who has reasonable suspicion of criminal activity sufficient to justify a stop under the standards of *Terry v. Ohio*, 392 U.S. 1. The California court has defined "credible and reliable" identification as "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." Appellee, who had been arrested and convicted under the statute, brought an action in Federal District Court challenging the statute's constitutionality. The District Court held the statute unconstitutional and enjoined its enforcement, and the Court of Appeals affirmed.

Held: The statute, as drafted and as construed by the state court, is unconstitutionally vague on its face within the meaning of the Due Process Clause of the Fourteenth Amendment by failing to clarify what is contemplated by the requirement that a suspect provide a "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest. Pp. 355-361.

COUNSEL: A. Wells Petersen, Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Daniel J. Kremer, Assistant Attorney General, and Jay M. Bloom, Deputy Attorney General.

Mark D. Rosenbaum, by invitation of the Court, 459 U.S. 964, argued the cause as amicus curiae in support of the judgment below. With him on the brief were Dennis M. Perluss, Fred Okrand, Mary Ellen Gale, Robert H. Lynn, and Charles S. Sims. *

* Briefs of amici curiae urging reversal were filed by William L. Cahalan, Edward Reilly Wilson, and Timothy A. Baughman for the Wayne County Prosecutor's Office; and by Wayne W. Schmidt, James P. Manak, and Fred E. Inbau for Americans for Effective Law Enforcement, Inc., et al.

Briefs of amici curiae urging affirmance were filed by Eugene G. Iredale for the California Attorneys for Criminal Justice; and by Michael Ratner for the Center for Constitutional Rights.

Briefs of amici curiae were filed by John K. Van de Kamp, Harry B. Sondheim, and John W. Messer for the Appellate Committee of the California District Attorneys Association; by Dan Stormer, John Huerta, and Peter Schey for the National Lawyers Guild et al.; and by Quin Denvir and William Blum for the State Public Defender of California.

JUDGES: O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion, post, p. 362. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, post, p. 369.

OPINION BY: O'CONNOR

OPINION

[*353] [***906] [**1856] JUSTICE O'CONNOR delivered the opinion of the Court.

[***LEdHR1A] [1A]This appeal presents a facial challenge to a criminal statute that requires persons who loiter or wander on the streets to provide a "credible and reliable" identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of *Terry v. Ohio*, 392 U.S. 1 (1968). [1] We conclude that the statute as it has been construed is unconstitutionally vague within the meaning of the Due Process Clause of the Fourteenth Amendment by failing to clarify what is contemplated [*354] by the requirement that a suspect provide a "credible and reliable" identification. [***907] Accordingly, we affirm the judgment of the court below.

1 -

California Penal Code Ann. § 647(e) (West 1970) provides:

"Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to

indicate to a reasonable man that the public safety demands such identification."

I

Appellee Edward Lawson was detained or arrested on approximately 15 occasions between March 1975 and January 1977 pursuant to Cal. Penal Code Ann. § 647(e) (West 1970). [2] Lawson was prosecuted only twice, and was convicted once. The second charge was dismissed.

2 The District Court failed to find facts concerning the particular occasions on which Lawson was detained or arrested under § 647(e). However, the trial transcript contains numerous descriptions of the stops given both by Lawson and by the police officers who detained him. For example, one police officer testified that he stopped Lawson while walking on an otherwise vacant street because it was late at night, the area was isolated, and the area was located close to a high crime area. Tr. 266-267. Another officer testified that he detained Lawson, who was walking at a late hour in a business area where some businesses were still open, and asked for identification because burglaries had been committed by unknown persons in the general area. *Id.*, at 207. The appellee states that he has never been stopped by police for any reason apart from his detentions under § 647(e).

Lawson then brought a civil action in the District Court for the Southern District of California seeking a declaratory judgment that § 647(e) is unconstitutional, a mandatory injunction to restrain enforcement of the statute, and compensatory and punitive damages against the various officers who detained him. The District Court found that § 647(e) was overboard because "a person who is stopped on less than probable cause cannot be punished for failing to identify himself." App. to Juris. Statement A-78. The District Court enjoined enforcement of the statute, but held that Lawson could not recover damages because the officers involved acted in the good-faith belief that each detention or arrest was lawful.

Appellant H. A. Porazzo, Deputy Chief Commander of the California Highway Patrol, appealed the District Court decision to the Court of Appeals for the Ninth Circuit. Lawson [*355] cross-appealed, arguing that he [**1857] was entitled to a jury trial on the issue of damages against the officers. The Court of Appeals affirmed the District Court determination as to the unconstitutionality of § 647(e). 658 F.2d 1362 (1981). The appellate court determined that the statute was unconstitutional in that it violates the Fourth Amendment's proscription against unreasonable searches and seizures, it contains a vague enforcement standard that is susceptible to arbitrary enforcement, and it fails to give fair and adequate notice of the type of conduct prohibited. Finally, the Court of Appeals reversed the District Court as to its holding that Lawson was not entitled to a jury trial to determine the good faith of the officers in his damages action against them, and remanded the case to the District Court for trial.

The officers appealed to this Court from that portion of the judgment of the Court of Appeals which declared § 647(e) unconstitutional and which enjoined its enforcement. We noted probable jurisdiction pursuant to 28 U. S. C. § 1254(2). 455 U.S. 999 (1982).

II

[***LEdHR2] [2] [***LEdHR3A] [3A] [***LEdHR4A] [4A] [***LEdHR5A] [5A]In the courts below, Lawson mounted an attack on the [***908] facial validity of § 647(e). [3] "In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, n. 5 (1982). As construed by the California Court of Appeal, [4] § 647(e) requires that an individual [*356] provide "credible and reliable" identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a *Terry* detention. [5] *People v. Solomon*, 33 Cal. App. 3d 429, [**1858] 108 Cal. Rptr. 867 [*357] (1973). "Credible and reliable" identification is defined by the State Court of Appeal as identification "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." *Id.*, at 438, 108 Cal. Rptr., at 873. In addition, a suspect may be required to "*account for his presence* . . . to the extent that it assists in producing credible and reliable identification . . . ." *Id.*, at 438, 108 Cal. Rptr., at 872. Under the [***909] terms of the statute, failure of the individual to provide "credible and reliable" identification permits the arrest. [6]

3 The appellants have apparently never

challenged the propriety of declaratory and injunctive relief in this case. See *Steffel v. Thompson*, 415 U.S. 452 (1974). Nor have appellants ever challenged Lawson's standing to seek such relief. We note that Lawson has been stopped on approximately 15 occasions pursuant to § 647(e), and that these 15 stops occurred in a period of less than two years. Thus, there is a "credible threat" that Lawson might be detained again under § 647(e). See *Ellis v. Dyson*, 421 U.S. 426, 434 (1975).

[***LEdHR3B] [3B] [***LEdHR4B] [4B]

4 In *Wainwright v. Stone*, 414 U.S. 21, 22-23 (1973), we held that "[for] the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation 'we must take the statute as though it read precisely as the highest court of the State has interpreted it.' *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 273 (1940)." The Court of Appeals for the Ninth Circuit noted in its decision that the state intermediate appellate court has construed the statute in *People v. Solomon*, 33 Cal. App. 3d 429, 108 Cal. Rptr. 867 (1973), that the State Supreme Court has refused review, and that *Solomon* has been the law of California for nine years. In these circumstances, we agree with the Ninth Circuit that the *Solomon* opinion is authoritative for purposes of defining the meaning of § 647(e). See 658 F.2d 1362, 1364-1365, n. 3 (1981).

[***LEdHR5B] [5B]

5 The *Solomon* court apparently read *Terry v. Ohio*, 392 U.S. 1 (1968), to hold that the test for a *Terry* detention was whether the officer had information that would lead a reasonable man to believe that the intrusion was appropriate. The Ninth Circuit noted that according to *Terry*, the applicable test under the Fourth Amendment requires that the police officer making a detention "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S., at 21. The Ninth Circuit then held that although what *Solomon* articulated as the *Terry* standard differed from what *Terry* actually held, "[we] believe that the *Solomon* court meant to incorporate in principle the standards enunciated in *Terry*." 658 F.2d, at 1366, n. 8. We agree with that interpretation of *Solomon*. Of course, if the *Solomon* court misread *Terry* and interpreted § 647(e) to permit investigative detentions in situations where the officers lack a reasonable suspicion of criminal activity based on objective facts, Fourth Amendment concerns would be implicated. See *Brown v. Texas*, 443 U.S. 47 (1979).

In addition, the *Solomon* court appeared to believe that both the *Terry* detention *and* frisk were proper under the standard for *Terry* detentions, and since the frisk was more intrusive than the request for identification, the request for identification *must* be proper under *Terry*. See 33 Cal. App. 3d, at 435, 108 Cal. Rptr., at 870-871. The Ninth Circuit observed that the *Solomon* analysis was "slightly askew." 658 F.2d, at 1366, n. 9. The court reasoned that under *Terry*, the frisk, as opposed to the detention, is proper only if the detaining officer reasonably believes that the suspect may be armed and dangerous, in addition to having an articulable suspicion that criminal activity is afoot.

6 In *People v. Caylor*, 6 Cal. App. 3d 51, 56, 85 Cal. Rptr. 497, 501 (1970), the court suggested that the State must prove that a suspect detained under § 647(e) was loitering or wandering for "evil purposes." However, in *Solomon*, which the court below and the parties concede is "authoritative" in the absence of a California Supreme Court decision on the issue, there is no discussion of any requirement that the State prove "evil purposes."

III

[***LEdHR6] [6]Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression. See generally M. Bassiouni, Substantive Criminal Law 53 (1978).

[***LEdHR7] [7] [***LEdHR8] [8]As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient

definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra*; *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Connally v. General Construction Co.*, 269 U.S. 385 (1926). Although the doctrine focuses [*358] both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith*, 415 U.S., at 574. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.*, at 575. [7]

7 Our concern for minimal guidelines finds its roots as far back as our decision in *United States v. Reese*, 92 U.S. 214, 221 (1876):

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government."

[***LEdHR9A] [9A]Section 647(e), as presently drafted and as construed by the state courts, contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest. An individual, whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets "only at the whim of any police officer" who happens to stop that individual under § 647(e). *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 [**1859] (1965). [***910] Our concern here is based upon the "potential for arbitrarily suppressing First Amendment liberties. . . ." *Id.*, at 91. In addition, § 647(e) implicates consideration of the constitutional right to freedom of movement. See *Kent v. Dulles*, 357 U.S. 116, 126 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500, 505-506 (1964). [8]

[***LEdHR9B] [9B]

8 In his dissent, JUSTICE WHITE claims that "[the] upshot of our cases . . . is that whether or not a statute purports to regulate constitutionally protected conduct, it should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications." *Post*, at 370. The description of our holdings is inaccurate in several respects. First, it neglects the fact that we permit a facial challenge if a law reaches "a substantial amount of constitutionally protected conduct." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). Second, where a statute imposes criminal penalties, the standard of certainty is higher. See *Winters v. New York*, 333 U.S. 507, 515 (1948). This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application. See, *e. g.*, *Colautti v. Franklin*, 439 U.S. 379, 394-401 (1979); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). The dissent concedes that "the overbreadth doctrine permits facial challenge of a law that reaches a substantial amount of conduct protected by the First Amendment. . . ." *Post*, at 371. However, in the dissent's view, one may not "confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own." *Post*, at 370. But we have traditionally viewed vagueness and overbreadth as logically related and similar doctrines. See, *e. g.*, *Keyishian v. Board of Regents*, 385 U.S. 589, 609 (1967); *NAACP v. Button*, 371 U.S. 415, 433 (1963). See also Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 110-113 (1960).

No authority cited by the dissent supports its argument about facial challenges in the arbitrary enforcement context. The dissent relies heavily on *Parker v. Levy*, 417 U.S. 733 (1974), but in that case we deliberately applied a less stringent vagueness analysis "[because] of the factors differentiating military society from civilian society." *Id.*, at 756. *Hoffman Estates, supra*, also

relied upon by the dissent, does not support its position. In addition to reaffirming the validity of facial challenges in situations where free speech or free association are affected, see 455 U.S., at 494, 495, 498-499, the Court emphasized that the ordinance in *Hoffman Estates* "simply regulates business behavior" and that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow." *Id.*, at 499, 498.

[*359] Section 647(e) is not simply a "stop-and-identify" statute. Rather, the statute requires that the individual provide a "credible and reliable" identification that carries a "reasonable assurance" of its authenticity, and that provides "means for later getting in touch with the person who has identified himself." *Solomon*, 33 Cal. App. 3d, at 438, 108 Cal. Rptr., at 872-873. In addition, the suspect may also have to account for his presence "to the extent it assists in producing [*360] credible and reliable identification." *Id.*, at 438, 108 Cal. Rptr., at 872.

[***LEdHR10A] [10A]At oral argument, the appellants confirmed that a suspect violates § 647(e) unless "the officer [is] satisfied that the identification is reliable." Tr. of Oral Arg. 6. In giving examples of how suspects would satisfy the requirement, appellants explained that a jogger, who was not carrying identification, could, depending on the particular officer, be required to answer a series of questions concerning the route that he followed to arrive at the place where the officers detained him, [9] or could satisfy the identification requirement [***911] simply by reciting his name and address. See *Id.*, at 6-10.

[***LEdHR10B] [10B]

9 To the extent that § 647(e) criminalizes a suspect's failure to answer such questions put to him by police officers, Fifth Amendment concerns are implicated. It is a "settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." *Davis v. Mississippi*, 394 U.S. 721, 727, n. 6 (1969).

[***LEdHR1B] [1B] [***LEdHR11] [11]It is clear that the full discretion accorded to the police to determine whether the suspect has provided a "credible and reliable" identification necessarily "[entrusts] [**1860] lawmaking 'to the moment-to-moment judgment of the policeman on his beat.'" *Smith, supra*, at 575 (quoting *Gregory v. Chicago*, 394 U.S. 111, 120 (1969) (Black, J., concurring)). Section 647(e) "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure,'" *Papachristou*, 405 U.S., at 170 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940)), and "confers on police a virtually unrestrained power to arrest and charge persons with a violation." *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (POWELL, J., concurring in result). In providing that a detention under § 647(e) may occur only where there is the level of suspicion sufficient to justify a *Terry* stop, the State ensures the existence of "neutral limitations on the conduct of individual officers." *Brown v. Texas*, 443 [*361] U.S., at 51.Although the initial detention is justified, the State fails to establish standards by which the officers may determine whether the suspect has complied with the subsequent identification requirement.

[***LEdHR12] [12]Appellants stress the need for strengthened law enforcement tools to combat the epidemic of crime that plagues our Nation. The concern of our citizens with curbing criminal activity is certainly a matter requiring the attention of all branches of government. As weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity. See *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). Section 647(e), as presently construed, requires that "suspicious" persons satisfy some undefined identification requirement, or face criminal punishment. Although due process does not require "impossible standards" of clarity, see *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947), this is not a case where further precision in the statutory language is either impossible or impractical.

IV

[***LEdHR1C] [1C] [***LEdHR13A] [13A]We conclude § 647(e) is unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute. [10] Accordingly, the judgment of [*362] the Court of Appeals is affirmed, [***912] and the case is remanded for further

proceedings consistent with this opinion.

[***LEdHR13B] [13B]

10 Because we affirm the judgment of the court below on this ground, we find it unnecessary to decide the other questions raised by the parties because our resolution of these other issues would decide constitutional questions in advance of the necessity of doing so. See *Burton v. United States*, 196 U.S. 283, 295 (1905); *Liverpool, N. Y. & P. S.S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885). See also *Ashwander v. TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring). The remaining issues raised by the parties include whether § 647(e) implicates Fourth Amendment concerns, whether the individual has a legitimate expectation of privacy in his identity when he is detained lawfully under *Terry*, whether the requirement that an individual identify himself during a *Terry* stop violates the Fifth Amendment protection against compelled testimony, and whether inclusion of the *Terry* standard as part of a criminal statute creates other vagueness problems. The appellee also argues that § 647(e) permits arrests on less than probable cause. See *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979).

It is so ordered.

CONCUR BY: BRENNAN

CONCUR

JUSTICE BRENNAN, concurring.

I join the Court's opinion; it demonstrates convincingly that the California statute at issue in this case, Cal. Penal Code Ann. § 647(e) (West 1970), as interpreted by California courts, is unconstitutionally vague. Even if the defect identified by the Court were cured, however, I would hold that this statute violates the Fourth [**1861] Amendment. [1] Merely to facilitate the general law enforcement objectives of investigating and preventing unspecified crimes, States may not authorize the arrest and criminal prosecution of an individual for failing to produce identification or further information on demand by a police officer.

1 We have not in recent years found a state statute invalid directly under the Fourth Amendment, but we have long recognized that the government may not "authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct." *Sibron v. New York*, 392 U.S. 40, 61 (1968). In *Sibron*, and in numerous other cases, the Fourth Amendment issue arose in the context of a motion by the defendant in a criminal prosecution to suppress evidence against him obtained as the result of a police search or seizure of his person or property. The question thus has always been whether particular conduct by the police violated the Fourth Amendment, and we have not had to reach the question whether state law purporting to authorize such conduct also offended the Constitution. In this case, however, appellee Edward Lawson has been repeatedly arrested under authority of the California statute, and he has shown that he will likely be subjected to further seizures by the police in the future if the statute remains in force. See *Los Angeles* v. *Lyons, ante*, at 105-109; *Gomez v. Layton*, 129 U. S. App. D. C. 289, 394 F.2d 764 (1968). It goes without saying that the Fourth Amendment safeguards the rights of those who are not prosecuted for crimes as well as the rights of those who are.

[*363] It has long been settled that the Fourth Amendment prohibits the seizure and detention or search of an individual's person unless there is probable cause to believe that he has committed a crime, except under certain conditions strictly defined by the legitimate requirements of law enforcement and by the limited extent of the resulting intrusion on individual liberty and privacy. See *Davis v. Mississippi*, 394 U.S. 721, 726-727 (1969). The scope of that exception to the probable-cause requirement for seizures of the person has been defined by a series of cases, beginning with *Terry v. Ohio*, 392 U.S. 1 (1968), holding that a police officer with reasonable suspicion of criminal activity, based on articulable facts, may detain a suspect [***913] briefly for purposes of limited questioning and, in so doing, may conduct a brief "frisk" of the suspect to protect himself from concealed weapons. See, *e. g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 880-884 (1975); *Adams v. Williams*, 407 U.S. 143, 145-146 (1972). Where probable cause is lacking, we have expressly declined to allow significantly more intrusive detentions or searches on the *Terry* rationale, despite the assertion of compelling law

enforcement interests. "For all but those narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause." *Dunaway v. New York*, 442 U.S. 200, 214 (1979). [2]

> 2 A brief detention is usually sufficient as a practical matter to accomplish all legitimate law enforcement objectives with respect to individuals whom the police do not have probable cause to arrest. For longer detentions, even though they fall short of a full arrest, we have demanded not only a high standard of law enforcement necessity, but also objective indications that an individual would not consider the detention significantly intrusive. Compare *Dunaway v. New York*, 442 U.S., at 212-216 (seizure of suspect without probable cause and custodial interrogation in police station violates Fourth Amendment), and *Davis v. Mississippi*, 394 U.S. 721, 727-728 (1969) (suspect may not be summarily detained and taken to police station for fingerprinting but may be ordered to appear at a specific time), with *Michigan v. Summers*, 452 U.S. 692, 701-705 (1981) (suspect may be detained in his own home without probable cause for time necessary to search the premises pursuant to a valid warrant supported by probable cause). See also *Florida v. Royer*, 460 U.S. 491, 500 (1983) (opinion of WHITE, J.) ("least intrusive means" requirement for searches not supported by probable cause).

[*364] *Terry* and the cases following it give full recognition to law enforcement officers' need for an "intermediate" response, short [**1862] of arrest, to suspicious circumstances; the power to effect a brief detention for the purpose of questioning is a powerful tool for the investigation and prevention of crimes. Any person may, of course, direct a question to another person in passing. The *Terry* doctrine permits police officers to do far more: If they have the requisite reasonable suspicion, they may use a number of devices with substantial coercive impact on the person to whom they direct their attention, including an official "show of authority," the use of physical force to restrain him, and a search of the person for weapons. *Terry v. Ohio*, *supra*, at 19, n. 16; see *Florida v. Royer*, 460 U.S. 491, 498-499 (1983) (opinion of WHITE, J.); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.). During such an encounter, few people will ever feel free not to cooperate fully with the police by answering their questions. Cf. 3 W. LaFave, Search and Seizure § 9.2, pp. 53-55 (1978). Our case reports are replete with examples of suspects' cooperation during *Terry* encounters, even when the suspects have a great deal to lose by cooperating. See, *e. g.*, *Sibron v. New York*, 392 U.S. 40, 45 (1968); *Florida v. Royer*, *supra*, at 493-495.

The price of that effectiveness, [***914] however, is intrusion on individual interests protected by the Fourth Amendment. We have held that the intrusiveness of even these brief stops for purposes of questioning is sufficient to render them "seizures" under the Fourth Amendment. See *Terry v. Ohio*, 392 U.S., at 16. For precisely that reason, the scope of seizures of the person on less than probable cause that *Terry* [*365] permits is strictly circumscribed to limit the degree of intrusion they cause. *Terry* encounters must be brief; the suspect must not be moved or asked to move more than a short distance; physical searches are permitted only to the extent necessary to protect the police officers involved during the encounter; and, most importantly, the suspect must be free to leave after a short time and to decline to answer the questions put to him.

"[The] person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation." *Id.*, at 34 (WHITE, J., concurring).

Failure to observe these limitations converts a *Terry* encounter into the sort of detention that can be justified only by probable cause to believe that a crime has been committed. See *Florida v. Royer*, 460 U.S., at 501 (opinion of WHITE, J.); *id.*, at 509-511 (BRENNAN, J., concurring in result); *Dunaway v. New York*, *supra*, at 216.

The power to arrest -- or otherwise to prolong a seizure until a suspect had responded to the satisfaction of the police officers -- would undoubtedly elicit cooperation from a high percentage of even those very

few individuals not sufficiently coerced by a show of authority, brief physical detention, and a frisk. We have never claimed that expansion of the power of police officers to act on reasonable suspicion alone, or even less, would further no law enforcement interests. See, *e. g.*, *Brown v. Texas*, 443 U.S. 47, 52 (1979). But the balance struck by the Fourth Amendment between the public interest in effective law enforcement and the equally public interest in safeguarding individual freedom and privacy from arbitrary governmental interference forbids such expansion. See *Dunaway v. New York*, *supra*; *United States v. Brignoni-Ponce*, 422 U.S., at 878. Detention beyond the limits [*366] of *Terry* without probable cause would improve the effectiveness of legitimate police investigations by only a small margin, [**1863] but it would expose individual members of the public to exponential increases in both the intrusiveness of the encounter and the risk that police officers would abuse their discretion for improper ends. Furthermore, regular expansion of *Terry* encounters into more intrusive detentions, without a clear connection to any specific underlying crimes, is likely to exacerbate ongoing tensions, where they exist, between the police and the public. See Report of the National Advisory Commission on Civil Disorders 157-168 (1968).

[***915] In sum, under the Fourth Amendment, police officers with reasonable suspicion that an individual has committed or is about to commit a crime may detain that individual, using some force if necessary, for the purpose of asking investigative questions. [3] They may ask their questions in a way calculated to obtain an answer. But they may not *compel* an answer, and they must allow the person to leave after a reasonably brief period of time unless the information they have acquired during the encounter has given them probable cause sufficient to justify an arrest. [4]

> 3 Police officers may have a similar power with respect to persons whom they reasonably believe to be material witnesses to a specific crime. See, *e. g.*, ALI Model Code of Pre-Arraignment Procedure § 110.2(1)(b) (Proposed Official Draft 1975).
>
> 4 Of course, some reactions by individuals to a properly limited *Terry* encounter, *e. g.*, violence toward a police officer, in and of themselves furnish valid grounds for arrest. Other reactions, such as flight, may often provide the necessary information, in addition to that which the officers already possess, to constitute probable cause. In some circumstances it is even conceivable that the mere fact that a suspect refuses to answer questions once detained, viewed in the context of the facts that gave rise to reasonable suspicion in the first place, would be enough to provide probable cause. A court confronted with such a claim, however, would have to evaluate it carefully to make certain that the person arrested was not being penalized for the exercise of his right to refuse to answer.

California cannot abridge this constitutional rule by making it a crime to refuse to answer police questions during a [*367] *Terry* encounter, any more than it could abridge the protections of the Fifth and Sixth Amendments by making it a crime to refuse to answer police questions once a suspect has been taken into custody. To begin, the statute at issue in this case could not be constitutional unless the intrusions on Fourth Amendment rights it occasions were necessary to advance some specific, legitimate state interest not already taken into account by the constitutional analysis described above. Yet appellants do not claim that § 647(e) advances any interest other than general facilitation of police investigation and preservation of public order -- factors addressed at length in *Terry*, *Davis*, and *Dunaway*. Nor do appellants show that the power to arrest and to impose a criminal sanction, in addition to the power to detain and to pose questions under the aegis of state authority, is so necessary in pursuit of the State's legitimate interests as to justify the substantial additional intrusion on individuals' rights. Compare Brief for Appellants 18-19 (asserting that § 647(e) is justified by state interest in "detecting and preventing crime" and "protecting the citizenry from criminal acts"), and *People v. Solomon*, 33 Cal. App. 3d 429, 436-437, 108 Cal. Rptr. 867, 872 (1973) (§ 647(e) justified by "the public need involved," *i. e.*, "protection of society against crime"), with *United States v. Brignoni-Ponce*, *supra*, at 884 (federal interest in immigration control permits stops at the border itself without reasonable suspicion), and *California v. Byers*, 402 U.S. 424, 456-458 (1971) (Harlan, J., concurring in judgment) (state interest in regulating automobiles justifies making it a crime to refuse to stop after an automobile accident and report it). Thus, because the State's interests extend only so far as to justify the limited searches and seizures defined by [***916] *Terry*, the balance of interests described in that case and its progeny

must control.

Second, it goes without saying that arrest and the threat of a criminal sanction [**1864] have a substantial impact on interests protected by the Fourth Amendment, far more severe than [*368] we have ever permitted on less than probable cause. Furthermore, the likelihood that innocent persons accosted by law enforcement officers under authority of § 647(e) will have no realistic means to protect their rights compounds the severity of the intrusions on individual liberty that this statute will occasion. The arrests it authorizes make a mockery of the right enforced in *Brown v. Texas*, 443 U.S. 47 (1979), in which we held squarely that a State may not make it a crime to refuse to provide identification on demand in the absence of reasonable suspicion. [5] If § 647(e) remains in force, the validity of such arrests will be open to challenge only after the fact, in individual prosecutions for failure to produce identification. Such case-by-case scrutiny cannot vindicate the Fourth Amendment rights of persons like appellee, many of whom will not even be prosecuted after they are arrested, see *ante*, at 354. A pedestrian approached by police officers has no way of knowing whether the officers have "reasonable suspicion" -- without which they may not demand identification even under § 647(e), *ante*, at 356, and n. 5 -- because that condition depends solely on the objective facts known to the officers and evaluated in light of their experience, see *Terry v. Ohio*, 392 U.S., at 30; *United States v. Brignoni-Ponce*, 422 U.S., at 884-885. The pedestrian will know that to assert his rights may subject him to arrest and all that goes with it: new acquaintances among jailers, lawyers, prisoners, and bail bondsmen, firsthand knowledge of local jail conditions, a "search incident to arrest," and the expense of defending against a possible prosecution. [6] The only response to be [*369] expected is compliance with the officers' requests, whether or not they are based on reasonable suspicion, and without regard to the possibility of later vindication in court. Mere reasonable suspicion does not justify subjecting the innocent to such a dilemma. [7]

5 In *Brown* we had no need to consider whether the State can make it a crime to refuse to provide identification on demand during a seizure permitted by *Terry*, when the police have reasonable suspicion but not probable cause. See 443 U.S., at 53, n. 3.

6 Even after arrest, however, he may not be forced to answer questions against his will, and -- in contrast to what appears to be normal procedure during *Terry* encounters -- he will be so informed. See *Miranda v. Arizona*, 384 U.S. 436 (1966). In fact, if he indicates a desire to remain silent, the police should cease questioning him altogether. *Id.*, at 473-474.

7 When law enforcement officers have probable cause to believe that a person has committed a crime, the balance of interests between the State and the individual shifts significantly, so that the individual may be forced to tolerate restrictions on liberty and invasions of privacy that possibly will never be redressed, even if charges are dismissed or the individual is acquitted. Such individuals may be arrested, and they may not resist. But probable cause, and nothing less, represents the point at which the interests of law enforcement justify subjecting an individual to any significant intrusion beyond that sanctioned in *Terry*, including either arrest or the need to answer questions that the individual does not want to answer in order to avoid arrest or end a detention.

[***917] By defining as a crime the failure to respond to requests for personal information during a *Terry* encounter, and by permitting arrests upon commission of that crime, California attempts in this statute to compel what may not be compelled under the Constitution. Even if § 647(e) were not unconstitutionally vague, the Fourth Amendment would prohibit its enforcement.

DISSENT BY: WHITE

DISSENT

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

The usual rule is that the alleged vagueness of a criminal statute must be judged in light of the conduct that is charged to be violative of the statute. See, *e. g.*, *United States v. Mazurie*, 419 U.S. 544, 550 (1975); *United States v. Powell*, 423 U.S. 87, 92-93 (1975). If the actor is given sufficient notice that [**1865] his conduct is within the proscription of the statute, his conviction is not vulnerable on vagueness grounds, even if as applied to other conduct, the law would be unconstitutionally vague. None of our cases "suggests that one who has received fair warning of the criminality of his own

conduct from the statute in question is nonetheless entitled to [*370] attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756 (1974). The correlative rule is that a criminal statute is not unconstitutionally vague on its face unless it is "impermissibly vague in all of its applications." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982).

These general rules are equally applicable to cases where First Amendment or other "fundamental" interests are involved. The Court has held that in such circumstances "more precision in drafting may be required because of the vagueness doctrine in the case of regulation of expression," *Parker v. Levy, supra*, at 756; a "greater degree of specificity" is demanded than in other contexts. *Smith v. Goguen*, 415 U.S. 566, 573 (1974). But the difference in such cases "relates to how strict a test of vagueness shall be applied in judging a particular criminal statute." *Parker v. Levy*, 417 U.S., at 756. It does not permit the challenger of the statute to confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own. See *ibid.* Of course, if his own actions are themselves protected by the First Amendment or other constitutional provision, or if the statute does not fairly warn that it is proscribed, he may not be convicted. But it would be unavailing for him to claim that although he knew his own conduct was unprotected and was plainly enough forbidden by the statute, others may be in doubt as to whether their acts are banned by the law.

The upshot of our cases, therefore, is that whether or not a statute purports to regulate constitutionally [***918] protected conduct, it should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications. If any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the [*371] law, the enactment is not unconstitutional on its face and should not be vulnerable to a facial attack in a declaratory judgment action such as is involved in this case. Under our cases, this would be true, even though as applied to other conduct the provision would fail to give the constitutionally required notice of illegality.

Of course, the overbreadth doctrine permits facial challenge of a law that reaches a substantial amount of conduct protected by the First Amendment; and, as I have indicated, I also agree that in First Amendment cases the vagueness analysis may be more demanding. But to imply, as the majority does, *ante*, at 358-359, n. 8, that the overbreadth doctrine requires facial invalidation of a statute which is not vague as applied to a defendant's conduct but which is vague as applied to other acts is to confound vagueness and overbreadth, contrary to *Parker v. Levy, supra.*

If there is a range of conduct that is clearly within the reach of the statute, law enforcement personnel, as well as putative arrestees, are clearly on notice that arrests for such conduct are authorized by the law. There would be nothing arbitrary or discretionary about such arrests. If the officer arrests for an act that both he and the lawbreaker know is clearly barred by the statute, it seems to me an untenable exercise of judicial review to invalidate a state conviction because in some other circumstance the officer may arbitrarily misapply the statute. That the law might not give sufficient guidance to arresting officers [**1866] with respect to other conduct should be dealt with in those situations. See, *e. g., Hoffman Estates, supra*, at 504. It is no basis for fashioning a further brand of "overbreadth" and invalidating the statute on its face, thus forbidding its application to identifiable conduct that is within the State's power to sanction.

I would agree with the majority in this case if it made at least some sense to conclude that the requirement to provide "credible and reliable identification" after a valid stop on reasonable suspicion of criminal conduct is "impermissibly vague in all of its applications." *Hoffman Estates v. Flipside*, [*372] *supra*, at 495. * But the [***919] statute is not vulnerable on this ground; and the majority, it seems to me, fails to demonstrate that it is. Suppose, for example, an officer requests identification information from a suspect during a valid *Terry* stop and the suspect answers: "Who I am is just none of your business." Surely the suspect would know from the statute that a refusal to provide any information at all would constitute a violation. It would be absurd to suggest that in such a situation only the unfettered discretion of a police officer, who has legally stopped a person on reasonable suspicion, would serve to determine whether a violation of the statute has occurred.

"It is self-evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know is [a failure to provide credible and reliable identification] and that would be covered by the statute . . . . In these instances, there would be ample notice to the actor and no room for undue discretion by enforcement officers. There may be a variety of other conduct that might or might not be claimed [to have failed to meet the statute's requirements] by the State, but unpredictability in those situations does not change the certainty in others." *Smith* v. *Goguen*, 415 U.S., at 584 (WHITE, J., concurring in judgment).

See *id.*, at 590 (BLACKMUN, J., joined by BURGER, C. J., agreeing with WHITE, J., on the vagueness issue). Thus, even if, as the majority cryptically asserts, the statute here [*373] implicates First Amendment interests, it is not vague on its face, however more strictly the vagueness doctrine should be applied. The judgment below should therefore not be affirmed but reversed and appellee Lawson remitted to challenging the statute as it has been or will be applied to him.

* The majority attempts to underplay the conflict between its decision today and the decision last Term in *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, by suggesting that we applied a "less strict vagueness test" because economic regulations were at issue. The Court there also found that the ordinances challenged might be characterized as quasi-criminal or criminal in nature and held that because at least some of respondent's conduct clearly was covered by the ordinance, the facial challenge was unavailing even under the "relatively strict test" applicable to criminal laws. 455 U.S., at 499-500.

The majority finds that the statute "contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification." *Ante*, at 358. At the same time, the majority concedes that "credible and reliable" has been defined by the state court to mean identification that carries reasonable assurance that the identification is authentic and that provides means for later getting in touch with the person. The narrowing construction given this statute by the state court cannot be likened to the "standardless" statutes involved in the cases cited by the majority. For example, *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972), involved a statute that made it a crime to be a "vagrant." The statute provided:

"'Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, . . . common drunkards, common night walkers, . . . lewd, wanton and lascivious persons, . . . common railers and brawlers, persons wandering or strolling around from place to place without [**1867] any lawful purpose or object, habitual loafers, . . . shall be deemed vagrants.'" *Id.*, at 156-157, n. 1.

In *Lewis* v. *City of New Orleans*, 415 U.S. 130, 132 (1974), [***920] the statute at issue made it a crime "'for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.'" The present statute, as construed by the state courts, does not fall in the same category.

The statutes in *Lewis* v. *City of New Orleans* and *Smith* v. *Goguen*, *supra*, as well as other cases cited by the majority clearly involved threatened infringements of First Amendment [*374] freedoms. A stricter test of vagueness was therefore warranted. Here, the majority makes a vague reference to potential suppression of First Amendment liberties, but the precise nature of the liberties threatened is never mentioned. *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87 (1965), is cited, but that case dealt with an ordinance making it a crime to "'stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on,'" *id.*, at 90, and the First Amendment concerns implicated by the statute were adequately explained by the Court's reference to *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938), and *Schneider* v. *State*, 308 U.S. 147 (1939), which dealt with the First Amendment right to distribute leaflets on city streets and sidewalks. There are no such concerns in the present case.

Of course, if the statute on its face violates the Fourth or Fifth Amendment -- and I express no views about that question -- the Court would be justified in striking it down. But the majority apparently cannot bring itself to take this course. It resorts instead to the vagueness doctrine to invalidate a statute that is clear in many of its applications but which is somehow distasteful to the majority. As here construed and applied, the

doctrine serves as an open-ended authority to oversee the States' legislative choices in the criminal law area and in this case leaves the State in a quandary as to how to draft a statute that will pass constitutional muster.

I would reverse the judgment of the Court of Appeals.

REFERENCES

Supreme Court's views regarding validity of criminal disorderly conduct statutes under void-for-vagueness doctrine

21 Am Jur 2d, Criminal Law 15-17; 39 Am Jur 2d, Highways, Streets, and Bridges 250

7 Am Jur Pl & Pr Forms (Rev), Constitutional Law, Forms 21, 38

USCS, Constitution, 14th Amendment

US L Ed Digest, Statutes 18, 18.9

L Ed Index to Annos, Certainty and Definiteness; Criminal Law; Due Process of Law

ALR Quick Index, Certainty and Definiteness; Criminal Law; Due Process of Law; Loitering

Federal Quick Index, Certainty and Definiteness; Criminal Law; Due Process of Law; Loitering

Annotation References:

Supreme Court's views regarding validity of criminal disorderly conduct statutes under void-for-vagueness doctrine. 75 L Ed 2d 1049.

Indefiniteness of language as affecting validity of criminal legislation or judicial definition of common-law crime. 96 L Ed 374, 16 L Ed 2d 1231.

Validity of loitering statutes and ordinances. 25 ALR3d 836.

Validity of vagrancy statutes and ordinances. 25 ALR3d 792.

EXHIBIT 6

Positive
As of: Jan 07, 2011

RICHMOND BORO GUN CLUB, INC., NEW YORK STATE RIFLE AND PISTOL ASSOCIATION, INC. and JOHN DOES I THROUGH VI, Plaintiffs-Appellants, and NATIONAL RIFLE ASSOCIATION OF AMERICA, Plaintiff, v. CITY OF NEW YORK, and LEE P. BROWN In His Official Capacity as POLICE COMMISSIONER OF THE CITY OF NEW YORK, Defendants-Appellees.

Docket No. 95-7944

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

97 F.3d 681; 1996 U.S. App. LEXIS 26491

March 15, 1996, Argued
October 10, 1996, Decided

PRIOR HISTORY: [**1] A New York City statute outlaws possession and transfer of certain firearms and ammunition feeding devices within the city. A New York City gun club, and others, challenge the law claiming (1) it is preempted by federal law, (2) it is unconstitutionally vague, and (3) it contravenes the Due Process Clause of the United States Constitution. The United States District Court for the Eastern District of New York (Reena Raggi, Judge), rejected all of the gun club's challenges.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, gun club and associated individuals, appealed from a judgment of the United States District Court for the Eastern District of New York, which granted summary judgment to defendants, city and police commissioner, in an action challenging Local Law 78, New York City, N.Y., Rules of the City of New York § 10-131 et seq.

OVERVIEW: The New York City Council passed Local Law 78, amending the New York City, N.Y., Rules of the City of New York § 10-131, et seq., and criminalizing the possession or transfer of assault weapons within the city. Plaintiffs, gun club and associated individuals, filed suit for a preliminary injunction against defendants, city and police commissioner. The district court granted defendants' motion for summary judgment. Plaintiffs appealed, arguing that Local Law 78 was unconstitutionally vague, preempted by federal law, and deprived them of liberty and property without due process. The court affirmed. The court held that plaintiffs' vagueness challenge was without merit. It was premature and based on a speculative threat of arbitrary enforcement. Plaintiffs' preemption argument failed because congress repealed 10 U.S.C.S. § 4312, and, even if it had not, the laws did not conflict. Plaintiffs' due process claims were rejected. Local Law 78 was not so drastic as to trigger substantive due process rights. It was a rational legislative response to increased assault weapon violence. Procedural due process was not violated because plaintiffs could challenge the ordinance in court.

OUTCOME: The court affirmed the district court's grant of summary judgment to defendants, city and police commissioner, in an action by plaintiffs, gun club and associated individuals, challenging a local gun law that

criminalized the possession or transfer of assault weapons. The court held that plaintiffs' theories did not justify judicial revocation of the decisions of the city council.

COUNSEL: Stephen P. Halbrook, Fairfax, VA (Susan Courtney Chambers, New York, NY, of counsel), for Plaintiffs-Appellants.

Alan Beckoff, New York City Law Dept, New York, NY (Paul A. Crotty, Corporation Counsel of the City of New York, New York, NY, on the brief, Stephen J. McGrath, Albert Fredericks, New York, NY, of counsel), for Defendants-Appellees.

(Ira S. Sacks, on the brief, Jocelyn Lee Jacobson, Deborah Lifshey, Fried, Frank, Harris, Shriver & Jacobson, New York, NY, Dennis A. Henigan, Gail Robinson, Center To Prevent Handgun Violence, Washington, DC, all of counsel), for Amicus Curiae Center To Prevent Handgun Violence, New York Association Of Chiefs Of Police, Detectives' Endowment Association, [**2] Captains Endowment Association, Lieutenants Benevolent Association and Sergeants Benevolent Association.

JUDGES: Before: FEINBERG, WALKER, and PARKER, Circuit Judges.

OPINION BY: PARKER

OPINION

[*683] PARKER, *Circuit Judge*:

Appellants Richmond Boro Gun Club, the New York State Rifle and Pistol Association, and John Does I through VI brought this action challenging New York City Local Law 78 of 1991, amending New York City Administrative Code § 10-131 & §§ 10-301 through 10-310 (hereafter "Local Law 78"), which criminalizes the possession or transfer of certain assault weapons and ammunition feeding devices within the city. [1] The United States District Court for the Eastern District of New York (Reena Raggi, *Judge*) denied plaintiffs' initial request for a preliminary injunction and, in a well reasoned opinion, granted defendants' motion for summary judgment. *Richmond Boro Gun Club, Inc. v. City of New York*, 896 F. Supp. 276 (E.D.N.Y. 1995). On appeal, plaintiffs press only three of the arguments raised below. Before this court plaintiffs argue that Local Law 78 (1) is unconstitutionally vague; (2) is preempted by federal laws and regulations establishing the Civilian Marksmanship Program; [**3] and (3) deprives them of rights to liberty and property without due process. We agree with the district court that plaintiffs' theories do not justify judicial revocation of the decisions of the New York City Council.

1 The National Rifle Association was also a plaintiff in the case, but has not joined in the appeal.

I. BACKGROUND

Section 10 of Local Law 78, which added a new Section 10-303.1 to Chapter 3 of the New York City Administrative Code, criminalizes, subject to certain exceptions, possession or transfer of assault weapons. Section 6 of Local Law 78, which amended Section 10-301 of the New York City Administrative Code, defines "Assault Weapon" as

> (a) any semiautomatic centerfire or rimfire rifle or semiautomatic shotgun which has one or more of the following features:
>
> 1) folding or telescoping stock or *no stock*;
>
> 2)*pistol grip that protrudes conspicuously beneath the action of the weapon;*
>
> 3) bayonet mount;
>
> 4) *flash suppressor or threaded barrel designed to accommodate* [**4] *a flash suppressor;*
>
> 5) *barrel shroud;*
>
> 6) grenade launcher; or
>
> 7) modifications of such features, or other features, determined by rule of the commissioner to be particularly suitable for military and not sporting purposes. In addition, the commissioner shall, by rule, designate specific semiautomatic centerfire or rimfire rifles or

semiautomatic shotguns, identified by make, model and/or manufacturer's name, as within the definition of assault weapon, if the commissioner determines that such weapons are particularly suitable for military and not sporting purposes.

(b) Any shotgun with a revolving-cylinder magazine.

(c) *Any part, or combination of parts, designed or redesigned or intended to readily convert a rifle or shotgun into an assault weapon.*

(d) "Assault weapon" shall not include any rifle or shotgun modified to render it permanently inoperative.

New York City Administrative Code § 10-301(16) (emphasis on sections challenged on vagueness grounds). Local Law 78 also defines and criminalizes the possession and transfer of "Ammunition feeding devices," which are "magazines, belts, feedstrips, drums or clips capable of being attached [**5] to or utilized with firearms, rifles, shotguns, or assault weapons." Local Law 78, §§ 4, 6 (creating New York City Administrative Code §§ 10-131.i & 10-301(17)). The law bans possession or disposition of any such feeding devices capable of holding more than five rounds of ammunition designed for use with a rifle or shotgun, Local Law 78, § 13 (amending New York City Administrative [*684] Code § 10-306), or capable of holding more than seventeen rounds of ammunition if designed for use with a handgun, Local Law 78, § 4 (creating New York City Administrative Code § 10-131(i)(6)).

The law exempts from its coverage state and city police or peace officers carrying such items in the lawful performance of their duties, and members of the federal or state armed forces who are authorized by law to carry these weapons. Local Law 78, § 12 (amending New York City Administrative Code § 10-305).

II. DISCUSSION

The district court assumed the truth of all of plaintiffs' allegations and applied the law to those allegations in granting summary judgment for New York City. Our review, then, is of the district court's legal conclusions. We review such conclusions de novo. *Motor Vehicle Mfrs. Ass'n* [**6] *v. New York Dep't of Envtl. Conservation*, 79 F.3d 1298, 1304 (2d Cir. 1996).

1. *The "Void for Vagueness" Argument*

"The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss*, 347 U.S. 612, 617, 98 L. Ed. 989, 74 S. Ct. 808 (1954). The principle underlying the doctrine is that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Id.*

Plaintiffs claim that Local Law 78 is unconstitutionally vague both on its face and as applied. They argue that several of the phrases used to identify an "assault weapon," such as a gun having "a pistol grip that protrudes conspicuously beneath the action," "no stock," "a threaded barrel designed to accommodate a flash suppressor," and "a barrel shroud," fail to provide notice of what is prohibited and is therefore vague facially and as applied to the rifles and shotguns owned by the plaintiffs.

Plaintiff's facial vagueness challenge is plainly without merit. They concede that the local law does not infringe upon a fundamental [**7] constitutional right. Courts rarely invalidate a statute on its face because of alleged vagueness if the statute does not relate to a fundamental constitutional right (usually first amendment freedoms) and if the statute provides "minimally fair notice" of what the statute prohibits. 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 17.8 n.22 (2d ed. 1992). *See also Chapman v. United States*, 500 U.S. 453, 467, 114 L. Ed. 2d 524, 111 S. Ct. 1919 (1991) ("vagueness claim must be evaluated as the statute is applied to the facts of [the] case" when "First Amendment freedoms are not infringed by the statute.").

Plaintiffs could perhaps succeed on a facial vagueness challenge if they could show that the law is impermissibly vague "in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982). However, it is obvious in this case that there exist numerous conceivably valid applications of Local Law 78. The district court's analysis of plaintiffs' facial

challenge is excellent and we readily adopt it:

> [Plaintiffs] hypothesize some ambiguous application for each factor used by New York City to identify the semiautomatic [**8] rifles and shotguns that will be deemed assault weapons under Local Law 78. But such conjectures hardly suffice to establish vagueness in *all* applications of the law.
>
> For example, plaintiffs complain that defining assault weapons to include rifles or shotguns with a "folding or telescoping stock or no stock" is vague because some person might unwittingly violate the law by removing a stock for a brief period to clean or transport a weapon. This possibility ignores the "core" category of weapons within this factor that are clearly intended to be the focus of the legislation: those either equipped with folding stocks or with permanently-removed stocks. The governmental concern is that such weapons can be discharged in a way that is characteristic of military and not sporting weapons. Since persons have plain notice of the applicability of the law to this core [*685] group of weapons, there is no facial vagueness in this factor.
>
> Plaintiffs further complain that defining an assault weapon by reference to "a pistol grip that protrudes conspicuously beneath the action of the weapon" is impermissibly vague because it is unclear what is meant by "conspicuously." The argument [**9] is disingenuous. As is made plain in the [Report and Recommendation of the ATF Working Group on the Importability of Certain Semiautomatic Weapons (1989) ("ATF Report")] prepared in connection with that agency's ban on the importation of assault weapons, most sporting firearms "employ a more traditional pistol grip *built into the wrist of the stock* of the firearm." ATF Report at 7 (emphasis added). By contrast, "the vast majority of military firearms employ a well-defined pistol grip that *protrudes conspicuously beneath the action of the weapon.*" *Id.* (emphasis added). The latter design is favored in military weapons because it aids in "one-handed firing" at hip level, a technique sometimes required in combat, but "not usually employed in hunting or competitive target competitions" where a firearm is held with two hands and fired at shoulder level. *Id.* Although plaintiffs argue that any rifle can be shot with one hand and at hip level, that is hardly the point. This factor aims to identify those rifles whose pistol grips are designed to make such spray firing from the hip particularly easy. Even a cursory review of the photographs submitted by the parties demonstrates [**10] that a sufficient number of assault rifles are so plainly equipped with grips that protrude conspicuously that it cannot be said that the factor is vague in all applications. Indeed, the court notes that Congress itself chose the very same formulation as a defining term for assault weapons in federal legislation. 18 U.S.C. § 921(a)(30)(B)(ii).
>
> Plaintiffs submit that defining assault weapons with reference to features such as a "bayonet mount," "a flash suppressor or threaded barrel designed to accommodate a flash suppressor," a "barrel shroud," or a "grenade launcher," violates due process because a host of items exist that, although not specifically intended to serve these purposes, could arguably do so, thereby subjecting an unsuspecting gun owner to criminal liability. This argument, however, defeats itself. As already noted, when a statute is challenged for facial vagueness, the issue is not whether plaintiffs can posit some application not clearly defined by the legislation. The issue is whether all applications are impermissibly vague. Certainly, there is no vagueness when the statute is applied to firearms advertised to include parts identified as bayonet mounts, [**11] flash suppressors, barrel shrouds, or grenade launchers.

Finally, plaintiffs complain that Local Law 78 is impermissibly vague in defining as an assault weapon "any part, or combination of parts, designed or redesigned or intended to readily convert a rifle or shotgun into an assault weapon." They submit that a rifle manufacturer's intent in designing a gun may not easily be discernable from the mere appearance of a weapon.

The Supreme Court has, however, already rejected vagueness challenges to similar language in other statutes. In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, [455 U.S. 489, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982)], the Court upheld a local ordinance requiring businesses to obtain licenses if they sold items "designed or marketed for use with illegal cannabis or drugs." The "designed" standard was held to encompass "at least an item that is principally used with illegal drugs by virtue of its objective features." 455 U.S. at 501, 102 S. Ct. at 1195. Although application of this standard might, in some cases, be ambiguous, it was sufficient to cover "at least some of the items" sold by Flipside and, thus, to preclude a facial vagueness challenge. Similarly, [**12] the vagueness challenge to the "marketed" standard was rejected in light of the implicit scienter element, "since a retailer could scarcely 'market' items 'for' a particular use without intending that use." *Id.* at 502, 102 S. Ct. at 1195. *See also Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, , 114 S. Ct. 1747, 1750, 128 L. Ed. 2d 539 (1994) (upholding federal statute [*686] that defined drug paraphernalia as items "primarily intended ... for use" or "designed for use" with controlled substances, although holding that neither standard required proof of scienter).

Applying the same analysis to this case, this court is persuaded from many of the

> submitted advertisements for semiautomatic rifles that the objective features of at least some of these firearms clearly bring them within the "designed" standard of Local Law 78. Whether the "intended to convert" standard does or does not require proof of scienter is a question that can be left for the New York courts. The fact remains that plaintiffs have failed to show that all applications of Local Law 78 are unconstitutionally vague.

896 F. Supp. at 289-90.

For similar reasons, appellants' [**13] as-applied vagueness challenge is without merit. Appellants have initiated a pre-enforcement challenge to the local law. This court has refrained from ruling on an as-applied challenge to an allegedly vague statute when the ordinance would be valid as applied to at least one activity in which plaintiff is engaged. *Brache v. County of Westchester*, 658 F.2d 47, 52 (2d Cir. 1981), *cert. denied*, 455 U.S. 1005, 71 L. Ed. 2d 874, 102 S. Ct. 1643 (1982). This conclusion was based upon principles of judicial restraint, principles that bear some resemblance to the doctrine of abstention. In *Brache*, the court sought to avoid:

> unnecessary, premature, or unduly broad pronouncements on constitutional issues, the intrusiveness of a court's considering all the situations in which a law could possibly be applied, and the possibility of a limiting construction being placed on the law in the event an application of questionable validity was concretely presented.

Id. This court has applied these considerations when, as here, litigants "engage in some conduct that could validly be prosecuted under a statute, [yet] challenge the statute's application to other conduct in which they are currently engaged." [**14] *Id.* New York City may choose to limit enforcement of the local law to weapons clearly proscribed by the law, such as those specifically identified by the police department. It would be premature to entertain this vagueness challenge based on a speculative threat of arbitrary enforcement "until a broader use of the ordinance is actually initiated." 658

F.2d at 53. *See also Village of Hoffman Estates*, 455 U.S. at 503-04 (employing similar reasoning in rejecting a pre-enforcement vagueness challenge to a village ordinance that banned the sale of any "items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs").

2. *The Preemption Challenge*

Plaintiffs also claim that Local Law 78 is preempted by federal laws establishing the Civilian Marksmanship Program. Plaintiffs draw our attention to 10 U.S.C. § 4308 (1994), the statute which governs the Army's management of the Civilian Marksmanship Program, and its legislative history, to suggest that Local Law 78 contravenes Congressional intent.

As the district court explained, 896 F. Supp. at 286, Congress established the Civilian Marksmanship Program ("CMP") in 1904. [**15] The purpose of CMP was to familiarize young men with the use of firearms and to develop their marksmanship proficiency should they ever be called to duty in the armed forces. CMP funds, which came from army appropriations, provided for, among other things (1) the operation and maintenance of rifle ranges, (2) the instruction of citizens in marksmanship, (3) the promotion of practice in the use of rifled arms, (4) the maintenance and management of matches and competition in the use of those arms, and (5) the sale of surplus M-1 Garand rifles to citizens over 18 who are members of approved gun clubs. 10 U.S.C.A. § 4308 (1959 & Supp. 1996). The program is administered by the Director of Civilian Marksmanship, who is appointed by the President. The director approves local gun clubs, such as plaintiff Richmond Boro Gun Club, for participation in the program. The Richmond Boro club has received a number of weapons from the federal government pursuant to federal regulations, possession of which are criminalized by the local law. In addition, [*687] several its members have purchased surplus M-1s, which they can no longer store or use in New York City. CMP regulations forbid them from selling or [**16] giving away these weapons.

As a participating club, Richmond Boro must conduct an active rifle marksmanship training program for at least nine months each year. 32 C.F.R. § 543.13. Its members may participate in the National Matches, an annual marksmanship competition conducted each year by the Secretary of the Army. *See* 10 U.S.C. § 4312. These matches are held at Camp Perry Ohio. Competitors in these matches use M1 rifles, M14 rifles, and M16 rifles, all of which are criminalized by the local law.

After the parties filed briefs in this case, Congress repealed the very statute on which plaintiffs rely in their preemption argument. *See* Corporation for the Promotion of Rifle Practice and Firearms Safety Act ("CPRPFSA"), Pub. L. No. 104-106, § 1624, 110 Stat. 186, 522 (1996) (repealing, inter alia, 10 U.S.C. § 4308). Rather than continuing the CMP program as an arm of the government, Congress privatized the operation of the CMP in the newly established private, non-profit, Corporation for the Promotion of Rifle Practice and Firearms Safety (hereafter "the corporation"). *Id.* §§ 1611-1615. The corporation "shall have responsibility for the overall supervision, oversight, [**17] and control of the [CMP]." *Id.* § 1612(a). The new corporation is to be funded by the collection of fees and donations. *Id.* § 1618(a). The new corporation is also authorized to sell firearms, ammunition, and other "accouterments," to qualified individuals. *Id.* § 1614(b)(2). However, such sales "are subject to applicable Federal, State, and local laws." *Id.* § 1614(e).

The transfer of these responsibilities to the corporation from the Army is to occur by September 30, 1996. *Id.* § 1612(d). And the new statute will take effect no later than October 1, 1996. *Id.* § 1624(c).

Because the old CMP statutes are not yet without force, we will conduct the preemption analysis under both the old and the new statutes. But the result is the same: there is no reason to render invalid the law passed by the New York City Council.

Consistent with the Supremacy Clause, state laws that interfere with or are contrary to the laws of Congress will not stand. *Gibbons v. Ogden*, 22 U.S. 1 (9 Wheat. 1, 6 L. Ed. 23) (1824). However, there is a strong presumption against federal preemption of state and local legislation. *California v. ARC America Corp.*, 490 U.S. 93, 101, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989). This [**18] presumption is especially strong in areas traditionally occupied by the states, such as health and safety measures. *English v. General Elec. Co.*, 496 U.S. 72, 79, 110 L. Ed. 2d 65, 110 S. Ct. 2270 (1990). A state measure is preempted when it is impossible to comply with both state and local law, or the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *California v. Federal Energy Regulatory Comm'n*, 495 U.S. 490, 506, 109 L. Ed. 2d

474, 110 S. Ct. 2024 (1990). Plaintiffs do not claim that it is impossible to comply with the requirements of both CMP and Local Law 78. Instead, they claim that the local law stands as an obstacle to the goals expressed by Congress in the CMP legislation and regulations.

A court should only find that a state or local law is preempted by congressional legislation if it determines that Congress intended such preemption. *Penn Dairies, Inc v. Milk Control Comm'n of Penn.*, 318 U.S. 261, 275, 87 L. Ed. 748, 63 S. Ct. 617 (1943). This intent should not lightly be inferred. *Id.*

Judge Raggi comprehensively addressed plaintiffs' preemption argument under the old statute, 896 F. Supp. at 285-89, and, again, we need not gild the lily. In the words of the district court:

> Local Law 78 does not [**19] prohibit city residents from receiving CMP-issued rifles nor from purchasing M-1 Garand rifles. It requires only that they store and use these weapons outside city limits. Nothing in the applicable federal laws or regulations requires a CMP club or its members to store or practice with these rifles in New York City or at any particular site. Plaintiffs' [*688] real complaint then is not conflict between federal and local law but personal inconvenience, since they are barred from keeping assault weapons in their homes and from practicing with them at their club's Staten Island rifle range. But such inconvenience is of no legal import. Home storage of government-issued weapons is only permitted under federal regulation; it is not mandated. 32 C.F.R. § 543.17(g)(5)(ii). The only storage site actively "encouraged" by federal regulation is storage at military or police facilities. 32 C.F.R. § 543.17(g)(5)(vi). Since such storage would necessarily require civilians to travel at least some distance from their homes to gain access to their rifles, and since such access might further be limited by the hours when such facilities are open to the public, it necessarily follows that no link exists between [**20] the federal interest in promoting civilian marksmanship and the site where persons store their weapons. Similarly, since federal law does not require CMP clubs to maintain their own ranges, the fact that plaintiffs will not be able to use assault rifles on their Staten Island range but will have to use some other facility does not evidence a conflict requiring preemption.

896 F. Supp. at 288. We cannot improve on the district court's analysis, except to add a brief discussion of the new statute.

Congress passed the CPRPFSA as part of the National Defense Authorization Act for Fiscal Year 1996. The CPRPFSA shows that Congress believes the CMP program should continue only if there is enough private financial support, and not as an arm of the government. That Congress has seen fit to further remove the promotion of the purposes originally served by the CMP from the operation of the federal government is further evidence that the New York City legislation is not preempted by federal law. Even if there were any question regarding Congress' intent to override local firearm legislation, it is resolved by the new statute's specific deferral to local law. CPRPFSA § 1614(e) (quoted [**21] above).

3. The Due Process Claim

Appellants' final claim is that New York state law creates liberty and property interests in the possession of rifles and shotguns which are violated by the local law, thus creating a violation of the Due Process Clause of the Fourteenth Amendment. They point to several provisions of New York law, including (1) the statutory Bill of Rights, which provides that "[a] well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms cannot be infringed," N.Y. Civ. Rights Law art 2, § 4 (McKinney 1992); (2) a State Penal law provision providing the right to purchase a rifle or shotgun in a state contiguous with New York and transport it into New York, N.Y. Penal Law § 265.40 (McKinney 1989 & Supp. 1996); and (3) licensing provisions for pistols and their ammunition feeding devices. N.Y. Penal Law § 400.00 (McKinney 1989 & Supp. 1996).

It is not clear whether plaintiffs assert a substantive or a procedural due process challenge to the local law.

Assuming the claim is one of substantive due process, it is rejected. As the district court pointed out, at least one circuit has held that [**22] violations of state law generally do not give rise to substantive due process claims. *Weimer v. Amen*, 870 F.2d 1400, 1405-06 (8th Cir. 1989). However, this circuit has held that "substantive due process protects against government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against government action that is 'incorrect or ill-advised.'" *Kaluczky v. City of White Plains*, 57 F.3d 202, 211 (2d Cir. 1995). The local law challenged by appellants is not sufficiently drastic to trigger substantive due process rights; rather, it is a rational legislative response to increased assault weapon violence in the city of New York. *See Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133, 145 (2d Cir. 1994) (rejecting substantive due process challenge to legislative act since law was rationally related to a legitimate government interest).

If, plaintiffs' due process argument is procedural in nature, it is similarly without merit. Even assuming they have a liberty or property interest in the possession of assault [*689] weapons, appellants cannot successfully challenge a legislative act on procedural due process grounds. "When the legislature [**23] passes a law which affects a general class of persons, those persons have all received procedural due process -- the legislative process. The challenges to such laws must be based on their substantive compatibility with constitutional guarantees." 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 17.8 (2d ed. 1992). *See also Interport Pilots Agency*, 14 F.3d at 142 ("Official action that is legislative in nature is not subject to the notice and hearing requirements of the due process clause. . . . Due process does not require any hearing or participation in 'legislative' decisionmaking other than that afforded by judicial review after rule promulgation"). Procedural due process has not been violated in this case because plaintiffs can (and do) challenge the legislative ordinance in federal or state court on the ground that it violates their substantive state or federal rights.

III. CONCLUSION

The judgment of the district court is affirmed.

EXHIBIT 7

ROE ET AL. v. WADE, DISTRICT ATTORNEY OF DALLAS COUNTY

No. 70-18

SUPREME COURT OF THE UNITED STATES

410 U.S. 113; 93 S. Ct. 705; 35 L. Ed. 2d 147; 1973 U.S. LEXIS 159

December 13, 1971, Argued
January 22, 1973, Decided

SUBSEQUENT HISTORY: Reargued October 11, 1972.
Rehearing denied by Roe v. Wade, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694, 1973 U.S. LEXIS 3282 (1973)
Motion denied by McCorvey v. Hill, 2003 U.S. Dist. LEXIS 12986 (N.D. Tex., June 19, 2003)

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS.
Roe v. Wade, 314 F. Supp. 1217, 1970 U.S. Dist. LEXIS 11306 (N.D. Tex., 1970)

DISPOSITION: 314 F.Supp. 1217, affirmed in part and reversed in part.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, a pregnant single woman and a married couple, and intervenor physician sued defendant district attorney challenging the constitutionality of Tex. Code Crim. Proc. Ann. arts. 1191-1194, and 1196 (abortion laws), and sought an injunction. The United States District Court for the Northern District of Texas declared that the laws violated U.S. Const. amends. IX and XIV privacy rights and was vague and overbroad, but denied the injunction.

OVERVIEW: Plaintiffs and intervenor appealed directly to the instant Court on the injunctive rulings. The State cross-appealed from the declaratory judgment. The Court affirmed the judgment, holding that abortion was within the scope of the personal liberty guaranteed by the Due Process Clause. This right was not absolute, but could be regulated by narrowly drawn legislation aimed at vindicating legitimate, compelling state interests in the mother's health and safety and the potentiality of human life. The former became compelling, and was thus grounds for regulation after the first trimester of pregnancy, beyond which the state could regulate abortion to preserve and protect maternal health. The latter became compelling at viability, upon which a state could proscribe abortion except to preserve the mother's life or health. The Texas statutes made no distinction between abortions performed early in pregnancy and those performed later, and it limited the legal justification for the procedure to a single reason --saving the mother's life -- so it could not survive the constitutional attack. This conclusion made it unnecessary for the Court to consider the doctor's vagueness challenge.

OUTCOME: The judgment of the district court as to the doctor's intervention was reversed, and the doctor's complaint in intervention was dismissed. In all other respects, the judgment of the district court was affirmed.

SYLLABUS

A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. A licensed physician (Hallford), who had two state abortion prosecutions pending against him, was permitted to intervene. A childless married couple (the Does), the wife not being pregnant, separately attacked the laws, basing alleged injury on the future possibilities of contraceptive failure, pregnancy, unpreparedness for parenthood, and impairment of the wife's health. A three-judge District Court, which consolidated the actions, held that Roe and Hallford, and members of their classes, had standing to sue and presented justiciable controversies. Ruling that declaratory, though not injunctive, relief was warranted, the court declared the abortion statutes void as vague and overbroadly infringing those plaintiffs' Ninth and Fourteenth Amendment rights. The court ruled the Does' complaint not justiciable. Appellants directly appealed to this Court on the injunctive rulings, and appellee cross-appealed from the District Court's grant of declaratory relief to Roe and Hallford. *Held*:

1. While 28 U. S. C. § 1253 authorizes no direct appeal to this Court from the grant or denial of declaratory relief alone, review is not foreclosed when the case is properly before the Court on appeal from specific denial of injunctive relief and the arguments as to both injunctive and declaratory relief are necessarily identical. P. 123.

2. Roe has standing to sue; the Does and Hallford do not. Pp. 123-129.

(a) Contrary to appellee's contention, the natural termination of Roe's pregnancy did not moot her suit. Litigation involving pregnancy, which is "capable of repetition, yet evading review," is an exception to the usual federal rule that an actual controversy must exist at review stages and not simply when the action is initiated. Pp. 124-125.

(b) The District Court correctly refused injunctive, but erred in granting declaratory, relief to Hallford, who alleged no federally protected right not assertable as a defense against the good-faith state prosecutions pending against him. *Samuels v. Mackell*, 401 U.S. 66. Pp. 125-127.

(c) The Does' complaint, based as it is on contingencies, any one or more of which may not occur, is too speculative to present an actual case or controversy. Pp. 127-129.

3. State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term. Pp. 147-164.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. Pp. 163, 164.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. Pp. 163, 164.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. Pp. 163-164; 164-165.

4. The State may define the term "physician" to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined. P. 165.

5. It is unnecessary to decide the injunctive relief issue since the Texas authorities will doubtless fully recognize the Court's ruling that the Texas criminal abortion statutes are unconstitutional. P. 166.

COUNSEL: Sarah Weddington reargued the cause for appellants. With her on the briefs were Roy Lucas, Fred Bruner, Roy L. Merrill, Jr., and Norman Dorsen.

Robert C. Flowers, Assistant Attorney General of Texas,

argued the cause for appellee on the reargument. Jay Floyd, Assistant Attorney General, argued the cause for appellee on the original argument. With them on the brief were Crawford C. Martin, Attorney General, Nola White, First Assistant Attorney General, Alfred Walker, Executive Assistant Attorney General, Henry Wade, and John B. Tolle. *

* Briefs of amici curiae were filed by Gary K. Nelson, Attorney General of Arizona, Robert K. Killian, Attorney General of Connecticut, Ed W. Hancock, Attorney General of Kentucky, Clarence A. H. Meyer, Attorney General of Nebraska, and Vernon B. Romney, Attorney General of Utah; by Joseph P. Witherspoon, Jr., for the Association of Texas Diocesan Attorneys; by Charles E. Rice for Americans United for Life; by Eugene J. McMahon for Women for the Unborn et al.; by Carol Ryan for the American College of Obstetricians and Gynecologists et al.; by Dennis J. Horan, Jerome A. Frazel, Jr., Thomas M. Crisham, and Dolores V. Horan for Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology; by Harriet F. Pilpel, Nancy F. Wechsler, and Frederic S. Nathan for Planned Parenthood Federation of America, Inc., et al.; by Alan F. Charles for the National Legal Program on Health Problems of the Poor et al.; by Marttie L. Thompson for State Communities Aid Assn.; by Alfred L. Scanlan, Martin J. Flynn, and Robert M. Byrn for the National Right to Life Committee; by Helen L. Buttenwieser for the American Ethical Union et al.; by Norma G. Zarky for the American Association of University Women et al.; by Nancy Stearns for New Women Lawyers et al.; by the California Committee to Legalize Abortion et al.; and by Robert E. Dunne for Robert L. Sassone.

JUDGES: Blackmun, J., delivered the opinion of the Court, in which Burger, C. J., and Douglas, Brennan, Stewart, Marshall, and Powell, JJ., joined. Burger, C. J., post, p. 207, Douglas, J., post, p. 209, and Stewart, J., post, p. 167, filed concurring opinions. White, J., filed a dissenting opinion, in which Rehnquist, J., joined, post, p. 221. Rehnquist, J., filed a dissenting opinion, post, p. 171.

OPINION BY: BLACKMUN

OPINION

[*116] [***156] [**708] MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This Texas federal appeal and its Georgia companion, *Doe* v. *Bolton, post*, p. 179, present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend [**709] to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement, [***157] free of emotion and of predilection. We seek earnestly to do this, and, because we do, we [*117] have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now-vindicated dissent in *Lochner v. New York*, 198 U.S. 45, 76 (1905):

"[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict

with the Constitution of the United States."

I

The Texas statutes that concern us here are Arts. 1191-1194 and 1196 of the State's Penal Code. [1] These make it a crime to "procure an abortion," as therein [*118] defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Similar statutes are in existence in a majority of the States. [2]

1 "Article 1191. Abortion

"If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

"Art. 1192. Furnishing the means

"Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

"Art. 1193. Attempt at abortion

"If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

"Art. 1194. Murder in producing abortion

"If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder."

"Art. 1196. By medical advice

"Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

The foregoing Articles, together with Art. 1195, compose Chapter 9 of Title 15 of the Penal Code. Article 1195, not attacked here, reads:

"Art. 1195. Destroying unborn child

"Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years."

2 Ariz. Rev. Stat. Ann. § 13-211 (1956); Conn. Pub. Act No. 1 (May 1972 special session) (in 4 Conn. Leg. Serv. 677 (1972)), and Conn. Gen. Stat. Rev. §§ 53-29, 53-30 (1968) (or unborn child); Idaho Code § 18-601 (1948); Ill. Rev. Stat., c. 38, § 23-1 (1971); Ind. Code § 35-1-58-1 (1971); Iowa Code § 701.1 (1971); Ky. Rev. Stat. § 436.020 (1962); La. Rev. Stat. § 37:1285 (6) (1964) (loss of medical license) (but see § 14:87 (Supp. 1972) containing no exception for the life of the mother under the criminal statute); Me. Rev. Stat. Ann., Tit. 17, § 51 (1964); Mass. Gen. Laws Ann., c. 272, § 19 (1970) (using the term "unlawfully," construed to exclude an abortion to save the mother's life, *Kudish v. Bd. of Registration*, 356 Mass. 98, 248 N. E. 2d 264 (1969)); Mich. Comp. Laws § 750.14 (1948); Minn. Stat. § 617.18 (1971); Mo. Rev. Stat. § 559.100 (1969); Mont. Rev. Codes Ann. § 94-401 (1969); Neb. Rev. Stat. § 28-405 (1964); Nev. Rev. Stat. § 200.220 (1967); N. H. Rev. Stat. Ann. § 585:13 (1955); N. J. Stat. Ann. § 2A:87-1 (1969) ("without lawful justification"); N. D. Cent. Code §§ 12-25-01, 12-25-02 (1960); Ohio Rev. Code Ann. § 2901.16 (1953); Okla. Stat. Ann., Tit. 21, § 861 (1972-1973 Supp.); Pa. Stat. Ann., Tit. 18, §§ 4718, 4719 (1963) ("unlawful"); R. I. Gen. Laws Ann. § 11-3-1 (1969); S. D. Comp. Laws Ann. § 22-17-1 (1967); Tenn. Code Ann. §§ 39-301, 39-302 (1956); Utah Code Ann. §§ 76-2-1, 76-2-2 (1953); Vt. Stat. Ann., Tit. 13, § 101 (1958); W. Va. Code Ann. § 61-2-8 (1966); Wis. Stat. § 940.04 (1969); Wyo. Stat. Ann. §§ 6-77, 6-78 (1957).

[*119] Texas [***158] [**710] first enacted a criminal abortion statute in 1854. Texas Laws 1854, c.

49, § 1, set forth in 3 H. Gammel, Laws of Texas 1502 (1898). This was soon modified into language that has remained substantially unchanged to the present time. See Texas Penal Code of 1857, c. 7, Arts. 531-536; G. Paschal, Laws of Texas, Arts. 2192-2197 (1866); Texas Rev. Stat., c. 8, Arts. 536-541 (1879); Texas Rev. Crim. Stat., Arts. 1071-1076 (1911). The final article in each of these compilations provided the same exception, as does the present Article 1196, for an abortion by "medical advice for the purpose of saving the life of the mother." [3]

3 Long ago, a suggestion was made that the Texas statutes were unconstitutionally vague because of definitional deficiencies. The Texas Court of Criminal Appeals disposed of that suggestion peremptorily, saying only,

"It is also insisted in the motion in arrest of judgment that the statute is unconstitutional and void in that it does not sufficiently define or describe the offense of abortion. We do not concur in respect to this question." *Jackson v. State*, 55 Tex. Cr. R. 79, 89, 115 S. W. 262, 268 (1908).

The same court recently has held again that the State's abortion statutes are not unconstitutionally vague or overbroad. *Thompson* v. *State* (Ct. Crim. App. Tex. 1971), appeal docketed, No. 71-1200. The court held that "the State of Texas has a compelling interest to protect fetal life"; that Art. 1191 "is designed to protect fetal life"; that the Texas homicide statutes, particularly Art. 1205 of the Penal Code, are intended to protect a person "in existence by actual birth" and thereby implicitly recognize other human life that is not "in existence by actual birth"; that the definition of human life is for the legislature and not the courts; that Art. 1196 "is more definite than the District of Columbia statute upheld in [*United States* v.] *Vuitch*" (402 U.S. 62); and that the Texas statute "is not vague and indefinite or overbroad." A physician's abortion conviction was affirmed.

In *Thompson*, n. 2, the court observed that any issue as to the burden of proof under the exemption of Art. 1196 "is not before us." But see *Veevers v. State*, 172 Tex. Cr. R. 162, 168-169, 354 S. W. 2d 161, 166-167 (1962). Cf. *United States v. Vuitch*, 402 U.S. 62, 69-71 (1971).

[*120] II

Jane Roe, [4] a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

4 The name is a pseudonym.

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. By an amendment to her complaint Roe purported to sue "on behalf of herself and all other women" similarly situated.

[***159] James Hubert Hallford, a licensed physician, sought and was granted leave to intervene in Roe's action. In his complaint he alleged that he had been arrested previously for violations of the Texas abortion statutes and [*121] that two such prosecutions were pending against him. He described conditions of patients who came to him seeking abortions, and he claimed that for many cases he, as a physician, was unable to determine [**711] whether they fell within or outside the exception recognized by Article 1196. He alleged that, as a consequence, the statutes were vague and uncertain, in violation of the Fourteenth Amendment, and that they violated his own and his patients' rights to privacy in the doctor-patient relationship and his own right to practice medicine, rights he claimed were guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

John and Mary Doe, [5] a married couple, filed a companion complaint to that of Roe. They also named the District Attorney as defendant, claimed like constitutional deprivations, and sought declaratory and injunctive relief. The Does alleged that they were a childless couple; that Mrs. Doe was suffering from a

"neural-chemical" disorder; that her physician had "advised her to avoid pregnancy until such time as her condition has materially improved" (although a pregnancy at the present time would not present "a serious risk" to her life); that, pursuant to medical advice, she had discontinued use of birth control pills; and that if she should become pregnant, she would want to terminate the pregnancy by an abortion performed by a competent, licensed physician under safe, clinical conditions. By an amendment to their complaint, the Does purported to sue "on behalf of themselves and all couples similarly situated."

5 These names are pseudonyms.

The two actions were consolidated and heard together by a duly convened three-judge district court. The suits thus presented the situations of the pregnant single woman, the childless couple, with the wife not pregnant, [*122] and the licensed practicing physician, all joining in the attack on the Texas criminal abortion statutes. Upon the filing of affidavits, motions were made for dismissal and for summary judgment. The court held that Roe and members of her class, and Dr. Hallford, had standing to sue and presented justiciable controversies, but that the Does had failed to allege facts sufficient to state a present controversy and did not have standing. It concluded that, with respect to the requests for a declaratory judgment, abstention was not warranted. On the merits, the District Court held that the "fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment," and that the Texas criminal abortion statutes were void on their face because they were both unconstitutionally vague and constituted an overbroad infringement of the plaintiffs' Ninth Amendment rights. The court then held that abstention was warranted with respect to the requests for an injunction. It therefore dismissed the Does' complaint, declared the abortion statutes void, and dismissed the application for injunctive relief. 314 F.Supp. 1217, 1225 (ND Tex. 1970).

The plaintiffs Roe and Doe and the intervenor Hallford, pursuant to [***160] 28 U. S. C. § 1253, have appealed to this Court from that part of the District Court's judgment denying the injunction. The defendant District Attorney has purported to cross-appeal, pursuant to the same statute, from the court's grant of declaratory relief to Roe and Hallford. Both sides also have taken protective appeals to the United States Court of Appeals for the Fifth Circuit. That court ordered the appeals held in abeyance pending decision here. We postponed decision on jurisdiction to the hearing on the merits. 402 U.S. 941 (1971). [*123] III

[***LEdHR1] [1]It might have been preferable if the defendant, pursuant to our Rule 20, had presented to us a petition for certiorari before judgment in the Court of Appeals with respect to the granting of the plaintiffs' prayer for declaratory relief. Our decisions in *Mitchell v. Donovan*, 398 U.S. 427 (1970), and *Gunn v. University Committee*, 399 U.S. 383 [**712] (1970), are to the effect that § 1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone. We conclude, nevertheless, that those decisions do not foreclose our review of both the injunctive and the declaratory aspects of a case of this kind when it is properly here, as this one is, on appeal under § 1253 from specific denial of injunctive relief, and the arguments as to both aspects are necessarily identical. See *Carter v. Jury Comm'n*, 396 U.S. 320 (1970); *Florida Lime Growers v. Jacobsen*, 362 U.S. 73, 80-81 (1960). It would be destructive of time and energy for all concerned were we to rule otherwise. Cf. *Doe* v. *Bolton, post*, p. 179.

IV

We are next confronted with issues of justiciability, standing, and abstention. Have Roe and the Does established that "personal stake in the outcome of the controversy," *Baker v. Carr*, 369 U.S. 186, 204 (1962), that insures that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution," *Flast v. Cohen*, 392 U.S. 83, 101 (1968), and *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972)? And what effect did the pendency of criminal abortion charges against Dr. Hallford in state court have upon the propriety of the federal court's granting relief to him as a plaintiff-intervenor? [*124]

A. *Jane Roe.* Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion

in Texas.

[***LEdHR2A] [2A] [***LEdHR3A] [3A]Viewing Roe's case as of the time of its filing and thereafter until as late as May, there can be little dispute that it then presented a case or controversy and that, wholly apart from the class aspects, she, as a pregnant single woman thwarted by the Texas criminal abortion laws, had standing to challenge those statutes. *Abele v. Markle*, 452 F.2d 1121, 1125 [***161] (CA2 1971); *Crossen v. Breckenridge*, 446 F.2d 833, 838-839 (CA6 1971); *Poe v. Menghini*, 339 F.Supp. 986, 990-991 (Kan. 1972).See *Truax v. Raich*, 239 U.S. 33 (1915). Indeed, we do not read the appellee's brief as really asserting anything to the contrary. The "logical nexus between the status asserted and the claim sought to be adjudicated," *Flast v. Cohen*, 392 U.S., at 102, and the necessary degree of contentiousness, *Golden v. Zwickler*, 394 U.S. 103 (1969), are both present.

The appellee notes, however, that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970, [6] or on the following June 17 when the court's opinion and judgment were filed. And he suggests that Roe's case must now be moot because she and all other members of her class are no longer subject to any 1970 pregnancy.

> 6 The appellee twice states in his brief that the hearing before the District Court was held on July 22, 1970. Brief for Appellee 13. The docket entries, App. 2, and the transcript, App. 76, reveal this to be an error. The July date appears to be the time of the reporter's transcription. See App. 77.

[*125] [***LEdHR4A] [4A]The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. *United States v. Munsingwear, Inc.*, 340 U.S. 36 [**713] (1950); *Golden v. Zwickler, supra*; *SEC v. Medical Committee for Human Rights*, 404 U.S. 403 (1972).

[***LEdHR5A] [5A]But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). See *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *Carroll v. Princess Anne*, 393 U.S. 175, 178-179 (1968); *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-633 (1953).

[***LEdHR2B] [2B] [***LEdHR3B] [3B] [***LEdHR4B] [4B] [***LEdHR5B] [5B]We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot.

B. *Dr. Hallford.* The doctor's position is different. He entered Roe's litigation as a plaintiff-intervenor, alleging in his complaint that he:

"In the past has been arrested for violating the Texas Abortion Laws and at the present time stands charged by indictment with violating said laws in the Criminal District Court of Dallas County, Texas to-wit: (1) The [***162] State of Texas vs. [*126] James H. Hallford, No. C-69-5307-IH, and (2) The State of Texas vs. James H. Hallford, No. C-69-2524-H. In both cases the defendant is charged with abortion . . . ."

In his application for leave to intervene, the doctor made like representations as to the abortion charges pending in the state court. These representations were also repeated in the affidavit he executed and filed in support of his motion for summary judgment.

[***LEdHR6] [6] [***LEdHR7] [7]Dr. Hallford is, therefore, in the position of seeking, in a federal court, declaratory and injunctive relief with respect to the same statutes under which he stands charged in criminal prosecutions simultaneously pending in state court. Although he stated that he has been arrested in the past for violating the State's abortion laws, he makes no allegation of any substantial and immediate threat to any federally protected right that cannot be asserted in his defense against the state prosecutions. Neither is there any allegation of harassment or bad-faith prosecution. In order to escape the rule articulated in the cases cited in

the next paragraph of this opinion that, absent harassment and bad faith, a defendant in a pending state criminal case cannot affirmatively challenge in federal court the statutes under which the State is prosecuting him, Dr. Hallford seeks to distinguish his status as a present state defendant from his status as a "potential future defendant" and to assert only the latter for standing purposes here.

We see no merit in that distinction. Our decision in *Samuels v. Mackell*, 401 U.S. 66 (1971), compels the conclusion that the District Court erred when it granted declaratory relief to Dr. Hallford instead of refraining from so doing. The court, of course, was correct in refusing to grant injunctive relief to the doctor. The reasons supportive of that action, however, are those expressed in *Samuels v. Mackell, supra*, and in *Younger v.* [*127] *Harris*, 401 U.S. 37 (1971); *Boyle v. Landry*, 401 U.S. 77 [**714] (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); and *Byrne v. Karalexis*, 401 U.S. 216 (1971). See also *Dombrowski v. Pfister*, 380 U.S. 479 (1965). We note, in passing, that *Younger* and its companion cases were decided after the three-judge District Court decision in this case.

[***LEdHR8] [8]Dr. Hallford's complaint in intervention, therefore, is to be dismissed. [7] He is remitted to his defenses in the state criminal proceedings against him. We reverse the judgment of the District Court insofar as it granted Dr. Hallford relief [***163] and failed to dismiss his complaint in intervention.

7 We need not consider what different result, if any, would follow if Dr. Hallford's intervention were on behalf of a class. His complaint in intervention does not purport to assert a class suit and makes no reference to any class apart from an allegation that he "and others similarly situated" must necessarily guess at the meaning of Art. 1196. His application for leave to intervene goes somewhat further, for it asserts that plaintiff Roe does not adequately protect the interest of the doctor "and the class of people who are physicians . . . [and] the class of people who are . . . patients . . . ." The leave application, however, is not the complaint. Despite the District Court's statement to the contrary, 314 F.Supp., at 1225, we fail to perceive the essentials of a class suit in the Hallford complaint.

C. *The Does.* In view of our ruling as to Roe's standing in her case, the issue of the Does' standing in their case has little significance. The claims they assert are essentially the same as those of Roe, and they attack the same statutes. Nevertheless, we briefly note the Does' posture.

Their pleadings present them as a childless married couple, the woman not being pregnant, who have no desire to have children at this time because of their having received medical advice that Mrs. Doe should avoid pregnancy, and for "other highly personal reasons." But they "fear . . . they may face the prospect of becoming [*128] parents." And if pregnancy ensues, they "would want to terminate" it by an abortion. They assert an inability to obtain an abortion legally in Texas and, consequently, the prospect of obtaining an illegal abortion there or of going outside Texas to some place where the procedure could be obtained legally and competently.

We thus have as plaintiffs a married couple who have, as their asserted immediate and present injury, only an alleged "detrimental effect upon [their] marital happiness" because they are forced to "the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible pregnancy." Their claim is that sometime in the future Mrs. Doe might become pregnant because of possible failure of contraceptive measures, and at that time in the future she might want an abortion that might then be illegal under the Texas statutes.

[***LEdHR9] [9]This very phrasing of the Does' position reveals its speculative character. Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place and all may not combine. In the Does' estimation, these possibilities might have some real or imagined impact upon their marital happiness. But we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy. *Younger v. Harris*, 401 U.S., at 41-42; *Golden v. Zwickler*, 394 U.S., at 109-110; *Abele v. Markle*, 452 F.2d, at 1124-1125; *Crossen v. Breckenridge*, 446 F.2d, at 839. The Does' claim falls far short of those resolved otherwise in the cases that the Does urge upon us, namely, *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971); *Data Processing Service v.*

Camp, 397 U.S. 150 [**715] (1970); [*129] and *Epperson v. Arkansas*, 393 U.S. 97 (1968). See also *Truax v. Raich*, 239 U.S. 33 (1915).

[***LEdHR10] [10]The Does therefore are not appropriate plaintiffs in this litigation. Their complaint was properly dismissed by the District Court, and we affirm that dismissal.

V

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the [***164] Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *id.*, at 460 (WHITE, J., concurring in result); or among those rights reserved to the people by the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S., at 486 (Goldberg, J., concurring). Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.

VI

It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.

[*130] 1. *Ancient attitudes.* These are not capable of precise determination. We are told that at the time of the Persian Empire abortifacients were known and that criminal abortions were severely punished. [8] We are also told, however, that abortion was practiced in Greek times as well as in the Roman Era, [9] and that "it was resorted to without scruple." [10] The Ephesian, Soranos, often described as the greatest of the ancient gynecologists, appears to have been generally opposed to Rome's prevailing free-abortion practices. He found it necessary to think first of the life of the mother, and he resorted to abortion when, upon this standard, he felt the procedure advisable. [11] Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion. [12]

8 A. Castiglioni, A History of Medicine 84 (2d ed. 1947), E. Krumbhaar, translator and editor (hereinafter Castiglioni).

9 J. Ricci, The Genealogy of Gynaecology 52, 84, 113, 149 (2d ed. 1950) (hereinafter Ricci); L. Lader, Abortion 75-77 (1966) (hereinafter Lader); K. Niswander, Medical Abortion Practices in the United States, in Abortion and the Law 37, 38-40 (D. Smith ed. 1967); G. Williams, The Sanctity of Life and the Criminal Law 148 (1957) (hereinafter Williams); J. Noonan, An Almost Absolute Value in History, in The Morality of Abortion 1, 3-7 (J. Noonan ed. 1970) (hereinafter Noonan); Quay, Justifiable Abortion -- Medical and Legal Foundations (pt. 2), 49 Geo. L. J. 395, 406-422 (1961) (hereinafter Quay).

10 L. Edelstein, The Hippocratic Oath 10 (1943) (hereinafter Edelstein). But see Castiglioni 227.

11 Edelstein 12; Ricci 113-114, 118-119; Noonan 5.

12 Edelstein 13-14.

2. *The Hippocratic Oath.* What then of the famous Oath that has stood so [**716] long as the ethical guide of the medical profession and that bears the name of the great Greek (460(?)-377(?) B. C.), who has been described [*131] as the Father of Medicine, the "wisest and the greatest practitioner of his art," and the "most important and most complete medical personality of antiquity," who dominated the medical schools of his time, and who typified the [***165] sum of the medical knowledge of the past? [13] The Oath varies somewhat according to the particular translation, but in any translation the content is clear: "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion," [14] or "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy." [15]

13 Castiglioni 148.
14 *Id.*, at 154.
15 Edelstein 3.

Although the Oath is not mentioned in any of the principal briefs in this case or in *Doe* v. *Bolton, post*, p. 179, it represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day. Why did not the authority of Hippocrates dissuade abortion practice in his time and that of Rome? The late Dr. Edelstein provides us with a theory: [16] The Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. See Plato, Republic, V, 461; Aristotle, Politics, VII, 1335b 25. For the Pythagoreans, however, it was a matter of dogma. For them the embryo was animate from the moment of conception, and abortion meant destruction of a living being. The abortion clause of the Oath, therefore, "echoes Pythagorean doctrines," [*132] and "in no other stratum of Greek opinion were such views held or proposed in the same spirit of uncompromising austerity." [17]

16 *Id.*, at 12, 15-18.
17 *Id.*, at 18; Lader 76.

Dr. Edelstein then concludes that the Oath originated in a group representing only a small segment of Greek opinion and that it certainly was not accepted by all ancient physicians. He points out that medical writings down to Galen (A. D. 130-200) "give evidence of the violation of almost every one of its injunctions." [18] But with the end of antiquity a decided change took place. Resistance against suicide and against abortion became common. The Oath came to be popular. The emerging teachings of Christianity were in agreement with the Pythagorean ethic. The Oath "became the nucleus of all medical ethics" and "was applauded as the embodiment of truth." Thus, suggests Dr. Edelstein, it is "a Pythagorean manifesto and not the expression of an absolute standard of medical conduct." [19]

18 Edelstein 63.
19 *Id.*, at 64.

This, it seems to us, is a satisfactory and acceptable explanation of the Hippocratic Oath's apparent rigidity. It enables us to understand, in historical context, a long-accepted and revered statement of medical ethics.

3. *The common law.* It is undisputed that at common law, abortion performed *before* "quickening" -- the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy [20] -- was not an indictable offense. [21] The absence [*133] [***166] of a [**717] common-law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins. These disciplines variously approached the question in terms of the point at which the embryo or fetus became "formed" or recognizably human, or in terms of when a "person" came into being, that is, infused with a "soul" or "animated." A loose consensus evolved in early English law that these events occurred at some point between conception and live birth. [22] This was "mediate animation." Although [*134] Christian theology and the canon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the 19th century, there was otherwise little agreement about the precise time of formation or animation. There was agreement, however, that prior to this point the fetus was to be regarded as part of the mother, and its destruction, therefore, was not homicide. Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40-80-day view, and perhaps to Aquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point. The significance of quickening was echoed by later common-law scholars and found its way into the received common law in this country.

20 Dorland's Illustrated Medical Dictionary 1261 (24th ed. 1965).
21 E. Coke, Institutes III *50; 1 W. Hawkins, Pleas of the Crown, c. 31, § 16 (4th ed. 1762); 1 W. Blackstone, Commentaries *129-130; M. Hale, Pleas of the Crown 433 (1st Amer. ed. 1847). For discussions of the role of the quickening concept in English common law, see Lader 78; Noonan 223-226; Means, The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality (pt. 1), 14 N. Y. L. F. 411, 418-428 (1968) (hereinafter Means I); Stern, Abortion: Reform and the Law, 59 J. Crim. L. C. & P. S. 84 (1968) (hereinafter Stern); Quay 430-432; Williams 152.
22 Early philosophers believed that the embryo

or fetus did not become formed and begin to live until at least 40 days after conception for a male, and 80 to 90 days for a female. See, for example, Aristotle, Hist. Anim. 7.3.583b; Gen. Anim. 2.3.736, 2.5.741; Hippocrates, Lib. de Nat. Puer., No. 10. Aristotle's thinking derived from his three-stage theory of life: vegetable, animal, rational. The vegetable stage was reached at conception, the animal at "animation," and the rational soon after live birth. This theory, together with the 40/80 day view, came to be accepted by early Christian thinkers.

The theological debate was reflected in the writings of St. Augustine, who made a distinction between *embryo inanimatus*, not yet endowed with a soul, and *embryo animatus*. He may have drawn upon Exodus 21:22. At one point, however, he expressed the view that human powers cannot determine the point during fetal development at which the critical change occurs. See Augustine, De Origine Animae 4.4 (Pub. Law 44.527). See also W. Reany, The Creation of the Human Soul, c. 2 and 83-86 (1932); Huser, The Crime of Abortion in Canon Law 15 (Catholic Univ. of America, Canon Law Studies No. 162, Washington, D. C., 1942).

Galen, in three treatises related to embryology, accepted the thinking of Aristotle and his followers. Quay 426-427. Later, Augustine on abortion was incorporated by Gratian into the Decretum, published about 1140. Decretum Magistri Gratiani 2.32.2.7 to 2.32.2.10, in 1 Corpus Juris Canonici 1122, 1123 (A. Friedburg, 2d ed. 1879). This Decretal and the Decretals that followed were recognized as the definitive body of canon law until the new Code of 1917.

For discussions of the canon-law treatment, see Means I, pp. 411-412; Noonan 20-26; Quay 426-430; see also J. Noonan, Contraception: A History of Its Treatment by the Catholic Theologians and Canonists 18-29 (1965).

Whether abortion of a *quick* fetus was a felony at common law, or even a lesser crime, is still disputed. Bracton, writing early in the 13th century, thought it homicide. [23] But [***167] the later and predominant [**718] view, following the great common-law scholars, has been that it was, at most, a lesser offense. In a frequently cited [*135] passage, Coke took the position that abortion of a woman "quick with child" is "a great misprision, and no murder." [24] Blackstone followed, saying that while abortion after quickening had once been considered manslaughter (though not murder), "modern law" took a less severe view. [25] A recent review of the common-law precedents argues, however, that those precedents contradict Coke and that even post-quickening abortion was never established as a common-law crime. [26] This is of some importance because while most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law, [27] others followed Coke in stating that abortion [*136] of a quick fetus was a "misprision," a term they translated to mean "misdemeanor." [28] That their reliance on Coke on this aspect of the law was uncritical and, apparently in all the reported cases, dictum (due probably to the paucity of common-law prosecutions for post-quickening abortion), makes it now appear doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus.

23 Bracton took the position that abortion by blow or poison was homicide "if the foetus be already formed and animated, and particularly if it be animated." 2 H. Bracton, De Legibus et Consuetudinibus Angliae 279 (T. Twiss ed. 1879), or, as a later translation puts it, "if the foetus is already formed or quickened, especially if it is quickened," 2 H. Bracton, On the Laws and Customs of England 341 (S. Thorne ed. 1968). See Quay 431; see also 2 Fleta 60-61 (Book 1, c. 23) (Selden Society ed. 1955).

24 E. Coke, Institutes III *50.

25 1 W. Blackstone, Commentaries *129-130.

26 Means, The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?, 17 N. Y. L. F. 335 (1971) (hereinafter Means II). The author examines the two principal precedents cited marginally by Coke, both contrary to his dictum, and traces the treatment of these and other cases by earlier commentators. He concludes that Coke, who himself participated as an advocate in an abortion case in 1601, may have intentionally misstated the law. The author even suggests a reason: Coke's strong feelings

against abortion, coupled with his determination to assert common-law (secular) jurisdiction to assess penalties for an offense that traditionally had been an exclusively ecclesiastical or canon-law crime. See also Lader 78-79, who notes that some scholars doubt that the common law ever was applied to abortion; that the English ecclesiastical courts seem to have lost interest in the problem after 1527; and that the preamble to the English legislation of 1803, 43 Geo. 3, c. 58, § 1, referred to in the text, *infra*, at 136, states that "no adequate means have been hitherto provided for the prevention and punishment of such offenses."

27 *Commonwealth* v. *Bangs*, 9 Mass. 387, 388 (1812); *Commonwealth* v. *Parker*, 50 Mass. (9 Metc.) 263, 265-266 (1845); *State* v. *Cooper*, 22 N. J. L. 52, 58 (1849); *Abrams* v. *Foshee*, 3 Iowa 274, 278-280 (1856); *Smith* v. *Gaffard*, 31 Ala. 45, 51 (1857); *Mitchell* v. *Commonwealth*, 78 Ky. 204, 210 (1879); *Eggart* v. *State*, 40 Fla. 527, 532, 25 So. 144, 145 (1898); *State* v. *Alcorn*, 7 Idaho 599, 606, 64 P. 1014, 1016 (1901); *Edwards* v. *State*, 79 Neb. 251, 252, 112 N. W. 611, 612 (1907); *Gray* v. *State*, 77 Tex. Cr. R. 221, 224, 178 S. W. 337, 338 (1915); *Miller* v. *Bennett*, 190 Va. 162, 169, 56 S. E. 2d 217, 221 (1949). Contra, *Mills* v. *Commonwealth*, 13 Pa. 631, 633 (1850); *State* v. *Slagle*, 83 N. C. 630, 632 (1880).

28 See *Smith* v. *State*, 33 Me. 48, 55 (1851); *Evans* v. *People*, 49 N. Y. 86, 88 (1872); *Lamb* v. *State*, 67 Md. 524, 533, 10 A. 208 (1887).

4. *The English statutory law.* England's first criminal abortion statute, Lord Ellenborough's Act, 43 Geo. 3, c. 58, came in 1803. It made abortion of a quick fetus, § 1, a capital crime, but in § 2 it provided [***168] lesser penalties for the felony of abortion before quickening, and thus preserved the "quickening" distinction. This contrast was continued in the general revision of 1828, 9 Geo. 4, c. 31, § 13. It disappeared, however, together with the death penalty, in 1837, 7 Will. 4 & 1 Vict., c. 85, § 6, and did not reappear in the Offenses Against the Person Act of 1861, 24 & 25 Vict., c. 100, § 59, that formed the core of English anti-abortion law until the liberalizing reforms of 1967. In 1929, the Infant Life (Preservation) Act, 19 & 20 Geo. 5, c. 34, came into being. Its emphasis was upon the destruction of "the life of [**719] a child capable of being born alive." It made a willful act performed with the necessary intent a felony. It contained a proviso that one was not to be [*137] found guilty of the offense "unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother."

A seemingly notable development in the English law was the case of *Rex* v. *Bourne*, [1939] 1 K. B. 687. This case apparently answered in the affirmative the question whether an abortion necessary to preserve the life of the pregnant woman was excepted from the criminal penalties of the 1861 Act. In his instructions to the jury, Judge Macnaghten referred to the 1929 Act, and observed that that Act related to "the case where a child is killed by a wilful act at the time when it is being delivered in the ordinary course of nature." *Id.*, at 691. He concluded that the 1861 Act's use of the word "unlawfully," imported the same meaning expressed by the specific proviso in the 1929 Act, even though there was no mention of preserving the mother's life in the 1861 Act. He then construed the phrase "preserving the life of the mother" broadly, that is, "in a reasonable sense," to include a serious and permanent threat to the mother's *health*, and instructed the jury to acquit Dr. Bourne if it found he had acted in a good-faith belief that the abortion was necessary for this purpose. *Id.*, at 693-694. The jury did acquit.

Recently, Parliament enacted a new abortion law. This is the Abortion Act of 1967, 15 & 16 Eliz. 2, c. 87. The Act permits a licensed physician to perform an abortion where two other licensed physicians agree (a) "that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated," or (b) "that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as [*138] to be seriously handicapped." The Act also provides that, in making this determination, "account may be taken of the pregnant woman's actual or reasonably foreseeable environment." It also permits a physician, without the concurrence of others, to terminate a pregnancy where he is of the good-faith opinion that the abortion "is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman."

5. *The American law.* In this country, the law in effect in all but a few States until mid-19th century was the pre-existing English common law. Connecticut, the first State to enact abortion legislation, adopted in 1821 that part of Lord Ellenborough's Act that related to a [***169] woman "quick with child." [29] The death penalty was not imposed. Abortion before quickening was made a crime in that State only in 1860. [30] In 1828, New York enacted legislation [31] that, in two respects, was to serve as a model for early anti-abortion statutes. First, while barring destruction of an unquickened fetus as well as a quick fetus, it made the former only a misdemeanor, but the latter second-degree manslaughter. Second, it incorporated a concept of therapeutic abortion by providing that an abortion was excused if it "shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose." By 1840, when Texas had received the common law, [32] only eight American States [*139] had [**720] statutes dealing with abortion. [33] It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening. Most punished attempts equally with completed abortions. While many statutes included the exception for an abortion thought by one or more physicians to be necessary to save the mother's life, that provision soon disappeared and the typical law required that the procedure actually be necessary for that purpose.

29 Conn. Stat., Tit. 20, § 14 (1821).

30 Conn. Pub. Acts, c. 71, § 1 (1860).

31 N. Y. Rev. Stat., pt. 4, c. 1, Tit. 2, Art. 1, § 9, p. 661, and Tit. 6, § 21, p. 694 (1829).

32 Act of Jan. 20, 1840, § 1, set forth in 2 H. Gammel, Laws of Texas 177-178 (1898); see *Grigsby v. Reib*, 105 Tex. 597, 600, 153 S. W. 1124, 1125 (1913).

33 The early statutes are discussed in Quay 435-438. See also Lader 85-88; Stern 85-88; and Means II 375-376.

Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950's, a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother. [34] The exceptions, Alabama and the District of Columbia, permitted abortion to preserve the mother's health. [35] Three States permitted abortions that were not "unlawfully" performed or that were not "without lawful justification," leaving interpretation of those standards to the courts. [36] In [*140] the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code, § 230.3, [37] set forth as Appendix [***170] B to the opinion in *Doe* v. *Bolton, post*, p. 205.

34 Criminal abortion statutes in effect in the States as of 1961, together with historical statutory development and important judicial interpretations of the state statutes, are cited and quoted in Quay 447-520. See Comment, A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems, 1972 U. Ill. L. F. 177, 179, classifying the abortion statutes and listing 25 States as permitting abortion only if necessary to save or preserve the mother's life.

35 Ala. Code, Tit. 14, § 9 (1958); D. C. Code Ann. § 22-201 (1967).

36 Mass. Gen. Laws Ann., c. 272, § 19 (1970); N. J. Stat. Ann. § 2A:87-1 (1969); Pa. Stat. Ann., Tit. 18, §§ 4718, 4719 (1963).

37 Fourteen States have adopted some form of the ALI statute. See Ark. Stat. Ann. §§ 41-303 to 41-310 (Supp. 1971); Calif. Health & Safety Code §§ 25950-25955.5 (Supp. 1972); Colo. Rev. Stat. Ann. §§ 40-2-50 to 40-2-53 (Cum. Supp. 1967); Del. Code Ann., Tit. 24, §§ 1790-1793 (Supp. 1972); Florida Law of Apr. 13, 1972, c. 72-196, 1972 Fla. Sess. Law Serv., pp. 380-382; Ga. Code §§ 26-1201 to 26-1203 (1972); Kan. Stat. Ann. § 21-3407 (Supp. 1971); Md. Ann. Code, Art. 43, §§ 137-139 (1971); Miss. Code Ann. § 2223 (Supp. 1972); N. M. Stat. Ann. §§ 40A-5-1 to 40A-5-3 (1972); N. C. Gen. Stat. § 14-45.1 (Supp. 1971); Ore. Rev. Stat. §§ 435.405 to 435.495 (1971); S. C. Code Ann. §§ 16-82 to 16-89 (1962 and Supp. 1971); Va. Code Ann. §§ 18.1-62 to 18.1-62.3 (Supp. 1972). Mr. Justice Clark described some of these States as having "led the way." Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola U. (L. A.) L. Rev. 1, 11 (1969).

> By the end of 1970, four other States had repealed criminal penalties for abortions performed in early pregnancy by a licensed physician, subject to stated procedural and health requirements. Alaska Stat. § 11.15.060 (1970); Haw. Rev. Stat. § 453-16 (Supp. 1971); N. Y. Penal Code § 125.05, subd. 3 (Supp. 1972-1973); Wash. Rev. Code §§ 9.02.060 to 9.02.080 (Supp. 1972). The precise status of criminal abortion laws in some States is made unclear by recent decisions in state and federal courts striking down existing state laws, in whole or in part.

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, [**721] and very possibly without such a limitation, the opportunity [*141] to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

6. *The position of the American Medical Association.* The anti-abortion mood prevalent in this country in the late 19th century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period.

An AMA Committee on Criminal Abortion was appointed in May 1857. It presented its report, 12 Trans. of the Am. Med. Assn. 73-78 (1859), to the Twelfth Annual Meeting. That report observed that the Committee had been appointed to investigate criminal abortion "with a view to its general suppression." It deplored abortion and its frequency and it listed three causes of "this general demoralization":

"The first of these causes is a wide-spread popular ignorance of the true character of the crime -- a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening.

"The second of the agents alluded to is the fact that the profession themselves are frequently supposed careless of foetal life . . . .

"The third reason of the frightful extent of this crime is found in the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors, which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowledges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it, [*142] and to its life as yet denies all protection." *Id.*, at 75-76. [***171] The Committee then offered, and the Association adopted, resolutions protesting "against such unwarrantable destruction of human life," calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies "in pressing the subject." *Id.*, at 28, 78.

In 1871 a long and vivid report was submitted by the Committee on Criminal Abortion. It ended with the observation, "We had to deal with human life. In a matter of less importance we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less." 22 Trans. of the Am. Med. Assn. 258 (1871). It proffered resolutions, adopted by the Association, *id.*, at 38-39, recommending, among other things, that it "be unlawful and unprofessional for any physician to induce abortion or premature labor, without the concurrent opinion of at least one respectable consulting physician, and then always with a view to the safety of the child -- if that be possible," and calling "the attention of the clergy of all denominations to the perverted views of morality entertained by a large class of females -- aye, and men also, on this important question."

Except for periodic condemnation of the criminal abortionist, no further formal AMA action took place until 1967. In that year, the Committee on Human Reproduction urged the adoption of a stated policy of opposition to induced abortion, except when there is "documented medical evidence" of a threat to the health or life of the mother, or that the child "may be born with incapacitating physical deformity or mental deficiency," or that a pregnancy "resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the [*143] patient," two other physicians "chosen because of their recognized professional competence have examined the patient and have concurred in writing, [**722] " and the procedure

"is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals." The providing of medical information by physicians to state legislatures in their consideration of legislation regarding therapeutic abortion was "to be considered consistent with the principles of ethics of the American Medical Association." This recommendation was adopted by the House of Delegates. Proceedings of the AMA House of Delegates 40-51 (June 1967).

In 1970, after the introduction of a variety of proposed resolutions, and of a report from its Board of Trustees, a reference committee noted "polarization of the medical profession on this controversial issue"; division among those who had testified; a difference of opinion among AMA councils and committees; "the remarkable shift in testimony" in six months, felt to be influenced "by the rapid changes in state laws and by the judicial decisions which tend to make abortion more freely available;" and a feeling "that this trend will continue." On June 25, 1970, the House of Delegates adopted preambles and most of the resolutions proposed by the reference committee. The preambles emphasized "the best interests of the patient," "sound clinical judgment," and "informed patient consent," in contrast to "mere acquiescence to the patient's demand." The resolutions asserted that abortion is a medical procedure that should be performed by a licensed physician in an accredited [***172] hospital only after consultation with two other physicians and in conformity with state law, and that no party to the procedure should be required to violate personally held moral principles. [38] Proceedings [*144] of the AMA House of Delegates 220 (June 1970). The AMA Judicial Council rendered a complementary opinion. [39]

38 "Whereas, Abortion, like any other medical procedure, should not be performed when contrary to the best interests of the patient since good medical practice requires due consideration for the patient's welfare and not mere acquiescence to the patient's demand; and

"Whereas, The standards of sound clinical judgment, which, together with informed patient consent should be determinative according to the merits of each individual case; therefore be it

"*RESOLVED*, That abortion is a medical procedure and should be performed only by a duly licensed physician and surgeon in an accredited hospital acting only after consultation with two other physicians chosen because of their professional competency and in conformance with standards of good medical practice and the Medical Practice Act of his State; and be it further

"*RESOLVED*, That no physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles. In these circumstances good medical practice requires only that the physician or other professional personnel withdraw from the case so long as the withdrawal is consistent with good medical practice." Proceedings of the AMA House of Delegates 220 (June 1970).

39 "The Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion that is performed in accordance with good medical practice and under circumstances that do not violate the laws of the community in which he practices.

"In the matter of abortions, as of any other medical procedure, the Judicial Council becomes involved whenever there is alleged violation of the Principles of Medical Ethics as established by the House of Delegates."

7. *The position of the American Public Health Association.* In October 1970, the Executive Board of the APHA adopted Standards for Abortion Services. These were five in number:

"a. Rapid and simple abortion referral must be readily available through state and local public [*145] health departments, medical societies, or other nonprofit organizations.

"b. An important function of counseling should be to simplify and expedite the provision of abortion services; it should not delay the obtaining of these services.

" [**723] c. Psychiatric consultation should not be mandatory. As in the case of other specialized medical services, psychiatric consultation should be sought for definite indications and not on a routine basis.

"d. A wide range of individuals from appropriately

trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors.

"e. Contraception and/or sterilization should be discussed with each abortion patient." Recommended Standards for Abortion Services, 61 Am. J. Pub. Health 396 (1971).

Among factors pertinent to life and health risks associated with abortion were three that "are recognized as important":

"a. the skill of the physician,

"b. the environment in which the abortion is performed, and above all

" [***173] c. the duration of pregnancy, as determined by uterine size and confirmed by menstrual history." *Id.*, at 397.

It was said that "a well-equipped hospital" offers more protection "to cope with unforeseen difficulties than an office or clinic without such resources. . . . The factor of gestational age is of overriding importance." Thus, it was recommended that abortions in the second trimester and early abortions in the presence of existing medical complications be performed in hospitals as inpatient procedures. For pregnancies in the first trimester, [*146] abortion in the hospital with or without overnight stay "is probably the safest practice." An abortion in an extramural facility, however, is an acceptable alternative "provided arrangements exist in advance to admit patients promptly if unforeseen complications develop." Standards for an abortion facility were listed. It was said that at present abortions should be performed by physicians or osteopaths who are licensed to practice and who have "adequate training." *Id.*, at 398.

8. *The position of the American Bar Association.* At its meeting in February 1972 the ABA House of Delegates approved, with 17 opposing votes, the Uniform Abortion Act that had been drafted and approved the preceding August by the Conference of Commissioners on Uniform State Laws. 58 A. B. A. J. 380 (1972). We set forth the Act in full in the margin. [40] The [*147] Conference [**724] has appended [***174] an enlightening Prefatory Note. [41]

40 "UNIFORM ABORTION ACT

"SECTION 1. [*Abortion Defined; When Authorized.*]

"(a) 'Abortion' means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.

"(b) An abortion may be performed in this state only if it is performed:

"(1) by a physician licensed to practice medicine [or osteopathy] in this state or by a physician practicing medicine [or osteopathy] in the employ of the government of the United States or of this state, [and the abortion is performed [in the physician's office or in a medical clinic, or] in a hospital approved by the [Department of Health] or operated by the United States, this state, or any department, agency, or political subdivision of either;] or by a female upon herself upon the advice of the physician; and

"(2) within [20] weeks after the commencement of the pregnancy [or after [20] weeks only if the physician has reasonable cause to believe (i) there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother, (ii) that the child would be born with grave physical or mental defect, or (iii) that the pregnancy resulted from rape or incest, or illicit intercourse with a girl under the age of 16 years].

"SECTION 2. [*Penalty.*] Any person who performs or procures an abortion other than authorized by this Act is guilty of a [felony] and, upon conviction thereof, may be sentenced to pay a fine not exceeding [$ 1,000] or to imprisonment [in the state penitentiary] not exceeding [5 years], or both.

"SECTION 3. [*Uniformity of Interpretation.*] This Act shall be construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.

"SECTION 4. [*Short Title.*] This Act may be cited as the Uniform Abortion Act.

"SECTION 5. [*Severability.*] If any provision

of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

"SECTION 6. [*Repeal.*] The following acts and parts of acts are repealed:

"(1)

"(2)

"(3)

"SECTION 7. [*Time of Taking Effect.*] This Act shall take effect -- -- -- -- -- -- ."

41 "This Act is based largely upon the New York abortion act following a review of the more recent laws on abortion in several states and upon recognition of a more liberal trend in laws on this subject. Recognition was given also to the several decisions in state and federal courts which show a further trend toward liberalization of abortion laws, especially during the first trimester of pregnancy.

"Recognizing that a number of problems appeared in New York, a shorter time period for 'unlimited' abortions was advisable. The time period was bracketed to permit the various states to insert a figure more in keeping with the different conditions that might exist among the states. Likewise, the language limiting the place or places in which abortions may be performed was also bracketed to account for different conditions among the states. In addition, limitations on abortions after the initial 'unlimited' period were placed in brackets so that individual states may adopt all or any of these reasons, or place further restrictions upon abortions after the initial period.

"This Act does not contain any provision relating to medical review committees or prohibitions against sanctions imposed upon medical personnel refusing to participate in abortions because of religious or other similar reasons, or the like. Such provisions, while related, do not directly pertain to when, where, or by whom abortions may be performed; however, the Act is not drafted to exclude such a provision by a state wishing to enact the same."

VII

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

[*148] It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously. [42] The appellants and *amici* contend, moreover, that this is not a proper state purpose at all and suggest that, if it were, the Texas statutes are overbroad in protecting it since the law fails to distinguish between married and unwed mothers.

42 See, for example, *YWCA v. Kugler*, 342 F.Supp. 1048, 1074 (N. J. 1972); *Abele v. Markle*, 342 F.Supp. 800, 805-806 (Conn. 1972) (Newman, J., concurring in result), appeal docketed, No. 72-56; *Walsingham v. State*, 250 So. 2d 857, 863 (Ervin, J., concurring) (Fla. 1971); *State v. Gedicke*, 43 N. J. L. 86, 90 (1881); Means II 381-382.

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman. [43] This was particularly true prior to the [*149] development of antisepsis. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur, and others first announced in 1867, but were not generally accepted and employed until about the turn of the century. Abortion mortality was high. Even after 1900, and perhaps until as late as the development of antibiotics in the 1940's, standard modern techniques such as dilation and curettage were not nearly so safe as they are today. Thus, it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

43 See C. Haagensen & W. Lloyd, A Hundred Years of Medicine 19 (1943).

[***LEdHR11] [11] [***LEdHR12] [12] [***LEdHR13] [13] [***LEdHR14] [14]Modern [**725] medical techniques have altered this situation. Appellants and various *amici* refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although [***175] not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth. [44] Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the areas of health and medical standards do remain. [*150] The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

44 Potts, Postconceptive Control of Fertility, 8 Int'l J. of G. & O. 957, 967 (1970) (England and Wales); Abortion Mortality, 20 Morbidity and Mortality 208, 209 (June 12, 1971) (U.S. Dept. of HEW, Public Health Service) (New York City); Tietze, United States: Therapeutic Abortions, 1963-1968, 59 Studies in Family Planning 5, 7 (1970); Tietze, Mortality with Contraception and Induced Abortion, 45 Studies in Family Planning 6 (1969) (Japan, Czechoslovakia, Hungary); Tietze & Lehfeldt, Legal Abortion in Eastern Europe, 175 J. A. M. A. 1149, 1152 (April 1961). Other sources are discussed in Lader 17-23.

The third reason is the State's interest -- some phrase it in terms of duty -- in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception. [45] The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

45 See Brief of *Amicus* National Right to Life Committee; R. Drinan, The Inviolability of the Right to Be Born, in Abortion and the Law 107 (D. Smith ed. 1967); Louisell, Abortion, The Practice of Medicine and the Due Process of Law, 16 U. C. L. A. L. Rev. 233 (1969); Noonan 1.

[*151] Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life. [46] Pointing to the absence of legislative history to support the contention, they claim that most state laws were designed solely to protect the woman. Because medical advances have lessened this concern, at least with respect to abortion in early pregnancy, they argue that with respect [***176] to such abortions the laws can no longer be justified by any state interest. There is some scholarly support for this view of original purpose. [47] The few state courts [**726] called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus. [48] Proponents of this view point out that in many States, including Texas, [49] by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another. [50] They claim that adoption of the "quickening" distinction through received common [*152] law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception.

46 See, *e. g.*, *Abele v. Markle*, 342 F.Supp. 800 (Conn. 1972), appeal docketed, No. 72-56.

47 See discussions in Means I and Means II.

48 See, *e. g.*, *State v. Murphy*, 27 N. J. L. 112, 114 (1858).

49 *Watson v. State*, 9 Tex. App. 237, 244-245 (1880); *Moore v. State*, 37 Tex. Cr. R. 552, 561, 40 S. W. 287, 290 (1897); *Shaw v. State*, 73 Tex. Cr. R. 337, 339, 165 S. W. 930, 931 (1914); *Fondren v. State*, 74 Tex. Cr. R. 552, 557, 169 S. W. 411, 414 (1914); *Gray v. State*, 77 Tex. Cr. R. 221, 229, 178 S. W. 337, 341 (1915). There is no immunity in Texas for the father who is not married to the mother. *Hammett v. State*, 84 Tex. Cr. R. 635, 209 S. W. 661 (1919); *Thompson* v. *State* (Ct. Crim. App. Tex. 1971), appeal docketed, No. 71-1200.

50 See *Smith v. State*, 33 Me., at 55; *In re Vince*, 2 N. J. 443, 450, 67 A. 2d 141, 144 (1949). A short discussion of the modern law on this issue is contained in the Comment to the ALI's Model Penal Code § 207.11, at 158 and nn. 35-37 (Tent. Draft No. 9, 1959).

It is with these interests, and the weight to be attached to them, that this case is concerned.

VIII

[***LEdHR15] [15] [***LEdHR16] [16] [***LEdHR17] [17]The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co.* v. *Botsford*, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968), *Katz v. United States*, 389 U.S. 347, 350 (1967), *Boyd v. United States*, 116 U.S. 616 (1886), see *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold v. Connecticut*, 381 U.S., at 484-485; in the Ninth Amendment, *id.*, at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities [***177] relating to marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541-542 (1942); contraception, *Eisenstadt v. Baird*, 405 U.S., at 453-454; *id.*, at 460, 463-465 [*153] (WHITE, J., concurring in result); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce v. Society of* [**727] *Sisters*, 268 U.S. 510, 535 (1925), *Meyer v. Nebraska*, *supra*.

[***LEdHR18] [18]This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

[***LEdHR19] [19] [***LEdHR20] [20] [***LEdHR21] [21] [***LEdHR22A] [22A] [***LEdHR23] [23] [***LEdHR24] [24]On the basis of elements such as these, appellant and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive. The [*154] Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point

in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccination); *Buck v. Bell*, 274 U.S. 200 (1927) (sterilization).

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be [***178] considered against important state interests in regulation.

We note that those federal and state courts that have recently considered abortion law challenges have reached the same conclusion. A majority, in addition to the District Court in the present case, have held state laws unconstitutional, at least in part, because of vagueness or because of overbreadth and abridgment of rights. *Abele v. Markle*, 342 F.Supp. 800 (Conn. 1972), appeal docketed, No. 72-56; *Abele v. Markle*, 351 F.Supp. 224 (Conn. 1972), appeal docketed, No. 72-730; *Doe v. Bolton*, 319 F.Supp. 1048 (ND Ga. 1970), appeal decided today, *post*, p. 179; *Doe v. Scott*, 321 F.Supp. 1385 (ND Ill. 1971), appeal docketed, No. 70-105; *Poe v. Menghini*, 339 F.Supp. 986 (Kan. 1972); *YWCA v. Kugler*, 342 F.Supp. 1048 (NJ 1972); *Babbitz v. McCann*, [*155] 310 F.Supp. 293 (ED Wis. 1970), appeal dismissed, 400 U.S. 1 (1970); *People v. Belous*, 71 Cal. 2d 954, 458 P. 2d 194 (1969), cert. denied, 397 U.S. 915 (1970); *State v. Barquet*, 262 So. 2d 431 (Fla. 1972).

Others have sustained state statutes. *Crossen v. Attorney General*, 344 F.Supp. 587 [**728] (ED Ky. 1972), appeal docketed, No. 72-256; *Rosen v. Louisiana State Board of Medical Examiners*, 318 F.Supp. 1217 (ED La. 1970), appeal docketed, No. 70-42; *Corkey v. Edwards*, 322 F.Supp. 1248 (WDNC 1971), appeal docketed, No. 71-92; *Steinberg v. Brown*, 321 F.Supp. 741 (ND Ohio 1970); *Doe* v. *Rampton* (Utah 1971), appeal docketed, No. 71-5666; *Cheaney v. State*, Ind. , 285 N. E. 2d 265 (1972); *Spears v. State*, 257 So. 2d 876 (Miss. 1972); *State v. Munson*, 86 S. D. 663, 201 N. W. 2d 123 (1972), appeal docketed, No. 72-631.

Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach.

[***LEdHR25] [25]Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. *Griswold v. Connecticut*, 381 U.S., at 485; *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964); *Cantwell v. Connecticut*, 310 U.S. 296, 307-308 (1940); see [*156] *Eisenstadt v. Baird*, 405 U.S., at 460, 463-464 (WHITE, J., concurring in result).

In the recent abortion cases, cited above, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interests in protecting health and potential life, and have concluded that neither interest justified broad limitations on the [***179] reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws have held that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable.

IX

The District Court held that the appellee failed to meet his burden of demonstrating that the Texas statute's infringement upon Roe's rights was necessary to support a compelling state interest, and that, although the appellee presented "several compelling justifications for state presence in the area of abortions," the statutes outstripped these justifications and swept "far beyond any areas of compelling state interest." 314 F.Supp., at 1222-1223. Appellant and appellee both contest that holding. Appellant, as has been indicated, claims an absolute right that bars any state imposition of criminal penalties in the area. Appellee argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest. As

noted above, we do not agree fully with either formulation.

A. The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, [*157] for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument. [51] On the other hand, the appellee conceded on reargument [52] that no case could be cited [**729] that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

51 Tr. of Oral Rearg. 20-21.

52 Tr. of Oral Rearg. 24.

The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators, Art. I, § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3; [53] in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl. 8; in the Electors provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application. [54]

53 We are not aware that in the taking of any census under this clause, a fetus has ever been counted.

54 When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?

There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out, n. 49, *supra*, that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?

[*158] [***180] [***LEdHR26] [26] All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn. [55] This is in accord with the results reached in those few cases where the issue has been squarely presented. *McGarvey v. Magee-Womens Hospital*, 340 F.Supp. 751 (WD Pa. 1972); *Byrn v. New York City Health & Hospitals Corp.*, 31 N. Y. 2d 194, 286 N. E. 2d 887 (1972), appeal docketed, No. 72-434; *Abele v. Markle*, 351 F.Supp. 224 (Conn. 1972), appeal docketed, No. 72-730. Cf. *Cheaney v. State*, Ind., at , 285 N. E. 2d, at 270; *Montana v. Rogers*, 278 F.2d 68, 72 (CA7 1960), aff'd *sub nom. Montana v. Kennedy*, 366 U.S. 308 (1961); *Keeler v. Superior Court*, 2 Cal. 3d 619, 470 P. 2d 617 (1970); *State v. Dickinson*, 28 [*159] Ohio St. 2d 65, 275 N. E. 2d 599 (1971). Indeed, our decision in *United States v. Vuitch*, 402 U.S. 62 (1971), inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the [**730] termination of life entitled to Fourteenth Amendment protection.

55 Cf. the Wisconsin abortion statute, defining "unborn child" to mean "a human being from the

time of conception until it is born alive," Wis. Stat. § 940.04 (6) (1969), and the new Connecticut statute, Pub. Act No. 1 (May 1972 special session), declaring it to be the public policy of the State and the legislative intent "to protect and preserve human life from the moment of conception."

This conclusion, however, does not of itself fully answer the contentions raised by Texas, and we pass on to other considerations.

[***LEdHR27] [27]B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary 478-479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold, Stanley, Loving, Skinner*, and *Pierce* and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Texas urges that, apart from the Fourteenth Amendment, life begins [***181] at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

[*160] It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics. [56] It appears to be the predominant, though not the unanimous, attitude of the Jewish faith. [57] It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family. [58] As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid. [59] Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks. [60] The Aristotelian theory of "mediate animation," that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this "ensoulment" theory from those in the Church who would recognize the existence of life from [*161] the moment of conception. [61] The latter is now, of course, the official belief of the Catholic Church. As one brief *amicus* discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substantial [**731] problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as menstrual extraction, the "morning-after" pill, implantation of embryos, artificial insemination, and even artificial wombs. [62]

56 Edelstein 16.

57 Lader 97-99; D. Feldman, Birth Control in Jewish Law 251-294 (1968). For a stricter view, see I. Jakobovits, Jewish Views on Abortion, in Abortion and the Law 124 (D. Smith ed. 1967).

58 Amicus Brief for the American Ethical Union et al. For the position of the National Council of Churches and of other denominations, see Lader 99-101.

59 L. Hellman & J. Pritchard, Williams Obstetrics 493 (14th ed. 1971); Dorland's Illustrated Medical Dictionary 1689 (24th ed. 1965).

60 Hellman & Pritchard, *supra*, n. 59, at 493.

61 For discussions of the development of the Roman Catholic position, see D. Callahan, Abortion: Law, Choice, and Morality 409-447 (1970); Noonan 1.

62 See Brodie, The New Biology and the Prenatal Child, 9 J. Family L. 391, 397 (1970); Gorney, The New Biology and the Future of Man, 15 U. C. L. A. L. Rev. 273 (1968); Note, Criminal

Law -- Abortion -- The "Morning-After Pill" and Other Pre-Implantation Birth-Control Methods and the Law, 46 Ore. L. Rev. 211 (1967); G. Taylor, The Biological Time Bomb 32 (1968); A. Rosenfeld, The Second Genesis 138-139 (1969); Smith, Through a Test Tube Darkly: Artificial Insemination and the Law, 67 Mich. L. Rev. 127 (1968); Note, Artificial Insemination and the Law, 1968 U. Ill. L. F. 203.

[***182] In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. For example, the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive. [63] That rule has been changed in almost every jurisdiction. In most States, recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few [*162] courts have squarely so held. [64] In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. [65] Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*. [66] Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

63 W. Prosser, The Law of Torts 335-338 (4th ed. 1971); 2 F. Harper & F. James, The Law of Torts 1028-1031 (1956); Note, 63 Harv. L. Rev. 173 (1949).

64 See cases cited in Prosser, *supra*, n. 63, at 336-338; Annotation, Action for Death of Unborn Child, 15 A. L. R. 3d 992 (1967).

65 Prosser, *supra*, n. 63, at 338; Note, The Law and the Unborn Child: The Legal and Logical Inconsistencies, 46 Notre Dame Law. 349, 354-360 (1971).

66 Louisell, Abortion, The Practice of Medicine and the Due Process of Law, 16 U. C. L. A. L. Rev. 233, 235-238 (1969); Note, 56 Iowa L. Rev. 994, 999-1000 (1971); Note, The Law and the Unborn Child, 46 Notre Dame Law. 349, 351-354 (1971).

X

[***LEdHR22B] [22B] [***LEdHR28] [28]In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches [*163] term and, at a point during pregnancy, each becomes "compelling."

[***LEdHR29] [29] [***LEdHR30A] [30A]With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical [**732] fact, referred to above at 149, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible [***183] state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

[***LEdHR31A] [31A]This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

[***LEdHR32A] [32A] [***LEdHR33A] [33A]With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion [*164] during that period, except when it is necessary to preserve the life or health of the mother.

[***LEdHR34] [34]Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.

This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness. See *United States v. Vuitch*, 402 U.S., at 67-72.

XI

[***LEdHR30B] [30B] [***LEdHR31B] [31B] [***LEdHR32B] [32B] [***LEdHR33B] [33B] [***LEdHR35] [35] [***LEdHR36] [36]To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a *lifesaving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life [*165] may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation [***184] of the life or health of the mother.

2. The State may define the term "physician," as it has been employed in the preceding paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the [**733] State, and may proscribe any abortion by a person who is not a physician as so defined.

In *Doe* v. *Bolton, post*, p. 179, procedural requirements contained in one of the modern abortion statutes are considered. That opinion and this one, of course, are to be read together. [67]

> 67 Neither in this opinion nor in *Doe* v. *Bolton, post*, p. 179, do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances. North Carolina, for example, N. C. Gen. Stat. § 14-45.1 (Supp. 1971), requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age, 41 N. C. A. G. 489 (1971); if the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional.

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where

important [*166] state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

XII

Our conclusion that Art. 1196 is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall. The exception of Art. 1196 cannot be struck down separately, for then the State would be left with a statute proscribing all abortion procedures no matter how medically urgent the case.

Although the District Court granted appellant Roe declaratory relief, it stopped short of issuing an injunction against enforcement of the Texas statutes. The Court has recognized that different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other. *Zwickler v. Koota*, 389 U.S. 241, 252-255 (1967); *Dombrowski v. Pfister*, 380 U.S. 479 (1965). We are not dealing with a statute that, on its face, appears to abridge free expression, an area of particular concern under *Dombrowski* and refined in *Younger v. Harris*, 401 U.S., at 50.

[***185] We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional.

The judgment of the District Court as to intervenor Hallford is reversed, and Dr. Hallford's complaint in intervention is dismissed. In all other respects, the judgment [*167] of the District Court is affirmed. Costs are allowed to the appellee.

[EDITOR'S NOTE: Additional opinions by Burger, Douglas, and White are published within Doe v. Bolton, 410 U.S. 179.]

It is so ordered.

[For concurring opinion of MR. CHIEF JUSTICE BURGER, see *post*, p. 207.]

[For concurring opinion of MR. JUSTICE DOUGLAS, see *post*, p. 209.]

[For dissenting opinion of MR. JUSTICE WHITE, see *post*, p. 221.]

CONCUR BY: STEWART

CONCUR

[***193contd] [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

MR. JUSTICE STEWART, concurring.

In 1963, this Court, in *Ferguson v. Skrupa*, 372 U.S. 726, [**734] purported to sound the death knell for the doctrine of substantive due process, a doctrine under which many state laws had in the past been held to violate the Fourteenth Amendment. As Mr. Justice Black's opinion for the Court in *Skrupa* put it: "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id.*, at 730. [1]

1 Only Mr. Justice Harlan failed to join the Court's opinion, 372 U.S., at 733.

Barely two years later, in *Griswold v. Connecticut*, 381 U.S. 479, the Court held a Connecticut birth control law unconstitutional. In view of what had been so recently said in *Skrupa*, the Court's opinion in *Griswold* understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet, the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution. [2] So it was clear [*168] to me then, and it is equally clear to me now, that the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the "liberty" that is protected by the Due Process Clause of the Fourteenth Amendment. [3] As so understood, *Griswold* stands as one in a long line of pre-*Skrupa* cases decided under the doctrine of substantive due process, and I now accept it as such.

2 There is no constitutional right of privacy, as

such. "[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy -- his right to be let alone by other people -- is, like the protection of his property and of his very life, left largely to the law of the individual States." *Katz v. United States*, 389 U.S. 347, 350-351 (footnotes omitted).

3 This was also clear to Mr. Justice Black, 381 U.S., at 507 (dissenting opinion); to Mr. Justice Harlan, 381 U.S., at 499 (opinion concurring in the judgment); and to MR. JUSTICE WHITE, 381 U.S., at 502 (opinion concurring in the judgment). See also Mr. Justice Harlan's thorough and thoughtful opinion dissenting from dismissal of the appeal in *Poe v. Ullman*, 367 U.S. 497, 522.

"In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents v. Roth*, 408 U.S. 564, 572. The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. See *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-239; [***194] *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535; *Meyer v. Nebraska*, 262 U.S. 390, 399-400. Cf. *Shapiro v. Thompson*, 394 U.S. 618, 629-630; *United States v. Guest*, 383 U.S. 745, 757-758; *Carrington v. Rash*, 380 U.S. 89, 96; *Aptheker v. Secretary of State*, 378 U.S. 500, 505; *Kent v. Dulles*, 357 U.S. 116, 127; *Bolling v. Sharpe*, 347 U.S. 497, 499-500; *Truax v. Raich*, 239 U.S. 33, 41.

[*169] As Mr. Justice Harlan once wrote: "The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise [**735] terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v. Ullman*, 367 U.S. 497, 543 (opinion dissenting from dismissal of appeal) (citations omitted). In the words of Mr. Justice Frankfurter, "Great concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 646 (dissenting opinion).

Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. *Loving v. Virginia*, 388 U.S. 1, 12; *Griswold v. Connecticut*, *supra*; *Pierce v. Society of Sisters*, *supra*; *Meyer v. Nebraska*, *supra*. See also *Prince v. Massachusetts*, 321 U.S. 158, 166; *Skinner v. Oklahoma*, 316 U.S. 535, 541. As recently as last Term, in *Eisenstadt v. Baird*, 405 U.S. 438, 453, we recognized "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person [*170] as the decision whether to bear or beget a child." That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy. "Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the [***195] right to send a child to private school protected in Pierce v. Society of Sisters, 268 U.S. 510 (1925), or the right to teach a foreign language protected in Meyer v. Nebraska, 262 U.S. 390 (1923)." *Abele v. Markle*, 351 F.Supp. 224, 227 (Conn. 1972).

Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment.

It is evident that the Texas abortion statute infringes that right directly. Indeed, it is difficult to imagine a more complete abridgment of a constitutional freedom than that worked by the inflexible criminal statute now in

force in Texas. The question then becomes whether the state interests advanced to justify this abridgment can survive the "particularly careful scrutiny" that the Fourteenth Amendment here requires.

The asserted state interests are protection of the health and safety of the pregnant woman, and protection of the potential future human life within her. These are legitimate objectives, amply sufficient to permit a State to regulate abortions as it does other surgical procedures, and perhaps sufficient to permit a State to regulate abortions more stringently or even to prohibit them in the late stages of pregnancy. But such legislation is not before us, and I think the Court today has thoroughly demonstrated that these state interests cannot constitutionally support the broad abridgment [**736] of personal [*171] liberty worked by the existing Texas law. Accordingly, I join the Court's opinion holding that that law is invalid under the Due Process Clause of the Fourteenth Amendment.

DISSENT BY: REHNQUIST

DISSENT

[***196] MR. JUSTICE REHNQUIST, dissenting.

The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While the opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it that invalidate the Texas statute in question, and therefore dissent.

I

The Court's opinion decides that a State may impose virtually no restriction on the performance of abortions during the first trimester of pregnancy. Our previous decisions indicate that a necessary predicate for such an opinion is a plaintiff [***197] who was in her first trimester of pregnancy at some time during the pendency of her lawsuit. While a party may vindicate his own constitutional rights, he may not seek vindication for the rights of others. *Moose Lodge* v. *Irvis*, 407 U.S. 163 (1972); *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). The Court's statement of facts in this case makes clear, however, that the record in no way indicates the presence of such a plaintiff. We know only that plaintiff Roe at the time of filing her complaint was a pregnant woman; for aught that appears in this record, she may have been in her *last* trimester of pregnancy as of the date the complaint was filed.

Nothing in the Court's opinion indicates that Texas might not constitutionally apply its proscription of abortion as written to a woman in that stage of pregnancy. Nonetheless, the Court uses her complaint against the Texas statute as a fulcrum for deciding that States may [*172] impose virtually no restrictions on medical abortions performed during the *first* trimester of pregnancy. In deciding such a hypothetical lawsuit, the Court departs from the longstanding admonition that it should never "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885). See also *Ashwander* v. *TVA*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring).

II

Even if there were a plaintiff in this case capable of litigating the issue which the Court decides, I would reach a conclusion opposite to that reached by the Court. I have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy. *Katz* v. *United States*, 389 U.S. 347 (1967).

If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with the statement of MR. JUSTICE STEWART in his concurring opinion that the "liberty," against deprivation of which without due process the Fourteenth [*173] Amendment protects, embraces more than the rights found in the Bill of Rights. But that [**737] liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic

legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. *Williamson v. Lee Optical* [***198] Co., 348 U.S. 483, 491 (1955). The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in *Williamson, supra.* But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.

The Court eschews the history of the Fourteenth Amendment in its reliance on the "compelling state interest" test. See *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 179 (1972) (dissenting opinion). But the Court adds a new wrinkle to this test by transposing it from the legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment. Unless I misapprehend the consequences of this transplanting of the "compelling state interest test," the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it.

[*174] While the Court's opinion quotes from the dissent of Mr. Justice Holmes in *Lochner v. New York*, 198 U.S. 45, 74 (1905), the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in *Lochner* and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the "right" to an abortion is not so universally accepted as the appellant would have us believe.

To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. As early as 1821, [***199] the first state law dealing directly with abortion was enacted by the Connecticut Legislature. Conn. Stat., Tit. 20, §§ 14, 16. By the time of the adoption of the Fourteenth [*175] Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting [**738] abortion. [1] While many States have amended or updated [*176] their laws, 21 of the laws on the books in 1868 [***200] remain in effect today. [2] Indeed, the Texas statute [**739] struck down today was, as the majority notes, first enacted in 1857 [*177] and "has remained substantially unchanged to the present time." *Ante*, at 119.

1 Jurisdictions having enacted abortion laws prior to the adoption of the Fourteenth Amendment in 1868:

1. Alabama -- Ala. Acts, c. 6, § 2 (1840).

2. Arizona -- Howell Code, c. 10, § 45 (1865).

3. Arkansas -- Ark. Rev. Stat., c. 44, div. III, Art. II, § 6 (1838).

4. California -- Cal. Sess. Laws, c. 99, § 45, p. 233 (1849-1850).

5. Colorado (Terr.) -- Colo. Gen. Laws of Terr. of Colo., 1st Sess., § 42, pp. 296-297 (1861).

6. Connecticut -- Conn. Stat., Tit. 20, §§ 14, 16 (1821). By 1868, this statute had been replaced by another abortion law. Conn. Pub. Acts, c. 71, §§ 1, 2, p. 65 (1860).

7. Florida -- Fla. Acts 1st Sess., c. 1637, subc.

3, §§ 10, 11, subc. 8, §§ 9, 10, 11 (1868), as amended, now Fla. Stat. Ann. §§ 782.09, 782.10, 797.01, 797.02, 782.16 (1965).

8. Georgia -- Ga. Pen. Code, 4th Div., § 20 (1833).

9. Kingdom of Hawaii -- Hawaii Pen. Code, c. 12, §§ 1, 2, 3 (1850).

10. Idaho (Terr.) -- Idaho (Terr.) Laws, Crimes and Punishments §§ 33, 34, 42, pp. 441, 443 (1863).

11. Illinois -- Ill. Rev. Criminal Code §§ 40, 41, 46, pp. 130, 131 (1827). By 1868, this statute had been replaced by a subsequent enactment. Ill. Pub. Laws §§ 1, 2, 3, p. 89 (1867).

12. Indiana -- Ind. Rev. Stat. §§ 1, 3, p. 224 (1838). By 1868 this statute had been superseded by a subsequent enactment. Ind. Laws, c. LXXXI, § 2 (1859).

13. Iowa (Terr.) -- Iowa (Terr.) Stat., 1st Legis., 1st Sess., § 18, p. 145 (1838). By 1868, this statute had been superseded by a subsequent enactment. Iowa (Terr.) Rev. Stat., c. 49, §§ 10, 13 (1843).

14. Kansas (Terr.) -- Kan. (Terr.) Stat., c. 48, §§ 9, 10, 39 (1855). By 1868, this statute had been superseded by a subsequent enactment. Kan. (Terr.) Laws, c. 28, §§ 9, 10, 37 (1859).

15. Louisiana -- La. Rev. Stat., Crimes and Offenses § 24, p. 138 (1856).

16. Maine -- Me. Rev. Stat., c. 160, §§ 11, 12, 13, 14 (1840).

17. Maryland -- Md. Laws, c. 179, § 2, p. 315 (1868).

18. Massachusetts -- Mass. Acts & Resolves, c. 27 (1845).

19. Michigan -- Mich. Rev. Stat., c. 153, §§ 32, 33, 34, p. 662 (1846).

20. Minnesota (Terr.) -- Minn. (Terr.) Rev. Stat., c. 100, §§ 10, 11, p. 493 (1851).

21. Mississippi -- Miss. Code, c. 64, §§ 8, 9, p. 958 (1848).

22. Missouri -- Mo. Rev. Stat., Art. II, §§ 9, 10, 36, pp. 168, 172 (1835).

23. Montana (Terr.) -- Mont. (Terr.) Laws, Criminal Practice Acts § 41, p. 184 (1864).

24. Nevada (Terr.) -- Nev. (Terr.) Laws, c. 28, § 42, p. 63 (1861).

25. New Hampshire -- N. H. Laws, c. 743, § 1, p. 708 (1848).

26. New Jersey -- N. J. Laws, p. 266 (1849).

27. New York -- N. Y. Rev. Stat., pt. 4, c. 1, Tit. 2, §§ 8, 9, pp. 12-13 (1828). By 1868, this statute had been superseded. N. Y. Laws, c. 260, §§ 1-6, pp. 285-286 (1845); N. Y. Laws, c. 22, § 1, p. 19 (1846).

28. Ohio -- Ohio Gen. Stat. §§ 111 (1), 112 (2), p. 252 (1841).

29. Oregon -- Ore. Gen. Laws, Crim. Code, c. 43, § 509, p. 528 (1845-1864).

30. Pennsylvania -- Pa. Laws No. 374, §§ 87, 88, 89 (1860).

31. Texas -- Tex. Gen. Stat. Dig., c. VII, Arts. 531-536, p. 524 (Oldham & White 1859).

32. Vermont -- Vt. Acts No. 33, § 1 (1846). By 1868, this statute had been amended. Vt. Acts No. 57, §§ 1, 3 (1867).

33. Virginia -- Va. Acts, Tit. II, c. 3, § 9, p. 96 (1848).

34. Washington (Terr.) -- Wash. (Terr.) Stats., c. II, §§ 37, 38, p. 81 (1854).

35. West Virginia -- See Va. Acts., Tit. II, c. 3, § 9, p. 96 (1848); W. Va. Const., Art. XI, par. 8 (1863).

36. Wisconsin -- Wis. Rev. Stat., c. 133, §§ 10, 11 (1849). By 1868, this statute had been superseded. Wis. Rev. Stat., c. 164, §§ 10, 11; c. 169, §§ 58, 59 (1858).

2 Abortion laws in effect in 1868 and still applicable as of August 1970:

1. Arizona (1865).

2. Connecticut (1860).

3. Florida (1868).

4. Idaho (1863).

5. Indiana (1838).

6. Iowa (1843).

7. Maine (1840).

8. Massachusetts (1845).

9. Michigan (1846).

10. Minnesota (1851).

11. Missouri (1835).

12. Montana (1864).

13. Nevada (1861).

14. New Hampshire (1848).

15. New Jersey (1849).

16. Ohio (1841).

17. Pennsylvania (1860).

18. Texas (1859).

19. Vermont (1867).

20. West Virginia (1863).

21. Wisconsin (1858).

There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.

III

Even if one were to agree that the case that the Court decides were here, and that the enunciation of the substantive constitutional law in the Court's opinion were proper, the actual disposition of the case by the Court is still difficult to justify. The Texas statute is struck down *in toto*, even though the Court apparently concedes that at later periods of pregnancy Texas might impose these selfsame statutory limitations on abortion. My understanding of past practice is that a statute found [*178] to be invalid as applied to a particular plaintiff, but not unconstitutional as a whole, is not simply "struck down" but is, instead, declared unconstitutional as applied to the fact situation before the Court. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Street v. New York*, 394 U.S. 576 (1969).

For all of the foregoing reasons, I respectfully dissent.

REFERENCES

Validity, under Federal Constitution, of abortion laws

1 Am Jur 2d, Abortion 1- 36; 32 Am Jur 2d, Federal Practice and Procedure 238; 42 Am Jur 2d, Injunctions 342- 344

1 Am Jur Pl & Pr Forms (Rev), Abortion, Form Nos. 1-6

2 Am Jur Trials 171, Investigating Particular Crimes 64

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ALR Quick Index, Abortion; Appeal and Error; Constitutional Law; Declaratory Judgments; Due Process of Law; Physicians and Surgeons; Police Power; Statutes

Federal Quick Index, Abortion; Abstention Doctrine; Appeal and Error; Constitutional Law; Declaratory Judgments; Due Process of Law; Physicians and Surgeons; Police Power; Statutes

Annotation References: 35 L Ed 2d 735.

Validity, under Federal Constitution, of abortion laws.

EXHIBIT 8

Analysis
As of: Jan 07, 2011

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM SAMUEL CHESTER, JR., Defendant-Appellant.

No. 09-4084

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

2010 U.S. App. LEXIS 26508

December 4, 2009, Argued
December 30, 2010, Decided

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. (2:08-cr-00105-1). John T. Copenhaver, Jr., District Judge.

United States v. Chester, 2008 U.S. Dist. LEXIS 80138 (S.D. W. Va., Oct. 7, 2008)

United States v. Chester, 367 Fed. Appx. 392, 2010 U.S. App. LEXIS 3739 (4th Cir. W. Va., 2010)

DISPOSITION: VACATED AND REMANDED.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant challenged the denial of his motion to dismiss the indictment by the United States District Court for the Southern District of West Virginia, at Charleston charging defendant under 18 U.S.C.S. § 922(g)(9) with possessing firearms after having been convicted of a misdemeanor crime of domestic violence under W. Va. Code § 61-2-28(a) and (b). Defendant entered a conditional guilty plea.

OVERVIEW: The court had vacated the judgment and remanded for the district court to conduct an analysis of whether § 922(g)(9) could be independently justified in light of a decision of the U.S. Supreme Court in Heller. The court granted the government's petition for panel rehearing. The court vacated its initial opinion and reissued its decision to provide guidance on the framework for deciding Second Amendment challenges. The sole issue was whether defendant's conviction for illegal possession of a firearm under § 922(g)(9) abridged his right to keep and bear arms under the Second Amendment. On review, the court vacated the order denying the motion to dismiss the indictment to require the government to demonstrate under the intermediate scrutiny standard that there was a reasonable fit between the challenged law providing permanent disarmament of all domestic violence misdemeanants and a "substantial" government objective of reducing domestic gun violence. The court was not able to say whether or not the Second Amendment, as historically understood, did or did not apply to persons convicted of domestic violence misdemeanors.

OUTCOME: The court vacated the order and remanded for further proceedings to afford the government an opportunity to shoulder its burden.

COUNSEL: ARGUED: Edward Henry Weis, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charleston, West Virginia, for Appellant.

Elizabeth Dorsey Collery, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for

Appellee.

ON BRIEF: Mary Lou Newberger, Federal Public Defender, Jonathan D. Byrne, Appellate Counsel, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charleston, West Virginia, for Appellant.

Charles T. Miller, United States Attorney, Gerald M. Titus, III, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee.

JUDGES: Before TRAXLER, Chief Judge, and AGEE and DAVIS, Circuit Judges. Chief Judge Traxler wrote the majority opinion, in which Judge Agee joined. Judge Davis wrote a separate opinion concurring in the judgment.

OPINION BY: TRAXLER

OPINION

TRAXLER, Chief Judge:

The sole issue presented in this appeal is whether William Samuel Chester's conviction for illegal possession of a firearm under 18 U.S.C. § 922(g)(9) abridges his right to keep and bear arms under the Second Amendment in light of *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). [*2] We vacate the decision below and remand for further proceedings.

I.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. *Heller* resolved a decades-long debate between those who interpreted the text to guarantee a private, individual right to bear arms and those who generally read it to secure a collective right to bear arms in connection with service in the state militia. [1] *See Heller*, 128 S. Ct. at 2789. *See generally Parker v. District of Columbia*, 478 F.3d 370, 379, 375 U.S. App. D.C. 140 (D.C. Cir. 2007) (explaining the collective right and individual right positions in the Second Amendment debate); *United States v. Emerson*, 270 F.3d 203, 218-20 (5th Cir. 2001) (same). Interpreting the text in light of how it would have been understood by "ordinary citizens in the founding generation," *Heller*, 128 S. Ct. at 2788, the Supreme Court sided with proponents of the individual right view and held that the Second Amendment guaranteed protection of an individual right to possess and carry arms without regard to militia service. *See id.* at 2799.

> 1 There are two basic manifestations [*3] of the collective-right view of the Second Amendment. The first model understands the Second Amendment simply to "empower state governments to arm militias," while the second model "argues that individuals have a right to own and possess firearms under the Second Amendment, but only insofar as it is connected with state militia service." *See* Kenneth A. Klukowski, *Armed By Right: The Emerging Jurisprudence of the Second Amendment*, 18 Geo. Mason U. Civ. Rts. L.J. 167, 175-76 (2008).

The Court began its textual analysis by explaining that the function of the Second Amendment's prefatory clause ("A well regulated Militia, being necessary to the security of a free State") is merely to announce a purpose for the command given by the operative clause ("the right of the people to keep and bear Arms, shall not be infringed")--"apart from that clarifying function, [the] prefatory clause does not limit or expand the scope of the operative clause." *Id.* at 2789. [2] The operative clause, *Heller* concluded, "guarantee[s] the individual right to possess and carry weapons in case of confrontation," a meaning that "is strongly confirmed by the historical background of the Second Amendment." *Id.* at 2797. [*4] Consideration of the historical sources was important because, as *Heller* explained, "the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right." *Id.* Finally, the Court explained why the prefatory clause was consistent with an individual right interpretation of the operative clause:

> The debate with respect to the right to keep and bear arms, as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution. . . . It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.

> It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy [*5] the citizens' militia by taking away their arms was the reason that right-unlike some other English rights-was codified in a written Constitution.

Id. at 2801.

> 2 The collective versus individual right debate turned largely on the relationship between the two clauses. "[I]ndividual right theorists say that the operative clause's effect is unmodified by the civic purpose announced in the prefatory clause, . . . while collective right theorists claim that the prefatory clause limits the scope of the Amendment . . . [to] the perpetuation of the militia system." *See* Klukowski, *Armed by Right, supra*, at 180-81.

Significantly, *Heller* recognized that the right to keep and bear arms, like other Constitutional rights, is limited in scope and subject to some regulation: "[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose.*" *Id.* at 2799; *see id.* at 2816 ("From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever [*6] and for whatever purpose."). One specific limitation recognized in *Heller* concerned the *types* of weapons protected by the Second Amendment. In accordance "with the historical understanding of the scope of the right," the Second Amendment protected only weapons "typically possessed by law-abiding citizens for lawful purposes." *Id.* at 2816; *see id.* at 2817 (explaining that the Second Amendment protected "the right to keep and carry arms . . . in common use at the time") (internal quotation marks omitted).

The other type of limitation identified in *Heller* involved what the Supreme Court termed "presumptively lawful regulatory measures," *id.* at 2817, n.26, although *Heller* did not explain *why* the listed regulations are presumptively lawful:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 2816-17. [3] Although the Court expressly declined to "undertake an exhaustive historical analysis . . . of the full scope [*7] of the Second Amendment," *id.* at 2816, it clearly staked out the core of the Second Amendment. Indeed, *Heller* explained that "whatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 2821.

> 3 The Supreme Court reiterated, without further explanation, these presumptively valid limitations in *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047, 177 L. Ed. 2d 894 (2010).

In light of these principles, the Supreme Court invalidated two District of Columbia statutes at issue in *Heller*. First, *Heller* invalidated the District's total ban on the possession of handguns, concluding that such a complete ban--which extended "to the home, where the need for defense of self, family, and property is most acute[,]"--was incompatible with the Second Amendment "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Id.* at 2817-18. Although the Court acknowledged that rational-basis scrutiny would be inappropriate, *see id.* at 2817, n.27, it declined to choose the proper level of scrutiny for Second Amendment challenges. Second, *Heller* [*8] concluded that the District's requirement that citizens keep their firearms in an inoperable condition "[made] it impossible for citizens to use [firearms] for the core lawful purpose of self-defense." *Id.* at 2818.

II.

In October 2007, officers from the Kanawha County, West Virginia, Sheriff's Department responded to a 911 call reporting a domestic disturbance at Chester's residence. Chester's wife reported to the officers that Chester grabbed her throat and threatened to kill her after she caught him receiving the services of a prostitute on their property. In a subsequent search of the home, officers recovered a 12-gauge shotgun in the kitchen pantry and a 9mm handgun in the bedroom. Chester admitted both firearms belonged to him.

In May 2008, as a result of this incident, Chester was indicted for possessing firearms after having been convicted "of a misdemeanor crime of domestic violence" in violation of 18 U.S.C. § 922(g)(9). The indictment charged that in February 2005, Chester had been convicted in Kanawha County Magistrate Court of domestic assault and battery, a misdemeanor offense under West Virginia law. *See* W. Va. Code § 61-2-28(a) and (b). Chester conceded that the 2005 domestic [*9] assault and battery offense qualified as a predicate "misdemeanor crime of domestic violence" under § 922(g)(9). [4]

> 4 For purposes of 18 U.S.C. § 922(g)(9), a "misdemeanor crime of domestic violence" is defined as an offense that "is a misdemeanor under Federal, State, or Tribal law" and "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse . . . of the victim." 18 U.S.C. § 921(a)(33)(A).

Chester moved to dismiss the indictment, arguing that § 922(g)(9), both on its face and as applied to him in this instance, violated his Second Amendment right to keep and bear arms under *Heller*. Seizing upon *Heller's* list of "presumptively lawful regulatory measures" including "longstanding prohibitions on the possession of firearms by felons and the mentally ill," 128 S. Ct. at 2817 & n.26, the district court reasoned by analogy that "the prohibition by Congress as embodied in § 922(g)(9) of the possession of a firearm by a misdemeanant who has committed a crime of domestic violence is a lawful exercise by the government of its regulatory authority notwithstanding the Second Amendment." *United States v. Chester*, No. 2:08-00105, 2008 U.S. Dist. LEXIS 80138, 2008 WL 4534210, at *2 (S.D.W.Va. Oct. 7, 2008) [*10] . The district court concluded that, like the felon dispossession provision set forth in § 922(g)(1), the prohibition of firearm possession by domestic violence misdemeanants is a danger-reducing regulation designed "to protect family members and society in general from potential [violence]." *Id.* In fact, the district court believed that, if anything, "the need to bar possession of firearms by domestic violence misdemeanants" is "often far greater than that of the similar prohibition of § 922(g)(1) on those who commit nonviolent felonies." *Id.* Thus, the district court denied the motion to dismiss the indictment, and Chester entered a conditional guilty plea, reserving his right to raise on appeal the application of the Second Amendment.

Chester then filed this appeal. In February 2010, we vacated the judgment and remanded in an unpublished opinion. *See United States v. Chester*, No. 09-4084, 367 Fed. Appx. 392, 2010 WL 675261 (4th Cir. Feb. 23, 2010) (per curiam). We declined to find § 922(g)(9) valid by analogy based on *Heller's* "presumptively lawful" language, and we remanded for the district court to conduct an analysis [*11] of whether § 922(g)(9) could be "'independently justified'" in light of *Heller*. *Id.* at 398. Our approach followed that taken in *United States v. Skoien*, 587 F.3d 803 (7th Cir. 2009), *vacated*, 614 F.3d 638 (7th Cir. 2010) (en banc), a panel decision that was vacated by the Seventh Circuit for *en banc* review at about the same time that we released our opinion in *Chester*. In *Skoien*, the defendant was convicted under 18 U.S.C. § 922(g)(9) for illegally possessing a shotgun that he claimed to have kept for hunting purposes. The *Skoien* panel reasoned that because "the core right of self-defense identified in *Heller* [was] not implicated," intermediate scrutiny was the appropriate standard to apply to the defendant's Second Amendment challenge to § 922(g)(9). *Id.* at 805. The panel voted to remand the case to give the government an opportunity to carry its burden imposed by the intermediate constitutional framework:

> Under intermediate scrutiny, the government need not establish a close fit between the statute's means and its end, but it must at least establish a *reasonable* fit. The government has done almost nothing to discharge this burden. Instead, it has premised its argument almost entirely [*12] on *Heller's* reference to the presumptive validity of felon-dispossession laws and reasoned by analogy that § 922(g)(9) therefore passes

constitutional muster. That's not enough.

Id. at 805-06. Similarly, we remanded Chester's appeal for clarification of the precise contours of his Second Amendment claim--a necessary step in determining the appropriate standard of constitutional scrutiny to apply--and for development of the record under the appropriate means-end framework. *See Chester*, 367 Fed. Appx. 392, 2010 WL 675261, at *6. We stopped short, however, of identifying the proper level of scrutiny, leaving that task to the district court on remand.

After we issued the unpublished *Chester* opinion, the government filed a petition for panel rehearing in light of the fact that the *Skoien* panel decision had been vacated by the Seventh Circuit *en banc*. While Chester's petition for rehearing was pending, the Seventh Circuit issued its en banc decision in *Skoien*, rejecting the Second Amendment challenge to § 922(g)(9) on the basis that "logic and data" demonstrate "a substantial relation between § 922(g)(9) and [an important governmental] objective." 614 F.3d at 642. We now grant panel rehearing, vacate our initial [*13] opinion and reissue our decision to provide district courts in this Circuit guidance on the framework for deciding Second Amendment challenges.

III.

We turn first to the question of how to evaluate Chester's Second Amendment challenge to § 922(g)(9). To the extent *Heller* provides an answer to this question, it would be found in the Court's truncated discussion of the limitations on the right to bear arms preserved by the Second Amendment. As noted previously, *Heller* recognized that the pre-existing right guaranteed by the Second Amendment "was not unlimited, just as the First Amendment's right of free speech was not." *Heller*, 128 S. Ct. at 2799; *see id.* at 2816. And because "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *preexisting* right," *id.* at 2797, determining the limits on the scope of the right is necessarily a matter of historical inquiry. *Heller* declined to "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment," *id.* at 2816, but did identify one specific historical limitation as to *which* arms a citizen had the right to bear. In accordance "with the historical understanding [*14] of the scope of the right," the Second Amendment protected only weapons "typically possessed by law-abiding citizens for lawful purposes." *Id.* at 2816; *see id.* at 2817 (explaining that the Second Amendment protected "the right to keep and carry arms . . in common use at the time") (internal quotation marks omitted). The Court found support for this limitation in "'the historical tradition of prohibiting the carrying of dangerous and unusual weapons.'" *Id.* at 2817. Thus, a citizen's right to carry or keep sawed-off shotguns, for instance, would not come within the ambit of the Second Amendment. *See id.* at 2816.

Having acknowledged that the scope of the Second Amendment is subject to historical limitations, the Court cautioned that *Heller* should not be read "to cast doubt on longstanding prohibitions" such as "the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Id.* at 2816-17. *Heller* described its exemplary list of "longstanding prohibitions" as "presumptively lawful regulatory measures," *id.* at 2817, n.26, without alluding to any historical evidence that the right to keep [*15] and bear arms did not extend to felons, the mentally ill or the conduct prohibited by any of the listed gun regulations. It is unclear to us whether *Heller* was suggesting that "longstanding prohibitions" such as these were historically understood to be valid limitations on the right to bear arms or did not violate the Second Amendment for some other reason. *See United States v. Rene E.*, 583 F.3d 8, 12 (1st Cir. 2009) (concluding that *Heller* "identified limits deriving from various historical restrictions on possessing and carrying weapons," including the felon dispossession provision, that "were left intact by the Second Amendment"). Federal felon dispossession laws, for example, were not on the books until the twentieth century, and the historical evidence and scholarly writing on whether felons were protected by the Second Amendment at the time of its ratification is inconclusive. But even if the listed regulations were not historical limitations on the scope of the Second Amendment, the Court could still have viewed the regulatory measures as "presumptively lawful" if it believed they were valid on their face under any level of means-end scrutiny applied. [5]

5 Other courts have found [*16] *Heller's* list of "presumptively lawful" firearm regulations susceptible to two meanings. *See United States v. Marzzarella*, 614 F.3d 85, 91 (3rd Cir. 2010) ("We recognize the phrase 'presumptively lawful'

could have different meanings under newly enunciated Second Amendment doctrine. On the one hand, this language could be read to suggest the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment. On the other hand, it may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny."); *Skoien*, 587 F.3d at 808 ("[I]t is not entirely clear whether this language should be taken to suggest that the listed firearms regulations are presumed to fall outside the scope of the Second Amendment right as it was understood at the time of the framing or that they are presumptively lawful under even the highest standard of scrutiny applicable to laws that encumber constitutional rights.").

Some courts have treated *Heller's* listing of "presumptively lawful regulatory measures," for all practical purposes, as a kind of "safe harbor" for unlisted regulatory measures, such as 18 U.S.C. § 922(g)(9), [*17] which they deem to be analogous to those measures specifically listed in *Heller*. *See, e.g., United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010) ("We see no reason to exclude § 922(g)(9) from the list of long-standing prohibitions on which *Heller* does not cast doubt."). This approach, however, approximates rational-basis review, which has been rejected by *Heller*. *See Heller*, 128 S. Ct. at 2817, n.27. In fact, the phrase "*presumptively* lawful regulatory measures" suggests the possibility that one or more of these "longstanding" regulations "could be unconstitutional in the face of an as-applied challenge." *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010).

In view of the fact that *Heller* ultimately found the District's gun regulations invalid "under any standard of scrutiny," it appears to us that the Court would apply some form of heightened constitutional scrutiny if a historical evaluation did not end the matter. The government bears the burden of justifying its regulation in the context of heightened scrutiny review; using *Heller's* list of "presumptively lawful regulatory measures" to find § 922(g)(9) constitutional by analogy would relieve the government of its [*18] burden.

Thus, a two-part approach to Second Amendment claims seems appropriate under *Heller*, as explained by the Third Circuit Court of Appeals, *see Marzzarella*, 614 F.3d at 89, and Judge Sykes in the now-vacated *Skoien* panel opinion, *see* 587 F.3d at 808-09. The first question is "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Id.* This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. *See Heller*, 128 S. Ct. at 2816. If it was not, then the challenged law is valid. *See Marzzarella*, 614 F.3d at 89. If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny. *See id. Heller* left open the issue of the standard of review, rejecting only rational-basis review. Accordingly, unless the conduct at issue is not protected by the Second Amendment at all, the Government bears the burden of justifying the constitutional validity of the law.

A.

Under this approach, the first question is whether [*19] § 922(g)(9) burdens or regulates conduct that comes within the scope of the Second Amendment--*i.e.*, whether the possession of a firearm in the home by a domestic violence misdemeanant is protected by the Second Amendment. *Cf. Marzzarella*, 614 F.3d at 89 ("Our threshold inquiry, then, is whether [the challenged law] regulates conduct that falls within the scope of the Second Amendment. In other words, we must determine whether the possession of an unmarked firearm in the home is protected by the right to bear arms."). Section 922(g)(9), like the felon-dispossession provision set forth in § 922(g)(1), permanently disarms an entire category of persons. Thus, we are seeking to determine whether a person, rather than the person's conduct, is unprotected by the Second Amendment. *See Skoien*, 614 F.3d at 649 (Sykes, J., dissenting) (framing the threshold question as "whether persons convicted of a domestic-violence misdemeanor are completely 'outside the reach' of the Second Amendment as a matter of founding-era history and background legal tradition").

In this case, the government has not taken the position that persons convicted of misdemeanors involving domestic violence were altogether excluded [*20] from the Second Amendment as it was understood by the founding generation. Moreover, it appears to us that the historical data is not conclusive on the question of whether the founding era understanding was that the