15

In the Supreme Court of the United States

REHEARING, OCTOBER TERM, 1972

No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,
Appellants,
JAMES HUBERT HALLFORD, M.D.,
Appellant-Intervenor,
vs.
HENRY WADE,
Appellee.

On Appeal from the United States District Court for the Northern District of Texas.

No. 70-40

MARY DOE, et al., etc.,
Appellants,
vs.
ARTHUR K. BOLTON, Attorney General of the State of Georgia, et al., etc.,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia.

Motion for Leave to File Brief Amici Curiae on Behalf of Organizations and Named Women in Support of Appellants in Each Case, and Brief Amici Curiae.

THE CALIFORNIA COMMITTEE TO LEGALIZE ABORTION
THE SOUTH BAY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN
ZERO POPULATION GROWTH, INC.
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SUBJECT INDEX

Page

Motion for Leave to File Brief Amici Curiae on Behalf of Organizations and Named Women in Support of Appellants in Each Case 1

Amici Curiae Brief on Behalf of Organizations and Named Women in Support of Appellants in Each Case 4

Opinions Below 4

Jurisdiction 5

Interest of Amici Curiae 5

Summary of Argument 5

Argument: Laws Which Restrict or Regulate Abortion as a Special Procedure Violate the Thirteenth Amendment by Imposing Involuntary Servitude Without Due Conviction for a Crime 6

I. Under the Thirteenth Amendment a Woman Has the Right to Freedom from the Involuntary Servitude of Pregnancy and Childbearing in the Absence of Due Conviction for a Crime 6

A. Scope and Application of the Thirteenth Amendment 6

B. Involuntary Pregnancy and Childbearing as Involuntary Servitude 9

1. Pregnancy: A State of Physical Servitude 9

a. Changes Due to the Physical Invasion of the Pregnant Woman's Body 9

Page

b. Results of Metabolic Alteration of the Pregnant Woman's Vital System 10

c. Depletion of the Pregnant Woman's Calcium and Iron 11

2. Involuntary Pregnancy 12

a. Contraceptive Failure 12

b. Limitations on the Right to Refuse 14

3. The Thirteenth Amendment Includes Protection Against Involuntary Pregnancy and Childbearing 15

II. There Is No Compelling State Interest to Justify Impairment of the Pregnant Woman's Fundamental Constitutional Right to Be Free from Involuntary Servitude 16

A. The Necessity of Showing a Compelling State Interest 16

B. The Nature of State Interest in Areas of Exception Permitting Limited Imposition of Involuntary Service 17

1. Military Service 17

2. Involuntary Commitment or Hospitalization 18

3. Jury Duty 18

4. Payment and Reporting of Taxes 19

C. The Nature of State Interest in the Abortion Conflict 19

1. The State's Interest in Rights of the Fetus 19

Page

2. The State's Interest in Protecting the Health and Welfare of the Pregnant Woman 25
3. The State's Interest in Promoting Population Growth 26
4. The State's Interest in Punishing Sexual Conduct and Promoting "Public Morality" 27

III. If the Culpability of the Pregnant Woman Is Presumed Rather Than Proved, She Is Denied Due Process Under the Fourteenth Amendment 29

Conclusion 31

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS — Pages

United States Constitution:
Amendment XIII ..... *passim*
Amendment XIV 19-20, 29-30

STATUTES

Comstock Act, Stat. Sec. 3893, 42nd Congress, Ch. 3 (1883) 27-28
Georgia Code Ann., Sec. 26-1103 (1969) 20
Georgia Code Ann., Sec. 30-102 (1971) 15
New York Consolidated Laws, Ch. 40, Sec. 1142 (1884) 28
2A Texas Penal Code, art. 1201 (1961) 20
38 U.S.C., Sec. 101 *et seq.* (1958) 18
50 U.S.C. app., Sec. 454 (1967) 18
Uniform Anatomical Gifts Act 22

CASES

Allen v. Hixson, 111 Ga. 460, 36 S.E. 810 (1900) 23
Arver v. United States, 245 U.S. 366 (1918) 18

Bailey v. Alabama, 219 U.S. 219 (1910) 7, 16
Bates v. City of Little Rock, 361 U.S. 516 (1960) 17
Beltran v. Cohen, 303 F. Supp. 889 (N.D. Cal. 1969) 19
Bonner v. Moran, 126 F.2d 121 (D.C. Cir. 1941) 22

California v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) *cert. denied,* 397 U.S. 915 (1970) 20, 25-26
Cantwell v. Connecticut, 310 U.S. 296 (1940) 17
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Crews v. Lundquist, 361 Ill. 193, 197 N.E. 768 (1935) 19
Civil Rights Cases, 109 U.S. 3 (1883) 6-8, 16
Clyatt v. United States, 197 U.S. 207 (1905) 7

Pages

Deutch v. United States, 367 U.S. 456 (1961) 30

Eisenstadt v. Baird, 405 U.S. 430 (March 22, 1972) 28-30

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Harper v. Virginia State Board of Education, 383 U.S. 663 (1966) 8
Hodges v. United States, 203 U.S. 1 (1906) 7, 16-17
Hurley v. Eddingfield, 156 Ind. 416, 59 N.E. 1058 (1901) 23

In re Wells' Will, 221 N.Y. Supp. 714 (1927) 20
Irvin v. Dowd, 366 U.S. 717 (1961) 30

Jobson v. Henne, 355 F.2d 129 (1966) 18
Jones v. Mayer, 392 U.S. 409 (1968) 8, 16

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Kramer v. United States, 147 F.2d 756 (6th Cir. 1945) *cert. denied,* 324 U.S. 878 (1945) 18

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Pages

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Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301 (1928) 23

People v. Sanger, 222 N.Y. 192, 118 N.E. 637 (1918) 28
Pollock v. Williams, 322 U.S. 4 (1944) 7-8

Reese v. United States, 225 F.2d 766 (9th Cir. 1955) 18

Shelton v. Tucker, 364 U.S. 479 (1960) 17, 29
Sherbert v. Verner, 374 U.S. 398 (1963) 17
Skinner v. Oklahoma, 316 U.S. 535 (1942) 31

Taylor v. Georgia, 315 U.S. 25 (1942) 18
Thornhill v. Alabama, 310 U.S. 88 (1940) 29
Toadvine v. Cincinnati N. O. & T. R. Ry., 20 F. Supp. 226 (E.D. Ky. 1937) 23

Union Pacific Rwy. Co. v. Botsford, 141 U.S. 250 (1891) 16
United States v. Bennett, 24 Fed. Case No. 14571 (S. D.N.Y. 1879) 28
United States v. Lumsden, 499 F.2d 154 (9th Cir. 1971) 18
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Pages

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Wilson, Robert A., M.D., FEMININE FOREVER (1966) 24

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Motion for Leave to File Brief Amici Curiae on Behalf of Organizations and Named Women in Support of Appellants in Each Case.

The organizations and named individuals whose names are appended here respectfully move for leave to file a brief *amici curiae* in these cases. The attorneys for appellants in both cases and for appellant-intervenor in the

Texas case have consented to the filing of this brief. The respective attorneys for the appellees have not so consented.

THE CALIFORNIA COMMITTEE TO LEGALIZE ABORTION is an organization consisting of approximately 5,000 individuals organized into chapters throughout the State of California and dedicated to the cause of removing the State's intervention in the decisions of pregnant women to obtain abortions. The California Committee to Legalize Abortion engages in activities which include preparation and circulation of petitions, one such initiative petition bearing approximately 300,000 signatures from California citizens requesting that a measure be placed on the California ballot to remove the State's intervention process in current California abortion law.

THE SOUTH BAY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN is located in the San Francisco Bay Area, California, as an affiliate of the National Organization for Women, a civil rights organization founded in 1966 and with approximately 20,000 members throughout the United States. The South Bay Chapter was founded in 1970 and consists of approximately 300 members dedicated to active work in bringing women into the mainstream of society and affirming a belief in the basic human right to limit one's own reproduction, including women's civil right to abortion.

ZERO POPULATION GROWTH, INC., is a national organization dedicated to achieving population stabilization by voluntary means. Founded in 1969, Zero Population Growth, Inc., (ZPG) has 300,000 members in 300 active chapters throughout the United States. The organization favors the recommendation on abortion contained in the 1972 Report of the President's Commission on Population Growth and the Future.

The concern of *amici,* CHERIEL MOENCH JENSEN and LYNETTE PERKES, stems from their desire to be single whole individuals, unencumbered by a pregnant condition and in

full control of their physical destiny. The necessity of Lynette Perkes to participate fully in her marriage, coupled with the frequency of contraceptive failure (already experienced twice), precludes her right to be secure in a non-pregnant condition. The concern of Cheriel Moench Jensen stems from her need to be as reliable and promising a professional person as the men with whom she must compete. As long as normal married life puts her at constant threat of having her capacity to work and to earn a living suspended by unintended pregnancy and childbearing, she cannot enter into financial or professional commitments with the same confidence as a man.

Each of the organizations and individuals urges upon the Court the position that laws restricting or regulating abortion as a special procedure violate the Thirteenth Amendment by imposing involuntary servitude without due conviction for a crime and without the justification of serving any current national or public need.

Amici believe that this brief raises aspects of constitutional issues before this Court hitherto unexplored by the parties, and that the expressions herein will be of assistance to the Court in the decisions of importance now before it.

For these reasons, we respectfully request leave to file the within brief *Amici Curiae.*

Respectfully submitted,

JOAN K. BRADFORD
Attorney for Movants

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OPINIONS BELOW.

The opinions have been stated in appellants' briefs and are not repeated herein.

JURISDICTION.

The jurisdiction has been stated in appellants' briefs and is not repeated herein.

INTEREST OF AMICI CURIAE.

The interest of Amici Curiae has been set forth in the accompanying motion to file this brief and need not be reiterated here.

SUMMARY OF ARGUMENT.

Despite the numerous issues involved in these cases, this brief will address itself only to one, so as to avoid repetition of the arguments presented by appellants and by other briefs of *amici curiae*. We believe that the time is ripe for this Court to announce that the laws which restrict or regulate abortion as a special procedure violate the Thirteenth Amendment by imposing involuntary servitude without due conviction for a crime.

Although the Texas abortion laws permit abortion only in the single instance where the mother's life would be saved and the Georgia laws permit abortion in certain additional categories, both, in the view of *Amici,* involve rights of unwillingly pregnant women that make it appropriate to treat the particular issue, to which this brief addresses itself, as being the same in both cases.

ARGUMENT: LAWS WHICH RESTRICT OR REGULATE ABORTION AS A SPECIAL PROCEDURE VIOLATE THE THIRTEENTH AMENDMENT BY IMPOSING INVOLUNTARY SERVITUDE WITHOUT DUE CONVICTION FOR A CRIME.

I. UNDER THE THIRTEENTH AMENDMENT A WOMAN HAS THE RIGHT TO FREEDOM FROM THE INVOLUNTARY SERVITUDE OF PREGNANCY AND CHILDBEARING IN THE ABSENCE OF DUE CONVICTION FOR A CRIME.

A. Scope and Application of the Thirteenth Amendment.

The Thirteenth Amendment to the Constitution provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

The Amendment, by its very language, prohibits both slavery *and* involuntary servitude, and requires due conviction of a crime as a condition precedent to all forms of involuntary servitude regardless of racial contexts.

From the outset, the Amendment has been interpreted by this Court to apply to all persons without regard to race or class, and to guarantee universal freedom in the United States.

The first cases on the Amendment, the early *Civil Rights Cases* of 1883, 109 U.S. 3, interpreted the Amendment as establishing two principles: (1) the prohibition of all forms of involuntary servitude and slavery, and (2) a guarantee of universal freedom to all persons. *The Civil Rights Cases* found that just as the opposite of "slavery" is freedom, so this Amendment, by abolishing the conditions of slavery and involuntary servitude, established "freedom" throughout the United States by implication. This Court construed the Amendment as "establishing and decreeing universal civil and political freedom throughout the United States." (*Id.* at 20)

> By its own unaided force and effect it abolished slavery, and established universal freedom . . . for the amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude should not exist in any part of the United States. (*Id.* at 20)

Application of the Amendment has never been limited to racial contexts. As this Court stated in *Bailey v. Alabama,* 219 U.S. 219, 240-241 (1910):

> While the immediate concern was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons, of whatever race, color, or estate, under the flag. . . . The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude.

The Thirteenth Amendment prohibits many forms of compulsory labor, *i.e.,* involuntary servitude of all kinds. As defined by this Court, involuntary servitude is "a condition of enforced compulsory service of one to another." *Hodges v. United States,* 203 U.S. 1, 16 (1906).

Laws compelling personal service in liquidation of a debt or other obligation are null and void as violations of the Thirteenth Amendment. *Bailey v. Alabama, supra; Clyatt v. United States,* 197 U.S. 207 (1905); *Pollock v. Williams,* 322 U.S. 4 (1944). Statutes imposing criminal penalties on laborers who fail to perform work necessary to pay off advance wages from a prospective employer are void as violative of the Thirteenth Amendment, the undoubted aim of the Amendment being, "not merely to end slavery but to maintain a system of completely free and voluntary labor

throughout the United States." *Pollock v. Williams, supra* at 17.

As conditions and values change, constitutional language takes on new meanings, because constitutional concepts are not static, "not shackled to the political theory of a particular era." *Harper v. Virginia State Board of Education,* 383 U.S. 663, 669 (1966). The Thirteenth Amendment, as revived by this Court with new force in *Jones v. Mayer,* 392 U.S. 409 (1968), reconsidered the early interpretation of the Amendment as set forth in *The Civil Rights Cases* of 1883, *supra.* In *Jones v. Mayer, supra,* the Court stated, at 443:

> At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.

In *Jones v. Mayer, supra,* this Court was not reluctant to recognize within the Thirteenth Amendment the "promise of freedom," turning the focus again from what the Amendment prohibits to what it guarantees, a broader principle of freedom from compulsory service of one person to another. (Note, *The New Thirteenth Amendment: A Preliminary Analysis,* 82 HARVARD L. REV. 1264, 1307 [1969].)

From time to time, this Court has recognized certain exceptions to the Thirteenth Amendment in the interests of serving compelling national or public needs, *e.g.,* military service, jury duty, confinement of the mentally ill (see the cases cited under Section II. B. herein); each time surrounding the exception with safeguards to insure individual rights.

It is the purpose of this brief to show that anti-abortion laws, which force an unwillingly pregnant woman to con-

tinue pregnancy to term, are a form of involuntary servitude without the justification of serving any current national or public need.

B. Involuntary Pregnancy and Childbearing as Involuntary Servitude.

1. PREGNANCY: A STATE OF PHYSICAL SERVITUDE.

Pregnancy is not a mere inconvenience. "The physical and functional alterations of pregnancy involve all the body systems,"[1] displacing body parts, depleting the body of its necessary elements and changing its chemical balance.

The pregnant woman's body is in a state of constant service, providing warmth, nutrients, oxygen and waste disposal for the support of the conceptus.[2] These activities are always to the detriment of the woman's body. They are performed for the benefit of the conceptus alone unless an interest of the pregnant woman is also served thereby, that is, unless the pregnant woman defines the pregnancy as wanted.

a. Changes due to the physical invasion of the pregnant woman's body.

During pregnancy, enlargement of the uterus within the abdominal cavity displaces and compresses the other abdominal contents including the heart, lungs and gastro-intestinal tract. The resulting pressure has a direct effect on circulation of the blood and increase in venous pressure, sometimes leading to irreversible varicose veins and hemorrhoids

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1. Hern, W., *Is Pregnancy Really Normal?*, 3 FAMILY PLANNING PERSPECTIVES 7 (January, 1971).

2. *Amici* use the term "conceptus" in this section because it is the only medical term which covers the uterine contents in all stages of pregnancy. Hereinbelow, in Section II. C. of this brief, the term "fetus" is used because it is the term of legal familiarity. In all cases, *amici* continue to mean the uterine contents at all stages of pregnancy.

and, with predictable frequency, to disabling thrombophlebitis.[3] The gastro-intestinal tract experiences functional interference causing constipation and displacement of the urinary tract, thus urinary tract infections occur in six to seven per cent of all pregnant women and such infections, in turn, lead to kidney infections. During the second and third months, bladder irritability is quite constant. Tearing and overstretching of the muscles of the pelvic floor occurs frequently during delivery, causing extensive and irreparable damage to the pelvic organs and their supporting connections. Surgery is often required to return these organs to position. Bladder control may be permanently lost.[4] The weight of the contents of the uterus causes sacroiliac strain accompanied by pain and backache, with the effects of the pressure being felt as far as the outermost extremities of the woman's body. The weight causes such pressure on the cervical spine as to result in numbness, tingling and proprioceptive acuity reduction in the hands.[5]

b. Results of metabolic alteration of the pregnant woman's vital systems.

During pregnancy estrogen levels exhibit severe increase, this phenomena accounting for the symptoms of nausea and vomiting occurring in one-half or more of all pregnant women. If this condition is prolonged, hospitalization is required. Evacuation of the contents of the uterus results in immediate and dramatic relief of symptoms. In severe cases blood protein may be destroyed. Bodies of women who

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3. Hern, *supra,* 8; Taylor, E., OBSTETRICS, 206 (1972); Williams, *Antepartum Thrombophlebitis Complicated by Hyperuricemia, Uremia and Polyhydramnios,* 105 AM. J. OBST. & GYNEC., 116 (Sept. 1, 1969).

4. Hern, *supra,* 8; Oxorn, H. and Foote, W., HUMAN LABOR AND BIRTH, 7, 8, 12 (1968).

5. Taylor, *supra,* 70, 216.

have died from this condition exhibit the symptoms of starvation, acidosis, dehydration and multiple vitamin deficiencies.[6]

The excess progesterone produced by the placenta causes fluid retention, increase in blood pressure, weight gain, irritability, lassitude, severe emotional tension, nervousness, inability to concentrate, and inability to sleep.[7] At least 40 per cent of pregnant women have symptomatic edema, distorting the hands, face, ankles and feet.[8] A woman's lungs respire 45 per cent more air than normal in an attempt to obtain the needed oxygen, but oxygen absorbed is less than normal despite the extra effort of the crowded lungs.[9]

c. Depletion of the pregnant woman's calcium and iron.

Because the conceptus utilizes almost twice as much calcium as the pregnant woman can assimilate from administered and dietary calcium, extra calcium must be drawn from a woman's calcium stores, mostly from her long bones. Thus, the pregnant woman is likely to suffer leg cramps.[10] In young women, permanent bone deformation results.

Total loss of a woman's iron stores during pregnancy and delivery is measured at 680 mg. Thus anemia of pregnancy is high and almost all pregnant women, especially those having repeated pregnancies, require supplementary iron.[11]

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6. Hern, *supra*, 7; Taylor, *supra*, 186, 187.

7. Hern, 8; Taylor, 73.

8. Taylor, 189.

9. *Id.* at 52.

10. Macy and Hunscher, *An Evaluation of Maternal Nitrogen and Mineral Needs During Embryonic and Infant Development*, 27 AM. J. OBST. & GYNEC. 878 (1934).

11. Taylor, 199; Chaudhuri, *Correlation of Toxemia with Anemia of Pregnancy*, 106 AM. J. OBST. & GYNEC., 255-258 (Jan. 15, 1970).

Efforts to correct this condition may fail because many pregnant women cannot tolerate iron supplements.

With such extensive effects, can pregnancy be considered as merely a "natural" state of being?[12]

2. INVOLUNTARY PREGNANCY.

Amici ask this Court to consider the lack of options open to the pregnant woman at the time of onset of her pregnancy.

a. Contraceptive failure.

Contraceptives are never foolproof. Any act of intercourse between a fertile man and woman constitutes some risk of conception, no matter what contraceptives are used. One woman in five using the most effective contraceptive available, the combined oral contraceptive "pill," will have one unplanned pregnancy during her 25 reproductively susceptible years.[13] Many women cannot take the "pill" because of its side effects. The second most effective device is the intrauterine shield. With this device in place, one woman in three will have one unwanted pregnancy. (The tolerance rate among women using this device is 96 per cent.[14] Intra-

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12. See Hern, *supra*, at 5-10.

13. Food and Drug Administration Advisory Committee on Obstetrics and Gynecology, F. D. A. REPORT ON ORAL CONTRACEPTIVES (Sept. 1969). Failure rates are: combined oral contraceptives, 0.7 per cent; sequential oral contraceptives, 1.4 per cent; intrauterine loop, 2.7 per cent; the double-coil intrauterine device, 2.8 per cent. Each average woman has 25 reproductively susceptible years. Multiply 25 years × device failure rate per 100 woman years. Example: 25 years × 1.4 failures per 100 woman years due to sequential pill = 35 per cent chance per woman, meaning one woman in three having one failure during her lifetime due to the use of the sequential pill. Figures for "the pill" include only those failures resulting from the drug properties. They do not include forgetfulness.

14. Davis, *The Shield Intrauterine Device,* 106 AM. J. OBST. & GYNEC. 456 (Feb. 1, 1970).

uterine devices are not normally prescribed for women who have not already given birth.) The death rate associated with the use of either of these devices is about the same—three per 100,000 woman users per year;[15] or put another way, one woman in 1,300 using either of these methods will die as a result. Among women taking the "pill," one in 80 will suffer blood clotting requiring hospitalization.[16]

The diaphragm results in three failures per woman over her 25-year reproductive life span. Other methods (foam, jellies, rhythm, condoms) are far less reliable.[17]

If 100,000 women who do not wish to become pregnant take the pill, three will probably die within the year and 1,000 will become pregnant.

Using these figures as a basis, a far safer method can be postulated. If these 100,000 women use the diaphragm, resulting in 12,000 pregnancies which are then legally terminable with abortion, the total death risk to these 100,000 women then becomes 0.36 per 100,000 women. The laws under consideration do not allow women to reduce their risks in this way.[18]

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15. Gilmore, *Something Better Than the Pill?*, N.Y. TIMES MAGAZINE, 7, 36 (July 20, 1969).

16. American Medical Association Official Pamphlet, WHAT YOU SHOULD KNOW ABOUT THE "PILL" (1970).

17. Havemann, BIRTH CONTROL, at 58, 59 (1967). Failure rates for the diaphragm = 12 per 100 woman years (three per fertile woman lifetime); the condom = 14 per 100 woman years (3.5 per fertile woman lifetime); withdrawal = 18 per 100 woman years (4.5 per fertile woman lifetime); rhythm = 24 per 100 woman years (6.0 per fertile woman lifetime).

18. State of California Department of Public Health, FIFTH ANNUAL REPORT ON THE IMPLEMENTATION OF THE CALIFORNIA THERAPEUTIC ABORTION ACT, A Report to the 1972 Legislature pursuant to Section 25955.5 of the Health and Safety Code; Tietze, *Mortality with Contraception and Induced Abortion,* 45 STUDIES IN FAMILY PLANNING 6 (1969).

Westoff[19] reports that one-fifth of all pregnancies studied were unwanted. The magnitude of the problem then is very large, affecting most women in substantial ways.

Under the present state of contraceptive failure, a woman does not have the option of remaining free of pregnancy by making careful use of contraceptives. She is at some risk in using the most effective methods of contraception available.

b. Limitations on the right to refuse.

The average married woman expects to bear two to three children,[20] yet coitus takes place between a couple married during the period of the woman's reproductive years (age 18 to 43) an average of 2,535 times.[21] The frequency of coitus stated in the Kinsey Report is average behavior between married couples. If the woman wishes to remain free of pregnancy once her desired family size is reached, her only sure method of remaining so free of pregnancy is complete abstinence from sexual intercourse. If she embarks on such a course, will the law uphold her decision?

A wife has no legal power to refuse to participate in the intimacies of married life. If she refuses her husband's

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19. Bumpass and Westoff, *The Perfect Contraceptive Population*, 169 SCIENCE 1177 (1970).

20. United States Dept. of Commerce, CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS, BIRTH EXPECTATIONS DATA: JUNE 1971, 1, Series P-20, No. 232 (Feb. 1972).

21. This figure is derived from data provided in the Kinsey Report, SEXUAL BEHAVIOR IN THE HUMAN MALE, showing average marital coitus taking place with a frequency of 2.6 times per week when the male is age 20, and 1.3 times per week when the male is forty-five. As the figures show a straight line decline, the average weekly frequency rate is 1.95. Thus, 1.95 times per week × 52 weeks per year × 25 fertile years = 2,535 acts of coitus per married woman's fertile lifetime. Kinsey, Pomeroy, and Martin, SEXUAL BEHAVIOR IN THE HUMAN MALE, at 255, data from Fig. 49 (1948).

forced attentions, there is no law to intervene in her behalf. She cannot charge her husband with rape. Indeed, if a married woman attempts to practice abstinence, the laws of most states treat her behavior as a denial of the marital right of the husband. Some jurisdictions construe refusal of sexual relations as desertion and thus ground for divorce. This is the law in Georgia under *Ga. Code Ann.* Sec. 30-102. (See also, *Whitfield v. Whitfield* 89 Ga. 471, 15 S.E. 543 [1892].) In some other jurisdictions, desertion is held to occur upon cessation of sexual relations notwithstanding that the spouses continue to take meals together, converse and in other ways behave as husband and wife.[22] In some other states in which cruelty is a ground, such refusal constitutes cruelty, giving the husband cause for divorce. In the states now recognizing "no-fault" divorce, or dissolution of marriage, the husband no longer needs to plead or prove specific grounds; his dissatisfaction is thus acceptable as sufficient cause for dissolving the marriage.

Under present law, a married woman has two choices: she can attempt to refuse to fulfill the sexual obligations of the marriage and thus risk termination of her marriage; or she can participate in normal marital relations and risk unwanted pregnancy and childbirth. With a choice of either alternative, she risks the consequence of a legally imposed penalty. The woman is left with no non-punishable course of action.

3. THE THIRTEENTH AMENDMENT INCLUDES PROTECTION AGAINST INVOLUNTARY PREGNANCY AND CHILDBEARING.

The women who bear children and the medical experts who assist them testify that pregnancy and childbearing are indeed labor. The fact that many women enter into such labor voluntarily and joyfully does not alter the fact that

22. Clark, THE LAW OF DOMESTIC RELATIONS, 336 (1968).

other women, under other circumstances, find childbearing too arduous, become pregnant through no choice of their own, and are then forced to complete the pregnancy to term by compulsion of state laws prohibiting voluntary abortion.

It is the purpose of the Thirteenth Amendment to prohibit a relationship in which one person or entity limits the freedom of another person. In the absence of a compelling state interest or due conviction for a crime, the state's forcing the pregnant woman through unwanted pregnancy to full term is a denial of her Thirteenth Amendment right to be free from "a condition of enforced compulsory service of one to another." (*Hodges v. United States, supra*). This is the very essence of involuntary servitude in which the personal service of one person is "disposed of or coerced for another's benefit." (*Bailey v. Alabama, supra.*)

II. THERE IS NO COMPELLING STATE INTEREST TO JUSTIFY IMPAIRMENT OF THE PREGNANT WOMAN'S FUNDAMENTAL CONSTITUTIONAL RIGHT TO BE FREE FROM INVOLUNTARY SERVITUDE.

A. The Necessity of Showing a Compelling State Interest.

The Thirteenth Amendment guarantees to every person those fundamental rights which are "the essence of civil freedom." *Jones v. Mayer, supra; The Civil Rights Cases, supra.* In *Union Pacific Railway Company v. Botsford,* 141 U.S. 250, 251 (1891), this Court recognized:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

It is clear that in order to justify the regulation of fundamental private rights, the state must show a compelling need. "Where there is significant encroachment upon

personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates v. City of Little Rock,* 361 U.S. 516, 524 (1960).

The critical issue is whether the state's regulation is "necessary . . . to the accomplishment of a permissible state policy." (*McLaughlin v. Florida,* 379 U.S. 184, 196 [1964]; *NAACP v. Button,* 371 U.S. 415, 438 [1963]; *Sherbert v. Verner,* 374 U.S. 398, 403 [1963]), and whether legislation impinging on constitutionally protected areas is narrowly drawn and not of "unlimited and indiscriminate sweep." *Shelton v. Tucker,* 364 U.S. 479, 490 (1960). See also *Cantwell v. Connecticut,* 310 U.S. 296, 308 (1940); *McCann v. Babbitz,* 310 F. Supp. 293 (E.D. Wis. 1970), (per curiam) *appeal dismissed,* 400 U.S. 1 (1970) (per curiam).

B. The Nature of State Interest in Areas of Exception Permitting the Imposition of Involuntary Service.

The law has recognized certain exceptions to the Thirteenth Amendment, all such exceptions being based on the state's compelling interest in serving the common need. Thus, although the Thirteenth Amendment proscribes a "condition of enforced compulsory service of one to another" (*Hodges v. United States, supra*), services required by the state for the benefit and protection of all citizens do not fall within the meaning of involuntary servitude under the Thirteenth Amendment. Avins, *Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Antidiscrimination Legislation,* 49 CORNELL L.Q. 228, 240 (1964).

1. MILITARY SERVICE.

Compulsory military service is not regarded as involuntary servitude, because the draftee's surrender of personal freedom and safety are made in the interests of national

defense, a common need. *Arver v. United States (Selective Draft Law Cases),* 245 U.S. 366 (1918); *United States v. Lumsden,* 449 F.2d 154 (9th Cir. 1971). Nor is the Thirteenth Amendment regarded as violated by assignment of conscientious objectors to work camps or other work assignments as an alternative to military service; again, a common need is served. *Kramer v. United States,* 147 F.2d 756 (6th Cir. 1945), *cert. den.* 324 U.S. 878; *Reese v. United States,* 225 F.2d 766 (9th Cir. 1955); *United States v. Rogers,* 454 F.2d 601 (7th Cir. 1971). However, the draftee is pressed into service only if his physical condition permits such service (*Selective Service Act of 1967,* 50 U.S.C.A. app. Sec. 454 [a]); he is paid for his services (*Id.* Sec. 454 [e]); and is further reimbursed by way of veterans' benefits (38 U.S.C. Sec. 101, *et seq.*).

2. INVOLUNTARY COMMITMENT OR HOSPITALIZATION.

The compulsory commitment of mentally ill individuals who may be harmful to themselves or to society if allowed to remain at large does not violate the Thirteenth Amendment, but only if the commitment procedures contain sufficient procedural safeguards and if the activities required of the individuals are for therapeutic purposes. *Jobson v. Henne,* 355 F.2d 129 (1966). However, if the mental institution requires inmates to perform chores which have no therapeutic purpose or relationship to the inmate's personal needs, the Thirteenth Amendment is violated. *Ibid.* See also *Taylor v. Georgia,* 315 U.S. 25 (1942) and Note, *District of Columbia Hospitalization of the Mentally Ill,* 65 COLUM. L. REV. 1062, 1066-72 (1965).

3. JURY DUTY.

Jury duty does not constitute involuntary servitude; such service rendering effective the government under which

liberty of the citizen may be protected. *Crews v. Lundquist,* 361 Ill. 193, 197 N.E. 768 (1935). But the citizen called for jury duty is excused if personal duties override.

4. PAYMENT AND REPORTING OF TAXES.

Payment and reporting of taxes is not regarded as involuntary servitude because the service is for support of the general welfare and not for another individual. *Beltran v. Cohen,* 303 F. Supp. 889 (N.D. Cal. 1969).

C. The Nature of State Interest in the Abortion Conflict.

The state's restriction or regulation of abortion as a special procedure imposes limitation on the pregnant woman's control of her person and her services. What compelling state interest justifies such impairment of her personal rights? A number of possible reasons have been stated:

1. THE STATE'S INTEREST IN RIGHTS OF THE FETUS.[23]

An argument recently raised is that the state has a compelling interest in protecting the rights of the fetus. This is the legal position taken by those who argue that conception is a dramatic moment in the evolution of a human being, after which the fetus becomes a "person" within the terms of the due process clause of the Fourteenth Amendment, and is so entitled to the constitutional protections afforded any other citizen.

Such argument disregards the nature of the state's interest in the fetus in all contexts other than the modern abortion conflict: *First:* The rights of citizenship con-

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23. *Amici* will, in this section, use the term *"fetus"* when referring to the contents of the uterus although the term is medically incorrect. Medically, the term *"embryo"* refers to the organism from conception through the first three months of gestation; the term *"fetus"* refers to the organism from the end of the first three pre-natal months until birth; the term *"conceptus"* covers *in utero* being through all stages of pregnancy. *Amici* use *"fetus"* here, a more familiar legal term.

ferred by the Fourteenth Amendment relate to "all persons *born* or naturalized . . ." (emphasis added). There are no cases holding that fetuses are protected by the Fourteenth Amendment. *Second:* Of all the statutes and rules referred to by proponents of the "right to life" argument, none confers rights on the fetus *in utero;* all such rights exist only in contemplation of live birth or reflect interests of the parents.[24] *Third:* The state does not generally regard as punishable the destruction of the fetus by any person other than the doctor or abortionist. See *Keeler v. Superior Court,* 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970), in which the California Supreme Court held that the assailant of a pregnant woman could not be guilty of murder although a Caesarean section and examination *in utero* revealed that the fetus, of approximately thirty-five weeks, had died of a severely fractured skull and resultant hemorrhaging. The same result would apply in Texas under 2A *Tex. Pen. Code,* art. 1202 (1961) and in Georgia under *Ga. Code Ann.,* Sec. 26-1103.

Some courts and commentators have already analyzed and rejected the idea that the state has any compelling interest in protecting the rights of the fetus. See *California v. Belous, supra; McCann v. Babbitz, supra;* Sands, *Therapeutic Abortion Act: An Answer to the Opposition,* 13 U.C.L.A. L. Rev. 285, 305 (1966); Ziff, *Recent Abortion Law Reforms,* 60 J. Crim. L. C. & P.S. 3 (1969).

Nevertheless, even if the position were accepted, *arguendo,* that the fetus is a "person" or "potential person,"

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24. See *e.g. In re Wells' Will,* 221 N. Y. Supp. 714 (1927), and *Carroll v. Skloff,* 415 Pa. 47, 202 A.2d 9 (1964), (ownership of property wholly dependent on live birth); Atkinson, Wills, 75 (2d ed. 1953); Prosser, Torts, 356 (3d ed. 1964), (an individual may sue for pre-natal injuries "provided he is born alive"); *California v. Belous,* 71 Cal. 2d 954, 968, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. den.* 397 U.S. 915 (1970), ("All of the statutes and rules relied upon [to support the right to life] require a live birth or reflect the interest of the parents.").

such recognition of the fetus would not provide the state with a compelling interest to justify encroachment upon the pregnant woman's possession and free control of her own person.

Let us assume, for the time being, that the pregnant woman and the fetus she carries within her body have come before the law as equal "persons." The woman desires an abortion. May the state legitimately intervene to prevent the abortion? At the present stage of medical knowledge and ability to control human incubation, the fetus cannot survive and develop into a separate self-sustaining person without contribution of the bodily force of the single female individual who carries that particular fetus within her body. Yet the laws prohibiting and regulating abortion, unlike all other laws in respect of persons, compel this pregnant woman to breathe, process food and donate blood for the sustenance of another human entity, either fully or partially developed. In no other instance does the law compel one individual to donate his/her bodily force to another individual. In no other instance does the law give another human — even a fully developed human — a right to life beyond that which the person himself can sustain.

The law does not give a person in need of blood the right to receive blood from an unwilling donor; the conclusiveness of the law on this subject being so clearly recognized that it is difficult even to imagine testing such a principle in the courts.[25]

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25. Notwithstanding the close relationship of parent and living child, there is no legal duty of the parent to contribute blood from his/her body for the donation to the living child. Even the parent of a live hemophiliac child is not required to donate his/her blood —the principle element for keeping the child alive. Nor are parents of living children required to draw any substance from their own bodies for contribution to their children. Mothers are not compelled to breast-feed their babies although medical data indicate that breast-fed babies are healthier.

The law does not give a person whose kidneys or other body parts are not functioning the right to demand another person's kidneys or body parts. The *Uniform Anatomical Gifts Act,* now enacted in forty-four states, recognizes that bodily parts are contributed only by the voluntary act of the donor; and the very titles of the statutes known as anatomical "gift" acts imply that lawmakers have never had any intention of authorizing forcible contributions of bodily parts from one human being to another. Rather than protecting the interests of potential donees in such cases, the state zealously safeguards the rights of potential organ donors. Legislators, courts and commentators, recognizing that there is no obligation, either legally or morally, for one person to supply another, even a close relative who may be dying, with a healthy organ, turn their attention to the issue of informed consent of the potential donor to make sure that he is acting free from any psychological coercion. See *Bonner v. Moran,* 126 F.2d 121 (D.C. Cir. 1941); Curran, *A Problem of Consent: Kidney Transplantation,* 34 N.Y.U. L. Rev. 891 (1959); Richards, *Medical-Legal Problems of Organ Transplantation,* 21 Hastings L. J. 77 (1969); Sanders and Dukeminier, *Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation,* 15 U.C.L.A. L. Rev. 357 (1968)[26]

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26. Sanders and Dukeminier note that the law permits kidney donation only from adult persons fully informed of the risks and consequences; that the use of prisoners as organ donors has been discontinued on the grounds of possible abuse; that kidney transplantations from living donors are illegal in France because of the fear of moral or psychological coercion. The authors state that donors with only one remaining kidney run the risk of shortening their lives should they be afflicted with kidney disease; and conclude by questioning the propriety of allowing any donor to take such risk. Where the life of the kidney donor may be placed in jeopardy by his donation, or where the consent of a minor is involved, courts use extreme care to be sure that knowing and voluntary consent precedes the donation. See *Bonner v. Moran, supra.*

As a general rule the law has traditionally been reluctant to impose liability on a person who has failed to rescue or aid one in peril as such liability would be an unwarranted limitation on personal freedom. *The Failure to Rescue: A Comparative Study,* 52 COLUMBIA L. REV. 631, 632 (1952). A person is not required to jeopardize his own safety to rescue another placed in danger by emergency circumstances. *London v. Atlanta Transit Company* (1955) 91 Ga. App. 753, 87 S. E. 2d 103, 106. This rule has a long history in case law,[27] and has been reaffirmed in the *Restatement of the Law of Torts (Second)* Section 314 (1965): "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him the duty to take such action." And Comment C of the Reporter's Notes states:

> The rule stated in this Section is applicable irrespective of the gravity of the danger to which the other is subjected and the insignificance of the trouble, effort, or expense of giving him aid or protection.

While it may be argued that the continuation of pregnancy is a non-active course, and so lacking in comparison with cases relating to "no duty to act," experts recognize that, once conception has taken place, there is *no* non-active course open to the pregnant woman. To abort takes action; to sustain the fetus also takes action. Even if the life support services which the woman's body brings into performance for sustenance of the fetus are largely automatic and non-voluntary, they are not non-services or non-actions. They are, according to medical experts, arduous, tiring and obstructive of other work. The contractions of childbirth

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27. *Toadvine v. Cincinnati, N.O. & T.R. Ry.* (E.D. Ky. 1937), 20 F. Supp. 226; *Allen v. Hixson,* 111 Ga. 460, 36 S.E. 810 (1900); *Hurley v. Eddingfield,* 156 Ind. 416, 59 N.E. 1058 (1901); *Gilbert v. Gwin-McCollum Funeral Home,* 268 Ala. 372, 106 So. 2d 646 (1958); *O'Keefe v. W. J. Barry Company,* 311 Mass. 517, 42 N.E. 2d 267 (1942); *Osterlind v. Hill,* 263 Mass. 73, 160 N.E. 301 (1928).

are literally "labor." They are the most strenuous work of which the human body is capable.

According to Robert A. Wilson, M.D., obstetrician and gynecologist: "The pressure exerted in this act of birth is at least 80 pounds per square inch, a truly astonishing feat of sheer muscular strength."[28]

Abortion laws alone compel the contribution of one individual's organs, blood, breath and life support system for another individual, either fully or partially formed. Unless the law recognizes fetuses as more valuable to the state or more worthy of the state's intervention than other potential donees of bodily organs or unless the state finds the freedom and bodily integrity of pregnant women to be less valuable than that of other potential donors, the state must be assumed to maintain in the abortion conflict at least the same position as it does in any similar conflict between two living persons. That is, whenever one person requires an organ donation, or a pint of blood, or even the temporary use of the other person's lung power for artificial respiration, the potential donor's right to refuse is not measured by the degree of interest the state may take in the life of the potential recipient. Rather, it is measured against the potential donor's right in his/her own bodily integrity.

If the pregnant woman, as potential donor, and the fetus, as potential donee, come before the law as equal "persons," one may not command involuntary servitude of the other; and so the potential donor retains her sovereignty over her body and her right to refuse. Therefore, it follows that the fetus, a potential person, can have no greater right over a potential donor. Unless the state has

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28. Wilson, Robert A., M.D., (Fellow of the American College of Surgeons Board of Obstetricians-Gynocologists, Diplomate of the International College of Surgeons, Fellow of the International College of Surgeons) describes such measurements in his book FEMININE FOREVER (1966).

some other compelling interest in forcing the donation of the pregnant woman's body to the service of the fetus, the state must stand aside in the abortion conflict; it cannot legitimately intervene in preventing the pregnant woman from withholding her life force from the fetus.

2. THE STATE'S INTEREST IN PROTECTING THE HEALTH AND WELFARE OF THE PREGNANT WOMAN.

Strict control by the state of all surgical procedures, not just abortion, is justifiable in the interests of the health of the persons involved. But state control of abortion otherwise available through modern medical science actually inhibits the health of the mother, and frustrates the very interest the state would protect.

When abortion laws were first adopted in this country, surgery was very dangerous. Aseptic procedures and antibiotics were unknown. Nearly 40 per cent of patients undergoing surgery of all kinds in the early 19th century died. See, *e.g.*, Ober, *Analysis of Surgical Practice at the New York Hospital,* 1808-33 (1970); *California v. Belous, supra,* at 965.

Today, however, it is literally safer for a woman to have an abortion in early pregnancy than to go through childbirth. See *California v. Belous, supra,* at 965. The maternal mortality rate for therapeutic abortion is three per 100,000; the maternal mortality rate connected with pregnancy and childbirth is 20 per 100,000. Tietze, *Mortality with Contraception and Induced Abortion,* 45 STUDIES IN FAMILY PLANNING 6 (1969).

On the other hand, women who cannot obtain therapeutic abortions because of the law are driven to criminal abortionists where mortality and morbidity rates are astronomical. See, *e.g.,* Moritz and Thompson, *Septic Abortion,* 95 AM. J. OBST. & GYNEC. 46 (1966); Reid, *Assessment and Management of the Seriously Ill Patient Following Abor-*

tion, 199 J.A.M.A. 805 (1967). Today, abortion restrictions designed "to protect women from serious risks to life and health in modern times become a scourge." *California v. Belous, supra,* at 967.

Any justification for abortion laws based on protecting the woman's health has long since been rendered obsolete by medical science, and no compelling state interest in this justification can possibly remain.

3. THE STATE'S INTEREST IN PROMOTING POPULATION GROWTH.

Abortion was not a crime at common law unless induced after the fetus had "quickened," *i.e.,* moved in the womb. Perkins, *Criminal Law* (1957) 101. Abortion prior to quickening was outlawed and punished as crime in France, England and the United States at the time when those countries required manpower for armies, settling or colonization, with the harshest anti-abortion laws existing in societies with an overriding interest in producing soldiers for military conquest. See Leavy and Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws,* 35 So. Cal. L. Rev. 123 (1962); Means, *The Law of New York Concerning Abortion and the Status of the Fetus, 1664-1968: A Case Study of Cessation of Constitutionality,* 14 N.Y.L.F. 411 (1968).

In the early history of our country's colonization and settlement, there was a felt need for more persons. Consequently, population growth was encouraged by anti-abortion law, and importation of slaves was allowed.

Unfortunately, our abortion law is dangerously out of date. Many of our laws and customs still reflect the desires of a nation seeking to fill a frontier. These laws, sensible enough at earlier stages of history when man's survival may have depended on encouraging population maintenance and growth, have become foolish and dangerous in the light of changed circumstances.

A state cannot seriously contend today that restrictions on abortion are justified by an overriding state interest in increasing population. See Ehrlich, *The Population Bomb,* 1968. On the contrary, it is accepted government policy to limit family size and to encourage family planning. Such state interest is expressed in *Population and the American Future, The Report of the President's Commission on Population Growth and the Future* (March, 1972) p. 192:

> Recognizing that our population cannot grow indefinitely, and appreciating the advantage of moving now toward the stabilization of population, the Commission recommends that the nation welcome and plan for a stabilized population.

The President's Commission recognizes the acceptability of voluntary abortion as a method of achieving population stability. (*Id.* at pp. 173-174, 177-178).

4. THE STATE'S INTEREST IN PUNISHING SEXUAL CONDUCT AND PROMOTING "PUBLIC MORALITY."

It is often argued that restrictions on abortion discourage sexual promiscuity by deterring pre-marital and extra-marital sex, and thus enhance "public morality." Such arguments must be reviewed in historical perspective.

The Nineteenth Century morality, in which anti-abortion and anti-contraceptive laws first flourished in this country, regarded sex and sexual information as "sinful." The *Comstock Act*[29], which prohibited dissemination of obscene ma-

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29. The Comstock Act, Stat. § 3893, 42nd Congress, Ch. 3 (1883): "Whoever . . . shall sell, lend, or give away . . . or shall have in his possession . . . any obscene book, pamphlet, writing, advertisement, circular, print, picture, drawing or other representative figure . . . or any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion, or shall advertise the same for sale . . . or shall manufacture, draw or print . . . any of such articles shall be deemed guilty of a misdemeanor . . ."

terials, did not differentiate between medical or technical studies of sexual activity, contraception, abortion, marriage manuals or hard core pornography. The public was to be shielded from all such sexual information.

The first case brought under the *Comstock Act* found a book dealing with sex in marriage to be obscene.[30] A New York statute[31] patterned after the *Comstock Act* served as the basis for conviction of Margaret Sanger when she opened the first birth control clinic in New York and attempted instruction of women regarding their reproductive systems.[32]

In the modern context, such archaic laws have been abridged by judicial decision and legislation recognizing needs for population control, public health and rights of individuals. (See *Griswold v. Connecticut,* 381 U.S. 479 [1965] and *Eisenstadt v. Baird,* 405 U.S. 430 [March 22, 1972].)

There is no evidence that a prohibition on abortion deters "immoral conduct" or even non-marital sex. This Court recently rejected a similar argument in invalidating a Massachusetts statute that prohibited sale of contraceptives to unmarried persons. *Eisenstadt v. Baird, supra.*

> [W]e cannot agree that the deterrence of pre-marital sex may reasonably be regarded as the purpose of the Massachusetts law. . . . It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication . . . (*Id.* at 440.)

In *Eisenstadt v. Baird,* this Court found that a prohibition on dissemination of contraceptives without limitation

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30. *United States v. Bennett,* 24 Fed. Case No. 14571 (S.D.N.Y. 1879).

31. *N. Y. Consolidated Laws,* Ch. 40 § 1142 (1884).

32. See *People v. Sanger,* 222 N.Y. 192, 118 N.E. 637 (1918).

to specifically criminal conduct swept too broadly. We submit that a prohibition on abortion without limitation to specifically criminal conduct (*e.g.,* fornication, adultery, prostitution) sweeps too broadly, prohibiting abortion for unwanted pregnancy occurring in marriage, or without criminal sexual conduct, as well as that resulting from an unlawful relationship. A statute cannot withstand the challenge of invasion of constitutional rights if it has such overbreadth that it forbids legitimate acts as well as illegitimate ones. *Eisenstadt v. Baird, supra; N.A.A.C.P. v. Alabama,* 377 U.S. 288 (1964); *Shelton v. Tucker, supra; Thornhill v. Alabama,* 310 U.S. 88 (1940).

III. IF THE CULPABILITY OF THE PREGNANT WOMAN IS PRESUMED RATHER THAN PROVED, SHE IS DENIED DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

The very language of the Thirteenth Amendment prohibits subjection to involuntary servitude "except as punishment for crime whereof the party shall have been duly convicted." Yet, the state's subjection of an unwilling woman to the continued pregnancy and childbearing compelled by anti-abortion law is accomplished without defining her substantive crime or providing her with due process in proving her guilt and inflicting her punishment.

It is pointless to argue that the pregnant woman is not the subject of the punishment inflicted upon a doctor/abortionist. Once pregnancy begins, the unwillingly pregnant woman is faced with a governmental mandate that requires her to dedicate her body and her strength to a fetus or, in the alternative, to seek out an illegal abortionist in unhealthful surroundings and thereby risk her health and life. The state, by withholding from the pregnant woman the assistance of competent surgical and medical care for legal abortion, effectively condemns the woman to

the alternative courses of the continued servitude of pregnancy or the dangers of risking her life and health.

What is the woman's crime? Substantive due process requires that it be clearly defined, not vague, not arbitrary. Is her crime that of having engaged in a sexual relationship? If the relationship occurred within marriage, no crime is involved in any state. On the contrary, the woman was compelled by virtue of her married state to submit to her husband. (See Subsection I.B. 2.b. *supra.*) Even if the pregnancy may have occurred as the result of some prohibited non-marital sexual conduct (according to due proof), an anti-abortion law punishing such conduct would be overbroad and beyond the competence of the state. (See *Eisenstadt v. Baird, supra.*) Is her crime that of failing in knowledge of, access to, or effectiveness of contraceptives? Such crime has not been defined by the state.

Regardless of the possible crime that a state might formulate as the basis for a pregnant woman's fault, procedural due process under the Fourteenth Amendment establishes a presumption of innocence which can be overcome only by evidence beyond a reasonable doubt, produced in a courtroom with the safeguards of fair procedure. As this Court stated in *Deutch v. United States:*

> "One of the rightful boasts of Western civilization is that the [prosecution] has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure." *Irvin v. Dowd,* 366 U.S. 717, 729. Among these is the presumption of the defendant's innocence.
>
> (367 U.S. 456, 471 [1961])

Can due process be totally overlooked in regard to individual rights of unwillingly pregnant women?

It is true that, at varying times in our country's history, rights of some individuals have gone unrecognized while urgently felt public needs pressed for stronger recognition. Thus, during the early years of this country's colonization and settlement, the pressing need for more persons to settle and work the land was allowed to override considerations of individual rights. Slaves were imported to work and the females of society were pressed into repeated reproductive service.

Today, this country's population has moved far beyond its needed growth, and current government policy is to encourage population control. Anti-abortion laws have outlived their purpose if regarded in historical perspective. Rights of the individual pregnant woman can no longer be ignored.

The Thirteenth Amendment's promise of freedom has long provided to male citizens the sovereign control of their own bodies.

In 1942, this Court protected the civil right of a male person, even one duly convicted of crime, to control his own reproductive system. *Skinner v. Oklahoma,* 316 U.S. 535. Is it any the less important that this Court protect the right of a female person to control her body and her reproductive system?

CONCLUSION

We respectfully request this Court to recognize that the anti-abortion laws which force an unwillingly pregnant woman to continue pregnancy to term are a form of involuntary servitude without due conviction for a crime and without the justification of serving any national or public need.

Respectfully submitted,

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