand always advance three or four decisions of the Court from which they argue that the Court has impliedly recognized a startling and dangerous extension of a right of privacy that they now ask the Court to enunciate expressly in the cases at bar. We discuss those alleged analogies in this section of our brief. None of them, we believe, can serve as analogy, much less precedent, for the grave proposition of constitutional law which the appellants seek to establish in this litigation.

A case usually cited by those challenging state abortion laws is *Loving v. Virginia*, 388 U.S. 1 (1967). There, this Court held that a state anti-miscegenous marriage statute violated the Equal Protection Clause of the Fourteenth Amendment. 388 U.S., at 12. As a supporting ground for its decision, the Court also found that such statutes deny due process, since "the freedom of choice to marry [can] not be restricted by invidious racial discrimination." *Ibid. Loving*, therefore, is no precedent in support of the appellants' notion of the extreme scope of a woman's constitutional right of privacy. It is purely an invidious racial discrimination holding.

Other cases on which the appellants rely must similarly fail in their role as alleged analogies for their position. *Skinner v. Oklahoma*, 316 U.S. 535 (1942), decided that the compulsory sterilization of some types of habitual criminals and not others represented an invidious discrimination condemned by the Fourteenth Amendment. Thus, *Skinner* is most accurately read as a case prohibiting the imposition of unreasonable impediments on the right to procreate and, in any event, cannot logically be stretched to serve as an analogy for the unrestricted right to abort. Likewise missing the mark as a supporting precedent is *Pierce v. Society of*

Sisters, 268 U.S. 510 (1925). This was the Court's landmark decision upholding, over the requirements of a state's compulsory school attendance law, the freedom of parents, guaranteed by the Due Process Clause of the Fourteenth Amendment, "to direct the upbringing and education of [their] children . . . " 268 U.S., at 534. Once more, the liberty which was protected in the *Pierce* case was not a "right of privacy" and again the legislation which was struck down had "no reasonable relation to some purpose within the competency of the State." 268 U.S., at 535.

When the obviously unanalogous authorities tendered by the appellants are put aside, they are left only with *Griswold v. Connecticut*, 381 U.S. 479 (1965), as the one slim reed of alleged precedent to which they cling in arguing for the awesome right of privacy which they would have the Court enunciate in this case. That decision, too, is insufficient to carry such a heavy burden. The *Griswold* case produced a number of opinions by the Justices of this Court, concurring and dissenting. The actual holding in the case, however, was that a statute which forbade the use of contraceptives by married couples violated a "penumbral" right of marital privacy, older than the Bill of Rights and one falling within a "zone of privacy created by several constitutional guarantees." 381 U.S., at 485. Three of the Justices who decided that case, two dissenting and one concurring, refused to recognize any constitutionally protected right of privacy whatsoever. The remaining six Justices agreed only that a law, the enforcement of which would require the invasion of the marital bedroom, transgressed on the intimacies of, and the right of privacy inherent in, the marital relationship.

The particular aspect of the marital relation with which the Connecticut statute at issue in *Griswold* interfered was the sexual relationship. The state made it criminal for a married couple to have sexual intercourse using contraceptives. Enforcement of the statute would have required actual invasion of the marital bedchamber. The Connecticut law challenged was more stringent and sweeping than any statute,

civil or ecclesiastical, in the history of social efforts to control contraception. Noonan, Contraception 491 (1965). In contrast, the Texas and Georgia statutes do not affect the sexual relations of husband and wife. Pregnancy does not interfere with these relations except under some circumstances at limited times. Guttmacher, Pregnancy and Birth 86 (1960).

Further, it is a distortion of both the "penumbral" and Ninth Amendment approaches relied on by the majority in *Griswold* to assert them as a basis for challenging state regulation of abortion as unconstitutional. Centuries of judicial and legislative history refute the argument that the unrestricted right to abort is an "emanation" of any specific guarantees of the Bill of Rights necessary to give them "life and substance". 381 U.S., at 484. Where, for example, after considering the "traditions and [collective] conscience of our people", will this Court find the right to unrestricted abortion a principle "so rooted [there] . . . as to be ranked as fundamental"? 381 U.S., at 493 (Goldberg, J. *concurring*). Rather, in the words of a state court on the subject, the tradition has been that: "Unnecessary interruption of pregnancy is universally regarded as highly offensive to public interest." *Miller v. Bennett,* 190 Va. 162, 169, 56 S.E.2d 217 (1949).

In relying on the *Griswold* case, the appellants have not considered that in this case, as opposed to that decision, there is another important interest at stake, the life of an unborn child. If, despite all the medical evidence and legal history on the point, the unborn child is not to be considered a person within contemplation of the law with legally protectable interests, then *Griswold* possibly might be stretched to serve as a precedent for the result that the appellants urge this Court to reach. On the other hand, if terminating pregnancy is something different from preventing it, if abortion is different from cosmetic surgery, if the fetus is not in the same class as the wart, and if we are dealing with something other than an inhuman organism, then *Griswold* is totally

inapposite. As medical knowledge of prenatal life has expanded, the rights of the unborn child have been enlarged. And even if it could still be argued that the fetus is not fully the equal of the adult, the law, through centuries of judicial decision and legislation, and following the lead supplied by medical science, has raised the equivalency of that life to such a status that the unborn child may not be deprived of it, absent the demonstrated necessity of protecting a reasonably equivalent interest on the part of the mother. *Griswold*, of course, presented no such conflict and therefore is not controlling in this case.

Finally, as we have previously argued,[58] abortion was always condemned at common law. In Blackstone's words, it was regarded as a "heinous misdemeanor".[59] American law gave it the same hostile reception. Therefore, any argument that by virtue of the passage of the Ninth Amendment there was reserved to pregnant women a "penumbral" constitutional right of privacy entitling her to abort for any reason and that such a "right" was one of the fundamental liberties of American citizens recognized before the Bill of Rights and retained by them thereafter is completely without support in either British or American constitutional history. There was no "right" to abort at common law. Rather, abortion—in contrast to contraception—was considered a serious criminal act.

Thus, on any fair analysis, the appellants' alleged precedents, including *Griswold*, furnish no support for their claim that there is a constitutional basis on which to claim that a woman has a right to abort, for any reason, an unborn child which she does not want.

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[58] *Supra*, pp. 24-29.

[59] Blackstone, *supra* n. 22, at 129-30.

III.

THE STATUTES ARE NOT UNCONSTITUTIONALLY VAGUE

In both cases, the appellants attacked the statutes in the courts below on the additional ground that they were unconstitutionally vague. The Texas three-judge federal court agreed. 314 F.Supp., at 1223. The Georgia three-judge court impliedly rejected the argument, but struck the statute down on other constitutional grounds. 319 F.Supp., at 1055. The appellants again raise the vagueness issue in their briefs which they have filed in this Court.

Neither of the courts below had the advantage of this Court's decision in *United States v. Vuitch*, 402 U.S. 62 (1971), at the time they handed down their decisions. In that case, this Court reversed the decision of a district court judge who had found that the District of Columbia abortion law was unconstitutionally vague.[60] The District of Columbia statute outlawed abortions except when "necessary for the preservation of the mother's life or health."[61] This Court's holding in *Vuitch* should be dispositive of the vagueness issue in these cases. The exception clause which this Court upheld in *Vuitch* is no more or less certain of meaning than the exception found in the Texas statute, *i.e.*, "for the purpose of saving the life of the mother". Likewise, the exceptions permitted under the Georgia statute are stated in language free of any inhibiting unconstitutional vagueness or ambiguity.

Doctors are neither in doubt nor in fear as to where abortions permitted by the Texas and Georgia statutes end and where those barred by them begin. For example, a recent study in California, whose abortion statute at the time had an exception limited solely to cases where termination of

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[60] 305 F.Supp. 1032 (D. D.C., 1969).

[61] 22 D.C. Code 201.

the pregnancy is necessary to preserve the life of the mother,[62] shows that there has never been a prosecution for an abortion performed in a hospital by a physician licensed to practice medicine in that state. Packer & Gamspell, *Therapeutic Abortion, A Problem in Law and Medicine*, 11 Stanford L.R. 418, 444 (1959). Other recent studies show the same has been true in New York and in Maryland. Hellegers, *Abortion, the Law, and the Common Good*, 3 Medical Opinion and Review, No. 5 (May 1967), p. 84. The *amicus* is confident that the same experience holds for Texas and Georgia and that in those jurisdictions, as in others, "the law has not gone out of its way to make things difficult for the physician, . . ."[63]

The words of Mr. Justice Holmes, as in so many other areas of constitutional law, supply the answer to any claim of the alleged vagueness of these two statutes. Speaking for the Court in *United States v. Wurzbach*, 280 U.S. 396, 399 (1930), he said:

> "Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to to make him take the risk."[64]

Accordingly, we urge the Court to adhere to its decision in *Vuitch* and reject any contention that these two statutes are

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[62]Cal. Penal Code §274.

[63]Hellegers, *supra*, at 84. Indeed, a recent decision of the Court of Appeals for the District of Columbia Circuit suggests, should appellants prevail on this appeal, that any "doctor's dilemma" will not be whether he will be punished if he performs an abortion but whether he will be punished if he does not. *Mary Doe, et al. v. General Hospital of the District of Columbia, et al.*, C. A. No. 24,011. For a recent case showing this is not an illusory concern see *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967).

[64]See also, *State v. Moretti*, 52 N. J. 182, 244 A.2d 499 (1968), *cert. den.*, 393 U.S. 952 (1968).

unconstitutionally vague in prescribing what is criminal conduct on the part of doctors and what is not.

IV.

THE REMAINING CONSTITUTIONAL ARGUMENTS ADVANCED BY THE APPELLANTS AND THE AMICI CURIAE SUPPORTING THEM ARE WITHOUT MERIT

In addition to their primary claim that the Texas and Georgia statutes violate rights of privacy guaranteed by the Ninth and the Fourteenth Amendments, the appellants in these cases, or the *amici curiae* who filed briefs in support of the appellants, attempt to raise several other constitutional issues. For instance, the doctor-appellants argue that the statutes in question transgress First and Fourteenth Amendment rights which guarantee them the right to pursue their chosen profession. Additionally, the appellants claim that the statutes under challenge in this litigation violate equal protection of the laws, so far as poorer citizens are concerned. These contentions are meritless.

A. *The Statutes Do Not Abridge Either First or Fourteenth Amendment Rights of Doctors.* In both cases, the doctor-appellants alleged that the particular statute in question "chills and defers plaintiffs from practicing their profession as medical practitioners" and thus offends rights guaranteed by the First and Fourteenth Amendments.[65] The dispositive answer to these contentions is that neither statute proscribes speech or medical advice but prohibits the commission of the criminal *acts* specified in the statute. If, as this *amicus* maintains, the acts outlawed by the statutes are within the constitutional competency of Texas and Georgia to proscribe as criminal conduct, then the argument is closed. Criminal acts do not fall within the "freedom of speech" which the First Amendment protects. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). On the other

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[65] App. 19 in No. 70-18 and App. 14 in No. 70-40.

hand, if we are wrong and these statutes do represent unconstitutional invasions of a woman's right to privacy, then the free speech argument advanced by the doctor-appellants becomes superfluous. Apart from that, however, we do not believe that the appellants can seriously argue that these abortion statutes are vulnerable on their face as abridging a doctor's or anyone else's right of free expression.

The identical rationale also answers appellants' claims that any freedom to pursue the profession of medicine guaranteed by the Due Process Clause of the Fourteenth Amendment is offended by the statutes involved in these cases. *Cf.*, *e.g.*, *Konigsberg v. State Bar of Calif.*, 366 U.S. 35, 44 (1961), with *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102-03 (1963). And it legitimately could be asked whether the deliberate destruction of the unborn child, absent a threat to a mother's life or a serious menace to her health, is really the practice of the "healing art" of medicine. Frankl, The Doctor and the Soul 37 (1969).

B. *Nor Do the Statutes Draw Invidious and Unconstitutional Discriminations Between the More Affluent and the Poor.* As so often happens in such cases, the parties attacking abortion statutes argue that they discriminate against the economically deprived. Specifically, appellants contend that there is an advantage to the class which is able to obtain abortions and that this advantage is enjoyed only by the more affluent people of Texas, Georgia and the rest of the United States. We doubt that this contention rises to the level of a constitutional argument which must be dealt with in these cases. If it were necessary, NRLC would point out that the statutes on their face apply to all persons committing the acts condemned and that there is no suggestion that they seek to discriminate on any invidious basis, including that of income.

Of course, departing from the facts of the two cases, it might be argued abstractly that (1) a poor woman finds it more difficult than a rich woman to leave Texas or Georgia in order to get an abortion in a jurisdiction where that might

be legal, and (2) she cannot afford treatment by a private physician who, some might say, would be more inclined to find a legal reason for the abortion. Hence, the two statutes bear unequally upon the poor. However, the same theoretical argument could be made of many types of conduct proscribed by the criminal laws of Texas and Georgia. There are jurisdictions to which wealthy persons may travel in order to indulge in the doubtful pleasures of gambling at will, using narcotics without restraint, and enjoying a plurality of wives. Could these doubtful "advantages" on the part of the rich be relied on as any basis to set aside the criminal statutes of Texas or Georgia proscribing such activities within those jurisdictions?

And even if it were assumed to be true that the rich are more likely than the poor to secure the services of a sympathetic physician for purposes of terminating an unwanted pregnancy, such a result, unintended by the statute, would not rise to the level of a constitutional infirmity. "It is no requirement of equal protection that all evils of the same genus be eradicated or none at all." *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949). If the statute is to fail, it must be shown that on its face it takes away a right guaranteed to the poor by the Constitution. *Fisch v. General Motors Corp.*, 169 F.2d 266, 270 (C. A. 6, 1948). No such showing is possible in these cases.

Unfortunately, Anatole France's sardonic comment about the "majestic equality" of the law much too often has proved to be true. Many criminal laws in actual practice do bear with unequal severity upon the poor. It is they who are more likely than the rich to be caught, to be unable to post bail bond, to be prosecuted, to be unskillfully defended, to be convicted and to be punished. However, the remedy for these injustices of society lies in the elimination or mitigation of the conditions and causes of poverty and in the reform of the administration of criminal justice, not by the selective invalidation of otherwise lawfully enacted criminal statutes.

V.

APPELLANTS' PUBLIC POLICY ARGUMENTS ARE MISPLACED

In addition to their arguments of unconstitutionality, the appellants, and their supporting *amici*, dwell at some length on what they believe is the poor public policy inherent in the Texas and Georgia abortion statutes in particular and in abortion laws generally. Attention is called to the fact that the presence of strict abortion statutes requires women often to go to non-medical practitioners for the performance of illegal abortions conducted under poor hygienic conditions. The problem of world overpopulation is also touched upon in the appellants' marshalling of their reasons why they think abortion laws are a bad thing. Finally, in the brief of at least one of the *amici*, there is the suggestion that abortion laws stand in the way of women's liberation and represent a stamp of servility imposed by men upon the women of America.

In our opinion, the validity of all of these arguments is very questionable. In any case, their assertion, directly or indirectly, in this litigation is misplaced. They should be directed to the legislatures of Texas and Georgia, not to this Court. Moreover, we point out that in recent years it has not been impossible to convince state legislatures that their abortion statutes should be revised.[66] Even if the appellants' public policy arguments were addressed to a legislative body, NRLC would dispute their validity. For example, Sweden, a country not unlike ours, and the nation which has had the longest experience with state-regulated abortions in Western Europe, has produced no evidence that criminal abortions, estimated at 20,000 a year when the law was passed in 1938, have been substantially reduced since that time. Uhrus,

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[66]New York has enacted an abortion statute which permits abortion for any reason within 24 weeks from the commencement of pregnancy. That act became effective on July 1, 1970. *New York Times*, July 2, 1970, p. 1. Laws almost, but not quite, as unrestrictive as the New York statute have recently been approved in Alaska, Hawaii and Washington State.

Some Aspects of the Swedish Law Governing Termination of Pregnancy, the Lancet 1292 (1964). Other studies confirm the belief that liberalization of abortion laws effect no reduction in the rate of criminal abortions and all that is done is to increase the total number of abortions. "Thus it is not unlikely that liberalization may increase rather than decrease maternal mortality." Cavanagh, *Reforming the Abortion Laws: A Doctor Looks at the Case*, America, April 18, 1970, p. 408.

So far as any alleged problem of overpopulation is concerned, abortion, whether on the free demand of a woman or on the intimidating command of the State, appears as a completely ineffective and extremely dangerous way to deal with such a problem, if it exists.[67] For instance, one side effect of the repeal of abortion statutes and the fostering of abortion through state auspices is that no group will be more likely to feel the sting more bitingly than the mothers of illegitimate children. Already, laws making the birth of illegitimate children a crime suggest the squeeze to which the poor mother might be subjected in an age of unrestricted, and state-sponsored, abortion.[68]

Finally, the suggestion that laws against abortion were enacted by men to constrain the behavior of women has nothing to support it except the historical accident that most of the criminal statutes, including abortion laws, were enacted by male legislators in the 19th Century when women were unable to vote. It is not evident how this general condition of political freedom influenced abortion laws more than it influenced other developments in the criminal law. Moreover, more women than men currently disapprove of elective,

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[67] In point of fact, recent statistics indicate that the population of the United States is approaching a zero growth rate. *Washington Post*, September 7, 1971, page A-1.

[68] *E.g.*, La. Rev. Stat. Ann. § 14.79.2; see Noonan, *Freedom To Reproduce: Cautionary History, Present Invasions, Future Assurance*, Biennial Conference on the "Control of One's Own Body", New York University, New York (1970).

or unrestricted, abortion.[69] The suggestion that abortion laws are peculiarly the product of a male-dominated government is especially inapposite in the case of Georgia, which enacted the abortion statute involved in this litigation in 1968. This *amicus* applauds the continuing process by which illegal discriminations against women have been removed. However, the claim that a woman should be free to destroy a human being whom she has conceived by voluntarily having sexual intercourse can only make sense if that human being be regarded as part of herself, a part which she may discard for her own good. However, at this point, the evolution of social doctrine favoring freedom for women collides squarely with modern scientific knowledge and with the medical and judicial recognition that the fetus in the womb is a living person. A woman should be left free to practice contraception; she should not be left free to commit feticide.

CONCLUSION

NRLC has stated its doubts that the lower courts should have exercised jurisdiction in these cases and urges that the decisions below be vacated on those grounds. However, if the Court does note probable jurisdiction in these two case, we respectfully ask, for the reasons stated in this brief,

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[69] *Supra* note 57.

that it affirm those portions of the judgments below which denied injunctive relief and reverse those portions which awarded declaratory relief.

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