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RECENT ABORTION LITIGATION

MARTIN F. MCKERNAN, JR.*

WITHIN THE PAST TWO YEARS there have been a number of challenges posed in the courts—both directly and sometimes inadvertently—to laws which allow for the performance of an abortion only to save the life (and in some cases the health) of the expectant mother. The first significant decision in this series was that of the California Supreme Court in *People v. Belous*.¹ This case involved the criminal conviction of a California physician, Leon Belous, for conspiracy to commit abortion by his recommendation of a patient to another doctor for the performance of such an operation. The court, in a 4-3 decision, found that the statute which proscribed abortion unless “necessary to preserve her (the expectant mother’s) life”² was unconstitutionally vague and reversed the conviction. The majority opinion noted that the statute was not “susceptible of a construction that does not violate legislative intent and that is sufficiently certain to satisfy due process requirements without improperly infringing on fundamental constitutional rights.”³ The United States Supreme Court dismissed the State’s appeal; and it is not unreasonable to assume that this denial was based upon the fact that the question had been mooted since California had adopted a new abortion law.⁴

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¹ 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970). For an excellent discussion of this decision, see, McGrew, *To Be or Not To Be: The Constitutional Question of the California Abortion Law*, 118 U. PA. L. REV. 643 (1970).

² Ch. 528, § 1 CAL. STAT. 1605 (1935), *as amended*, CAL. PENAL CODE § 274 (Deering 1960).

³ 71 Cal. 2d at 960, 458 P.2d at 197, 80 Cal. Rptr. at 357.

⁴ CAL. HEALTH AND SAFETY CODE §§ 25950-54. Abortion is permitted under this law if continuation of the pregnancy would gravely impair the physical or mental health of the expectant mother, if the pregnancy resulted from rape or incest or if the expectant mother is under fifteen years of age.

(This new California statute, incidentally, does not go to the same lengths as that proposed in the Model Penal Code of the American Law Institute, which would also allow such operations when two licensed physicians believe that the child would be born with either serious mental or physical defects.⁵ Since its original proposal the Code has been considered, at some level, by the legislatures of all fifty states. To date, twelve states⁶ have adopted its major provisions with certain minor alterations, with California eliminating that section which allows for eugenic abortions. Four other states⁷ now permit the performance of an abortion simply upon the request of the expectant mother, with one of these jurisdictions⁸ allowing such operations up until the twenty-fourth week of the pregnancy.)

Shortly after the *Belous* decision a United States District Court judge in Washington, D.C. ruled that the District of Columbia abortion law was also impermissibly vague.⁹ This statute allows for the performance of such an operation when either the life or health of the expectant mother is threatened by continuation of

the pregnancy.¹⁰ The Supreme Court has assumed probable jurisdiction in the appeal of this decision by the Government and oral arguments have been completed. The indictment had been dismissed upon alleged vagueness grounds in this case, however, on a motion for summary judgment prior to trial. The Court could thus remand the case in order to establish some record by which it could determine whether the statute was actually vague as applied to, and viewed and interpreted by, the particular defendant.

Some recent decisions have moved from the tangential issue of vagueness to discuss the substantive—and more basic—questions which are involved in the entire area of the alleged right of expectant mothers to abort unwanted children and the possible right of these children to continued existence. One such decision involved a Milwaukee physician under prosecution for violating the Wisconsin abortion law which proscribes such operations unless “necessary to save the life of the mother.”¹¹ Following his arrest for alleged violation of the statute, Dr. Sidney Babbitz instituted proceedings before a three-judge federal court pursuant to appropriate federal statutes.¹² He sought a declaratory judgment that the law was violative of his First and Fourteenth Amendment rights and that it was also violative of the expectant mother’s right of privacy; and he requested enjoinder of further prosecution under it.

⁵ MODEL PENAL CODE § 230.3(2), (3), (Proposed Official Draft, 1962). For a discussion of this portion of the Code, see Giannella, *The Difficult Quest for a Truly Humane Abortion Law*, 13 VILL. L. REV. 257 (1968).

⁶ Arkansas, California, Colorado, Delaware, Georgia, Kansas, Maryland, New Mexico, North Carolina, Oregon, South Carolina and Virginia.

⁷ Alaska, Hawaii, New York and Washington.

⁸ New York.

⁹ *United States v. Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969), *prob. juris. noted*, 397 U.S. 1061 (1970).

¹⁰ 67 STAT. 93, ch. 159, § 203; D.C. CODE ANN. § 22-201.

¹¹ WIS. STAT. § 940.04.

¹² 28 U.S.C. §§ 1343, 2201, 2202; 42 U.S.C. § 1983.

In its decision¹³ the three-judge court considered the contention of vagueness in light of the *Belous* and *Vuitch* cases; but found that the Wisconsin Legislature had been neither vague nor indefinite in its choice of language, which was substantially similar to that found in both the California and District of Columbia statutes. This court noted that the statute met the requirement enunciated by the Supreme Court in 1930¹⁴ when it stated that:

Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.¹⁵

However, citing a series of Supreme Court cases establishing, under the right of privacy, such things as the right to marry and raise children,¹⁶ the right to marry unhampered by statutory racial restrictions,¹⁷ and the right to the acquisition of information on contraceptives,¹⁸ this three-judge court found that the same right of privacy extended to the expectant mother so that the state could not decree that she must carry an unborn child prior to quickening.

The *Babbitz* decision is difficult to understand for a number of reasons. In 1803

the first English statute dealing with abortion was enacted.¹⁹ This law did away with the requirement enunciated by Coke and by Blackstone that the fetus must have quickened before an abortion could be viewed as a felony. The necessity of quickening was possibly abandoned because advances in scientific thought were indicating that the developing life within the womb took on some form and viability prior to that which the law had previously assumed. In 1837 another English statute²⁰ further amended the laws dealing with abortion and eliminated completely any reference to quickening, which had been retained to determine the degree of punishment to be meted out to one convicted of an abortion. While the original Wisconsin statute dealing with abortions retained the prescription that quickening have occurred before punishment could be imposed, this provision was eliminated in 1858. It is indeed strange that this three-judge federal court would revert to a standard long discarded in the vast majority of common law jurisdictions both in the United States and elsewhere.²¹

¹⁹ "Miscarriage of Women Act," 43 Geo. III, c. 58 (1803).

²⁰ "Offenses Against the Person Act," 7 Will. IV, and 1 Vict., c. 85 (1837).

²¹ This decision also apparently stands in direct contradiction to basic probate laws governing the appointment of a guardian for unborn children. It is also questionable in light of *dictum* expressed by the Wisconsin Supreme Court in *Puhl v. Wisconsin Auto Ins. Co.*, 8 Wis. 2d 343, 99 N.W.2d 163 (1959) in which it was clearly indicated that the law in Wisconsin will protect the unborn child, in tort law, from the moment of conception. There are, of course, no logical legal protections to rationally be accorded the unborn child if his mother can destroy him at will. In this area see generally Note, *The Law and*

¹³ *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970).

¹⁴ *United States v. Wurzbach*, 280 U.S. 396 (1930).

¹⁵ *Id.* at 399.

¹⁶ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

¹⁷ *Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁸ *Griswold v. Connecticut*, 381 U.S. 479 (1965)

While the court—in a declaratory judgment—did find the statute to be unconstitutional, it nonetheless refused to grant injunctive relief against its enforcement. Thereupon the Milwaukee District Attorney proceeded with his criminal prosecution of Dr. Babbitz. The doctor then returned to the same judges, and upon his second request was granted injunctive relief. Upon an appeal to the United States Court of Appeals for the Seventh Circuit this injunction was upheld and the matter is now on appeal to the United States Supreme Court. However, a series of very recent Supreme Court decisions could vitally affect both the declaratory judgment provision of the three-judge court's original ruling and especially its later injunction. These decisions will be discussed later.

Other Federal Court Decisions

Following a 1965 United States Supreme Court decision²² the popularity of specially-convened three-judge federal courts increased rapidly. The number of cases heard by such courts has almost doubled since this decision—from 147 in 1965 to 291 in 1970.²³ Accounting for at least some of this new-found popularity has been a series of cases before these panels challenging state abortion statutes.

In addition to the court in the *Babbitz*

decision three other such panels have ruled abortion statutes to be unconstitutional on various grounds. One such court had before it the Texas law, which proscribes abortions unless performed “. . . for the purpose of saving the life of the mother.”²⁴ The panel found that the law interfered with the constitutionally-protected right to decide whether to have children as enunciated by the Supreme Court,²⁵ and ruled that no compelling state interest had been demonstrated which would give the government the authority to forbid the exercise of this right through the utilization of abortion.²⁶ While the panel did observe that the state might well have the right to regulate abortions, it said that this particular statute under which it attempted to exercise the right was void for overbreadth in that it did not limit its application to whatever compelling state interest, if any, might exist. The court, however, on general grounds of federal abstention, refused to grant the injunctive relief against enforcement of the statute which the plaintiffs had requested. The plaintiffs have appealed the denial of the injunction to the United States Supreme Court. However, the Court has not assumed jurisdiction. The State has appealed the declaratory judgment portion of the decision to the United States Court of Appeals for the Fifth Circuit; but action by the Circuit Court has been stayed pending the outcome of the proceeding before the Supreme Court.

Another three-judge federal court found

the Unborn Child: The Legal and Logical Inconsistencies, 46 NOTRE DAME LAW. 349 (1971); Noonan, *The Constitutionality of the Regulation of Abortion*, 21 HASTINGS L.J. 51 (1969); Gordon, *The Unborn Plaintiff*, 6 MICH. L. REV. 579 (1965).

²² *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

²³ *The Constitution and the Courts*, THE WALL ST. J., March 2, 1971, at 16, col. 2.

²⁴ TEX. PEN. CODE, art. 1196.

²⁵ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²⁶ *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970).

the Georgia abortion statute,²⁷ fashioned along the lines of that proposed in the Model Penal Code of the American Law Institute,²⁸ also to be unconstitutional on the ground that the constitutionally-protected right of privacy included the right to abort an unwanted pregnancy. In what is an extremely confusing decision,²⁹ the court then went on to observe, however, that the decision to abort was not a purely private one on the part of the expectant mother, even in consultation with her husband; and noted that the state had certain interests in legislating in this area but found fault with the statute under consideration in that it limited the number of reasons for which an abortion may be sought. The panel denied the injunctive relief which had been requested by the plaintiffs in their original challenge to the statute and the entire matter is now on cross-appeals to the Supreme Court with protective appeals having been filed in the United States Court of Appeals for the Fifth Circuit.

One three-judge federal court has granted injunctive relief against enforcement of a state abortion statute at the same time it issued a declaratory judgment that the law was unconstitutional.³⁰ The panel found that the Illinois statute was impermissibly vague and ruled that it unduly infringed upon the right of an expectant mother to decide whether she wanted children (as applied to pregnancies within the first trimester of the term).

What is most interesting in regard to this decision is that an immediate appeal of the injunctive provision to Justice Thurgood Marshall, the Circuit Justice for the Seventh Circuit, brought an order of vacation of the injunction. The entire decision will now be cross-appealed by both parties to the suit—one side seeking to have the declaratory judgment provision reversed and the other seeking to have that portion upheld and the injunction reinstated.

A number of other three-judge federal courts have upheld state statutes restricting the performance of abortion specifically to those situations where the life of the expectant mother is at stake. One such decision³¹ had under consideration the Louisiana statute which forbade an abortion unless “. . . done for the relief of a woman whose life appears in peril. . . .”³² On the issue of vagueness, the panel agreed with the *Babbitz* decision and said that the statute provided meaningful guidance to physicians. The court noted that little or no importance has been attached to whatever rights may be possessed by the unborn child and drew a sharp distinction between the right to decide whether or not to bear children as enunciated by the Supreme Court³³ and the right to destroy those children who have been conceived but who are not yet born. Closely examining a large amount of medical evidence, the court ruled that the State of Louisiana had not been overreaching in assigning a certain amount of legal status to the unborn

²⁷ GA. CODE ANN. § 26-1101 *et seq.*

²⁸ See note 5 *supra*.

²⁹ Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970).

³⁰ Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971).

³¹ Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970).

³² LA. REV. STAT. ANN. § 37:1285 *et seq.*

³³ Griswold v. Connecticut, 381 U.S. 479 (1965).

infant. The court concluded on the note that for federal panels to summarily strike down state statutes, which have been given consideration by the Legislature, is to debilitate popular government.

In another decision³⁴ a three-judge federal court, in considering the constitutionality of the Ohio abortion law³⁵ on possible vagueness grounds, observed that the problem was not that those who sought to have the statute declared invalid did not understand the law, but that basically they did not accept its provisions. This panel also drew a sharp distinction between the right to decide not to bear children and the right to destroy an unborn child. It said that to attempt to bring this latter "right" under the aegis of the *Griswold* decision was a refusal to recognize the prohibition of the Fifth and Fourteenth Amendments against depriving anyone of "life . . . without due process of law." This recognition of constitutional protection granted to unborn children was upheld by the court in its examination of biological evidence; and also in its examination of those rights which the law has traditionally accorded a child *en ventre sa mere*.

Another recent decision³⁶ involved the North Carolina abortion law³⁷ which was patterned along the provisions of the Model Penal Code proposed by the American Law

Institute.³⁸ The court said that the issue under consideration was whether the state could constitutionally assign to the human organism in its early prenatal development the right to be born within certain strictly prescribed exceptions; and then answered its own question in the affirmative. The panel went on to draw a sharp distinction between the right not to have children³⁹ and the claimed freedom to exercise this right through abortion. In analyzing the total question it observed that:

To determine the state interest we shall not attempt to choose between extreme positions. Whether possessing a soul from the moment of conception or mere protoplasm, the fertilized egg is, we think, 'unique as a physical entity'; with the potential to become a person. Whatever that entity is, the state has chosen to protect its very existence. The state's power to protect children is a well-established constitutional maxim. That this power should be used to protect a fertilized egg or embryo or fetus during the period of gestation embodies no logical infirmity, but would seemingly fall within the 'plenary power of government.' That there is a state interest has until recently been taken for granted. History sides with the state.⁴⁰

Federal Abstention

Two three-judge federal courts, convened to consider the constitutionality of abortion statutes in Missouri and Minnesota, dismissed the cases on the primary basis of federal abstention.

In the Minnesota⁴¹ decision one plain-

³⁴ *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio 1970). See also *Wagner v. Finch*, 413 F.2d 267 (5th Cir. 1969); Oaks, *Abortion and Due Process*, 23 RES IPSA LOQUITUR 5 (1970).

³⁵ OHIO REV. CODE § 2901.16.

³⁶ *Corkey v. Edwards*, — F. Supp. — (W.D.N.C. 1971).

³⁷ N.C. GEN. STAT. § 14-45 *et seq.* (1969).

³⁸ See note 5 *supra*.

³⁹ *Griswold v. Connecticut*, *supra* at 18.

⁴⁰ *Corkey v. Edwards*, *supra* at —.

⁴¹ *Doe v. Randall*, 314 F. Supp. 32 (D. Minn. 1970).

tiff, a doctor, had performed an abortion upon one of the other plaintiffs. The doctor sought an injunction against prosecution even though none had been initiated; and also sought a declaratory judgment that the State's statute was unconstitutional on various grounds. The court ruled flatly that the abstention doctrine was applicable in that situation and that it had no place asserting itself into a possible state criminal trial when no federal rights were immediately threatened.

Shortly thereafter, the three-judge federal court which had been convened to entertain various challenges to the Missouri law likewise dismissed the suit.⁴² In that case there was no allegation that anyone had performed an abortion or that any prosecution was threatened. In the dismissal, the panel relied upon the

. . . long-standing reluctance on the part of the federal courts to exercise jurisdiction over controversies involving unsettled questions of state law where the questions have not been decided in the state tribunal first, even though there are underlying federal constitutional questions.⁴³

The panel noted a Supreme Court decision which had recently reiterated this principle.⁴⁴ While the abstention doctrine

is definitely applicable where there has been no consideration of the matter by a state court, it would appear to be equally applicable in the situations where the constitutionality of a statute has been considered by a state court and not found wanting—unless, of course, there are extraordinary circumstances where the danger of irreparable loss is both great and immediate.⁴⁵

The implicit limitations which both the Constitution and judicial precedent place upon the interference of federal courts in the interpretation and application of state criminal statutes was recently emphasized in a series of Supreme Court decisions. In one of these cases⁴⁶ a three-judge federal court had ruled that the California Criminal Syndicalism Act was void for vagueness and overbreadth in violation of the First and Fourteenth Amendments; and enjoined prosecution of the plaintiff in the federal suit under the act. The Court said that the judgment enjoining prosecution

must be reversed as a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances.⁴⁷

While this statement would appear to be especially applicable to the *Babbitt* decision, discussed *supra*, another comment of the Court would seem to have equal ap-

⁴² *Rodgers v. Danforth*, — F. Supp. — (W.D. Mo. 1970).

⁴³ *Id.* at —.

⁴⁴ *Reetz v. Bozanich*, 397 U.S. 82 (1970). This decision involved the review of the declaration of a three-judge federal district court that an Alaskan statute was unconstitutional when the constitutional question had not been previously considered by any state court. The Supreme Court held that the abstention doctrine was applicable and that state courts should have the

opportunity to pass on whatever constitutional questions might be involved in the enactment or enforcement of their own state laws.

⁴⁵ *Fenner v. Boykin*, 271 U.S. 240, 243-244 (1926).

⁴⁶ *Younger v. Harris*, 39 U.S.L.W. 4201 (U.S. Feb. 23, 1971).

⁴⁷ *Id.* at 4202.

plicability to those other federal decisions which have held state abortion laws unconstitutional. In most of these cases, those seeking to have the laws declared unconstitutional were doctors, women and clergymen. The Supreme Court noted, in reference to those who joined Petitioner Younger in seeking to have prosecution enjoined under the Syndicalism Act, that

. . . persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs in such cases.⁴⁸

Speaking for eight members of the Court (Justice Douglas dissented), Justice Black thoroughly discussed the role of the federal judiciary in the enforcement and applicability of state statutes. He said that the concept of "Our Federalism," as envisioned by the Framers of the Constitution, represented ". . . a sensitivity to the legitimate interests of both State and National Governments . . ."⁴⁹ and that this concept explained ". . . why it has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions."⁵⁰ However, the Court apparently still views the intervention of three-judge district courts as legitimate when there is an allegation of a

bad-faith prosecution or an attempt to harass under the color of state law as expressed in *Dombrowski*.⁵¹

Justice Black concluded his opinion with the comment that ". . . the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good faith attempts to enforce it. . ."⁵² Two other decisions,⁵³ handed down the same day, emphasize this concept of restraint on the part of the federal courts; and the general applicability of these cases to those suits challenging state abortion statutes appears unmistakable.⁵⁴

State Court Actions

The constitutionality of abortion laws has also been considered by three state supreme courts, in addition to the California Supreme Court in the *Belous* case.

In dealing with the Iowa abortion statute,⁵⁵ that State's Supreme Court considered the possible vagueness of the law in light of the *Belous* decision. The court said that the statute before it was substantially similar to that under consideration in the California case but ruled that it was not persuaded by the majority of the California court and upheld the Iowa

⁴⁸ *Id.* See also *Golden v. Zwickler*, 394 U.S. 103 (1969); *Doe v. Dunbar*, 320 F. Supp. 1297 (D. Colo. 1970). But see *Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement?* 78 YALE L.J. 816 (1969).

⁴⁹ 39 U.S.L.W. at 4203.

⁵⁰ *Id.* See also *Douglas v. City of Jeannette*, 319 U.S. 157 (1943).

⁵¹ *Dombrowski v. Pfister*, 380 U.S. 479 (1965).
⁵² 39 U.S.L.W. at 4206.

⁵³ *Boyle v. Landry*, 39 U.S.L.W. 4207 (U.S. Feb. 23, 1971); *Perez v. Ledesma*, 39 U.S.L.W. 4214 (U.S. Feb. 23, 1971).

⁵⁴ In addition to those cases discussed herein, challenges to state abortion statutes are currently pending before three-judge federal courts in Arizona, Colorado, Kentucky, New Jersey, Oklahoma, Pennsylvania and Utah.

⁵⁵ IOWA CODE, § 701.1.

law.⁵⁶ This case involved the appeal of a person, who was not a physician, from a criminal conviction for referring expectant mothers to another person for abortions. In discussing the contention that the statute effectuated a denial of equal protection the Iowa Court examined an earlier decision⁵⁷ in which it had clearly established a presumption of innocence in the case of a physician's *bona fide* attempt at compliance with the law. The court noted, however, that this presumption—and its inherent protection—does not extend to a person who is not a physician.

The argument that the Louisiana abortion law⁵⁸ is unconstitutional, on a number of grounds, was presented to that State's Supreme Court in the appeal of a non-physician convicted of violating the statute. The court ruled that such arguments were to be properly addressed to the legislature and upheld the law.⁵⁹

The Vermont statute⁶⁰ was also considered by that State's Supreme Court in a petition for postconviction relief by a non-physician, on the grounds that the law was unconstitutionally vague.⁶¹ The petitioner had pleaded guilty to the original indictment of assisting in the procurement of an abortion, and the court said that this removed the viability of any claim of surprised innocence due to vagueness. The

Vermont Supreme Court also noted that the petitioner was in no way situated to enforce his claim that the law was impermissibly vague as applied to women generally or to doctors who must decide whether an abortion would be allowable under the law; and it affirmed the conviction of the petitioner.

Abortion statutes have also been considered by a number of lower state courts. Some of these have ruled the law under examination to be unconstitutional,⁶² while others have upheld them.⁶³

Conclusion

There are a number of anomalies already existent in the law which are, of course, reflections of the mores of the society which the law mirrors. There is no need to create further contradictions within our jurisprudential ethic, lest more people come to share the opinion of Mr. Bumble that the law is indeed "a ass."

The child, *en ventre sa mere*, can inherit by will and by intestacy; he can be the beneficiary of a trust and he can be tortiously injured; he can be represented by a guardian seeking support from his parents and he can be protected by criminal statutes on parental neglect. The unborn's parents have also been held to have a right of action against the perpetrator of his

⁵⁶ *State v. Abodeely*, — Iowa —, 179 N.W. 2d 347 (1970).

⁵⁷ *State v. Dunkelbarger*, 206 Iowa 971, 221 N.W. 592 (1928).

⁵⁸ LA. REV. STAT. § 14:87, *et seq.*

⁵⁹ *State v. Pesson*, 256 La. 201, 235 So. 2d 568 (1970).

⁶⁰ VT. STAT. ANN. tit. 13, § 101.

⁶¹ *State v. Bartlett*, 270 A.2d 168 (1970).

⁶² *See, e.g., Commonwealth v. Page* (C.P. of Centre County, Penn., #1968-353, 1970); *People v. Anast* (Cir. Ct. of Cook County, Ill., #69-3429, 1970); *State v. Munson*, (Cir. Ct. of the 7th Jud. Dist. of S. Dak., 1970).

⁶³ *See, e.g., Commonwealth v. Brunelle*, (Super. Ct. of Middlesex County, Mass., #83879, 1970); *State v. Hodgson*, (Dist. Ct. of the 2d Jud. Dist. of Ramsey County, Minn., #23789, 1970).

wrongful death. It would be somewhat ludicrous for the courts, in light of the panoply of rights which statutory and decisional law have conferred upon the child *in utero*, to simultaneously decree that he can be deprived of that right upon which all others depend, except in the most serious circumstances.⁶⁴ Should the courts give breath to this inherent contradiction in sanctioning abortions, except in such circumstances, Mr. Bumble could well prove to be more of a prophet than Dickens had ever thought possible. *

⁶⁴ See generally Archibald, *The Law as a Schizophrenic*, 23 RES IPSA LOQUITUR 12 (1970).

* Following the preparation of this article, the United States Supreme Court acted in two of the cases discussed herein.

In *Babbitz v. McCann*, 39 U.S.L.W. — (U.S. —, 1971) the Court in an 8-1 decision with Justice Douglas dissenting, vacated the judgment of a three-judge federal district court in Wisconsin which had declared the State's abortion statute unconstitutional and had enjoined prosecution under it. In addition to the vacation, the Court remanded the case to the three-judge district court for further consideration in light of the recent decisions in *Younger v. Harris*, 39 U.S.L.W. 4201 (U.S. Feb. 23, 1971) and its companion cases, which are discussed in the body of this article.

In *United States v. Vuitch*, 39 U.S.L.W. 4464

(U.S. Apr. 21, 1971) the Supreme Court upheld the constitutionality of the District of Columbia statute reversing the decision of Judge Gesell, on the trial level, that the law was void for vagueness. Four members of the Court, the Chief Justice and Justices Harlan, White and Blackmun concurred in the majority opinion written by Justice Black. Justices Harlan and Blackmun contended that the Court ought not to have assumed jurisdiction, but said that they nevertheless concurred in the ultimate decision of the majority; while Justices Brennan and Marshall, also feeling that the Court ought not to have assumed jurisdiction, refused to pass on the merits. Justices Douglas and Stewart, while feeling that the assumption of jurisdiction was proper, disagreed with the majority in its ultimate disposition of the matter. The majority opinion on the merits clearly established that it is the burden of the Government to establish, in a criminal abortion proceeding, not only that an abortion was performed but also that its performance fell outside the confines of the law. The majority also concluded that the word "health" in the D.C. statute included mental health, thus sanctioning the performance of abortions for psychiatric reasons under this law. This clearly places a burden upon the medical profession to determine just what psychiatric grounds, if any, do actually exist which would warrant the destruction of unborn children. There can be little constitutional argument with the destruction of one human life in order to save the life of another. However, our jurisprudential ethic has never equated human life itself with mental health, and an examination of this equation must be undertaken in a subsequent case.