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## Committee to Defend Reproductive Rights v. Myers: Procreative Choice Guaranteed for All Women

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## COMMITTEE TO DEFEND REPRODUCTIVE RIGHTS V. MYERS: PROCREATIVE CHOICE GUARANTEED FOR ALL WOMEN

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The problem of birth control has arisen directly from the effort of the feminine spirit to free itself from bondage.<sup>1</sup>

In 1973, the United States Supreme Court established abortion as a constitutional right for all women.<sup>2</sup> One might have expected that the following five years would have brought the end of the abortion controversy; instead, the first wave of vehement counterattacks led by anti-choice forces<sup>3</sup> had only begun.

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1. M. SANGER, *WOMEN AND THE NEW RACE* (1920).

2. In *Roe v. Wade*, 410 U.S. 113 (1973) and its companion case, *Doe v. Bolton*, 410 U.S. 179 (1973), the United States Supreme Court asserted that the right of privacy encompasses a woman's decision whether or not to terminate her pregnancy. The Court also recognized that the state has a legitimate interest in ensuring both the health of the mother and in protecting potential life. *Roe v. Wade*, 410 U.S. at 162. In resolving the conflict between the woman's unimpaired freedom of choice and the state's interest, the Court held that before the end of the first trimester of pregnancy, neither the state interest in ensuring the mother's health nor in protecting potential life is substantial enough to justify an intrusion into the woman's freedom. *Id.* In the second trimester, the state interest in the health of the mother is sufficiently substantial to justify regulation. However, in the third trimester, when viability of the fetus is achieved, the state interest in protecting potential life justifies prohibition against abortion, except when necessary to protect the life of the mother. *Id.* at 163.

3. The anti-choice or anti-abortion forces are usually called by their chosen names which are "Pro-Life" and "Right to Life." However, the terms anti-choice or anti-abortion groups will be used in this Note to refer to groups advocating the elimination of legal access to abortion. Important among these groups is the National Right to Life Committee, an umbrella organization of anti-abortion groups. The National Right to Life Committee boasts a membership of over 11,000,000, and has affiliates in all 50 states. State organizations have been able to gather considerable financial resources, raised through tax-deductible contributions to their "education funds." *RELIGIOUS COALITION FOR ABORTION RIGHTS, THE ABORTION RIGHTS CRISIS* (1978). The California Pro-Life Council, Inc. is the umbrella organization for the scattered California anti-abortion groups.

Senators Joseph Montoya and David Roberti and Representative Alister McAlister, three of the legislators who have been most responsible for introducing bills infringing upon women's access to abortion, are on the Advisory Board of the California Pro-Life Council, Inc., the California affiliate to the National Right to Life Committee.

Their banner was abortion, and their first major target was the most vulnerable—young and poor women.<sup>4</sup>

Shortly after a five-justice majority of the United States Supreme Court reached its decision upholding the Hyde Amendment,<sup>5</sup> which restricted federal funding for abortion, the California Legislature voted to severely restrict Medi-Cal funds for abortion in its 1978 Budget Act.<sup>6</sup> Implementation of the Califor-

There are some distinct differences between the two major organizations supporting and opposing abortion—the National Abortion Rights Action League (NARAL) and the National Right to Life Committee (NRLC). For example, NRLC members are more likely to have been raised in large families, to prefer large families and to have large families. NRLC members are also more likely than NARAL members to oppose sex education in schools, the availability of birth control information to teenagers, divorce, and contraceptive sterilization. They are also more likely to believe that premarital, extra marital and homosexual relations are wrong. Most NRLC members oppose the ERA; most NARAL members support it. NARAL has a higher percentage of female members and directors than NRLC. NARAL members are somewhat better educated, have higher incomes and more often live in large cities and their suburbs than NRLC members. Almost 70% of NRLC members are Catholic, while only 4% of NARAL members are Catholic. Almost none of the NRLC members are Jewish; 17% of NARAL are Jewish. Participation by Protestants and Blacks is low in both NRLC and NARAL. Whatever their religion, nine out of ten NRLC members reported that religion plays a very important part in their lives compared to one out of five NARAL members. Granberg, *The Abortion Activists*, 4 FAM. PLAN. PERSP. 157 (1981).

4. Young and poor women have few resources to fight back against abortion restrictions and the most to gain by the unfettered continuance of abortion services. In California, in 1976, 35% of all legal abortions were performed on women under the age of 20. In that same year, 50% of all legal abortions were paid by Medi-Cal. PLANNED PARENTHOOD AFFILIATES OF CALIFORNIA, *THE FACTS OF LIFE IN CALIFORNIA 1981*, compiled from STATE DEPARTMENT OF HEALTH SERVICES ABORTION REPORTS (March, 1981).

5. The Hyde Amendment altered the 1977 Department of Health, Education and Welfare (currently the Department of Health and Human Services) appropriations bill, and provided reimbursement for abortions "only where the life of the mother would be endangered if the fetus were carried to term." Act of Sept. 30, 1976, Pub. L. No. 94-439 § 209, 90 Stat. 1434. A second "Hyde Amendment" was passed in the summer of 1977 allowing for funding where the pregnancy resulted from rape or incest in addition to the earlier exception for cases in which the woman's life was endangered. Act of Dec. 9, 1977, Pub. L. No. 95-205, § 101, 91 Stat. 1460.

In *Harris v. McRae*, 448 U.S. 297 (1980), a majority of the United States Supreme Court upheld restrictions on federal Medicaid funding on abortions (similar to the proposed California Medi-Cal restrictions). Although the Supreme Court acknowledged that the program provided unequal treatment in the distribution of public benefits, it concluded that the Federal Constitution required no special justification for the distribution as long as the program placed no new obstacles in the path of the woman seeking to exercise her constitutional right. *Id.* at 315.

6. The Budget Act of 1978, 1978 Cal. Stat. ch. 359, § 2 (expired June 30, 1979), provided that abortions would be funded by the state:

- (a) Where the life of the mother would be endangered if the fetus were carried to full term.

nia restrictions, however, was stayed until the California Supreme Court found the Budget Act restriction unconstitutional in *Committee to Defend Reproductive Rights v. Myers (C.D.R.R.)*.<sup>7</sup>

Although the United States and California Supreme Courts interpreted similar statutory restrictions, the courts analyzed them under different constitutional theories. The United States

(b) Where the pregnancy is ectopic.

(c) Where the pregnancy results from an act punishable under Section 261.5 of the Penal Code, and such act has been reported, within 60 days, to a law enforcement agency or a public health agency which has immediately reported it to a law enforcement agency, and the abortion occurs during the first trimester.

(d) Where the pregnancy results from an act punishable under Section 261.5 of the Penal Code, and the female is under 16 years of age, and the abortion is performed no later than the first trimester, provided the female's parent or guardian or, if none, an adult of the female's choice is notified at least five days prior to the abortion by the physician who performs the abortion. Regulations governing the notice requirement shall be promulgated by the Director of the Department of Health Services.

(e) Where the pregnancy results from an act punishable under Section 285 of the Penal Code and such act has been reported to a law enforcement agency or a public health agency which has immediately reported it to a law enforcement agency and the abortion occurs no later than during the second trimester.

(f) Where it is determined by fluid obtained through amniocentesis that the mother is likely to give birth to a child with a major or severe genetic or congenital abnormality due to the presence of chromosomal abnormalities, neural tube defects, biochemical diseases, hemoglobinopathies, sex-linked diseases, and the infectious processes.

(g) Where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term, on account of any of the following conditions: Toxemia; renal failure; diabetes with vascular degeneration; thrombosis, Addison's disease; high blood pressure with renal complications; high blood pressure with previous cardio-vascular accident; hydatidiform mole; congestive cardiac failure; and placenta previa, when so certified under penalty of perjury by two physicians, one of whom, where practicable, is a specialist in the affected medical discipline, and documentation thereof is provided with the claim for payment.

7. 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981). The California Legislature re-enacted the provisions of the 1981 Budget Act restricting Medi-Cal coverage for abortion despite the California Supreme Court finding that the restrictions were unconstitutional. C.D.R.R. subsequently filed a petition for a writ of mandate and a temporary stay to prevent implementation of the statute.

Supreme Court found that no constitutional right was violated because the fundamental right to privacy only protected the woman against undue burdens on her right to decide between abortion and childbirth.<sup>8</sup> The Court found that the woman's right to choose was not unduly burdened because the government had not directly interfered with any fundamental right. The Court concluded that the Federal Constitution required no special justification for the government to withhold funds for abortion, but not childbirth, because the program placed no new obstacles in the path of the woman seeking to exercise her right of choice.<sup>9</sup>

In keeping with three decades of California precedent,<sup>10</sup> the California Supreme Court held that special scrutiny will be applied whether or not the state erects new obstacles that impede the exercise of a constitutional right;<sup>11</sup> the impediment may fall short of an absolute prohibition to the right. Unlike the United States Supreme Court, the California Supreme Court has acknowledged "both the practical importance of many governmental benefits to individual recipients and the corresponding likelihood that a discriminatory benefit program will effectively nullify important constitutional rights."<sup>12</sup>

This Note will trace the development of the right to privacy as applied to abortion funding and as interpreted by the United States and California Supreme Courts. Although both courts have recognized the physical and psychological harm from forced childbearing or parenting, only the California court has been willing to unequivocally acknowledge the enormous implications on a woman's education, employment and associational opportunities.<sup>13</sup> For a woman, the right to privacy, inherent in

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8. *Harris v. McRae*, 448 U.S. 297, 317 (1980).

9. *Id.* at 315.

10. See *C.D.R.R. v. Myers*, 29 Cal. 3d at 263, 625 P.2d at 786, 172 Cal. Rptr. at 873.

11. *C.D.R.R. v. Myers*, 29 Cal. 3d at 257, 625 P.2d at 781, 172 Cal. Rptr. at 869.

12. *Id.* at 268, 625 P.2d at 788, 172 Cal. Rptr. at 875.

13. *Id.* at 275, 625 P.2d at 791, 172 Cal. Rptr. at 878 (citing Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 641 n.90 (1980)). For example, teenage parents have substantially less education, hold lower-prestige jobs and have greater job dissatisfaction than their classmates who postpone childbearing. There are fewer opportunities for education and employment for teenage mothers than for teenage fathers who do not experience the emotional and physical problems of childbirth and usually assume less responsibility for the care of the child. Card & Wise, *Teenage Mothers and Teenage Fathers: The Impact of Early Child Bearing on the Parents' Personal and Professional Lives*. 4 FAM. PLAN. PERSP. 199 (1978).

the decision whether or not to bear a child, is essential for personal control of her body. Unlike the United States Supreme Court, the *C.D.R.R.* court has asserted that *all* women have the right to procreative choice.

# I. PROCREATIVE CHOICE: A FUNDAMENTAL RIGHT GUARANTEED BY BOTH FEDERAL AND CALIFORNIA CONSTITUTIONS

The emphasis must not be on the right to abortion but on the right to privacy and reproductive control.<sup>14</sup>

## A. THE FEDERAL GUARANTEE

The birth of the federal right of privacy was first announced in 1965 in *Griswold v. Connecticut*.<sup>15</sup> The origins of the right and the areas included within the "zones of privacy"<sup>16</sup> were ambiguous; the members of the Court were unable to agree on the

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14. Cary, *Life Faces Portia— How Feminists Are Changing the Law*, Ms., Apr. 1974, at 94 (quoting Ruth Bader Ginsberg). Without the full capacity to limit her own reproduction, a woman's other "freedoms" are tantalizing mockeries that cannot long be denied, since the chief rationale for denial disappears. Cisler, *Unfinished Business: Birth Control and Women's Liberation*, in *SISTERHOOD IS POWERFUL* 245-46 (R. Morgan ed. 1970) [hereinafter cited as *Unfinished Business*].

15. 381 U.S. 479 (1965). The defendants, operators of a birth control clinic, were prosecuted for dispensing birth control devices to a married couple in violation of a Connecticut criminal statute which prohibited the use of contraceptives.

16. Activities that take place in the home or affect marriage and childbirth have received the greatest protection. Less traditional lifestyles have been afforded less protection. *Griswold* recognized a constitutionally protected zone of privacy surrounding existing constitutional guarantees, but the Court failed to identify the parameters of the right. Nevertheless, the protected zone clearly includes a married couple's right to use contraceptives. The zone of privacy also protects certain activities performed within the home, such as the right to possess "obscene" materials. *Stanley v. Georgia*, 394 U.S. 557 (1969).

Courts have responded divergently to sexual privacy cases. Compare *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975) (no constitutional rights where sodomy laws were enforced against two consenting adult males in private) with *Ancofora v. Board of Education*, 359 F. Supp. 843, 851 (D. Md. 1973) ("[T]he time has come today for private, consenting adult homosexuality to enter the sphere of constitutionally protected interests") and *Mindel v. United States Civil Service Comm'n*, 312 F. Supp. 485 (N.D. Cal. 1970). The *Mindel* court held that a man was illegally fired from the Post Office because he lived with a woman who was not his wife. The court found that because private sexual behavior is constitutionally protected, the state could not invade the sanctity of the man's home without compelling justification. The court did not specify whether the protection was due to the nature of the sexual behavior, the fact that the activity had taken place in the home, or because the government could not have discovered this information without intrusive investigation.

precise constitutional basis for the right. Although seven of the justices believed the Constitution protected the right to privacy in some manner, no more than three agreed on any theory supporting that right.

Justice Douglas found certain unenumerated rights within the "penumbra" of existing constitutional guarantees.<sup>17</sup> He contended that "without these peripheral rights the specific rights would be less secure."<sup>18</sup> "The present case," he concluded, "concerns a *relationship* lying within the zone of privacy created by several fundamental constitutional guarantees."<sup>19</sup> The right established by the Court was not to protect the *individuals* who might choose to use contraceptives; it was to protect the intimate relationship between the married couple and their physician.<sup>20</sup>

The right to privacy in the use of contraceptives was extended to individuals in *Eisenstadt v. Baird*.<sup>21</sup>

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>22</sup>

Thus, the right to practice contraception without undue

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17. *Griswold v. Connecticut*, 381 U.S. at 484-85. Specifically, Justice Douglas constructed the right out of the first, third, fourth, fifth and ninth amendments.

18. *Id.* at 484-83.

19. *Id.* at 485 (emphasis added).

20. *Id.* at 482.

21. 405 U.S. 438 (1972). At the close of a lecture on overpopulation and contraception, Baird invited members of the audience to help themselves to contraceptive articles. He personally handed a package of contraceptive foam to a young, allegedly single, woman. *Id.* at 440 n.1. As a result of dispensing the foam, Baird was convicted of violating a statute (Mass. GEN. LAWS ANN. ch. 272, § 21-21A (West 1966)) which made it a crime to sell, lend or give away any contraceptive drug, medicine, instrument, or article, except if the actor was a physician administering or prescribing contraceptives to married persons or a pharmacist filling out prescriptions to married persons. *Id.* at 438.

22. *Id.* at 453 (emphasis in original).

governmental interference rests with the individual, not the marital relationship. The Court's recognition of the separate intellectual and emotional entities of the couple was an important step for the liberation of women from unwanted childbirth. It is the woman who usually takes responsibility for the success or failure of contraception since she is the individual who is most directly affected by and concerned with pregnancy, its termination by either abortion or childbirth, and childcare. It follows then, that it is the woman who feels the greatest social, economic and health impacts as a result of governmental policies which restrict her ability to obtain obstetric care.

The right of privacy to procure birth control evolved even further as a result of *Roe v. Wade*<sup>23</sup> and *Doe v. Bolton*.<sup>24</sup> In his opinions for the Court,<sup>25</sup> Justice Blackmun proclaimed the decision to terminate a pregnancy is encompassed within the constitutionally protected right of privacy.<sup>26</sup> The Court ruled, however, that the right to choose abortion is not absolute. The Court divided the full term of pregnancy into trimesters to facilitate its analysis concerning the competing interests between women and the state. With respect to the first trimester, because of the minimized health risks of abortion,<sup>27</sup> the Court held the state has no

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23. 410 U.S. 113 (1973).

24. 410 U.S. 179 (1973).

25. The United States Supreme Court first addressed the abortion controversy in 1973 when it decided *Roe v. Wade* and *Doe v. Bolton*. *Roe* involved Texas statutes which made it illegal to perform an abortion unless it was necessary to save the mother's life. *Doe* challenged Georgia statutes which limited the availability of abortions by requiring that: (1) The attending physician obtain the concurrence of two other physicians that the procedure was necessary; (2) a hospital committee make such a finding; (3) the abortion be performed in an accredited hospital; and (4) the patient be a Georgia resident.

26. *Roe v. Wade*, 410 U.S. at 153.

27. Justice Blackmun relied heavily on the argument that abortion laws became unconstitutional when abortion became safer than childbirth. *Id.* at 150 (citing Means, *The Law of New York Concerning Abortion and the Status of the Foetus*, 1664-1968; *A Case of Cessation of Constitutionality* (pt. 1), 14 N.Y.L. FORUM 411, 418-28 (1968). Tracing the history of New York State anti-abortion laws, Means asserts that the origin of that 1828 law, and of similar statutes in other states, lay in a wish to protect women from the dangers of nineteenth century surgery, not in a wish to limit their control of their bodies. Means, *supra* at 411-515. One may question whether *maternal protection* was the entire reason for revoking women's common-law right to abortion. Perhaps the physician activists who led the crusade against abortion in the nineteenth century had personal, professional, or political motives. Although many physicians of that day probably regarded abortion as morally wrong, they were also intent on professionalizing the practice of medicine and restoring themselves to a respected position as leaders of society. F. JAFFE, B. LINDHEIM & P. LEE, *ABORTION POLITICS* 65 (1981) [hereinafter cited as F. JAFFE,



interest in regulating the decision whether or not to bear a child.<sup>28</sup> During the second trimester the state's interest in protecting maternal health does arise. At this time the state is justified in imposing conditions upon abortion services to the extent that such conditions reasonably relate to the protection of the mother's health.<sup>29</sup> During the third trimester, when the fetus is viable, the state's interest in protecting potential life is sufficient to justify the prohibition of abortion.<sup>30</sup>

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et al]. The abortion issue gave licensed physicians a means to highlight the dangers in a procedure that was performed largely by "irregular doctors." *Id.* Legal abortion could have been viewed as giving health professionals an important means of optimizing their patients well-being; instead, it was viewed as threatening their roles. *Id.* at 66. At an American Medical Association (AMA) meeting in 1970, one physician noted: "'Legal abortion makes the patient truly the physician: She makes the diagnosis and establishes the therapy.'" *Id.* This obviously does not fit the physician's self-image as healer and teacher. The physician who declared, "'a woman is a uterus surrounded by a supporting organism and directing personality,'" would hardly want to be deemed merely a technician who carries out his patient's wishes. F. JAFFEE, et al., *supra* at 64 (quoting I. Galdston, M.D., cited in M. S. CALDERONE, *ABORTION IN THE UNITED STATES*, 118 (1958)).

Physicians are still reluctant to provide abortion services. Seven years after the *Roe* and *Doe* decisions, many women are still unable to obtain abortions either because there are no providers in the counties in which they live or the services that do exist are minimal. Seims, *Abortion Availability in the United States*, 2 *FAM. PLAN. PERSP.* 88, 93 (1980). In eight out of ten U.S. counties, services were not adequate to meet the abortion need. As a result, more than one million women were unable to obtain abortions in their own counties; five out of ten could not obtain them at all. *Id.* at 88. For some women, traveling to other counties caused them little difficulty. For others, especially poor, young and rural women, travel was difficult, if not impossible. *Id.* at 93.

It is very hard to believe that abortion was safer than childbirth in the early 1700's, or any other "legal" operation for that matter, yet, no law seemed necessary then. What happens if, once again, childbirth is made less threatening, from a physical standpoint, than abortion? Do anti-abortion laws suddenly become constitutional again? Or have women won the inalienable right to take calculated risks in their interest for self-determination? All the excellent health supporting reasons—improved health, lower birth and death rate, freer medical practice, happier families, sexual privacy—"are only embroidery on the basic fabric: women's right to her own reproduction." *Unfinished Business*, *supra* note 14, at 276. That one reason belies the notion that women are only nurturant creatures who welcome every new possibility of adding a new member to the human race. That a woman may not want another child, or even one child, requires admitting that the traditional expectation is a gross oversimplification of the nature of women. This was something the Supreme Court was not yet prepared to do. Erickson, *Women and the Supreme Court: Anatomy is Destiny*, 41 *BROOKLYN L.R.* 209, 255 (1974) (citing Rossi, *Abortion Laws and Their Victims*, *TRANSACTION*, Sept./Oct. 1966, at 7).

28. *Roe v. Wade*, 410 U.S. at 163.

29. *Id.*

30. *Id.* at 163-64. The Court defined viable as the point at which the fetus is potentially able to live outside the mother's womb, even with the help of artificial aid. *Id.* at 160.

*Roe* and *Doe* have been criticized for leaving unanswered as many questions as they resolved.<sup>31</sup> One question important to women's rights is to whom did the Court entrust the right to decide whether or not to terminate pregnancy? At the beginning of his opinion in *Roe*, Justice Blackmun wrote the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>32</sup> In a surprising shift of focus, Justice Blackmun turned to an entirely different relationship: the "physician and his pregnant patient."<sup>33</sup> "For the period of pregnancy prior to this 'compelling point,' the attending *physician*, in consultation with his patient, is free to determine without regulation by the state that the patient's pregnancy should be terminated."<sup>34</sup> Finally, the transfer from the pregnant woman's right to decide to the physician's right to decide for her was complete: "Up to [the third trimester,] the abortion decision in all aspects is inherently, and primarily, a *medical* decision, and basic responsibility for it must rest with the physician."<sup>35</sup>

Following the rationale of *Roe* and *Doe*, does a woman, then, only have a right to terminate her pregnancy but not the right to *decide* to terminate it? If her right is to privacy, how can it be conditioned upon the concurrence of a physician? Clearly, to grant women the right to decide is to give women more power to shape their destinies; the very power which for so many years has been denied them.

## B. THE CALIFORNIA GUARANTEE

The California Supreme Court first recognized the funda-

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31. For example, *Roe* did not decide whether a minor was entitled to abortion with parental consent or notification, or whether the father or husband had veto power. It also left vague the definition of viability. All these have set the stage for future legislation fountain-headed by anti-abortion groups.

32. *Roe v. Wade*, 410 U.S. at 153.

33. *Id.* at 156.

34. *Id.* at 163 (emphasis added).

35. *Id.* at 166 (emphasis added). Justice Douglas, in his concurring opinion expanded upon the same reasoning: "The right of privacy has no more conspicuous place than in the physician-patient relationship, unless it be in the priest-penitent relation." *Id.* at 219. He then concluded that the Georgia statute at issue in *Doe*—requiring a woman to obtain approval of two physicians in addition to her own for an abortion—was a "total destruction of the right of privacy between physician and patient and the intimacy of relation which that entails." *Id.*

mental right of procreative choice in *People v. Belous*.<sup>36</sup> *Belous* was decided four years before the United States Supreme Court acknowledged the existence of a comparable federal constitutional right.<sup>37</sup> The court found the statutory language, "necessary to preserve the life of the mother,"<sup>38</sup> unconstitutionally vague:<sup>39</sup> "If the fact of ill health or the mere 'possibility' of suicide<sup>40</sup> is sufficient to meet the test of 'necessary to preserve her life,'<sup>41</sup> it is clear that a showing of immediacy or certainty of death is not essential for a lawful abortion."<sup>42</sup> The court held that such a definition would be an invalid infringement on the woman's constitutional "right to life"<sup>43</sup> and to choose whether to bear children."<sup>44</sup> The court further asserted that the critical is-

36. 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert denied*, 397 U.S. 915 (1970). *Belous*, a physician and surgeon, appealed his conviction for performing an abortion and conspiracy to commit an abortion in violation of CAL. PENAL CODE § 274 (amended repeatedly since 1967) and CAL. PENAL CODE § 184 (West 1970).

37. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973). See *supra* notes 15-35 and accompanying text for a discussion of the federal guarantee of procreative choice.

38. Section 274 of the Penal Code then read:

Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, is punishable by imprisonment in the state prison . . . .

CAL. PENAL CODE § 274 (amended repeatedly since 1967).

Section 274 now provides:

Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, except as provided in the Therapeutic Abortion Act . . . is punishable by imprisonment in the state prison.

CAL. PENAL CODE § 274 (West Supp. 1981).

39. *People v. Belous*, 71 Cal. 2d at 962-63, 458 P.2d at 198-99, 80 Cal. Rptr. at 359-60.

40. *People v. Abaranel*, 239 Cal. App. 2d 31, 48 Cal. Rptr. 336 (1965). The obstetrician performed an abortion after receiving letters from two psychiatrists indicating an abortion was necessary to prevent a possible suicide. The court reversed the conviction because the state could not prove the necessary criminal intent that the abortion was performed for a purpose other than to save the woman's life.

41. *People v. Belous*, 71 Cal. 2d at 962, 458 P.2d at 199, 80 Cal. Rptr. at 359.

42. *Id.*

43. *Id.* at 963, 458 P.2d at 199, 80 Cal. Rptr. at 359. "The woman's right to life is involved because childbirth involves risks of death." *Id.*

44. *Id.* The Court based its finding of the right to choose whether or not to bear children on *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965). "The fundamental right of

sue was not whether the rights existed, but whether the state had a compelling interest in their regulation.<sup>45</sup> The court concluded the compelling state interests were protection of maternal health and protection of the fetus.<sup>46</sup>

The court found that infringement of fundamental rights, resulting from a requirement that death of the mother be certain, was not justified on the basis of considerations of the woman's health when abortion is during the first trimester of pregnancy.<sup>47</sup> The pregnant woman's right to life<sup>48</sup> took precedence over the state's interest in protecting potential life.<sup>49</sup> Additionally, the vagueness of the statute caused the physician to act at "his" peril when "he" determined that the woman was *entitled* to an abortion.<sup>50</sup> Thus, the physician had a personal stake in reaching the conclusion that the woman should not have an abortion.<sup>51</sup> The statute would have deprived those women of abortions who were entitled to them for medical reasons.<sup>52</sup>

The California Supreme Court declined to decide the constitutionality of the Therapeutic Abortion Act<sup>53</sup> because the act

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a woman to choose whether or not to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right to privacy' or 'liberty' in matters related to marriage, family, and sex." *People v. Belous*, 71 Cal. 2d at 963, 458 P.2d at 199, 80 Cal. Rptr. at 359.

45. *Id.* at 964, 458 P.2d at 200, 80 Cal. Rptr. at 360.

46. *Id.* at 965-67, 458 P.2d at 201-02, 80 Cal. Rptr. at 361-62.

47. *Id.*

48. The Court defined "right to life" as the right of a woman to be free from the risks of childbirth. *Id.* at 963, 458 P.2d at 199, 80 Cal. Rptr. at 359.

49. *Id.* at 969, 458 P.2d at 203, 80 Cal. Rptr. at 363.

50. *Id.* at 972, 458 P.2d at 204, 80 Cal. Rptr. at 364.

51. *Id.*

52. *Id.* at 973, 458 P.2d at 205, 80 Cal. Rptr. at 365. Again, it appears that a high court is constructing the right of procreative choice upon the foundation of health.

53. The Therapeutic Abortion Act provides:

A holder of the physician's and surgeon's certificate, as defined in the Business and Professions Code, is authorized to perform an abortion or aid or assist or attempt an abortion, only if each of the following requirements is met:

(a) The abortion takes place in a hospital which is accredited by the Joint Commission on Accreditation of Hospitals.

(b) The abortion is approved in advance by a committee of the medical staff of the hospital, which committee is established and maintained in accordance with standards promulgated by the Joint Commission on Accreditation of Hospitals. In any case in which the committee of the medical staff consists of no more than three licensed physicians and surgeons, the unani-

was adopted after the abortion performed by Dr. Belous. The act denies abortion unless the committee of the medical staff finds that "[t]here is a substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother," and/or "[t]he pregnancy resulted from rape or incest."<sup>54</sup> The proponents of change appear to picture women as victims—of rape, incest, or disease—never as shapers of their own destinies.<sup>55</sup> Still, a woman's right to privacy to choose whether or not to bear children is contingent upon her victimization: She must be a victim of mental or physical disorder or rape to qualify for that which is hers as a person. This paternalistic attitude is almost always the basis for any reform of repressive laws governing women. The *C.D.R.R.* court departed from this protectiveness rationale by insisting that "the constitutional right of choice is essential [for a woman's] ability to retain *personal control* over her own body."<sup>56</sup>

## II. THE DIVERGENCE OF UNITED STATES AND CALIFORNIA SUPREME COURTS ON THE ISSUE OF ABORTION FUNDING

### A. FEDERAL DEFUNDING OF ABORTION

In the wake of *Roe* and *Doe*, many states implemented abortion statutes in accordance with the standards set forth by the Supreme Court. However, because the Court left many questions unanswered, state legislatures, influenced by a very vocal minority,<sup>57</sup> seized upon any means of limiting a woman's right to

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mous consent of all committee members shall be required in order to approve the abortion.

(c) The Committee of the Medical Staff finds that one or more of the following conditions exist:

(1) There is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother;

(2) The pregnancy resulted from rape or incest.

CAL. HEALTH & SAFETY CODE § 25952 (West Supp. 1981).

"The term 'mental health' as used in Section 25951 means mental illness to the extent that the woman is dangerous to herself or to the person or property of others or is in need of supervision or restraint." CAL. HEALTH & SAFETY CODE § 25954 (West Supp. 1981).

54. *Id.*

55. *Unfinished Business*, *supra* note 14, at 275.

56. *C.D.R.R. v. Myers*, 29 Cal. 3d at 274, 625 P.2d at 792, 172 Cal. Rptr. at 879.

57. According to a survey conducted by the National Opinion Research Center of

procreative choice. Legislation limiting women's access to legal abortions have included mandatory information,<sup>58</sup> consent<sup>59</sup> and notification provisions,<sup>60</sup> prohibition of advertisement or discussion of abortion services,<sup>61</sup> a requirement that all second trimester

the University of Chicago (NORC) in 1980, only 10% of U.S. adults disapproved of abortion under all circumstances:

<u>Circumstance</u>	<u>% which believed it should be possible for a woman to obtain legal abortion</u>
(1) If the woman's health is seriously endangered	90
(2) Pregnancy as a result of rape	83
(3) Strong chance of defective baby	83
(4) Family has low income and cannot afford child	52
(5) Woman not married and does not want to marry the man	48
(6) Woman married but does not want another child	47
For any reason	41
Average approval for the six specified reasons	67

Granberg & Granberg, *Abortion Attitudes, 1965-1980: Trends and Determinants*, 5 FAM. PLAN. PERSP. 250, 252 (1980).

58. In 1976, the Supreme Court stated that some form of special informed consent requirement for abortion was legal, even if prior written consent was not required for any other surgical procedure. *Planned Parenthood v. Danforth*, 428 U.S. 52, 67 (1976). Federal district and appellate courts have either preliminarily or permanently enjoined mandatory information requirements which provided a description of the fetal characteristics and giving biased information about the effects of abortion. Some courts have upheld state provisions which require the physician to inform the patient of alternatives to abortion. *See, e.g., Wynn v. Carey*, 582 F.2d 1375 (7th Cir. 1978), *aff'd*, 599 F.2d 193 (1979); *Margaret v. Edwards*, 488 F. Supp. 181 (E.D. La. 1980); *Planned Parenthood Assoc. v. Ashcroft*, 483 F. Supp. 679 (W.D. Mo. 1980); *Akron Center for Reproductive Health v. Akron*, 479 F. Supp. 1172 (N.D. Ohio 1979).

59. In 1976 the Supreme Court invalidated a Missouri statute which required the husband's prior written consent. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). The Court ruled that the decision whether or not to bear a child ultimately rests with the woman and her physician because it is she "who physically bears the child and who is more directly and immediately affected by the pregnancy . . ." *Id.* at 71.

In 1979 the Supreme Court held that a mature minor has the right to decide to have an abortion without parental consent. *Bellotti v. Baird*, 443 U.S. 622 (1979).

60. The Supreme Court has not decided whether states can require parental notification. However, four states now have parental notification statutes in effect. They are Maryland, Montana, Tennessee and Utah. *See REPRODUCTIVE FREEDOM PROJECT ACLU, WOMEN'S LEGAL GUIDE TO REPRODUCTIVE RIGHTS* 1, 11 (1981) [hereinafter cited as *WOMEN'S LEGAL GUIDE*].

61. Some state laws prohibiting advertisement or discussion of abortion services have been invalidated. *WOMEN'S LEGAL GUIDE*, *supra* note 48, at 14 (citing *Planned*

ter abortions be performed in hospitals,<sup>62</sup> and provisions for individual viability determinations.<sup>63</sup>

It is the governmental restriction of funding, however, that has unquestionably been the predominant factor in limiting women's access to safe abortion.<sup>64</sup> The first major case to deal with the constitutional issue of abortion defunding was *Maier v. Roe*.<sup>65</sup> In *Maier* the Supreme Court upheld a Connecticut Medicaid program which limited state funding for first trimester non-therapeutic abortions.<sup>66</sup> *Harris v. McRae*,<sup>67</sup> the most recent

*Parenthood Assoc. v. Ashcroft*, 483 F. Supp. 679 (W.D. Mo. 1980); *Valley Family Planning v. North Dakota*, 489 F. Supp. 238 (1980).

62. As of February, 1981, sixteen states require that second-trimester abortions be performed only in hospitals. They are California, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Massachusetts, Missouri, Montana, New York, North Dakota, Oklahoma, Tennessee, Utah and Virginia. *WOMEN'S LEGAL GUIDE*, *supra* note 60, at 12-13.

63. In *Colautti v. Franklin*, 439 U.S. 379 (1979), the Supreme Court held void for vagueness certain provisions of the Pennsylvania Abortion Control Act which statute provided in part:

(a) Every person who performs or induces an abortion shall prior thereto have made a determination *based on his experience, judgment or professional competence* that the fetus is not viable, and if the determination is that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable, shall exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the fetus to be born alive so long as a different technique would not be necessary in order to preserve the life or health of the mother.

(d) Any person who fails to make the determination provided for in subsection (a) of this section, or who fails to exercise the degree of professional skill, care and diligence or to provide the abortion technique as provided for in subsection (a) of this section . . . shall be subject to such civil or criminal liability as would pertain to him had the fetus been a child who was intended to be born and not aborted.

PA. STAT. ANN. tit. 35, § 6605(a) (Purdon 1977) (emphasis added).

64. See *Beal v. Doe*, 432 U.S. 438, 455 (1977) (Marshall J., dissenting) for a discussion of the impact of abortion defunding.

65. 432 U.S. 464 (1977). In *Maier*, plaintiffs attacked the Connecticut Medicaid program which limited state funding for first trimester, non-therapeutic abortions to those deemed medically necessary.

66. *Id.*

67. 448 U.S. 297 (1980). The majority upheld the constitutionality of the federal

abortion defunding case to be brought before the Supreme Court, addressed the controversial Hyde Amendment.<sup>68</sup> While purporting to uphold *Roe*, the Supreme Court effectively limited *Roe's* application. According to the Court, *Roe* did not guarantee an unqualified right to abortion; the right protects the woman only from undue burdens on her freedom to *decide* to terminate her pregnancy by abortion.<sup>69</sup> Since the state had not *directly* interfered with that fundamental right, the Court applied minimum scrutiny.<sup>70</sup> Because encouragement of childbirth sufficiently justified the withholding of funds by the state, no infringement was found.<sup>71</sup> The Supreme Court has made clear that it will be unwilling to closely scrutinize state action which *significantly affects* a woman's exercise of her right to choose. Infringement of that right probably entails the state giving another entity *absolute* veto power over her decision.

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Hyde Amendment. For a brief discussion of the Hyde Amendment, see *supra* note 5. *McRae* dealt with almost the identical issues as *Maher*. *Maher* involved a denial of funding for non-therapeutic abortions; *McRae* involved a denial of funding for therapeutic abortions unless they fell within the provisions of the amendment. Despite the majority's decision to uphold the constitutionality of the Hyde Amendment which cut federal funding to states for most abortions, some states have either voluntarily continued to fund abortions for indigent women (Alaska, Colorado, Hawaii, Maryland, Michigan, New York, North Carolina, Oregon, Washington, Washington D.C.) or fund abortions because of court order (California and Massachusetts) or have suits pending in the courts (Connecticut and New Jersey). ACLU NEWS, REPRODUCTIVE FREEDOM: VICTORY SPARKS ACTION, April, 1981.

68. See note 5 *supra* and accompanying text for a discussion of the Hyde Amendment.

69. *Id.* at 314 (citing *Maher v. Roe*, 432 U.S. at 473-74). In *Doe v. Bolton*, 410 U.S. 179 (1973), the Court struck down certain procedural requirements which unduly burdened the woman's ability to obtain an abortion: approval of a hospital committee, concurrence of two other physicians and performance of the abortion in a hospital. In *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), the Supreme Court found a spousal consent requirement unconstitutional. In *Bellotti v. Baird*, 443 U.S. 662 (1979), the Court determined that a mature minor need not obtain parental consent for an abortion. According to the *Maher* court, while the above requirements unduly interfere with a woman's right to decide to obtain an abortion, governmental withholding of Medicaid funds for abortion but not for childbirth does not unduly interfere with an indigent woman's right to decide. Theoretically, this may be true. A husband who can withhold consent has absolute veto power over his wife's decision to have an abortion; a state which withholds funds from an indigent woman for abortion but not for childbirth does not have *absolute* veto power over her decision. Realistically, it is doubtful that a woman qualified for Medicaid will be able to obtain money for an abortion. Thus, the state's power to withhold funds for abortion but not for childbirth acts as an absolute veto on the indigent woman's decision to obtain an abortion.

70. *Id.* at 315.

71. *Id.* at 325.



The Supreme Court has been willing, however, to inquire into the legislative motivation to determine whether or not the state action was premised upon an impermissible purpose. Under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>72</sup> a plaintiff need not prove that the legislative action rested *solely* on an impermissible purpose, or "even that a particular purpose was the dominant or primary one."<sup>73</sup> "When there is proof that an impermissible purpose has been a motivating factor . . . judicial deference is no longer justified."<sup>74</sup> One evidentiary source is legislative or administrative history, "especially where there are contemporary statements by members of the decision making body . . . ."<sup>75</sup>

The *Roe* reasoning "necessarily entails the proposition that no governmental action can be predicated on the view that the previability period abortion is per se morally objectionable."<sup>76</sup> However, government may take action that has the effect of discouraging women from seeking abortion as long as that action is not predicated on the idea that abortion is immoral.<sup>77</sup> The majority of the Court in *McRae* contended that *Roe* "does not prevent government 'from making a value judgment favoring childbirth over abortion, . . . by the allocation of public funds.'"<sup>78</sup> However, the "'value judgment favoring childbirth' . . . is predicated on the view that abortion is per se . . . morally objectionable."<sup>79</sup>

A review of the hearings on the proposed Hyde Amendment reveals that the perception of abortion as immoral played a very significant role in its passage. This is candidly illustrated by the representative who proposed the amendment: "[T]here are those

72. 429 U.S. 252 (1977). In *Village of Arlington Heights*, the Supreme Court sustained the Village's refusal to rezone from a single-family to a multiple-family classification. The Court held that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Id.* at 264-65. The plaintiff was unable to prove that a racially discriminatory purpose was a motive in the Village's rezoning decision. *Id.* at 270.

73. *Id.* at 265.

74. *Id.* at 265-66.

75. *Id.* at 268.

76. Perry, *Why the Supreme Court was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, 32 STAN. L. REV. 1113, 1116 (1980).

77. *Id.* at 1121.

78. *Id.* at 1122 (quoting *Maher v. Roe*, 432 U.S. at 474-75).

79. *Id.* at 1123 (quoting *Maher v. Roe*, 432 U.S. at 474-75).

of us who believe it is to the everlasting shame of this country that . . . this year over a million human lives will be destroyed because they are inconvenient to someone."<sup>80</sup> Since an impermissible purpose was a motivating factor in the abortion defunding cases, the Supreme Court should have struck them down.

**B. CALIFORNIA FUNDING OF ABORTION: *Committee to Defend Reproductive Rights v. Myers***

**1. *Facts***

Prior to 1978, the Medi-Cal program paid for legal abortions obtained by Medi-Cal recipients as part of its general medical funding program. In 1978, however, the California Legislature inserted provisions into the 1978 Budget Act restricting Medi-Cal funding of abortions.<sup>81</sup>

Before the 1978 restrictions could take effect, the plaintiffs<sup>82</sup> filed suit against Beverlee A. Myers, Director of the State De-

80. 122 CONG. REC. 20,410 (1976) (statement of Rep. Hyde).

81. Budget Act of 1978, 1978 Cal. Stat. ch. 359, § 2 (expired June 30, 1979). While the suit attacking the 1978 Budget Act restrictions was pending before the Supreme Court on petition for hearing, that act expired. It was replaced by an essentially identical provision in the 1979 Budget Act. Budget Act of 1979, 1979 Cal. Stat. ch. 259, § 2 (expired June 30, 1980). The primary difference between the 1978 and 1979 acts is that the former provided funding for abortions to avoid severe and long lasting physical health damage only when that damage arose from ten medical conditions: Toxemia, renal failure; diabetes with vascular degeneration; thrombosis; Addison's disease; high blood pressure with renal complications; high blood pressure with previous cardio-vascular accident; hydatidiform mole; congestive cardiac failure; and placenta previa.

Plaintiffs then filed an original petition in the Supreme Court, *C.D.R.R. v. Cory*, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981), seeking a mandate to bar enforcement of the 1979 Act. The Supreme Court granted an alternative writ and stayed enforcement of the restrictions pending resolution on the merits. *Id.* at 260, 625 P.2d at 783, 172 Cal. Rptr. at 870.

The 1979 Budget Act expired June 30, 1980, and was re-enacted by the 1980 Budget Act, 1980 Cal. Stat. ch. 510, § 2 (1980) (expired June 30, 1981), which imposed restrictions on abortion funding identical to those in the 1979 act. Plaintiffs then filed an original petition for mandate—*C.D.R.R. v. Unruh*, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981), to restrain enforcement of the 1980 act. The Supreme Court issued an alternative writ and stayed enforcement of the funding restrictions pending their resolution. *Id.* at 285, 625 P.2d at 799, 172 Cal. Rptr. at 886. Subsequently, the Court consolidated the three actions and reversed. *Id.*

82. The plaintiffs are comprised of various welfare and health care rights organizations: Women's Litigation Unit; San Francisco Neighborhood Legal Assistance Foundation; San Francisco National Center for Youth Law; San Francisco Equal Rights Advocates, Inc.; American Civil Liberties Union Foundation of Northern California, Inc., San Francisco; American Civil Liberties Union Foundation of Southern California, Los Angeles; three physicians; one patient; and one taxpayer.

partment of Health Services, to enjoin her from enforcing the restrictions.<sup>83</sup> The California Court of Appeal, in a two-to-one decision, held that the Budget Act was constitutional.<sup>84</sup> The California Supreme Court reversed.<sup>85</sup>

## 2. Issues

In evaluating the constitutionality of the Budget Act, the California Supreme Court found that, under article 1, section 1 of the California Constitution,<sup>86</sup> all women in the state possess a fundamental right to choose whether or not to bear a child.<sup>87</sup> The court employed the test long established by the California courts<sup>88</sup> in determining whether the government could indirectly infringe upon a Medi-Cal recipient's freedom of procreative choice. Stressing that the state "bears a heavy burden of demonstrating the practical necessity" for the unequal treatment, the Court followed the three-part test established in *Bagley v. Washington Township Hospital District*.<sup>89</sup>

- [1] Do the restrictions imposed on a poor woman's right of procreative choice relate to the purposes of the medi-

83. *C.D.R.R. v. Myers*, 29 Cal. 3d at 259, 625 P.2d at 800, 172 Cal. Rptr. at 869.

84. *Id.* (citing 93 Cal. App. 3d 492, 156 Cal. Rptr. 73 (1979)).

85. *C.D.R.R. v. Myers*, 29 Cal. 3d 252, 285, 625 P.2d 779, 799, 172 Cal. Rptr. 866, 886 (1981).

86. CAL. CONST. art 1, § 1 (1879, amended 1974) provides: "All people are by nature free and independent and have certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness and privacy."

87. The California Supreme Court first recognized the existence of the constitutional right of procreative choice in *People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

88. In the three decades prior to *C.D.R.R. v. Myers*, the California courts have considered the legality of a variety of public benefit programs which sought to condition the receipt of benefits on the waiver of a wide range of constitutional rights. See *Parrish v. Civil Serv. Comm'n*, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967) (receipt of welfare payments conditioned on the recipient's waiver of the right of privacy in his home); *Bagley v. Washington Township Hospital Dist.*, 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966) (hospital district discharged an employee because she refused to discontinue her activities in support of a recall election); *Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 171 P.2d 885 (1946) (conditioning the use of public school buildings for public meetings so as to exclude "subversive elements" from using the school for meetings); *Housing Authority v. Cordova*, 130 Cal. App. 2d 883, 279 P.2d 215 (1955) (excluding "subversive persons" from publicly supported low-rent housing projects).

89. 65 Cal. 2d 499, 505, 421 P.2d 409, 412, 55 Cal. Rptr. 401, 404 (1966).

cal program?<sup>90</sup>

- [2] Does the utility of imposing such restrictions manifestly outweigh the resulting impairment of the woman's constitutional rights?<sup>91</sup>
- [3] Do the statutory provisions serve the state interest in providing medical care to the poor in a manner least offensive to the woman's right of procreative choice?<sup>92</sup>

### 3. *Analysis*

In March, 1981, the California Supreme Court held that the California statutory restriction limiting Medi-Cal funding for abortions was unconstitutional.<sup>93</sup> Although the United States Supreme Court in *Maier*<sup>94</sup> and in *McRae*<sup>95</sup> upheld similar restrictions, the California Court reasoned that, because the federal cases presented no state constitutional question, the federal court had not addressed or resolved the question of whether the restrictions were consonant with California constitutional guarantees. The court concluded that Budget Act restrictions imposed on California poor women must be determined by the state courts: "[J]ust as the United States Supreme Court bears the ultimate judicial responsibility for determining matters of federal law, the [California Supreme Court] bears the ultimate judicial responsibility for resolving questions of state laws."<sup>96</sup>

To determine the constitutionality of the Budget Act restrictions under California law, the court started from the premise, first asserted in *Belous*<sup>97</sup> in 1969, that the fundamental right of a woman to choose whether or not to bear children followed from the right of privacy in matters related to marriage, family and sex.<sup>98</sup> While procreative choice is so fundamental

90. *Id.* at 505-06, 421 P.2d at 412, 55 Cal. Rptr. at 404.

91. *Id.* at 506, 421 P.2d at 413, 55 Cal. Rptr. at 405.

92. *Id.* at 507, 421 P.2d at 413, 55 Cal. Rptr. at 405.

93. *C.D.R.R. v. Myers*, 29 Cal. 3d at 257, 625 P.2d at 781, 172 Cal. Rptr. at 869.

94. *Maier v. Roe*, 432 U.S. 464 (1976). See *supra* notes 65-80 and accompanying text for a discussion of this case.

95. *Harris v. McRae*, 448 U.S. 297 (1980). See *supra* notes 67-80 and accompanying text for a discussion of this case.

96. *C.D.R.R. v. Myers*, 29 Cal. 3d at 261-62, 625 P.2d at 783, 172 Cal. Rptr. at 870.

97. *People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970). See *supra* notes 36-52 and accompanying text for a discussion of this case.

98. *Id.* at 963, 458 P.2d at 199, 80 Cal. Rptr. at 359.

that it merits the protection of both federal and state constitutional guarantees of privacy, the California provision is explicitly guaranteed.<sup>99</sup> Recently the court has ruled that California's constitutional guarantee of privacy is more protective than its federal counterpart in areas of familial autonomy and sexual freedom.<sup>100</sup>

The court in *C.D.R.R.* was more sensitive to the implication of unwanted childbirth than the United States Supreme Court. It asserted that "[c]losely related to this fundamental interest in life and health is the basic recognition that, for a woman, the constitutional right of choice is essential to her ability to retain personal control over her own body."<sup>101</sup> Other than in health terms, nowhere in either *Belous* or *Roe* did the courts stress the profound impact of unwanted childbirth upon a woman. In *C.D.R.R.* the court recognized that: "The implications of an unwanted child for a woman's education, employment and associational opportunities (often including marriage opportunities) are of enormous proportion."<sup>102</sup>

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99. CAL. CONST. art. 1, § 1 (1879, amended 1974). See *supra* note 86 for the text of this provision.

100. *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980). The California Supreme Court struck down a city ordinance which defined "family" as an individual or two or more persons related by blood, marriage or legal adoption or a group of not to exceed five other persons. The Court held that the distinction drawn by the ordinance between related and unrelated persons violates the right of privacy guaranteed by the California Constitution. Compare *City of Santa Barbara v. Adamson* with *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (sustaining an ordinance similar to that in *Santa Barbara*).

101. *C.D.R.R. v. Myers*, 29 Cal. 3d at 274, 625 P.2d at 792, 172 Cal. Rptr. at 879.

102. *Id.* at 275, 625 P.2d at 791, 172 Cal. Rptr. at 878 (quoting Karst, *supra* note 13, at 641, n.90). Another commentator has stated:

Of all the decisions a person makes about his or her body, one of the most profound and intimate relate to whether, when and how one's body is to become the vehicle for another human being's creation. If a man is the involuntary source of a child—if he is forbidden, for example, to practice contraception—the violation of his personality is profound; the decision that one wants to engage in sexual intercourse but does not want to parent another human being may reflect the deepest of personal convictions. But if a woman is forced to bear a child—not simply to provide an ovum but to carry the child to term—the invasion is incalculably greater.

L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 924 (1978), quoted in, *C.D.R.R. v. Myers*, 29 Cal. 3d at 274, 625 P.2d at 792, 172 Cal. Rptr. at 879. Thus, quite apart from the physical experience of pregnancy itself, an experience which of course has no analogue for the

After the court established that the right of privacy embraces procreative choice, it turned to the question of whether the statutory restriction on abortions funded by Medi-Cal required the surrender of a constitutional right as a condition to a benefit. If abortion and childbirth are independent constitutional rights, the government offends no constitutional principle by funding one and not the other, because the state has unquestioned authority to subsidize the exercise of one fundamental right without incurring an obligation to fund another.<sup>103</sup>

According to the California Supreme Court in *Belous*<sup>104</sup> and the United States Supreme Court in *Roe*,<sup>105</sup> abortion and childbirth are not independent constitutional rights. They are, rather, two aspects of a single right to procreative choice. The dissent in *C.D.R.R.* complained, however, that the legislature is merely "funding childbirth of some women."<sup>106</sup> However, as the majority pointed out, the state is not obligated to provide medical care to the poor, although once benefits are made available, it bears a heavy burden in justifying any statutory provision which withholds benefits from qualified individuals solely because they exercise a constitutional right.<sup>107</sup> The Attorney General argued, however, that the state violates no constitutional precept when it merely declines to extend a public benefit to individuals "who choose to exercise a constitutional right in a manner the state does not approve and does not wish to subsidize."<sup>108</sup>

According to the Supreme Court in *McRae*, the Federal

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male, there is the attachment the experience creates, partly physiological and partly psychological, between mother and child. *Id.* "[I]t is difficult to imagine a clearer case of bodily intrusion, even if the original conception was in some sense voluntary." *C.D.R.R. v. Myers*, 29 Cal. 3d at 274, 625 P.2d at 792, 172 Cal. Rptr. at 879 (quoting *L. Tribe, supra*, at 924).

103. For example, public and private educational rights are distinct constitutional rights. The guarantee of a free education is secured by the California Constitution, CAL. CONST. art. 1, §§ 1, 5, while the right to attend a non-public school is an aspect of the protection of liberty embodied in the fourteenth amendment of the United States Constitution, *Pierce v. Society Sisters*, 268 U.S. 510 (1925).

104. *People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

105. *Roe v. Wade*, 410 U.S. 113 (1973).

106. The breadth of the Medi-Cal program itself belies any suggestion that the state is giving only the specialized benefit of medical expense for childbirth as Medi-Cal also funds contraception and sterilization.

107. *C.D.R.R. v. Myers*, 29 Cal. 3d at 257, 625 P.2d at 781, 172 Cal. Rptr. at 869.

108. *Id.* at 263, 625 P.2d at 785, 172 Cal. Rptr. at 872.

Constitution requires no special justification for the discriminatory treatment of childbirth and abortion as long as the governmental action places no new obstacles in the path of the woman seeking to exercise her decision.<sup>109</sup> However, governing California cases have long held that a discriminatory government benefit program demands special scrutiny whether or not it erects new obstacles that impede the exercise of a constitutional right.<sup>110</sup>

In order to satisfy this special scrutiny, the state is required to show that it has a compelling interest for implementing the conditional prerequisites for receipt of the benefits.<sup>111</sup> To test whether the state interest in withholding funds for abortion (but not childbirth) was compelling, the California Supreme Court employed the three-part standard historically used to measure the constitutionality of statutory schemes which condition receipt of benefits upon the waiver of a constitutional right.<sup>112</sup>

According to the test, the state must demonstrate: (1) the imposed conditions relate to the purpose of the legislation which confers the benefit or privilege, (2) the utility of imposing the

109. *Harris v. McRae*, 448 U.S. at 315.

110. *C.D.R.R. v. Myers*, 29 Cal. 3d at 257, 625 P.2d at 781, 172 Cal. Rptr. at 869. A comparison of California and United States Supreme Court decisions demonstrates the divergence between the state and federal interpretations. *Id.* at 266, 625 P.2d at 786, 172 Cal. Rptr. at 873. In *Parrish v. Civil Serv. Comm'n*, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967), the California Supreme Court applied the *Bagley* three-part standard and found the governmental conditioning of the receipt of welfare benefits upon a recipient's waiver of his constitutional right of privacy in his name to be unconstitutional. By contrast, the United States Supreme Court in *Wyman v. James*, 400 U.S. 309 (1971), subjected a similar governmental intrusion upon the rights of welfare recipients to a lesser degree of scrutiny and then upheld the governmental policy. In *Wirta v. Alameda-Contra Costa Transit Dist.*, 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967), the California Supreme Court struck down a discriminatory public transit advertising policy which made advertising space on public buses available for commercial expression but denied this benefit to those who wished to advertise their political views. The United States Supreme Court in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), sustained the unequal advertising policy when it declined to use strict scrutiny. The California Supreme Court in *Fort v. Civil Serv. Comm'n*, 61 Cal. 2d 331, 292 P.2d 385, 38 Cal. Rptr. 625 (1964), used strict standards when it tested the constitutionality of limitations on the political activities of public employees. By contrast, the United States Supreme Court in *U.S. Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), upheld broad restrictions on political activities of federal employees when it used a less demanding standard.

111. *C.D.R.R. v. Myers*, 29 Cal. 3d at 265, 625 P.2d at 786, 172 Cal. Rptr. at 873.

112. *Id.* at 257, 625 P.2d at 781, 172 Cal. Rptr. at 868.

conditions must manifestly outweigh any resulting impairment of constitutional rights, and (3) the unavailability of less offensive alternatives.<sup>113</sup> The statutory restrictions failed to satisfy all three parts.

First, the restriction imposed on poor women who seek to exercise their constitutional right of procreative choice bears no relation to the fundamental purpose of the Medi-Cal program.<sup>114</sup> Indeed, the restrictions are contrary to the primary purpose of the program which is to alleviate the expense of those who cannot afford needed medical care.<sup>115</sup> The Budget Act restrictions on abortion funding would instead cause poor women to be subjected to significant health hazards or even death.<sup>116</sup>

Second, the utility of the funding benefits does not manifestly outweigh the impairment of constitutional rights because the fiscal advantages are illusory<sup>117</sup> and the purported state in-

113. *Bagley v. Washington Township Hospital Dist.*, 65 Cal. 2d at 505-06, 421 P.2d at 412, 55 Cal. Rptr. at 404.

114. *C.D.R.R. v. Myers*, 29 Cal. 3d at 271, 625 P.2d at 790, 172 Cal. Rptr. at 877. The purpose of Medi-Cal "is to afford health care and related remedial or preventive services to recipients of public assistance and to medically indigent aged and other persons, including related social services which are necessary for those receiving health care . . . ." CAL. WELF. & INST. CODE § 14000 (West 1980).

115. In 1979, 187,312 legal abortions were performed in California. Of those, approximately 52% were paid by Medi-Cal. *PLANNED PARENTHOOD AFFILIATES OF CALIFORNIA, THE FACTS OF LIFE IN CALIFORNIA 1981* (March, 1981) (compiled from State Department of Health Services Abortion Reports).

116. *C.D.R.R. v. Myers*, 29 Cal. 3d at 272, 625 P.2d at 690, 172 Cal. Rptr. at 877. About 1,000,000 abortions were probably performed every year in the United States prior to *Roe v. Wade*. *Unfinished Business*, *supra* note 14, at 260. See generally E. BATES & E. ZAWADSKI, *CRIMINAL ABORTIONS* (1964). The most accurate figure estimating the number of deaths from septic abortions during the same period is between 500 and 1,000 deaths. This does not include the number of women who die each year from causes related to real or imagined unwanted pregnancies—like suicide, murder or automobile "accidents." *Unfinished Business*, *supra* note 14 at 260 (citing Tietze & Lewit, *Abortion*, *SCIENTIFIC AMERICAN*, Jan., 1969, at 23). The legislative restrictions would have us return to the days when one percent of the women choosing to risk abortion die.

117. *C.D.R.R. v. Myers*, 29 Cal. 3d at 277-78, 625 P.2d at 793-94, 172 Cal. Rptr. at 881-82.

*Minimal Costs Associated With  
Unwanted Births*

Abortion . . . . .	\$ 379
Medi-Cal births . . . . .	2,225
One year follow-up care . . . . .	1,173
One year AFDC . . . . .	3,972
One year foodstamps . . . . .	240
One year fostercare . . . . .	5,021



terest in protecting nonviable life cannot subordinate a woman's right of procreative choice.<sup>118</sup> The Court recognized the "actual impairment of constitutional rights will be severe indeed."<sup>119</sup> The purpose of the Medi-Cal program belies any contrary suggestion, since the women who are most affected by the restrictions are the ones least able to pay for medically safe abortions. The budget restrictions do not merely provide a benefit which the indigent pregnant woman is realistically free to accept or refuse; on the contrary, the state is using the power of its purse to enforce compulsory childbirth.<sup>120</sup> The Court concluded that statutory restrictions would "severely impair or totally deny" the exercise of the woman's constitutional right and "only the most *compelling* of state interests" could satisfy the second prong of the *Bagley* text.<sup>121</sup>

The neutrality stance adopted by the court prevents the state from failing to subsidize a disfavored method of exercising a constitutional right. Even if the state can show a compelling interest in protecting a nonviable fetus, the state cannot pursue that interest in the discriminatory manner adopted by the legislature.<sup>122</sup> The state statutory scheme did not protect "all fetuses by promoting their interests over the rights of all women."<sup>123</sup> In the past, the court has criticized statutory schemes that restrict

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Adoption service ..... 4,263

These figures are based on 1977 costs. PLANNED PARENTHOOD AFFILIATES OF CALIFORNIA, *MEDI-CAL ABORTION: COST FACTORS* (1980) (compiled from State Department of Health Services Abortion Reports).

118. The rights involved are "the woman's right to life and to choose whether to bear children." *C.D.R.R. v. Myers*, 29 Cal. 3d at 274, 625 P.2d 792, 172 Cal. Rptr. at 879 (quoting *People v. Belous*, 71 Cal. 2d at 963, 458 P.2d at 199, 80 Cal. Rptr. at 359). *Roe v. Wade*, 410 U.S. 113 (1969), established permissible standards for state regulations of abortions, holding that prior to the third trimester of pregnancy the state may regulate only to protect the woman's health. Only during the third trimester may the state enact restrictions to protect the viable fetus. The state's efforts to limit first and second trimester abortions to protect the fetus "inverts the priority of interests established in *Roe* and improperly subordinates the woman's right of choice to the lesser state interests established in *Roe* and improperly subordinates the woman's right of choice to the lesser state interests in protecting a nonviable fetus." *C.D.R.R. v. Myers*, 29 Cal. 3d at 280, 625 P.2d at 795, 172 Cal. Rptr. at 882 (1981).

119. *C.D.R.R. v. Myers*, 29 Cal. 3d at 275, 625 P.2d at 791, 172 Cal. Rptr. at 878.

120. *Id.* at 276, 625 P.2d 791, 172 Cal. Rptr. at 878.

121. *Id.* (emphasis added).

122. *Id.* at 281, 625 P.2d at 794, 172 Cal. Rptr. at 881.

123. *Id.*

the rights of the poor more severely than others.<sup>124</sup>

And third, the state has less restrictive alternatives: It can meet the needs of indigent women without burdening their constitutional right of procreative choice by impartially funding both childbirth and abortion.<sup>125</sup> The court appropriately acknowledged that the implications of an unwanted child for a woman's education, employment and associational opportunities are enormous.<sup>126</sup> For a woman of low income, the results can be devastating.<sup>127</sup> The court concluded that the decision whether or not to bear a child "is so private that each woman in California, rich or poor, is guaranteed the constitutional right to make that decision as an individual, uncoerced by governmental intrusion."<sup>128</sup> The *morality* of abortion should be free to live in each home; it is not a legal or constitutional matter.<sup>129</sup>

### III. CONCLUSION

The abortion funding controversy has been but one aspect of the battle to keep the impact of *Roe* and *Doe* within the most narrow confines. Since 1973, anti-choice forces have been able to lobby for the passage of numerous restrictions.

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124. *Id.* See *Serrano v. Priest*, 18 Cal. 3d 728, 135 Cal. Rptr. 345, 557 P.2d 929 (1976). In *Serrano* the California Court struck down a school financing system, based upon local district taxes, as violating the equal protection clause of the California Constitution. The court found wealth to be a suspect class in this context because it touched upon a fundamental right (education) under the California Constitution and thus warranted a strict scrutiny analysis. The Supreme Court has recently reached the opposite conclusion in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1974), based upon the Federal Constitution. In *Serrano* the California Supreme Court recognized the quality of education one receives will have a direct impact upon the opportunities available in the work force and society at large. The court therefore held education a fundamental right. 18 Cal. 3d at 766, 557 P.2d at 951, 135 Cal. Rptr. at 367. The court reasoned that a system based upon local taxes resulted in varying qualities of education depending upon the wealth of the community in which the school was situated. Because wealth is a suspect classification under the California Constitution and, because a fundamental right was involved, the court found the financing plan violated the state equal protection clause.

125. *Id.* at 283, 625 P.2d at 795, 172 Cal. Rptr. at 882.

126. *Id.* at 275, 625 P.2d at 791, 172 Cal. Rptr. at 878, (quoting Karst, *supra* note 13, at 641, n.90).

127. In 1977, it cost a low-income family \$44,000 to raise a child to age eighteen on a bare minimum standard of living. PLANNED PARENTHOOD AFFILIATES OF CALIFORNIA, *MEDI-CAL ABORTION: COST FACTORS* (1980) (compiled from Population Reference Bureau Statistics (May, 1977)).

128. *C.D.R.R. v. Myers*, 29 Cal. 3d at 284, 625 P.2d at 797, 172 Cal. Rptr. at 884.

129. *Id.*

When the question of public funding of abortion came before the United States Supreme Court, it held that no fundamental right was infringed because the right of privacy only protected the woman from undue burdens on her right to decide.<sup>130</sup> Because the government had not unduly burdened her choice by direct interference, the Constitution required no close judicial scrutiny.<sup>131</sup>

The California Supreme Court, by contrast, has not been as deferential to the state legislature as the Supreme Court has been to Congress. In a line of California cases beginning with *Danskin v. San Diego Unified School District*,<sup>132</sup> the California court has required the state to show a compelling interest when the government seeks to grant a public benefit conditioned upon the recipient's waiver of a fundamental right. Although the waiver may fall short of an absolute prohibition of the right, it need only impede the actual exercise of the right.<sup>133</sup> Perhaps the real power of the *Danskin* line of cases lies in the fact that the California Supreme Court has made clear that it will take an active role in examining the constitutionality of governmental impediments to the implementation of constitutional rights.

In *C.D.R.R.*, the state funding restrictions represented an attempt by the state to condition the receipt of medical payments for the termination of pregnancy upon the waiver of the woman's right to choose abortion. After the California Supreme Court closely examined the governmental interests, it found the state could assert no compelling interests for funding childbirth, but not abortion. The decision has guaranteed that thousands of poor women, who each year must face the decision whether or not to have an abortion, may do so unhampered by governmental interference.

*Alison Erca*

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130. *Harris v. McRae*, 448 U.S. 297, 317 (1980).

131. *Id.* at 315.

132. *Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 171 P.2d 885 (1946).

133. *C.D.R.R. v. Myers*, at 263, 625 P.2d at 786, 172 Cal. Rptr. at 873.