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## Constitutional Reflections on Abortion Reform

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## CONSTITUTIONAL REFLECTIONS ON ABORTION REFORM

by Patrick L. Baude\*

There is a familiar irony in the progress of many reforms. A modest proposal—that a man should be permitted to marry his dead wife’s sister, or that spring guns should not be set in the forest—is met with the argument that the reform principle, if sound, should be extended to permit the apparently unthinkable—that a woman should marry her dead husband’s brother<sup>1</sup>—or to prohibit the necessary—that a man “put glass bottles or spikes on the top of a wall, or even have a savage dog, to prevent persons from entering his yard.”<sup>2</sup> The *reductio* is not only disowned but also denounced at the time; yet the attraction of consistency and the momentum of reform often lead those who bitterly resented the outlandish argument to embrace it. And so widows marry their brothers-in-law and the owners of ferocious dogs increase liability coverage.

In the United States this self-expanding tendency of reform sometimes appears in constitutional adjudication. For example, in *Muller v. Oregon*<sup>3</sup> the Supreme Court upheld an Oregon statute limiting women’s working hours in factories to ten: “Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained.”<sup>4</sup> The ten-hour limit, valid solely for women’s special needs, was upheld for men a few years later in *Bunting v. Oregon*.<sup>5</sup> Had a Justice in *Muller* expressed fear of the ten-hour day for men, he might have received the answer Professor Frankfurter, arguing *Bunting*, gave to Mr. Justice McReynolds’ fears that ten hours would become four: “Your honor, if by chance I may make such a hypothesis, if your physician should find that you’re eating too much meat, it isn’t necessary for him to urge you to become a vegetarian.”<sup>6</sup> Nonetheless it would today be difficult to deny legislative power to fix a

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<sup>1</sup> See E. TURNER, *ROADS TO RUIN* 110-35 (Penguin ed. 1966).

<sup>2</sup> *Hott v. Wilkes*, 106 Eng. Rep. 674, 680 (K.B. 1820).

<sup>3</sup> 208 U.S. 412 (1908).

<sup>4</sup> 208 U.S. at 422.

<sup>5</sup> 243 U.S. 426 (1917).

<sup>6</sup> H. PHILLIPS, *FELIX FRANKFURTER REMINISCES* 102 (1960).

four-hour working day; indeed the remarkable thing about the regulatory developments touched off by *Muller v. Oregon* is that the original sex discriminating Oregon statute would probably be invalid today, on account of the very sex discrimination that sustained it initially.

United States abortion law is evolving comparably. Even eight years ago, public opinion was deeply divided when a Phoenix housewife sought to avoid giving birth after taking Thalidomide.<sup>7</sup> The Model Penal Code, promulgated that year, authorized abortion in cases of felonious intercourse, to avoid deformity, and to protect the physical or mental health of the mother;<sup>8</sup> these faintly daring innovations are now in danger of being declared unconstitutional because they are too limited. In the last year, three courts have invalidated moderate abortion statutes<sup>9</sup> and the New York legislature has permitted abortion at will in early pregnancy.<sup>10</sup> The purpose of this article is to trace the way slight reform has made radical innovation inevitable.

The first of the recent cases invalidating a conventional limited abortion statute arose in California.<sup>11</sup> The defendant, an "eminent physician," was consulted by a then unmarried couple distraught by the woman's pregnancy. Although the physician at first resisted their tearful pleas, he finally decided to help when they convinced him that the woman would have an illegal abortion anyway. The physician's motivation, according to the court, was simply to save the woman from the enormous medical risks of "butchery in Tijuana or self-mutilation."<sup>12</sup> So the patient was given the name of a Los Angeles man licensed to practice medicine in Mexico but not California.

The California Penal Code, amended while the case was on appeal, then provided:

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<sup>7</sup> See S. Finkbine, *Lesser of Two Evils*, in CASE FOR LEGALIZED ABORTION NOW 15-25 (A. Guttmacher ed. 1967).

<sup>8</sup> MODEL PENAL CODE § 230.3 (2) (Prop. Off. Draft, 1962).

<sup>9</sup> *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970); *United States v. Vuitch*, 305 F.Supp. 1032 (D.D.C. 1969), *proc. juris. postponed*, 397 U.S. 1061 (1970), *parties requested to brief procedural questions*, 399 U.S. 923 (1970); *People v. Belous*, 80 Cal. Rptr. 354, 458 P.2d 194 (1969), *cert. denied*, 397 U.S. 915 (1970).

<sup>10</sup> "An abortifacient act is justifiable when committed upon a female with her consent by a duly licensed physician acting (a) under a reasonable belief that such is necessary to preserve her life, or, (b) within twenty-four weeks from the commencement of her pregnancy." Similar provisions apply to the woman's own efforts. N.Y. PENAL LAW § 125.05 (3) (McKinney 1970).

<sup>11</sup> *People v. Belous*, 80 Cal. Rptr. 354, 458 P.2d 194 (1969), *cert. denied*, 397 U.S. 915 (1970).

<sup>12</sup> 80 Cal. Rptr. at 356, 458 P.2d at 196. The defendant's life-saving state of mind could have been relevant in applying the California statute's exemption for cases where abortion is "necessary to preserve" the woman's life. It is thus not surprising that Justice Burke, dissenting, chose to emphasize disputed evidence that the defendant from time-to-time received referral fees from an illegal abortionist. 80 Cal. Rptr. at 367, 458 P.2d at 207.

Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years.<sup>13</sup>

The defendant was convicted in superior court, but the California Supreme Court reversed, holding the statute void for vagueness.

The offensive statutory phrase was “necessary to preserve the life.” According to the court, the only clear meaning that could be given the phrase would limit it to situations where the woman was certain to die if pregnancy were not terminated. Such a saving construction was unacceptable for two reasons: (1) the woman’s constitutional right to live would be infringed and (2) legislative intent would be frustrated.

The weight to be given the first reason depends on whether the second can be taken seriously. The court found legislative intent, not in the records or language of the legislature, but in three earlier cases of the California Court of Appeals. The first of those cases was *People v. Ballard*.<sup>14</sup> As the California Supreme Court in *Belous* described that case: “[T]he evidence established that the woman was ‘extremely nervous . . . upset, had headaches, was unable to sleep, and thought that she was pregnant. She was agitated, disturbed and had many problems.’”<sup>15</sup> However true this may be, the California Supreme Court should perhaps add that the *Ballard* court understandably relied on the fact that the only gynecologist (the defendant) who examined the woman concluded that she was not pregnant at the time of surgery—in other words, the prosecution failed to establish that the act was an abortion rather than the removal of the placenta remaining after a miscarriage.

The second case discussed in *Belous* was a subsequent prosecution against Dr. Ballard.<sup>16</sup> This time the doctor treated two women who, according to the supreme court’s summary in *Belous*, were in a “‘bad state of health’ because of self-imposed abortive practices.”<sup>17</sup> One might easily be led to believe that *Ballard II* had authorized an abortion to preserve the woman’s

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<sup>13</sup> CAL. LAWS 1935, ch. 528, § 1, at 1605.

<sup>14</sup> 167 Cal. App. 2d 803, 335 P.2d 204 (1959).

<sup>15</sup> 80 Cal. Rptr. at 359, 458 P.2d at 199, citing *People v. Ballard*, 167 Cal. App. 2d at 813-14, 335 P.2d at 211.

<sup>16</sup> *People v. Ballard*, 218 Cal. App. 2d 295, 32 Cal. Rptr. 233 (1963).

<sup>17</sup> 80 Cal. Rptr. at 359, 458 P.2d at 199.

life from the risks of clumsy efforts to abort herself (here turpentine pills, Lysol and soap). But again, the basic holding was that the women were not pregnant, and therefore that the doctor's actions were not "procuring the miscarriage:"

It was ascertained from the two women who testified that at the time each of the women went to the doctor they were not pregnant, that each of them had had a miscarriage and each was in a bad state of health because of self-imposed abortive practices. There is no evidence to the effect that the doctor thought or believed either or both of the women to be pregnant. In fact the evidence is to the exact contrary.<sup>18</sup>

It then becomes puzzling to assess the court's observation in *Belous* that "[a]fter the decision in *Ballard* [I or II?], the legislature did not amend the statute to repudiate the rule suggested by that case and to establish a definition requiring certainty of death."<sup>19</sup> It is not obvious why the legislature would be stirred to action by two cases deciding that a non-abortion is not an abortion. It is perhaps surprising that the legislature did not act to relieve the prosecution's proof problems by making the removal of a dead fetus incriminating under certain circumstances.<sup>20</sup>

The third court of appeals case used to find legislative intent in *Belous* was *People v. Abarbanel*,<sup>21</sup> where, at least, the court did determine that an abortion had occurred. In *Abarbanel* the defendant physician performed the abortion after referral from a psychiatrist who judged that the woman might otherwise commit suicide. Such a holding, not disturbed by the legislature, might, as the *Belous* court suggested, indeed refute the construction that "necessary to preserve the life" meant "to prevent certain death." The difficulty with asking so much of *Abarbanel* is that the legislature can hardly be said to have acquiesced for a long period in the construction: the statute in question was repealed at the next regular session of the legislature,<sup>22</sup> while Dr. *Belous*' appeal was pending.

The point of examining the efforts of the court in *Belous* to reject the "to prevent certain death" construction is not to show that the California Supreme Court, like other courts, can read

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<sup>18</sup> 218 Cal. App. 2d at 307, 32 Cal. Rptr. at 241.

<sup>19</sup> 80 Cal. Rptr. at 359, 458 P.2d at 199.

<sup>20</sup> See G. WILLIAMS, SANCTITY OF LIFE AND THE CRIMINAL LAW 191 (1957).

<sup>21</sup> 239 Cal. App. 2d 31, 48 Cal. Rptr. 336 (1965).

<sup>22</sup> The *Abarbanel* case became clear authority only when the California Supreme Court denied rehearing, on 16 February 1966. The legislature, already in regular session, adjourned on 4 April. The 1967 regular session adopted the Therapeutic Abortion Act, CAL. HEALTH & SAFETY CODE §§ 25950 to 54 (West Supp. 1967), patterned on the MODEL PENAL CODE, *supra* note 8.

previous cases perversely. It is rather to emphasize the significance the court must have placed on its alternative ground that the woman's constitutional right to life would be infringed should the court hold that the "to prevent certain death" construction was constitutional. In making this argument the court assumes that "it is clear that the state could not forbid a woman to procure an abortion where, to a medical certainty, the result of childbirth would be death."<sup>23</sup> Yet the basis of this principle must be that the fetus is not "equivalent to the born child,"<sup>24</sup> for if the fetus were treated as an ordinary person, it is far from *clear* that the mother could kill it to save her own life. Self-saving sacrifice of another has never been an easy problem.<sup>25</sup>

The court then concludes that the woman's constitutional right to life encompasses the physician's right to save the woman not only from certain death, but also from high risk:

Moreover, a definition requiring certainty of death would work an invalid abridgment of the woman's constitutional rights. The rights involved in the instant case are the woman's rights to life and to choose whether to bear children.<sup>26</sup>

This argument proves too much. If there is a constitutionally protected right to choose whether to bear children, exercisable by more than contraception or abstinence from sexual intercourse, there is an end to laws punishing abortion (by licensed physicians). Vague or clear, harsh or weak, they are invalid; yet the court refuses to reach that conclusion directly.

Difficulties also result from the court's conclusion that the state denies the "rights to life" by requiring the woman to expose herself to less-than-certain risks of death. Yet, citizens are sometimes forced to assume such risks, as in military conscription or prudent rules limiting the use of lethal force in self-defense. The risks involved in the draft, or self-defense, are of course necessary to serve governmental objectives officially perceived to be important. But whether the fetus is "equivalent to a born child" or not, the state can certainly claim some important interest in controlling its destruction; it is not pure fancy to assert as great a state interest in unborn children as in burglars.

The court then should not be understood to rely directly on the right of the woman to life or her choice whether to bear children. Those rights serve principally to require that the language of a

<sup>23</sup> 80 Cal. Rptr. at 363, 458 P.2d at 203.

<sup>24</sup> 80 Cal. Rptr. at 363, 458 P.2d at 203.

<sup>25</sup> See *Regina v. Dudley*, 14 Q.B.D. 273 (1884); *United States v. Holmes*, 26 F. Cas. 360 (No. 15, 383) (E.D. Pa. 1842).

<sup>26</sup> 80 Cal. Rptr. at 359, 458 P.2d at 199.

statute affecting them be subjected to unusually strict scrutiny. Thus the real issue remains vagueness, and it remains a theoretical possibility that artful drafting could produce a valid moderate abortion statute. The court has already determined (1) that abortion must be permitted where death in childbirth is certain and (2) that it must also be permitted in other circumstances (presumably high-risk pregnancies). It would seem simple for the court to announce what the Constitution requires, and then to construe the statute accordingly. The problem is that the constitutional limits are just clear enough to enable the court to perceive the statute's vices, but just vague enough to prevent an appropriate recasting statute. Apparently any construction more permissive than "to obviate certain death" but less than "death more likely from childbirth than abortion" is necessarily cast in terms like "substantially or reasonably," and is therefore vague. The court indicated a "childbirth more dangerous than abortion" test would be clear, but too far removed from the language of the statute; that test might be derived from the current California statute's permission for abortion where there is "substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother."<sup>27</sup>

There are, however, two grave defects with a statutory rule permitting abortion where childbirth would be more dangerous to the mother. First, there is some evidence that unrestricted abortion is safer than normal childbirth. For every one hundred thousand live births in the United States, there are twenty-eight maternal deaths.<sup>28</sup> Some countries with permissive abortion codes have lower death rates from abortion; Czechoslovakia's death rate has been put at 3.1 per 100,000 abortions,<sup>29</sup> and Hungary's rate may be even lower. On the other hand, Denmark's rate is 41 per 100,000, and Sweden's is comparably high. It is obviously impossible to place great reliance on these figures, given different standards of reporting, generally differing levels of mortality from all causes, and inescapable problems of self-selection. It is possible that women who seek abortions are bad medical risks due, for example, to psychiatric complications or previous difficulties in childbirth. But it is equally possible that women who seek legal

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<sup>27</sup> CAL. HEALTH & SAFETY CODE § 25951 (c) (1) (West Supp. 1967).

<sup>28</sup> U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 55 (90th edition, 1969).

<sup>29</sup> A. Cernoch, *Experiences in Czechoslovakia with the Effects and Consequences of Legalized Artificial Termination of Pregnancy* (unpublished paper), cited in D. CALLAHAN, *ABORTION: LAW, CHOICE AND MORALITY* 46 n.51 (1970). A complete survey varying national experiences may be found in D. CALLAHAN, *supra* 31-47; that survey is the basis of the figures given in the text.

abortions are good medical risks for normal pregnancy, due to their social class or their willingness to accept medical care. Present evidence concerning abortion deaths in the United States is certainly useless to predict death rates under liberalized schemes since abortions are now, in theory at least, legally authorized for women who face medical or psychiatric difficulties.<sup>30</sup> In short, it is now impossible to disprove the proposition that “[l]egal abortion . . . in the early months is safer than carrying a pregnancy to term.”<sup>31</sup> If this conclusion is sound, the California Supreme Court’s suggested limiting construction is meaningless. Abortion allowed only when the risks of childbirth are greater would always be allowed.

The second defect with the California court’s proposed limiting construction is that it imposes an intolerable burden upon the physician. In the individual case, the physician cannot reasonably be expected to rely upon statistical predictions to determine whether the childbirth or the abortion is more dangerous. Yet, the test would require a physician to balance the complex and inconclusive data, at pain of felony for misjudgment. The facts surrounding the physician’s judgment, then, at least establish an uncertainty (read “vagueness”) as great as that in the original California statute.

There is thus no way, consistent with its own reasoning, to stop the *Belous* case short of invalidating all conventional laws punishing abortions undertaken by licensed physicians. An entirely different legislative scheme might, however, have greater success: abortions could be allowed only upon prior judicial or administrative order. Problems of vagueness would be eliminated for the physician, although related new issues would be created<sup>32</sup> and administration would prove either costly beyond reason or arbitrary beyond the Fourteenth Amendment.

The *Belous* case was followed by a federal district court which found unconstitutionally vague the District of Columbia’s exception for abortions “necessary for the preservation of the mother’s life or health.”<sup>33</sup> The addition of “health” to “life” was the principal difference from the California statute; that difference

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<sup>30</sup> Contemporary medical techniques, however, have made normal childbirth possible despite a wide variety of physical diseases which would once have been sufficient medical cause for termination of pregnancy. See generally G. WILLIAMS, *SANCTITY OF LIFE AND THE CRIMINAL LAW* 167-69 (1957).

<sup>31</sup> M. Potts, *Legal Abortion in Eastern Europe*, 59 *EUGENICS REV.* 235 (1967).

<sup>32</sup> Such as discretionary administration and “defiance of unlawful authority.”

<sup>33</sup> *United States v. Vuitch*, 305 F.Supp. 1032 (D.D.C. 1969), *prob. juris. postponed*, 397 U.S. 1061 (1970), *parties requested to brief procedural questions*, 399 U.S. 323 (1970).

could scarcely clarify the statutory language if one already found it vague. Its principal function might be to introduce the puzzles of psychiatric indications. For example, what of a woman who threatens to commit suicide rather than bear a child?<sup>34</sup> And what of the obvious fact that a woman who wants an abortion will be unhappy if it is denied? One can easily foresee that the same process which transmutes larceny by the rich to kleptomania will describe a wealthy woman's prospective unhappiness as neurosis.<sup>35</sup> The only fault in the district court's opinion is its acceptance of the oblique approach of *Belous* and, perhaps, the disingenuousness of its ritual, "[t]he Court cannot legislate."<sup>36</sup>

A second federal district court has refused to follow the District of Columbia. Three judges found that "men of common intelligence" need not guess at the meaning of Wisconsin's "necessary to save the life of the mother."<sup>37</sup> Instead, after citing the Supreme Court's recent birth control<sup>38</sup> and miscegenation<sup>39</sup> decisions to establish an "inherently personal right" in certain private decisions, the court concluded "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."<sup>40</sup> In concluding that the state's interest is not compelling, the court surprisingly finds it unnecessary to deny that the unquickened embryo is a "human being."<sup>41</sup> Thus, the Wisconsin district court at least adopts willingly the result that seems the inevitable but disclaimed consequence of *Belous*: that to be constitutional, the statute must allow all abortions. The social utility of the particular result, and of the practice of reaching similar results by judicial decision, are questions fully aired elsewhere.

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<sup>34</sup> Allowed: *People v. Abarbanel*, 239 Cal. App. 2d 31, 48 Cal. Rptr. 336 (1965). Denied: *Hatchard v. State*, 79 Wis. 357, 48 N.W. 380 (1891).

<sup>35</sup> Future challenges, if necessary, may succeed on grounds of economic discrimination; at any rate, the theory is clear if the evidence is "sketchy." The "further contention that the statute discriminates against the poor and in its present operation denies medical help in city hospitals but is more liberally applied in some private hospitals has considerable support in the sketchy statistics and other data presented. The statute has received differing interpretations in the hospitals. In the light of the Court's ruling, however, there is no reason why the statute cannot henceforth be evenly applied throughout the city in a way which removes the principal basis for existing uncertainty and confusion. National and local policy provides free medical care for the poor. It is legally proper and indeed imperative that uniform medical abortion services be provided all segments of the population, the poor as well as the rich. Principles of equal protection under our Constitution require that policies in our public hospitals be liberalized immediately." 305 F.Supp. at 1035.

<sup>36</sup> 305 F.Supp. at 1035.

<sup>37</sup> *Babbitz v. McCann*, 310 F.Supp. 293, 298 (E.D. Wis. 1970).

<sup>38</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>39</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>40</sup> 310 F.Supp. at 301.

<sup>41</sup> 310 F.Supp. at 301.

It is however worth noting the ease with which the court finds that the state has no compelling interest in preventing the death of what it considers human beings. The opposite result may be reached with equal implausibility. Professor Louisell concludes that the Constitution *prohibits* a state from allowing freely chosen abortions.<sup>42</sup> He reaches that conclusion from the premise that an unborn child is a person and therefore entitled to equality of protection with others.

It is not difficult to argue that unborn children are persons. The reception of the genetic code at conception is probably the most influential single event in shaping the human characteristics of an adult.<sup>43</sup> Add to the scientific importance of conception the ethical values of reverence for life and the practical weight of the law as teacher: is it comfortable to insist that physicians and mothers may kill the fetus simply because they so desire. But it is no easier to insist that we bear human reverence for life simply because science calls it life. Reverence for life and humanity may indeed, as Louisell argues, be what offers hope for man's future. Yet we must make our own decision what to revere; neither genetic nor federal codes can define the beginning of democratic community.

The irony of the matter is that constitutional litigation, ordinarily thought of as a brake on radical revision of legal values, has in this instance operated to prevent consensus on moderate compromise.<sup>44</sup> If one extreme must be chosen, the near future lies with the Wisconsin district court. The general prohibition of abortion is too closely linked with policies of population growth, masculine domination, and concealment of sexual urges, to survive in an openly erotic and overcrowded society of equal men and woman.

Much can be said for irreducible minima of governmental decency;<sup>45</sup> much can also be said for laws of inclusive generality.<sup>46</sup> Yet to require that one person be given certain rights (the neurotic woman must have an abortion if she wants), and then to scrutinize severely a different course for a different case (the unwilling mother), is too powerful. Still, the wisest course may not

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<sup>42</sup> D. Louisell, *Abortion, the Practice of Medicine and the Due Process of Law*, 16 U.C.L.A.L. REV. 233 (1969); D. Louisell & J. Noonan, *Constitutional Balance*, in MORALITY OF ABORTION (J. Noonan ed. 1970).

<sup>43</sup> See generally J. Noonan, *Abortion and the Catholic Church: A Summary History*, 12 NATURAL L.F. 85 (1967).

<sup>44</sup> A similar point is made in R. Dixon, *Warren Court Crusade for the Holy Grail of "One Man-One Vote"*, 1969 SUP. CT. REV. 219.

<sup>45</sup> F. Michelman, *The Supreme Court, 1968 Term-Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

<sup>46</sup> *Railway Express Agency v. New York*, 336 U.S. 106, 111 (1949) (concurring opinion of Jackson, J.).

be for the courts to force the sexual and population revolutions faster than tentative moral accommodation in the legislature permits.<sup>47</sup> But perhaps Rousseau's "Good laws make better ones, bad laws make worse" is more accurate than Voltaire's "The best is the enemy of the good."

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<sup>47</sup> Judicial activism may engender legislative passivity in a variety of ways. For example, fear of becoming an interstate "abortion mill" may deter a state from liberalization of its laws. Thus Georgia's version of the Model Penal Code adds: "No abortion is authorized or shall be performed under this section unless each of the following conditions is met: (1) The pregnant woman requesting the abortion certifies in writing under oath and subject to the penalties of false swearing to the physician who proposes to perform the abortion that she is a bona fide legal resident of the State of Georgia. (2) The physician certifies that he believes the woman is a bona fide resident of this State and that he has no information which should lead him to believe otherwise." GA. CODE ANN. § 26-1202 (b) (1968). Similar restrictions were enacted by North Carolina. N.C. GEN. STAT. § 14-45.1 (1969).

These residence requirements are vulnerable in light of *Shapiro v. Thompson*, 394 U.S. 618 (1969), holding that Connecticut may not deny welfare to residents during a one-year waiting period. The *Shapiro* rule has been applied to medical treatment for indigents, and the extension to abortion seems likely. *Board of Supervisors v. Robinson*, 457 P.2d 951 (Ariz. Ct. App. 1969), *vacated as moot*, 105 Ariz. 280, 463 P.2d 536 (1970). See generally R. Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C. L. REV. 730, 774-75 (1968); *Residence Requirements After Shapiro v. Thompson*, 70 COLUM. L. REV. 134 (1970).

*Shapiro* could be distinguished because it involved discrimination between new and old residents rather than residents and non-residents. The distinction seems trivial at first, but suggests a more important issue—can some states experiment in legislative policy without forcing their experiments on neighboring law-makers? Unrestricted mobility poses some threat of a Gresham's law for state legislation. The issue may remain academic, since the resident of a restrictive state would be more likely to seek an abortion in New York than a lawsuit in Georgia. The plaintiff, if there is one, should not forget to point out the vagueness of "residency," whose possible meanings range from "temporarily sleeping" to "domiciled."