IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 70-18

JANE ROE, JOHN DOE, AND MARY DOE, *Appellants,*

JAMES HUBERT HALLFORD, M.D., *Appellant-Intervenor,*

v.

HENRY WADE, *Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

No. 70-40

MARY DOE, *et al., Appellants,*

v.

ARTHUR K. BOLTON, *et al., Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION FOR PERMISSION TO FILE BRIEF AND BRIEF AMICUS CURIAE ON BEHALF OF NEW WOMEN LAWYERS, WOMEN'S HEALTH AND ABORTION PROJECT, INC., NATIONAL ABORTION ACTION COALITION

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MOTION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE AND TO PARTICIPATE IN ORAL ARGUMENT.

Amici, the New Women Lawyers, the Women's Health and Abortion Project, Inc. and the Women's National Abortion Action Coalition, by their undersigned counsel hereby move this Court for permission to file the annexed Brief Amicus Curiae in the above-captioned cases and to participate in oral argument.

Amici have requested permission of the attorneys for the parties to file the annexed brief but have not yet received responses from all of them.

Amici have set forth the reasons why they seek to file a brief amicus curiae and why they feel their brief would be of special assistance to the Court in the statement of interest, accompanying their motion. Amici believe they have raised aspects of the constitutional issues before this court hitherto unexplored by the parties.

Any decision by this Court in the two cases before it will deeply affect the lives of more than half the citizens of this country. Amici are aware that this Court has treated limited aspects of the question of abortion before and recognize the competence of the counsel in the above-captioned cases. Nonetheless, given the gravity of the question of a woman's right to abortion, aspects of which are being raised de novo before this Court, and given the fact that some decisions of this Court have turned on arguments raised by an amicus curiae, amici believe their participation in oral argument would be of assistance to this Court in determining the sensitive and complex issues before it.

Therefore amici respectfully urge this Court to grant their motion and permit them to file the requested brief amicus and participate in the oral argument of the cases of Roe v. Wade and Doe v. Bolton.

Respectfully submitted,

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STATEMENT OF INTEREST

During the past two years the question of the constitutionality of abortion laws - of the right of a woman to control her own body and life - has become one of the most burning issues for women throughout the country. As women have become aware of the myriad levels of unconstitutional discrimination they face daily, they have become most acutely aware of the primary role which restrictions on abortions plays in that discrimination. As a result, women throughout the country have become determined to free themselves of the crippling and unconstitutional restrictions on their lives. As a major part of their efforts, thousands of women have sought and continue to seek the aid of federal and state courts in their challenges to abortion statutes. In New York State, more than three hundred persons, primarily women sued to have their state laws declared unconstitutional. Abramowicz v. Lefkowitz, 69 Civ. 4469 (S.D.N.Y.), dismissed as moot on July 1, 1970 when the New York State Statute went into effect permitting the performance of abortions up to twenty-four weeks of pregnancy. In New Jersey more than one thousand women sought the aid of the federal courts. Abromowitz v. Kugler, 431-1970 D.N.J, argued in December, 1970, and awaiting decision. In Pennsylvania again well over one thousand persons, most of whom were women, similarly sought the aid of the court in Ryan v. Spector, 70-2527, E.D.Pa. See also Connecticut, where 858 women sued in Aberle v. Markel, Civ. Action #14291 D.Conn. (May 14, 1971), dismissed, presently on appeal; and Rhode Island, where over one hundred took similar action in Women of Rhode Island v. Israel, Civ. Action #4605 (D.R.I.) in which a three judge court has been convened.*

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* These actions by women are only a portion of the sweeping challenges on the abortion laws of this country which have taken place in the last two years. The following is a partial list of such challenges. California v. Belous, 80 Cal. Rptr. 354 (1969), cert.

(footnote continued following page)

Similar efforts to challenge the abortion laws of their states are being developed by women in other states throughout the country. These women have sought the assistance of the federal courts because of the degree to which restrictions on the availability of abortion have crippled and even destroyed their own lives and lives of many other women.

The organizations listed below share the concern of these thousands of women who have sought the assistance of the courts. Each of the groups has a particular concern to see that these unconstitutional burdens and restrictions on a woman's life be removed.

The issues raised by the Texas and Georgia cases presently before this Court are not local

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denied, 397 U.S. 915 (1970); People v. Robb, #149005 and 159061, Munic.Ct., Orange Co.Cal. (Jan. 9, 1970); Babbitz v. McCann, 310 F.Supp. 293 (E.D.Wisc., 1970), remanded 91 S.Ct. 1375 (1971); Kennan v. Nichol, 71-C-118 (W.D.Wisc.); Hodgson v. Randall, 7 Cr. L.2186, affirmed, 91 S.Ct. 1656 (1971); Hodgson v. Minnesota, cert. denied, 41 S.Ct. 1655 (1971); Doe v. Scott, Civ. Action #70 C 395 (E.D.Ill.); Rosen v. Louisiana State Board of Medical Examiners, 318 F.Supp. 1217 (1970), upholding the constitutionality of the Louisiana statute, Cassibry, J., dissenting. Rogers v. Danforth, Civ. Action No. 18360-2 W.D.Miss., dismissed September 10, 1970; Steinberg v. Rhodes, C-70-289, W.D.Ohio; Doe v. Dunbar, Civ. Action #C-2402, D.Colo.; South Dakota v. Munson, Circuit Ct., Pennington Cty. S.D., April 20, 1970; Walsingham v. Florida, No. 40,210 (Sup.Ct.Fla., July 12, 1971).

but national issues. The problems raised by restrictive abortion laws are problems of millions of pregnant women.*

Therefore, Amici have drawn on cases and statutes throughout the country in order to aid this Court in deeply and fully understanding the problem before it.

The New Women Lawyers is an unincorporated membership association of women lawyers and law students in the New York City area.

Amongst its purposes is to work through the courts to redress the discrimination and oppression which women face under the law.

As women lawyers and law students amici are both members of the class whose interests are before this Court and advocates for that class. Therefore, amici have special insight into the problems and issues presented in the two abortion cases which may be of assistance to the Court.

The Women's Health and Abortion Project, Inc., is a non-profit corporation in the State of New York which grew out of the challenge to the constitutionality of the former New York abortion statute. Amongst the purposes of the Project is to counsel, and provide information to women concerning family planning and abortion without fee. Since the liberalized New York abortion law went into effect on July 1,

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* There are three basic types of laws used throughout the United States to prevent the performance of abortion, laws permitting the performance of abortion, a) only when necessary to save the life of the woman, b) when necessary to preserve her life and health and c) the "reform type law which permits abortion for reasons of life and health, as well as when the fetus resulted from rape, incest or when

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1970, the Project has counselled thousands of desperate women from across the country who came to New York seeking abortions. The women's Health and Abortion Project therefore has particular concern for and understanding of the problems of women in need of abortion and is particularly concerned with the infringement of women's rights by laws such as those of Georgia and Texas restricting the availability of abortion to women.

The Women's National Abortion Action Coalition is a coalition of women's groups and individual women throughout the country who have united in efforts to eliminate all abortion laws. Many of the individual women within the Coalition are plaintiffs in class action litigation challenging the constitutionality of the abortion laws of their own states. Many others work with pregnancy counseling groups and are members of women's groups whose prime concern is the elimination of discriminatory laws such as abortion laws.

Therefore, the Coalition is particularly concerned about the issues presented in the two cases before this Court and well suited to understand and present to this Court, to the fullest extent, the tolls which these laws take on the lives of women.

Amici believe that their special perspective on the constitutional issues before this Court will be of assistance to this Court in its deliberations on one of today's most sensitive issues -- an issue of overwhelming importance to

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there is a likelihood of fetal deformity, etc. In discussing the constitutional infirmities of abortion laws, amici have not distinguished amongst the different types of laws because regardless of their wording their effect has all been the same -- to deny an abortion to nearly every woman who wishes one.

more than 50% of the nation's population. Amici have sought to present aspects of the issue involving the constitutional rights of women which they believe have not been treated by the parties to this litigation or by other amici such as the manner in which the challenged Texas and Georgia statutes deprive women of their rights to life, liberty and the equal protection of the laws guaranteed by the Fourteenth Amendment and the degree to which they constitute cruel and usual punishment in violation of the Eighth Amendment to the Constitution.

Amici, therefore, urge this Court to accept their Brief Amicus in the hope that it will be of assistance in unravelling the crucial constitutional issues before this Court.

SUMMARY OF ARGUMENT

This is a brief Amicus in support of actions challenging the constitutionality of the abortion statutes of Georgia, Georgia Code Annotated § 26 - 1201 et seq. (1969); and Texas, Texas Penal Code Articles 1191, 1192, 1193, 1194 and 1196. The Texas statute permits abortion only when necessary to preserve the life of the pregnant woman. Under the Georgia statute a woman may obtain an abortion only with the approval of a committee of doctors where the abortion is necessary to preserve her life or health, or when the pregnancy resulted from rape, or would result in a deformed child.

Amici have argued that both statutes are void in that they violate the most basic constitutional rights of women.

First, the Texas and Georgia statutes and other statutes which restrict the availability of abortion, deny to women their right to control and direct their lives and bodies as protected by the Fourteenth Amendment's guarantees of life and liberty. Amici have attempted to set forth for this Court the manner in which the status of pregnancy and motherhood severely restricts the life of a woman the way in which an unwanted pregnancy can unalterably change and even destroy her life.

Amici have next shown that despite the fact that both man and woman are responsible for any pregnancy, it is the woman who bears the disproportionate share of the de jure and de facto burdens and penalties of pregnancy, child birth and child rearing. Thus, any statute which denies a woman the right to determine whether she will bear those burdens denies her the equal protection of the laws.

Carrying, giving birth to, and raising an unwanted child can be one of the most painful and longlasting punishments that a person can endure. Amici have argued that statutes which condemn women to share their bodies with another organism against their will, to be child breeders and rearers against their will, violate the Eighth Amendment's proscription against cruel and unusual punishment.

Finally, amici contend there is no compelling state interest in forcing a woman to these deprivations of her constitutional rights. For, it is no longer possible to justify a ban on abortions to protect a woman's health and such a ban is a consitutionally unacceptable method to use to establish a particular moral standard. Furthermore, the argument that the state must protect the life of the fetus when examined closely is in reality a codification of a particular religious doctrine and therefore constitutionally insufficient.

In closing, amici have urged that the doctrine of Younger v. Harris does not bar the Court from deciding this matter before it for in fact Mary Doe in Doe v. Bolton and Jane Roe in Roe v. Wade may not challenge the abortion statutes of Georgia and Texas in state criminal proceedings as envisioned in Younger and must turn to the Federal Courts to safeguard their constitutional rights.

I. THE GEORGIA AND TEXAS STATUTES RESTRICTING THE AVAILABILITY OF ABORTION VIOLATE THE MOST BASIC RIGHTS OF WOMEN TO LIFE, LIBERTY AND PROPERTY GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.

Under the Fourteenth Amendment to the Constitution, no state shall "...deprive any person of life, liberty, or property without due process of law." The courts have not yet, however, begun to come to grips with the fact that approximately one half of our citizenry is systematically being denied those guarantees of the Fourteenth Amendment. That is exactly the effect of the abortion laws of Texas and Georgia, and nearly every other state in the United States. Amici urge this Court not to shrink from redressing the constitutional wrongs perpetrated on women.

For the first time, this Court has the opportunity to give serious and full consideration to the degree to which laws such as those challenged herein, in denying women the control of their reproductive life, violate their most basic constitutional rights.

In the past two years, the Supreme Court of the State of California, the United States District Court for the District of Columbia below, and the Municipal Court of Central Orange County, California, recognized that it is "the fundamental right of the woman to choose whether to bear children...." California v. Belous, 80 Cal. Rptr. 354, 359 (1969), Cert. Denied, 397 U.S. 915 (1970). See also, United States v. Vuitch, 305 F.Supp. 1032 (D.D.C., 1969) reversed on other grounds, 91 S.Ct. 1294(1971); Roe v. Wade, 314 F.Supp. 1217 (N.D. Tex.,1970) jurisdiction noted, 91 S.Ct.1610 (1971); Babbitz v. McCann, 310 F.Supp. 293 (E.D.Wisc. 1970) remanded 400 U.S. 1 (1971); South Dakota v. Munson, 7th Jud'l District, Pennington Co., S.Dak. (1970); Doe v. Scott, #70 C 395 (N.D.Ill.) Jan 29, 1971; California v. Robb, #140,005 Mun. Ct., Orange Co., Cal., Jan 9, 1970, and most recently, Walsingham

v. Florida, #40,210, Sup.Ct. Fla.,(July 12, 1971) which overturned convictions of three men convicted of conspiring to commit abortion and cast severe doubt on the constitutionality of the Florida statute, and City of New York v. Wyman, reported in full, New York Law Journal. May 19, 1971, invalidating state restrictions on medicade reimbursement for abortions. In Wyman, Justice Spiegel spoke of "... the fundamental nature of the right to terminate pregnancy" and stated that "a woman has a Constitutional right pursuant to the United States Constitution Amendments IX and XIV to terminate an unwanted pregnancy."

The decision by a woman of whether and when she will bear children may be the most fundamental decision of her life because of its far-reaching significance, affecting almost every aspect of her life from the earliest days of her pregnancy.

A. The Right to Life.

Persons seeking to uphold restrictive abortion laws argue that the State has a compelling interest in protecting human life. Amici could not agree more. But, we argue that the responsibility of the State runs to persons who are living and that the State may not maintain laws which effect the most serious invasions of the constitutional rights of its citizens.

From the very fact, as noted by the California Supreme Court in Belous, that "childbirth involves the risk of death", California v. Belous, supra, at 359, it should be most obvious that laws which force women to bear every child she happens to conceive raises the most severe constitutional questions under the Fourteenth Amendment.

Nearly ten years ago a medical expert reported that "the risk to life from an abortion, performed by an experienced physician in a hospital on a healthy woman in the first trimester of pregnancy is far smaller than the risk ordinarily associated with pregnancy and childbirth. (Dr. Christopher Tietze, Legal Abortion in Eastern Europe J.A.M.A. 175:1149 (1961, April). A recent study of the death rate from childbirth in the United States revealed that there are still 20 deaths per 100,000 pregnancies among American women. Studies in Family Planning, 34:6-8 September 1969, Population Council, New York. The same study reported that the death rate due to legalized abortions performed in hospitals in Eastern Europe is 3 per 100,000 pregnancies. And so, in the United States today, giving birth is nearly 7 times more dangerous than a therapeutic abortion.

Furthermore, if a woman truly believes she should not continue an unwanted pregnancy and give birth to and raise an unwanted child, she will not be deterred by the fact that an abortion in her circumstances would be illegal. She will do this despite the great hazards to her physical and mental health -- and the great financial expense involved.

She will do this even though she knows that under local law she is performing a criminal act.

The very fact that legal abortion is unavailable for most women forces them into an additional hazard to their health and life. Aware of the failure rate of most contraceptives* and afraid of an accidental pregnancy which they will be unable to terminate, millions of women daily expose themselves to the known and as yet unknown dangers of the pill** even though they would prefer not to.

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* There is no such thing as a contraceptive device which is both 100% safe and 100% effective. Oral contraceptives, which have the highest degree of effectiveness are the least safe. However, for a variety of reasons, 15-28% of the women who use the pill stop taking it after two years. The interuterine device (I.U.D.) is not 100% effective though its failure rate has not yet been fully determined. However, to date, 50% of the women who use the I.U.D. have it removed within two years. Sheldon J. Segal, PhD, Population Council, and Christopher Tietze, M.D. Population Council, "Contraceptive Technology, Current and Perfected Methods, Reports of Population Family Planning," issued by the Population Council and the International Institute for the Study of Human Reproduction, Columbia University, October 1969, pp. 9 and 7.

The failure rate for the diaphragm is 12% (that is, of 100 women using the diaphragm in a year, twelve women will become pregnant). The failure rate for the condom is 14%. Ernest Havamann, Ed., Time-Life, Inc. A Special Report: Birth Control, New York, 1967, p. 159.

** Although there are not yet definitive conclusions concerning the dangers of oral contraceptives, their safety and general effects on women are sufficiently in question to have warranted full-blown Senate hearing by the Subcommittee on Monopoly of the Senate Select Committee on Small Business which began in

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The fear of accidental pregnancy is so great that even women who have medical histories that indicate that they should not take oral contraceptives

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January 1970, and continued in February and March. See "Competitive Problems in the Drug Industry," Subcommittee on Monopoly of Senate Select Committee on Small Business, 91st Cong. 2nd Sess. Although there has been a conflict of medical and scientific opinion expressed at the hearings, the response of the government to the question seems to be markedly casual in contrast with its swift action on a somewhat related matter -- cyclamates. It certainly leads women to believe that their government is less concerned with their health and safety than with curbing population or with health matters which also affect men. This concern on the part of women was not eased when they observed the action of the Food and Drug Administration with respect to warnings about possible dangers of birth control pills. Following the first part of the Senate hearings the F.D.A. ordered that a leaflet lising in detail the dangers of oral contraceptives be enclosed in each package of pills. New York Times, "Warning on Pill Drafted by F.D.A.", March 5, 1970. Only one month later the Department of Health Education and Welfare announced that a "compromise" warning would be used. A warning "far shorter and less emphatic about dangers than [the] earlier version." The compromise version not only eliminated nearly the entire list of potential hazards, merely noting there might be side effects and further stated, without any basis in fact, "'These points were discussed with you when you chose this method of contraception.'" New York Times, "Compromise Warning on Birth Pill Announced," April 8, 1970.

feel compelled to do so.*

Thus while governments profess their overwhelming concern for human life, they force their female citizens into the intolerable dilemma of choosing between what in many instances would be a totally irresponsible act of bearing and casting off, or even "raising" an unwanted child or jeopardizing their life and health, both physical and mental, by obtaining an illegal abortion or attempting to self-abort. What is more, this professed concern for life in fact results in hazards to women's lives, often forcing them into the hands of unskilled and unscrupulous persons directly in the face of the guarantees of the Fourteenth Amendment.

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* It may be reassuring to note that a high use of abortion is generally coupled with a high use of contraception. That is, women who use contraceptives have "a higher motivation toward fertility control. They are likely to resort to abortion when contraceptive efforts fail. The greater the expectation of avoiding pregnancy through contraception the greater the likelihood of an induced abortion once pregnancy occurs..." "What is more, liberalization of abortion laws tends to accompany an increase in the use of contraceptives." Induced Abortion and Contraception, paper delivered by Emily Moore at Workshop of National Institute of Child Health and Human Development and National Institute of Mental Health, December 15-16, 1969, p. 12.

B. The Right to Liberty

If the Fourteenth Amendment and its guarantees are to have any real meaning for women, they must not be read to protect only women's physical survival. The Fourteenth Amendment speaks not merely of life, but of life and liberty. For the framers of our constitution recognized well that it is not life alone which must be protected, but also personal liberty and freedom. Because of that fact, the Constitution has established requirements that neither life nor liberty may be denied a person without the guarantees of due process. As the Court of Appeals for the Second Circuit stated in Madera v. Board of Education of the City of New York, 386 F.2d 778, 783-4(2nd Cir., 1967), invoking a long-standing constitutional principle:

> '...The'liberty' mentioned in [the Fourteenth] Amendment means, not only the right of the citizen to be free from the mere physical restraint of his person by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation....'Allgeyer v. State of Louisiana, 165 U.S. 578, 589, 17 S.Ct. 427, 37 L.Ed. 832 (1897).

The right of liberty is one which is complex and closely related to other rights protected by the Constitution. As stated by this Court in Smith v. Texas, 233 U.S. 630, 636 (1914),

> Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use [her] powers of mind or body in any lawful calling.

The right of liberty has long been seen by this Court as one which is basic to matters of family and

children. In Meyer v. Nebraska, 262 U.S. 390, 399 (1823) this Court stated

> Without doubt 'liberty' denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, and acquire undue knowledge, to marry, establish and home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

It should go without saying that the liberty to establish a home and bring up children is nearly meaningless if it does not include the liberty to decide when and whether to have those children. Of course, this right to control the timing of one's family is now express in Griswold v. Connecticut, 381 U.S. 479 (1965).

Even this does not circumscribe the limits of liberty, however. As Justice Douglas expressed in his dissent in Poe v. Ulman, 367 U.S. 497, 516 (1961):

> Though I believe that 'due process' as used in the Fourteenth Amendment includes all of the first eight Amendments, I do not think it is restricted and confined to them.... The right 'to marry, establish a home and bring up children' was said in Meyer v. Nebraska ... to come within the 'liberty' of the person protected by the Due Process Clause of the Fourteenth Amendment.... 'Liberty' is a conception that sometimes gains content from the examinations of other specific guarantees... or from experience with the requirements of a free society.

Most recently the understanding of personal liberty has come to include such matters as physical appearance -- the way in which a person presents himself or herself

to the world. In Breen v. Kahl, 296 F.Supp. 702, 706 (W.D.Wisc., 1969), aff'd 419 F.2d 1034 (7th Cir., 1969), the court ordered the reinstatement of high school students whose hair length did not conform to the school board standard stating:

> The freedom of an adult male or female to present himself or herself physically to the world in the manner of his or her own choice is a highly protected freedom....
>
> For the state to impair this freedom, in the absence of a compelling subordinating interest in doing so, would offend a widely shared concept of human dignity, would assault personality and individuality, would undermine identity, and would invade human 'being'. It would violate a basic value 'implicit in the concept of ordered liberty'. Palko v. Connecticut, 302 U.S. 219, 325....
>
> It would deprive a man or woman of liberty without due process of law in violation of the Fourteenth Amendment. See Griswold, 381 U.S. at 499-500 (Harlan, J., concurring).

Accord, Griffin v. Tatum, 300 F.Supp. 60 (M.D. Ala., 1969); Westley v. Rossi, 305 F.Supp. 706 (D. Minn., 1969); Durham v. Pulsiter, 312 F.Supp. 411 (D. Ut., 1970); Reichenberg v. Nelson, 310 F.Supp. 248 (D. Nebr., 1970).

The concept of the right to liberty is one which has developed from the right to contract in Allgeyer, to the right to raise a family in Meyer, to the right to control one's own appearance in Breen. Surely none of these rights can be seen as more basic, fundamental or worthy of protection than a woman's right to control her body and the nature, direction and quality of her life.

In light of this understanding of the meaning of the guarantees of the Fourteenth Amendment, it is even

more critical that this Court carefully examine the ways in which women are systematically deprived of their rights by the abortion laws of Texas and Georgia as well as those of nearly every state in the nation.

It should be obvious that from the moment a woman becomes pregnant her status in society changes as a result of both direct and indirect actions of the government and because of social mores. Except in very rare cases (primarily among the wealthy) she is certainly no longer "free in the enjoyment of all [her] faculties; ... free to use them in all lawful ways; to live and work where [she] will; to earn [her] livelihood by any lawful calling; to pursue any livelihood or avocation...". Madera v. Board of Education of the City of New York, supra at 783-4.

Pregnancy, from the moment of conception, severely limits a woman's liberty. In many cases of both public and private employment women are forced to temporarily or permanently leave their employment when they become pregnant. The employer has no duty to transfer a pregnant woman to a less arduous job during any stage of pregnancy (should the woman or her doctor consider this advisable); nor is there any statutory duty to rehire the woman after she gives birth. For example, under the New York State Civil Service Law, Rule 3, a female employee must report her pregnancy to the appointing authority not later than the fourth month. The appointing authority then may in his discretion "...place the employee on leave at any time when in its judgment the the interest of either the department or the employee would be best served." [emphsis supplied] There is no indication that the employee's medical condition is the critical factor and there are no standards on which the decision in made. What is plain is that regardless of whether the woman wishes and/or needs to continue working, regardless of whether she is physically capable of working, she may nonetheless be required to stop working solely because of her pregnancy. In many if not most states women who are public employees are compelled to terminate their employment at some arbitrary date during pregnancy regardless of

whether they are capable of continuing work. See for example Cohen v. Chesterfield County School Board, Civ. Action No. 678-70-R (E.D.Va.) May 17, 1971; Schattman v. Texas Employment Commission, Civil Action No. A-70-CA-75 (W.D.Tex.) February 25, 1971; and LaFleur v. v. Cleveland School Board of Education, Civil Action No. C-71-292 N.D. Ohio, May 27, 1971.

In Connecticut a directive from the Attorney General in 1938 stated that a pregnant woman could not be employed "during the four weeks previous to and following her confinement." This rule still exists. In fact, such employment is a criminal offense (directed against the employer). This denial of liberty in one's work is accompanied by an unconstitutional taking of property, for Connecticut provides no maternity benefits. A woman is also denied unemployment compensation during her last two months of pregnancy, even when her unemployment is due to some reason other than pregnancy. CGST 31-236(5). Janello v. Administrator, Unemployment Compensation Act, 178 A.2d 282, 23 Conn. Supp. 155 (1961). If "total or partial unemployment is due to pregnancy," the woman is completely ineligible for benefits. Janello, supra at 156. Even worse, the employer has the absolute, arbitrary right to fire a pregnant woman when, in his estimation, her pregnancy would interfere with her work. Janello, supra at 157.

In Louisiana a recent amendment in 1968 of L. S.A.- R.S. 23:1601(6)(b) enables a woman who is forced to leave her employment either by contract or otherwise on account of pregnancy, to qualify for unemployment compensation. But, as illustrated in the case of Grape v. Brown, 231 So. 2d 663 (Ct. App. La., 1970) the unemployment compensation in no way adequately compensates either for the actual wages lost, or for the denial of liberty which forces a woman to receive unemployment compensation. Mary Grape was employed as a key punch operator by Southwestern Electric Power Co. When she became pregnant she was advised that the company policy required that expectant mothers terminate employment no later than the end of the 150th

day of pregnancy and that no leaves of absence would be granted. Thus she was forced onto unemployment compensation and had lost her job.

Mississippi laws curtail even more severely the liberty of a woman and her property. Sec. 7379(a), Miss. Code 1942 Rec. states that a married woman who has left work because of pregnancy is considered to have voluntarily severed her employment without good cause and therefore is not even entitled to unemployment compensation. See Mississippi Employment Security Commission v. Corley, 148 So.2d 715 (Miss., 1963). Thus, the pregnant woman loses her job, her source of income, and is forced to become economically dependent on others. The law is most harsh on pregnant women who are heads of households, and depended upon as breadwinners. Statistics show that a very high percent of all working women are in this position, i.e. they must work to support themselves and/or their children.

But restrictions on a woman's liberty and property only begin with pregnancy. A woman worker with children is considered "unavailable for work" (which means that she cannot qualify for unemployment compensation), if she restricts her hours of availability to late afternoon and night shifts so that she may care for her children during the day. Connecticut courts have often held that "domestic responsibilities" are "personal reasons unrelated to employment," Lukienchuk v. Administrator, Unemp. Comp. Act, 176 A.2d 892, 23 Conn. Sup. 85 (Super. Ct., 1961) or "entirely disconnectied from any attribute of employment" Lenz v. Administrator, Unemp. Comp. Act, 17 Conn. Sup. 315 (Super. Ct.,1951). In one decision the court said that a woman had just five weeks to try to rearrange her life and her domestic responsibilities to try to make herself "available for work" according to Connecticut standards (i.e. ready to work at all hours of the day.) There is only one case that held that a woman who restricted her availability for personal reasons was entitled to unemployment compensation. The woman had seven children. Carani v. Danaher, 13 Conn. Supp.109(Super. Ct.,1943).

But the dominant belief is that a woman's "personal reasons" (in most cases, "domestic responsibilities") for seeking work during specific hours are not relevant to employment. Thus, women with home responsibilities (children or husband) -- who need or want to work -- are considered "unavailable for work." They are denied the freedom "to live and work where they will, to earn their livelihood by any lawful calling" Allgeyer v. Louisiana, supra and "to engage in any of the common occupations of life" Meyer v. Nebraska, supra -- freedoms that are implicit in the Fourteenth Amendment's "concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319(1937). It becomes clear from Connecticut decisions on pregnant working women that the State of Connecticut considers pregnancy a"malady," Adams v. American Fastener Co., 7 Conn. Supp. 379(1939) Under these circumstances, a case can well be made that the anti-abortion law, in compelling a pregnant woman to continue this condition against her wishes, is not merely a denial of liberty, but also an imposition of cruel and unusual punishment on the woman. See Section III infra. "Confinement" well describes the situation of the pregnant woman, or mother, who is denied work, or restricted in her work because of an employer's decision on her ability to work.

Here we see how inextricably the rights to life and liberty are mixed and even more how laws restricting abortion deny women both.

Once a woman has given birth, according to the Court of Appeals for the Fifth Circuit, she may still be barred from employment as long as she has pre-school children. Phillips v. Martin Marietta Corp., 411 F.2d 1 (5th Cir., 1969). See Section II, infra, for a discussion of the treatment of Phillips by this Court. Furthermore, if she needs or merely wishes to work while she has pre-school children she cannot unless she is fortunate enough to have family who will care for the children or is wealthy enough to hire help. And, though a housekeeper, nurse, or baby sitter is a necessary expense enabling her to work, she may not deduct the salary of that person from her income tax 26 U.S.C.

214 and thus is normally left with little if any of her pay after those expenses are covered.

Thus as long as a woman has young children she is denied the right to obtain employment though her "...power to earn a living for [herself] and those dependent upon [her] is in the nature of personal liberty." Smith v. Hill, 285 F.Supp. 556, 560 (D.N.C., 1968).

A further denial of liberty results from the fact that women are generally forced to arbitrarily end their education because of pregnancy. Until recently, girls who became pregnant were forced to drop out of public school in New York. In New York City, Central Harlem, more than forty percent of the girls who leave school before graduation do so because of pregnancy. Haryou, 1964, Youth in the Ghetto, N.Y. Orans Press, p. 185. This still happens in countless other cities throughout the country as well. See, for example, Perry v. Grenada Municipal Separate School District, 300 F.Supp. 748 (N.D.Miss., 1969). Many women are also deprived of higher education because of college rules requiring that pregnant women leave school.

The importance of education in modern society has been stressed and restressed in recent years, since Chief Justice Warren stated in Brown v. Board of Education, 347 U.S. 483, 493 (1954):

> Today, education is perhaps the most important function of state and local governments.... It is required in the performance of our most basic public responsibilities.... It is the very foundation of good citizenship. Today it is a principal instrument in awakening..cultural values, in preparing...for later professional training and in helping...to adjust normally to his environment.

It has been recognized more recently that there are special problems for women in obtaining education for

though "men and women are equally in need of continuing education...at present women's opportunities are more limited than men's." American Women: Report of the President's Commission on the Status of Women, 1963, p. 11. Nonetheless, women are robbed of their education and opportunity for any development and self-fulfillment; robbed of their rights to be "free in the enjoyment of all (their) faculties," Madera, supra, at 783-4, by chance an unwanted pregnancy.

The incursions on the liberty of an unmarried woman who becomes pregnant are even more severe. She too may be fired from her job and is even more likely to be compelled to discontinue her education. Unable to terminate her pregnancy, she is often forced into marriage against her will and better judgment in an attempt to cope with the new economic and social realities of her life. Such marriages are forced on women despite the fact that the right to marry or not to marry may not be invaded by the state. Loving v. Virginia, 388 U.S. 1 (1967).*

Of course, frequently, the man who is responsible for the pregnancy refuses to marry her. Then unable to support herself she may be forced to become a welfare recipient, become part of that cycle of poverty, and expose herself to the personal humiliation, loss of personal liberty and inadequate income that entails.

To further add to her difficulties, the mere

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* The reaction of forcing a pregnant girl or woman into marriage as a "solution" to an unwanted out-of-wedlock pregnancy is exemplified by the ruling of a Maryland court in 1955, waiving the marriage age requirments to permit a thirteen year old pregnant girl to marry. Harold Rosen, M.D., Psychiatric Implications of Abortion, A Case Study of Social Hypocrisy, 17 Wes.R.L.Rev. 454, at 454.

fact of her out-of-wedlock pregnancy or child resulting from that pregnancy may be used as "some evidential or presumptive effect" to a decision to exclude or remove her from public housing. Thorpe v. Housing Authority, 393 U.S. 268, 271 (1969). Thus, having been forced to bear a child she did not want, she may be deprived of her right and ability to provide for herself and her child either because of employer policies or because of her inability to leave the child. Surviving on at least marginal income, she who is most obviously in need of public housing is then deprived of decent shelter because of the existence of that very same child.

For a woman perhaps the most critical aspect of liberty is the right to decide when and whether she will have a child -- with all the burdens and limitations on her freedom which that entails. But that has been robbed from her by men who make the laws which govern her.

As early as 1848 women spoke out against the way in which men controlled their lives -- denied them of any meaningful liberty. At the Women's Rights Convention held in Seneca Falls, New York, on July 14, 1848, the women spoke of men as follows:

> He has compelled her (woman) to submit to laws in the formation of which she has no voice.... He has taken all her rights to property, even to the wages she earns.... In the covenant of marriage...the law (gives) him power to deprive her of her liberty and to administer chastisement.... He closes against her all the avenues of wealth and distinction which he considers most honorable to himself.... He has denied her the facilities for obtaining a thorough education.... He has endeavored in every way that he could to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing

to lead an abject life. Victory, How Women Won It, National American Woman Suffrage Association, A Centennial Symposium, 1840-1940, H.W. Wilson Co., 1940, pp. 15-25.

Restrictive laws governing abortion such as those of Texas and Georgia are a manifestation of the fact that men are unable to see women in any role other than that of mother and wife. Furthermore,

> So long as he continues to think and write, to speak and act, as if maternity was the one and sole object of a woman's existence -- so long as children are conceived in weariness and disgust -- you must not look for high-toned men and women capable of accomplishing any great and noble achievement.*

As recently as July 12, 1971 the Supreme Court of the State of Florida reversed three convictions for conspiracy to commit abortion. In the concluding sentence of its opinion the Court stated: "In sum the [abortion] statute intrudes into the area of personal liberty of women and does it crudely in vague, uncertain, archaic language." Walsingham v. Florida, supra, slip opinion, p. 15, Ervin, J., Concurring.

The Florida statute does not alone abridge a woman's fundamental right to liberty. The statutes of Georgia, Texas and nearly every other state in the nation similarly deny to women throughout the country their most precious right to control their lives and bodies.

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* Elizabeth Stanton to Gerrit Smith, December 21, 1857, Stanton Papers, LC, quoted in Andrew Sinclair, The Emancipation of the American Woman, Harper Colophon Books, New York, 1966, p. 259.

II. THE GEORGIA AND TEXAS STATUTES RESTRICTING THE AVAILABILITY OF ABORTIONS DENY WOMEN THE EQUAL PROTECTION OF THE LAWS GUARANTEED TO THEM BY THE FOURTEENTH AMENDMENT.

The express guarantee of equal protection was originally designed to protect black people. Since that time, its protection has been greatly extended. First the courts extended equal protection to protect Chinese, Yick Wo v. Hopkins, 118 U.S. 356 (1886). More recently it has been extended to protect aliens, Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948); Mexican American, Hernandez v. Texas, 347 U.S. 475 (1954), and poor persons, Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963), and Shapiro v. Thompson, 394 U.S. 618 (1969).

Most recently federal estate courts have begun to apply the guarantees of the equal protection of the laws to prohibit discrimination against women.

In White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) exclusion of women and Negroes from Alabama juries was held unconstitutional. In United States ex rel Robinson v. York, 281 F. Supp. 8, (D. Conn. 1968) differential sentences for men and women were struck down as "invidious discrimination against [women] which is repugnant to the equal protection of the laws guaranteed in the Fourteenth Amendment. In Kirstein v. Rector and Visitors of the University of Virginia, 309 F. Supp. 184 (E.D. Va. 1970) a three judge court held that the exclusion of women from the University of Virginia violated their rights to the equal protection of the laws. In 1970 a federal District Court in New York held that a public tavern could not deny service to a woman. Seidenberg v. McSorely's Ale House, Inc., 317 F.Supp. 583 (S.D.N.Y., 1970).

More recently the Supreme Court of the state of California rejected the ruling of this Court in Muller v. Oregon, 208 U.S. 412 (1908) to find that laws restricting women from being bartenders except in the most limited circumstances stand in violation of the guarantees of the Fourteenth Amendment. Sail'er Inn v. Kirby, # 29811 Sup. Ct. Calif. May 27, 1971.

Federal district courts have also looked to the guarantees of equal protection to invalidate regulations compelling female employees to take a leave of absence from work because of pregnancy. Cohen v. Chesterfield County School Board, # 678-70-R (E.D.Va.) (May 17, 1971); Schattman v. Texas Employment Commission, # A-70-Ca-75 (W.D. Tex.) (April 16, 1971) Order Denying Motion for Relief from Judgment. See also Mengelkoch v. Industrial Welfare Commission, 437 F. 2d 563 (9th Cir. 1971) holding that plaintiffs' challenge to California protective labor laws raised substantial constitutional questions.

Despite the fact that women are entitled to the equal protection of the laws, one major area in which they are daily denied that protection is in the area of abortion.

Man and woman have equal responsibility for the act of sexual intercourse. Should the woman accidentally become pregnant, against her will, however, she endures in many instances the entire burden or "punishment."

In obtaining an abortion, the threats and punishments fall on the woman. This happens even where the decision to have an abortion has been a mutual one. Only the woman is subjected to the variety of threats which often accompany the painful search for abortion - the threats of frightened or hostile doctors of giving her name to the police - the threat of subpoena and/or prosecution if the doctor who would help her is arrested.

It is often said that if men could become pregnant or if women sat in the legislatures there would no longer be laws prohibiting abortion. This is not said in jest. It reaches to the heart of the unequal position of women with respect to the burdens of bearing and raising children and the fact that they are robbed of the ability to choose whether they wish to bear those burdens.

And the woman carries an unequal and greater share of the burden, not merely for nine months, but

for many years, all in violation of the equal protection of the laws, as we shall discuss below. The abortion laws therefore present a rather unusual constitutional situation. At first glance, it would appear that the concept of equal protection of the laws might not even apply to abortion since the laws relate only to women. However, when we look beyond the face of the laws to their effect, we see that the constitutional test of equal protection must be applied.* For the effect of the laws is to force women, against their will, into a position in which they will be subjected to a whole range of de facto forms of discrimination based on the status of pregnancy and motherhood.

As we have discussed at length above, a woman who has a child is subject to a whole range of de jure and de facto punishments, disabilities and limitations to her freedom from the earliest stages of pregnancy. In the most obvious sense she alone must bear the pains and hazards of pregnancy and childbirth. She may be suspended or expelled from school and thus robbed of her opportunity for education and self-development. She may be fired or suspended from her employment and thereby denied the right to earn a living and, if single and without independent income, forced into the degrading position of living on welfare.

For example, many if not most employers including public employers have policies requiring pregnant women to take a leave of absense or otherwise terminate their employment at a given stage of pregnancy. Recently the case of LaFleur v. Cleveland Board of Education, # C-71-292 N.D. Ohio, May 12, 1971 upheld one such regulation. Contra, Cohen

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* Here , of course, we are discussing not the secondary effect of the laws on persons who perform abortions and who might be men or women, but on the persons who feel the greatest impact of the laws, women.

v. Chesterfield County School Board, supra, and Schattman v. Texas State Employment Commission, supra. If she has pre-school age children, employers may refuse to hire her despite the provisions of the Civil Rights Act of 1964 which states that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual ... because of such individual's sex...." 42 U.S.C. 200 e-2(a)(4)(emphasis added), for, according to the Fifth Circuit, it is inconceivable that Congress intended to:

> exclude absolutely any consideration of the normal relationship of working father to their pre-school age children and to require that an employer treat the two exactly alike in the administration of its general hiring policies. Phillips v. Martin Marietta, supra, 411 F. 2d at 4.

Only this winter this Court effectively affirmed that court's ruling with Justice Marshall dissenting by holding that

> The existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under §703(e) of the [civil rights] Act. Phillips v. Martin Marietta Corp. 91 S. Ct. 496, 498 (1971).

In other words this court said if men refuse to share equally in the care of their children then women may be doubly burdened - they may be burdened with the responsibilities of child care and they may be deprived of employment opportunities as well.

If a woman is unmarried, unless she succeeds in obtaining an abortion, she has no choice but to bear the child, while the man who shares responsibility for her pregnancy can, and often does, just walk away.

As a practical matter, the woman is then alone with the problem of seeking and financing an abortion

and if that fails, she is alone paying the expenses of pre-natal care and childbirth and raising and supporting the child. She could seek to establish paternity of the father and therefore some measure of financial responsibility, However, to do this she must expose herself to accusations by the father concerning her sexual behavior as part of his attempt to avoid legal responsibility for the child. In some states she would further be forced to admit the commission of a crime, e.g. D.C. Code § 22-1002 (Crime of Fornication). Furthermore, although in most areas a parent has the legal responsibility to support his or her child whether married or single, e.g. D.C. Code §22-903, in some of those same places a parent will only be punished for neglect where married -- thus the irresponsibility of the man who walks away from the child he has helped to create is reinforced by the rule of law. For example, under New York law the mother is expressly liable for child support if the father is unable to support the child or cannot be found within the state. New York Family Court Act § 414.

In Texas, a father of an out-of-wedlock child has neither the common law nor the statutory duty to support his child. Home of Holy Infancy v. Kaska, 397 S.W. 2d 208 (Tex. 1965). See also Lane v. Phillips, 6 S.W. 610 (Tex. 1887), Beaver v. State, 256 S.W. 929 (Cr. App. Tex., 1923).

Having been forced to give birth to a child she did not want, a woman may be subject to criminal sanctions for child neglect, e.g., D.C. Code §22-902, if she does not care for the child to the satisfaction of the state. In some states even here the disabilities for the woman are greater than for the man. The New York courts seem to have found as a matter of law that the mother has a greater responsibility for the child than the father. In the case of People v. Edwards, 42 Misc. 2d 930, 249 N.Y.S. 2d 325 (1964), though the father and mother were jointly indicted for failure to provide shelter and medical attention for their baby, the court held that only the mother could be punished for failing to bring the baby to a doctor when a condition which began with a diaper rash resulted in the child's death. Of course, again, if the woman is

unmarried and paternity was never legally established, the woman bears these legal burdens alone.

The unwed mother may suffer additional disabilities by being denied employment because of her status. Courts are gradually recognizing the inequities of so penalizing unwed mothers. Nonetheless, not every woman is in a position to go to court to contest such discriminatory actions and many such policies and practices still exist throughout the country unchallenged.

Even where the father is present, the mother rather than father will be primarily responsible for raising the children. As long as "women, as a class earn less than men." Gruenwald v. Gardner, 390 F.2d 591 (2d Cir., 1968), and women have less opportunity for advancement**, they, rather than the father, will remain at home to raise the family.

The rulings of the Fifth Circuit and this Court in Phillips v. Martin Marietta, supra, further reinforce this arbitrary role differentiation, forcing the greater burden on child care on the mother. For in saying that a mother of pre-school age children may constitutionally be denied employment though a father may not, the power and authority of the courts is reinforcing the actions of private employers and society to force a woman to 'stay at home and take care of the children' even if she has otherwise provided for their care.

If such a broad range of disabilities are permitted to attach to the status of pregnancy and

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* "In 1959, 1960 and 1961, median earnings for male workers with taxable incomes was...approximately twice the median earnings of females." Gruenwald v. Gardner, supra, p. 592 n. 2.

** See, for example, Study of Employment of Women in the Federal Government, 1968; U.S. Civil Service Commission, Manpower Statistics Division, Washington, D.C.

motherhood, that status must be one of choice. And it is not sufficient to say that the women "chose" to have sexual intercourse, for she did not choose to become pregnant. As long as she is forced to bear such an extraordinarily disproportionate share of the pains and burdens of childrearing (including, of course, pregnancy and childbirth), then, to deprive her of the ultimate choice as to whether she will in fact bear those burdens violates the most basic aspects of "our American ideal of fairness" guaranteed and enshrined in the Fourteenth Amendment. Bolling v. Sharpe, 347 U.S. 497 (1954).

There is yet another way in which women are denied the equal protection of the laws. This Court has shown great concern with the "conception of political equality" Reynolds v. Sims, 377 U.S. 533, 558 (1964) and particualrly with "questions of alleged 'invidious discriminations * * * against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.'" Reynolds v. Sims, supra, 377 U.S. at 561 citing Skinner v. Oklahoma, 316 U.S. 535, 536 (1942). Because of this concern, in a line of cases the court has sought to guarantee that each citizen is fairly and equally represented in the legislature which make laws governing his or her life. See Baker v. Carr, 369 U.S. 186 (1962), Reynolds v. Sims, supra, and their progeny. Nevertheless, in the instance of abortion laws one finds the grossest form of lack of representation.

This court can surely take judicial notice of the fact that the state legislatures in Texas and Georgia, like state legislatures throughout the country are composed almost exclusively of men. As the supreme court of the state of Oregon stated in State v. Hunter, 300 P. 2d 455,457-7,208 Ore. 282 (Ore., 1956).

> ...We believe that we are justified in taking judicial notice of the fact that the membership of the legislative assembly which enacted this statute was predominately masculine. That fact is important

> in determining what the legislature might have had in mind with respect to this particular statute...

Therefore we have a situation in which persons are making laws which could never possibly effect them.*

These laws which are passed largely by men and only affect women were first instituted many years prior to the time that women even had the vote. The Georgia statute was enacted in 1876, the Texas in 1907. This relationship between the legislators and the laws they are making is even more complex than it may appear on the surface. For laws such as the abortion laws presently before this court in fact insure that women never will be able to function fully in the society in a manner that will enable them to participate as equals with men in making the laws which control and govern their lives. For as long as women are unable to control their reproductive lives they will be forced to disrupt their education, forego their career, and will never be a totally functioning part of the government which determines her rights. Forced to remain at home with her children a woman has neither the time, the money, nor the mobility to either organize an effective lobby on her own behalf or to assert her own rights as a direct participant in the legislative workings of government. The underrepresented city dweller could not realistically look to the rural dominated legislature to rectify the inequality of representation, nor could black people look to a white controlled legislature to eliminate the gerrymandering which cheapened their votes. Gomillion v. Lightfoot, 364 U.S. 339 (1960). Neither can women realistically look to male controlled legislatures to change laws which will return to them the control of their lives and bodies and that may incidentally

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* It may be worth noting that the only other major areas of law in which this occurs is with laws governing children and incompetents; that alone may give interesting insights into the views of legislators towards women.

free them to actively participate in those same legislatures. Therefore, if women are to have their rights redressed they can look only to the courts.*

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* Amici have not addressed themselves to the economic discrimination resulting from the application of the abortion laws of Texas and Georgia on the understanding that the issue is being treated fully by other amici and by parties to the litigation. Amici are deeply concerned, however about the economic hardship and blatant economic discrimination effected by such laws restricting the availability of legal abortion.

III. ABORTION LAWS VIOLATE THE CONSTITUTIONAL GUARANTEE AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT.

To understand what having an unwanted pregnancy and child means to a woman, it may be best to consider the following analogy: a group of people are walking along the street. Half the group crosses; the remainder are stopped by a red light. Those stopped by the light are told the following:

> "From now on, for about nine months, you are going to have to carry a twenty-five pound pack on your back. Now, you will have to endure it, whether you develop ulcers under the load whether your spine becomes deformed, no matter how exhausted you get, you and this are inseparable.
>
> Then, after nine months you may drop this load, but from then on you are going to have it tied to your wrist. So that, wherever you go this is going to be with you the rest of your life and if, by some accident, the rope is cut or the chain is cut, that piece of rope is always going to be tied to you to remind you of it."*

Of course, this analogy is not complete. It does not include the extreme, sometimes excruciating pain and risk of death involved with the process of transferring the pack from your back to your wrist, nor does it fully describe the limitations placed on your liberty by having that load chained to your wrist for a substantial portion, if not all of your life. It does, however, begin to give some picture of the pain and burden of pregnancy and motherhood when both are involuntary. Forcing a woman to bear a child against her will is indeed a form of punishment, a result of society's ambivalent attitude towards female sexuality.The existence

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* Testimony of psychiatrist Natalie Shainess, in Schulder & Kennedy, Abortion Rap, McGraw-Hill, 1971, p. 125-6.

of the sexual "double standard" has created the social response that when a woman becomes pregnant accidentally, she must be "punished" for her transgression, particularly if she is single. This punishment falls solely on the woman: she must face the physical burdens and emotional strains of an unwanted pregnancy, the degrading experience of having an illegal abortion "often in filthy motel rooms at the mercy of quacks who are charging exhorbitant fees." Ervin, J. concurring, Walsingham v. Florida, Case No. 40,210 (S.Ct. Fla., July 12, 1971), and if unable to get such an abortion, the responsibilities and trauma involved in raising an unwanted child. The man equally responsible for the pregnancy faces no such punishment.

Those who seek to impose the punishment of forcing a woman to bear a child against her will could not be considering its scope and dimensions. Such a punishment condemns a woman to severe physical burden, pain and labor not only during pregnancy, but also through the birth process and after the child is born, imposing on her years of toil and loss of freedom. To deny an unmarried woman an abortion is even more obviously a punishment and an act of greater cruelty as she is totally alone, with all of the physical, financial and social burdens of raising a child.

The Eighth Amendment to the United States Constitution protects all persons against the infliction of "cruel and unusual punishment." Amici contend that the expanding constitutional concern, as expressed by this Court, with practices which "offend the dignity of man", are contrary to "the evolving standards of decency that mark the progress of a maturing society" and punishment "disproportionate to the offense committed" as violative of the Eighth Amendment necessitates a finding that laws restricting abortion are unconstitutional

In 1910, the Supreme Court in Weems v. United States, 217 U.S. 349 (1910), repudiated the nineteenth century assumption that the punishments proscribed by the Eighth Amendment were limited to the barbarous practices

of seventeenth century England. "The Cruel and Unusual Punishment Clause and The Substantive Criminal Law" 79 Harv.L.Rev. 635, 636-7 (1966). The Court in Weems, invalidating a section of the Phillipine Penal Code authorizing a sentence of 15 years hard labor and concomitant forfeiture of citizenship rights noted that a "principle to be vital must be capable of wider application than the mischief which gave it birth," 217 U.S. at 373. Further the Court held that the Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." 217 U.S. at 367. Underlying the Court's holding was the concept of "proportional punishment" as a "precept of the fundamental law." Significantly, the Court considered the moral stigma and mental anguish suffered as a result of such punishment to be of equal relevance as the purely physical burden imposed.

In Trop v. Dulles, 356 U.S. 86 (1958), invalidating a punishment of denaturalization for desertion as unconstitutional in violation of the Eighth Amendment, the Court again emphasized the standard of proportion, and the flexible, expansive nature of the Eighth Amendment's ban, while declaring their willingness to apply the Eighth Amendment affirmatively to protect individual liberty. Noting that the "traditional" punishment for desertion was death, the court rejected the notion that "excessiveness" alone was determinative of constitutional validity. Instead, the Court asserted that "the question is whether the punishment subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment." 356 U.S. at 99. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." 356 U.S. at 100. The Amendment, the Court noted, was not a static one; it "must draw its meaning from evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 101. In setting a standard for the application of the Amendment, the Court rejected, as well, an exclusive concern with the physical aspect of punishment, forbidding what it characterized as "the total destruction of the individual's status in organized society." 356 U.S. at 101.

This Court's most recent analysis of the flexibility of the Eighth Amendment is found in Robinson v.

California, 370 U.S. 660 (1962). In that case, the Court held that a state law which made the "status" of narcotics addiction a criminal offense constituted "cruel and unusual punishment" in violation of the guarantees of the Eighth Amendment. For Justice Douglas stated in his analysis of the constitutional development of the Eighth Amendment; Douglas, J. concurring at 675:

> The historic punishments that were cruel and unusual included "burning at the stake, crucifixion, breaking on the wheel" (In re Kemmler, 136 U.S. 436, 446, 10 S.Ct. 930,933 34 L.Ed. 519) quartering, the rack and the thumbscrew (see Chambers v. Florida, 309 U.S. 227, 237, 60 S.Ct. 472, 477, 84 L.Ed. 716) and in some circumstances even solitary confinement (See In re Medley, 134 U.S. 160, 167-8, 10 S.Ct. 384, 386, 33 L.Ed. 835). The question presented in the earlier cases concerned the degree of severity with which a particular offense was punished or the element of cruelty present. A punishment out of all proportion to the offense may bring it within the ban against "cruel and unusual punishment." See O'Neil v. Vermont, 144 U.S. 323, 331, 12 S.Ct. 693, 696, 36 L.Ed.450. So may the cruelty of the method of punishment as, for example, disemboweling a person alive. See Wilkerson v. Utah, 99 U.S. 130, 135, 25 L.Ed. 345. But the principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick.

The essence of the Eighth Amendment, as evolved in the cases discussed above, lies in its concern with the "disproportionate" nature of the punishment imposed, the moral anguish as well as physical burdens of punishment, the extent to which punishment is a response to an individual's 'status' and is measured by 'evolving standards of decency", and offensiveness to the "dignity of

man." Laws which force women to endure unwanted pregnancy and motherhood against their will or to become criminals and take the risks to physical and mental health resulting from an illegal abortion are disproportionate to the act for which they are being punished --an act which, in many instances, is not even illegal. Further, amici contend that abortions, in fact if not in theory, punish women for private, sexual activity for which only women bear the repercussions of pregnancy therefore punishing them for their status as women and potential child-bearers.

The pain and suffering associated with an unwanted pregnancy or child, is not solely physical pain. The emotional pain and scarring which accompanies an unwanted pregnancy is an equally important and far more lasting form of pain which must be considered in the context of guarantees of the Eighth Amendment, and the emphasis given to mental anguish as a crucial component of "cruel and unusual punishment." According to Dr. Natalie Shainess, who has devoted the majority of her 25-year practice as a psychoanalyst and psychiatrist to the area of feminine psychology and particularly with the experience of being a mother, a woman who does not want her pregnancy suffers depression through nearly the entire pregnancy and often that depression is extremely severe. Furthermore, according to Dr. Shainess that depression continues even after birth may even go into psychotic states, and may result in permanent emotional damage to the woman.

Such potential permanent emotional damage, the risks to physical health and safety which may also result in permanent physical harm, see Fletcher v. State, 362 S.W.2d 845 (Cr.App.Tex., 1962), and the burdens of taking care of an unwanted child, constitute a form of long-term imprisonment. Such long term imprisonment... "could be so disproportionate to the offense as to fall within the inhibition" of the Eighth Amendment. Hemans v. United States, 163 F.2d 228 (6th Cir., 1947). For most women, bearing and raising an unwanted child is

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* Schulder and Kennedy, supra, p. 122.

worse, it is life-term imprisonment. For the woman, the unwanted pregnancy may also carry with it the trauma of being rejected or mistreated by the man when he learns of the pregnancy. Under such conditions, the child resulting from the relationship would constitute a lasting and omnipresent reminder of the suffering the woman experienced from the man. Such a life-long reminder is a form of constant punishment that the woman should not be forced to face. When she is forced into that situation, however, not only does she suffer emotionally, but her suffering is manifested in her relations with her child. She may vent her anger by physically injuring the child,* neglecting the child, or being extremely over protective, virtually "smothering" the child emotionally.

According to New York law as interpreted by its courts, a "child at tender age is entitled to have such care, love and discipline as only a good and devoted mother can usually give," Ullman v. Ullman, 151 A.D. 419, 135 N.Y.S. 80 (1912) (emphasis added); it is entitled to care which includes its "spiritual and moral life" In re Roe, 92 N.Y.S.2d 882, 883, 196 Misc. 830 (Dom.Rel.Ct., 1949). Nonetheless, the State, by its insistence on the right to life for the fetus, practically ensures that once born, the child will receive neither the care, love, nor spiritual and moral life to which it is entitled. If indeed, the unwanted child is a hated child, in denying women the right to abortion Texas, Georgia, and all other states with laws which restrict abortion are punishing not only the mother, but also the very child they claim to protect. Furthermore, under New York law a mother is required to give "care, guidance, supervision, love and affection," In re Carl, 174 Misc. 955, 22 N.Y.S.2d 782, 784 (Dom.Rel., 1940), to the

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* According to Ray E. Helfer, M.D., who has recently edited a book called The Battered Child, University of Chicago Press, 1968, and is an expert in the field, an unwanted pregnancy may be a crisis situation in the three factor pattern which leads to physical abuse of children.

child she never wanted in the first place and she is punished if she is unable to.

By denying women the right to abortion the state is punishing her for her sexual activity with the equivalent of long-term imprisonment and giving her an indeterminate sentence of life with an unwanted child. Sentencing a woman to a full term pregnancy and motherhood against her will is thus a clear violation of her right to be free from cruel and unusual punishment. The words of this Court in Weems, supra, are most appropriate in describing such a "sentence."

> [Her] prison bars and [some] chains are removed, it is true after [nine months], but [she] goes from them to a perpetual limitation of [her] liberty. [She] is forever kept under the shadow of [her] crime....
>
> ...[She] is subject to tormenting regulattions that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty. It may be that even the cruelty of pain is not omitted. [She] must bear a chain night and day. [She] is condemned to painful as well as hard labor. 30 S.Ct. at 549.

Even where the woman decides she cannot endure the pains and penalties of pregnancy and motherhood, which the law attempts to force on her, she is still exposed to what may be the great physical and emotional pain and the far greater danger of illegal abortion. It has long been thought that abortion in and of itself caused substantial destructive emotional effects on women. More recently, however, a number of studies have shown that when abortions are legally obtained women do not suffer psychological harm as a result of their experience, but rather in most cases their emotional status improves and many report that they experience emotional growth as a result of the abortion

experience. Pratt, Rappaport & Barlow, Arch. Gen. Psychiat., 20:408-414 (1969).

It is no answer to suggest that the woman may always choose to minimize her pain by placing the child for adoption following birth -- performing the function of "commodity" or a "baby breeder". For as one woman has movingly described:*

> The kind of trauma of giving a baby up for adoption leaves you with the feeling of -- at least I had my feeling about it as a mother -- I was a mother who had abandoned my child and I fought against this self-concept.
>
> I prepared to think of myself as a breeder, I was just breeding babies for someone else to take rather than think of myself as a mother who abandoned her baby.
>
> But the guilt -- for months after I left the home, I'd wake up in the night crying and sort of rocking my pillow and this feeling sometimes of deprivation but ... the guilt was stronger than the feeling that someone else had deprived, someone had ripped the baby from my arms.
>
> I would have been more comfortable that way than what I did, because I actually signed the papers and gave the baby up.

For this woman, and for many others, this experience carries with it a further overwhelming sense of guilt at having done something shameful -- a sense of guilt which may haunt her for years after and which, in the same person, will not develop in connection with an abortion -- even an illegal abortion. Such mental anguish, and the emotional harm which ultimately

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* Schulder and Kennedy, Ibid., p. 23.

results is certainly disproportionate to the act for which a woman is being punished, and constitutes cruel and unusual punishment for her.

Finally, some might feel that whereas it may be constitutionally impermissible to deny a married woman an abortion, it is permissible to force an unmarried woman to see her pregnancy and its consequences through as a "deterrent to her immorality." However, not only is such a position unconstitutional, it is irrational. Compared with a married woman, an unmarried woman is likely to experience even greater unconstitutional deprivations of her liberty, as a result of the greater pain and suffering from being forced to bear and raise an unwanted child with no help from the man who is equally responsible for the conception of that child. Furthermore, both she and the child will become a financial "burden" on the society if she is forced to go on welfare.

Millions of women are now becoming truly conscious of the manifold forms of oppresion and discrimination of their sex in our society. They are beginning to publicly express their outrage at what they have always known - that bearing and raising a child that they do not want is indeed cruel and unusual punishment. Such punishment involves not only an indeterminate sentence and a loss of citizenship rights as an independent person as held unconstitutional in Weems, supra, great physical hardship and emotional damage 'disproportionate' to the "crime" of participating equally in sexual activity with a man, as held unconstitutional in Trop, supra, but is punishment for her 'status' as a woman and a potential child-bearer as held unconstitutional in Robinson, supra. As this Court in Trop so firmly stated, the concept underlying the Eighth Amendment is "nothing less than the dignity of man" 356 U.S. at 100 and "must draw its meaning from evolving standards of decency" at 101. Abortion laws reinforce the legally-legitimized indignities that women have already

suffered under for too long and bear witness to the inferior position to which women are relegated. The total destruction of a woman's status in society results from compelling her to take sole responsibility for having the illegal abortion or bear the unwanted child, and suffer the physical hardship and mental anguish whichever she chooses. Only the woman is punished by society for an act in which she has participated equally, only she is punished for her "status" as child-bearer. In light of "evolving standards of decency that mark the progress of a maturing society", the basis of the Eighth Amendment as set forth in Trop, supra, the struggle of women for full and meaningful equality in society over the last hundred years indicates that it would indeed be a sign of the immaturity of our social development if these laws were upheld. White persons have had to readjust their thinking and actions to question whether laws which discriminated against blacks were unconstitutional.

Men (of whom the legislatures and courts are almost exclusively composed) must now learn that they may not constitutionally impose the cruel penalties of unwanted pregnancy and motherhood on women, where the penalties fall solely on them.

IV. THERE IS NO COMPELLING STATE INTEREST JUSTIFYING THE VIOLATION OF FUNDAMENTAL CONSTITUTIONAL RIGHTS EFFECTED BY THE CHALLENGED ABORTION LAWS.

Historically under common law and in the early years of American law, abortion was legally permissible before the fetus was "quick" inside the mother. See generally, Cyril S. Means, Jr., "The Law of New York Concerning Abortion and the Status of the Fetus, 1664-68: A Case of Cessation of Constitutionality," 14 N.Y.L.F. 411, Feb. 1968; and Roy Lucas, "Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes," 46 N.C. L. Rev. 732, June 1968. The adoption of laws regulating (and almost effectively eliminating) legal abortion came about for a combination of three major reasons, none of which can any longer constitutionally justify the extreme incursion into and violation of protected rights effected by the challenged abortion laws. The three reasons were: (a) "compelling uniform adherence to specified moral norms ...[by] (l)egal bans on both contraception and all abortion...." Lucas, supra, p. 732, i.e., moral norms regarding sexual relations; (b) protecting the health of the mother from the dangers then inherent in any operation, Lucas, supra, p. 732; Means, supra; and (c) enforcing the newly established religious concept that the soul was present in the body from the time of conception. Lawrence Lader, Abortion, Beacon Press, Boston, 1966.

The operation and effect of the challenged Georgia and Texas abortion laws directly violate plaintiffs' constitutionally protected rights of life, liberty, equal protection, personal privacy of associations and others as well. As the Supreme Court of California stated in California v. Belous, supra, 80 Cal.Rptr. at 360:

> The critical issue is not whether such rights exist, but whether the state has

> a compelling interest in the regulation of a subject which is within the police powers of the state (Shapiro v. Thompson (1969), 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600; Sherbert v. Verner, (1963), 374 U.S. 398, 403, 83 S.Ct. 1790, 10 L.Ed.2d 965), whether the regulation is "necessary *** to the accomplishment of a permissible state policy" (McLaughlin v. Florida (1964), 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222; see also, NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 105; Bates v. City of Little Rock (1960) 361 U.S. 516, 527, 80 S.Ct. 412, 4 L.Ed.2d 480; Huntley v. Public Util. Comm. 69 A.C. 62, 69 Cal. Rptr. 605, 442 P.2d 685; Vogel v. County of Los Angeles, 68 Cal.2d 18, 21, 64 Cal. Rptr. 409, 434 P.2d 961; People v. Woody, 61 Cal.2d 716, 718, 40 Cal.Rptr. 69, 394 P.2d 813.

The fact that the abortion laws may have been valid when first enacted does not resolve the questions concerning the present constitutionality of the law. California v. Belous, supra, at 362. Compare Gray v. Sanders, 372 U.S. 368, 381 (1963) with South v. Peters, 339 U.S. 276, 277 (1950); Baker v. Carr, 369 U.S. 186, 237 (1962); with Colgrove v. Green, 328 U.S. 549, 556 (1946); Brown v. Board of Education, supra, with Plessy v. Ferguson, 163 U.S. 537 (1896).

Most persons who seek to justify the constitutionality of abortion laws would now concede that the first two of the three justifications mentioned above are no longer able to sustain abortion laws which take such great tolls on the lives of women.

It is common knowledge that an abortion no longer entails the danger it did in the mid 1800's and early 1900's when the Texas and Georgia abortion

laws as well as the laws of nearly all the other states were first enacted. In fact, as pointed out above, there is considerable evidence that abortion now carries about the same, if not lesser risks then childbirth. See p. 10, supra. Therefore the medical rationalization to sustain abortion restrictions can be easily dispensed with.

As for the use of abortion laws to ensure the community standard of morality, it should be clear from this Court's decision in Griswold v. Connecticut, supra, 381 U.S. at 498, Justice Goldberg, Warren and Brennan, concurring that such an argument is not constitutionally sufficient. See also Walsingham v. Florida, supra, slip opinion, p. 12, which notes that the abortion statutes themselves "...[do] not show a compelling state interest in prohibiting premarital sexual intercourse (the prelude to unwed mothers) since [they draw] no distinction between married and unmarried women." In any case it is quite evident that the "community" standard is at present a changing one. Furthermore, we must consider just who is the community. For on this particular issue there are at minimum two communities -- the community of men and the community of women. Normally, we cannot and should not consider legislation from such a perspective but in this case we can and must. For here we have legislation which is made by men [see Page 32-33, supra] who are never directly affected by it (except to the extent that they fear that they themselves might never have been born were there no abortion law). It is women, who at best have an indirect voice in the determination of these laws, who must suffer from them. And it should be plain that the community of women does not support these laws. For centuries they have been seeking and obtaining abortions even at substantial risk to themselves despite the voice of the legislature.

It may well be said that the abortion laws which the states seek to maintain in fact undermine

the moral fabric of the community. For, it is those laws which not only force countless women to flagrantly violate the law each year, but forces them into the sordid underworld of criminal abortions.*

However, even assuming the maintenance of a particular standard of morality for men and women were sufficient to sustain some legislation in the area, that legislation could not be drawn in such a way as to consistently place all of its weight and burden on only one sex. For this is just the sort of invidious discrimination prohibited by the Fourteenth Amendment.

Thus we must look to the third rationale for abortion laws. Although it is generally discussed in terms of the "right to life," if we analyze it more closely, the third rationale is actuaally a means of enforcing the religious concept that the soul is present in the body from the time of conception and therefore must be saved. The use of criminal statutes to enforce the views of one or more particular religious groups is of course proscribed by the First Amendment's Establishment Clause.

Looking closer at the argument that the state must guarantee to every fetus its right to life, we must immediately be struck by tremendous inconsistencies in the state's alleged concern for life.

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* Amici do not take either the position that women who have abortions are "criminals" or that all persons who are willing to aid women in terminating unwanted pregnancies are criminals. However, there are many persons who unscrupulously profit from women's predicament and misery with little concern for their health and safety.

In fact, claims of great concern for the life of the fetus are at best questionable in practice and turn sour when examined in light of their consequences on the lives of women.

It is clear both from the application of the abortion laws as well as from other areas of law that the concern of the state in the life of the fetus is at best a qualified concern. Firstly, under the laws of many states the fetus has "no legal personality or identity until it sees the light of day." Endresz v. Friedberg, 24 N.Y.2d 478, 301 N.Y.S.2d 65, 70 (1969), and, therefore, an action for wrongful death of a fetus cannot be sustained. See also, Graf v. Taggart , 43 N.J. 303, 204 A.2d 140 (1964); Norman v. Murphy, 124 Cal.App.2d 95, 268 P.2d 178 (Dis.Ct.App., 1954); Keyes v. Construction Service, 340 Mass. 633, 165 N.E.2d 912 (1960); Powers v. City of Troy, 4 Mich. App. 572, 145 N.W.2d 418 (1966); Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964), for similar rules in New Jersey, California, Massachusetts, Michigan and Pennsylvania.

What is more laws governing abortion in Georgia as in several other states with supposed "reform laws" show at best a qualified concern for the life of a fetus. Those statutes permit the abortion of a fetus resulting from rape or incest, and in some states a fetus growing within the body of an unmarried woman under the age of fourteen, fifteen or sixteen, or a woman with German Measles, e.g., Colo. Rev. Stat. Ann. § 40-2-50 et seq. (Supp. 1967).

In other states, a pregnant woman may not be

executed if she is "quick with child". New York Code of Criminal Procedure, §§ 501 et seq. Presumably, as was true historically, a woman who is pregnant with an unquick fetus may be executed.* Of course, in that case the fetus will die with her.

Furthermore, in no other way do the states act to protect the fetus from dangers to its existence. There exist no intensive prenatal care programs for those expectant mothers who do not receive this necessary care. There exist no massive education programs concerning diet, exercise, etc., for expectant mothers. There is no mandatory innoculation against rubella, a crippling disease for a fetus to be affected by. Drugs harmful to the fetus are allowed on the market even though alternative treatment could be utilized. In New York, for example, the State Department of Social Services does not provide additional money for the fetus until the fourth month of pregnancy. Title 18, Codes, Rules and Regulations of the State of New York, § 353.2. Clearly, the states take no affirmative action to care for the fetus in which they claim such a compelling interest. Nor do the governments consistently protect the interest of the children who are subsequently born.**

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* For further historical discussion of this distinction between the quick and unquick fetus in New York law, see Means, supra, 14 N.Y.L.F. at pp. 441-3.

** If governments insist that there is a compelling state interest in protecting human life and therefore in outlawing abortions, why is it that these same governments fail to protect the rights of illegitimate children who are subsequently born. Although Levy v. Louisiana, 391 U.S. 68 (1968), stated that a state cannot treat an illegitimate child differently from legitimate offspring, in Labine v. Vincent, 91

(fn. continues on next page)

In light of these facts we must look again at the argument that the state must protect each and every fetus which has been conceived. In order to assert this view one must assume that every fetus is a human being equal in all respects to every living citizen from the moment of conception. Stripped of any religious definitions of when meaningful human life begins, that is when the soul enters the human organism, the various medical procedures for terminating pregnancy that are currently illegal under the challenged laws are not significantly different from some current methods of birth control.*

(fn. continued from preceding page)
S.Ct. 1017 (1971), this Court upheld a Louisiana statute which prohibited illegitimate children, though duly acknowledged, from claiming and taking property by interstate succession for their father's estate. There are cases in both the states of Georgia and Texas which reveal the same form of discrimination. In Patterson v. Liberty Mutual Insurance Co., 147 S.E.2d 64 (1966), the Georgia Court of Appeals refused to allow a posthumous illegitimate child who brought a proceeding to recover compensation for death of the deceased employee, the child's father, to recover. In Hargrove v. Lloyds Casualty Company of New York, 66 S.W.2d 466 (1933), the Texas Court held that an illegitimate child could not recover compensation for her father's death under Workingman's Compensation Act. Thus there would seem to be a fundamental inconsistency in vigorously protecting the right of the child to be born and then denying that same child equal protection. Such protection of the property of the father from the claims of his out-of-wedlock children may well be yet another factor to encourage men to desert the children they have fathered and the mothers of those children.

* E.G., it is commonly accepted that the intrauterine device (IUD) acts as an abortive agent rather than as a contraceptive which prevent conception.

There is a great variation in positions as to when the essential "humanness" which causes society to protect the life of its citizens actually develops. In fact, the final determination is a philosophical or religious one.

For example, one might consider that the moment of fertilization is the moment of creation of a human being. Under that approach the development of that "life" could not be interfered with from that moment of fertilization. In that case no I.U.D.'s could be legally used by women though they are widely used throughout the country. According to Father Robert F. Drinan, former Dean of the Boston College Law School, and now United States Congressman,

> There is no doubt whatever that countless individuals and several opinion molding groups in America are convinced that the Catholic Church is using its persuasion, its prestige and its political power to fight any change in the abortion laws. These individuals and associations are sometimes afraid to speak openly about the role of the Church lest they deepen the Church's antagonism to the causes they espouse. Drinan, Robert F., S.J., "The Morality of Abortion Laws," 14 Cath. Lawyer 190, 195 Summer (1968).

For that reason the political activities of the Catholic Church and its proponents in opposing even liberalization of abortion laws remains an open secret which is difficult if not impossible to "prove" in a traditional legal sense. However, in reporting the passage by the Hawaii legislature of a bill repealing that state's abortion law, the New York Times stated that "The Roman Catholic Church waged a long battle to try to keep the abortion bill from passing." New York Times, 2/25/70, 1:5. The Hawaiian experience is

plainly not an isolated experience.

Significantly, under the common law there appears to have been no legal proscription against abortion before the fetus was quick within the mother -- and it was at that time that the soul was thought to enter the organism. Means, supra, at 426-8. At approximately the time that the view of the Catholic Church shifted concerning the entry of the soul, laws concerning abortion did too -- both moving back to the time of conception.*

What is more, according to Rabbi David M. Feldman, Author of Birth Control in Jewish Law, the position of the Catholic Church on the question of abortion is doctrinal rather than a general moral position. The position stems in part from an ancient interpretation of the Hebrew Septuagint, with respect to "ensoulment" leading to the proscription of abortion of a "formed" fetus. Feldman, Birth Control in Jewish Law, New York University Press 1968, pp. 257-8 and 269. It further stems from the position of the Church on original sin and baptism, which leads to the conclusion that if a fetus is not permitted to develop to term so that it can be baptized at birth, it is "worse than murder" for then the fetus is doomed to limbo. Feldman, Ibid., pp. 268 and 270.

In contrast with the Catholic approach to abortion, under Jewish law, the welfare of the woman -- her pain and suffering -- is paramount. Feldman, Ibid., pp. 291-2. In Jewish law, the fetus does not become a person until the moment of birth, Feldman, Ibid., pp. 255 and 273. The fetus, at least in the early stages is considered part of its

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** This was coupled with crusades in Calvinist theology and New England Puritanism against sex and immorality. Lader, Lawrence, Abortion, Beacon Press (1966).

mother's body, Feldman, Ibid., p. 265, and only when its head emerges is it inviolate. Feldman, Ibid., p. 275. Therefore, in any number of situations in which abortion would be permissible under Jewish law it would be forbidden under the laws of Texas and Georgia and nearly every other state in the country as would be more consonant with Catholic doctrine.

Abortion laws throughout the country are thus based on a religious definition of when "human" life begins. As a result, no woman may legally terminate an unwanted pregnancy except under the most limited circumstances, because to do so would offend the religious precepts of others. She then, though forced to adopt certain beliefs, has her personal constitutional freedoms eroded by laws which not only favor one religious doctrine but actually enforce it. Thus, the Texas and Georgia as well as most other abortion laws are in direct conflict with constitutional rule that "[t]he government is neutral, and while protecting all, it prefers none, and it disparages none." School District of Abington Township v. Schempp, 374 U.S. 203, 215 (1965). As this Court stated in that case:

> The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or all orthodoxies. 374 U.S. at 222.

Just such fusion deprives countless of women each year of the most basic control over their bodies and their lives in a way which will affect them for the rest of their days, and all in violation of the constitutional proscription against the establishment

of religion.

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state or Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state." Everson v. Board of Education, 330 U.S. 1, 15-16 (1947), citing Reynolds v. United States, 98 U.S. 145, 164 (1878).

The Texas and Georgia laws governing abortion constitute the most glaring example of the demolition of that wall. Furthermore, insisting that a woman carry to term each and every pregnancy which may occur the state is not only enforcing a particular religious belief but developing a form of right unique in American law. For, in no other instance does the right to live include the right to use another person's body -- his or her kidney, heart and lungs. Yet the denial to

women the right to an abortion gives a fetus the right to occupy an unwilling woman's body and use not only her uterus but every other organ of her body without her consent.

Thus stripped of the remaining religions justification for the prohibition of abortion, there is no argument sufficient to sustain the abridgment of a women's rights effected by the denial of abortion.

"Where there is a significant encroachment upon personal liberty, the State may prevail only by showing a subordinating interest which is compelling." Griswold v. Connecticut, supra, 381 U.S. at 497, citing Bates v. City of Little Rock, 361 U.S. 516, 524 (1960).

Amici urge this Court to consider the following questions:

> Are the interests of society being served by a law which exposed over a million women last year to such risks [as described above]? Are the interests of society being served by women bearing unwanted children, subjected to the pressures of an emotionally and financially deprived existence? Are the interests of society being served by the population explosion we are now witnessing? South Dakota v. Munson, supra, slip opinion, p. 9.
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> Thus the real question is not "How can we justify abortion"? but "How can we justify compulsory childbearing?" Cisler, "Unfinished Business: Birth Control and Women's Liberation," Sisterhood is Powerful, ed., Robin Morgan, Random House, 1970, p. 278.

This Court must then conclude, as other courts have across the nation, that,

> Upon a balancing of relevant interest, we hold that a woman's right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the state without a more compelling public necessity than is reflected in the statute in question. Walsingham v. Florida, supra, slip opinion, p. 12, citing Babbitz v. McCann, supra.

And further, that,

> The Court can find no compelling interest of the state and concludes that the right to choose to bear or not to bear children is a fundamental right of the individual woman to be exercised in any manner she chooses and which may not in any way be abridged by law. People v. Robb, supra, slip opinion, p. 9.

V. YOUNGER v. HARRIS DOES NOT IMPAIR OR LESSEN THE JURISDICTION, POWER OR RESPONSIBILITY OF THIS COURT TO GRANT THE RELIEF REQUESTED.

In Younger v. Harris, 91 S.Ct. 746 (1971), and its companion cases this Court refused to rule on the constitutionality of several state statutes challenged on First Amendment grounds. The Court held that the constitutional objections could and should be raised by the litigants in defense to a criminal prosecution, and the litigants would not be irreparably harmed by raising their constitutional rights in that forum. That is not the case here however.

In the two cases before this Court the primary plaintiffs are women in need of abortions. Neither they, nor other women throughout the country, who daily have their rights denied by the Georgia, Texas and other abortion statutes, can turn to the state criminal process for a determination of their rights. For, the violation of their rights does not stem primarily from the fact that they may be prosecuted for having an abortion (though in rare cases they are), but from the fact that a very real threat of criminal prosecution of third parties prevents them from obtaining the medical care they require. As long as abortion laws such as those of Georgia and Texas are in effect they will not be able to obtain abortions. As the Supreme Court of the State of California recognized in California v. Belous, supra, 80 Cal.Rptr. at 366, since the doctor is risking his own freedom and professional career in performing an abortion, "Rather than being impartial, the physician has a 'direct, personal, substantial, pecuniary interest in reaching a conclusion' that the woman should not have an abortion." The situation of women barred from obtaining

abortions by unconstitutional laws is therefore distinguishable from that of appellees in Boyle v. Landry, 91 S.Ct. 758 (1971). This Court found that they were deterred from exercising their constitutional rights only by their own "imaginary or speculative fears of prosecution." 91 S.Ct. at 758. Furthermore, women are not required to entrust the protection of their constitutional rights to a third party which has litte interest in protecting those rights. Perlman v. United States, 247 U.S. 7, 12-13 (1918).

Amici have attempted to show that to require a woman to carry, give birth to and raise a child against her will is indeed irreparable harm sufficient to satisfy the standard of Dyson v. Stein, 91 S.Ct. 769 (1971), decided with Younger v. Harris, supra, in which the Court stated that,

> ...federal intervention affecting pending state criminal prosecutions, either by injunction or by declaratory judgment is proper only where irreparable injury is threatened. The existence of such injury is a matter to be determined carefully under the facts of each case.

The rights of women such as Mary Doe and Jane Roe who are denied the abortions they seek must not turn on whether some few medical personnel are courageous enough to open themselves to prosecution by performing the needed abortions, and then challenge the restrictive law in a criminal proceeding. This is too tenuous a thread for millions of women throughout the country to rest their constitutional rights on. In Younger v. Harris, supra, 91 S.Ct. at 751, this Court noted that it has long been considered appropriate for the federal courts to rule on the constitutionality of state criminal

statutes where,

> ... The threat to the plaintiff's federally protected rights [is] one that cannot be eliminated by his defense against a single criminal prosecution. See, e.g., Ex Parte Young, 209 U.S. 123, 145-7.

That is exactly the situation before the Court. Women are having their lives and bodies mangled and destroyed daily by abortion laws such as those of Georgia and Texas and cannot look to the state criminal process to rid themselves of the bonds of those laws. This Court must, therefore, exercise the "duty" of the federal courts to hear and decide federal constitutional claims, for the federal courts are the "...primary and powerful reliances for vindicating every right given by the Constitution...." Zwickler v. Koota, 381 U.S. 241, 247 (1967).

CONCLUSION

For the foregoing reasons Amici urge this Court to find Georgia Code Annotated § 26-1201 and Texas Penal Code Articles 1191, 1192, 1193, 1194 and 1196 violate the most fundamental rights of women guaranteed by the United States Constitution.

Respectfully submitted,

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