

## Carey v. Population Servs. Int'l

Supreme Court of the United States

Argued January 10, 1977 ; June 9, 1977; As amended

No. 75-443

### Reporter

431 U.S. 678 \*; 97 S. Ct. 2010 \*\*; 52 L. Ed. 2d 675 \*\*\*; 1977 U.S. LEXIS 104 \*\*\*\*; 2 Media L. Rep. 1935

CAREY, GOVERNOR OF NEW YORK, ET AL.  
v. POPULATION SERVICES INTERNATIONAL  
ET AL.

unconstitutional in its entirety.

### Overview

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

**Disposition:** The decision was affirmed. The statute was an unjustified intrusion by the state on individual decisions in matters of childbearing, protected as privacy rights by the Due Process Clause of [U.S. Const. amend. XIV](#)

### Core Terms

contraceptive, advertize, adult, abortion, pregnancy, sexual activity, privacy, sexual, marry, distribution of contraceptives, right to privacy, state interest, invalidate, unmarried, suppress, constitutionally protected, state regulation, woman, join, compelling state interest, sexual intercourse, young people, nonprescription, procreate, terminate, marriage, licensed pharmacist, promiscuous, intrusion, disease

### Case Summary

#### Procedural Posture

Appellant challenged the decision of the United States District Court for the Southern District of New York holding [N.Y. Educ. Law § 6811\(8\)](#) (1972), which regulated the sales, advertisements, and displays of contraceptives, to be

Appellees, seller of contraceptives and others, challenged [N.Y. Educ. Law § 6811\(8\)](#) (1972) prohibiting sales of contraceptives to minors, and advertisements or displays of contraceptives, and providing that only pharmacists could sell contraceptives to adults. The lower court found the statute unconstitutional, and the Court affirmed, holding that the statute was an unjustified intrusion by the state on individual decisions in matters of childbearing, protected as privacy rights by the Due Process Clause of [U.S. Const. amend. XIV](#). The Court rejected the contention that the statute was a constitutionally permissible regulation of morality of minors, holding that because the state could not flatly prohibit the choice of a minor to terminate a pregnancy, a blanket prohibition of distribution of contraceptives to minors was a fortiori unconstitutional. The statute's ban on advertising was an unconstitutional suppression of commercial information related to protected activity. Limiting distribution to pharmacists imposed an unconstitutional burden on the individual's right to use contraceptives; an exception permitting physicians to dispense contraceptives did not save the statute.

#### Outcome

The decision was affirmed. The statute was an unjustified intrusion by the state on individual decisions in matters of childbearing, protected as privacy rights by the Due Process Clause of [U.S.](#)

[Const. amend. XIV.](#)

## **LexisNexis® Headnotes**

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Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Constitutional Law > Substantive Due Process > Privacy > General Overview

Constitutional Law > Substantive Due Process > Scope

### **[HN1](#) Privacy, Personal Decisions**

Although the Constitution does not explicitly mention any right of privacy, the court has recognized that one aspect of the "liberty" protected by the [due process clause of the Fourteenth Amendment](#) is a right of personal privacy, or a guarantee of certain areas or zones of privacy. This right of personal privacy includes the interest in independence in making certain kinds of important decisions. While the outer limits of this aspect of privacy have not been marked by the court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education.

Constitutional Law > Substantive Due Process > Privacy > General Overview

### **[HN2](#) Substantive Due Process, Privacy**

If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Healthcare Law > Medical Treatment > Abortion > Right to Privacy

Constitutional Law > Substantive Due Process > Privacy > General Overview

Healthcare Law > Medical Treatment > End-of-Life Decisions > General Overview

### **[HN3](#) Privacy, Personal Decisions**

That the constitutionally protected right of privacy extends to an individual's liberty to make choices regarding contraception does not, however, automatically invalidate every state regulation in this area. The business of manufacturing and selling contraceptives may be regulated in ways that do not infringe protected individual choices. And even a burdensome regulation may be validated by a sufficiently compelling state interest.

Constitutional Law > Substantive Due Process > Privacy > General Overview

### **[HN4](#) Substantive Due Process, Privacy**

The Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the state.

Constitutional Law > Bill of Rights > Fundamental Rights > General Overview

Constitutional Law > Bill of Rights > General Overview

Constitutional Law > Substantive Due Process > Privacy > General Overview

### **[HN5](#) Bill of Rights, Fundamental Rights**

Minors, as well as adults, are protected by the Constitution and possess constitutional rights. Whatever may be their precise impact, neither the [Fourteenth Amendment](#) nor the [Bill of Rights](#) is for adults alone. On the other hand, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination

Constitutional Law > Bill of Rights > General Overview

Constitutional Law > Equal Protection > Nature & Scope of Protection

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > General Overview

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

## **[HN6](#) Fundamental Freedoms, Freedom of Speech**

Minors are entitled to constitutional protection for freedom of speech, equal protection against racial discrimination, due process in civil contexts, and a variety of rights of defendants in criminal proceedings, including the requirement of proof beyond a reasonable doubt, the prohibition of double jeopardy, the rights to notice, counsel, confrontation, and cross-examination, and not to incriminate oneself, and the protection against coerced confessions.

Family Law > Parental Duties & Rights > Consent > Abortion

Healthcare Law > Medical Treatment > Abortion > Right to Privacy

Constitutional Law > Substantive Due Process > Privacy > General Overview

Family Law > Parental Duties & Rights > In Loco Parentis

## **[HN7](#) Consent, Abortion**

The right to privacy in connection with decisions affecting procreation extends to minors as well as to adults.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Governments > Police Powers

## **[HN8](#) Substantive Due Process, Privacy**

State restrictions inhibiting privacy rights of minors are valid only if they serve any significant state interest that is not present in the case of an adult.

Constitutional Law > ... > Freedom of Speech > Commercial Speech > General Overview

## **[HN9](#) Freedom of Speech, Commercial Speech**

A state may not completely suppress the dissemination of concededly truthful information about entirely lawful activity, even when that information could be categorized as commercial speech.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Obscenity

Criminal Law & Procedure > ... > Sex Crimes > Obscenity > General Overview

Constitutional Law > ... > Fundamental  
 Freedoms > Freedom of Speech > General  
 Overview

Constitutional Law > ... > Fundamental  
 Freedoms > Freedom of Speech > Scope

## [HN10](#) Freedom of Speech, Obscenity

The fact that protected speech may be offensive to some does not justify its suppression.

## Lawyers' Edition Display

### Summary

An action challenging the constitutionality of a New York statute which makes it a crime (1) for anyone to sell or distribute contraceptives to minors under the age of 16, (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons over 15, and (3) for anyone to advertise or display contraceptives, was instituted against state officials in the United States District Court for the Southern District of New York by various individuals and organizations, including an out-of-state corporation which made mail-order sales of contraceptives in New York, advertised its products in periodicals in New York, and had been threatened with prosecution under the New York statute. A three-judge District Court held that the statute was unconstitutional under the [First](#) and [Fourteenth Amendments](#) (398 F Supp 321).

On direct appeal, the United States Supreme Court affirmed, holding that all of the provisions of the New York statute were unconstitutional. Although unable to agree on an opinion with regard to the prohibition of distribution of contraceptives to minors under 16, seven members of the court agreed that such prohibition was unconstitutional under the protection of the right of privacy afforded by the [due process clause of the Fourteenth Amendment](#). In an opinion (part of which constituted the opinion of the court--parts I, II, III, and V) by Brennan, J., joined by Stewart, Marshall,

and Blackmun, JJ., and joined in part by White (holdings 1, 3, and 4 below), Powell (holding 1), and Stevens (holdings 1-4), JJ., it was held that (1) the out-of-state corporation had standing to challenge the constitutionality of the statute not only in its own right but also on behalf of its potential customers; (2) an aspect of the "liberty" protected by the [due process clause of the Fourteenth Amendment](#) was the right of personal privacy, including the right of the individual, married or single, to be free of unwarranted governmental intrusion in the area of personal decisions regarding contraception and the determination whether to bear or beget children, it being necessary that any governmental regulations concerning such matters must be justified by "compelling state interests," and must be narrowly drawn to express only those interests; (3) the due process right of privacy was violated by New York's prohibition of the distribution of nonmedical contraceptives to persons over 15 except through licensed pharmacists, since (a) the statute imposed a significant burden on the right of individuals to use contraceptives and did not serve any compelling state interest, and (b) the statute could not be justified as serving state interests in protecting health or potential life, expressing concern that young people, as store clerks, not sell contraceptives, serving as a quality control device, or facilitating enforcement of the other statutory provisions; and (4) the statutory prohibition of all advertisements or displays of contraceptives was an unconstitutional suppression of commercial speech protected by the [First Amendment](#), and could not be justified on the ground that advertisements of contraceptives would be offensive and embarrassing to those exposed to them and would legitimize sexual activity of young people. Brennan, J., joined by Stewart, Marshall, and Blackmun, JJ., also expressed the view (part IV of the opinion) that New York's prohibition of the distribution of contraceptives to those under 16 (except by a physician) was not constitutionally permissible as a regulation of the morality of minors in furtherance of the state's policy against

promiscuous sexual intercourse among minors, since (a) the right to privacy in connection with decisions affecting procreation extended to minors as well as to adults, (b) state restrictions inhibiting minors' privacy rights were valid only if they served a "significant state interest" not present in the case of an adult, (c) a blanket prohibition of the distribution of contraceptives to minors was foreclosed in view of the court's decisions holding that a state could not impose blanket prohibitions or blanket requirements of parental consent as to abortions for minors, (d) there was substantial doubt whether limiting access to contraceptives would in fact substantially discourage sexual activity among the young, as the state contended, and (e) the narrow exception allowing physicians to supply contraceptives to minors under 16 did not save the statute, it being improper for the state to delegate the authority to disapprove of minors' sexual behavior to physicians, who might exercise such authority arbitrarily, either to deny contraceptives to young people, or to undermine the state's policy of discouraging illicit early sexual behavior.

White, J., concurring in part and concurring in the result in part, expressed the view that (1) the court's opinion should not be regarded as declaring unconstitutional any state law forbidding extramarital sexual relations, (2) the prohibition against distribution of contraceptives to minors under 16 was invalid primarily because the state had not demonstrated that the prohibition measurably contributed to the deterrent purposes advanced by the state as justification for the restriction, and (3) the argument that a minor had the constitutional right to put contraceptives to their intended use, notwithstanding the combined objection of both parents and the state, was frivolous.

Powell, J., concurred in part and concurred in the judgment, expressing the view that (1) the "compelling state interest" standard should not be applied as to state regulations affecting adult sexual relations, (2) the validity of state laws restricting

the freedom of action of young persons in sexual matters should be controlled by whether the restriction rationally served valid state interests, not by a "significant state interest" standard, (3) New York's statutory prohibition of distribution of contraceptives to minors under 16 (except by a physician) infringed the privacy interests of married females between the ages of 14 and 16 (such marriages being permitted by state law), and unjustifiably interfered with parental interests in rearing their children by prohibiting parents from distributing contraceptives to their children, (4) New York's statutory provision making it unlawful for anyone but a licensed pharmacist to sell or distribute contraceptives to adults and to minors over 15, particularly insofar as it prohibited distribution by mail to adults, worked a significant invasion of the constitutionally protected privacy in decisions concerning sexual relations, and (5) New York could not lawfully prohibit all advertisement or display of contraceptives, although a state could impose carefully tailored restrictions designed to serve legitimate governmental concerns as to the effect of commercial advertising on the young.

Stevens, J., concurring in part and concurring in the judgment, expressed the view that (1) although the argument that a minor had the constitutional right to put contraceptives to their intended use, notwithstanding the combined objection of both parents and the state was frivolous, nevertheless New York's prohibition against the distribution of contraceptives to persons under 16 constituted a deprivation of liberty without due process of law, since the prohibition denied young persons and their parents a choice which, if available, would reduce exposure to disease or unwanted pregnancy, and since the prohibition could not be justified as having the symbolic effect of communicating disapproval of sexual activity by minors, and (2) New York's prohibition of all contraceptive advertising was unconstitutional, although the [First Amendment](#) did not deprive a state of all power to regulate such advertising in order to minimize its offensiveness.

Burger, Ch. J., dissented.

Rehnquist, J., dissenting, expressed the view that (1) a state could properly use its police power to legislate in the interests of its concept of the public morality, by seeking to discourage unmarried minors, under 16, from having promiscuous intercourse with one another, and (2) New York's prohibition of commercial advertisements and its requirement that all sales be made by licensed pharmacists should be upheld, since whatever New York's reasons for the restriction on distribution, such restriction could not significantly impair the access to contraceptives of a person with a settled and deliberate intention to procure them.

## **Headnotes**

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COURTS §236.5 > STATUTES §37

> constitutionality of state criminal statute -- standing -- case or controversy -- > Headnote:

[LEdHN\[1\]](#) [1]

In a federal court action challenging the constitutionality of a state statute which makes it a crime (1) for anyone to sell or distribute contraceptives to minors under the age of 16, (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons over 15, and (3) for anyone to advertise or display contraceptives, an out-of-state corporation which makes mail-order sales of contraceptives in the state, and which advertises its contraceptives in periodicals in the state, has standing to challenge the statute not only in its own right but also on behalf of its potential customers, where the corporation had been threatened with prosecution in the state, it not being necessary that the threatened prosecution be imminent; the statute inflicts on the corporation "injury in fact," satisfying the case or controversy requirements of Article III of the Constitution, since the legal duties created by the statute were addressed directly to vendors and the corporation was obliged either to heed the statutory

prohibitions, thereby incurring a direct economic injury through constriction of its market, or to disobey the statutory commands and suffer legal sanctions.

LAW §525 > due process -- privacy -- > Headnote:

[LEdHN\[2\]](#) [2]

Although the Constitution does not explicitly mention any right of privacy, one aspect of the "liberty" protected by the [due process clause of the Fourteenth Amendment](#) is a right of personal privacy, or a guarantee of certain areas or zones of privacy; this right of personal privacy includes the interest in independence in making certain kinds of decisions, and among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education.

LAW §528.5 > due process -- privacy -- decision as to procreation -- > Headnote:

[LEdHN\[3\]](#) [3]

If the due process right of privacy under the [Fourteenth Amendment](#) means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

LAW §528.5 > due process -- privacy -- decision as to procreation -- > Headnote:

[LEdHN\[4\]](#) [4]

That the right of privacy protected under the [due](#)

[process clause of the Fourteenth Amendment](#) extends to an individual's liberty to make choices regarding contraception does not automatically invalidate every state regulation in this area; the business of manufacturing and selling contraceptives may be regulated in ways that do not infringe protected individual choices, and even a burdensome regulation may be validated by a sufficiently compelling state interest; regulations imposing a burden on the fundamental decision as to whether to bear or beget a child may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.

LAW §528.5 > due process -- privacy -- regulation of contraceptive sales -- > Headnote:

[LEdHN\[5A\]](#) [5A][LEdHN\[5B\]](#) [5B]

The right of privacy protected under the [due process clause of the Fourteenth Amendment](#) is violated by a state statute which prohibits the distribution of nonmedical contraceptives to persons over 15 except through licensed pharmacists, since so limiting the distribution of contraceptives imposes a significant burden on the right of individuals to use contraceptives and does not serve any compelling state interest; the statute cannot be justified as (1) serving state interests in maintaining medical standards or protecting health or potential life, (2) furthering state interests by expressing concern that young people, as store clerks, not sell contraceptive products, (3) serving as a quality control device and preventing tampering with the products, or (4) facilitating enforcement of other statutory provisions prohibiting sales of contraceptives to persons under 16 and prohibiting advertisements or displays of contraceptives. (Rehnquist, J., dissented from this holding.)

LAW §528.5 > due process -- decisions as to procreation -- > Headnote:

[LEdHN\[6\]](#) [6]

Under the protection of privacy afforded by the [due process clause of the Fourteenth Amendment](#), state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision may be justified only by a compelling state interest, and must be narrowly drawn to express only the legitimate state interests at stake.

LAW §528.5 > due process -- privacy -- prohibition of contraceptive sales to minors -- > Headnote:

[LEdHN\[7A\]](#) [7A][LEdHN\[7B\]](#) [7B][LEdHN\[7C\]](#) [7C][LEdHN\[7D\]](#) [7D]

A state statute which prohibits the sale or distribution of nonprescription contraceptives to persons under 16 is unconstitutional under the protection of the right of privacy afforded by the [due process clause of the Fourteenth Amendment](#). [Per: Brennan, J., Stewart, J., Marshall, J., Blackmun, J., White, J., Powell, J., and Stevens, J. Dissenting: Rehnquist, J.]

LAW §935.5 > free speech -- advertisement of contraceptives -- > Headnote:

[LEdHN\[8A\]](#) [8A][LEdHN\[8B\]](#) [8B]

A state statute which prohibits any advertisement or display of contraceptives is an unconstitutional suppression of expression protected by the [First Amendment](#), and such total suppression of commercial speech cannot be justified on the ground that advertisements of contraceptive products would be offensive and embarrassing to those exposed to them and would legitimize sexual activity of young people; the prohibition of

advertising and display of contraceptives is invalid as to prescription as well as nonprescription contraceptives, at least when the advertising is by persons who are licensed to sell such products. (Rehnquist, J., dissented from this holding.)

## Syllabus

[Section 6811\(8\) of the New York Education Law](#) makes it a crime (1) for any person to sell or distribute any contraceptive of any kind to a minor under 16; (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons 16 or over; and (3) for anyone, including licensed pharmacists, to advertise or display contraceptives. In appellees' action against appellant state officials challenging the constitutionality of [§ 6811\(8\)](#), a three-judge District Court declared the statute unconstitutional in its entirety under the [First](#) and [Fourteenth Amendments](#) insofar as it applies to nonprescription contraceptives, and enjoined its enforcement as so applied. Held: The judgment is affirmed. Pp. 682-703; 707-708; 713-716.

[398 F.Supp. 321](#), affirmed.

MR. JUSTICE BRENNAN delivered the opinion of the Court with respect to Parts I, II, III, and V, finding that:

1. Appellee Population Planning Associates (PPA), a corporation that makes mail-order sales of [\*\*\*\*2] nonmedical contraceptive devices from its North Carolina offices and regularly advertises its products in New York periodicals and fills mail orders from New York residents without limiting availability of the products to persons of any particular age, has the requisite standing to maintain the action not only in its own right but also on behalf of its potential customers, [Craig v. Boren](#), 429 U.S. 190, and therefore there is no occasion to decide the standing of the other appellees. Pp. 682-684.

2. Regulations imposing a burden on a decision as fundamental as whether to bear or beget a child

may be justified only by compelling state interests, and must be narrowly drawn to express only those interests. Pp. 684-686.

3. The provision prohibiting distribution of nonmedical contraceptives to persons 16 or over except through licensed pharmacists clearly burdens the right of such individuals to use contraceptives if they so desire, and the provision serves no compelling state interests. It cannot be justified by an interest in protecting health insofar as it applies to nonhazardous contraceptives or in protecting potential life, nor can it be justified by a concern [\*\*\*\*3] that young people not sell contraceptives, or as being designed to serve as a quality control device or as facilitating enforcement of the other provisions of the statute. Pp. 686-691.

4. The prohibition of any advertisement or display of contraceptives that seeks to suppress completely any information about the availability and price of contraceptives cannot be justified on the ground that advertisements of contraceptive products would offend and embarrass those exposed to them and that permitting them would legitimize sexual activity of young people. These are classically not justifications validating suppression of expression protected by the [First Amendment](#), and here the advertisements in question merely state the availability of products that are not only entirely legal but constitutionally protected. Pp. 700-702.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, concluded in Part IV that the provision prohibiting distribution of contraceptives to persons under 16, as applied to nonprescription contraceptives, cannot be justified as a permissible regulation of minors' morality in furtherance of the State's policy against [\*\*\*\*4] promiscuous sexual intercourse among the young. Pp. 691-699.

(a) The right to privacy in connection with decisions affecting procreation extends to minors as well as to adults, and since a State may not impose a blanket prohibition, or even a blanket requirement

of parental consent, on the choice of a minor to terminate her pregnancy, Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is a fortiori foreclosed. Pp. 693-694.

(b) The argument that sexual activity may be deterred by increasing the hazards attendant on it has been rejected by the Court as a justification for restrictions on the freedom to choose whether to bear or beget a child. Eisenstadt v. Baird, 405 U.S. 438, 448; Roe v. Wade, 410 U.S. 113, 148. Moreover, there is substantial doubt whether limiting access to contraceptives will in fact substantially discourage early sexual behavior. When a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some state policy requires more than [\*\*\*\*5] the unsupported assertion (appellants here having conceded that there is no evidence that teenage extramarital sexual activity increases in proportion to the availability of contraceptives) that the burden is connected to such a policy. Pp. 694-696.

(c) That under another provision of the statute a minor under 16 may be supplied with a contraceptive by a physician does not save the challenged provision, especially where appellants asserted no medical necessity for imposing a limitation on the distribution of nonprescription contraceptives to minors. Pp. 697-699.

MR. JUSTICE WHITE concluded that the prohibition against distribution of contraceptives to persons under 16 cannot be justified primarily because the State has not demonstrated that such prohibition measurably contributes to the deterrent purposes that the State advances as justification. Pp. 702-703.

MR. JUSTICE POWELL concluded that the prohibition against distribution of contraceptives to persons under 16 is defective both because it infringes the privacy interests of married females between the ages of 14 and 16 and because it

prohibits parents from distributing contraceptives to their children, thus unjustifiably [\*\*\*\*6] interfering with parental interests in rearing children. Pp. 707-708.

MR. JUSTICE STEVENS concluded that the prohibition against distribution of contraceptives to persons under 16 denies such persons and their parents a choice which, if available, would reduce exposure to venereal disease or unwanted pregnancy, and that the prohibition cannot be justified as a means of discouraging sexual activity by minors. Pp. 713-716.

BRENNAN, J., announced the Court's judgment and delivered an opinion of the Court (Parts I, II, III, and V), in which STEWART, MARSHALL, BLACKMUN, and STEVENS, JJ., joined; in all but Part II of which WHITE, J., joined; and in Part I of which POWELL, J., joined; and an opinion (Part IV), in which STEWART, MARSHALL, and BLACKMUN, JJ., joined. WHITE, J., post, p. 702, POWELL, J., post, p. 703, and STEVENS, J., post, p. 712, filed opinions concurring in part and concurring in the judgment. BURGER, C.J., dissented. REHNQUIST, J., filed a dissenting opinion, post, p. 717.

**Counsel:** Arlene R. Silverman, Assistant Attorney General of New York, argued the cause for appellants. With her on the briefs were Louis J. Lefkowitz, Attorney General, and Samuel A. Hirshowitz, [\*\*\*\*7] First Assistant Attorney General.

Michael N. Pollet argued the cause for appellees. With him on the brief was Steven Delibert. \*

**Judges:** Burger, Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist, Stevens

**Opinion by:** BRENNAN

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\*Briefs of amici curiae urging affirmance were filed by Melvin L. Wulf, Judith M. Mears, and Rena Uviller for the American Civil Liberties Union; and by Harriet F. Pilpel and Eve W. Paul for the Planned Parenthood Federation of America et al.

## Opinion

[\*681] [\*\*\*682] [\*\*2014] MR. JUSTICE BRENNAN delivered the opinion of the Court (Parts I, II, III, and V), together with an opinion (Part IV), in which MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN joined.

Under [New York Educ. Law § 6811\(8\)](#) (McKinney 1972) it is a crime (1) for any person to sell or distribute any contraceptive of any kind to a minor under the age of 16 years; (2) for anyone other [\*\*\*\*8] than a licensed pharmacist to distribute contraceptives to persons 16 or over; and (3) for anyone, including licensed pharmacists, to advertise or display contraceptives.<sup>1</sup> A three-judge District Court for the Southern District of New York declared [§ 6811\(8\)](#) unconstitutional in its entirety under the [First](#) and [Fourteenth](#)

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<sup>1</sup> [Section 6811\(8\)](#) provides:

"It shall be a class A misdemeanor for:

. . . . .

"8. Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of contraception to a minor under the age of sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy, is hereby prohibited."

After some dispute in the District Court the parties apparently now agree that Education Law [§ 6807\(b\)](#) (McKinney 1972) constitutes an exception to the distribution prohibitions of [§ 6811\(8\)](#). [Section 6807\(b\)](#) provides:

"This article shall not be construed to affect or prevent:

. . . . .

"(b) Any physician... who is not the owner of a pharmacy, or registered store, or who is not in the employ of such owner, from supplying his patients with such drugs as the physician... deems proper in connection with his practice...."

The definition of "drugs" in Education Law § 6802(7) (McKinney 1972) apparently includes any contraceptive drug or device. See nn. 7, 13, and 23, and text, *infra*, at 697-699. See also [398 F. Supp. 321, 329-330](#), and n. 8.

[Amendments of the \[\\*682\] Federal Constitution](#) insofar as it applies to nonprescription contraceptives, and enjoined its enforcement as so applied. [398 F.Supp. 321 \(1975\)](#). We noted probable jurisdiction, [426 U.S. 918 \(1976\)](#). We affirm.

[\*\*\*\*9] I

[LEdHN\[1\]](#) [1]We must address a preliminary question of the standing of the various appellees to maintain the action. We conclude that appellee Population Planning Associates, Inc. (PPA) has the requisite standing and therefore have no occasion to decide the standing of the other appellees.<sup>2</sup>

[\*\*\*\*10] PPA [\*\*\*683] is a corporation primarily engaged in the mail-order retail sale of nomedical contraceptive devices from its offices in North Carolina. PPA regularly advertises its products in periodicals published or circulated in New York, accepts orders from New York residents, and fills orders by mailing contraceptives to New York purchasers. Neither the advertisements nor [\*\*2015] the order forms accompanying them limit availability of PPA's products to persons of any particular age.

Various New York officials have advised PPA that its activities violate New York law. A letter of December 1, 1971, notified PPA that a PPA advertisement in a New York college newspaper violated [§ 6811\(8\)](#), citing each of the three

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<sup>2</sup> In addition to PPA, the plaintiffs in the District Court, appellees here, are Population Services International, a nonprofit corporation disseminating birth control information and services; Rev. James B. Hagen, a minister and director of a venereal disease prevention program that distributes contraceptive devices; three physicians specializing in family planning, pediatrics, and obstetrics-gynecology; and an adult New York resident who alleges that the statute inhibits his access to contraceptive devices and information, and his freedom to distribute the same to his minor children. The District Court held that PPA and Hagen had standing, and therefore found it unnecessary to decide the standing of the other plaintiffs. *Id.*, at 327-330.

The appellants here, defendants in the District Court, are state officials responsible for the enforcement of the Education Law provisions.

challenged provisions, and requested "future compliance" with the [\*683] law. A second letter, dated February 23, 1973, notifying PPA that PPA's magazine advertisements of contraceptives violated the statute, referred particularly to the provisions prohibiting sales to minors and sales by nonpharmacists, and threatened: "In the event you fail to comply, the matter will be referred to our Attorney General for legal action." Finally, PPA was served with [\*\*\*\*11] a copy of a report of inspectors of the State Board of Pharmacy, dated September 4, 1974, which recorded that PPA advertised male contraceptives, and had been advised to cease selling contraceptives in violation of the state law.

That PPA has standing to challenge [§ 6811\(8\)](#), not only in its own right but also on behalf of its potential customers, is settled by [Craig v. Boren, 429 U.S. 190, 192-197 \(1976\)](#). Craig held that a vendor of 3.2% beer had standing to challenge in its own right and as advocate for the rights of third persons, the gender-based discrimination in a state statute that prohibited sale of the beer to men, but not to women, between the ages of 18 and 21. In this case, as did the statute in Craig, [§ 6811\(8\)](#) inflicts on the vendor PPA "injury in fact" that satisfies Art. III's case-or-controversy requirement, since "[t]he legal duties created by the statutory sections under challenge are addressed directly to vendors such as [PPA. It] is obliged either to heed the statutory [prohibition], thereby incurring a direct economic injury through the constriction of [its] market, or to disobey the statutory command and suffer" legal sanctions. [\*\*\*\*12] [429 U.S., at 194](#).<sup>3</sup> [\*\*\*684] Therefore, [\*684] PPA is among

the "vendors and those in like positions [who] have been uniformly permitted to resist efforts at restricting their operations by acting as advocates for the rights of third parties who seek access to their market or function." *Id.*, at 195. See also [Eisenstadt v. Baird, 405 U.S. 438, 443-446 \(1972\)](#); [Sullivan v. Little Hunting Park, 396 U.S. 229, 237 \(1969\)](#); [Barrows v. Jackson, 346 U.S. 249, 257-260 \(1953\)](#). As such, PPA "is entitled to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should [its] constitutional challenge fail." [Craig v. Boren, supra, at 195](#), quoting [Griswold v. Connecticut, 381 U.S. 479, 481 \(1965\)](#).<sup>4</sup>

## [\*\*\*\*13] II

[\*\*2016] [LEdHN\[2\]](#) [2][HN1](#) Although "[t]he Constitution does not explicitly mention any right of privacy," the Court has recognized that one aspect of the "liberty" protected by the [Due Process Clause of the Fourteenth Amendment](#) is "a right of personal privacy, or a guarantee of certain areas or zones of privacy." [Roe v. Wade, 410 U.S. 113, 152 \(1973\)](#). This right of personal privacy includes "the interest in independence in making certain kinds of important decisions." [Whalen v. Roe, 429 U.S. 589, 599-600 \(1977\)](#). While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among [\*685] the decisions that an individual may make without unjustified

<sup>3</sup> Appellants contend that PPA has not suffered "injury in fact" because it has not shown that prosecution under [§ 6811\(8\)](#) is imminent. [Steffel v. Thompson, 415 U.S. 452, 459-460 \(1974\)](#) is dispositive of this argument. PPA alleges that it has violated the challenged statute in the past, and continues to violate it in the regular course of its business; that it has been advised by the authorities responsible for enforcing the statute that it is in violation; and that on at least one occasion, it has been threatened with prosecution. The threat is not, as in [Poe v. Ullman, 367 U.S. 497, 508 \(1961\)](#) (plurality opinion), "chimerical." In that case, the

challenged state law had fallen into virtual desuetude through lack of prosecution over some 80 years, and plaintiffs alleged no explicit threat of prosecution. Here, PPA has been threatened with legal action, and prosecutions have been brought under the predecessor of [§ 6811\(8\)](#) as recently as 1965. See, e.g., [People v. Baird, 47 Misc. 2d 478, 262 N.Y.S. 2d 947 \(1965\)](#).

<sup>4</sup> Indeed, the case for the vendor's standing to assert the rights of potential purchasers of his product is even more compelling here than in Craig, because the rights involved fall within the sensitive area of personal privacy. In such a case potential purchasers "may be chilled from... assertion [of their own rights] by a desire to protect the very privacy [they seek to vindicate] from the publicity of a court suit." [Singleton v. Wulff, 428 U.S. 106, 117 \(1976\)](#).

government interference are personal decisions "relating to marriage, [Loving v. Virginia](#), 388 U.S. 1, 12 (1967); procreation, [Skinner v. Oklahoma ex rel. Williamson](#), 316 U.S. 535, 541-542 (1942); contraception, [Eisenstadt v. Baird](#), 405 U.S., at 453-454; *id.*, at 460, 463-465 [\*\*\*\*14] (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 Sisters](#), 268 U.S. 510, 535 (1925); [Meyer v. Nebraska](#), [262 U.S. 390, 399 (1923)]." [Roe v. Wade](#), *supra*, at 152-153. See also [Cleveland Board of Education v. LaFleur](#), 414 U.S. 632, 639-640 (1974).

[LEdHN\[3\]](#) [3]The decision whether or not to beget or bear a child is at the very [\*\*\*685] heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy, a right first explicitly recognized in an opinion holding unconstitutional a statute prohibiting the use of contraceptives, [Griswold v. Connecticut](#), *supra*, and most prominently vindicated in recent years in the contexts of contraception, [Griswold v. Connecticut](#), *supra*; [Eisenstadt v. Baird](#), *supra*; and abortion, [Roe v. Wade](#), *supra*; [Doe v. Bolton](#), 410 U.S. 179 (1973); [Planned Parenthood of Central Missouri v. Danforth](#), 428 U.S. 52 (1976). [\*\*\*\*15] This is understandable, for in a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among the most private and sensitive. [HN2](#) "If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." [Eisenstadt v. Baird](#), *supra*, at 453. (Emphasis omitted.)

[LEdHN\[4\]](#) [4][HN3](#) That the constitutionally protected right of privacy extends to an individual's liberty to make choices regarding contraception does not, however, automatically invalidate every

state [\*686] regulation in this area. The business of manufacturing and selling contraceptives may be regulated in ways that do not infringe protected individual choices. And even a burdensome regulation may be [\*\*\*\*16] validated by a sufficiently compelling state interest. In *Roe v. Wade*, for example, after determining that the "right of privacy... encompass[es] a woman's decision whether or not to terminate her pregnancy," 410 U.S., at 153, we cautioned that the right is not absolute, and that certain state interests (in that case, "interests in safeguarding health, in maintaining medical standards, and in protecting potential life") may at some point "become sufficiently compelling to sustain regulation of the factors that govern the abortion decision." *Id.*, at 154. "Compelling" is of course the key word; where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests. [\*\*2017] *Id.*, at 155-156, and cases there cited.

With these principles in mind, we turn to the question whether the District Court was correct in holding invalid the provisions of [§ 6811\(8\)](#) as applied to the distribution of nonprescription contraceptives.

### III

[LEdHN\[5A\]](#) [5A] [\*\*\*\*17] We consider first the wider restriction on access to contraceptives created by [§ 6811\(8\)](#)'s prohibition of the distribution of nonmedical contraceptives to adults except through licensed pharmacists.

Appellants argue that this Court has not accorded a "right of access to contraceptives" the status of a fundamental aspect of personal liberty. They emphasize that *Griswold v. Connecticut* struck down a [\*\*\*686] state prohibition of the use of contraceptives, and so had no occasion to discuss laws "regulating their manufacture or sale." 381 U.S., at 485. *Eisenstadt v. Baird*, was decided under

the [Equal Protection Clause](#), holding that "whatever the rights of the individual to access to contraceptives [**\*687**] may be, the rights must be the same for the unmarried and the married alike." [405 U.S., at 453](#). Thus appellants argue that neither case should be treated as reflecting upon the State's power to limit or prohibit distribution of contraceptives to any persons, married or unmarried. But see [id., at 463-464](#) (WHITE, J., concurring in result).

The fatal fallacy in this argument is that it overlooks the underlying premise of those decisions [**\*\*\*\*18**] that the Constitution protects "the right of the individual... to be free from unwarranted governmental intrusion into... the decision whether to bear or beget a child." [Id., at 453](#). Griswold did state that by "forbidding the use of contraceptives rather than regulating their manufacture or sale," the Connecticut statute there had "a maximum destructive impact" on privacy rights. [381 U.S., at 485](#). This intrusion into "the sacred precincts of marital bedrooms" made that statute particularly "repulsive." [Id., at 485-486](#). But subsequent decisions have made clear that the constitutional protection of individual autonomy in matters of childbearing is not dependent on that element. *Eisenstadt v. Baird*, holding that the protection is not limited to married couples, characterized the protected right as the "decision whether to bear or beget a child." [405 U.S., at 453](#) (emphasis added). Similarly, *Roe v. Wade*, held that the Constitution protects "a woman's decision whether or not to terminate her pregnancy." [410 U.S., at 153](#) (emphasis added). See also [Whalen v. Roe, supra, at 599-600](#), and n. 26. These decisions [**\*\*\*\*19**] put *Griswold* in proper perspective. *Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that [HN4](#) the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.

Restrictions on the distribution of contraceptives

clearly burden the freedom to make such decisions. A total prohibition against sale of contraceptives, for example, would intrude [**\*688**] upon individual decisions in matters of procreation and contraception as harshly as a direct ban on their use. Indeed, in practice, a prohibition against all sales, since more easily and less offensively enforced, might have an even more devastating effect upon the freedom to choose contraception. Cf. [Poe v. Ullman, 367 U.S. 497 \(1961\)](#).

[LEdHN\[6\]](#) [6]An instructive analogy is found in decisions after [Roe v. Wade, supra](#), that held unconstitutional statutes that did not prohibit [**\*\*\*\*20**] abortions outright but limited in a variety of ways a woman's access to them. [Doe v. Bolton, 410 U.S. 179 \(1973\)](#); [Planned Parenthood of Central Missouri v. Danforth, \[\\*\\*\\*687\] 428 U.S. 52 \(1976\)](#). See also [Bigelow v. Virginia, 421 U.S. 809 \[\\*\\*2018\] \(1975\)](#). The significance of these cases is that they establish that the same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely. Both types of regulation "may be justified only by a 'compelling state interest'... and... must be narrowly drawn to express only the legitimate state interests at stake." [Roe v. Wade, supra, at 155](#).

<sup>5</sup> See also [Eisenstadt v. Baird, 405 U.S., at 463](#) (WHITE, J., concurring in result). This is so not because there is an independent fundamental "right of access to contraceptives," but because such access is essential to exercise [**\*\*\*\*21**] of the

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<sup>5</sup> Contrary to the suggestion advanced in MR. JUSTICE POWELL's opinion, we do not hold that state regulation must meet this standard "whenever it implicates sexual freedom," post, at 705, or "affect[s] adult sexual relations," post, at 703, but only when it "burden[s] an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision." *Supra*, this page. As we observe below, "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults," n. 17, *infra*, and we do not purport to answer that question now.

constitutionally protected right of decision in matters of childbearing that is the [\*689] underlying foundation of the holdings in *Griswold*, *Eisenstadt v. Baird*, and *Roe v. Wade*.

[LEdHN\[5B\]](#) [5B]Limiting the distribution [\*\*\*\*22] of nonprescription contraceptives to licensed pharmacists clearly imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so. [Eisenstadt v. Baird, supra, at 461-464](#) (WHITE, J., concurring in result). The burden is, of course, not as great as that under a total ban on distribution. Nevertheless, the restriction of distribution channels to a small fraction of the total number of possible retail outlets renders contraceptive devices considerably less accessible to the public, reduces the opportunity for privacy of selection and purchase,<sup>6</sup> and lessens the possibility of price competition.<sup>7</sup> Cf. [Griswold v. Connecticut, 381 U.S., at 503](#) (WHITE, J., concurring in judgment). Of particular relevance here is [Doe v. Bolton, supra](#), in which the Court struck down, as unconstitutionally burdening the right of a woman to choose abortion, a statute requiring that abortions be performed only in accredited hospitals, in the absence of proof that the requirement was substantially related to the State's interest [\*\*\*688] in protecting the patient's health. [410 U.S., at 193-195](#). The same [\*\*\*\*23] infirmity infuses the limitation in [§ 6811\(8\)](#). "Just as in

*Griswold*, where the right of married persons to use contraceptives was 'diluted or adversely affected' by permitting a [\*690] conviction for giving advice as to its exercise,... so here, to sanction a medical restriction upon distribution of a contraceptive not proved hazardous to health would impair the exercise of the constitutional right." [Eisenstadt v. Baird, 405 U.S., at 464](#) (WHITE, J., concurring in result).

[\*\*\*\*24] There remains the inquiry whether the provision serves a compelling state interest. Clearly "interests... in maintaining medical standards, and in protecting potential [\*\*2019] life," [Roe v. Wade, 410 U.S., at 154](#), cannot be invoked to justify this statute. Insofar as [§ 6811\(8\)](#) applies to nonhazardous contraceptives,<sup>8</sup> it bears no relation to the State's interest in protecting health. [Eisenstadt v. Baird, supra, at 450-452](#); 463-464 (WHITE, J., concurring in result).<sup>9</sup> Nor is the interest in protecting potential life implicated in state regulation of contraceptives. [Roe v. Wade, supra, at 163-164](#).

[\*\*\*\*25] Appellants therefore suggest that [§ 6811\(8\)](#) furthers other state interests. But none of them is comparable to those the Court has heretofore recognized as compelling. Appellants argue that the limitation of retail sales of nonmedical contraceptives to pharmacists (1) expresses "a proper concern that young people not sell contraceptives"; (2) "allows purchasers to inquire as to the relative qualities of the varying products and prevents anyone from tampering with them"; and (3) facilitates enforcement of the other

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<sup>6</sup> As MR. JUSTICE POWELL notes, post, at 711, the prohibition of mailorder sales of contraceptives, as practiced by PPA, is a particularly "significant invasion of the constitutionally protected privacy in decisions concerning sexual relations."

<sup>7</sup> The narrow exception to [§ 6811\(8\)](#) arguably provided by [New York Educ. Law § 6807\(b\)](#) (McKinney, Supp. 1976-1977), see n. 1, supra, which permits a physician "who is not the owner of a pharmacy, or registered store" to supply his patients with "such drugs as [he]... deems proper in connection with his practice" obviously does not significantly expand the number of regularly available, easily accessible retail outlets for nonprescription contraceptives, and so has little relevance to our analysis of this aspect of [§ 6811\(8\)](#).

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<sup>8</sup> We have taken judicial notice that "not all contraceptives are potentially dangerous." [Eisenstadt v. Baird, 405 U.S., 438, 451](#), and n. 9 (1972). See also [id., at 463-464](#) (WHITE, J., concurring in result).

<sup>9</sup> Indeed, in light of other provisions of both federal and state law that comprehensively regulate hazardous drugs and devices, see, e.g., [21 U.S.C. §§ 351-360](#), especially § 353(b); N. Y. Educ. Law §§ 6800-6826 (McKinney 1972 and Supp. 1976-1977), especially § 6810, it is unclear what health-related interest the State could have in nonprescription contraceptives. [Eisenstadt v. Baird, supra, at 452](#).

provisions of the statute. Brief for Appellants 14. The first hardly can justify the statute's incursion into constitutionally protected rights, and [\*691] in any event the statute is obviously not substantially related to any goal of preventing young people from selling contraceptives.<sup>10</sup> Nor is the statute designed to serve as a quality control device. Nothing in the record suggests that pharmacists are particularly qualified to give advice on the merits of different nonmedical contraceptives, or that such advice is more necessary to the purchaser of contraceptive products than to consumers of other nonprescription items. Why pharmacists are better able or [\*\*\*\*26] more inclined than other [\*\*\*689] retailers to prevent tampering with prepackaged products, or, if they are, why contraceptives are singled out for this special protection, is also unexplained.<sup>11</sup> As to ease of enforcement, the prospect of additional administrative inconvenience has not been thought to justify invasion of fundamental constitutional rights. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

[\*\*\*\*27] IV<sup>12</sup>

A

LEdHN[7A] [7A]The District Court also held unconstitutional, as applied to nonprescription

contraceptives, the provision of [§ 6811\(8\)](#) prohibiting the distribution of contraceptives to those under [\*692] 16 years of age.<sup>13</sup> Appellants contend that this provision of the statute is [\*\*2020] constitutionally permissible as a regulation of the morality of minors, in furtherance of the State's policy against promiscuous sexual intercourse among the young.

The question of the extent of state power [\*\*\*\*28] to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible of precise answer. We have been reluctant to attempt to define "the totality of the relationship of the juvenile and the state." *In re Gault*, 387 U.S. 1, 13 (1967). Certain principles, however, have been recognized. [HN5](#) "Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S., at 74. "[W]hatever may be their precise impact, neither the *Fourteenth Amendment* nor the *Bill of Rights* is for adults alone." *In re Gault*, *supra*, at 13.<sup>14</sup> On the other hand, we [\*\*\*690] have held in a variety of contexts that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." *Prince v. Massachusetts*, 321 U.S., at 158, 170 (1944). See *Ginsberg v. New York*, 390 U.S. 629 (1968). See also *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

<sup>10</sup> Nothing in New York law limits the employment of minors who work as sales clerks in pharmacies. To the extent that minors employed in other retail stores selling contraceptive products might be exposed "to undesirable comments and gestures," Brief for Appellants 3-4, or otherwise corrupted by exposure to such products, minors working as sales clerks in pharmacies are exposed to the same hazards.

<sup>11</sup> As the District Court pointed out, while these interests are insufficient to justify limiting the distribution of nonhazardous contraceptives to pharmacists, other restrictions may well be reasonably related to the objective of quality control. We therefore express no opinion on, for example, restrictions on the distribution of contraceptives through vending machines, which are not before us in this case. See [398 F. Supp., at 336](#).

<sup>12</sup> This part of the opinion expresses the views of JUSTICES BRENNAN, STEWART, MARSHALL, and BLACKMUN.

<sup>13</sup> Subject to an apparent exception for distribution by physicians in the course of their practice. See n. 1, *supra*, and *infra*, at 697-699, and n. 23.

<sup>14</sup> Thus [HN6](#) minors are entitled to constitutional protection for freedom of speech, *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624 (1943); equal protection against racial discrimination, *Brown v. Board of Education*, 347 U.S. 483 (1954); due process in civil contexts, *Goss v. Lopez*, 419 U.S. 565 (1975); and a variety of rights of defendants in criminal proceedings, including the requirement of proof beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970), the prohibition of double jeopardy, *Breed v. Jones*, 421 U.S. 519 (1975), the rights to notice, counsel, confrontation, and cross-examination, and not to incriminate oneself, *In re Gault*, 387 U.S. 1 (1967), and the protection against coerced confessions, *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Haley v. Ohio*, 332 U.S. 596 (1948).

[\*\*\*\*29] [\*693] Of particular significance to the decision of this case, [HN7](#) the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults. [Planned Parenthood of Central Missouri v. Danforth, supra](#), held that a State "may not impose a blanket provision... requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy." [428 U.S., at 74](#). As in the case of the spousal-consent requirement struck down in the same case, [id., at 67-72](#), "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto," [id., at 74](#), "which the state itself is absolutely and totally prohibited from exercising." [Id., at 69](#). [HN8](#) State restrictions inhibiting privacy rights of minors are valid only if they serve "any significant state interest... that is not present in the [\*\*\*\*30] case of an adult." [Id., at 75](#).<sup>15</sup> [Planned Parenthood](#) found that no such interest justified a state requirement of parental consent.<sup>16</sup>

[\*\*\*\*31] [\*694] [\*\*2021] Since the State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the

constitutionality of a blanket prohibition of the distribution of contraceptives to minors is a fortiori foreclosed. The State's interests in protection of the mental and physical health of the pregnant minor, and in protection of potential life are clearly more implicated by the abortion decision than by the decision to use a nonhazardous contraceptive.

Appellants argue, however, that significant state interests are served by restricting minors' access to contraceptives, because free availability to minors of contraceptives would lead to increased sexual activity among the young, in violation of the policy of New York to discourage [\*\*\*691] such behavior.<sup>17</sup> The argument is that minors' sexual activity may be deterred by increasing the hazards attendant on it. The same argument, however, would support a ban on abortions for minors, or indeed support a prohibition on abortions, or access to contraceptives, for the unmarried, whose sexual activity is also against the public policy of many [\*\*\*\*32] States. Yet, in each of these areas, the Court has rejected the argument, noting in *Roe v. Wade*, that "no court or commentator has taken the argument seriously." [410 U.S., at 148](#). [\*695] The reason for this unanimous rejection was stated in *Eisenstadt v. Baird*: "It would be plainly unreasonable to assume that [the State] has prescribed pregnancy and the birth of an unwanted child [or the physical and psychological dangers of an abortion] as punishment for fornication." [405 U.S., at 448](#). We remain reluctant to attribute any

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<sup>15</sup>This test is apparently less rigorous than the "compelling state interest" test applied to restrictions on the privacy rights of adults. See, e.g., n. 16, *infra*. Such lesser scrutiny is appropriate both because of the States' greater latitude to regulate the conduct of children, [Prince v. Massachusetts, 321 U.S. 158 \(1944\)](#); [Ginsberg v. New York, 390 U.S. 629 \(1968\)](#), and because the right of privacy implicated here is "the interest in independence in making certain kinds of important decisions," [Whalen v. Roe, 429 U.S. 589, 599-600 \(1977\)](#), and the law has generally regarded minors as having a lesser capability for making important decisions. See, e.g., [Planned Parenthood, 428 U.S., at 102](#) (STEVENS, J., concurring in part and dissenting in part).

<sup>16</sup>*Planned Parenthood*, however, "does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy. See [Bellotti v. Baird, \[428 U.S. 132 \(1976\)\]](#). The fault of [the particular statute considered in *Planned Parenthood*] is that it imposes a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy... without a sufficient justification for the restriction." [Id., at 75](#).

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<sup>17</sup>Appellees argue that the State's policy to discourage sexual activity of minors is itself unconstitutional, for the reason that the right to privacy comprehends a right of minors as well as adults to engage in private consensual sexual behavior. We observe that the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating such behavior among adults. See generally Note, On Privacy: Constitutional Protection for Personal Liberty, 48 N.Y.U.L. Rev. 670, 719-738 (1973). But whatever the answer to that question, [Ginsberg v. New York, supra](#), indicates that in the area of sexual mores, as in other areas, the scope of permissible state regulation is broader as to minors than as to adults. In any event, it is unnecessary to pass upon this contention of appellees, and our decision proceeds on the assumption that the Constitution does not bar state regulation of the sexual behavior of minors.

such "scheme of values" to the State. <sup>18</sup>

[\*\*\*\*33] Moreover, there is substantial reason for doubt whether limiting access to contraceptives will in fact substantially discourage early sexual behavior. Appellants themselves conceded in the District Court that "there is no evidence that teenage extramarital sexual activity increases in proportion to the availability of contraceptives," [398 F. Supp., at 332](#), [\*\*2022] and n. 10, and accordingly offered none, in the District Court or here. Appellees, on the other hand, cite a considerable body of evidence and opinion indicating that there is no such deterrent effect. <sup>19</sup> Although [\*\*\*692] we take judicial notice, as did the [\*696] District Court, [id., at 331-333](#), that with or without access to contraceptives, the incidence

of sexual activity among minors is high, <sup>20</sup> and the consequences of such activity are frequently devastating, <sup>21</sup> the studies cited by appellees play no part in our decision. It is enough that we again confirm the principle that when a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than [\*\*\*\*34] a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy. <sup>22</sup>

[\*\*\*\*35] [\*697] B

Appellants argue that New York does not totally prohibit distribution of contraceptives to minors under 16, and that accordingly [§ 6811\(8\)](#) cannot be held unconstitutional. Although [§ 6811\(8\)](#) on its face is a flat unqualified prohibition, Educ. Law [§ 6807\(b\)](#) (McKinney, Supp. 1976-1977), see nn. 1,

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<sup>18</sup> We note, moreover, that other provisions of New York law argue strongly against any conclusion that the deterrence of illegal sexual conduct among minors was an objective of [§ 6811\(8\)](#). First, a girl in New York may marry as young as 14, with the consent of her parents and a family court judge. [N.Y. Dom. Rel. Law §§ 15-a, 15\(2\), 15\(3\)](#) (McKinney 1964 and Supp. 1976-1977). Yet although sexual intercourse by a married woman of that age violates no state law, [§ 6811\(8\)](#) prohibits distribution of contraceptives to her. Second, New York requires that birth control information and services be provided to recipients of certain welfare programs, provided only that they are "of childbearing age, including children who can be considered sexually active." [N.Y. Soc. Serv. Law § 350\(1\)\(e\)](#) (McKinney 1976); cf. [42 U.S.C. § 602\(a\)\(15\)\(A\) \(1970 ed., Supp. V\)](#). See also [N.Y. Soc. Serv. Law § 365-a\(3\)\(c\)](#) (McKinney 1976); cf. [42 U.S.C. § 1396d\(a\)\(vii\)\(4\)\(C\) \(1970 ed., Supp. V\)](#). Although extramarital intercourse is presumably as contrary to state policy among minors covered by those programs as among others, state law requires distribution of contraceptives to them and prohibits their distribution to all others.

<sup>19</sup> See, e.g., Settlege, Baroff & Cooper, Sexual Experience of Younger Teenage Girls Seeking Contraceptive Assistance for the First Time, *Family Planning Perspectives*, P. 223, Fall 1973; Pilpel & Wechsler, Birth Control, Teenagers and the Law: A New Look 1971, *Family Planning Perspectives*, P. 37, July 1971; Stein, Furnishing Information and Medical Treatment to Minors for Prevention, Termination and Treatment of Pregnancy, *Clearinghouse Review*, P. 131, 132, July 1971; Reiss, Contraceptive Information and Sexual Morality, *Journal of Sex Research*, P. 51, Apr. 1966. See also Note, Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy, 88 *Harv. L. Rev.* 1001, 1010, and n. 67 (1975); Jordan, A Minor's Right to Contraceptives, 7 *U. Calif. Davis L. Rev.* 270, 272-273 (1974).

<sup>20</sup> See, e.g., [id., at 271-273](#); Kanter & Zelnick, Sexual Experience of Young Unmarried Women in the United States, *Family Planning Perspectives* 9 (Oct. 1972).

<sup>21</sup> Although this is not the occasion for a full examination of these problems, the following data sketchily indicate their extent. According to New York City Department of Health statistics, filed with the Court by the American Civil Liberties Union as amicus curiae, in New York City alone there were over 6,000 live births to girls under the age of 17 in 1975, as well as nearly 11,000 abortions. Moreover, "[t]eenage motherhood involves a host of problems, including adverse physical and psychological effects upon the minor and her baby, the continuous stigma associated with unwed motherhood, the need to drop out of school with the accompanying impairment of educational opportunities, and other dislocations [including] forced marriage of immature couples and the often acute anxieties involved in deciding whether to secure an abortion." Note, Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy, 88 *Harv. L. Rev.* 1001, 1010 (1975) (footnotes omitted). See also Jordan, *supra*, n. 19, at 273-275.

<sup>22</sup> Appellants argue that the statement in [Ginsberg v. New York, 390 U.S., at 641](#), that "it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors," is authority that the burden is appellees' to prove that there is no connection between the statute and the asserted state policy. But Ginsberg concerned a statute prohibiting dissemination of obscene material that it held was not constitutionally protected. In contrast [§ 6811\(8\)](#) concerns distribution of material access to which is essential to exercise of a fundamental right.

7, and 13, *supra*, provides that nothing in Education Law §§ 6800-6826 shall be construed to prevent "[a]ny physician... from supplying his patients with such drugs as [he]... deems proper in connection with his practice." This narrow exception, however, does not save the statute. As we have held above as to limitations upon distribution to adults, less than total restrictions on access to contraceptives that significantly burden the right to decide whether to bear children must also pass constitutional scrutiny. Appellants assert no medical necessity for imposing a medical limitation on the distribution **[\*\*\*693]** of nonprescription contraceptives to minors. Rather, they argue that such a restriction serves to emphasize to young people the seriousness with which the State views the decision to engage in sexual intercourse **[\*\*2023]** at an early age. <sup>23</sup>

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<sup>23</sup> There is considerable doubt that appellants accurately identify the legislative purposes in enacting Educ. Law §§ 6807(b) and 6811(8). *Section 6811(8)* (formerly Educ. Law § 6804-b and before that Penal Law § 1142(2)) was first enacted in 1965 as a modification, apparently in response to *Griswold v. Connecticut*, 381 U.S. 479 (1965), of former Penal Law § 1142, titled "Indecent articles." 1965 N.Y. Laws, c. 637. This statute, which dated back at least to § 318 of the Penal Code of 1881, 1881 N.Y. Laws, c. 676, had made it a misdemeanor for any person to distribute or advertise "any instrument or article, or any drug or medicine, for the prevention of conception." *Section 6807(b)*, on the other hand, generally excepts the distribution of drugs by a physician in the course of his practice from all the licensing requirements and restrictions imposed on the practice of pharmacy by Education Law §§ 6800-6826 (subject to certain provisos not here relevant). Such a provision, in one form or another and bearing several different numbers, has been included in the article concerning the practice of pharmacy since that article was first incorporated in the Education Law in 1927, see former Education Law § 1361, 1927 N.Y. Laws, c. 85, and before that a similar provision was included in the statutes regulating pharmacy in the Public Health Law. See, e.g., Public Health Law of 1893, § 187, 1893 N.Y. Laws, c. 661. Thus, § 6807(b) and its predecessors long predate the inclusion of § 6811(8) in the Education Law.

Even more significantly, when § 6811(8) was first enacted as Penal Law § 1142(2), it was not subject to the physicians' exception of § 6807(b). Rather, it was apparently subject to a different physicians' exception, former Penal Law § 1145 ( § 321 of the Penal Code of 1881), which provided:

"An article or instrument, used or applied by physicians lawfully practicing, or by their direction or prescription, for the cure or prevention of disease, is not an article of indecent or immoral nature or use, within this chapter. The supplying of such articles to such

But **[\*\*\*\*36]** this is only another form of the **[\*698]** argument that juvenile sexual conduct will be deterred by making contraceptives more difficult to obtain. Moreover, that argument is particularly poorly suited to the restriction **[\*699]** appellants are attempting to justify, which on appellants' construction delegates the State's authority to disapprove of minors' sexual behavior to physicians, who may exercise it arbitrarily, <sup>24</sup> either

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physicians or by their direction or prescription, is not an offense under this chapter."

This was interpreted by the New York Court of Appeals to permit a physician "in good faith" to use contraceptives to treat "a married person to cure or prevent disease," but not to permit "promiscuous advice to patients irrespective of their condition." *People v. Sanger*, 222 N.Y. 192, 194-195, 118 N.E. 637, 637-638 (1918), appeal dismissed for lack of jurisdiction, 251 U.S. 537 (1919) (per curiam). See also *People v. Byrne*, 99 Misc. 1, 163 N.Y.S. 682 (1917); *People v. Baird*, 47 Misc. 2d 478, 262 N.Y.S.2d 947 (1965).

In light of this history, it appears that insofar as the legislature had § 6807(b) in mind at all when it transferred the prohibition of distribution of contraceptives to those under 16 from the Penal Law to the Education Law, it thought of that section as at most a narrow exception, analogous to § 1145, permitting physicians, "in connection with [their] practice," to treat or prevent disease, rather than, as appellants assert, intending that §§ 6807(b) and 6811(8) be read together as establishing a scheme under which contraceptives would be freely available to those under 16, but limiting the distribution function to physicians. The legislative history of attempts in 1972 and 1974 to modify § 6811(8), to which appellants refer, supports this construction. The legislators debating those bills seem to have thought of § 6811(8) as a flat prohibition of the distribution of contraceptives to minors, and made no reference to § 6807(b).

<sup>24</sup> In *Doe v. Bolton*, 410 U.S. 179, 196 (1973), we doubted that physicians would allow their moral "predilections on extramarital sex" to interfere with their medical judgments concerning abortions. Here, however, no medical judgment is involved at all; the State purports to commission physicians to engage in moral counseling that can reflect little other than their private views on the morality of premarital sex among the young. It seems evidence that many physicians are likely to have views on this subject to a significant degree more permissive or more restrictive than those of the State, the minor, or the minor's parents. Moreover, nothing in § 6807(b) suggests that the role of the physician is limited to such "counseling." The statute does nothing more than to permit the physician to provide his patients with such drugs or devices as he "deems proper." Such "absolute, and possibly arbitrary" discretion over the privacy rights of minors is precisely what Planned Parenthood condemned. 428 U.S., at 74.

to deny contraceptives to [\*\*\*694] young people, or to undermine the State's policy of discouraging illicit early sexual behavior. This the State may not [\*\*2024] do. Cf. [Planned Parenthood of Central Missouri v. Danforth](#), 428 U.S., at 69, 74.<sup>25</sup>

[\*\*\*\*37] [\*700] V

[LEdHN\[8A\]](#) [8A]The District Court's holding that the prohibition of any "advertisement or display" of contraceptives is unconstitutional was clearly correct. Only last [Term](#) [Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council](#), 425 U.S. 748 (1976), held that [HN9](#) a State may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity," even when that information could be categorized as "commercial speech." [Id.](#), at 773. Just as in that case, the statute challenged here seeks to suppress completely any information about the availability and price of contraceptives.<sup>26</sup> Nor does the case present any question left open in [Virginia Pharmacy Bd.](#); here, as there, there can be no contention that the regulation is "a mere time, place, and manner restriction," [id.](#), at 771, or that it prohibits only misleading or deceptive advertisements, [ibid.](#), or "that the transactions proposed in the forbidden advertisements are

themselves [\*\*\*\*38] illegal in any way. Cf. [Pittsburgh Press Co. v. Human Relations Comm'n](#), [413 U.S. 376 (1973)]." [Id.](#), at 772-773. Moreover, in addition to the "substantial individual and societal interests" in the free flow of commercial information enumerated in [Virginia Pharmacy Bd.](#), [supra](#), at 763-766, the [\*701] information suppressed by this statute "related to activity with which, at least in some respects, [\*\*\*695] the State could not interfere." 425 U.S., at 760. Cf. [Bigelow v. Virginia](#), 421 U.S. 809 (1975).

Appellants contend that advertisements of contraceptive [\*\*\*\*39] products would be offensive and embarrassing to those exposed to them, and that permitting them would legitimize sexual activity of young people. But these are classically not justifications validating the suppression of expression protected by the [First Amendment](#). At least where obscenity is not involved, we have consistently held that [HN10](#) the fact that protected speech may be offensive to some does not justify its suppression. See, e.g., [Cohen v. California](#), 403 U.S. 15 (1971).<sup>27</sup> As for the possible "legitimation" of illicit sexual behavior, whatever might be the case if the advertisements directly incited illicit sexual activity among the young, none of the advertisements in this record can even remotely be characterized as "directed to inciting or producing imminent lawless action and... likely to incite or produce such action." [Brandenburg v. Ohio](#), 395 U.S. 444, 447 (1969). They merely state the availability of products and services that are not only entirely legal, cf. [Pittsburgh Press Co. v. Human Relations Comm'n](#), [\*\*2025] 413 U.S. 376 (1973), but constitutionally protected. Cf. [Bigelow v. Virginia](#), [supra](#).<sup>28</sup>

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<sup>25</sup>In cases involving abortions, we have emphasized that the decision to terminate a pregnancy is properly made by a woman in consultation with her physician. See, e.g., [Roe v. Wade](#), 410 U.S. 113, 153, 164 (1973); [Planned Parenthood of Central Missouri v. Danforth](#), 428 U.S., at 75. No such suggestion, however, has been made concerning the right to obtain or use contraceptives. See [Griswold v. Connecticut](#), [supra](#); [Eisenstadt v. Baird](#), 405 U.S. 438 (1972). The reason, of course, is that the abortion decision necessarily involves a medical judgment, [Roe v. Wade](#), [supra](#), at 164, while the decision to use a nonhazardous contraceptive does not. [Eisenstadt v. Baird](#), [supra](#), at 463-464 (WHITE, J., concurring in result). See also n. 24, [supra](#).

<sup>26</sup> [LEdHN\[8B\]](#) [8B]

The prohibition of advertising and display of contraceptives is invalid as to prescription as well as nonprescription contraceptives, at least when the advertising is by persons who are licensed to sell such products. [Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council](#), 425 U.S. 748 (1976).

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<sup>27</sup>Indeed, as the Court recognized in [Virginia Pharmacy Bd.](#), much advertising is "tasteless and excessive," and no doubt offends many. 425 U.S., at 765.

<sup>28</sup>Appellants suggest no distinction between commercial and noncommercial speech that would render these discredited arguments meritorious when offered to justify prohibitions on commercial speech. On the contrary, such arguments are clearly directed not at any commercial aspect of the prohibited advertising

These [\*\*\*\*40] arguments [\*702] therefore do not justify the total suppression of advertising concerning contraceptives.<sup>29</sup>

Affirmed.

THE CHIEF JUSTICE dissents.

**Concur by:** WHITE; POWELL; STEVENS

## **Concur**

MR. JUSTICE [\*\*\*\*41] WHITE, concurring in part and concurring in the result.

I join Parts I, III, and V of the Court's opinion and concur in the result with respect to Part IV. \*

Although I saw no reason in [Eisenstadt v. Baird](#), 405 U.S. 438 (1972), to reach "the novel constitutional question whether a State may restrict or forbid the distribution of contraceptives to the unmarried," *id.*, at 465 (concurring in result), four of the seven Justices participating in that case held that in this respect the rights of unmarried persons were equal to those of the married. [\*\*\*696] Given Eisenstadt and given the decision of the Court in the abortion case, [Roe v. Wade](#), 410 U.S. 113 (1973), the result reached by the Court in Part III of its opinion appears warranted. I do not regard the opinion, however, as declaring unconstitutional any state law forbidding extramarital sexual [\*\*\*\*42] relations. On this assumption I join Part III.

[LEdHN\[7B\]](#) [7B]I concur in the result in Part IV primarily because the State has not demonstrated that the prohibition against distribution of

contraceptives to minors measurably contributes to the deterrent purposes which the State advances as justification for the restriction. Again, however, the legality of state laws forbidding premarital intercourse is not at issue here; and, with MR. JUSTICE STEVENS, "I would describe as [\*703] 'frivolous' appellees' argument that a minor has the constitutional right to put contraceptives to their intended use, notwithstanding the combined objection of both parents and the State," post, at 713.

In joining Part V of the Court's opinion, I should also say that I agree with the views of MR. JUSTICE STEVENS expressed in Part II of his separate opinion.

MR. JUSTICE POWELL, concurring in part and concurring in the judgment.

I agree that Population Planning Associates has standing to maintain this action, and therefore join Part I of the Court's opinion. Although I concur in the judgment of the Court, I am not persuaded [\*\*\*\*43] that the Constitution requires the severe constraints that the Court's opinion places upon legislative efforts to regulate the distribution of contraceptives, particularly to the young.

I

The Court apparently would subject all state regulation affecting adult sexual relations to the strictest standard of judicial review. Under today's decision, such regulation "may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." Ante, at 686. Even regulation restricting only the sexual activity of the young must now be justified by a "significant state interest," a standard that is "apparently [\*\*2026] less rigorous" than the standard the Court would otherwise apply. Ante, at 693 n. 15. In my view, the extraordinary protection the Court would give to all personal decisions in matters of sex is neither required by the Constitution nor supported by our prior decisions.

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but at the ideas conveyed and form of expression - the core of [First Amendment](#) values. Cf. *Linmark Associates, Inc. v. Willingboro*, ante, at 96-97.

<sup>29</sup> We do not have before us, and therefore express no views on, state regulation of the time, place, or manner of such commercial advertising based on these or other state interests.

\* There is no need for present purposes to agree or disagree with the Court's summary of the law expressed in Part II.

A

The cases on which the Court relies for its "compelling interest" standard do not support the sweeping principle it adopts today. Those cases generally involved direct and substantial [\*704] interference with constitutionally protected rights. In [\*\*\*\*44] Griswold v. Connecticut, 381 U.S. 479 (1965), the Court invalidated a state statute prohibiting the use of contraceptives and making it illegal for physicians to give advice to married persons regarding contraception. The statute was viewed as one "operat[ing] directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation," p1391\*697 id., at 482, and "seek[ing] to achieve its goals by means having a maximum destructive impact upon that relationship," id., at 485. In Roe v. Wade, 410 U.S. 113 (1973), the Court reviewed a Texas statute imposing severe criminal sanctions on physicians and other medical personnel who performed nontherapeutic abortions, thus effectively foreclosing the availability and safety of this desired service. And just last Term, in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), we invalidated Missouri's requirement of spousal consent as a state-imposed "absolute obstacle to a woman's decision that Roe held to be constitutionally protected from such interference." Id., at 71 n. 11.

The Court relies on [\*\*\*\*45] Planned Parenthood, supra, and Doe v. Bolton, 410 U.S. 179 (1973), for the proposition that "the same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely." Ante, at 688. But neither of those cases refers to the "compelling state interest" test. In Bolton, the Court invalidated procedural requirements of the Georgia abortion statute that were found not "reasonably related" to the asserted legislative purposes or to the "patient's needs." 410 U.S., at 194, 199. Planned Parenthood involved - in

addition to the "absolute obstacle" referred to above - the Missouri requirement of prior written consent by the pregnant woman. Despite the fact that Missouri normally did not require written consent for other surgical procedures, the Court [\*705] sustained this regulation without requiring any demonstration of compelling state interests. The Court recognized that the decision to abort "is an important, and often a stressful one, [\*\*\*\*46] " and the State thus constitutionally could assure that the woman was aware of the significance of the decision. 428 U.S., at 67.

In sum, the Court quite unnecessarily extends the reach of cases like Griswold and Roe. Neither our precedents nor sound principles of constitutional analysis require state legislation to meet the exacting "compelling state interest" standard whenever it implicates sexual freedom. In my view, those cases make clear that that standard has been invoked only when the state regulation entirely frustrates or heavily burdens the exercise of constitutional rights in this area. See Bellotti v. Baird, 428 U.S. 132, 147 (1976). This is not to say that other state regulation is free from judicial review. But a test so severe that legislation rarely can meet it should be imposed by courts with deliberate restraint in view of the respect that properly should be accorded legislative judgments.

B

There is also no justification for subjecting restrictions on the sexual activity of the [\*\*2027] young to heightened judicial review. Under our prior cases, the States have broad latitude to legislate with respect to adolescents. [\*\*\*\*47] [\*\*\*\*698] The principle is well settled that "a State may permissibly determine that, at least in some precisely delineated areas, a child... is not possessed of that full capacity for individual choice" which is essential to the exercise of various constitutionally protected interests. Ginsberg v. New York, 390 U.S. 629, 649-650 (1968) (STEWART, J., concurring in result). This principle is the premise of our prior decisions,

ostensibly reaffirmed by the plurality, ante, at 692, holding that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." [\*Prince v. Massachusetts\*, 321 U.S. 158, 170 \(1944\)](#). [\*706] Restraints on the freedom of minors may be justified "even though comparable restraints on adults would be constitutionally impermissible." [\*Planned Parenthood of Central Missouri v. Danforth\*, supra, at 102](#) (STEVENS, J., concurring in part and dissenting in part). <sup>1</sup>

[\*\*\*\*48] New York has exercised its responsibility over minors in areas falling within the "cluster of constitutionally protected choices" relating to sex and marriage. Ante, at 685. It has set an age limitation below which persons cannot marry without parental consent, [\*N. Y. Dom. Rel. Law §§ 15, 15-a\*](#) (McKinney 1964 and Supp. 1976-1977), and has established by statute the age at which a minor is legally recognized as having the capacity to consent to sexual activity, Penal Law § 130.05 (3)(a) (McKinney 1975). See also Penal Law §§ 130.25, 130.30, 130.35 (McKinney 1975). These provisions highlight the State's concern that its juvenile citizens generally lack the maturity and understanding necessary to make decisions concerning marriage and sexual relationships.

Until today, I would not have thought it was even arguably necessary to review state regulation of this sort under a standard that for all practical purposes approaches the "compelling state interest" standard. At issue in [\*Ginsberg v. New York\*, supra](#), for example, was the question of the constitutionality on its face of a New York criminal obscenity statute which prohibited the sale to minors of

material defined [\*\*\*\*49] to be obscene on the basis of its appeal to them whether or not it would be obscene to adults. The Court recognized that "the State has [\*707] an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'" [390 U.S., at 640-641](#), quoting [\*Prince v. Massachusetts\*, supra, at 165](#). Consequently, the "only question remaining" in that case was "whether the New York Legislature might rationally conclude, as it has, [\*\*\*699] that exposure to the materials proscribed by [the statute] constitutes such an 'abuse.'" [390 U.S., at 641](#). Similarly, the relevant question in any case where state laws impinge on the freedom of action of young people in sexual matters is whether the restriction rationally serves valid state interests.

II

With these considerations in mind, I turn to the specific provisions of the New York statute limiting the distribution of contraceptives.

A

[LEdHN\[7C\]](#) [7C] New York has made it a crime for anyone other than a physician [\*\*\*\*50] to sell or distribute [\*\*2028] contraceptives to minors under the age of 16 years. Educ. Law [§ 6811 \(8\)](#) (McKinney 1972). This element of New York's program of regulation for the protection of its minor citizens is said to evidence the State's judgment that the health and well-being of minors would be better assured if they are not encouraged to engage in sexual intercourse without guidance. Although I have no doubt that properly framed legislation serving this purpose would meet constitutional standards, the New York provision is defective in two respects. First, it infringes the privacy interests of married females between the ages of 14 and 16, see ante, at 695 n. 18, in that it prohibits the distribution of contraceptives to such females except by a physician. In authorizing marriage at that age, the State also sanctions sexual intercourse between the partners and expressly

<sup>1</sup>MR. JUSTICE STEVENS recently provided the following examples, deeply rooted in our traditions and law:

"Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman is already pregnant." [428 U.S., at 102](#).

recognizes that once the marriage relationship exists the husband and [\*708] wife are presumed to possess the requisite understanding and maturity to make decisions concerning sex and procreation. Consequently, the state interest that justifies a requirement of prior counseling with respect to [\*\*\*\*51] minors in general simply is inapplicable with respect to minors for whom the State has affirmatively approved marriage.

Second, this provision prohibits parents from distributing contraceptives to their children, a restriction that unjustifiably interferes with parental interests in rearing their children. Cf. [Ginsberg/ v. New York, 390 U.S., at 639](#) and n. 7. "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'" Ibid., quoting [Prince v. Massachusetts, supra, at 166](#). See [Wisconsin v. Yoder, 406 U.S. 205, 231-233 \(1972\)](#); [Pierce v. Society of Sisters, 268 U.S. 510, 534-535 \(1925\)](#); [Meyer v. Nebraska, 262 U.S. 390, 399-401 \(1923\)](#). Moreover, this statute would allow the State "to enquire into, prove, and punish," [Poe v. Ullman, 367 U.S. 497, 548 \(1961\)](#) [\*\*\*\*52] (Harlan, J., dissenting), the exercise of this parental responsibility. The [\*\*\*700] State points to no interest of sufficient magnitude to justify this direct interference with the parental guidance that is especially appropriate in this sensitive area of child development.<sup>2</sup>

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<sup>2</sup> The particular provision at issue makes it a crime for "[a]ny person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of contraception to a minor under the age of sixteen years...." Educ. Law [§ 6811 \(8\)](#) (McKinney 1972). For the reasons stated in the text, this provision unjustifiably infringes the constitutionally protected interests of parents and married female minors, and it is invalid in those two respects. Although the prohibition on distribution might be sustained as to other individuals if the restrictions on parental distribution and

[\*\*\*\*53] [\*709] But in my view there is considerably more room for state regulation in this area than would be permissible under the plurality's opinion. It seems clear to me, for example, that the State would further a constitutionally permissible end if it encouraged adolescents to seek the advice and guidance of their parents before deciding whether to engage in sexual intercourse. [Planned Parenthood, 428 U.S., at 91](#) (STEWART, J., concurring). The State justifiably may take note of the psychological pressures that might influence children at a time in their lives when they generally do not possess the maturity necessary to understand [\*\*2029] and control their responses. Participation in sexual intercourse at an early age may have both physical and psychological consequences. These include the risks of venereal disease and pregnancy, and the less obvious mental and emotional problems that may result from sexual activity by children. Moreover, society has long adhered to the view that sexual intercourse should not be engaged in promiscuously, a judgment that an adolescent may be less likely to heed than an adult.

Requiring minors to seek parental guidance would [\*\*\*\*54] be consistent with our prior cases. In *Planned Parenthood*, we considered whether there was "any significant state interest in conditioning [a minor's] abortion [decision] on the consent of a parent or person in loco parentis that is not present in the case of an adult." [428 U.S., at 75](#). Observing that the minor necessarily would be consulting with a physician on all aspects of the abortion decision, we concluded that the Missouri requirement was invalid because it imposed [\*710] "a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination

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distribution to married female minors could be treated as severable, the result "would be to create a program quite different from the one the legislature actually adopted." [Sloan v. Lemon, 413 U.S. 825, 834 \(1973\)](#). I therefore agree with the Court that the entire provision must be invalidated. See [Dorchy v. Kansas, 264 U.S. 286, 291 \(1924\)](#); [Dollar Co. v. Canadian C. & F. Co., 220 N. Y. 270, 279, 115 N.E. 711, 713 \(1917\)](#).

of her pregnancy and [did] so without a sufficient justification for the restriction." Ibid. But we explicitly suggested that a materially different constitutional issue would be presented with respect to a statute assuring in most instances consultation between the parent and child. Ibid., citing *Bellotti v. Baird*, 428 U.S. 132 (1976). See *Planned Parenthood, supra*, at 90-91 (STEWART, J., concurring).

[\*\*701] A requirement of prior parental consultation is merely one illustration of permissible regulation in this [\*\*\*\*55] area. As long as parental distribution is permitted, a State should have substantial latitude in regulating the distribution of contraceptives to minors. <sup>3</sup>

B

New York also makes it a crime for anyone other than a licensed pharmacist to sell or distribute contraceptives to adults and to minors aged 16 or over. The only serious justification offered by the State for this prohibition is that it is necessary to facilitate enforcement of the limitation on distribution to children under 16 years of age. Since the Court invalidates that limitation today, the pharmacy restriction lacks any rational justification. I therefore agree with the Court that § 6811(8)'s limitation on the distribution of nonprescription contraceptives cannot be sustained.

But even if New York were to enact constitutionally permissible [\*\*\*\*56] limitations on access for children, I doubt that it could justify the present pharmacy restriction as an enforcement measure. Restricting the kinds of retail outlets that may distribute [\*711] contraceptives may well be justified, <sup>4</sup> but the present statute even prohibits

<sup>3</sup>As long as access is available through parents, I perceive no constitutional obstacle to state regulation that authorizes other designated adults - such as physicians - to provide relevant counseling.

<sup>4</sup>Absent some evidence that a restriction of outlets to registered pharmacists heavily burdens the constitutional interests of adults, there would be no basis for applying the standard of review

distribution by mail to adults. In this respect, the statute works a significant invasion of the constitutionally protected privacy in decisions concerning sexual relations. By requiring individuals to buy contraceptives [\*\*2030] over the counter, the statute heavily burdens constitutionally protected freedom. <sup>5</sup>

[\*\*\*\*57] III

I also agree with the Court that New York cannot lawfully prohibit all "advertisement or display" of contraceptives. But it seems to me that the Court's opinion may be read too broadly. It flatly dismisses, as justifications "classically" irrelevant, the State's contentions that the indiscriminate advertisement of contraceptive products in some settings could be unduly offensive and could be viewed by the young as legitimization of sexual promiscuity. I agree that these justifications [\*712] cannot support a complete ban on advertising, [\*\*\*702] but I see no reason to cast any doubt on the authority of the State to impose carefully tailored restrictions designed to serve legitimate governmental concerns as to the effect of commercial advertising on the young. <sup>6</sup>

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articulated in *Griswold* and *Roe*. See *Part I, supra*. Indeed, in the absence of such evidence there would be no reason to set aside a legislative judgment that enforcement of constitutionally permissible limitations on access for minors, see Part II-A, *supra*, warrants a reasonable limitation on the means for marketing contraceptives. Without some limitations on the number and type of retail outlets it would be difficult - if not impossible - to effectuate the state interest in assuring that minors are counseled before purchasing contraceptive devices. As pharmacists are licensed professionals, the State may be justified in relying on them to act responsibly in observing regulations applicable to minors.

<sup>5</sup>It is not a satisfactory answer that an individual may preserve anonymity as one of a number of customers in a retail outlet. However impersonal the marketplace may be, it does not approach the privacy of the home. There may be some risk that mail distribution will occasionally permit circumvention of permissible restrictions with respect to children, but this does not justify the concomitant burden on the constitutional rights of adults.

<sup>6</sup>The State argues that unregulated commercial advertisement of contraceptive products would be viewed by the young as "legitimation" of - if not an open invitation to - sexual promiscuity. The Court simply finds on the basis of the advertisements in the record before us that this interest does not justify total suppression of

[\*\*\*58] MR. JUSTICE STEVENS, concurring in part and concurring in the judgment.

For the reasons stated in Parts I, II, and III of the opinion of the Court, which I join, I agree that Population Planning Associates, Inc., has standing to challenge the New York statute and that the grant to licensed pharmacists of a monopoly in the distribution of nonmedical contraceptives is unconstitutional. I also agree with the conclusion that New York's prohibition against the distribution of contraceptives to persons under 16 years of age is unconstitutional, and with the Court's conclusion that the total suppression of advertising or display of contraceptives is invalid, but my reasons differ from those set forth in Part IV of MR. JUSTICE BRENNAN's [\*713] opinion and I wish to add emphasis to the limitation on the Court's holding in Part V.

I

[LEdHN\[7D\]](#) [7D]There are two reasons why I do not join Part IV. First, the holding in [Planned Parenthood of Missouri v. Danforth](#), 428 U.S. 52, 72-75, that a minor's decision to abort her pregnancy may not be conditioned on parental consent, is not dispositive here. The [\*\*\*59] options available to the already pregnant minor are fundamentally different from those available to nonpregnant minors. The former must bear a child unless she aborts; but persons in the latter category can and generally will avoid childbearing by abstention. Consequently, even if I had joined that

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advertising concerning contraceptives. The Court does leave open the question whether this or other state interests would justify regulation of the time, place, or manner of such commercial advertising. Ante, at 702 n. 29. In my view, such carefully tailored restrictions may be especially appropriate when advertising is accomplished by means of the electronic media. As Judge Leventhal recently observed in that context, "[T]here is a distinction between the all-out prohibition of a censor, and regulation of time and place of speaking out, which still leaves access to a substantial part of the mature audience. What is entitled to [First Amendment](#) protection is not necessarily entitled to [First Amendment](#) protection in all places. [Young v. American Mini Theatres, Inc.](#), 427 U.S. 50... (1976). Nor is it necessarily entitled to such protection at all times." [Pacifica Foundation v. FCC](#), 181 U.S. App. D.C. 132, 157, 556 F.2d 9, 34 (1977) (dissenting opinion).

part of Planned Parenthood, I could not agree that the Constitution provides the same measure of protection to the minor's right to use contraceptives as to the pregnant female's right to abort.

Second, I would not leave open the question whether there is a significant state [\*\*2031] interest in discouraging sexual activity among unmarried persons under 16 years of age. Indeed, I would describe as "frivolous" appellees' argument that a minor has the constitutional right to put contraceptives to their intended use, notwithstanding the combined objection of both parents and the State.

For the reasons explained by MR. [\*\*\*703] JUSTICE POWELL, I agree that the statute may not be applied to married females between the ages of 14 and 16, or to distribution by parents. I am not persuaded, however, that these glaring defects alone justify an injunction against other applications [\*\*\*60] of the statute. Only one of the three plaintiffs in this case is a parent who wishes to give contraceptives to his children. The others are an Episcopal minister who sponsors a program against venereal disease, and a mail-order firm, which presumably has no way to determine the age of its customers. I am satisfied, for the reasons that follow, that the statute is also invalid as applied to them.

[\*714] The State's important interest in the welfare of its young citizens justifies a number of protective measures. See [Planned Parenthood of Central Missouri v. Danforth](#), *supra*, at 102 (STEVENS, J., concurring in part and dissenting in part). Such special legislation is premised on the fact that young persons frequently make unwise choices with harmful consequences; the State may properly ameliorate those consequences by providing, for example, that a minor may not be required to honor his bargain. It is almost unprecedented, however, for a State to require that an ill-advised act by a minor give rise to greater risk of irreparable harm than a similar act by an

adult.<sup>1</sup>

**[\*\*\*\*61]** Common sense indicates that many young people will engage in sexual activity regardless of what the New York Legislature does; and further, that the incidence of venereal disease and premarital pregnancy is affected by the availability or unavailability of contraceptives. Although young persons theoretically may avoid those harms by practicing total abstention, inevitably many will not. The statutory prohibition denies them and their parents a choice which, if available, would reduce their exposure to disease or unwanted pregnancy.

**[\*715]** The State's asserted justification is a desire to inhibit sexual conduct by minors under 16. Appellants do not seriously contend that if contraceptives are available, significant numbers of minors who now abstain from sex will cease abstaining because they will no longer fear pregnancy or disease.<sup>2</sup> Rather appellants' central argument is that the statute has the important symbolic effect of **[\*\*\*704]** communicating

disapproval of sexual activity by minors.<sup>3</sup> In essence, therefore, the statute is defended as a form **[\*\*2032]** of propaganda, rather than a regulation of behavior.<sup>4</sup>

**[\*\*\*\*\*62]** Although the State may properly perform a teaching function, it seems to me that an attempt to persuade by inflicting harm on the listener is an unacceptable means of conveying a message that is otherwise legitimate. The propaganda technique used in this case significantly increases the risk of unwanted pregnancy and venereal disease. It is as though a State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets. One need not posit a constitutional right to ride a motorcycle to characterize such a restriction as irrational and perverse.

Even as a regulation of behavior, such a statute would be defective. Assuming that the State could impose a uniform **[\*716]** sanction upon young persons who risk self-inflicted harm by operating motorcycles, or by engaging in sexual activity, surely that sanction could not take the form of deliberately injuring the cyclist or infecting the promiscuous child. If such punishment may not be administered deliberately, after trial and a finding of guilt, it manifestly cannot be imposed by a legislature, indiscriminately and at random. This kind of government-mandated harm, is, in my judgment, appropriately **[\*\*\*\*\*63]** characterized as a deprivation of liberty without due process of law.

## II

In Part V of its opinion, the Court holds that New York's total ban on contraceptive advertising is

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<sup>1</sup>Only two other States have adopted similar legislation. Family Planning, Contraception and Voluntary Sterilization: An Analysis of Laws and Policies in the United States, Each State and Jurisdiction, A Report of the National Center for Family Planning Services 76 (1971) (DHEW Pub. No. (HSA) 74-16001). This publication contains a comprehensive survey of state laws in this area. The authors were aware of "no case in which either a doctor or a layman has been successfully prosecuted under any criminal statute for providing contraceptive information or services to a minor or has been held liable for damages for providing contraception to a minor without parental consent." *Id.*, at 70. This survey also indicated that "the clear trend is toward the removal of all such barriers to the sale and distribution of contraceptives." *Id.*, at 59. By 1971 there were 34 States with no law restricting or regulating distribution of contraceptives, *ibid.*, and 33 States with no restrictions on advertising or display. *Id.*, at 60.

<sup>2</sup>Appellants make this argument only once, in passing. See Brief for Appellants 20. In the District Court, appellants candidly admitted that "there is no evidence that teenage extramarital sexual activity increases in proportion to the availability of contraceptives...." See *398 F. Supp.* 321, 322. Indeed, appellants maintain that it is a "fact that youngsters will not use contraceptives even where available...." Reply Brief for Appellants 5.

<sup>3</sup>The fact that the State admittedly has never brought a prosecution under the statute, *id.*, at 2 is consistent with appellants' position that the purpose of the statute is merely symbolic.

<sup>4</sup>Appellants present no empirical evidence to support the conclusion that the State's "propaganda" is effective. Simply as a matter of common sense, it seems unlikely that many minors under 16 are influenced by the mere existence of a law indirectly disapproving of their conduct.

unconstitutional under [Bigelow v. Virginia](#), 421 U.S. 809, and [Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council](#), 425 U.S. 748. Specifically, the Court holds that all contraceptive advertising may not be suppressed because some advertising of that subject may be offensive and embarrassing to the reader or listener. I also agree with that holding.

The Court properly does not decide whether the State may impose any regulation on the content of contraceptive advertising in order to minimize its offensive character. I have joined Part V of the opinion on the understanding that it does not foreclose such regulation simply because an advertisement is within the zone protected by the [First Amendment](#).

The fact that a type of communication is entitled to some constitutional protection does not require the conclusion that it is totally immune from regulation. Cf. [Young v. American Mini Theatres, Inc.](#), 427 U.S. 50, 65-71 (opinion of STEVENS, J.). An editorial [\*\*\*\*64] and an advertisement in the same newspaper may contain misleading matter in equal measure. Although each is a form of protected expression, one may be censored while the other may not.

[\*\*\*705] In the area of commercial speech - as in the business of exhibiting motion pictures for profit - the offensive character of [\*717] the communication is a factor which may affect the time, place, or manner in which it may be expressed. Cf. [Young v. American Mini Theatres, Inc.](#), *supra*. The fact that the advertising of a particular subject matter is sometimes offensive does not deprive all such advertising of [First Amendment](#) protection; but it is equally clear to me that the existence of such protection does not deprive the State of all power to regulate such advertising in order to minimize its offensiveness. A picture which may appropriately be included in an instruction book may be excluded from a billboard.

I concur in the judgment and in Parts I, II, III, and

V of the Court's opinion.

**Dissent by:** REHNQUIST

## **Dissent**

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MR. JUSTICE REHNQUIST, dissenting.

Those who valiantly but vainly defended the heights of Bunker Hill in 1775 made it possible that men such as James [\*\*\*\*65] Madison might later sit in the first Congress and [\*\*2033] draft the [Bill of Rights to the Constitution](#). The post-Civil War Congresses which drafted the Civil War Amendments to the Constitution could not have accomplished their task without the blood of brave men on both sides which was shed at Shiloh, Gettysburg, and Cold Harbor. If those responsible for these Amendments, by feats of valor or efforts of draftsmanship, could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men's room of truck stops, notwithstanding the considered judgment of the New York Legislature to the contrary, it is not difficult to imagine their reaction. <sup>1</sup>

[\*\*\*\*66] [\*718] I do not believe that the cases discussed in the Court's opinion require any such result, but to debate the Court's treatment of the question on a case-by-case basis would concede more validity to the result reached by the Court than I am willing to do. <sup>2</sup> There comes a point

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<sup>1</sup> As well as striking down the New York prohibitions of commercial advertising and sales to persons under 16, the Court holds invalid the State's requirement that all sales be made by licensed pharmacists. Whatever New York's reasons for this particular restriction on distribution - and several can be imagined - I cannot believe that it could significantly impair the access to these products of a person with a settled and deliberate intention to procure them.

<sup>2</sup> I cannot, however, let pass without comment, the statement that "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." Ante,

when endless and illconsidered extension of principles originally formulated in quite different cases produces such an indefensible result that no logic chopping can possibly make the fallacy of the result more obvious. The Court here in effect [\*\*\*706] holds that the [First](#) and [Fourteenth Amendments](#) not only guarantee full and free debate before a legislative judgment as to the moral dangers to which minors within the jurisdiction of the State should not be subjected, but goes further and absolutely prevents the representatives of the majority from carrying out such a policy after the issues have been fully aired.

[\*\*\*\*67] No questions of religious belief, compelled allegiance to a secular creed, or decisions on the part of married couples as to procreation, are involved here. New York has simply decided that it wishes to discourage unmarried minors under 16 from having promiscuous sexual intercourse with one another. Even the Court would scarcely go so far as to say that this is not a subject with which the New York Legislature may properly concern itself.

That legislature has not chosen to deny to a pregnant woman, after the fait accompli of pregnancy, the one remedy [\*719] which would enable her to terminate an unwanted pregnancy. It has instead sought to deter the conduct which will produce such faits accomplis. The majority of New York's citizens are in effect told that however deeply they may be concerned about the problem of promiscuous sex and intercourse among unmarried teenagers, they may not adopt this means of dealing with it. The Court holds that New York may not use its police power to legislate in the interests of its concept of the public morality as it pertains to minors. The Court's denial of a power so fundamental to self-government must, in the long

run, prove to be [\*\*\*\*68] but a temporary departure from a wise and heretofore settled course of adjudication to the contrary. I would reverse the judgment of the District Court.

## References

Supreme Court's views as to validity of laws restricting or prohibiting sales or distribution to minors of particular types of goods or services otherwise available to adults

3 Am Jur 2d, Advertising 4, 6; 12 Am Jur 2d, Birth Control 1, 4; 62 Am Jur 2d, Privacy 2- 4, 16, 26

USCS, [Constitution, 1st](#) and [14th Amendments](#)

US L Ed Digest, Constitutional Law 528.5, 935.5

ALR Digests, Constitutional Law 445, 791

L Ed Index to Annos., Advertising; Due Process of Law; Freedom of Speech, Press, Religion, and Assembly; Privacy

ALR Quick Index, Advertising; Birth Control; Due Process of Law; Freedom of Speech and Press; Privacy

Federal Quick Index, Advertising; Birth Control; Due Process of Law; Freedom of Speech and Press; Privacy

### Annotation References:

Supreme Court's views as to validity of laws restricting or prohibiting sale or distribution to minors of particular types of goods or services otherwise available [\*\*\*\*69] to adults. [53 L Ed 2d 892](#).

Supreme Court's views as to concept of "liberty" under [due process clauses of Fifth](#) and [Fourteenth Amendments](#). 47 L Ed 2d 975.

Supreme Court's views as to the federal legal aspects of the right of privacy. 43 L Ed 2d 871.

Supreme Court's view as to what is a "case or controversy" within the meaning of Article III of the Federal Constitution or an "actual controversy"

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at 688 n. 5, 694 n. 17. While we have not ruled on every conceivable regulation affecting such conduct the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been "definitively" established. *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976). See [Hicks v. Miranda](#), 422 U.S. 332, 343-344 (1975).

within the meaning of the Declaratory Judgment Act ([28 USCS 2201](#)). *40 L Ed 2d 783*.

Applicability to advertisements of [First Amendment's](#) guaranty of free speech and press. *37 L Ed 2d 1124*.

Validity, under Federal Constitution ,of abortion laws. [35 L Ed 2d 735](#).

The Supreme Court and the right of free speech and press. [93 L Ed 1151](#), [2 L Ed 2d 1706](#), [11 L Ed 2d 1116](#), [16 L Ed 2d 1053](#), [21 L Ed 2d 976](#).

Binding effect upon state courts of opinion of United States Supreme Court supported by less than a majority of all its members. [65 ALR3d 504](#).

Validity of regulations as to contraceptives or the dissemination of birth control information. [96 ALR2d 955](#).

[\*\*\*\*70] Right of privacy. [138 ALR 22](#), [168 ALR 446](#), [14 ALR2d 750](#).

Interest necessary to maintenance of declaratory determination of validity of statute or ordinance. *174 ALR 549*.



Positive

As of: October 18, 2026 1:40 AM Z

## **Carpenter v. Superior Court**

Court of Appeal of California, Fourth Appellate District, Division One

July 28, 2023, Opinion Filed

D081640

### **Reporter**

93 Cal. App. 5th 1279 \*; 311 Cal. Rptr. 3d 669 \*\*; 2023 Cal. App. LEXIS 577 \*\*\*

KELSEY CARPENTER, Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent; THE PEOPLE, Real Party in Interest.

showed defendant failed to call for help after defendant saw the infant was bleeding and struggling to breathe.

**Subsequent History:** Review denied by [Carpenter v. Superior Court, 2023 Cal. LEXIS 5696 \(Cal., Oct. 11, 2023\)](#)

### **Outcome**

Writ petition denied.

### **Prior**

**History:** [\*\*\*1] ORIGINAL PROCEEDING in mandate challenging an order of the Superior Court of San Diego County, No. SCN422556, Michael D. Washington, Judge.

### **LexisNexis® Headnotes**

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**Disposition:** Petition denied.

Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > Appellate Review

### **Case Summary**

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#### **Overview**

**HOLDINGS:** [1]-Although defendant could not be prosecuted for having an unattended home birth or for any effects of defendant's alleged drug use or lack of prenatal care during pregnancy, [Health & Saf. Code, §§ 123462](#), 123467, subd. (a), and [Cal. Const., art. I, § 1.1](#), did not bar prosecuting defendant for post-birth acts or omissions that might have led to the death of defendant's newborn infant because the acts and omissions did not occur in utero, but occurred after the infant was born alive; [2]-There was sufficient cause to defeat a *Pen. Code*, § 995, motion, and bind over defendant on charges of implied malice murder under [Pen. Code, §§ 187, subd. \(a\)](#), 188, subd. (a)(2), and felony child endangerment under [Pen. Code, § 273a, subd. \(a\)](#), because the prosecution's evidence

**HN1** When an appellate court reviews a *Pen. Code*, § 995, motion, the appellate court disregards the ruling of the superior court and directly reviews the determination of the magistrate.

Evidence > Burdens of Proof > Preponderance of Evidence

Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > Evidence

**HN2** The magistrate's job at the preliminary hearing is to determine whether there is sufficient cause to believe the defendant is guilty of the charged offense. [Pen. Code, § 872](#). Sufficient cause in this context means reasonable and probable cause—in other words, facts that would lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of

the guilt of the accused. It is a level of proof below preponderance of the evidence.

Criminal Law & Procedure > Preliminary  
Proceedings > Preliminary Hearings > Procedural  
Matters

**HN3** When a defendant files a *Pen. Code*, § 995, motion, the court must set aside the information if the defendant has been committed without reasonable or probable cause. § 995, *subd. (a)(2)(B)*. To establish probable cause sufficient to withstand the motion, the People must make some showing as to the existence of each element of the charged offense. Evidence sufficient to justify a prosecution need not be sufficient to support a conviction. When it comes to the required showing for probable cause, the bar is exceedingly low.

Evidence > Weight & Sufficiency

Criminal Law & Procedure > Preliminary  
Proceedings > Preliminary Hearings > Appellate  
Review

**HN4** In reviewing a *Pen. Code*, § 995, motion, an appellate court conducts an independent review of the evidence, but will not substitute its judgment for that of the magistrate as to the credibility or weight of the evidence. Absent express findings, however, the appellate court cannot assume the magistrate has resolved factual disputes or passed upon the credibility of witnesses.

Governments > Legislation > Interpretation

Evidence > Weight & Sufficiency

Criminal Law & Procedure > Preliminary  
Proceedings > Preliminary Hearings > Appellate  
Review

**HN5** Where a magistrate made a legal conclusion rather than factual findings, an appellate court reviews the record independently to determine

whether the evidence presented at the preliminary hearing constituted sufficient cause to sustain the charges in the information. And where a challenge to the sufficiency of the evidence is based on the interpretation of a statute, the appellate court's interpretation of the statute is *de novo* as well. The appellate court will not set aside the information if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it.

Governments > Legislation > Interpretation

**HN6** A court's fundamental task in interpreting a statute is to ascertain the Legislature's intent so as to effectuate its purpose. In determining that intent, the court looks first to the words of the statute, which are the most reliable indications of the Legislature's intent. The court does not construe those words in a vacuum; it considers the provisions at issue in the context of the statutory framework as a whole. If the statutory language is unambiguous, then its plain meaning controls. If, however, the language supports more than one reasonable construction, then the court may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history.

Governments > Legislation > Interpretation

Criminal Law & Procedure > Defenses

**HN7** *Health & Saf. Code*, §§ 123462, 123467, *subd. (a)*, do not prohibit a prosecution for post-birth acts or omissions that may have led to an infant's death. Any such cause of perinatal death would necessarily not have occurred in utero and thus does not fall under the types of pregnancy outcomes shielded from prosecution by § 123467. § 123467, *subd. (a)*. [Section 123462](#) protects the right to have a home birth and make decisions regarding childbirth, but there is no indication from the statutory language that the Legislature intended to also immunize all otherwise criminal acts or

omissions occurring after a live birth.

Governments > Legislation > Interpretation

**HN8** Courts will not infer from a statute an evidentiary rule not expressly stated. A court may not rewrite a statute, either by inserting or omitting language, to make it conform to a presumed intent that is not expressed.

Governments > Legislation > Interpretation

**HN9** When one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning.

Governments > Legislation > Interpretation

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

**HN10** Based on the statutory language of [Health & Saf. Code, §§ 123462](#), 123467, subd. (a), and principles of statutory construction, the prosecution is not categorically precluded from using pre-birth conduct as evidence of intent.

Governments > Legislation > Interpretation

Criminal Law & Procedure > ... > Murder > Definitions > Malice

**HN11** Murder is the unlawful killing of a person with malice aforethought. [Pen. Code, § 187, subd. \(a\)](#). Malice aforethought can be either express or implied, with the latter defined as when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. [Pen. Code, § 188, subd. \(a\)\(2\)](#). The California Supreme Court has interpreted implied malice to have both a physical and a mental component. The physical component is satisfied by the performance of an act, the natural

consequences of which are dangerous to life. It is also satisfied by a failure to act where the defendant has a legal obligation to act.

Family Law > Parental Duties & Rights > Duties > Care & Control of Children

Criminal Law & Procedure > ... > Crimes Against Persons > Endangerment > Elements

**HN12** Parents have a common law duty to protect their children and may be held criminally liable for failing to do so.

Evidence > Types of Evidence > Circumstantial Evidence

Criminal Law & Procedure > ... > Murder > Definitions > Malice

**HN13** The mental component of implied malice is satisfied where the defendant knows that their conduct endangers the life of another and acts with a conscious disregard for life. The standard is subjective—the defendant must have actually appreciated the risk involved. Given that there is rarely direct evidence of subjective awareness, it often must be proved by circumstantial evidence.

Evidence > Burdens of Proof > Allocation

Criminal Law & Procedure > ... > Murder > Definitions > Malice

**HN14** To establish implied malice, the People must prove four elements: (1) the defendant intentionally committed the act in question or intentionally failed to act; (2) the natural and probable consequences of which were dangerous to human life; (3) at the time she acted or failed to act, she knew her act or failure to act was dangerous to human life; and (4) she deliberately acted or failed to act with conscious disregard for human life.

Civil Procedure > ... > Writs > Common Law  
Writs > Prohibition

Evidence > Inferences & Presumptions > Inferences

**HN15** In the procedural posture of a petition for a writ of prohibition challenging the denial of a motion to dismiss the information, the appellate court does not determine whether there is substantial evidence satisfying the elements of the charged offense; rather, the appellate court must determine whether, considering all the evidence and reasonable inferences at this stage of the proceedings, there is some rational ground for assuming the possibility that there is sufficient evidence in support of these elements.

Criminal Law &  
Procedure > ... > Murder > Definitions > Malice

**HN16** Even if a death is accidental or unintentional, it may still have been caused by an act or omission committed with implied malice. An act or a failure to act causes death if it is a substantial factor in causing the death. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.

Criminal Law & Procedure > Preliminary  
Proceedings > Preliminary Hearings > Evidence

**HN17** Even where physicians have competing views of the cause of death, and even if the defense theory is more plausible, the court may not find an absence of probable cause simply because it finds the defense witnesses slightly more persuasive than the prosecution witnesses.

Evidence > Inferences & Presumptions > Inferences

Criminal Law & Procedure > Preliminary  
Proceedings > Preliminary Hearings > Evidence

**HN18** At a probable cause hearing, every

legitimate inference that may be drawn from the evidence must be drawn in favor of the information.

Criminal Law & Procedure > Preliminary  
Proceedings > Preliminary Hearings > Appellate  
Review

**HN19** A reviewing court may not substitute its own personal belief as to the ultimate determination to be made at trial for that of a reasonable person evaluating the evidence. Unless the prosecution has presented evidence that is inherently implausible, its witnesses were conclusively impeached, or no reasonable person would find the witnesses credible, the court may not reject its evidence at the probable cause stage.

Criminal Law & Procedure > ... > Crimes Against  
Persons > Endangerment > Elements

**HN20** The felony child endangerment statute applies to a person who under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered. [Pen. Code, § 273a, subd. \(a\)](#).

Governments > Legislation > Vagueness

**HN21** Laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly because, among other reasons, vague laws may trap the innocent by not providing fair warning.

Constitutional Law > Substantive Due

Process > Privacy > Personal Decisions

[HN22](#) California law protects people from interference with their reproductive freedom, including the right to have a home birth and make other decisions about childbirth, but this does not mean the state also immunizes all post-birth acts and omissions related to those decisions that would otherwise be subject to criminal or civil penalty.

## Headnotes/Summary

### Summary

[\*1279] CALIFORNIA OFFICIAL REPORTS SUMMARY

The superior court denied defendant's motion to set aside for lack of probable cause (*Pen. Code*, § 995) an information charging defendant with implied malice murder (*Pen. Code*, §§ 187, *subd. (a)*, 188, *subd. (a)(2)*) and felony child endangerment (*Pen. Code*, § 273a, *subd. (a)*). (Superior Court of San Diego County, No. SCN422556, Michael D. Washington, Judge.)

The Court of Appeal denied writ relief. Although defendant could not be prosecuted for having an unattended home birth or for any effects of defendant's alleged drug use or lack of prenatal care during pregnancy (*Health & Saf. Code*, §§ 123462, 123467, *subd. (a)*; *Cal. Const.*, art. I, § 1.1), the court held there was no bar to prosecuting defendant for postbirth acts or omissions that might have led to the death of defendant's newborn infant because the acts and omissions did not occur in utero, but occurred after the infant was born alive. There was sufficient cause to defeat the *Penal Code* § 995 motion and bind over defendant on the charges because the prosecution's evidence showed defendant failed to call for help after defendant saw the infant was bleeding and struggling to breathe. (Opinion by Buchanan, J., with McConnell, P. J., and Huffman, J., concurring.)

### Headnotes

## CALIFORNIA OFFICIAL REPORTS HEADNOTES

### [CA\(1\)](#) (1)

#### **Indictment and Information § 36—Motion to Quash or Set Aside—Appellate Review.**

When an appellate court reviews a *Pen. Code*, § 995 motion, the appellate court disregards the ruling of the superior court and directly reviews the determination of the magistrate.

### [CA\(2\)](#) (2)

#### **Criminal Law § 150—Preliminary Proceedings—Discharge or Holding to Answer—Probable Cause.**

The magistrate's job at the preliminary hearing is to determine whether there is sufficient cause to believe the defendant is guilty of the charged offense (*Pen. Code*, § 872). Sufficient cause in this context means reasonable and probable cause—in other words, facts that would lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused. It is a level of proof below preponderance of the evidence.

### [CA\(3\)](#) (3)

#### **Indictment and Information § 35—Motion to Quash or Set Aside—Weight and Sufficiency of Evidence—Elements.**

When a defendant files a *Pen. Code*, § 995 motion, the court must set aside the information if the defendant has been committed without reasonable or probable cause (§ 995, *subd. (a)(2)(B)*). To establish probable cause sufficient to withstand the motion, the People must make some showing as to the existence of each element of the charged offense. Evidence sufficient to justify a prosecution need not be sufficient to support a conviction. When it comes to the required showing for

probable cause, the bar is exceedingly low.

#### [CA\(4\)](#) (4)

##### **Indictment and Information § 36—Motion to Quash or Set Aside—Appellate Review—Standards.**

In reviewing a *Pen. Code*, § 995 motion, an appellate court conducts an independent review of the evidence, but will not substitute its judgment for that of the magistrate as to the credibility or weight of the evidence. Absent express findings, however, the appellate court cannot assume the magistrate has resolved factual disputes or passed upon the credibility of witnesses.

#### [CA\(5\)](#) (5)

##### **Indictment and Information § 36—Motion to Quash or Set Aside—Appellate Review—Standards.**

Where a magistrate made a legal conclusion rather than factual findings, an appellate court reviews the record independently to determine whether the evidence presented at the preliminary hearing constituted sufficient cause to sustain the charges in the information. And where a challenge to the sufficiency of the evidence is based on the interpretation of a statute, the appellate court's interpretation of the statute is *de novo* as well. The appellate court will not set [\*1281] aside the information if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it.

#### [CA\(6\)](#) (6)

##### **Statutes § 29—Construction—Language—Legislative Intent—Context.**

A court's fundamental task in interpreting a statute is to ascertain the Legislature's intent so as to effectuate its purpose. In determining that intent,

the court looks first to the words of the statute, which are the most reliable indications of the Legislature's intent. The court does not construe those words in a vacuum; it considers the provisions at issue in the context of the statutory framework as a whole. If the statutory language is unambiguous, then its plain meaning controls. If, however, the language supports more than one reasonable construction, then the court may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history.

#### [CA\(7\)](#) (7)

##### **Criminal Law § 17—Defenses—Reproductive Privacy Act—Applicability—Acts or Omissions after Birth.**

[Health & Saf. Code, §§ 123462, 123467, subd. \(a\)](#), did not prohibit a prosecution for defendant's post-birth acts or omissions that might have led to the death of her newborn infant. Any such cause of perinatal death would necessarily not have occurred in utero and thus did not fall under the types of pregnancy outcomes shielded from prosecution by [§ 123467, subd. \(a\)](#). [Section 123462](#) protects the right to have a home birth and make decisions regarding childbirth, but there is no indication from the statutory language that the Legislature intended to also immunize all otherwise criminal acts or omissions occurring after a live birth.

[[Erwin et al., Cal. Criminal Defense Practice \(2023\) ch. 41, § 41.16](#); [Cal. Forms of Pleading and Practice \(2023\) ch. 4, Abortion and Birth Control Methods, § 4.13](#).]

#### [CA\(8\)](#) (8)

##### **Statutes § 20—Construction—Judicial Function.**

Courts will not infer from a statute an evidentiary rule not expressly stated. A court may not rewrite a statute, either by inserting or omitting language, to make it conform to a presumed intent that is not

expressed.

### CA(9) (9)

#### **Statutes § 39—Construction—Conformation of Parts.**

When one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning.

### CA(10) (10)

#### **Criminal Law § 8—Mental State—Intent—Evidence—Reproductive Privacy Act—Prebirth Conduct.**

Based on the statutory language of [Health & Saf. Code, §§ 123462, 123467, subd. \(a\)](#), and principles of [\*1282] statutory construction, the prosecution is not categorically precluded from using prebirth conduct as evidence of intent.

### CA(11) (11)

#### **Homicide § 10—Murder—Implied Malice—Physical Component.**

Murder is the unlawful killing of a person with malice aforethought ([Pen. Code, § 187, subd. \(a\)](#)). Malice aforethought can be either express or implied, with the latter defined as when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart ([Pen. Code, § 188, subd. \(a\)\(2\)](#)). The California Supreme Court has interpreted implied malice to have both a physical and a mental component. The physical component is satisfied by the performance of an act, the natural consequences of which are dangerous to life. It is also satisfied by a failure to act where the defendant has a legal obligation to act.

### CA(12) (12)

#### **Parent and Child § 8—Criminal Liability—Failure to Protect.**

Parents have a common law duty to protect their children and may be held criminally liable for failing to do so.

### CA(13) (13)

#### **Homicide § 10—Murder—Implied Malice—Mental Component.**

The mental component of implied malice is satisfied where the defendant knows that their conduct endangers the life of another and acts with a conscious disregard for life. The standard is subjective—the defendant must have actually appreciated the risk involved. Given that there is rarely direct evidence of subjective awareness, it often must be proved by circumstantial evidence.

### CA(14) (14)

#### **Homicide § 10—Murder—Implied Malice—Elements.**

To establish implied malice, the People must prove four elements: (1) the defendant intentionally committed the act in question or intentionally failed to act; (2) the natural and probable consequences of which were dangerous to human life; (3) at the time the defendant acted or failed to act, the defendant knew the act or failure to act was dangerous to human life; and (4) the defendant deliberately acted or failed to act with conscious disregard for human life.

### CA(15) (15)

#### **Indictment and Information § 36—Motion to Quash or Set Aside—Appellate Review—Sufficiency of Evidence.**

In the procedural posture of a petition for a writ of prohibition challenging the denial of a motion to dismiss the information, the appellate court does not determine whether there is substantial evidence satisfying the elements of the charged offense; rather, the appellate court must determine whether, considering all the evidence and reasonable inferences at this stage of the proceedings, there is some rational ground for assuming the possibility that there is sufficient evidence in support of these elements.

[\*1283] [CA\(16\)](#) (16)

**Homicide § 10—Murder—Implied Malice—Substantial Causative Factor.**

Even if a death is accidental or unintentional, it may still have been caused by an act or omission committed with implied malice. An act or a failure to act causes death if it is a substantial factor in causing the death. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.

[CA\(17\)](#) (17)

**Criminal Law § 153—Preliminary Proceedings—Discharge or Holding to Answer—Probable Cause—Homicide—Conflicting Evidence on Cause of Death.**

Even where physicians have competing views of the cause of death, and even if the defense theory is more plausible, the court may not find an absence of probable cause simply because it finds the defense witnesses slightly more persuasive than the prosecution witnesses.

[CA\(18\)](#) (18)

**Criminal Law § 150—Preliminary Proceedings—Discharge or Holding to Answer—Probable Cause to Hold—Inferences.**

At a probable cause hearing, every legitimate inference that may be drawn from the evidence must be drawn in favor of the information.

[CA\(19\)](#) (19)

**Indictment and Information § 35—Motion to Quash or Set Aside—Weight and Sufficiency of Evidence—Reasonable Person Standard.**

A reviewing court may not substitute its own personal belief as to the ultimate determination to be made at trial for that of a reasonable person evaluating the evidence. Unless the prosecution has presented evidence that is inherently implausible, its witnesses were conclusively impeached, or no reasonable person would find the witnesses credible, the court may not reject its evidence at the probable cause stage.

[CA\(20\)](#) (20)

**Infants § 16—Offenses Against Infants—Felony Child Endangerment.**

The felony child endangerment statute applies to a person who under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered ([Pen. Code, § 273a, subd. \(a\)](#)).

[CA\(21\)](#) (21)

**Constitutional Law § 113—Substantive Due Process—Statutory Vagueness.**

Laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that the person may act accordingly

because, among other reasons, vague laws may trap the innocent by not providing fair warning.

[\*1284] [CA\(22\)](#) (22)

**Criminal Law § 17—Defenses—Reproductive Privacy Act—Applicability—Acts or Omissions after Birth.**

California law protects people from interference with their reproductive freedom, including the right to have a home birth and make other decisions about childbirth, but this does not mean the state also immunizes all postbirth acts and omissions related to those decisions that would otherwise be subject to criminal or civil penalty.

**Counsel:** Brian J. White; Law Office of Amber Fayerberg and Amber Fayerberg for Petitioner.

No appearance for Respondent.

Summer Stephan, District Attorney, Linh Lam, Valerie Ryan and Jennifer Kaplan, Deputy District Attorneys, for Real Party in Interest.

**Judges:** Opinion by Buchanan, J., with McConnell, P. J., and Huffman, J., concurring.

**Opinion by:** Buchanan, J.

## **Opinion**

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**BUCHANAN, J.**—Effective January 1, 2023, the Legislature enacted a new law providing immunity from criminal or civil liability for a person's acts or omissions with respect to their pregnancy or pregnancy outcome, including “perinatal death due to causes that occurred in utero.” ([Health & Saf. Code, § 123467, subd. \(a\).](#))<sup>1</sup> As part of the same bill, the Legislature declared that an individual's fundamental right of privacy regarding personal

reproductive decisions includes “the right to make and effectuate decisions about all matters relating to pregnancy, including prenatal care [and] childbirth.” ([§ 123462.](#)) This case requires us to explore the dividing line between immune conduct relating to a person's pregnancy or reproductive decisions and nonimmune [\*\*\*2] postbirth conduct allegedly causing the death of an infant who was born alive.

The relevant facts are undeniably tragic. Kelsey Carpenter gave birth to a baby girl at home, alone, after deciding that she would not risk having her child removed from her custody as had happened with her two older children when they tested positive for drugs after being delivered at the hospital. She again used drugs during her pregnancy. After Carpenter's daughter was born, the baby struggled to breathe, and Carpenter attempted to provide her with CPR. Carpenter also cut the baby's umbilical cord but did not clamp it, and [\*1285] the umbilical stump continued to bleed. Carpenter bathed, diapered, clothed, and attempted to breastfeed the baby before seemingly passing out. When she woke up, her newborn daughter was dead.

Before the new immunity provision went into effect, the People charged Carpenter with implied malice murder and felony child endangerment, contending that Carpenter intentionally chose an unattended at-home delivery, despite being warned of the dangers, in an effort to evade child welfare services and at the risk of her daughter's life. According to the People, Carpenter's acts and omissions, including [\*\*\*3] her failure to seek medical assistance after [\*\*675] realizing her baby was in distress, caused the baby to bleed to death. The People presented evidence in support of the charges against Carpenter at a preliminary hearing, at the end of which the magistrate found the evidence sufficient to hold Carpenter to answer on the charges. Carpenter then moved to dismiss the information.

By petition for writ of mandate, Carpenter now

<sup>1</sup> Undesignated statutory references are to the Health and Safety Code.

challenges the superior court's order denying her motion to set aside the information for lack of probable cause under *Penal Code* section 995. She contends that she is immune from prosecution based on the new law, which went into effect after the preliminary hearing, but before the superior court ruled on her *section 995* motion. Carpenter argues that the People's prosecution of her is unlawful because it is based on her actions and omissions with respect to her pregnancy outcome and violates her right to choose to have an unattended home birth.

We agree that Carpenter cannot be prosecuted for her decision to have an unattended home birth or any effect that her alleged drug use or lack of prenatal care during pregnancy may have had on her baby. We conclude, however, that the law does not preclude the People's [\*\*\*4] prosecution of Carpenter for her acts and omissions after her daughter was born alive. Given the minimal showing the prosecution is required to make at a preliminary hearing, and after conducting an independent review of the record, we also conclude that there was sufficient cause—albeit by the thinnest of margins—to bind over Carpenter on the implied malice murder and felony child endangerment charges. We therefore deny the petition.

#### FACTUAL AND PROCEDURAL BACKGROUND

In November 2020, Carpenter went into labor at her apartment approximately two weeks before her due date. She gave birth at home to a baby girl named Kiera who died within hours. In March 2021, the People charged Carpenter with one count of murder (*Pen. Code*, § 187, *subd. (a)*) and one count of felony child endangerment resulting in death (*Pen. Code*, § 273a, [\*1286] *subd. (a)*). In September 2022, a preliminary hearing was held before a magistrate judge. The People presented evidence consisting of testimony from law enforcement officers, Carpenter's statements, text messages sent to and from Carpenter, and testimony from the medical examiner who performed Kiera's autopsy.

#### A. Events Leading Up to the Birth

##### 1. Carpenter's Conversations and Text Messages with Her Mother

Detective Ryan Malone, [\*\*\*5] who was one of the officers assigned to investigate Kiera's death, testified at the preliminary hearing that he interviewed Carpenter's mother, Shande, to get more information about Carpenter. Shande stated that her daughter suffered from anxiety, depression, and oppositional defiant disorder, occasionally drank alcohol, and used to be on methadone. She was aware that Carpenter was pregnant but had not spoken to her much in the two months leading up to Kiera's birth due to an argument they had. The last time Shande spoke on the phone to Carpenter, about a week before she gave birth, Carpenter mentioned to her mother that she was “red-flagged” by Child Welfare Services (CWS). Shande told Detective Malone that Carpenter had two other children who were removed from her custody by CWS after testing positive for drugs at the time of birth. Carpenter had visitations with her sons, but they were not under her direct care. One of Carpenter's sons was under Shande's care.

[\*\*676] Carpenter told Shande that when it came to her most recent pregnancy, she wanted to have her babies<sup>2</sup> at home with the help of a midwife. Shande told Detective Malone that Carpenter was excited to have the babies and wanted to [\*\*\*6] keep them.

During the hearing, Detective Malone read several text messages between Carpenter and Shande into the record. The pair exchanged texts the day before Carpenter went into labor, with Carpenter expressing frustration with her mother for not allowing her to see her son. Shande asked Carpenter when she was due and then said, “It's not safe to have twins at home, Kelsey, especially bc they will be born addicted to methadone which you're on for most of the pregnancy and whatever you're on now, not to mention alcohol, et cetera.

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<sup>2</sup> Carpenter mistakenly believed she was pregnant with twins.

WAY TOO DANGEROUS FOR THEM AND YOU.” Carpenter did not respond until the following day at 10:42 p.m. when she told her mother she was in labor. She also left her mother a voicemail around the same time, telling her she was in labor, but Shande was sleeping and did not respond.

**[\*1287]**

## 2. Carpenter's Other Text Messages

Before and during labor, Carpenter also sent a number of text messages to various other people discussing her labor and decision not to go to a hospital to give birth. These texts provide a general timeline of the events leading up to Kiera's birth.

The morning of November 14, 2020, Carpenter texted a contact listed in her phone as “Ryan CLINIC” that **[\*\*\*7]** she was having contractions, stating that they were “coming every few minutes so [I'm ]gonna chug this wine and take klonopins and push my children ... . I AM NOT LOSING MY KIDS AND THATS WHAT WILL HAPPEN IF I GO TO THE HOSPITAL. ...” At 3:45 p.m., she texted Ryan again, saying she was in active labor. Ryan asked whether Carpenter was in the hospital, and she responded: “Fuck no!!!!!! I'm DOING IT HERE IM NOT LOSING MY[FUCKING KIDS!!”

Carpenter seemed to blame Ryan for not helping her delay her early labor, texting him at 4:05 p.m.: “What don't u get!!!!!! Had u given me something THIS MORNING I WOULD HAVE LASTED THE DAY [¶] ... [¶] You think I don't know you had s[hi]t that could have subsided my labor and you DID NOTHING [¶] ... [¶] Bye im having my babies tonight probably in the middle of the night im 3 middle fingers ... .” Shortly after 6:00 p.m., she texted Ryan again: “Your bitch ass could have stopped it with fetalnyl [sic] I will hate you for the rest of my life got[it] ? Because I wasn't dilated yesterday and now by tomorrow afternoon ill have either dead or alive babies im NOT LOSI[NG] THEM.TO YOUR SALT SHIT AND WINE COCKTAIL [¶] ... [¶] And get the fuck

away **[\*\*\*8]** from.me!!!!!!!!!! If you tell ANYONE IM HAVING THEM AT HOME BY MYSELF YOU CAN JUMP OFF THE BRIDGE WITH JEFF FOR ALL I CARE!!!!”

At 6:22 p.m., Carpenter texted someone named Shawn M. that she had been in labor since 4:00 a.m. that morning and would not be going to the hospital. She said she was “hurting really badly” and told him not to tell anyone that she was giving birth at her apartment “where the kids were safe from the system.”

At 6:37 p.m., Carpenter texted her friend Eddie E.: “Im in labor. [¶] No hospitals are happening f[o]r me tonigh[t]. I had my bloody show i had my mucus membrane break and I have contractions less than 5 minutes apart[.] [¶] ... [¶] I need **[\*\*677]** some clean towels and sheets its a big one on the list[.]. [¶] For home births[.] [¶] Please do you have anything I am contacting a midwife I met but I need your help[.] [¶] Im scared !!!!!!!!!!!!!!! I have stuff in my system from yesterday, and I AM NOT LOSING MY KIDS.” Eddie responded: “I have no wheels right now or money[.] ... Let me see what I can do.”

**[\*1288]**

At 6:53 p.m., Carpenter texted another contact in her phone, Ken K., asking if his wife was a midwife and seeking help with the birth. She told Ken she had been **[\*\*\*9]** studying for months and asked him if he could provide clean towels and sheets. When Detective Malone later spoke with Ken, he confirmed that Carpenter had texted him asking if his wife could help her with her labor and delivery. Ken told Carpenter he could not assist her but that he would keep their conversation confidential, as she asked him not to tell anyone what she was doing.

At 7:33 p.m., Carpenter texted Eddie again: “You have no medical experience just forget it what I need fro[m] you is towels and sheets can your brother bring them over[?] [¶] I'm about to get in my bath and ride out some of these contractions and I need new sheets put on my bed for the

birthing itself to take them out clean them up and I have to prepare for cpr I have a ton to do[.] [¶] It will be another 10 hours but 5 of that is pushing and making sure they are ok[.] I can't get through a contraction without having to stop talking so they are severe enough to where my next stage is water breaking or someone has to d[o] it for [ ]me ... you don't trust any midwife or nurses u.k[n]ow??? [¶] I need the set up ready i have the health everything for their breathing my CPR cert all ready but its getting harder [\*\*\*10] to walk around I need help.” Eddie replied that he would ask his brother.

At 8:48 p.m., Ryan texted Carpenter again: “I would appreciate it if you would come back down to reality and realize that you can't have your kids at home safely you haven't even been to a prenatal care ... you don't even know when your kids are supposed to be born you need help dude ... .” At 10:42 p.m. Carpenter texted Ryan: “Im.in labor [i]n.my bathtub with twins and its the most excruciating pain in the entire world.” Ryan responded: “Dude is anyone there[?] [¶] I'm being dead serious you have to be careful with this I know you're fear [sic] but this is no joke what if something goes wrong?” Carpenter replied: “I NEED AN OPIA[TE]. THIS IS THE MOST PAIN IVE EVER EVER BEEN IN IN MY LIFE ... [¶] Please!!!!!! Otherwise i have to go the hospital their heart beats are ok but im contracting every 30 seconds [¶] ... [¶] My mom won't answer !!!!! And the hospital now [sic] I've drank Ive smoked cigarettes I've done whatever to try to stop this process [¶] ... make it easier PLEASE GET FENTANYL THEY WONT TEST FOR IT.”

At 11:14 p.m., Carpenter texted Ryan again: “Eddie's brother[ ] just walked out an[d [\*\*\*11] ]left ... [m]e in the bathtub my contrac[tions are every 15 secs[.] [¶] Im crying I fe[e] I need to push[.] [¶] I need somet[hing] for the pain[.] [¶] Omg im freaking.”

Ryan did not respond until 1:09 a.m., when he texted: “Dude I'm going to call an ambulance[.] [¶] Please help me help you I don't know what else

to [\*\*\*1289] do[.] [¶] I'm going to give it 10 minutes then I'm going to have to call. I don't know what else to do and you could get seriously hurt or the babies[.] [¶] Everything will get worked out I know you're scared and don't want to loose [sic] them but if you don't get to the hospital [it] could end really bad.”

[\*\*\*678]

### 3. Statements from Carpenter's Contacts

Eddie told Detective Malone that Carpenter planned to give birth at home to avoid the hospital because of her history with CWS with her previous children. Eddie encouraged her to go to the hospital multiple times.

Detective Malone also testified that he spoke with Eddie's brother, Iran A., who told the detective that he received texts from Carpenter at around 8:19 p.m. the night of November 14 asking him to bring rubber gloves and masks to her apartment, which he did. Iran had not met Carpenter in person at that point, but he [\*\*\*12] had previously agreed to give her a ride to the hospital when she went into labor. Iran arrived at Carpenter's apartment at around 10 p.m. At Carpenter's request, he checked her cervix, retrieved “a bottle of wine and some pills” for her, and drew her a bath. According to Iran, Carpenter then insisted that Iran leave her apartment because he did not seem comfortable with the situation. When Detective Malone asked Iran why he did not call 911, Iran stated that Carpenter “commanded him” not to.

### B. Events After the Birth

The parties agree that Carpenter gave birth to Kiera sometime after 11:14 p.m. on November 14 and before 6:29 a.m. on November 15.

#### 1. Carpenter's Texts

At 6:29 a.m. on November 15, Carpenter used her phone for the first time since the prior night, texting Ryan: “My daughter died.” [¶] “I woke up next to a dead baby[.] [¶] I've been giving her mouth to mouth its not working[.] [¶] Im going to kill.myself today. [¶] Bye.”

## 2. Carpenter's Statements to First Responders

Carpenter called 911 at 6:59 a.m. on November 15. She was crying and told the dispatcher that she had just given birth and the baby was not breathing. She said that she had tried to give the baby CPR but it was [\*\*\*13] not working. The dispatcher asked Carpenter whether she had planned on having a home birth, and she said “no.”

Paramedics arrived on the scene at 7:05 a.m. Paramedic Captain Rocky Rehberg was the first person to enter Carpenter's apartment after her call to [\*1290] 911. Detective Malone testified that Captain Rehberg said his “first thought was that the baby was dead—was blue around the lips, had no pulse, was limp, and he thought that was odd because, according to their knowledge, the baby—the mom had just given birth prior to the arrival and the baby seemed like he had been dead—she had been dead longer than that.” Captain Rehberg told Detective Malone that he remembered noticing that the umbilical cord had not been clamped and he thought that the baby had died from blood loss.

Officer Ann O'Neill spoke with Carpenter at her apartment, and Carpenter said she had given birth about two hours before the officers arrived. She told Officer O'Neill that after she gave birth, “the baby was not breathing, [and] possibly had a nasal passage blockage.” Carpenter said she had not been able to call 911 sooner because her cell phone was dead. Officer O'Neill testified that the officers and paramedics [\*\*\*14] urged Carpenter to go to the hospital, but she initially refused because she said she had an issue at the hospital with the birth of her prior child, “which is why she wanted to have the baby at home.”

## 3. Observations of Law Enforcement and Medical Staff at the Hospital

Oceanside Police Officer Tyrone Dunn testified that he was on duty the morning [\*\*679] of November 15 when he received a “possible CPR call” and was directed to Tri-City Medical Center, where Kiera had been transported by ambulance.

Upon entering the emergency department, Officer Dunn ran into Captain Rehberg, who stated that the baby had no pulse when he arrived at the scene. Officer Dunn then entered the room where one of the emergency room (ER) physicians, Dr. Ma, was talking and giving directions to nurses attending to Kiera. Dr. Ma asked why the baby had low blood pressure, and when he inspected her diaper, he found a pool of blood in the diaper, leading him to suspect the baby was bleeding.

Medical staff then directed Officer Dunn to bags of clothing and a placenta that the paramedics had taken to the hospital with them. Officer Dunn described seeing a piece of Scotch tape on Kiera's umbilical cord stump as she was laying [\*\*\*15] on the table in the ER and medical staff were attempting to save her life. Dr. Ma removed the piece of tape from the baby's body. The photograph of the piece of tape with blood on it shown at the preliminary hearing also depicted a bloody piece of gauze, but Officer Dunn did not recall seeing any gauze by the umbilical cord when he was in the room.

## 4. Carpenter's Postarrest Statements to Law Enforcement Officers

After she was arrested, Carpenter agreed to speak to law enforcement officers about what happened during and after Kiera's birth. Carpenter told Detective Malone and his partner that while in labor, she felt like she needed [\*1291] to have a bowel movement, so she went to the bathroom. While she was over the toilet, she pushed multiple times and eventually gave birth to a crying baby girl. Carpenter said she cut the umbilical cord using medical scissors, put some cloth over the end of the umbilical cord, and tried to nurse the baby. At that point, the baby seemed like she was having trouble breathing and began turning blue, so Carpenter started giving the baby CPR, but it was not working.

Carpenter told the officers she initially could not call 911 because her phone was dead, and she [\*\*\*16] could not find her phone charger. She

eventually found her phone charger, charged her phone, and called 911. When asked why she could not go to a neighbor's apartment to ask for help, she said she was in pain and could barely walk.

Carpenter also told the officers that she was working with a midwife named Shannon S. and that she never planned on having the baby at home but instead had always planned on having the baby at the hospital. She stated that she wanted to work with the midwife to ask her about “HypnoBirthing” because being at the hospital was very stressful. Carpenter said she made an agreement with Tri-City Medical Center that she would give birth there. She stated that she had not been trying to avoid CWS.

#### 5. Carpenter's Statements to Others

Detective Malone testified that contrary to what Carpenter had said, Shannon told officers that although she was a registered nurse in Georgia, Carpenter never talked to her about acting as a midwife or providing any medical assistance for her birth. Shannon met Carpenter at their shared doctor's office several months before Carpenter gave birth. She exchanged phone numbers with Carpenter with the intent of being friends with her after [\*\*\*17] she had her baby. Shannon had no knowledge of Carpenter's plan to give birth at home. Shannon told Detective Malone she had received a text from Carpenter about being in labor, but she had recently lost her phone and did not see the text until the following day.

[\*\*680] When Shannon saw Carpenter at their shared doctor's office a couple of days after Carpenter was released from jail, Carpenter relayed what had happened during her labor and delivery. According to Shannon, Carpenter said she gave birth in the bathroom, where she started bleeding profusely, and then the baby came quickly. Carpenter told Shannon she had secured the baby's umbilical cord but did not say how. She also told Shannon that after Kiera was born, she had trouble breathing. Shannon told Carpenter that was probably because the baby needed deep suction,

which the hospital could have performed. Carpenter further told Shannon that after she woke up, Kiera [\*1292] was dead on her chest, and her body was blue. This led Shannon to believe that Carpenter must have passed out at some point after giving birth. Finally, Shannon told Detective Malone that Carpenter told her that she had previously read online about “the percentages of the [\*\*\*18] bad things happening during home births ... but she never thought it would really happen to her in real life.”

#### 6. Items Found at Carpenter's Apartment

At the hearing, Detective Malone described what was found after officers executed a search warrant and searched Carpenter's apartment. The officers found the medical scissors and plastic sheeting Carpenter had mentioned during her interview, as well as a bloodstained binder from Tri-City Medical Center with information on how to take care of a newborn, including paperwork titled “Neonatal Release Care Guide.” Also at the apartment was a book titled “Parenting, Substance Misuse, and Child Welfare,” which had some pages that had been tabbed or highlighted, some insurance paperwork for LB Medical Group LLC for midwife services, and a printout from a website titled “Emergency Labor. What To Do If You Have To Give Birth Alone,” which was a “step-by-step” guide. Detective Malone testified that the printout stated that “step 2 is to call 911” and he “recall[ed] somewhere around step 5 or 6 it tells you what to do with the umbilical cord. And it says to not cut the umbilical cord because of the blood and other lifesaving things that are in there [\*\*\*19] to help keep the baby alive while you wait for EMS to arrive.” Other items found at the apartment included a contraction timer, crib, a changing table, baby toys, gauze dressing pads, a fetal Doppler monitor, an opened packet of antibiotic ointment, a plastic or rubber bulb suction, a baby bottle, and other baby care items.

Detective Malone also testified that officers found drug paraphernalia in Carpenter's apartment, including a plastic ice cream scoop with

crystallized methamphetamine in it and a crushed aluminum can containing black tar heroin residue. Carpenter told officers that the drug paraphernalia belonged to someone named Ryan K. who had recently been at her apartment. She said that she had been receiving daily treatment for methadone, but that was the extent of her drug use.

### *C. Autopsy and Cause of Death*

Medical examiner Dr. Anna Park determined the cause of death to be “perinatal death associated with methamphetamine and buprenorphine exposure and unattended delivery.” Dr. Park concluded in her medical report and at the hearing that the manner of death was “accidental,” but she agreed that other medical examiners could reasonably have concluded the cause of death [\*1293] to be “undetermined.” [\*\*\*20] When questioned at the hearing what she meant by “unattended delivery,” Dr. Park stated that the phrase was “meant to describe the fact that improper procedure was performed in order—at the time of delivery, [\*\*681] which included not clamping the umbilical cord upon cutting the cord. In addition, no sterile procedure was used to cut the cord, and there was no medical personnel to—present to monitor the fetus upon delivery. Typically, you have fetal monitoring during the time of delivery too. And, in essence, also to describe the hemorrhaging at the umbilical stump which was apparent at the time of the autopsy.” She also testified to seeing dried blood around the umbilical stump and the baby's abdomen, that Kiera had been “wrapped in a hospital blanket” that was “soaked” in blood, and that her diaper “was also covered in blood,” although the amount of blood was “unquantifiable.”

### *D. Magistrate's Findings*

At the end of the hearing, the magistrate judge issued her findings, stating that she found sufficient evidence under the probable cause standard to bind Carpenter over on the implied malice murder charge: “In terms of the implied malice murder, the subjective awareness, and the conscious [\*\*\*21]

disregard for human life, I do find that there is sufficient evidence for a preliminary hearing. I do find that there is sufficient evidence of that.”

The magistrate focused on Carpenter's actions before Kiera's birth as she explained her findings: “She had—what's interesting is that she's taken a lot of steps to prepare for having this baby at home. And her goal is not to have CWS involved because she's aware of what's going to happen if she does have this at the hospital because of what had happened to her other two children. So her desire to not get CWS involved really overcame her duty to make sure that this baby was delivered safely. [¶] Not that she didn't make efforts to have a safe delivery in a sense: The article that she had at her house, her inquiry as to a nurse, her inquiry of a midwife, which indicates to this Court that she was aware that she shouldn't be having this baby by herself at home without any kind of medical training, and that it was not safe to do so. So I do find that there is subjective awareness there.”

The magistrate continued: “But even if she had this baby unexpectedly, wasn't expecting to go into labor early, she had multiple opportunities to go to [\*\*\*22] the hospital, and she had multiple people telling her by text message that she needed to go to the hospital and get help and not deliver this baby alone. But, again, she chose not to do that because of her desire not to have CWS involved. And so when I listen to that evidence and consider that evidence, I do find that there is enough for a preliminary hearing bind-over, that there is implied malice.”

### **[\*1294]**

Moving on to the element of causation and her conclusion, the magistrate stated: “As to the expert testimony that I believe that you will ultimately get out, Mr. White, from your experts—and I had the doctor here testify. And her analysis and cause of death was different than, I believe, what your expert is going to testify to. She did agree to some points, but ultimately, her cause of death did not change even with the report that you had asked her

about. And so for all of those reasons, and based on the evidence that this Court heard, I do believe that there's probable cause to believe that the following offenses in Counts 1, 2, and the allegation attached to Count 2 have been committed and the defendant is guilty thereof. So I do bind this case over to the Superior Court on both charges [\*\*\*23] and the allegation in Count 2.”

At the end of the hearing, the complaint was deemed to be an information, Carpenter was arraigned, and she entered a plea of not guilty to both counts.

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#### E. Penal Code Section 995 Motion To Dismiss

In January 2023, Carpenter filed a motion to dismiss the information pursuant to *Penal Code section 995 (section 995 motion)*. Carpenter argued that the newly enacted Assembly Bill No. 2223 (2021–2022 Reg. Sess.), which added and amended certain sections of the Health and Safety Code, immunizes her from prosecution, and that the People failed to present sufficient cause to bind the case over for trial.

The trial court heard argument and denied the motion, finding that the magistrate could properly infer that the evidence of Carpenter's postbirth conduct was sufficient to bind her over on the implied malice murder charge. The trial court stated: “The court can and [the magistrate] can infer from the conduct of the defendant in doing those things and not calling 9-1-1, she failed to act in her daughter's best interest. She failed to get her daughter the medical help that she should have known that her daughter needed because she should have understood that she didn't have the medical training necessary to deliver her own child.”

#### F. Writ Proceeding [\*\*\*24]

After Carpenter filed the present petition for a writ of prohibition, we issued an order directing the superior court to show cause why the relief sought in the petition should not be granted and stayed the criminal proceedings against Carpenter in trial

court. The People filed a return, and Carpenter filed a reply.

[\*1295]

#### DISCUSSION

I

HN1 CA(1) (1) “When we review a *section 995* motion, we ‘disregard[] the ruling of the superior court and directly review[] the determination of the magistrate.’” (*People v. San Nicolas (2004) 34 Cal.4th 614, 654 [21 Cal. Rptr. 3d 612, 101 P.3d 509]* (*San Nicolas*).) HN2 CA(2) (2) The magistrate's job at the preliminary hearing is “to determine whether there is ‘sufficient cause’ to believe defendant guilty of the charged offense.” (*People v. Abelino (2021) 62 Cal.App.5th 563, 573 [276 Cal. Rptr. 3d 728]* (*Abelino*); see also *Pen. Code, § 872*.) “Sufficient cause” in this context means “‘reasonable and probable cause’”—in other words, facts that would lead a person “of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused.” (*People v. Uhlemann (1973) 9 Cal.3d 662, 667 [108 Cal. Rptr. 657, 511 P.2d 609]*.) It is a level of proof below preponderance of the evidence. (*People v. Superior Court (Valenzuela) (2021) 73 Cal.App.5th 485, 496 [288 Cal. Rptr. 3d 627]* (*Valenzuela*).)

HN3 CA(3) (3) When a defendant files a *section 995* motion, the court must set aside the information if the defendant has been committed without reasonable or probable cause. (*Pen. Code, § 995, subd. (a)(2)(B)*.) To establish probable cause sufficient to withstand the motion, “‘the People must make some showing [\*\*\*25] as to the existence of each element of the charged offense.’” (*People v. Scully (2021) 11 Cal.5th 542, 582 [278 Cal. Rptr. 3d 792, 486 P.3d 1029]*.) Evidence sufficient to justify a prosecution need not be sufficient to support a conviction. (*Ibid.*) Indeed, it is well settled that, when it comes to the required showing for probable cause, the bar is “‘exceedingly low.’” (*Abelino, supra, 62 Cal.App.5th at p. 573*.)

**HN4 CA(4)** (4) In reviewing the *section 995* motion, we “conduct an independent review of the evidence, but will not substitute our judgment for that of the magistrate as to the credibility or weight of the evidence.” (*San Nicolas, supra, 34 Cal.4th at p. 654 [\*\*683]*.) Absent express findings, however, we “cannot assume [the magistrate] has resolved factual disputes or passed upon the credibility of witnesses.” (*People v. Slaughter (1984) 35 Cal.3d 629, 638 [200 Cal. Rptr. 448, 677 P.2d 854] (Slaughter)*.)

Carpenter argues that the trial court improperly substituted itself as fact finder in reviewing the magistrate's ruling, and she urges this court not to “reweigh the facts.” But the magistrate here did not resolve any factual disputes or assess the credibility of the witnesses. Rather, the magistrate merely accepted the prosecution's evidence and determined it was sufficient to support the charges against Carpenter, stating: “In terms of the implied [\*1296] malice murder, the subjective awareness, and the conscious disregard for human life, I do find that there is sufficient [\*\*\*26] evidence for a preliminary hearing. ... [B]ased on the evidence that this Court heard, I do believe that there's probable cause to believe that the following offenses in Counts 1, 2, and the allegation attached to Count 2 have been committed and the defendant is guilty thereof.” We find that this is a legal conclusion. (See *Slaughter, supra, 35 Cal.3d at p. 638*; *Zemek v. Superior Court (2020) 44 Cal.App.5th 535, 546 [257 Cal. Rptr. 3d 729] (Zemek)* [where “the prosecution witnesses' testimony ‘was not inherently improbable, [they were] not significantly impeached, and the [magistrate] made no findings as to [their] demeanor,’ [the court] must conclude that the magistrate's remarks are legal conclusions”].)

**HN5 CA(5)** (5) Because the magistrate made a legal conclusion rather than factual findings, we review the record independently to determine whether the evidence presented at the preliminary hearing constituted sufficient cause to sustain the charges in the information. (*Zemek, supra, 44*

*Cal.App.5th at p. 546*; *Valenzuela, supra, 73 Cal.App.5th at p. 499*.) And where, as here, a challenge to the sufficiency of the evidence is based on the interpretation of a statute, our interpretation of the statute is de novo as well. (*People v. Gallardo (2015) 239 Cal.App.4th 1333, 1340 [192 Cal. Rptr. 3d 100]*.) We will not set aside the information “‘if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it.’” (*San Nicolas, supra, 34 Cal.4th at p. 654*.)

## [\*\*\*27] II

**CA(6)** (6) We first analyze Carpenter's contention that the People's prosecution of her in this case is prohibited because the evidence consists entirely of conduct protected by *sections 123462* and *123467*. To do so, we must interpret the statutes to determine whether and how they apply here. **HN6** Our fundamental task in interpreting a statute is to ascertain the Legislature's intent so as to effectuate its purpose. (*Cummins, Inc. v. Superior Court (2005) 36 Cal.4th 478, 487 [30 Cal. Rptr. 3d 823, 115 P.3d 98]*.) In determining that intent, we “look first to the words of the statute, which are the most reliable indications of the Legislature's intent.” (*Ibid.*) We do not construe those words in a vacuum; we consider the provisions at issue “in the context of the statutory framework as a whole.” (*Ibid.*) “‘If the statutory language is unambiguous, then its plain meaning controls. If, however, the language supports more than one reasonable construction, then we may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history.’” (*Kim v. Reins International California, Inc. (2020) 9 Cal.5th 73, 83 [259 Cal. Rptr. 3d 769, 459 P.3d 1123]*.)

## [\*1297] [\*\*684]

### A. Assembly Bill No. 2223

The day after Carpenter's preliminary hearing, Governor Newsom signed several bills relating to reproductive health care access and privacy into law. One of these was Assembly Bill No. 2223

(2021–2022 Reg. Sess.), which went [\*\*\*28] into effect on January 1, 2023 (Assembly Bill 2223). It made several changes to the [Reproductive Privacy Act \(Health & Saf. Code, § 123460 et seq.\)](#), including amending [section 123462](#) and adding [section 123467 to the Health and Safety Code](#). Substantively, these changes included: prohibiting a person from being subject to civil or criminal liability based on their actions or omissions with respect to their pregnancy or actual, potential, or alleged pregnancy outcome, or based solely on their actions to assist a pregnant person exercising their reproductive rights; clarifying that an abortion is not unauthorized if performed by the pregnant person; authorizing a party whose rights are protected by the [Reproductive Privacy Act](#) to bring a civil action against an offending state actor when those rights are interfered with; and authorizing a person aggrieved by a violation of the [Reproductive Privacy Act](#) to bring a civil action pursuant to the [Tom Bane Civil Rights Act \(Civ. Code, § 52.1\)](#). Assembly Bill 2223 also amended the Government Code relating to coroners' handling of fetal deaths, and prohibited the use of a coroner's statements on the certificate of fetal death to establish, bring, or support a criminal prosecution or civil cause of damages against a person immune from liability relating to their pregnancy or actual, potential, or alleged [\*\*\*29] pregnancy outcome as set forth in the [Reproductive Privacy Act](#).

### B. Statutory Language

We turn first to the language of the relevant portions of [sections 123462](#) and [123467](#). [Section 123462](#) sets forth the Legislative findings and declarations with respect to the [Reproductive Privacy Act](#), which was first enacted in 2002 and originally provided, in relevant part: “The Legislature finds and declares that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions.” (§ [123462](#); Stats. 2002, ch. 385, § 8.) Assembly Bill 2223 amended this provision to add language defining “personal reproductive decisions” as entailing “the right to make and effectuate

decisions about all matters relating to pregnancy, *including prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.*” (§ [123462](#), italics added.) “Pregnancy” is defined in [section 123464, subdivision \(b\)](#), as “the human reproductive process, beginning with the implantation of an embryo.”

Assembly Bill 2223 also added [section 123467](#) as follows: “Notwithstanding any other law, a person shall not be subject to civil or criminal liability or penalty, or otherwise deprived of their rights under this article, based on their [\*\*\*1298] actions or omissions with respect [\*\*\*30] to their pregnancy or actual, potential, or alleged pregnancy outcome, including miscarriage, stillbirth, or abortion, or *perinatal death due to causes that occurred in utero.*” (§ [123467, subd. \(a\)](#), italics added.)

[Health and Safety Code section 123464](#) does not define “perinatal,” but [Welfare and Institutions Code section 14134.5](#) defines it as “the period from establishment of pregnancy to one month following delivery.” ([Welf. & Inst. Code, § 14134.5, subd. \(b\)](#).) Elsewhere in the Health and Safety Code, the Legislature defines “perinatal care” as “care received from the time of conception through the first year after birth.” ([Health & Saf. Code, § 123485, subd. \(d\)](#).) The International Encyclopedia of Public Health provides that the term [\*\*\*685] “perinatal” is generally used to describe the period from approximately 22 completed weeks of pregnancy up to seven completed days of life. (See Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2223 (2021–2022 Reg. Sess.) as amended Mar. 17, 2022, p. 10, citing L.S. Bakketeig, P. Bergsjø, “Perinatal Epidemiology” (2008), p. 45.)

We need not decide which of these definitions applies here. Following any of them, the plain language of the statute clearly encompasses actions or omissions during pregnancy alleged to have caused Kiera's death within hours of her birth. There is thus no question that the statute prohibits the prosecution of Carpenter for any effect that her

alleged drug use or lack of prenatal care may have had on Kiera, or **[\*\*\*31]** her decision to have a home birth (which is also separately protected because [section 123467](#) mandates that a person may not be deprived of their right under [section 123462](#) “to make and effectuate decisions about all matters relating to pregnancy, including ... childbirth”)—regardless of whether such acts or omissions may have contributed to Kiera's death ([§ 123462](#)). All of these acts fall within the plain language of the immunity established by [section 123467](#).<sup>3</sup>

**[\*1299]**

The People do not dispute this conclusion as it relates to the *actus reus* of the charges filed against Carpenter. Rather, they contend that: (1) the phrase “perinatal death due to causes that occurred in utero” renders [section 123467](#) inapplicable to this case, because it is Carpenter's acts and omissions *after* Kiera's birth, not while she was in utero, that form the basis of the charges against Carpenter, and the prosecution therefore falls outside the purview of Assembly Bill 2223; and (2) although Carpenter cannot be prosecuted for her acts or omissions during her pregnancy prior to Kiera's birth, such conduct can be used to demonstrate the necessary

*mens rea*—here, implied malice.

Carpenter, on the other hand, contends that the magistrate's consideration of the evidence of her conduct **[\*\*\*32]** during pregnancy was consistent with the People's now unlawful theory of the case: that she made a criminal error in deciding, against the advice of others, to give birth at home alone; and that decision, along with her drug use, resulted in the death of her baby. (See [§§ 123462](#) and [123467, subd. \(a\)](#).) According to Carpenter, the People have now pivoted to a new theory based on her conduct after Kiera's birth, but there is no way to extricate her conduct during pregnancy from the effect that conduct allegedly had on her pregnancy outcome. She **[\*\*686]** argues that evidence of her prebirth conduct is therefore inadmissible, because allowing the People to present such evidence to prove the intent element of her allegedly criminal postbirth conduct would undermine the legislative intent of Assembly Bill 2223.

**CA(7) (7)** We conclude first that [HN7 sections 123462](#) and [123467, subdivision \(a\)](#), do not prohibit the People's prosecution of Carpenter for postbirth acts or omissions that may have led to Kiera's death. Any such cause of perinatal death would necessarily not have “occurred in utero,” and thus does not fall under the types of pregnancy outcomes shielded from prosecution by [section 123467](#). ([§ 123467, subd. \(a\)](#).) [Section 123462](#) protects Carpenter's right to have a home birth and make decisions regarding her childbirth, **[\*\*\*33]** but there is no indication from the statutory language that the Legislature intended to also immunize all otherwise criminal acts or omissions occurring after a live birth.

The *evidentiary* use of Carpenter's prebirth conduct presents a more challenging issue. Though it is a close call, we believe the People have the better argument here and conclude there is no categorical exclusion of prebirth evidence.

**CA(8) (8)** First, the plain language of Assembly Bill 2223 does not prohibit the use of a person's conduct during pregnancy as evidence of implied

<sup>3</sup> At oral argument, counsel for Carpenter argued that cutting the umbilical cord is an “action[] ... with respect to [her] pregnancy” as contemplated by [section 123467](#) and is therefore also protected conduct under the statute. Read in isolation, we acknowledge that this is one possible interpretation of the statutory phrase “with respect to their pregnancy,” which the Legislature has not further defined. We also agree with Carpenter that pregnancy and childbirth exist along a continuum. It is thus difficult to pinpoint the precise moment at which a pregnancy ends and actions can no longer be characterized as being taken “with respect to” the pregnancy. Under Carpenter's broad interpretation, however, the statute would confer immunity even if she had deliberately decided not to clamp the umbilical cord for the purpose of causing her baby to bleed to death. We do not believe the Legislature intended to create such immunity for perinatal deaths. Based on the statutory language read as a whole, we conclude that the Legislature intended to limit the immunity for perinatal deaths to “causes that occurred in utero.” ([§ 123467, subd. \(a\)](#).) As we will further explain, any ambiguity in the statutory language is resolved by the legislative history, which indicates that the Legislature passed this statute mainly with the intent of providing immunity for adverse pregnancy outcomes due to self-managed abortions or drug use during pregnancy. (See pt. II.C., *post*.)

malice or any other criminal intent if the person is not otherwise immune to prosecution. [HN8](#) We will not infer from the statute an evidentiary rule not expressly stated. (See [Cornette v. Department of Transportation \(2001\) 26 Cal.4th 63, \[\\*1300\] 73–74 \[109 Cal. Rptr. 2d 1, 26 P.3d 332\] \(Cornette\)](#) [“A court may not rewrite a statute, either by inserting or omitting language, to make it conform to a presumed intent that is not expressed.”].)

[CA\(9\)](#) (9) Carpenter's argument is further undermined by the fact that elsewhere in Assembly Bill 2223, the Legislature included express language similar to the rule she implicitly argues for here. The bill amended [section 103005](#), which requires a coroner to include certain facts on a fetal death certificate, to add the following: “This section shall not be used [\*\*\*34] to *establish, bring, or support a criminal prosecution* or civil cause of action seeking damages against any person who is immune from liability under [Section 123467](#).” (§ [103005, subd. \(b\)](#), italics added.) Thus, had the Legislature intended to enact a similar evidentiary rule relating to conduct during pregnancy, it “clearly knew” how to do so and could have explicitly so stated. ([People v. Albillar \(2010\) 51 Cal.4th 47, 56 \[119 Cal. Rptr. 3d 415, 244 P.3d 1062\]](#); see also [Cornette, supra, 26 Cal.4th at p. 73 \[HN9\]](#) “When one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning.”].)

[CA\(10\)](#) (10) Moreover, taking Carpenter's interpretation of the statute to its logical conclusion would lead to absurd consequences. What if, for example, a defendant made statements while pregnant that she intended to smother her baby to death once it was born and thought it would be easier to get away with the act at home than in the hospital, and then in fact did so in the hours after the baby was born? We do not believe the Legislature intended through Assembly Bill 2223 to prevent the prosecution from using such statements as evidence of intent to kill simply because they

were made during pregnancy, but that would be the result compelled [\*\*\*35] by Carpenter's statutory interpretation. We therefore conclude, [HN10](#) based on the statutory language and principles of statutory construction, that the prosecution is not [\*\*687] categorically precluded from using prebirth conduct as evidence of Carpenter's intent.

### C. Legislative History

Even if the statutory language were ambiguous, the legislative history of Assembly Bill 2223 further supports our conclusion that [sections 123462 and 123467](#) do not categorically prohibit the People's prosecution of Carpenter or their reliance on her statements during pregnancy as evidence of intent in this case. There is nothing in the legislative history to indicate that the Legislature intended to immunize all postbirth conduct associated with pregnancy and home birth.

Assembly Bill 2223's findings and declarations define reproductive justice as “the human right to control our bodies, sexuality, gender, work, and [\*1301] reproduction,” which at its core is “the belief in the right to bodily autonomy, the right to have children, the right to not have children, and the right to parent the children we have with dignity and respect in safe and sustainable communities.” The bill explains that the prohibition of “civil and criminal penalties for [\*\*\*36] people's actual, potential, or alleged pregnancy outcomes” is critical to making reproductive justice a reality for all Californians. (Assem. Bill 2223.) Indeed, Assembly Bill 2223 was passed in part in response to criminal prosecutions across the country of people for “having miscarriages or stillbirths or for self-managing an abortion,” and the bill's findings and declarations, drafted by the bill's author, note that “California has not been exempt. Despite clear law that ending or losing a pregnancy is not a crime, police have investigated and prosecutors have charged people with homicide for pregnancy losses. For example, the District Attorney in the County of Kings prosecuted two women for murder after they suffered stillbirths.” (Assem. Bill 2223.) Each woman was prosecuted (and imprisoned)

based on the theory that her drug use during pregnancy caused the death of her fetus. (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2223 (2021–2022 Reg. Sess.) as amended May 19, 2022, p. 8.) This background provides useful context and further elucidates that one of the Legislature's main goals in passing the bill was to prohibit the criminalization of adverse pregnancy outcomes due to self-managed abortions or drug use during pregnancy. [\*\*\*37]

Underscoring these points are the June 20, 2022 bill analysis comments from the Senate Rules Committee: “Even though existing state law does not criminalize a person's own actions that might result in a pregnancy loss, two women were recently charged and imprisoned for their pregnancy losses in California. *In response to this*, the bill reaffirms and strengthens protections in existing state law that prohibit civil or criminal liability for the acts of a pregnant person in relation to their pregnancy outcomes.” (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2223 (2021–2022 Reg. Sess.) as amended June 20, 2022, p. 4, italics added.) The comments additionally note that, “[i]n response to” the United States Supreme Court's recent opinion in [\*Dobbs v. Jackson Women's Health\* \(2022\) 597 U.S. 215 \[213 L.Ed.2d 545, 142 S.Ct. 2228\]](#) overturning “almost 50 years of precedent that the right to an abortion was protected under the U.S. Constitution” and a recent Texas law banning abortions beginning six weeks after a person's last menstrual period, Assembly Bill 2223 “seeks to ensure that no one in the State of California is investigated, prosecuted, or incarcerated from ending a pregnancy or experiencing a pregnancy loss and that their right to reproductive freedom is protected.” [\*\*\*38] (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2223 (2021–2022 Reg. Sess.) as amended June 20, 2022, pp. 4–5.)

[\*\*688] Moreover, comments from the analysis for the April 5, 2022 hearing of the Assembly Committee on Judiciary specifically address the

People's argument [\*1302] that the statute does not immunize a pregnant person from prosecution for all pregnancy outcomes during the perinatal period. The phrase “due to causes that occurred in utero” in [section 123467](#) was not initially included in the statutory language. (See Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2223 (2021–2022 Reg. Sess.) as amended Mar. 17, 2022, p. 9.) It was added via amendment to address concerns from opponents to the bill who argued that the “perinatal death” language could preclude criminal investigation of an infant's death regardless of the alleged cause. (*Id.* at pp. 9–10.) The bill's author noted that the statutory language as initially drafted “may not be sufficiently clear that ‘perinatal death’ is intended to be the consequence of a pregnancy complication. Thus, the bill could be interpreted to immunize a pregnant person from all criminal penalties for all pregnancy outcomes, including the death of a newborn for any reason during the ‘perinatal’ period after birth, including a cause of death which is not attributable to [\*\*\*39] pregnancy complications, *which clearly is not the author's intent.*” (*Id.* at p. 10, italics added.)

The author therefore proposed the following language for [section 123467, subdivision \(a\)](#): “Notwithstanding any other law, a person shall not be subject to civil or criminal liability or penalty ... based on their actions or omissions with respect to their pregnancy or actual, potential, or alleged pregnancy outcome, including miscarriage, stillbirth, or abortion, or perinatal death *due to a pregnancy-related cause.*” (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2223 (2021–2022 Reg. Sess.) as amended Mar. 17, 2022, p. 10, boldface omitted.) The phrase “due to a pregnancy related cause” was ultimately revised to “due to causes that occurred in utero.” (See [§ 123467, subd. \(a\)](#).)

Seeking to avoid the obvious conclusion resulting from this legislative background, Carpenter argues that her situation exemplifies the Legislature's public health concerns and is precisely the type of scenario the Legislature sought to avoid in enacting

Assembly Bill 2223: she planned a home birth because she reasonably and justifiably feared CWS would remove her children from her custody based on her substance use disorder as had happened in the past.

But her description of the legislative intent is not quite accurate. Assembly Bill 2223's declarations and findings state: "The threat [\*\*\*40] of criminal prosecutions or civil penalties on pregnant people through child welfare, immigration, housing, or other legal systems has a harmful effect on individual and public health. When a person fears state action being taken against them related to their pregnancy, they are less likely to seek medical care when they need it. If they do seek care, punishing them for actual, potential, or alleged pregnancy outcomes interferes with professional care and endangers the [\*1303] relationship between providers and patients." The various committee analyses of the bill include commentary from the bill's cosponsors noting that the "threat of criminal prosecution has a harmful effect on individual and public health, because people who fear prosecution due to their health issues are deterred from seeking care." (See, e.g., Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2223 (2021–2022 Reg. Sess.) as amended May 19, 2022, p. 9; Assem. Com. on Health, Analysis of Assem. Bill No. 2223 (2021–2022 Reg. Sess.) as amended Apr. 6, 2022, p. 6.) This indicates that the Legislature and sponsors of the bill sought to protect pregnant people from criminalization of their pregnancy outcomes, not those who avoid seeking [\*\*689] medical care because they are afraid of having their child removed by CWS.

Indeed, the legislative comments confirm that Assembly Bill 2223 does not affect the ability of the state to consider, [\*\*\*41] under already-existing child welfare laws, "a parent's dangerous acts during pregnancy because those acts could affect the welfare of a child who is born after the pregnancy. ... Thus, a pregnant person's actions during pregnancy *could* ultimately affect their parenting rights and result in the deprivation of

those rights." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2223 (2021–2022 Reg. Sess.) as amended Mar. 17, 2022, p. 9.) The bill's author proposed adding the phrase "under this article" to the original language "to clarify that the immunity provided by the bill only extends to the deprivation of rights related to pregnancy." (*Id.* at p. 10, boldface & italics omitted.) The provision as enacted therefore states that a person "*under this article*, based on their actions or omissions with respect to their pregnancy or actual, potential, or alleged pregnancy outcome ... ." (§ 123467, *subd. (a)*, italics added.) Under the now-effective law, CWS can still remove a child from their parent's custody after they are born based on conduct that occurred during pregnancy, including drug use.

Viewed against this backdrop, it is clear that the focus of Assembly Bill 2223 was on ensuring no one in California is prosecuted or subject to civil penalties for ending a pregnancy or experiencing a pregnancy loss, including due to self-managed abortions [\*\*\*42] or drug use during pregnancy. We therefore conclude that [Health and Safety Code sections 123462](#) and [123467](#) do not automatically preclude prosecution of Carpenter under [Penal Code sections 187](#) and 273a, subdivision (a), for any postbirth conduct that allegedly caused Kiera's death, nor do they preclude use of her conduct during pregnancy as evidence of intent.

Our determination on this point does not, however, compel us to also conclude that the People are not at all constrained by [Health and Safety Code sections 123462](#) and [123467](#) in terms of the evidence they may rely on in this case. To the contrary, and as we explain in more detail below, some of the [\*1304] evidence presented at the preliminary hearing may not be admissible to demonstrate implied malice for Carpenter's postbirth conduct, because it relates to conduct now protected under Assembly Bill 2223.

### III

Having concluded that [sections 123462](#) and [123467](#) do not automatically immunize Carpenter from

prosecution for Kiera's death, we must now determine whether the allowable evidence presented at the preliminary hearing was sufficient to demonstrate implied malice murder such that Carpenter was properly bound over on the murder charge.

#### A. Implied Malice Murder

**HN11 CA(11)** (11) Murder is the unlawful killing of a person with malice aforethought. (*Pen. Code*, § 187, *subd. (a)*.) Malice aforethought can be either express or implied, with [\*\*\*43] the latter defined as “when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.” (*Pen. Code*, § 188, *subd. (a)(2)*.) The Supreme Court has interpreted implied malice to have “both a physical and a mental component. The physical component is satisfied by the performance of “an act, the natural consequences of which are dangerous to life.”” (*People v. Chun* (2009) 45 Cal.4th 1172, 1181 [91 Cal. Rptr. 3d 106, 203 P.3d 425] (*Chun*)). It is also satisfied by the failure to act [\*\*690] where the defendant has a legal obligation to act. (*People v. Werntz* (2023) 90 Cal.App.5th 1093, 1115 [307 Cal. Rptr. 3d 731] (*Werntz*)). **CA(12)** (12) Carpenter had such an obligation here, as **HN12** “parents have a common law duty to protect their children and may be held criminally liable for failing to do so.” (*People v. Rolon* (2008) 160 Cal.App.4th 1206, 1219 [73 Cal. Rptr. 3d 358]; see also *Werntz*, at p. 1116 [finding physical component of implied malice murder satisfied where mother failed to protect her daughter].)

**HN13 CA(13)** (13) The mental component is satisfied where the defendant knows that their “conduct endangers the life of another and ... acts with a conscious disregard for life.”” (*Chun*, *supra*, 45 Cal.4th at p. 1181.) The standard is subjective—the defendant must have “actually appreciated the risk involved.” (*People v. Watson* (1981) 30 Cal.3d 290, 297 [179 Cal. Rptr. 43, 637 P.2d 279] (*Watson*)). Given that there is rarely direct evidence of subjective awareness, it often

must be proved by circumstantial evidence. (See *Valenzuela*, *supra*, 73 Cal.App.5th at p. 502.)

**CA(14)** (14) Thus, **HN14** to establish [\*\*\*44] implied malice, the People must prove four elements: (1) Carpenter intentionally committed the act in question or intentionally failed to act; (2) the natural and probable consequences of which [\*\*\*1305] were dangerous to human life; (3) at the time she acted or failed to act, she knew her act or failure to act was dangerous to human life; and (4) she deliberately acted or failed to act with conscious disregard for human life. (See *Chun*, *supra*, 45 Cal.4th at p. 1181; *Werntz*, *supra*, 90 Cal.App.5th at pp. 1115–1116.)

#### B. Analysis

**CA(15)** (15) Carpenter contends that the People failed to present evidence of two of the required elements of implied malice murder: (1) the mental component, or subjective knowledge of danger to life; and (2) causation. **HN15** In this procedural posture, we do not determine whether there is substantial evidence satisfying these components of implied malice; rather, we must determine whether, “[c]onsidering all the evidence and reasonable inferences at this stage of the proceedings, there is ‘some rational ground for assuming the possibility’” that there is sufficient evidence in support of these elements. (*Valenzuela*, *supra*, 73 Cal.App.5th at p. 504, *italics added*.) We conclude that there is.

##### 1. Sufficiency of the Evidence of Causation

The People rely mainly on Carpenter's act of cutting Kiera's umbilical cord without [\*\*\*45] properly securing it as well as her alleged failure to timely call 911 to support the physical component of the implied malice murder charge. Carpenter does not dispute the fact that she cut the umbilical cord or the timing of her call to 911. Instead, she argues that there is a lack of evidence showing that her action or inaction caused Kiera's death. We find that sufficient evidence was presented at the preliminary hearing to demonstrate probable cause

that Carpenter's failure to properly secure the umbilical cord and/or seek medical attention for Kiera after she continued bleeding caused her death.<sup>4</sup>

**[\*\*691]** Dr. Park, the medical examiner who conducted Kiera's autopsy, testified at the preliminary hearing that her determination as to Kiera's cause of death was "perinatal death associated with methamphetamine and buprenorphine toxicity and unattended delivery." She stated that "unattended delivery" was **[\*1306]** "meant to describe the fact that improper procedure was performed in order—at the time of delivery, which included not clamping the umbilical cord upon cutting the cord. In addition, no sterile procedure was used to cut the cord, and there was no medical personnel to—present to monitor **[\*\*\*46]** the fetus upon delivery. Typically, you have fetal monitoring during the time of delivery too. And, in essence, also to describe the hemorrhaging at the umbilical stump which was apparent at the time of the autopsy." She also testified to seeing dried blood around the umbilical stump and the baby's abdomen, that Kiera had been "wrapped in a hospital blanket" that was "soaked" in blood, and that her diaper "was also covered in blood."

Dr. Park further described her review of Tri-City Medical emergency records, including a report from one of the doctors who attempted to save Kiera's life, stating that the emergency department doctor's assessment was that the baby had died due to fatal blood loss from the umbilical stump. She

testified: "I would agree that, yes, the blood loss—the acute blood loss is something very substantial and contributed to the death of the baby." We conclude that Dr. Park's testimony is sufficient to meet the "exceedingly low" hurdle the prosecution needs to clear at a preliminary hearing in terms of demonstrating that blood loss from the umbilical stump caused Kiera's death. ([Abelino, supra, 62 Cal.App.5th at p. 573.](#))

**CA(16) (16)** In arguing to the contrary, Carpenter points to Dr. Park's testimony and medical **[\*\*\*47]** report stating that the baby's manner of death was "accidental," and her description of the acute blood loss as a mere "contribution" to death, rather than the cause. While true, these distinctions are not material. First, Dr. Park's determination of the manner of death as accidental is a medical, not legal, conclusion. **HN16** Even if a death is accidental or unintentional, it may still have been caused by an act or omission committed with implied malice. Second, an act or a failure to act causes death "if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death." ([People v. Cornejo \(2016\) 3 Cal.App.5th 36, 60 \[207 Cal. Rptr. 3d 366\]](#), quoting [CALCRIM No. 520](#); see also [People v. Jennings \(2010\) 50 Cal.4th 616, 643 \[114 Cal. Rptr. 3d 133, 237 P.3d 474\] \(Jennings\)](#) [an act may be considered the proximate cause of death where it was a "substantial factor" contributing to the death].)

Dr. Park testified that she believed Kiera's blood loss was "something very substantial" that contributed to the baby's death. No more is required at this stage. Thus, because there is some evidence that Carpenter either caused the blood loss by cutting the umbilical cord without clamping it or failed to stop the blood loss or call 911 as part of her legal duty to protect **[\*\*\*48]** Kiera, there is probable cause of causation. (See [Jennings, supra, 50 Cal.4th at p. 643 \[\\*\\*692\]](#) **[\*1307]** ["[A]s long as the jury finds that without the criminal act the death would not have occurred when it did, it need

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<sup>4</sup> However, we reject the People's contentions that two of the specific omissions by Carpenter that were dangerous to Kiera's life were (1) her refusal to call 911 when Kiera would not latch and (2) her decision to wait 30 minutes to call 911 after waking up to Kiera's lifeless body. First, we agree with Carpenter that a baby's inability to latch and breastfeed within hours of being born does not present an emergency dangerous to life, and Kiera's death therefore cannot be attributed to the fact that Carpenter did not call 911 when Kiera was unable to latch. Second, the People do not argue—and presented no evidence—that Kiera was still alive when Carpenter awoke. The failure to call 911 *after* the infant had already died cannot, both as a matter of law and common sense, be a cause of her death.

not determine which of the concurrent causes was the principal or primary cause of death.”].)

[CA\(17\)](#) (17) Carpenter also argues that the only evidence at the preliminary hearing regarding the point from which Kiera had experienced hemorrhaging showed that it was at the umbilical cord's point of insertion into the placenta, not any allegedly improper cutting of the cord. This is not accurate, as Dr. Park testified that (1) the ER physician, Dr. Ma, “thought the baby had died because there was exsanguination or fatal blood loss from the umbilical stump,” and (2) Dr. Park agreed with Dr. Ma that “the acute blood loss is something very substantial and contributed to the death of the baby.” But [HN17](#) even where physicians have competing views of the cause of death, and even if the defense theory is more plausible, the court may “not find an absence of probable cause simply because it finds the defense witnesses slightly more persuasive than the prosecution witnesses.” ([Cooley v. Superior Court \(2002\) 29 Cal.4th 228, 257–258 \[127 Cal. Rptr. 2d 177, 57 P.3d 654\] \(Cooley\)](#)).<sup>5</sup>

Moreover, Dr. Park testified that she could state with reasonable medical [\*\*\*49] certainty that it was “likely that the baby could have survived” if a third party with medical training had been present at the birth. She based her opinion on the fact that someone such as a “midwife would have known how to deliver a baby properly to prevent acute blood loss and to have monitored the baby upon delivery to make sure that the cord and the placenta was delivered properly.” Although Carpenter may not be prosecuted for choosing to have a home birth without a midwife or any other medical professional present, this testimony still supports an inference that, had Carpenter called 911 after being unable to properly secure Kiera's umbilical cord,

Kiera would not have experienced fatal blood loss.

We thus conclude that the People have presented evidence that is sufficient to support a finding of probable cause that Carpenter's failure to stop Kiera's blood loss—whether by cutting the umbilical cord and failing to secure the umbilical stump or by not calling for medical assistance when her baby was bleeding—caused her death. To be clear, however, the prosecution cannot rely on a theory that Kiera's death was attributable to methamphetamine and/or buprenorphine toxicity caused [\*\*\*50] by Carpenter's drug use during pregnancy.

[\*1308]

## 2. Sufficiency of the Evidence of Subjective Knowledge

Carpenter also contends that the People failed to present evidence that she had the subjective awareness of danger to life necessary to show that she acted with implied malice. The People argue that Carpenter's awareness of the risk to Kiera's life is evidenced by: (1) her text messages to and from people before Kiera was born, with multiple people warning her of the dangers of having a baby at home alone; (2) her text messages warning others not to call 911; (3) her attempt to stop Kiera's bleeding by placing a piece of tape on the umbilical stump; (4) her statement to Detective Malone that at one point, she started giving Kiera CPR, but it was not working; and (5) an article she printed warning [\*\*693] of the dangers of having a home birth and containing instructions not to cut the baby's umbilical cord. They further point to evidence presented at the hearing that after Kiera was born, she turned blue and was having trouble breathing, was bleeding from her umbilical stump, had a pool of blood in her diaper, had blood on her clothing, and became limp—all of which are visible signs of a medical emergency. [\*\*\*51] According to the People, these facts demonstrate that Carpenter knew Kiera was having a medical emergency, but she willfully failed to seek medical assistance.

<sup>5</sup> Although [Cooley](#) involved a determination of probable cause by a superior court in a sexually violent predator case rather than a preliminary hearing in a criminal case, the Supreme Court concluded that the standard of review for each is the same. ([Cooley, supra, 29 Cal.4th at p. 257.](#))

Although we have concluded there is no categorical preclusion of prebirth evidence, some of the prebirth evidence relied on by the People still raises delicate evidentiary issues because it relates directly to Carpenter's protected conduct. For example, any statements from Carpenter's friends and family expressing their opinions, *before* Kiera's birth, that merely having a home birth is dangerous go directly to Carpenter's protected conduct in choosing to have an unattended home birth. These statements are less directly relevant (if at all) to the question of Carpenter's subjective awareness of the specific danger to Kiera's life *after* she was born. And even if relevant, the admission of this evidence at trial could create a risk of conviction on the prohibited theory that Carpenter chose to give birth at home with knowledge of the risks, raising a potential admissibility issue under [Evidence Code section 352](#). Many of Carpenter's own prebirth text messages raise similar evidentiary issues because they also go to her mental state with respect to her [\*\*\*52] protected decision to give birth at home on her own. We do not decide these evidentiary questions, however, because we do not need to rely on any of this evidence to resolve the probable cause question before us.

We conclude that the evidence of Carpenter's statements about what happened *after* Kiera was born constitutes probable cause in support of the subjective knowledge element of the implied malice murder charge. Carpenter told Officer O'Neill that after she gave birth, "the baby was not breathing, [and] possibly had a nasal passage blockage." She told Detective Malone that [\*1309] "[t]he baby was crying, and she cut the umbilical cord using medical scissors and put some cloth over the end of the umbilical cord and tried to start nursing the baby. And at that point, the baby seemed like she was having trouble breathing and started turning blue, so she started giving the baby CPR but it wasn't working."

Carpenter argues in a footnote that we should ignore Detective Malone's testimony on this point because it is contrary to other evidence presented at

the hearing, though she claims not to be asking us to reweigh the evidence to make a credibility determination. She attempts to thread the needle [\*\*\*53] between the two by contending that because the magistrate did not rely on this portion of the record, we may not do so either. She is incorrect. As we have explained, the magistrate made a legal conclusion regarding the sufficiency of the evidence, and we are therefore required to conduct an independent review of the entire record to determine whether the prosecution presented evidence demonstrating probable cause. ([Valenzuela, supra, 73 Cal.App.5th at p. 499](#).)

In conducting that review, we conclude that the testimony from Detective Malone and Officer O'Neill about Carpenter's statements is sufficient to demonstrate her subjective awareness of the danger to life for purposes of the preliminary hearing. A baby that is struggling to breathe and turning blue is clearly in distress and in need of medical attention, and Carpenter's [\*\*694] awareness of this fact is further demonstrated by her attempt to administer CPR to Kiera.<sup>6</sup> Carpenter argues that the People improperly rely on the reasonable person standard instead of Carpenter's own subjective awareness, as required to show implied malice. But under these circumstances, "[i]t takes no leap of logic ... to conclude that because anyone would be aware of the risk, [Carpenter] was aware [\*\*\*54] of the risk." ([People v. Moore \(2010\) 187 Cal.App.4th 937, 941 \[114 Cal. Rptr. 3d 540\] \(Moore\)](#) [concluding that record contained substantial evidence that the defendant acted with

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<sup>6</sup> [CA\(18\) \(18\)](#) Although Carpenter also told law enforcement that she could not call 911 because her phone was dead, it is unclear whether she meant that her phone was dead when she woke up on November 15, or it was already dead right after she gave birth when Kiera was "not breathing," she was "turning blue," and the CPR "wasn't working," and Carpenter passed out before she was able to charge her phone enough to dial 911. However, [HN18](#) at a probable cause hearing, "[e]very legitimate inference that may be drawn from the evidence must be drawn in favor of the information." ([Rideout v. Superior Court \(1967\) 67 Cal.2d 471, 474 \[62 Cal. Rptr. 581, 432 P.2d 197\] \(Rideout\)](#).) We must therefore infer that Carpenter could have called 911 but did not do so.

implied malice].)

Though a closer call, we conclude that Carpenter's subjective awareness of the danger to Kiera's life can also be inferred from the fact that the infant was bleeding from her umbilical stump after Carpenter cut the cord. Carpenter did not expressly state that she was aware Kiera was bleeding, but that fact can be inferred from the blood that was on the piece of tape she applied [\*1310] to the umbilical stump, which had pooled in the infant's diaper and seeped onto her blanket. Dr. Park testified that the only place on Kiera's body the blood could have come from was where her umbilical cord had been cut. If an hours-old, prematurely born infant continues to bleed from her umbilical stump despite attempts to stop that bleeding, one can infer that any parent would be aware that the situation presented a medical emergency. (See [Moore, supra, 187 Cal.App.4th at p. 941.](#))

We recognize that there is more than one reasonable interpretation of the evidence presented at the hearing regarding Kiera's blood loss. It is possible, for example, that there was very little bleeding until after Carpenter passed out, so she did not [\*\*\*55] actually witness an amount of bleeding that would lead her to believe Kiera was experiencing a medical emergency. Or, as Dr. Park admitted, it would be reasonable to think that Carpenter, who had been bleeding profusely herself after giving birth, had transferred some of her own blood to Kiera's diaper before putting it on the infant. Again, however, we must draw every legitimate inference that can be drawn from the evidence in favor of the prosecution. ([Rideout, supra, 67 Cal.2d at p. 474.](#)) The question at this point is not whether the prosecution's evidence will support a conviction, or even whether it is persuasive, but whether it demonstrates probable cause. (See [id. at p. 475.](#))

The People also contend that the article found at Carpenter's home containing instructions on what to do in an emergency home birth, including a

warning not to cut the umbilical cord, further demonstrates her subjective awareness that cutting the cord presented a danger to human life. Carpenter argues that the inference the People seek to draw from the presence of this article in her apartment is purely speculative, pointing to the fact that the prosecutor herself admitted at the preliminary hearing that, “of course I have no idea and I cannot speculate [\*\*\*56] whether or not [\*\*695] she actually read [the article.]” But other evidence presented at the hearing supports the inference that Carpenter read the article.

For example, Carpenter told Shannon that she had previously read online about “the percentages of the bad things happening during home births”; she told Ken that she had been “studying” for months in preparation for a home birth; and she appears to have tabbed or highlighted other reading materials related to parenting that were found at her apartment. At this stage, such facts are sufficient to draw the inference that Carpenter also read the article, which she appears to have printed from a website, warning not to cut the umbilical cord before seeking medical assistance. There is thus “some rational ground for assuming the possibility” that there will be sufficient evidence at trial showing her subjective awareness of the risk to Kiera's life. ([Valenzuela, supra, 73 Cal.App.5th at p. 504.](#))

[\*1311]

We agree with Carpenter that the situations in [People v. Burden \(1977\) 72 Cal.App.3d 603 \[140 Cal. Rptr. 282\]](#) and [People v. Latham \(2012\) 203 Cal.App.4th 319 \[137 Cal. Rptr. 3d 443\]](#), which the People analogize to this case, are easily distinguishable from the facts presented here. The father in [Burden](#) allowed his five-month-old son to slowly die of starvation and admitted that he did not feed the child or do anything [\*\*\*57] to help him because he “just didn't care” if his son lived or died. ([Burden, at p. 609.](#)) This, along with photographs showing that the infant was obviously “in a state of terminal starvation” when he died, was sufficient to support a finding of implied

malice. (*Id.* at p. 620.) In *Latham*, a diabetic 17 year old died of diabetic ketoacidosis after her parents allowed her condition to deteriorate over the course of five days without seeking medical treatment. (*Latham*, at p. 323.) The court found that there was substantial evidence to support the parents' conviction for implied malice murder because the girl had been hospitalized in the past, the parents had received training to recognize the symptoms of diabetic ketoacidosis, multiple people who saw the girl in the days leading up to her death told her parents she needed to go to the hospital, and testimony indicated that the parents did not seem to care about their daughter's condition. (*Id.* at pp. 328–331.)

Carpenter's actions, or alleged lack thereof, do not come close to showing the same “lack of concern as to the victim's survival” that was present in *Burden* and *Latham*, as the People argue. The conduct of a father who watches his five-month-old infant slowly starve to death over the course of several weeks—or [\*\*\*58] of parents who watch their diabetic 17-year-old daughter slip into a coma over the course of five days—is fundamentally different from a mother who has just endured the pain and trauma of going through childbirth prematurely and alone, yet still attempts to bathe, feed, and clothe her newborn before apparently passing out due to sheer exhaustion and blood loss.

**CA(19) (19)** Nevertheless, *HN19* the court “may not substitute its own personal belief as to the ultimate determination to be made at trial for that of a reasonable person evaluating the evidence.” (*Cooley, supra*, 29 Cal.4th at p. 258.) Unless the prosecution has presented evidence that is “inherently implausible,” its witnesses were “conclusively impeached,” or “no reasonable person would find [the witnesses] credible,” we may not reject its evidence at this stage. (*Ibid.*) We are not presented with such a situation here, and we therefore accept the prosecution's evidence [\*\*\*696] as sufficient to show probable cause of Carpenter's subjective awareness.

IV

**CA(20) (20)** The same facts that support our conclusion that the prosecution has presented evidence of implied malice murder sufficient to show probable [\*1312] cause support the same conclusion as to the charge of felony child endangerment under *Penal Code section 273a, subdivision (a)*. *HN20* This statute [\*\*\*59] applies to a person who “under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered ...” (*Pen. Code, § 273a, subd. (a)*.)

For the same reasons we have already explained, we reject the People's assertion that Carpenter caused or permitted her infant to suffer unjustifiable physical pain by being unable to successfully breastfeed her within hours of her birth and by texting others before calling 911 after she awoke to her lifeless baby. However, the People have presented evidence that Carpenter cut the baby's umbilical cord without properly securing the stump, allowed it to continue bleeding, saw that Kiera was struggling to breathe and that CPR was not working, and failed to call 911. The evidence presented provides “some rational ground for assuming the possibility” that these acts and omissions by Carpenter were taken willfully under [\*\*\*60] circumstances likely to result in death or injury or endanger Kiera's health—and did, in fact, result in Kiera's death. (*San Nicolas, supra*, 34 Cal.4th at p. 654.) We therefore find that the People have made the exceedingly low showing required to defeat the *section 995* motion as to the felony child endangerment charge.

V

Carpenter also contends that construing *Penal Code sections 187* and *273a* to permit prosecution of this case renders those statutes unconstitutionally vague

and a violation of her federal due process rights as well as her right to privacy and equal protection under the California constitution.

**CA(21) (21)** Her first argument is that [Penal Code sections 187](#) and [273a](#) fail to provide notice to a pregnant person of what conduct constitutes murder or felony child endangerment if they choose to have an unattended home birth and the outcome “is ultimately not positive.” The United States Supreme Court has explained that [HN21](#) laws must “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly” because, among other reasons, “[v]ague laws may trap the innocent by not providing fair warning.” (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108 [33 L. Ed. 2d 222, 92 S. Ct. 2294].) We agree with the People that a person of ordinary intelligence would know that intentionally failing to call 911 when their infant is **\*\*\*61** struggling to breathe and bleeding after their umbilical stump has been cut without being properly secured is an **[\*1313]** abdication of parental duty that could result in criminal penalty. To the extent the People are able to prove the set of facts they allege based on Carpenter's acts and omissions after Kiera was born, we conclude that the application of the statutes is not impermissibly vague.

Carpenter next argues that prosecution of this case violates her rights to **\*\*\*697** privacy and equal protection under [article I, section 1.1 of the California Constitution](#), which is titled “Reproductive Freedom” and provides: “The state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives. This section is intended to further the constitutional right to privacy guaranteed by [Section 1](#), and the constitutional right to not be denied equal protection guaranteed by [Section 7](#). Nothing herein narrows or limits the right to privacy or equal protection.” According to Carpenter, the People are

prosecuting her for choosing to have a home birth, which is a right protected under California law.

The People, on the **\*\*\*62** other hand, claim to “fully recognize and honor the rights clarified and strengthened in [Health and Safety Code sections 123462](#) and [123467](#)” and contend that Carpenter is not being prosecuted for her choice to have a home birth. Rather, she is being prosecuted for the acts and omissions that jeopardized Kiera's life after she was born and then experienced a medical emergency.

**CA(22) (22)** We again agree with the People. Carpenter's argument on this point fails for the same reasons set forth in part II, *ante*. [HN22](#) California law protects Carpenter from interference with her reproductive freedom, including her right to have a home birth and make other decisions about her childbirth, but this does not mean the state also immunizes all postbirth acts and omissions related to those decisions that would otherwise be subject to criminal or civil penalty. We thus conclude that prosecution of this case does not violate Carpenter's constitutional rights.

## VI

We agree with Carpenter that she is not “similar to a parent who gives birth and abandons her baby in a dumpster,” an analogy made by the People which she fairly describes as unfounded, inflammatory, and unhelpful. But this is also not a case where the baby's death is attributable solely to causes that **\*\*\*63** occurred in utero, which would render the prosecution prohibited under [section 123467](#). Regardless of the difference in the People's characterization of their argument at the time of the preliminary hearing and now on appeal, there was evidence presented at the hearing of Carpenter's conduct after her **[\*1314]** daughter's birth sufficient to find probable cause to bind her over on the charges filed against her under current law.

We find the Supreme Court's words in [Watson](#) fitting here: “We do not suggest that the foregoing facts conclusively demonstrate implied malice, or

that the evidence necessarily is sufficient to convict defendant of second degree murder. On the contrary, it may be difficult for the prosecution to carry its burden of establishing implied malice to the moral certainty necessary for a conviction. Moreover, we neither contemplate nor encourage the routine charging of second degree murder in [these types of] cases. We merely determine that the evidence before us is sufficient to uphold the second degree murder counts in the information, and to permit the prosecution to prove, if it can, the elements of second degree murder.” ([Watson, supra, 30 Cal.3d at p. 301.](#)) Nothing more is required to survive a *Penal Code* section 995 challenge, and we therefore [\*\*\*64] deny Carpenter's petition at this early stage of the proceedings.

#### DISPOSITION

The petition is denied. The stay issued by this court on March 14, 2023, is vacated.

McConnell, P. J., and Huffman, J., concurred.

Petitioner's petition for review by the Supreme Court was denied October 11, 2023, S281733.



Questioned

As of: October 18, 2026 1:40 AM Z

*Cleveland Bd. of Educ. v. LaFleur*

Supreme Court of the United States

October 15, 1973, Argued ; January 21, 1974, Decided \*

No. 72-777

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\* Together with No. 72-1129, *Cohen v. Chesterfield County School Board et al.*, on certiorari to the United States Court of Appeals for the Fourth Circuit.

**Reporter**

414 U.S. 632 \*; 94 S. Ct. 791 \*\*; 39 L. Ed. 2d 52 \*\*\*; 1974 U.S. LEXIS 44 \*\*\*\*; 6 Fair Empl. Prac. Cas. (BNA) 1253; 7 Empl. Prac. Dec. (CCH) P9072; 67 Ohio Op. 2d 126

CLEVELAND BOARD OF EDUCATION ET AL.  
v. LaFLEUR ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

**Disposition:** [No. 72-777, 465 F.2d 1184](#), affirmed; [No. 72-1129, 474 F.2d 395](#), reversed and remanded.

**Core Terms**

teacher, pregnancy, pregnant, school board, maternity leave, teach, irrebuttable presumption, mandatory, classroom, termination, school year, eligibility, semester, constitutional liberty, classification, notice, birth, cutoff date, certificate, impairment, return to work, state interest, bear a child, invalid, attain, unfit

**Case Summary****Procedural Posture**

Petitioner teachers filed claims against respondent school boards under [42 U.S.C.S. § 1983](#), challenging the constitutionality of the maternity leave rules. The United States Court of Appeals for the Fourth Circuit upheld the constitutionality of the challenged regulations, but the United States Court of Appeals for the Sixth Circuit ruled similar regulations were unconstitutional. The Court granted certiorari.

**Overview**

The school boards' maternity leave regulations required arbitrary dates for when a pregnant teacher had to cease teaching due to her pregnancy. The Court held that the freedom of personal choice in matters of marriage and family life was one of the

liberties protected by the [Due Process Clause of the Fourteenth Amendment](#). The arbitrary cutoff dates embodied in the mandatory leave rules had no rational relationship to the valid state interest of preserving continuity of instruction, and allowing the individual teacher the choice to set firm dates later in pregnancy would serve the boards' objectives, while not violating the teachers' exercise of constitutionally protected freedom. The Court held that while it might be easier for the school boards to conclusively presume that all pregnant women were unfit to teach past a certain date, administrative convenience alone was insufficient to make valid what otherwise was unconstitutional. The Court also held that any school board regulations which arbitrarily limited the teachers' right to return to teaching suffered from the same constitutional deficiencies that plagued the presumption in the termination rules.

**Outcome**

The Court affirmed the judgment which had ruled the regulations unconstitutional, and reversed the judgment which held the regulations constitutional.

**LexisNexis® Headnotes**

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Labor & Employment Law > ... > Scope & Definitions > Employee Leave Requirements > Adoption & Childbirth

Constitutional Law > Substantive Due Process > Privacy > General Overview

**[HN1](#) Fundamental Rights, Procedural Due**

## Process

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](#). There is a right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms. Because public school maternity leave rules directly affect one of the basic civil rights of man, the [Due Process Clause of the Fourteenth Amendment](#) requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty.

Education Law > Administration &  
Operation > Tuition > Residency  
Classifications

Evidence > Inferences &  
Presumptions > Presumptions > Rebuttal of  
Presumptions

Constitutional Law > ... > Fundamental  
Rights > Procedural Due Process > General  
Overview

Constitutional Law > ... > Fundamental  
Rights > Procedural Due Process > Scope of  
Protection

Education Law > Administration &  
Operation > Tuition > Tuition Reductions &  
Refunds

### [HN2](#) Tuition, Residency Classifications

Permanent irrebuttable presumptions have long been disfavored under the [Due Process Clauses of the Fifth](#) and [Fourteenth Amendments](#).

Constitutional Law > ... > Fundamental  
Rights > Procedural Due Process > Scope of  
Protection

Constitutional Law > Bill of  
Rights > Fundamental Rights > General  
Overview

### [HN3](#) Procedural Due Process, Scope of Protection

The Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the [Bill of Rights](#) in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Constitutional Law > Equal  
Protection > Gender & Sex

### [HN4](#) Equal Protection, Gender & Sex

While it might be easier for school boards to conclusively presume that all pregnant women are unfit to teach past the fourth or fifth month or even the first month, of pregnancy, administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law. The [Fourteenth Amendment](#) requires the school boards to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty, in support of their legitimate goals.

Constitutional Law > Substantive Due  
Process > Privacy > General Overview

Governments > Local  
Governments > Ordinances & Regulations

Labor & Employment Law > ... > Scope &  
 Definitions > Employee Leave  
 Requirements > Adoption & Childbirth

## **HN5 Substantive Due Process, Privacy**

Mandatory termination provisions of maternity regulations violate the [Due Process Clause of the Fourteenth Amendment](#) where their use of unwarranted conclusive presumptions seriously burden the exercise of protected constitutional liberty.

## **Lawyers' Edition Display**

### **Summary**

These cases present issues as to the validity under the [due process clause of the Fourteenth Amendment](#) of school regulations dealing with maternity leaves of teachers. In No. 72-777, certain pregnant teachers instituted civil rights actions in the United States District Court for the Northern District of Ohio challenging the constitutionality of a maternity leave rule of the Board of Education of Cleveland, Ohio, which provided that a pregnant teacher must take maternity leave beginning 5 months before the expected birth of her child, that the teacher give notice of her pregnancy at least 2 weeks prior to the time when she must begin her maternity leave, and that she could become eligible for re-employment no earlier than the beginning of the next school semester after her child was 3 months old, provided that a doctor issued a certificate attesting to the teacher's health. The District Court found against the teachers ([326 F Supp 1208](#)), but the United States Court of Appeals for the Sixth Circuit reversed, finding that the Cleveland rule was in violation of the [equal protection clause of the Fourteenth Amendment](#) ([465 F2d 1184](#)). In No. 72-1129, a pregnant teacher instituted a civil rights action in the United States District Court for the Northern District of Virginia challenging the constitutionality of a maternity leave rule of the School Board of Chesterfield County, Virginia which contained notice (6

months) and mandatory termination (4 months) provisions similar to the Cleveland rule, but which provided that the teacher would be eligible for re-employment upon her submission of a notice from a doctor attesting to her physical fitness, with her re-employment guaranteed no later than the first day of the school year following the date when she became eligible. The District Court held that the rule violated the [equal protection clause](#) ([326 F Supp 1159](#)), but the United States Court of Appeals for the Fourth Circuit, after first affirming, on rehearing reversed and upheld the constitutionality of the rule ([474 F2d 395](#)).

On certiorari, the United States Supreme Court affirmed as to No. 72-777 and reversed and remanded as to No. 72-1129. In an opinion by Stewart, J., expressing the view of five members of the court, it was held that (1) although the provisions for advance notice in the maternity leave rules were rational and perhaps necessary for continuity of instruction, nevertheless the mandatory employment termination provisions violated the [due process clause of the Fourteenth Amendment](#) as not being necessary for continuity of instruction or for keeping physically unfit teachers out of the classroom, and as establishing a conclusive presumption of the physical incapacity of the teacher after the fourth or fifth month of pregnancy, which presumption was neither necessarily nor universally true, and (2) the Cleveland provision barring a teacher's return to employment until after her child was 3 months old was similarly violative of the due process clause, but the Virginia re-employment rule was not unconstitutional.

Douglas, J., concurred in the result.

Powell, J., concurring in the result, stated that the issues should be decided in terms of equal protection of the laws, and that under that principle the maternity leave rules were invalid as not having a rational basis.

Rehnquist, J., joined by Burger, Ch. J., dissented on

the grounds that the majority's reliance on the invalidity of irrebuttable presumptions endangered the validity of countless state and federal statutes, and that if any generally applicable rule concerning mandatory termination of employment was permissible, the rules in the instant case were not invalid.

## Headnotes

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LAW §745 > teachers -- maternity leave -- conclusive presumption of unfitness -- > Headnote:

[LEdHN\[1\]](#) [1] [LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C]

Mandatory employment termination provisions contained in the maternity leave rules of two school districts--one district's rule requiring termination of a teacher's employment at the end of the fourth month of her pregnancy and the other district's rule requiring termination at the end of the fifth month--are violative of the [due process clause of the Fourteenth Amendment](#), since neither the necessity for continuity of instruction nor the state interest in keeping physically unfit teachers out of the classroom can justify such sweeping mandatory leave regulations; the rules' conclusive presumptions that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing her job are neither necessarily nor universally true, unduly penalize a female teacher for deciding to bear a child, and thus violate the due process clause.

ERROR §21.9 > conflict of decisions -- maternity leave rules -- > Headnote:

[LEdHN\[2\]](#) [2]

The United States Supreme Court will grant certiorari to resolve a conflict between United States Courts of Appeals regarding the

constitutionality of mandatory maternity leave rules for public school teachers.

LAW §528.5 > PRIVACY §1 > due process -- marriage and family -- > Headnote:

[LEdHN\[3\]](#) [3]

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](#); there is a right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

LAW §745 > teachers -- maternity leave rules -- > Headnote:

[LEdHN\[4\]](#) [4]

Under the [due process clause of the Fourteenth Amendment](#), public school maternity leave rules must not needlessly, arbitrarily, or capriciously impinge upon a teacher's constitutional liberty to make decisions concerning child bearing.

SCHOOLS §1 > teachers -- maternity leave rules -- continuity of instruction -- > Headnote:

[LEdHN\[5\]](#) [5]

Continuity of instruction is a significant and legitimate educational goal, and regulations requiring pregnant teachers to provide early notice of their condition to school authorities facilitate administrative planning toward the important objectives of continuity.

SCHOOLS §1 > teachers -- maternity leave rules -- continuity of instruction -- > Headnote:

[LEdHN\[6\]](#) [6]

Although advance notice provisions of maternity leave rules of two school districts--one district's rules requiring a teacher to give notice of her pregnancy 5 months and 2 weeks before the expected birth of the child and the other district's rules requiring 6 months notice--are wholly rational and may well be necessary to serve the objective of continuity of instruction, nevertheless the absolute requirements of termination of teaching employment at the end of the fourth month of pregnancy under the second rule, and at the end of the fifth month under the first rule, are not necessary to serve that objective.

SCHOOLS §1 > teachers -- physically unfit -- > Headnote:

[LEdHN\[7\]](#) [7]

The objective of keeping physically unfit teachers out of a classroom is legitimate, both on educational and safety grounds.

LAW §101 > Bill of Rights -- due process clause -- purpose -- > Headnote:

[LEdHN\[8\]](#) [8]

The [Bill of Rights](#) in general, and the [due process clause of the Fourteenth Amendment](#) in particular, were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

LAW §745 > SCHOOLS §1 > teachers -- maternity leave rule -- physically unfit -- > Headnote:

[LEdHN\[9\]](#) [9]

Although school boards have an interest in devising prompt and efficient procedures to achieve their legitimate objectives concerning the physical fitness of pregnant teachers to teach, administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law under the [Fourteenth Amendment](#).

LAW §745 > teachers -- return from maternity leave -- > Headnote:

[LEdHN\[10\]](#) [10]

That portion of a school district's maternity leave rule which bars a teacher from returning to work until her child reaches the age of three months is wholly arbitrary and irrational, and hence violates the [due process clause of the Fourteenth Amendment](#); the age limitation serves no legitimate state interest, unnecessarily penalizes the female teacher for asserting her right to bear children, and establishes an irrebuttable presumption that no mother is physically fit to return to work until her child reaches the age of three months, a presumption which is neither necessarily nor universally true.

LAW §745 > teachers -- return from maternity leave -- > Headnote:

[LEdHN\[11\]](#) [11]

A school district's maternity leave rules which, in regard to re-employment, provide that the teacher becomes eligible for re-employment upon submission of a medical certificate from her physician and that her return to work is guaranteed no later than the beginning of the next school year following the eligibility determination, is not

unconstitutional under the [due process clause of the Fourteenth Amendment](#), the medical certificate being both a reasonable and narrow method of protecting the school board's interest in teacher fitness, while the possible deferring of return until the next school year serves the goal of preserving continuity of instruction.

## Syllabus

Pregnant public school teachers brought these actions under [42 U. S. C. § 1983](#) challenging the constitutionality of mandatory maternity leave rules of the Cleveland, Ohio (No. 72-777), and Chesterfield County, Virginia (No. 72-1129), School Boards. The Cleveland rule requires a pregnant school teacher to take unpaid maternity leave five months before the expected childbirth, with leave application to be made at least two weeks before her departure. Eligibility to return to work is not accorded until the next regular semester after her child is three months old. The Chesterfield County rule requires the teacher to leave work at least four months, and to give notice at least six months, before the anticipated childbirth. Re-employment is guaranteed no later than the first day of the school year after the date she is declared re-eligible. Both schemes require a physician's certificate of physical fitness prior to the teacher's return. Each Court of Appeals reversed the court below, one holding [\*\*\*\*2] the Chesterfield County maternity leave rule constitutional, the other holding the Cleveland rule unconstitutional. *Held*:

1. The mandatory termination provisions of both maternity rules violate the [Due Process Clause of the Fourteenth Amendment](#). Pp. 639-648.

(a) The arbitrary cutoff dates (which obviously come at different times of the school year for different teachers) have no valid relationship to the State's interest in preserving continuity of instruction, as long as the teacher is required to give substantial advance notice that she is pregnant. Pp.

639-643.

(b) The challenged provisions are violative of due process since they create a conclusive presumption that every teacher who is four or five months pregnant is physically incapable of continuing her duties, whereas any such teacher's ability to continue past a fixed pregnancy period is an individual matter; and the school boards' administrative convenience alone cannot suffice to validate the arbitrary rules. Pp. 643-648.

2. The Cleveland three-month return provision also violates due process, being both arbitrary and irrational. It creates an irrebuttable presumption that the mother (whose good health must be [\*\*\*\*3] medically certified) is not fit to resume work, and it is not germane to maintaining continuity of instruction, as the precise point a child will reach the relevant age will occur at a different time throughout the school year for each teacher. Pp. 648-650.

3. The Chesterfield County return rule, which is free of any unnecessary presumption, comports with due process requirements. P. 650.

**Counsel:** Charles F. Clarke argued the cause and filed a brief for petitioners in No. 72-777. Philip J. Hirschkop argued the cause for petitioner in No. 72-1129. With him on the brief was John B. Mann.

Jane M. Picker argued the cause for respondents in No. 72-777. With her on the brief were Rita Page Reuss and Sidney Picker, Jr. Samuel W. Hixon III argued the cause for respondents in No. 72-1129. With him on the brief was Frederick T. Gray. <sup>+</sup>

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<sup>+</sup> Andrew J. Ruzicho filed a brief for the International Association of Official Human Rights Agencies as amicus curiae urging affirmance in No. 72-777. Philip J. Tierney filed a brief for the Maryland Commission on Human Relations as amicus curiae urging reversal in No. 72-1129. Briefs of amici curiae urging affirmance in No. 72-1129 were filed by Andrew P. Miller, Attorney General, and Walter H. Ryland, Assistant Attorney General, for the Commonwealth of Virginia, and by Gordon Dean Booth, Jr., Richard S. Maurer, and Sidney F. Davis for Delta Air Lines, Inc. Briefs of amici curiae urging reversal in No. 72-1129 and affirmance in No. 72-777 were filed by Solicitor General Bork, Assistant Attorney General

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**Judges:** Stewart, J., delivered the opinion of the Court, in which Brennan, White, Marshall, and Blackmun, JJ., joined. Douglas, J., concurred in the result. Powell, J., filed an opinion concurring in the result, post, p. 651. Rehnquist, J., filed a dissenting opinion, in which Burger, C. J., joined, post, p. 657.

**Opinion by:** STEWART

## Opinion

[\*634] [\*\*793] [\*\*\*57] MR. JUSTICE STEWART delivered the opinion of the Court.

[LEdHN\[1\]](#) [1]The respondents in No. 72-777 and the petitioner in No. 72-1129 are female public school teachers. During the 1970-1971 school year, each informed her local school board that she was pregnant; each was compelled by a mandatory maternity leave rule to quit her job without pay several months before the [\*\*794] expected birth of her child. These cases call upon us to decide the constitutionality of the school boards' rules.

I

Jo Carol LaFleur and Ann Elizabeth Nelson, the respondents in No. 72-777, are junior high school teachers employed by the Board of Education of Cleveland, Ohio. Pursuant to a rule first adopted in 1952, the school board requires every pregnant

school teacher to take maternity leave without pay, beginning five months before the expected birth of her child. Application for such leave must be [\*\*\*\*5] made no later than two weeks prior to the date of departure. A teacher on maternity leave is not allowed [\*635] to return to work until the beginning of the next regular school semester which follows the date when her child attains the age of three months. A doctor's certificate attesting to the health of the teacher is a prerequisite to return; an additional physical examination may be required. The teacher on maternity leave is not promised re-employment after the birth of the child; she is merely given priority in reassignment to a position for which she is qualified. Failure to comply with the mandatory maternity leave provisions is ground for dismissal.<sup>1</sup>

[\*\*\*\*\*6] [\*636] [\*\*\*58] Neither Mrs. LaFleur

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<sup>1</sup>The Cleveland rule provides:

"Any married teacher who becomes pregnant and who desires to return to the employ of the Board at a future date may be granted a maternity leave of absence without pay.

"APPLICATION A maternity leave of absence shall be effective not less than *five (5) months before the expected date* of the normal birth of the child. Application for such leave shall be forwarded to the Superintendent at least *two (2) weeks before the effective date of the leave of absence*. A leave of absence without pay shall be granted by the Superintendent for a period not to exceed *two (2) years*.

"REASSIGNMENT A teacher may return to service from maternity leaves not earlier than the *beginning of the regular school semester* which follows the child's age of *three (3) months*. In unusual circumstances, exceptions to this requirement may be made by the Superintendent with the approval of the Board. *Written request* for return to service from maternity leave must reach the Superintendent at least six (6) weeks prior to the beginning of the semester when the teacher expects to resume teaching and shall be accompanied by a doctor's certificate stating the health and physical condition of the teacher. The Superintendent may require an additional physical examination.

"When a teacher qualifies to return from maternity leave, she shall have priority in reassignment to a vacancy for which she is qualified under her certificate, but she shall not have prior claim to the exact position she held before the leave of absence became effective.

"A teacher's failure to follow the above rules for maternity leave of absence shall be construed as termination of contract or as grounds for dismissal." (Emphasis in original.)

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Pottinger, Louis F. Claiborne, Joseph T. Eddins, and Beatrice Rosenberg for the United States; by David Rubin and Jerry D. Anker for the National Education Assn. et al.; by Winn Newman and Ruth Weyand for the International Union of Electrical, Radio and Machine Workers, AFL-CIO; by Theodore R. Mann, Joseph B. Robison, Sylvia Roberts, Ruth Bader Ginsburg, Melvin L. Wulf, and John Litgenberg for the American Civil Liberties Union et al.; and by Paul O. H. Pigman for Margaret M. Broussard. Evelle J. Younger, Attorney General, Elizabeth Palmer, Assistant Attorney General, and Joanne Condas, Deputy Attorney General, filed a brief for the California Department of Human Resources Development as amicus curiae.

nor Mrs. Nelson wished to take an unpaid maternity leave; each wanted to continue teaching until the end of the school year.<sup>2</sup> Because of the mandatory maternity leave rule, however, each was required to leave her job in March 1971.<sup>3</sup> The two women then filed separate suits in the United States District Court for the Northern District of Ohio under [42 U.S.C. § 1983](#), challenging the constitutionality of the maternity leave rule. The District Court tried the cases together, and rejected the plaintiffs' arguments. [326 F.Supp. 1208](#). A divided panel of the United States Court of Appeals for the Sixth Circuit reversed, finding the Cleveland rule in violation of the [Equal Protection Clause of the Fourteenth Amendment](#).<sup>4</sup> [465 F.2d 1184](#).

**[\*\*795]** The petitioner in No. 72-1129, Susan Cohen, was employed by the School Board of Chesterfield County, Virginia. That school board's maternity leave regulation requires that a pregnant teacher leave work at least four months prior to the expected birth of her child. Notice **[\*637]** in writing must be given to the school board at least six months prior to the expected birth date. A teacher on maternity leave is declared re-eligible for employment when she submits written notice from a physician that she is physically fit for re-employment, and when she can give assurance that

care of the child will cause only minimal interference with her job responsibilities. The teacher is guaranteed re-employment **[\*\*\*\*8]** no later than the first day of the school year following the date upon which she is declared re-eligible.<sup>5</sup>

**[\*\*\*\*9] [\*638] [\*\*\*59]** Mrs. Cohen informed the Chesterfield County School Board in November 1970, that she was pregnant and expected the birth of her child about April 28, 1971.<sup>6</sup> She initially requested that she be permitted to continue teaching until April 1, 1971.<sup>7</sup> The school board rejected the

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<sup>5</sup> The Chesterfield County rule provides:

"MATERNITY PROVISIONS

"a. Notice in writing must be given to the School Board at least six (6) months prior to the date of expected birth.

"b. Termination of employment of an expectant mother shall become effective at least four (4) months prior to the expected birth of the child. Termination of employment may be extended if the superintendent receives written recommendations from the expectant mother's physician and her principal, and if the superintendent feels that an extension will be in the best interest of the pupils and school involved.

"c. Maternity Leave

"(1) Maternity leave must be requested in writing at the time of termination of employment.

"(2) Maternity leave will be granted only to those persons who have a record of satisfactory performance.

"(3) An individual will be declared eligible for re-employment when she submits written notice from her physician that she is physically fit for full-time employment and when she can give full assurance that care of the child will cause minimal interference with job responsibilities.

"(4) Re-employment will be guaranteed no later than the first day of the school year following the date that the individual was declared eligible for re-employment.

"(5) All personnel benefits accrued, including seniority, will be retained during maternity leave unless the person concerned shall have accepted other employment.

"(6) The school system will have discharged its responsibility under this policy after offering re-employment for the first vacancy that occurs after the individual has been declared eligible for re-employment."

<sup>6</sup> Mrs. Cohen's child was in fact born on May 2.

<sup>7</sup> Unlike the Cleveland rule, n. 1, *supra*, the Chesterfield County regulation allows the superintendent of schools to extend a teacher's

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<sup>2</sup> Mrs. LaFleur's child was born on July 28, 1971; Mrs. Nelson's child was born during August of that year.

<sup>3</sup> Effective February 1, 1971, the Cleveland regulation was amended to provide that only teachers with one year of continuous service qualified for maternity leave; teachers with less than one year were required to resign at the beginning of the fifth month of pregnancy. Since Mrs. Nelson had less than a year of service at the time she notified her principal that she was pregnant, the school board originally required her to resign her teaching position. The school board has since conceded that the February 1 amendment did not apply to Mrs. Nelson, since it was enacted after her contract of employment was executed. Pursuant to that concession, the board has placed Mrs. Nelson, like Mrs. LaFleur, on mandatory leave.

<sup>4</sup> **[\*\*\*\*7]** Chief Judge Phillips filed a separate opinion, dissenting in part and concurring in part. He felt that the portion of the challenged regulation requiring maternity leave at the beginning of the fifth month of pregnancy was constitutional; he agreed with the majority, however, that the three-month post-delivery waiting period before becoming eligible to return to teaching was unconstitutional.

request, as it did Mrs. Cohen's subsequent suggestion that she be allowed to teach until January 21, 1971, the end of the first school semester. Instead, she was required to leave her teaching job on December 18, 1970. She subsequently filed this suit under [42 U. S. C. § 1983](#) in the United States District Court for the Eastern District of Virginia. The District Court held that the school board regulation violates the [Equal Protection Clause](#), and granted appropriate relief. [326 F.Supp. 1159](#). A divided panel of the Fourth Circuit affirmed, but, on rehearing en banc, the Court of Appeals upheld the constitutionality of the challenged regulation in a 4-3 decision. [474 F.2d 395](#).

[LEdHN\[2\]](#) [2]We granted certiorari in both cases, [411 U.S. 947](#), in order to resolve the conflict between the Courts of Appeals regarding the constitutionality of such mandatory maternity leave rules for public school teachers.<sup>8</sup>

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employment beyond the normal cutoff date, if he determines that such action is in the best interests of the students and school involved. See n. 5, *supra*.

<sup>8</sup> [\*\*\*\*10] Apart from the cases here under review, there are at least three other reported federal appellate opinions dealing with the constitutionality of mandatory maternity leave regulations. Compare [Green v. Waterford Board of Education](#), [473 F.2d 629](#) (CA2), and [Buckley v. Coyle Public School System](#), [476 F.2d 92](#) (CA10) (both invalidating mandatory leave rules for pregnant public school teachers) with [Schattman v. Texas Employment Comm'n](#), [459 F.2d 32](#) (CA5) (upholding a leave policy of a state agency).

For opinions of the district courts dealing with mandatory maternity leaves, see, e. g., [Heath v. Westerville Board of Education](#), [345 F.Supp. 501](#) (SD Ohio); [Pocklington v. Duval County School Board](#), [345 F.Supp. 163](#) (MD Fla.); [Bravo v. Board of Education of the City of Chicago](#), [345 F.Supp. 155](#) (ND Ill.); [Williams v. San Francisco Unified School District](#), [340 F.Supp. 438](#) (ND Cal.); [Seaman v. Spring Lake Park Independent School District](#), [363 F.Supp. 944](#) (Minn.); [Monell v. Department of Social Services](#), [357 F.Supp. 1051](#) (SDNY).

Cf. [Struck v. Secretary of Defense](#), [460 F.2d 1372](#) (CA9), vacated and remanded to consider the issue of mootness, [409 U.S. 1071](#); [Gutierrez v. Laird](#), [346 F.Supp. 289](#) (DC); [Robinson v. Rand](#), [340 F.Supp. 37](#) (Colo.) (all dealing with Air Force regulations requiring separation of pregnant personnel).

The practical impact of our decision in the present cases may have

[\*\*\*\*11] [\*639] [\*\*796] [\*\*\*60] II

[LEdHN\[3\]](#) [3]This Court has long recognized that [HN1](#) freedom of personal choice in matters of marriage and family life is one of the liberties protected by the [Due Process Clause](#) [\*640] of the [Fourteenth Amendment](#). [Roe v. Wade](#), [410 U.S. 113](#); [Loving v. Virginia](#), [388 U.S. 1, 12](#); [Griswold v. Connecticut](#), [381 U.S. 479](#); [Pierce v. Society of Sisters](#), [268 U.S. 510](#); [Meyer v. Nebraska](#), [262 U.S. 390](#). See also [Prince v. Massachusetts](#), [321 U.S. 158](#); [Skinner v. Oklahoma](#), [316 U.S. 535](#). As we noted in [Eisenstadt v. Baird](#), [405 U.S. 438, 453](#), there is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

[LEdHN\[4\]](#) [4]By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these

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been somewhat lessened by several recent developments. At the time that the teachers in these cases were placed on maternity leave, Title VII of the Civil Rights Act of 1964, 78 Stat. 253, [42 U. S. C. § 2000e et seq.](#), did not apply to state agencies and educational institutions. [42 U. S. C. §§ 2000e \(b\)](#) and [2000e-1](#). On March 24, 1972, however, the Equal Employment Opportunity Act of 1972 amended Title VII to withdraw those exemptions. Pub. L. 92-261, 86 Stat. 103. Shortly thereafter, the Equal Employment Opportunity Commission promulgated guidelines providing that a mandatory leave or termination policy for pregnant women presumptively violates Title VII. [29 CFR § 1604.10](#), [37 Fed. Reg. 6837](#). While the statutory amendments and the administrative regulations are, of course, inapplicable to the cases now before us, they will affect like suits in the future.

In addition, a number of other federal agencies have promulgated regulations similar to those of the Equal Employment Opportunity Commission, forbidding discrimination against pregnant workers with regard to sick leave policies. See, e. g., [5 CFR § 630.401 \(b\)](#) (Civil Service Commission); [41 CFR § 60-20.3 \(g\)](#) (Office of Federal Contract Compliance). See generally Koontz, Childbirth and Child Rearing Leave: Job-Related Benefits, 17 N. Y. L. F. 480, 487-490; Comment, Love's Labors Lost: New Conceptions of Maternity Leaves, 7 Harv. Civ. Rights-Civ. Lib. L. Rev. 260, 280-281. We, of course, express no opinion as to the validity of any of these regulations.

protected freedoms. Because public school maternity leave rules directly affect "one of the basic civil rights of man," [Skinner v. Oklahoma, supra, at 541](#), [\*\*\*\*12] the [Due Process Clause of the Fourteenth Amendment](#) requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty. The question before us in these cases is whether the interests advanced in support of the rules of the Cleveland and Chesterfield County School Boards can justify the particular procedures they have adopted.

The school boards in these cases have offered two essentially overlapping explanations for their mandatory maternity leave rules. First, they contend that the firm cutoff dates are necessary to maintain continuity of classroom instruction, [\*\*797] since advance knowledge of when [\*641] a pregnant teacher must leave facilitates the finding and hiring of a qualified substitute. Secondly, the school boards seek to justify their maternity rules by arguing that at least some teachers become physically incapable of adequately performing certain of their duties during the latter part of pregnancy. By keeping the pregnant teacher [\*\*\*61] out of the classroom during these final months, the maternity leave rules are said to protect the health of the teacher and her unborn child, while at the same time assuring [\*\*\*\*13] that students have a physically capable instructor in the classroom at all times.<sup>9</sup>

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<sup>9</sup>The records in these cases suggest that the maternity leave regulations may have originally been inspired by other, less weighty, considerations. For example, Dr. Mark C. Schinnerer, who served as Superintendent of Schools in Cleveland at the time the leave rule was adopted, testified in the District Court that the rule had been adopted in part to save pregnant teachers from embarrassment at the hands of giggling schoolchildren; the cutoff date at the end of the fourth month was chosen because this was when the teacher "began to show." Similarly, at least several members of the Chesterfield County School Board thought a mandatory leave rule was justified in order to insulate schoolchildren from the sight of conspicuously pregnant women. One member of the school board thought that it was "not good for the school system" for students to view pregnant teachers, "because some of the kids say, my teacher swallowed a water melon, things like that."

[\*\*\*\*14] [LEdHN\[5\]](#) [5]It cannot be denied that continuity of instruction is a significant and legitimate educational goal. Regulations requiring pregnant teachers to provide early notice of their condition to school authorities undoubtedly facilitate administrative planning toward the important [\*642] objective of continuity. But, as the Court of Appeals for the Second Circuit noted in [Green v. Waterford Board of Education, 473 F.2d 629, 635](#):

"Where a pregnant teacher provides the Board with a date certain for commencement of leave . . . that value [continuity] is preserved; an arbitrary leave date set at the end of the fifth month is no more calculated to facilitate a planned and orderly transition between the teacher and a substitute than is a date fixed closer to confinement. Indeed, the latter . . . would afford the Board more, not less, time to procure a satisfactory long-term substitute." (Footnote omitted.)

[LEdHN\[6\]](#) [6]Thus, while the advance-notice provisions in the Cleveland and Chesterfield County rules are wholly rational and may well be necessary to serve the objective of continuity of instruction, the absolute requirements of termination at the end of the fourth or fifth [\*\*\*\*15] month of pregnancy are not. Were continuity the only goal, cut-off dates much later during pregnancy would serve as well as or better than the challenged rules, providing that ample advance notice requirements were retained. Indeed, continuity would seem just as well attained if the teacher herself were allowed to choose the date upon which to commence her leave, at least so long

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The school boards have not contended in this Court that these considerations can serve as a legitimate basis for a rule requiring pregnant women to leave work; we thus note the comments only to illustrate the possible role of outmoded taboos in the adoption of the rules. Cf. [Green v. Waterford Board of Education, 473 F.2d, at 635](#) ("Whatever may have been the reaction in Queen Victoria's time, pregnancy is no longer a dirty word").

as the decision were required to be made and notice given of it well in advance of the date selected.<sup>10</sup>

[\*\*\*62] In fact, since the fifth or sixth month of pregnancy [\*643] will obviously begin at different [\*\*\*\*16] times in the school year for different teachers, the present Cleveland and Chesterfield County rules may serve to hinder attainment of the very continuity objectives that they are purportedly [\*\*798] designed to promote. For example, the beginning of the fifth month of pregnancy for both Mrs. LaFleur and Mrs. Nelson occurred during March of 1971. Both were thus required to leave work with only a few months left in the school year, even though both were fully willing to serve through the end of the term.<sup>11</sup> Similarly, if continuity were the only goal, it seems ironic that the Chesterfield County rule forced Mrs. Cohen to leave work in mid-December 1970 rather than at the end of the semester in January, as she requested.

[LEdHN\[1A\]](#) [1A]We thus conclude that the arbitrary cutoff dates embodied in the mandatory leave rules before [\*\*\*\*17] us have no rational relationship to the valid state interest of preserving continuity of instruction. As long as the teachers are required to give substantial advance notice of their condition, the choice of firm dates later in pregnancy would serve the boards' objectives just as well, while imposing a far lesser burden on the women's exercise of constitutionally protected freedom.

[LEdHN\[7\]](#) [7]The question remains as to whether the cutoff dates at the beginning of the fifth and

sixth months can be justified on the other ground advanced by the school boards -- the necessity of keeping physically unfit teachers out of the classroom. There can be no doubt that such an objective is perfectly legitimate, both on educational and safety grounds. And, despite the plethora of conflicting medical testimony in these cases, we can assume, [\*644] *arguendo*, that at least some teachers become physically disabled from effectively performing their duties during the latter stages of pregnancy.

[LEdHN\[1B\]](#) [1B]The mandatory termination provisions of the Cleveland and Chesterfield County rules surely operate to insulate the classroom from the presence of potentially incapacitated pregnant teachers. But the question [\*\*\*\*18] is whether the rules sweep too broadly. See [Shelton v. Tucker, 364 U.S. 479](#). That question must be answered in the affirmative, for the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor -- or the school board's -- as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.

As the Court noted last Term in [Vlandis v. Kline, 412 U.S. 441, 446](#), "[HN2](#) permanent irrebuttable presumptions have long been disfavored under the [Due Process Clauses of the Fifth](#) and [Fourteenth Amendments](#)." In *Vlandis*, the Court declared unconstitutional, under the [Due Process Clause of the Fourteenth Amendment](#), a Connecticut statute mandating [\*\*\*63] an irrebuttable presumption of nonresidency for the purposes of qualifying for reduced tuition rates at a state university. We said in [\*\*\*\*19] that case, [id., at 452](#):

"It is forbidden by the Due Process Clause to deny

<sup>10</sup>It is, of course, possible that either premature childbirth or complications in the latter stages of pregnancy might upset even the most careful plans of the teacher, the substitute, and the school board. But there is nothing in these records to indicate that such emergencies could not be handled, as are all others, through the normal use of the emergency substitute teacher process. See [Green, supra, at 635-636](#).

<sup>11</sup>Indeed, it is somewhat difficult to view the Cleveland mandatory leave rule as seriously furthering the goal of continuity, since the rule requires only two weeks' advance notice before the leave is to commence.

an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has [\*645] reasonable alternative means of making the crucial determination."

Similarly, in [Stanley v. Illinois, 405 U.S. 645](#), the Court held that an Illinois statute containing an irrebuttable presumption that unmarried fathers are incompetent to raise their children violated the Due Process Clause. Because of the statutory presumption, the State took custody of all illegitimate children upon the death of the mother, without allowing [\*\*799] the father to attempt to prove his parental fitness. As the Court put the matter:

"It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children." [Id., at 654](#) (footnotes [\*\*\*\*20] omitted).

Hence, we held that the State could not conclusively presume that any particular unmarried father was unfit to raise his child; the Due Process Clause required a more individualized determination. See also [United States Dept. of Agriculture v. Murry, 413 U.S. 508](#); [id., at 514-517](#) (concurring opinion); [Bell v. Burson, 402 U.S. 535](#); [Carrington v. Rash, 380 U.S. 89](#).

These principles control our decision in the cases before us. While the medical experts in these cases differed on many points, they unanimously agreed on one -- the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter.<sup>12</sup>

<sup>12</sup> There were three medical witnesses in the Cleveland case: Dr. Sarah Marcus and Dr. Veners Rutenbeigs (Mrs. Nelson's obstetrician), who testified on behalf of the respondents, and Dr. William C. Weir, the petitioners' expert. While Dr. Weir generally disagreed with his colleagues on the potential effects of pregnancy on a teacher's job performance, he noted that each pregnancy was an

Even assuming, *arguendo*, that [\*646] there are some women who would be physically unable to work past the particular cutoff dates embodied in the challenged rules, it is evident that there are large numbers of teachers who are fully capable of continuing work for longer than the Cleveland and Chesterfield County regulations will allow. Thus, the conclusive presumption embodied in these rules, like that in *Vlandis* [\*\*\*\*21], is neither [\*\*\*\*64] "necessarily [nor] universally true," and is violative of the Due Process Clause.

[\*\*\*\*22] [LEdHN\[8\]](#) [8] The school boards have argued that the mandatory termination dates serve the interest of administrative convenience, since there are many instances of teacher pregnancy, and the rules obviate the necessity for case-by-case determinations. Certainly, the boards have an interest in devising prompt and efficient procedures to achieve their legitimate objectives in this area. But, as the Court stated in [Stanley v. Illinois, supra, at 656](#):

"[HN3](#) The Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the [Bill of Rights](#) in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government [\*647] officials no less, and perhaps more, than mediocre ones." (Footnote omitted.)

[LEdHN\[9\]](#) [9] [HN4](#) While it might be easier for the school boards to conclusively presume that all

individual matter, and should be prescribed for as such. Similarly, the two medical experts in the Chesterfield County case, Dr. Leo J. Dunn and Dr. David C. Forrest, testified that each particular pregnancy must be managed as an individual matter. Cf. R. Benson, *Handbook of Obstetrics & Gynecology* 109 (4th ed. 1971); Curran, *Equal Protection of the Law: Pregnant School Teachers*, 285 *New England J. Medicine* 336; Comment, *Mandatory Maternity Leave of Absence Policies -- An Equal Protection Analysis*, 45 *Temp. L. Q.* 240, 245.

pregnant women are unfit to teach past the fourth or fifth month or even the first month, of pregnancy, administrative convenience alone is insufficient to make valid what otherwise is a violation of due [\*\*\*\*23] process of law.<sup>13</sup> The [Fourteenth Amendment](#) requires the school boards [\*\*800] to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty, in support of their legitimate goals.<sup>14</sup>

[LEdHN\[1C\]](#) [1C]We conclude, therefore, that neither the necessity for continuity of instruction nor the state interest in keeping [\*648] physically unfit teachers out of the classroom can justify the sweeping mandatory leave regulations that the Cleveland and Chesterfield County School Boards have adopted. While the regulations no doubt represent a good-faith attempt to achieve a laudable goal, they cannot pass muster under the [Due Process Clause of the Fourteenth Amendment](#), because they employ irrebuttable presumptions that [\*\*\*\*25] unduly penalize a female teacher for deciding to bear a child.

### [\*\*\*65] III

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<sup>13</sup>This is not to say that the only means for providing appropriate protection for the rights of pregnant teachers is an individualized determination in each case and in every circumstance. We are not dealing in these cases with maternity leave regulations requiring a termination of employment at some firm date during the last few weeks of pregnancy. We therefore have no occasion to decide whether such regulations might be justified by considerations not presented in these records -- for example, widespread medical consensus about the "disabling" effect of pregnancy on a teacher's job performance during these latter days, or evidence showing that such firm cutoffs were the only reasonable method of avoiding the possibility of labor beginning while some teacher was in the classroom, or proof that adequate substitutes could not be procured without at least some minimal lead time and certainty as to the dates upon which their employment was to begin.

<sup>14</sup> [\*\*\*\*24] The school boards have available to them reasonable alternative methods of keeping physically unfit teachers out of the classroom. For example, they could require the pregnant teacher to submit to medical examination by a school board physician, or simply require each teacher to submit a current certification from her obstetrician as to her ability to continue work. Indeed, when evaluating the physical ability of a teacher to *return* to work, each school board in this case relies upon precisely such procedures. See nn. 1 and 5, *supra*; see also text, *infra*, at 648-650.

In addition to the mandatory termination provisions, both the Cleveland and Chesterfield County rules contain limitations upon a teacher's eligibility to return to work after giving birth. Again, the school boards offer two justifications for the return rules -- continuity of instruction and the desire to be certain that the teacher is physically competent when she returns to work. As is the case with the leave provisions, the question is not whether the school board's goals are legitimate, but rather whether the particular means chosen to achieve those objectives unduly infringe upon the teacher's constitutional liberty.

Under the Cleveland rule, the teacher is not eligible to return to work until the beginning of the next regular school semester following the time when her child attains the age of three months. A doctor's certificate attesting to the teacher's health is required before return; an additional physical examination may be required at the option of the school board.

The respondents in No. 72-777 do not seriously challenge either the medical requirements of the Cleveland rule or the policy of limiting [\*\*\*\*26] eligibility to return to the next semester following birth. The provisions concerning a medical certificate or supplemental physical examination are narrowly drawn methods of protecting the [\*649] school board's interest in teacher fitness; these requirements allow an individualized decision as to the teacher's condition, and thus avoid the pitfalls of the presumptions inherent in the leave rules. Similarly, the provision limiting eligibility to return to the semester following delivery is a precisely drawn means of serving the school board's interest in avoiding unnecessary changes in classroom personnel during any one school term.

The Cleveland rule, however, does not simply contain these reasonable medical and next-semester eligibility provisions. In addition, the school board requires the mother to wait until her child reaches the age of three months before the return rules begin to operate. The school board has offered no

reasonable justification for this supplemental limitation, and we can perceive none. To the extent that the three-month provision reflects the school board's thinking that no mother is fit to return until that point in time, it suffers from the same [\*\*\*\*27] [\*\*801] constitutional deficiencies that plague the irrebuttable presumption in the termination rules.<sup>15</sup> The presumption, moreover, is patently unnecessary, since the requirement of a physician's certificate or a medical examination fully protects the [\*\*\*66] school's interests in this [\*650] regard. And finally, the three-month provision simply has nothing to do with continuity of instruction, since the precise point at which the child will reach the relevant age will obviously occur at a different point throughout the school year for each teacher.

[\*\*\*\*28] LEdHN[10] [10] Thus, we conclude that the Cleveland return rule, insofar as it embodies the three-month age provision, is wholly arbitrary and irrational, and hence violates the Due Process Clause of the Fourteenth Amendment. The age limitation serves no legitimate state interest, and unnecessarily penalizes the female teacher for asserting her right to bear children.

LEdHN[11] [11] We perceive no such constitutional infirmities in the Chesterfield County rule. In that school system, the teacher becomes eligible for re-employment upon submission of a medical certificate from her physician; return to work is guaranteed no later than the beginning of the next school year following the eligibility

determination.<sup>16</sup> The medical certificate is both a reasonable and narrow method of protecting the school board's interest in teacher fitness, while the possible deferring of return until the next school year serves the goal of preserving continuity of instruction. In short, the Chesterfield County rule manages to serve the legitimate state interests here without employing unnecessary presumptions that broadly burden the exercise of protected constitutional liberty.

#### [\*\*\*\*29] [\*651] IV

For the reasons stated, we hold that the HN5 mandatory termination provisions of the Cleveland and Chesterfield County maternity regulations violate the Due Process Clause of the Fourteenth Amendment, because of their use of unwarranted conclusive presumptions that seriously burden the exercise of protected constitutional liberty. For similar reasons, we hold the three-month provision of the Cleveland return rule unconstitutional.

Accordingly, the judgment in No. 72-777 is affirmed; the judgment in No. 72-1129 is reversed, and the case is remanded to the Court of Appeals for the Fourth Circuit for further proceedings consistent with this opinion.

*It is so ordered.*

MR. JUSTICE DOUGLAS concurs in the result.

**Concur by: POWELL**

**Concur**

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<sup>15</sup> It is clear that the factual hypothesis of such a presumption -- that no mother is physically fit to return to work until her child reaches the age of three months -- is neither necessarily nor universally true. See R. Benson, *supra*, n. 12, at 209 (patient may return to "full activity or employment" if course of progress up to fourth or fifth week is normal). Cf. Comment, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 Harv. Civ. Rights-Civ. Lib. L. Rev., at 262 n. 11, 287 n. 145.

Of course, it may be that the Cleveland rule is based upon another theory -- that new mothers are too busy with their children within the first three months to allow a return to work. Viewed in that light, the rule remains a conclusive presumption, whose underlying factual assumptions can hardly be said to be universally valid.

[\*\*802] MR. JUSTICE POWELL, concurring in

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<sup>16</sup> The Virginia rule also requires that the teacher give assurance that care of the child will not unduly interfere with her job duties. While such a requirement has within it the potential for abuse, there is no evidence on this record that the assurance required here is anything more than that routinely sought by employers from prospective employees -- that the worker is willing to devote full attention to job duties. Nor is there any evidence in this record that the school authorities do not routinely accept the woman's assurance of her ability to return.

the result.

I concur in the Court's result, but I am unable to join its opinion. In my view these cases should not be decided on the ground that the mandatory maternity leave regulations impair any right to bear children or create an "irrebuttable presumption." [\*\*\*67] It seems to me that equal protection analysis is the appropriate frame of reference.

These regulations undoubtedly add to the burdens of childbearing. But certainly [\*\*\*\*30] not every government policy that burdens childbearing violates the Constitution. Limitations on the welfare benefits a family may receive that do not take into account the size of the family illustrate this point. See [Dandridge v. Williams, 397 U.S. 471 \(1970\)](#). Undoubtedly Congress could, as another example, constitutionally seek to discourage excessive population growth by limiting tax deductions for dependents. That would represent an [\*652] intentional governmental effort to "penalize" childbearing. See *ante*, at 640. The regulations here do not have that purpose. Their deterrent impact is wholly incidental. If some intentional efforts to penalize childbearing are constitutional, and if [Dandridge, supra](#), means what I think it does, then certainly these regulations are not invalid as an infringement of any right to procreate.

I am also troubled by the Court's return to the "irrebuttable presumption" line of analysis of [Stanley v. Illinois, 405 U.S. 645 \(1972\)](#) (POWELL, J., not participating), and [Vlandis v. Kline, 412 U.S. 441 \(1973\)](#). Although I joined the opinion of the Court [\*\*\*\*31] in *Vlandis* and continue fully to support the result reached there, the present cases have caused me to re-examine the "irrebuttable presumption" rationale. This has led me to the conclusion that the Court should approach that doctrine with extreme care. There is much to what MR. JUSTICE REHNQUIST says in his dissenting opinion, *post*, at 660, about the implications of the doctrine for the traditional legislative power to operate by classification. As a matter of logic, it is

difficult to see the terminus of the road upon which the Court has embarked under the banner of "irrebuttable presumptions." If the Court nevertheless uses "irrebuttable presumption" reasoning selectively, the concept at root often will be something else masquerading as a due process doctrine. That something else, of course, is the [Equal Protection Clause](#).

These cases present precisely the kind of problem susceptible of treatment by classification. Most school teachers are women, a certain percentage of them are pregnant at any given time, and pregnancy is a normal biological function possessing, in the great majority of cases, a fairly well defined term. The constitutional difficulty is not that [\*\*\*\*32] the boards attempted to deal with [\*653] this problem by classification. Rather, it is that the boards chose irrational classifications.

A range of possible school board goals emerge from the cases. Several may be put to one side. The records before us abound with proof that a principal purpose behind the adoption of the regulations was to keep visibly pregnant teachers out of the sight of school-children.<sup>1</sup> The boards do not advance this today as a legitimate objective, yet its initial primacy casts a shadow over these cases. Moreover, most of the after-the-fact rationalizations proposed by these boards are unsupported in the records. The boards emphasize teacher absenteeism, classroom discipline, the safety of schoolchildren, and the safety of the expectant [\*\*\*68] mother and her unborn child. No doubt these are legitimate concerns. But the boards have failed to demonstrate that these interests are in fact threatened by the continued employment of pregnant teachers.

[\*\*803] To be [\*\*\*\*33] sure, the boards have a legitimate and important interest in fostering continuity of teaching. And, even a normal pregnancy may at some point jeopardize that interest. But the classifications chosen by these

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<sup>1</sup> See, e. g., *ante*, at 641 n. 9.

boards, so far as we have been shown, are either counterproductive or irrationally overinclusive even with regard to this significant, nonillusory goal. Accordingly, in my opinion these regulations are invalid under rational-basis standards of equal protection review.<sup>2</sup>

**[\*\*\*\*34] [\*654]** In speaking of continuity of teaching, the boards are referring in part to their valid interest in reducing the number of times a new teacher is assigned to a given class. It is particularly appropriate to avoid teacher turnover in the middle of a semester, since continuity in teaching approach, as well as teacher-pupil relationships, is otherwise impaired. That aspect of the Cleveland regulation limiting a teacher's eligibility to return to the classroom to the semester following delivery, which the Court approves, *ante*, at 649, rationally serves this legitimate state interest. But the four- and five-month prebirth leave periods of the two regulations and the three-month post-birth provision of the Cleveland regulation do not. As the Court points out, *ante*, at 642-643, such cutoff points are more likely to prevent continuity of teaching than to preserve it. Because the cutoff dates occur throughout the school year, they inevitably result in the removal of many capable teachers from the classroom in the middle or near the end of a semester, thus provoking the disruption the boards hope to avoid.

The boards' reference to continuity of teaching also encompasses **[\*\*\*\*35]** their need to assure constant classroom coverage by teachers who are up to the task. This interest is obviously legitimate. No one disputes that a school board must concern itself with the physical and emotional capabilities

of its teachers. But the objectionable portions of these regulations appear to be bottomed on factually unsupported assumptions about the ability of pregnant teachers to perform their jobs. The overwhelming weight of the medical testimony adduced in these cases is that most teachers undergoing normal pregnancies are quite capable of carrying out their responsibilities until some ill-defined point a short period prior to term. Certainly the boards have made little effort to contradict this conclusion. Thus, it appears that by forcing all pregnant teachers undergoing a normal **[\*655]** pregnancy from the classroom so far in advance of term, the regulations compel large numbers of able-bodied teachers to quit work.<sup>3</sup> Once more, such policies inhibit, **[\*\*\*\*69]** rather than further, the goal of continuity of teaching. For no apparent reason, they remove teachers from their students and require the use of substitutes.

**[\*\*\*\*36]** The boards' reliance on the goal of continuity of teaching also takes into account their obvious planning needs. Boards must know when pregnant teachers will temporarily cease their teaching responsibilities, so that substitutes may be scheduled to fill the vacancies. And, planning requires both notice of pregnancy and a fixed termination date. It appears, however, that any termination **[\*\*804]** date serves the purpose.<sup>4</sup> The choice of a cutoff date that produces several months of forced unemployment is thus wholly unnecessary to the planning of the boards. Certainly nothing in the records of these cases is to the contrary.

For the above reasons, I believe the linkage between the boards' legitimate ends and their

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<sup>2</sup> I do not reach the question whether sex-based classifications invoke strict judicial scrutiny, *e. g.*, [Frontiero v. Richardson](#), 411 U.S. 677 (1973), or whether these regulations involve sex classifications at all. Whether the challenged aspects of the regulations constitute sex classifications or disability classifications, they must at least rationally serve some legitimate articulated or obvious state interest. While there are indeed some legitimate state interests at stake here, it has not been shown that they are rationally furthered by the challenged portions of these regulations.

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<sup>3</sup> Teachers who undergo abnormal pregnancies may well be disabled, either temporarily or for a substantial period. But as I read the Court, boards may deal with abnormal pregnancies like any other disability. *Ante*, at 642 n. 10.

<sup>4</sup> One may question, however, whether planning needs are well served by the mere two-week gap between notice and departure set forth in the Cleveland regulation. The brief notice the Cleveland board has allowed itself casts some doubt on that board's reliance on planning needs.

chosen means is too attenuated [\*\*\*\*37] to support those portions of the regulations overturned by the Court. Thus, I concur in the Court's result. But I think it important to emphasize the degree of latitude the Court, as I read it, has left the boards for dealing with the real and recurrent problems presented by teacher pregnancies. Boards may demand in every case "substantial advance notice of [\*656] [pregnancy] . . . ." *Ante*, at 643. Subject to certain restrictions, they may require all pregnant teachers to cease teaching "at some firm date during the last few weeks of pregnancy. . . ." *Id.*, at 647 n. 13.<sup>5</sup> The Court further holds that boards may in all cases restrict re-entry into teaching to the outset of the school term following delivery. *Id.*, at 649.

[\*\*\*\*38] In my opinion, such class-wide rules for pregnant teachers are constitutional under traditional equal protection standards.<sup>6</sup> School boards, confronted with sensitive and widely variable problems of public education, must be accorded latitude in the operation of school systems and in the adoption of rules and regulations of general application. *E. g.*, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 42-43 [\*\*\*\*70] (1973). A large measure of discretion is essential to the effective discharge of

the duties vested in these local, often elective, governmental units. My concern with the Court's [\*657] opinion is that, if carried to logical extremes, the emphasis on individualized treatment is at war with this need for discretion. Indeed, stringent insistence on individualized treatment may be quite impractical in a large school district with thousands of teachers.

[\*\*\*\*39] But despite my reservations as to the rationale of the majority, I nevertheless conclude that in these cases the gap between the legitimate interests of the boards and the particular means chosen to attain them is too wide. A restructuring generally along the lines indicated in the Court's opinion seems unavoidable. Accordingly, I concur in its result.

**Dissent by: REHNQUIST**

## **Dissent**

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MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court rests its invalidation of the school regulations involved in these cases on the *Due Process Clause of the Fourteenth Amendment*, rather than on any claim of sexual discrimination under [\*\*805] the *Equal Protection Clause* of that Amendment. My Brother STEWART thereby enlists the Court in another quixotic engagement in his apparently unending war on irrebuttable presumptions. In these cases we are told that although a regulation "requiring a termination of employment at some firm date during the last few weeks of pregnancy," *ante*, at 647 n. 13, might pass muster, the regulations here challenged requiring termination at the end of the fourth or fifth month of pregnancy violate due process of law.

As THE CHIEF JUSTICE pointed out in his dissent last [\*\*\*\*40] year in *Vlandis v. Kline*, 412 U.S. 441, "literally thousands of state statutes create classifications permanent in duration, which are less than perfect, as all legislative classifications

<sup>5</sup> The Court's language does not specify a particular prebirth cutoff point, and we need not decide that issue, as these boards have attempted to support only four- and five-month dates. In light of the Court's language, however, I would think that a four-week prebirth period would be acceptable. I do not agree with the Court's view of the stringent standards a board must meet to justify a reasonable prebirth cutoff date. See *ante*, at 647 n. 13. Nothing in the Constitution mandates the heavy burden of justification the Court has imposed on the boards in this regard. If school boards must base their policies on a "widespread medical consensus . . .," the "only reasonable method . . ." for accomplishing a goal, or a demonstration that needed services will otherwise be impossible to obtain, *ibid.*, they may be seriously handicapped in the performance of their duties.

<sup>6</sup> As the Court notes, these cases arose prior to the recent amendment extending Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., to state agencies and educational institutions. Pub. L. 92-261, 86 Stat. 103. See *ante*, at 639 n. 8. Like the Court, I do not address the impact of Title VII on mandatory maternity leave regulations.

are, and might be improved on by individualized determinations . . . ." *Id.*, at 462. Hundreds of years ago in England, before Parliament came to be thought of as a body having general lawmaking power, [\*658] controversies were determined on an individualized basis without benefit of any general law. Most students of government consider the shift from this sort of determination, made on an *ad hoc* basis by the King's representative, to a relatively uniform body of rules enacted by a body exercising legislative authority, to have been a significant step forward in the achievement of a civilized political society. It seems to me a little late in the day for this Court to weigh in against such an established consensus.

Countless state and federal statutes draw lines such as those drawn by the regulations here which, under the Court's analysis, might well prove to be arbitrary in individual cases. The District of Columbia Code, for example, draws [\*\*\*\*41] lines with respect to age for several purposes. The Code requires that a person to be eligible to vote be 18 years of age,<sup>1</sup> that a male be 18 and a female be 16 before a valid marriage may be contracted,<sup>2</sup> that alcoholic beverages not be sold to a person under the age of 21 years,<sup>3</sup> or beer or light wines to any person under the age of 18 years.<sup>4</sup> A resident of the District of Columbia must be 16 years of age to obtain a permit to operate a motor [\*\*\*71] vehicle,<sup>5</sup> [\*\*\*\*42] and the District of Columbia delegate to the United States Congress must be 25 years old.<sup>6</sup> Nothing in the Court's opinion clearly demonstrates why its logic would not equally well sustain a challenge to these laws from a 17-year-old who insists that he is just as well informed for

voting purposes as an 18-year-old, from a 20-year-old who insists that he is just as able to carry his liquor as a 21-year-old, or from the numerous other [\*659] persons who fall on the outside of lines drawn by these and similar statutes.

More closely in point is the jeopardy in which the Court's opinion places longstanding statutes providing for mandatory retirement of government employees. Title 5 U. S. C. § 8335 provides with respect to Civil Service employees:

"(a) Except as otherwise provided by this section, an employee who becomes 70 years of age and completes 15 years of service shall be automatically separated from the service. . . ."

It was pointed out by my Brother STEWART only last year in his concurring opinion in *Roe v. Wade*, 410 U.S. 113, 168, that "the 'liberty' protected by the *Due Process Clause of the Fourteenth Amendment* covers more than those freedoms explicitly named in the *Bill of Rights*. . . . Cf. . . . *Truax v. Raich*, 239 U.S. 33, 41." In *Truax v. Raich*, the Court said:

"It requires no argument to show that the right to work for a living in [\*\*\*806] the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure." 239 U.S. 33, 41 (1915).

[\*\*\*\*43] Since this right to pursue an occupation is presumably on the same lofty footing as the right of choice in matters of family life, the Court will have to strain valiantly in order to avoid having today's opinion lead to the invalidation of mandatory retirement statutes for governmental employees. In that event federal, state, and local governmental bodies will be remitted to the task, thankless both for them and for the employees involved, of individual determinations of physical

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<sup>1</sup> D. C. Code Ann. § 1-1102 (1973).

<sup>2</sup> *Id.*, § 30-103.

<sup>3</sup> *Id.*, § 25-121.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Id.*, § 40-301.

<sup>6</sup> *Id.*, § 1-291 (b)(2).

impairment and senility.

**[\*660]** It has been said before, [Williamson v. Lee Optical Co., 348 U.S. 483 \(1955\)](#), but it bears repeating here: All legislation involves the drawing of lines, and the drawing of lines necessarily results in particular individuals who are disadvantaged by the line drawn being virtually indistinguishable for many purposes from those individuals who benefit from the legislative classification. The Court's disenchantment with "irrebuttable presumptions," and its preference for "individualized determination," is in the last analysis nothing less than an attack upon the very notion of lawmaking itself.

The lines drawn by the school boards in the city of **[\*\*\*\*44]** Cleveland and Chesterfield County in these cases require pregnant teachers to take forced leave at a stage of their pregnancy when medical evidence seems to suggest that a majority of them might well be able to continue teaching without any significant possibility of physical impairment. But, so far as I am aware, the medical evidence also suggests that in some cases there may be physical impairment **[\*\*\*72]** at the stage of pregnancy fastened on by the regulations in question, and that the probability of physical impairment increases as the pregnancy advances. If legislative bodies are to be permitted to draw a general line anywhere short of the delivery room, I can find no judicial standard of measurement which says the ones drawn here were invalid. I therefore dissent.

## References

68 Am Jur 2d, Schools 172.

22 Am Jur Pl & Pr Forms (Rev ed), Schools, Form 126

22 Am Jur Proof of Facts 563, Dismissal of Teachers for Cause

US L Ed Digest, Constitutional Law 745; Schools 1  
ALR Digests, Constitutional Law 455; Schools 42, 43

L Ed Index to Annos, Due Process of Law; Schools  
ALR Quick Index, Due Process of Law; Pregnancy;  
**[\*\*\*\*45]** Schools; Schoolteachers

Federal Quick Index, Due Process of Law; Schools and School Districts

### Annotation References:

Mandatory maternity leave rules or policies for public schoolteachers as constituting violation of [equal protection clause of Fourteenth Amendment to Federal Constitution. 17 ALR Fed 768](#).

Constitutionality of statutes or ordinances making one fact presumptive or prima facie evidence of another. 51 ALR 1139, 86 ALR 179, 162 ALR 495.

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As of: October 18, 2026 1:40 AM Z

## **Cohen v. Cowles Media Co.**

Supreme Court of the United States

March 27, 1991, Argued ; June 24, 1991, Decided

No. 90-634

### **Reporter**

501 U.S. 663 \*; 111 S. Ct. 2513 \*\*; 115 L. Ed. 2d 586 \*\*\*; 1991 U.S. LEXIS 3639 \*\*\*\*; 59 U.S.L.W. 4773; 18 Media L. Rep. 2273; 91 Cal. Daily Op. Service 4796; 91 Daily Journal DAR 7417

COHEN v. COWLES MEDIA CO., dba  
MINNEAPOLIS STAR & TRIBUNE CO., et al.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE  
SUPREME COURT OF MINNESOTA.

**Disposition:** [457 N. W. 2d 199](#), reversed and  
remanded.

### **Core Terms**

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promissory estoppel, newspaper, generally  
applicable, confidentiality, truthful information,  
compensatory damages, cause of action, state  
action, emotional, doctrine of promissory estoppel,  
distressing, campaign, gather

### **Case Summary**

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#### **Procedural Posture**

The case was before the court on a writ of certiorari to the Supreme Court of Minnesota, reversing a judgment awarding compensatory damages to plaintiff informer based on a theory of promissory estoppel. The state court concluded that the enforcement of defendants' promise of confidentiality violated defendants' [First Amendment](#) rights, because defendant was a newspaper publisher.

#### **Overview**

Plaintiff agreed to provide defendant with

documents relating to a candidate in an upcoming election, but only if he was given a promise of confidentiality. The newspaper nevertheless published the name of the source, and plaintiff was subsequently fired from his job. Plaintiff sued for breach of contract and fraud. The jury awarded compensatory and punitive damages. The court of appeals reversed the award of punitive damages after concluding that plaintiff failed to establish a fraud claim, the only claim that would support such an award. The state supreme court reversed the compensatory damages award, concluding that enforcement of the promise of confidentiality under a promissory estoppel theory violated defendants' [First Amendment](#) rights. The Supreme Court reversed, holding that defendant newspaper publisher had no special immunity from the application of general laws and was therefore liable just as any other for breach of contract based on promissory estoppel.

#### **Outcome**

The Supreme Court reversed.

### **LexisNexis® Headnotes**

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Business & Corporate  
Compliance > ... > Contract  
Formation > Consideration > Promissory  
Estoppel  
Contracts Law > Contract

Formation > Consideration > Promissory  
Estoppel

Civil Procedure > ... > Subject Matter  
Jurisdiction > Federal Questions > General  
Overview

Constitutional Law > The  
Judiciary > Jurisdiction > General Overview

### **HN1 Consideration, Promissory Estoppel**

It is irrelevant to the United States Supreme Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided.

Civil Rights Law > ... > Elements > Color of  
State Law > General Overview

Constitutional Law > Bill of  
Rights > Fundamental Freedoms > General  
Overview

Constitutional Law > ... > Freedom of  
Speech > Free Press > General Overview

Constitutional Law > Bill of Rights > State  
Application

### **HN2 Elements, Color of State Law**

The application of state rules of law in state courts in a manner alleged to restrict [U.S. Const. amend. I](#) freedoms constitutes "state action" under the [Fourteenth Amendment](#).

Copyright Law > ... > Civil Infringement  
Actions > Remedies > Injunctions

Criminal Law & Procedure > ... > Investigative  
Authority > Subpoenas > General Overview

Evidence > Privileges > Journalist's  
Privilege > Elements

Constitutional Law > ... > Fundamental  
Freedoms > Freedom of Speech > Scope

Copyright Law > Constitutional Copyright  
Protections > First Amendment Considerations

Copyright Law > Scope of Copyright  
Protection > Publication > General Overview

Criminal Law & Procedure > ... > Grand  
Juries > Investigative Authority > Duty of  
Witnesses to Appear

Evidence > Privileges > Journalist's  
Privilege > General Overview

Evidence > Privileges > Journalist's  
Privilege > Scope

### **HN3 Remedies, Injunctions**

Generally applicable laws do not offend the [First Amendment](#) simply because their enforcement against the press has incidental effects on its ability to gather and report the news. The truthful information sought to be published must have been lawfully acquired. For example, the press may not with impunity break and enter an office or dwelling to gather news. Neither does the [First Amendment](#) relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source. The press, like others interested in publishing, may not publish copyrighted material without obeying the copyright laws. Similarly, the media must obey the National Labor Relations Act and the Fair Labor Standards Act, may not restrain trade in violation of the antitrust laws, and must pay non-discriminatory taxes.

Constitutional Law > ... > Freedom of  
Speech > Free Press > General Overview

Governments > Legislation > Types of Statutes

## **HN4 Freedom of Speech, Free Press**

The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. Accordingly, enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.

Business & Corporate

Compliance > ... > Contract

Formation > Consideration > Promissory

Estoppel

Contracts Law > Contract

Formation > Consideration > Promissory

Estoppel

Constitutional Law > ... > Fundamental

Freedoms > Freedom of Speech > Scope

## **HN5 Consideration, Promissory Estoppel**

The Minnesota doctrine of promissory estoppel is a law of general applicability. It does not target or single out the press. Rather, the doctrine is generally applicable to the daily transactions of all the citizens of Minnesota. The [First Amendment](#) does not forbid its application to the press.

## **Lawyers' Edition Display**

### **Decision**

[First Amendment](#) held not to bar informant from recovering damages, under Minnesota promissory estoppel law, for newspapers' breach of promise to keep informant's identity confidential.

### **Summary**

During the 1982 Minnesota gubernatorial race, an informant who was associated with one party's campaign gave two newspapers' reporters unfavorable information concerning the other

party's candidate for lieutenant governor. The informant provided this information after having received a promise from the reporters to keep the informant's identity confidential. However, pursuant to a decision of the newspapers' editorial staffs, the informant's name was included in the newspapers' stories concerning the information. The informant was fired from his job after the stories were published. The informant, alleging fraudulent misrepresentation and breach of contract, filed suit against the newspapers' publishers in Minnesota state court. A jury returned a verdict in the informant's favor and awarded him compensatory and punitive damages. The Court of Appeals of Minnesota, affirming in part and reversing in part on appeal, (1) set aside the award of punitive damages, on the ground that the informant had failed to establish a fraud claim, but (2) upheld the award of compensatory damages, on the ground that there was sufficient evidence to support the breach of contract claim ([445 NW2d 248](#)). The Supreme Court of Minnesota, affirming in part and reversing in part on appeal, held that (1) the printing of the informant's name did not support a fraud claim, (2) the reporters' promise of confidentiality was not legally enforceable in a breach of contract action, and (3) the informant's claim was not sustainable under a theory of promissory estoppel, given that the enforcement of the promise under such a theory would violate the publishers' rights under the [Federal Constitution's First Amendment](#) ([457 NW2d 199](#)).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by White, J., joined by Rehnquist, Ch. J., and Stevens, Scalia, and Kennedy, JJ., it was held that (1) the [First Amendment](#) did not prohibit the informant from recovering damages under Minnesota's promissory estoppel doctrine, given that (a) the [First Amendment](#) does not forbid the application of such a generally applicable law to the press, (b) the application of such a law, under the circumstances presented, would not punish the newspapers for publishing truthful information that was lawfully obtained, since (i) the parties themselves

determined the scope of their legal obligations, and any restrictions that were placed on the publication of truthful information were self-imposed by the newspapers, (ii) it was not clear that the newspapers obtained the informant's name lawfully, as it was obtained only by making a promise that the newspapers did not honor, and (iii) the newspapers' payment of compensatory damages to the informant was constitutionally indistinguishable from a generous bonus paid to a confidential news source, (c) the informant was not attempting to use a promissory estoppel cause of action to avoid the strict requirements for establishing a defamation claim, in that the informant was seeking damages not for injury to his reputation or his state of mind, but rather for a breach of promise that allegedly caused him to lose his job and lowered his earning capacity, and (d) any inhibition of truthful reporting by news organizations that might result from permitting the informant to maintain such a cause of action would be no more than the incidental--and constitutionally insignificant--consequence of applying a generally applicable law to the press; and (2) the jury verdict that awarded the informant compensatory damages would not be reinstated, but rather the case would be remanded to the Minnesota Supreme Court to address and resolve in the first instance the questions (a) whether the informant had established a promissory estoppel claim under Minnesota law, (b) whether the jury verdict could be upheld on a promissory estoppel basis, and (c) whether Minnesota's constitution should be construed to shield the press from a promissory estoppel cause of action such as that of the informant.

Blackmun, J., joined by Marshall and Souter, JJ., dissenting, expressed the view that the use of the informant's promissory estoppel claim to penalize the reporting of truthful information regarding a political campaign would be a violation of the [First Amendment](#), given that (1) to the extent that truthful speech may ever be sanctioned consistent with the [First Amendment](#), such sanctioning must be in furtherance of a state interest of the highest order, (2) Minnesota's interest in enforcing its promissory

estoppel doctrine in the case at hand was not compelling, and (3) the imposition of civil sanctions on the publishers was not justifiable as a cost of acquiring newsworthy material.

Souter, J., joined by Marshall, Blackmun, and O'Connor, dissenting, expressed the view that (1) the general applicability of Minnesota's promissory estoppel doctrine was not dispositive of the case at hand; (2) in balancing the competing interests involved in the case, the public's [First Amendment](#) right to receive the information at issue, rather than the publishers' own rights, was paramount; and (3) Minnesota's interest in enforcing a newspaper's promise of confidentiality was insufficient to outweigh the interest in unfettered publication of the information at issue.

## Headnotes

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CONSTITUTIONAL LAW §960 > First Amendment -- newspapers' breach of confidentiality -- promissory estoppel liability -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D] [LEdHN\[1E\]](#) [1E] [LEdHN\[1F\]](#) [1F]

The [Federal Constitution's First Amendment](#) does not prohibit an informant from recovering damages, under a state's generally applicable promissory estoppel doctrine, for the breach by newspaper publishers of a promise--by newspaper reporters to the informant in exchange for truthful information--that the informant's identity would be kept confidential, given that (1) the [First Amendment](#) does not forbid the application of such a generally applicable law to the press; (2) the application of such a law, under the circumstances presented, will not punish the newspaper publishers for publishing truthful information that was lawfully obtained, since (a) the parties themselves determined the scope of their legal obligations, and any restrictions that were placed on the publication of truthful information were self-imposed, (b) it is not clear

that the publishers obtained the informant's name lawfully, as it was obtained only by making a promise that the publishers did not honor, and (c) the publishers' payment of compensatory damages to the informant is constitutionally indistinguishable from a generous bonus paid to a confidential news source; (3) the informant is not attempting to use a promissory estoppel cause of action to avoid the strict requirements for establishing a defamation claim, in that the informant is seeking damages not for injury to his reputation or his state of mind, but rather for a breach of promise that allegedly caused him to lose his job and lowered his earning capacity; and (4) any inhibition of truthful reporting by news organizations that might result from permitting the informant to maintain such a cause of action would be no more than the incidental--and constitutionally insignificant--consequence of applying a generally applicable law to the press. (Blackmun, Marshall, Souter, and O'Connor, JJ., dissented from this holding.)

APPEAL §455 > dismissal -- decision of federal question -- > Headnote:

[LEdHN\[2\]](#) [2]

On certiorari to review the decision of a state's highest court, which held that enforcement, under state-law promissory estoppel theory, of a promise--by newspaper reporters to an informant in exchange for information--that the informant's identity would be kept confidential would violate the publishers' rights under the [Federal Constitution's First Amendment](#), the United States Supreme Court need not dismiss the case without reaching the merits--even though the promissory estoppel theory was allegedly not argued or presented in the lower state courts--given that it is irrelevant to the Supreme Court's jurisdiction whether a party raised below and argued a federal-law issue that the state's highest court actually considered and decided; also, the Supreme Court

need not dismiss the case on the ground that the decision of the state's highest court rested entirely on an interpretation of state law, where the conclusion of the state's highest court that enforcement of the promise would violate the publishers' [First Amendment](#) rights indicates that the holding was rested on federal law.

CONSTITUTIONAL LAW §520 > Fourteenth Amendment -- state action -- > Headnote:

[LEdHN\[3\]](#) [3]

The application of state rules of law in state courts in a manner alleged to restrict freedoms that are guaranteed by the [Federal Constitution's First Amendment](#) constitutes "state action" within the meaning of the [Fourteenth Amendment](#); thus, a private cause of action in state court for promissory estoppel involves state action such that the protections of the [First Amendment](#) are triggered, where (1) the action is brought against newspaper publishers by an informant who seeks damages for the publishers' alleged breach of a promise--by newspaper reporters to the informant in exchange for information--that the informant's identity would be kept confidential, (2) a recovery by the informant on the theory of promissory estoppel would create legal obligations, never explicitly assumed by the parties, that would be enforced through the official power of the state's courts, and (3) the state's highest court determined that the publishers' [First Amendment](#) rights would be violated by the enforcement of such obligations.

CONSTITUTIONAL LAW §927 > freedom of press -- > Headnote:

[LEdHN\[4\]](#) [4]

Under the [Federal Constitution's First Amendment](#), state officials may not punish a newspaper's publication of truthful information--lawfully

obtained by the newspaper--about a matter of public significance, absent a need to further a state interest of the highest order.

CONSTITUTIONAL LAW §927 > freedom of press -- application of general laws -- > Headnote:  
[LEdHN\[5A\]](#) [5A][LEdHN\[5B\]](#) [5B]

Generally applicable laws do not offend the [Federal Constitution's First Amendment](#) simply because their enforcement against the press has incidental effects on the press' ability to gather and report the news; the publisher of a newspaper has no special immunity, under the [First Amendment](#), from the application of general laws; thus, the press may not, with impunity, break and enter an office or dwelling to gather news; accordingly, enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations; the [First Amendment](#) does not require that the press should not be subjected to any law which, in any fashion or to any degree, limits or restricts the press' right to report truthful information. (Blackmun, Marshall, Souter, and O'Connor, JJ., dissented in part from this holding.)

CONSTITUTIONAL LAW §944 > WITNESSES  
 §70 > freedom of press -- immunity -- > Headnote:  
[LEdHN\[6\]](#) [6]

The [Federal Constitution's First Amendment](#) does not relieve a newspaper reporter of the obligation, shared by all citizens, to respond to a grand jury subpoena and to answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source.

CONSTITUTIONAL LAW §960 > COPYRIGHT  
 AND LITERARY PROPERTY §21 > freedom of press  
 -- > Headnote:  
[LEdHN\[7\]](#) [7]

Notwithstanding the [Federal Constitution's First Amendment](#), the press--like others interested in publishing--may not publish copyrighted material without obeying the copyright laws.

CONSTITUTIONAL LAW §956 > First Amendment -- labor -- > Headnote:  
[LEdHN\[8\]](#) [8]

Notwithstanding the [Federal Constitution's First Amendment](#), the media must obey the National Labor Relations Act ([29 USCS 151 et seq.](#)) and the Fair Labor Standards Act ([29 USCS 201 et seq.](#)).

CONSTITUTIONAL LAW §952 > First Amendment -- antitrust -- > Headnote:  
[LEdHN\[9\]](#) [9]

Notwithstanding the [Federal Constitution's First Amendment](#), the media may not restrain trade in violation of the antitrust laws.

CONSTITUTIONAL LAW §955 > First Amendment -- taxation -- > Headnote:  
[LEdHN\[10\]](#) [10]

Notwithstanding the [Federal Constitution's First Amendment](#), the media must pay nondiscriminatory taxes.

CONSTITUTIONAL LAW §960 > freedom of press --

promissory estoppel -- > Headnote:

[LEdHN\[11\]](#) [11]

For purposes of the rule that generally applicable laws do not offend the [Federal Constitution's First Amendment](#) simply because their enforcement against the press has incidental effects on the press' ability to gather and report the news, Minnesota's doctrine of promissory estoppel is a law of general applicability, in that the doctrine does not target or single out the press but rather is generally applicable to the daily transactions of all the citizens of the state.

DAMAGES §1 > CRIMINAL LAW

§69 > punishment -- > Headnote:

[LEdHN\[12\]](#) [12]

Compensatory damages, as opposed to criminal sanctions, are not a form of punishment.

LIBEL AND SLANDER §3 > publication of informant's name -- > Headnote:

[LEdHN\[13\]](#) [13]

An informant whose name is published by newspapers, allegedly in breach of a promise that his identity would be kept confidential, cannot maintain a suit against the newspapers for defamation, given that the information disclosed--that is, the informant's name--is true.

APPEAL §1692.2 > remand -- issues not decided below -- > Headnote:

[LEdHN\[14\]](#) [14]

On certiorari to review the decision of a state's highest court, which reversed a trial court's award

of compensatory damages to an informant against newspaper publishers that revealed the informant's name despite a promise that the informant's identity would be kept confidential--where the grounds for reversal were that (1) the informant could not maintain the claims of fraudulent misrepresentation and breach of contract on which the damages award had been based, and (2) enforcement of the promise under state promissory estoppel law would violate the publishers' rights under the [Federal Constitution's First Amendment](#)--the United States Supreme Court, upon holding that the informant was constitutionally permitted to maintain a cause of action for promissory estoppel, and upon reversing the judgment of the state's highest court, will not reinstate the jury verdict that awarded the informant compensatory damages, but rather will remand the case to the state's highest court to address and resolve in the first instance the questions whether (1) the informant had established a promissory estoppel claim under state law, (2) the jury verdict could be upheld on a promissory estoppel basis, and (3) the state's constitution should be construed to shield the press from a promissory estoppel cause of action such as that of the informant.

## Syllabus

During the 1982 Minnesota gubernatorial race, petitioner Cohen, who was associated with one party's campaign, gave court records concerning another party's candidate for Lieutenant Governor to respondent publishers' newspapers after receiving a promise of confidentiality from their reporters. Nonetheless, the papers identified him in their stories, and he was fired from his job. He filed suit against respondents in state court, alleging, among other things, a breach of contract. The court rejected respondents' argument that the [First Amendment](#) barred the suit, and a jury awarded him, *inter alia*, compensatory damages. The State Court of Appeals affirmed, but the State Supreme Court reversed, holding that a contract cause of

action was inappropriate. It then went on to address the question whether Cohen could recover under state law on a promissory estoppel theory even though that issue was never tried to a jury, nor briefed nor argued by the parties, concluding [\*\*\*\*2] that enforcement under such a theory would violate respondents' [First Amendment](#) rights.

*Held:*

1. This Court has jurisdiction. Respondents' contention that the case should be dismissed because the promissory estoppel theory was not argued or presented in the courts below and because the State Supreme Court's decision rests entirely on a state-law interpretation is rejected. It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided. [Orr v. Orr, 440 U.S. 268, 274-275, 59 L. Ed. 2d 306, 99 S. Ct. 1102](#). Moreover, the Minnesota Supreme Court made clear that its holding rested on federal law, and respondents have defended against this suit all along by arguing that the [First Amendment](#) barred the enforcement of the reporters' promises. Pp. 667-668.

2. The [First Amendment](#) does not bar a promissory estoppel cause of action against respondents. Such a cause of action, although private, involves state action within the meaning of the [Fourteenth Amendment](#) and therefore triggers the [First Amendment's](#) protections, since promissory estoppel is a state-law doctrine creating legal [\*\*\*\*3] obligations never explicitly assumed by the parties that are enforceable through the Minnesota courts' official power. Cf., e. g., [New York Times Co. v. Sullivan, 376 U.S. 254, 265, 11 L. Ed. 2d 686, 84 S. Ct. 710](#). However, the doctrine is a law of general applicability that does not target or single out the press, but rather is applicable to all Minnesota citizens' daily transactions. Thus, the [First Amendment](#) does not require that its enforcement against the press be subject to stricter scrutiny than would be applied to enforcement against others, cf. [Associated Press v. NLRB, 301](#)

[U.S. 103, 132-133, 81 L. Ed. 953, 57 S. Ct. 650](#), even if the payment is characterized as compensatory damages. Nor does that Amendment grant the press protection from any law which in any fashion or to any degree limits or restricts its right to report truthful information. [Florida Star v. B. J. F., 491 U.S. 524, 105 L. Ed. 2d 443, 109 S. Ct. 2603](#), distinguished. Moreover, Cohen sought damages for a breach of promise that caused him to lose his job and lowered his earning capacity, and did not attempt to use a promissory estoppel cause of action to avoid the strict requirements for establishing [\*\*\*\*4] a libel or defamation claim. [Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 99 L. Ed. 2d 41, 108 S. Ct. 876](#), distinguished. Any resulting inhibition on truthful reporting is no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law requiring it to keep certain promises. Pp. 668-672.

3. Cohen's request that his compensatory damages award be reinstated is rejected. The issues whether his verdict should be upheld on the ground that a promissory estoppel claim had been established under state law and whether the State Constitution may be construed to shield the press from an action such as this one are matters for the State Supreme Court to address and resolve in the first instance. P. 672.

**Counsel:** Elliot C. Rothenberg argued the cause and filed briefs for petitioner.

John D. French argued the cause for respondents. With him on the brief for respondent Cowles Media Co. were John Borger and Randy M. Lebedoff. Stephen M. Shapiro, Andrew L. Frey, Kenneth S. Geller, Mark I. Levy, Michael W. McConnell, Paul R. Hannah, Laurie A. Zenner, John C. Fontaine, and Cristina L. Mendoza filed a brief for respondent Northwest [\*\*\*\*5] Publications, Inc. \*

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\* Rex S. Heinke, Robert S. Warren, Jerry S. Birenz, Ralph P. Huber, W. Terry Maguire, Rene P. Milam, Richard M. Schmidt, Harold W. Fuson, Jr., Barbara Wartelle Wall, James E. Grossberg, George Freeman, and William A. Niese filed a brief for Advance

**Judges:** WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL and SOUTER, JJ., joined, post, p. 672. SOUTER, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined, post, p. 676.

**Opinion by:** WHITE

## Opinion

[\*665] [\*\*\*594] [\*\*2516] JUSTICE WHITE delivered the opinion of the Court.

[LEdHN\[1A\]](#) [1A]The question before us is whether the [First Amendment](#) prohibits a plaintiff from recovering damages, under state promissory estoppel law, for a newspaper's breach of a promise of confidentiality given to the plaintiff in exchange for information. We hold that it does not.

During the closing days of the 1982 Minnesota gubernatorial race, Dan Cohen, an active Republican associated with Wheelock Whitney's Independent-Republican gubernatorial campaign, approached [\*\*\*\*6] reporters from the St. Paul Pioneer Press Dispatch (Pioneer Press) and the Minneapolis Star and Tribune (Star Tribune) and offered to provide documents relating to a candidate in the upcoming election. Cohen made clear to the reporters that he would provide the information only if he was given a promise of confidentiality. Reporters from both papers promised to keep Cohen's identity anonymous and Cohen turned over copies of two public court records concerning Marlene Johnson, the Democratic-Farmer-Labor candidate for Lieutenant Governor. The first record indicated that Johnson had been charged in 1969 with three counts of unlawful assembly, and the second that she had been convicted in 1970 of petit theft. Both newspapers interviewed Johnson for her

explanation and one reporter tracked down the person who had found the records for Cohen. As it turned out, the unlawful assembly charges arose out of Johnson's participation in a protest of an alleged failure to hire minority workers on municipal construction projects, and the charges were eventually dismissed. The petit theft conviction was for leaving a store without paying [\*666] for \$ 6 worth of sewing materials. The [\*\*\*\*7] incident apparently occurred at a time during which Johnson was emotionally distraught, and the conviction was later vacated.

After consultation and debate, the editorial staffs of the two newspapers independently decided to publish Cohen's name as part of their stories concerning Johnson. In their stories, both papers identified Cohen as the source of the court records, indicated his connection to the Whitney campaign, and included denials by Whitney campaign officials of any role in the matter. The same day the stories appeared, Cohen was fired by his employer.

Cohen sued respondents, the publishers of the Pioneer Press and Star Tribune, in Minnesota state court, [\*\*\*595] alleging fraudulent misrepresentation and breach of contract. The trial court rejected respondents' argument that the [First Amendment](#) barred Cohen's lawsuit. A jury returned a verdict in Cohen's favor, awarding him \$ 200,000 in compensatory damages and \$ 500,000 in punitive damages. The Minnesota Court of Appeals, in a split decision, reversed the award of punitive damages after concluding that Cohen had failed to establish a fraud claim, the only claim which would support such an award. [445 N.W.2d 248, 260 \(1989\)](#). [\*\*\*\*8] However, the court upheld the finding of liability for breach of contract and the \$ 200,000 compensatory damages award. [Id., at 262](#).

A divided Minnesota Supreme Court reversed the compensatory damages award. [457 N.W.2d 199 \(1990\)](#). After affirming the Court of Appeals' determination that Cohen had not established a claim for fraudulent misrepresentation, the court

considered his breach-of-contract claim and concluded that "a contract cause of action is inappropriate [**\*\*2517**] for these particular circumstances." *Id.*, at 203. The court then went on to address the question whether Cohen could establish a cause of action under Minnesota law on a promissory estoppel theory. Apparently, a promissory estoppel theory was never tried to the jury, nor briefed nor argued by [**\*667**] the parties; it first arose during oral argument in the Minnesota Supreme Court when one of the justices asked a question about equitable estoppel. See App. 38.

In addressing the promissory estoppel question, the court decided that the most problematic element in establishing such a cause of action here was whether injustice [**\*\*\*\*9**] could be avoided only by enforcing the promise of confidentiality made to Cohen. The court stated: "Under a promissory estoppel analysis there can be no neutrality towards the [First Amendment](#). In deciding whether it would be unjust not to enforce the promise, the court must necessarily weigh the same considerations that are weighed for whether the [First Amendment](#) has been violated. The court must balance the constitutional rights of a free press against the common law interest in protecting a promise of anonymity." [457 N.W.2d at 205](#). After a brief discussion, the court concluded that "in this case enforcement of the promise of confidentiality under a promissory estoppel theory would violate defendants' [First Amendment](#) rights." *Ibid.*

We granted certiorari to consider the [First Amendment](#) implications of this case. 498 U.S. 1011 (1990).

[LEdHN\[2\]](#) [2] Respondents initially contend that the Court should dismiss this case without reaching the merits because the promissory estoppel theory was not argued or presented in the courts below and because the Minnesota Supreme Court's decision rests entirely on the interpretation of state [**\*\*\*\*10**] law. These contentions do not merit extended discussion. [HN1](#) It is irrelevant to this

Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided. [Orr v. Orr](#), 440 U.S. 268, 274-275, 59 L. Ed. 2d 306, 99 S. Ct. 1102 (1979); [Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.](#), 472 U.S. 749, 754, n. 2, 86 L. Ed. 2d 593, 105 S. Ct. 2939 (1985); [Mills v. Maryland](#), [**\*\*\*596**] 486 U.S. 367, 371, n. 3, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988); [Franks v. Delaware](#), 438 U.S. 154, 161-162, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978); [Jenkins v. Georgia](#), 418 U.S. 153, 157, 41 L. Ed. 2d 642, 94 S. Ct. 2750 (1974). Moreover, that the Minnesota Supreme Court rested its holding on federal law could not be made [**\*668**] more clear than by its conclusion that "in this case enforcement of the promise of confidentiality under a promissory estoppel theory would violate defendants' [First Amendment](#) rights." [457 N.W.2d at 205](#). It can hardly be said that there is no [First Amendment](#) issue present in the case when respondents have defended against this suit all along by arguing that the [First Amendment](#) [**\*\*\*\*11**] barred the enforcement of the reporters' promises to Cohen. We proceed to consider whether that Amendment bars a promissory estoppel cause of action against respondents.

[LEdHN\[3\]](#) [3] The initial question we face is whether a private cause of action for promissory estoppel involves "state action" within the meaning of the [Fourteenth Amendment](#) such that the protections of the [First Amendment](#) are triggered. For if it does not, then the [First Amendment](#) has no bearing on this case. The rationale of our decision in [New York Times Co. v. Sullivan](#), 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964), and subsequent cases compels the conclusion that there is state action here. Our cases teach that [HN2](#) the application of state rules of law in state courts in a manner alleged to restrict [First Amendment](#) freedoms constitutes "state action" under the [Fourteenth Amendment](#). See, e. g., *id.*, at 265; [NAACP v. Claiborne Hardware Co.](#), 458 U.S. 886, 916, n. 51, 73 L. Ed. 2d 1215, 102 S. Ct. 3409 (1982); [Philadelphia Newspapers, Inc. v. Hepps](#), 475 U.S. 767, 777, 89 L. Ed. 2d 783, 106

[S. Ct. 1558 \(1986\)](#). In this case, the Minnesota Supreme Court held that if Cohen could recover at [\*\*\*\*12] all it would be on the theory of promissory estoppel, a state-law doctrine which, in the absence of a contract, creates obligations never explicitly assumed by the parties. These legal obligations would be enforced through the official power of the Minnesota courts. Under our cases, that is enough to constitute "state action" for purposes of the [Fourteenth Amendment](#).

[LEdHN\[4\]](#) [4] Respondents rely on the proposition that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a [\*669] state interest of the highest order." [Smith v. Daily Mail Publishing Co.](#), 443 U.S. 97, 103, 61 L. Ed. 2d 399, 99 S. Ct. 2667 (1979). That proposition is unexceptionable, and it has been applied in various cases that have found insufficient the asserted state interests in preventing publication of truthful, lawfully obtained information. See, e. g., [Florida Star v. B. J. F.](#), 491 U.S. 524, 105 L. Ed. 2d 443, 109 S. Ct. 2603 (1989); [Smith v. Daily Mail](#), *supra*; [Landmark Communications, Inc. v. Virginia](#), 435 U.S. 829, 56 L. Ed. 2d 1, 98 S. Ct. 1535 (1978).

[\*\*\*\*13] [LEdHN\[5A\]](#) [5A] [LEdHN\[6\]](#) [6] [LEdHN\[7\]](#) [7] [LEdHN\[8\]](#) [8] [LEdHN\[9\]](#) [9] [LEdHN\[10\]](#) [10] This case, however, is not controlled by this line of cases but, rather, by the equally well-established line of decisions holding that [HN3](#) generally applicable laws do not offend the [First Amendment](#) simply because their enforcement against the press has incidental effects on its [\*\*\*597] ability to gather and report the news. As the cases relied on by respondents recognize, the truthful information sought to be published must have been lawfully acquired. The press may not with impunity break and enter an office or dwelling to gather news. Neither does the [First Amendment](#) relieve a newspaper reporter of

the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source. [Branzburg v. Hayes](#), 408 U.S. 665, 33 L. Ed. 2d 626, 92 S. Ct. 2646 (1972). The press, like others interested in publishing, may not publish copyrighted material without obeying the copyright laws. See [Zacchini v. Scripps-Howard Broadcasting Co.](#), 433 U.S. 562, 576-579, 53 L. Ed. 2d 965, 97 S. Ct. 2849 (1977). Similarly, the media must obey the National Labor Relations Act, [\*\*\*\*14] [Associated Press v. NLRB](#), 301 U.S. 103, 81 L. Ed. 953, 57 S. Ct. 650 (1937), and the Fair Labor Standards Act, [Oklahoma Press Publishing Co. v. Walling](#), 327 U.S. 186, 192-193, 90 L. Ed. 614, 66 S. Ct. 494 (1946); may not restrain trade in violation of the antitrust laws, [Associated Press v. United States](#), 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945); [Citizen Publishing Co. v. United States](#), 394 U.S. 131, 139, 22 L. Ed. 2d 148, 89 S. Ct. 927 (1969); and must pay non-discriminatory taxes, [Murdock v. Pennsylvania](#), 319 U.S. 105, 112, 87 L. Ed. 1292, 63 S. Ct. 870 (1943); [Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue](#), 460 U.S. 575, 581-583, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983). [\*670] Cf. [University of Pennsylvania v. EEOC](#), 493 U.S. 182, 201-202, 107 L. Ed. 2d 571, 110 S. Ct. 577 (1990). It is, therefore, beyond dispute that "the [HN4](#) publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." [Associated Press v. NLRB](#), *supra*, at 132-133. Accordingly, enforcement of such general laws against the press is [\*\*\*\*15] not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.

[LEdHN\[1B\]](#) [1B] [LEdHN\[11\]](#) [11] There can be little doubt that [HN5](#) the Minnesota doctrine of promissory estoppel is a law of general applicability. It does not target or single out the press. Rather, insofar as we are advised, the doctrine is generally applicable to the daily transactions of all the citizens [\*\*2519] of

Minnesota. The [First Amendment](#) does not forbid its application to the press.

[LEdHN\[1C\]](#) [1C][LEdHN\[12\]](#) [12]JUSTICE BLACKMUN suggests that applying Minnesota promissory estoppel doctrine in this case will "punish" respondents for publishing truthful information that was lawfully obtained. *Post*, at 675-676. This is not strictly accurate because compensatory damages are not a form of punishment, as were the criminal sanctions at issue in [Smith v. Daily Mail, supra](#). If the contract between the parties in this case had contained a liquidated damages provision, it would be perfectly clear that the payment to petitioner would represent a cost of acquiring newsworthy material to be published at a profit, rather than a punishment imposed by the State. The payment of compensatory damages in this [\*\*\*\*16] case is constitutionally indistinguishable from a generous bonus paid to a confidential news source. [\*\*\*598] In any event, as indicated above, the characterization of the payment makes no difference for [First Amendment](#) purposes when the law being applied is a general law and does not single out the press. Moreover, JUSTICE BLACKMUN's reliance on cases like [Florida Star v. B. J. F., supra](#), and *Smith v. Daily Mail* is misplaced. In those cases, the State itself defined the content of publications that would trigger liability. Here, by contrast, [\*671] Minnesota law simply requires those making promises to keep them. The parties themselves, as in this case, determine the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are self-imposed.

[LEdHN\[1D\]](#) [1D] [LEdHN\[5B\]](#) [5B]Also, it is not at all clear that respondents obtained Cohen's name "lawfully" in this case, at least for purposes of publishing it. Unlike the situation in *Florida Star*, where the rape victim's name was obtained through lawful access to a police report, respondents obtained Cohen's name only by making a promise

that they did not [\*\*\*\*17] honor. The dissenting opinions suggest that the press should not be subject to any law, including copyright law for example, which in any fashion or to any degree limits or restricts the press' right to report truthful information. The [First Amendment](#) does not grant the press such limitless protection.

[LEdHN\[1E\]](#) [1E][LEdHN\[13\]](#) [13]Nor is Cohen attempting to use a promissory estoppel cause of action to avoid the strict requirements for establishing a libel or defamation claim. As the Minnesota Supreme Court observed here, "Cohen could not sue for defamation because the information disclosed [his name] was true." [457 N.W.2d at 202](#). Cohen is not seeking damages for injury to his reputation or his state of mind. He sought damages in excess of \$ 50,000 for breach of a promise that caused him to lose his job and lowered his earning capacity. Thus, this is not a case like [Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 99 L. Ed. 2d 41, 108 S. Ct. 876 \(1988\)](#), where we held that the constitutional libel standards apply to a claim alleging that the publication of a parody was a state-law tort of intentional infliction of emotional distress.

[LEdHN\[1F\]](#) [1F][LEdHN\[14\]](#) [14]Respondents and amici argue that permitting [\*\*\*\*18] Cohen to maintain a cause of action for promissory estoppel will inhibit truthful reporting because news organizations will have legal incentives not to disclose a confidential source's identity even when that person's identity is itself newsworthy. JUSTICE SOUTER makes a similar argument. But if this is the case, [\*672] it is no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law that requires those who make certain kinds of promises to keep them. Although we conclude that the [First Amendment](#) does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law, we reject Cohen's request that in reversing the Minnesota Supreme Court's judgment

we reinstate the jury verdict awarding him \$ 200,000 in compensatory damages. See Brief for Petitioner 31. The Minnesota Supreme Court's incorrect conclusion that the [First Amendment](#) barred Cohen's claim may **[\*\*2520]** well have truncated its consideration of whether a promissory estoppel claim had otherwise **[\*\*\*599]** been established under Minnesota law and whether Cohen's jury verdict could be upheld on a promissory **[\*\*\*\*19]** estoppel basis. Or perhaps the State Constitution may be construed to shield the press from a promissory estoppel cause of action such as this one. These are matters for the Minnesota Supreme Court to address and resolve in the first instance on remand. Accordingly, the judgment of the Minnesota Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*So ordered.*

**Dissent by:** BLACKMUN; SOUTER

## **Dissent**

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JUSTICE BLACKMUN, with whom JUSTICE MARSHALL and JUSTICE SOUTER join, dissenting.

I agree with the Court that the decision of the Supreme Court of Minnesota rested on federal grounds and that the judicial enforcement of petitioner's promissory estoppel claim constitutes state action under the [Fourteenth Amendment](#). I do not agree, however, that the use of that claim to penalize the reporting of truthful information regarding a political campaign does not violate the [First Amendment](#). Accordingly, I dissent.

The majority concludes that this case is not controlled by the decision in [Smith v. Daily Mail Publishing Co.](#), 443 U.S. 97, 61 L. Ed. 2d 399, 99 S. Ct. 2667 **[\*673]** (1979), to the effect that a State may not punish the publication of lawfully **[\*\*\*\*20]** obtained, truthful information "absent a need to further a state interest of the highest order."

[Id.](#), at 103. Instead, we are told, the controlling precedent is "the equally well-established line of decisions holding that generally applicable laws do not offend the [First Amendment](#) simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Ante*, at 669. See, e. g., [Branzburg v. Hayes](#), 408 U.S. 665, 33 L. Ed. 2d 626, 92 S. Ct. 2646 (1972); [Oklahoma Press Publishing Co. v. Walling](#), 327 U.S. 186, 192-193, 90 L. Ed. 614, 66 S. Ct. 494 (1946); [Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue](#), 460 U.S. 575, 581-583, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983). I disagree.

I do not read the decision of the Supreme Court of Minnesota to create any exception to, or immunity from, the laws of that State for members of the press. In my view, the court's decision is premised, not on the identity of the speaker, but on the speech itself. Thus, the court found it to be of "critical significance," that "the promise of anonymity arises in the classic [First Amendment](#) context of the **[\*\*\*\*21]** quintessential public debate in our democratic society, namely, a political source involved in a political campaign." 457 N.W.2d 199, 205 (1990); see also *id.*, at 204, n. 6 (" [New York Times v. Sullivan](#), 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 . . . (1964), holds that a state may not adopt a state rule of law to impose impermissible restrictions on the federal constitutional freedoms of speech and press"). Necessarily, the [First Amendment](#) protection afforded respondents would be equally available to nonmedia defendants. See, e. g., [Lovell v. Griffin](#), 303 U.S. 444, 452, 82 L. Ed. 949, 58 S. Ct. 666 **[\*\*\*600]** (1938) ("The liberty of the press is not confined to newspapers and periodicals. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion"). The majority's admonition that "'the publisher of a newspaper has no special immunity from the application of general laws,'" *ante*, at 670, and its **[\*674]** reliance on the cases that support that principle, are therefore misplaced.

In *Branzburg*, for example, this Court found it significant [\*\*\*\*22] that "these cases involve no intrusions upon speech or assembly, no . . . restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. . . . No penalty, civil or criminal, related to the content of published material is [\*\*2521] at issue here." [408 U.S. at 681](#). Indeed, "the sole issue before us" in *Branzburg* was "the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime." *Id.*, at 682. See also [Associated Press v. NLRB](#), 301 U.S. 103, 133, 81 L. Ed. 953, 57 S. Ct. 650 (1937); [Associated Press v. United States](#), 326 U.S. 1, 20, n. 18, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945); [Citizen Publishing Co. v. United States](#), 394 U.S. 131, 139, 22 L. Ed. 2d 148, 89 S. Ct. 927 (1969). In short, these cases did not involve the imposition of liability based upon the content of speech.<sup>1</sup>

[\*\*\*\*23] Contrary to the majority, I regard our decision in [Hustler Magazine, Inc. v. Falwell](#), 485 U.S. 46, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988), to be precisely on point. There, we found that the use of a claim of intentional infliction of emotional distress to impose liability for the publication of a satirical critique violated the [First Amendment](#). There was no doubt that Virginia's tort of intentional infliction of emotional distress was "a

law of general applicability" unrelated to the suppression of speech.<sup>2</sup> Nonetheless, a unanimous Court found that, when used to penalize the expression of opinion, the law was subject to the strictures of the [First Amendment](#). In applying that principle, we concluded, *id.*, at 56, [\*\*\*601] that "public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,'" as defined by [New York Times Co. v. Sullivan](#), 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964). In so doing, we rejected [\*\*\*\*24] the argument that Virginia's interest in protecting its citizens from emotional distress was sufficient to remove from [First Amendment](#) protection a "patently offensive" expression of opinion. [485 U.S. at 50](#).<sup>3</sup>

[\*\*\*\*25] As in *Hustler*, the operation of Minnesota's doctrine of promissory estoppel in this case cannot be said to have a merely "incidental" burden on speech; the publication of important political speech is the claimed violation. Thus, as in *Hustler*, the law may not be enforced to punish the expression [\*676] of truthful [\*\*2522] information or opinion.<sup>4</sup> In the instant case, it is

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<sup>1</sup>The only arguable exception is [Zacchini v. Scripps-Howard Broadcasting Co.](#), 433 U.S. 562, 53 L. Ed. 2d 965, 97 S. Ct. 2849 (1977). In *Zacchini*, a performer sued a news organization for appropriation of his "right to the publicity value of his performance," *id.*, at 565, after it broadcast the entirety of his act on local television. This Court held that the [First Amendment](#) did not bar the suit. We made clear, however, that our holding did not extend to the reporting of information about an event of public interest. We explained: "If . . . respondent had merely reported that petitioner was performing at the fair and described or commented on his act, with or without showing his picture on television, we would have a very different case." *Id.*, at 569. Thus, *Zacchini* cannot support the majority's conclusion that "a law of general applicability," *ante*, at 670, may not violate the [First Amendment](#) when employed to penalize the dissemination of truthful information or the expression of opinion.

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<sup>2</sup>The Virginia cause of action for intentional infliction of emotional distress at issue in *Hustler* provided for recovery where a plaintiff could demonstrate "that the defendant's conduct (1) is intentional or reckless; (2) offends generally accepted standards of decency or morality; (3) is causally connected with the plaintiff's emotional distress; and (4) caused emotional distress that was severe." [485 U.S. at 50, n. 3](#).

<sup>3</sup>The majority attempts to distinguish *Hustler* on the ground that there the plaintiff sought damages for injury to his state of mind whereas the petitioner here sought damages "for a breach of a promise that caused him to lose his job and lowered his earning capacity." *Ante*, at 671. I perceive no meaningful distinction between a statute that penalizes published speech in order to protect the individual's psychological well being or reputational interest and one that exacts the same penalty in order to compensate the loss of employment or earning potential. Certainly, our decision in *Hustler* recognized no such distinction.

<sup>4</sup>The majority argues that, unlike the criminal sanctions we considered in [Smith v. Daily Mail Publishing Co.](#), 443 U.S. 97, 61 L.

undisputed that the publication at issue was true.

[\*\*\*\*26] To the extent that truthful speech may ever be sanctioned consistent with the [First Amendment](#), it must be in furtherance of a state interest "of the highest order." [Smith, 443 U.S. at 103](#). Because the Minnesota Supreme Court's opinion makes clear that the State's interest in enforcing its promissory estoppel doctrine in this case was far from compelling, see [457 N.W.2d at 204-205](#), I would affirm that court's decision.

I respectfully dissent.

[\*\*\*602] JUSTICE SOUTER, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE O'CONNOR join, dissenting.

I agree with JUSTICE BLACKMUN that this case does not fall within the line of authority holding the press to laws of general applicability where commercial activities and relationships, [\*677] not the content of publication, are at issue. See *ante*, at 674. Even such general laws as do entail effects on the content of speech, like the one in question, may of course be found constitutional, but only, as

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[Ed. 2d 399, 99 S. Ct. 2667 \(1979\)](#), the liability at issue here will not "punish" respondents in the strict sense of that word. *Ante*, at 670. While this may be true, we have long held that the imposition of civil liability based on protected expression constitutes "punishment" of speech for [First Amendment](#) purposes. See, e. g., [Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 386, 37 L. Ed. 2d 669, 93 S. Ct. 2553 \(1973\)](#) ("In the context of a libelous advertisement . . . this Court has held that the [First Amendment](#) does not shield a newspaper from *punishment* for libel when with actual malice it publishes a falsely defamatory advertisement") (emphasis added), citing [New York Times Co. v. Sullivan, 376 U.S. 254, 279-280, 11 L. Ed. 2d 686, 84 S. Ct. 710 \(1964\)](#); [Gertz v. Robert Welch, Inc., 418 U.S. 323, 340, 41 L. Ed. 2d 789, 94 S. Ct. 2997 \(1974\)](#) ("*Punishment* of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press") (emphasis added). Cf. [New York Times Co., 376 U.S. at 297](#) (Black, J., concurring) ("To *punish* the exercise of this right to discuss public affairs or to *penalize* it through libel judgments is to abridge or shut off discussion of the very kind most needed") (emphasis added).

Though they be civil, the sanctions we review in this case are no more justifiable as "a cost of acquiring newsworthy material," *ante*, at 670, than were the libel damages at issue in *New York Times Co.*, a permissible cost of disseminating newsworthy material.

Justice Harlan observed,

"when [such effects] have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which [\*\*\*\*27] has necessarily involved a weighing of the governmental interest involved. . . . Whenever, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved." [Konigsberg v. State Bar of California, 366 U.S. 36, 51, 6 L. Ed. 2d 105, 81 S. Ct. 997 \(1961\)](#).

Thus, "there is nothing talismanic about neutral laws of general applicability," [Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 901, 108 L. Ed. 2d 876, 110 S. Ct. 1595 \(1990\)](#) (O'CONNOR, J., concurring in judgment), for such laws may restrict [First Amendment](#) rights just as effectively as those directed specifically at speech itself. Because I do not believe the fact of general applicability to be dispositive, I find it necessary to articulate, measure, and compare the competing interests involved in any given case to determine the legitimacy of burdening constitutional interests, and such has been the Court's recent practice in publication cases. See [Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 99 L. Ed. 2d 41, 108 S. Ct. 876 \(1988\)](#); [\*\*\*\*28] [Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 53 L. Ed. 2d 965, 97 S. Ct. 2849 \(1977\)](#).

Nor can I accept the majority's position that we may dispense with balancing because the burden on publication is in a sense "self-imposed" [\*\*2523] by the newspaper's voluntary promise of confidentiality. See *ante*, at 671. This suggests both the possibility of waiver, the requirements for which have not been met here, see, e. g., [Curtis Publishing Co. v. Butts, 388 U.S. 130, 145, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 \(1967\)](#), as well as a conception of [First Amendment](#) rights as those of the speaker alone, with a value that may be

measured without reference to the importance of the [\*678] information to public discourse. But freedom of the press is ultimately founded on the value of enhancing such discourse for the sake of a citizenry better informed and thus more prudently self-governed. "The [First Amendment](#) goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." [First Nat. Bank of Boston v. Bellotti](#), 435 U.S. 765, 783, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1978). [\*\*\*\*29] In this context, "'it is the right of the [public], not the right of the [media], which is paramount,'" [CBS, Inc. v. FCC](#), 453 U.S. 367, 395, 69 L. Ed. 2d 706, 101 S. Ct. 2813 (1981) (emphasis omitted) [\*\*\*603] (quoting [Red Lion Broadcasting Co. v. FCC](#), 395 U.S. 367, 390, 23 L. Ed. 2d 371, 89 S. Ct. 1794 (1969)), for "without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally," [Cox Broadcasting Corp. v. Cohn](#), 420 U.S. 469, 492, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975); cf. [Richmond Newspapers, Inc. v. Virginia](#), 448 U.S. 555, 573, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980); [New York Times Co. v. Sullivan](#), 376 U.S. 254, 278-279, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964).

The importance of this public interest is integral to the balance that should be struck in this case. There can be no doubt that the fact of Cohen's identity expanded the universe of information relevant to the choice faced by Minnesota voters in that State's 1982 gubernatorial election, the publication of which was thus of the sort quintessentially subject to strict [First Amendment](#) [\*\*\*\*30] protection. See, e. g., [Eu v. San Francisco Cty. Democratic Central Comm.](#), 489 U.S. 214, 223, 103 L. Ed. 2d 271, 109 S. Ct. 1013 (1989). The propriety of his leak to respondents could be taken to reflect on his character, which in turn could be taken to reflect on the character of the candidate who had retained him as an adviser. An election could turn on just such a factor; if it should, I am ready to assume that it

would be to the greater public good, at least over the long run.

This is not to say that the breach of such a promise of confidentiality could never give rise to liability. One can conceive of situations in which the injured party is a private individual, [\*679] whose identity is of less public concern than that of petitioner; liability there might not be constitutionally prohibited. Nor do I mean to imply that the circumstances of acquisition are irrelevant to the balance, see, e. g., [Florida Star v. B. J. F.](#), 491 U.S. 524, 534-535, 105 L. Ed. 2d 443, 109 S. Ct. 2603, and n. 8 (1989), although they may go only to what balances against, and not to diminish, the [First Amendment](#) value of any particular piece of information.

Because I believe the State's interest in [\*\*\*\*31] enforcing a newspaper's promise of confidentiality insufficient to outweigh the interest in unfettered publication of the information revealed in this case, I respectfully dissent.

## References

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- 28 Am Jur 2d, *Estoppel and Waiver* 48, 49; 58 Am Jur 2d, *Newspapers, Periodicals, and Press Associations* 19, 20
  - 9A Am Jur Pl & Pr Forms (Rev), *Estoppel and Waiver*, Form 31
  - 4 Am Jur Proof of Facts 2d 641, *Detrimental Reliance on Promise*
  - USCS, [Constitution, Amendment 1](#)
  - L Ed Digest, *Constitutional Law* 927, 960
  - L Ed Index, *Breach of Promise; Estoppel and Waiver; Freedom of Speech and Press; Informers; Newspapers and Periodicals; Privileged and Confidential Matters*
  - Index to Annotations, *Freedom of Speech and Press; Informers; Newspapers and Periodicals; Privileged and Confidential Matters; Promissory Estoppel*

501 U.S. 663, \*679; 111 S. Ct. 2513, \*\*2523; 115 L. Ed. 2d 586, \*\*\*603; 1991 U.S. LEXIS 3639, \*\*\*\*31

#### Annotation References:

The Supreme Court and the right of free speech and press. [93 L Ed 1151](#), [2 L Ed 2d 1706](#), [11 L Ed 2d 1116](#), [16 L Ed 2d 1053](#), [21 L Ed 2d 976](#) .

[First Amendment](#) as immunizing newsman from liability for tortious conduct while gathering news. [28 ALR Fed 904](#).

Privilege [\*\*\*\*32] of newsgatherer against disclosure of confidential sources of information. [99 ALR3d 37](#).

Comment Note.--Promissory estoppel. [48 ALR2d 1069](#).



Caution

As of: October 18, 2026 6:38 AM Z

## **Committee to Defend Reproductive Rights v. Myers**

Supreme Court of California

March 20, 1981

S.F. Nos. 24069, 24053, 24192

### **Reporter**

29 Cal. 3d 252 \*; 625 P.2d 779 \*\*; 172 Cal. Rptr. 866 \*\*\*; 1981 Cal. LEXIS 137 \*\*\*\*; 20 A.L.R.4th 1118

COMMITTEE TO DEFEND REPRODUCTIVE RIGHTS et al., Plaintiffs and Appellants, v. BEVERLEE A. MYERS, as Director, etc., et al., Defendants and Respondents. COMMITTEE TO DEFEND REPRODUCTIVE RIGHTS et al., Petitioners, v. KENNETH CORY, as State Controller, et al., Respondents. COMMITTEE TO DEFEND REPRODUCTIVE RIGHTS et al., Petitioners, v. JESSE M. UNRUH, as State Treasurer, et al., Respondents

**Subsequent History:** [\*\*\*\*1] Respondents' Petition for a Rehearing was Denied April 29, 1981. Richardson, J., was of the Opinion that the Petition should be Granted.

**Prior History:** Superior Court of the City and County of San Francisco, No. 741710, Ira A. Brown, Jr., Judge [case on appeal].

**Disposition:** In S.F. 24069, the judgment is reversed. In S.F. 24053, the alternative writ, having served its purpose, is discharged and the peremptory writ is denied. In S.F. 24192, a peremptory writ of mandate shall issue, directing respondents to refrain from enforcing the unconstitutional restrictions in the Budget Act of 1980 challenged herein. Plaintiffs shall recover their costs in these proceedings, including reasonable attorneys fees pursuant to the provisions of [section 1021.5 of the Code of Civil Procedure](#). Because these three proceedings are inextricably interrelated, on remand of S.F. 24069 the San Francisco Superior Court shall fix an appropriate cost award, including attorneys fees, by reference

to the costs and attorney services expended in all three proceedings.

### **Core Terms**

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abortion, constitutional right, woman, fetus, childbirth, right to privacy, privacy, procreative choice, recipient, budget, pregnancy, bear a child, state interest, women's rights, medical care, discriminatory, fundamental rights, impair, statutory scheme, compelling interest, public benefit, outweigh, impose a condition, state constitution, subsidize, pregnant, withhold, resulting impairment of constitutional rights, exercise of constitutional rights, medically necessary

### **Case Summary**

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#### **Procedural Posture**

Plaintiff indigent women sought writ of mandate regarding a judgment from the Court of Appeal of California, which upheld respondent state officials' enforcement of the California Budget Act funding restrictions that limited Medi-Cal funding for abortions. The instant court issued an alternative writ for similar actions pending at the time of the appeal and stayed enforcement of the restrictions until resolution of the merits of plaintiffs' suit.

#### **Overview**

On review, plaintiff indigent women contended that the challenged California Budget Act funding restrictions constituted a selective and discrimination public funding scheme that violated

plaintiffs' constitutional right to privacy. The court held that when examined in light of the special scrutiny required under Danskin-Bagley principles, the statutory scheme at issue was unconstitutional. The court found that the funding restrictions were antithetical to the purpose of the Medi-Cal program; that the benefits of the funding restrictions did not manifestly outweigh the impairment of the constitutional right to privacy; that the fiscal advantages of the restrictions were illusory; that the asserted state interest in protecting fetal life was subordinate to a woman's fundamental right of procreative choice; and that the Medi-Cal program, as qualified by the funding restrictions, did not aid poor women who chose to bear children in a manner least offensive to the rights of those who chose abortion. The court reversed, discharged the alternative writs, and issued peremptory mandate relief to preclude the enforcement of the unconstitutional restrictions.

### Outcome

The court reversed the judgment that upheld the validity of the subject Budget Act funding restrictions on the Medi-Cal program and issued a writ of mandate to prevent enforcement of the unconstitutional restrictions that operated to withhold selectively medical service benefits from plaintiffs solely because they sought to exercise their constitutional right of procreative choice in a manner not favored by respondent state officials.

### LexisNexis® Headnotes

Constitutional Law > Substantive Due Process > Scope

### HN1 Constitutional Law, Substantive Due Process

A discriminatory or restricted government benefit program demands special scrutiny whether or not it erects some new or additional obstacle that impedes

the exercise of constitutional rights.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Constitutional Law > Substantive Due Process > Scope

### HN2 Case or Controversy, Constitutionality of Legislation

In order to sustain the constitutionality of a statutory scheme that conditions the receipt of benefits upon a recipient's waiver of a constitutional right or upon his exercise of such right in a manner which the government approves, the state must demonstrate: (1) that the imposed conditions relate to the purposes of the legislation which confers the benefit or privilege; (2) that the utility of imposing the conditions manifestly outweighs any resulting impairment of constitutional rights; and (3) that there are no less offensive alternatives available for achieving the state's objective.

Healthcare Law > Medical Treatment > Abortion > General Overview

Public Health & Welfare  
Law > Healthcare > Services for Disabled & Elderly Persons > General Overview

Healthcare Law > Medical Treatment > General Overview

Healthcare Law > Medical Treatment > End-of-Life Decisions > General Overview

Public Health & Welfare  
Law > ... > Providers > Payments & Reimbursements > General Overview

### HN3 Medical Treatment, Abortion

The California Medi-Cal program funds physician, hospital or clinic outpatient, and surgical center services, as well as inpatient hospital services, for recipients of public assistance and medically indigent aged and other persons. [Cal. Welf. & Inst. Code §§ 14000, 14132\(a\), \(b\)](#). Abortions performed by a physician, whether in a hospital, clinic, or office, are medical services which, in the absence of special funding restrictions, would be funded under the foregoing provisions.

Criminal Law & Procedure > ... > Sexual  
Assault > Rape > Elements

Public Health & Welfare  
Law > ... > Providers > Payments &  
Reimbursements > General Overview

Criminal Law & Procedure > ... > Sexual  
Assault > Incest > General Overview

#### [HN4](#) Rape, Elements

Although the 1978 Budget Act enactment restricting Medi-Cal funding of abortions differs slightly from the 1979 and 1980 restrictions, all in essence provide funding for abortions only (1) when pregnancy would endanger the mother's life; (2) when pregnancy would cause severe and long-lasting physical health damage to the mother; (3) when pregnancy is the result of illegal intercourse (rape, incest, or unlawful intercourse with a minor); or (4) when abortion is necessary to prevent the birth of severely defective infants.

Constitutional Law > Bill of  
Rights > Fundamental Rights > General  
Overview

Constitutional Law > Supremacy  
Clause > General Overview

Constitutional Law > Bill of Rights > General  
Overview

#### [HN5](#) Bill of Rights, Fundamental Rights

The California Constitution is, and always has been, a document of independent force.

Constitutional Law > Supremacy  
Clause > General Overview

#### [HN6](#) Constitutional Law, Supremacy Clause

State courts, in interpreting constitutional guarantees contained in state constitutions, are independently responsible for safeguarding the rights of their citizens.

Constitutional Law > Supremacy  
Clause > General Overview

#### [HN7](#) Constitutional Law, Supremacy Clause

Just as the United States Supreme Court bears the ultimate judicial responsibility for determining matters of federal law, the California Supreme Court bears the ultimate judicial responsibility for resolving questions of state law, including the proper interpretation of provisions of the state constitution.

Constitutional Law > Supremacy  
Clause > General Overview

#### [HN8](#) Constitutional Law, Supremacy Clause

[Cal. Const. art. I, § 24](#) provides that the rights guaranteed by the state constitution are not dependent on those guaranteed by the United States Constitution.

Constitutional Law > Equal  
Protection > Poverty

Governments > State & Territorial  
Governments > Boundaries

Public Health & Welfare  
 Law > ... > Providers > Payments &  
 Reimbursements > General Overview

### **HN9 Equal Protection, Poverty**

Although the state has no constitutional obligation to provide medical care to the poor, a long line of California decisions establishes that once the state has decided to make such benefits available, it bears a heavy burden of justification in defending any provision which withholds such benefits from otherwise qualified individuals solely because they choose to exercise a constitutional right.

Constitutional Law > Substantive Due  
 Process > Privacy > General Overview

Constitutional Law > Equal  
 Protection > Poverty

### **HN10 Substantive Due Process, Privacy**

Under [Cal. Const. art. I, § 1](#), all women in the state -- rich and poor alike -- possess a fundamental constitutional right to choose whether or not to bear a child.

Constitutional Law > Substantive Due  
 Process > Privacy > General Overview

### **HN11 Substantive Due Process, Privacy**

See [Cal. Const. art. I, § 1](#).

Constitutional Law > Substantive Due  
 Process > Scope

Governments > State & Territorial  
 Governments > Property

### **HN12 Constitutional Law, Substantive Due Process**

A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is use of state property.

Constitutional Law > Substantive Due  
 Process > Scope

### **HN13 Constitutional Law, Substantive Due Process**

California courts repeatedly reject the argument that because the state is not obligated to provide a general benefit, it may confer such a benefit on a selective basis which excludes certain recipients solely because they seek to exercise a constitutional right.

Constitutional Law > Substantive Due  
 Process > Scope

### **HN14 Constitutional Law, Substantive Due Process**

The California Supreme Court acknowledges that government may, when circumstances inexorably so require, impose conditions upon the enjoyment of publicly conferred benefits despite a resulting qualification of constitutional rights.

Constitutional Law > Equal Protection > Nature  
 & Scope of Protection

Constitutional Law > Substantive Due  
 Process > Scope

### **HN15 Equal Protection, Nature & Scope of Protection**

The government bears a heavy burden of demonstrating the practical necessity for an unequal statutory treatment.

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > Substantive Due Process > Scope

### **HN16 Bill of Rights, Fundamental Freedoms**

The state must satisfy a three-part standard to justify an unequal treatment scheme. First, the state must establish that the imposed conditions relate to the purpose of the legislation which confers the benefit or privilege. Second, not only must the conditions annexed to the enjoyment of a publicly conferred benefit reasonably tend to further the purpose sought by conferment of that benefit, but also the utility of imposing the conditions must manifestly outweigh any resulting impairment of constitutional rights. Third, in imposing conditions upon the enjoyment of publicly conferred benefits, as in the restriction of constitutional rights by more direct means, the state must establish the unavailability of less offensive alternatives and demonstrate that the conditions are drawn with narrow specificity, restricting the exercise of constitutional rights only to the extent necessary to maintain the integrity of the program which confers the benefits.

Constitutional Law > Substantive Due Process > Scope

### **HN17 Constitutional Law, Substantive Due Process**

The entire Danskin-Bagley doctrine is concerned solely with the validity of conditional prerequisites for the receipt of various benefits which the government has no obligation to provide.

Constitutional Law > Substantive Due Process > Scope

### **HN18 Constitutional Law, Substantive Due Process**

California holdings uniformly confirm that the absence of an "additional obstacle" to the exercise of one's constitutional rights does not eliminate the government's burden of demonstrating the propriety of the condition or limitation under the Bagley test.

Constitutional Law > Substantive Due Process > Scope

### **HN19 Constitutional Law, Substantive Due Process**

Under Danskin-Bagley principles, whenever the state conditions the receipt of a benefit upon the waiver of a constitutional right or discriminatorily withholds such a benefit from individuals who exercise such right, the state must demonstrate the propriety of the condition in terms of the governing three-part test.

Constitutional Law > Substantive Due Process > Scope

### **HN20 Constitutional Law, Substantive Due Process**

When the state implements a general public benefit program, the California Constitution imposes definite limitations on the state's ability to offer such a benefit in a fashion which discriminates against the exercise of constitutional rights.

Constitutional Law > Substantive Due Process > Scope

### **HN21 Constitutional Law, Substantive Due Process**

The Bagley test posits a threefold inquiry: (1) whether the conditions which are imposed relate to the purposes of the legislation which provide the

benefit; (2) whether the utility of the conditions imposed clearly outweighs the resulting impairment of constitutional rights; and (3) whether there are no less offensive alternatives available to achieve the state's objective.

Constitutional Law > Substantive Due  
Process > Scope

## **HN22 Constitutional Law, Substantive Due Process**

Congress may withhold all sorts of facilities for a better life, but if it affords them it cannot make them available in an obviously arbitrary way or exact surrender of freedoms unrelated to the purpose of the facilities.

Constitutional Law > Substantive Due  
Process > Privacy > General Overview

## **HN23 Substantive Due Process, Privacy**

Both California and federal authorities establish that, at least prior to viability, the state may not subordinate a woman's own medical interests or her right of procreative choice to the interests of the fetus.

Constitutional Law > Substantive Due  
Process > Scope

## **HN24 Constitutional Law, Substantive Due Process**

A court in undertaking the "weighing" or "balancing" process under the second part of the Bagley test must realistically assess the importance of the state interest served by the restrictions and the degree to which the restrictions actually serve such interest; further the court must carefully evaluate the importance of the constitutional right at stake and gauge the extent to which the

individual's ability to exercise that right is threatened or impaired, as a practical matter, by the specific statutory restrictions or conditions at issue. The court must canvass the various factors on each side of the scale in order to determine whether the utility of the restrictions "manifestly outweighs" the resulting impairment of constitutional rights.

Constitutional Law > Substantive Due  
Process > Scope

## **HN25 Constitutional Law, Substantive Due Process**

In undertaking the "weighing" or "balancing" under the second part of the Bagley test, the court begins by examining the nature and importance of the constitutional right at issue, and then consider the degree to which this right is actually threatened by the challenged statutory scheme.

Constitutional Law > Substantive Due  
Process > Privacy > General Overview

Criminal Law & Procedure > ... > Homicide,  
Manslaughter & Murder > Criminal  
Abortion > General Overview

## **HN26 Substantive Due Process, Privacy**

In California, law and medicine recognize that therapeutic abortion is a legitimate medical treatment which may be necessary for the preservation of a pregnant woman's life and health.

Constitutional Law > Substantive Due  
Process > Privacy > Personal Decisions

Constitutional Law > Substantive Due  
Process > Privacy > General Overview

## **HN27 Privacy, Personal Decisions**

The fundamental right of the woman to choose

whether to bear children follows from the United States Supreme Court's and the California Supreme Court's repeated acknowledgment of a "right of privacy" or "liberty" in matters related to marriage, family, and sex.

Constitutional Law > Substantive Due Process > Privacy > General Overview

### **HN28 Substantive Due Process, Privacy**

If the right of privacy means anything, it is the right of the individual to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Healthcare Law > Medical Treatment > Abortion > Right to Privacy

### **HN29 Substantive Due Process, Privacy**

During the first two trimesters of pregnancy, when the fetus is not viable, the state's interest in protecting the fetus is not of compelling character. Consequently, the state may not subordinate the woman's fundamental right of procreative choice to the state's interest in protecting a nonviable fetus.

Constitutional Law > Substantive Due Process > Privacy > General Overview

### **HN30 Substantive Due Process, Privacy**

Prior to the third trimester of pregnancy, the state may regulate only to protect the woman's health -- not to protect the fetus. In the third trimester the state may enact restrictions to protect the fetus, but may not proscribe abortions necessary to preserve the woman's life or health.

Constitutional Law > Substantive Due Process > Privacy > General Overview

### **HN31 Substantive Due Process, Privacy**

Protection of a nonviable fetus is not a compelling state interest.

Constitutional Law > Substantive Due Process > Privacy > General Overview

### **HN32 Substantive Due Process, Privacy**

A woman's right to choose may be infringed only by regulations necessary to further a compelling interest.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Constitutional Law > Substantive Due Process > Privacy > General Overview

### **HN33 Privacy, Personal Decisions**

The asserted state's interest in protecting a nonviable fetus is subordinate to the woman's right of privacy.

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

### **HN34 Constitutional Law, Substantive Due Process**

In effect, the third part of the Bagley test requires the state to adopt the "least offensive alternative" adequate to achieve any legitimate state interest.

This requirement parallels the requirement that the state, to sustain legislation subject to strict judicial scrutiny under the equal protection clause, must demonstrate not only that it has a compelling interest which justifies the law, but that the distinctions drawn by the law are necessary to further its purpose.

Constitutional Law > Substantive Due  
Process > Privacy > General Overview

### **HN35 Substantive Due Process, Privacy**

The morality of abortion is not a legal or constitutional issue; it is a matter of philosophy, of ethics, and of theology. It is a subject upon which reasonable people can, and do, adhere to vastly divergent convictions and principles.

Constitutional Law > Substantive Due  
Process > Privacy > General Overview

### **HN36 Substantive Due Process, Privacy**

Although the legislature need not subsidize any of the costs associated with childbearing, or with health care generally, once it chooses to enter the constitutionally protected area of choice, it must do so with genuine indifference. It may not weight the options open to the pregnant woman by its allocation of public funds; in this area, government is not free to achieve with carrots what it is forbidden to achieve with sticks.

## **Headnotes/Summary**

### **Summary**

#### **CALIFORNIA OFFICIAL REPORTS SUMMARY**

In the first of three actions consolidated on appeal, plaintiffs brought suit in the superior court to enjoin the enforcement of provisions of the Budget Act of 1978 which restricted the circumstances under

which public funds were authorized to pay for abortions for Medi-Cal recipients. Plaintiffs also filed original petitions for mandate in the Supreme Court to restrain enforcement of similar provisions of the 1979 and 1980 Budget Acts. All three acts in essence provided funding for abortions only when pregnancy would endanger the mother's life, when pregnancy would cause severe and long-lasting physical health damage to the mother, when pregnancy was the result of illegal intercourse, or when abortion was necessary to prevent the birth of severely defective infants. The trial court, with respect to the 1978 act, upheld the restrictions and refused injunctive relief. (Superior Court of the City and County of San Francisco, No. 741710, Ira A. Brown, Jr., Judge [case on appeal].)

The Supreme Court reversed the judgment of the trial court in the case on appeal, denied a peremptory writ in the original writ proceeding challenging the 1979 restrictions, and issued a peremptory writ directing respondent state officials to refrain from enforcing the unconstitutional restrictions in the Budget Act of 1980. The court first held that a three-part test established by California unconstitutional condition cases was applicable for evaluating the constitutionality of the statutory scheme at issue, even in the absence of a new or additional obstacle impeding the exercise of constitutional rights, since it conditioned the receipt of benefits upon a recipient's waiver of a constitutional right or upon his exercise of such right in a manner which the government approved. In order to sustain the constitutionality of such a scheme under the California Constitution, the state was thus required to demonstrate that the imposed conditions related to the purposes of the legislation which conferred the benefit or privilege, that the utility of imposing the conditions manifestly outweighed any resulting impairment of constitutional rights, and that there were no less offensive alternatives available for achieving the state's objective. Measuring the statutory scheme against this standard, the court held that it violated the privacy and equal protection guarantees of the California Constitution, since the restrictions were

antithetical to the purpose of the Medi-Cal program, since the fiscal advantages of the restrictions were illusory and the asserted state interest in protecting fetal life could not constitutionally claim priority over the woman's fundamental right of procreative choice, and since the restrictions did not aid poor women who chose to bear children in a manner least offensive to the rights of those who chose abortion. (Opinion by Tobriner, J., with Mosk and Newman, JJ., concurring. Separate concurring opinion by Bird, C. J. Separate dissenting opinion by Richardson, J., with Clark, J., concurring.)

## Headnotes

### CA(1) (1)

#### **Constitutional Law § 8—Power and Duty of Courts to Construe—Obligation to Independently Construe State Constitutional Safeguards.**

--State courts, in interpreting state constitutional guarantees, are independently responsible for safeguarding the rights of their citizens and bear an independent constitutional obligation to interpret state constitutional safeguards in a manner consistent with the governing principles of state law.

### CA(2) (2)

#### **Public Aid and Welfare § 31—Medi-Cal—Constitutionality of Statutes Limiting Funding for Abortions—Applicable Standards of Review.**

--Whenever the state conditions the receipt of a benefit upon the waiver of a constitutional right or discriminatorily withholds such a benefit from individuals who exercise such right, the state bears a heavy burden of justification. Thus, in order to sustain the constitutionality of statutory provisions limiting Medi-Cal funding for abortions under the California Constitution, the state was required to demonstrate that the imposed conditions related to

the purposes of the legislation which conferred the benefit, that the utility of imposing the conditions manifestly outweighed any resulting impairment of constitutional rights, and that there were no less offensive alternatives available for achieving the state's objective. The absence of an additional obstacle to the exercise of one's constitutional right of procreative choice did not eliminate the government's burden of demonstrating the propriety of the condition or limitation under this three-prong test.

### CA(3a) (3a) CA(3b) (3b)

#### **Public Aid and Welfare § 31—Medi-Cal—Constitutionality of Statutes Limiting Funding for Abortions.**

--Statutory provisions limiting Medi-Cal funding for abortions are invalid under the privacy and equal protection guarantees of the California Constitution, when measured against established state constitutional standards. First, the restrictions imposed on poor women who seek to exercise their constitutional right of procreative choice bear no relationship whatsoever to the fundamental purpose of the Medi-Cal program, which is to alleviate the hardship and suffering incurred by those who cannot afford needed medical care, and instead directly impede such fundamental purpose by subjecting poor women to significant health hazards. Second, the alleged benefits flowing from the Medi-Cal funding restrictions in no sense manifestly outweigh the resulting severe impairment of constitutional rights, when viewed in light of the fundamental and intimate nature of the constitutional right of procreative choice, since the restrictions do not in reality serve the state's legitimate interest in conserving its limited fiscal resources, and since the state's interest in protecting a nonviable fetus is subordinate to a woman's right of privacy. Third, the statutory scheme does not serve the state interest in providing medical care for indigents in a manner least offensive to a woman's right of procreative choice, since the state can

readily meet the needs of indigent women without burdening their right of procreative choice simply by funding impartially the expenses of childbirth and abortion.

#### CA(4) (4)

##### **Privacy § 3—Nature and Extent of Right—Abortion.**

--Statutory provisions limiting Medi-Cal funding for abortions undermine the right of privacy guaranteed under Cal. Const., art. I, § 1, in that they threaten not only a woman's interests in life, health, and personal bodily autonomy, but also her right to decide for herself whether to parent a child.

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**Judges:** Opinion by Tobriner, J., with Mosk and Newman, JJ., concurring. Separate concurring opinion by Bird, C. J. Separate dissenting opinion by Richardson, J., with Clark, J., concurring.

#### **Opinion by: TOBRINER**

#### **Opinion**

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[\*256] [\*\*780] [\*\*\*\*3] [\*\*\*867] Plaintiffs, representing indigent women throughout the state, challenge the constitutionality under the California Constitution of provisions in the 1978, 1979, and 1980 California Budget Acts that limit Medi-Cal funding for abortions. Although the acts differ in minor respects, all afford full funding of medical expenses incurred by indigent women who decide to bear a child, but, except in a few limited circumstances, deny funding to those indigent women who choose to have an abortion. Plaintiffs contend that this selective or discriminatory public funding scheme violates a number of distinct constitutional guarantees, in particular the women's rights of privacy, due process, and equal protection of the laws.

At the outset, to dispel certain misconceptions that have appeared in this case, we must clarify the precise, narrow legal issue before this court. First, this case does not turn on the morality or immorality of abortion, and most decidedly does not concern the personal views of the individual justices as to the wisdom of the legislation itself or the ethical considerations involved in a woman's individual decision whether or not to bear a child. Indeed, although [\*\*\*\*4] in this instance the Legislature has adopted restrictions which discriminate against women who choose to have an abortion, similar constitutional issues would arise if the Legislature -- as a population control measure, for example -- funded Medi-Cal abortions but refused to provide comparable medical care for poor women who choose childbirth. Thus, the constitutional question before us does not involve a weighing of the value of abortion as against

childbirth, but instead concerns the protection of either procreative choice from discriminatory governmental treatment.

Second, contrary to the suggestion of the defendants and the dissent, the question presented is not whether the state is generally obligated to subsidize the exercise of constitutional rights for those who cannot otherwise afford to do so; plaintiffs do not [\*\*\*868] contend that the state would be required to [\*\*781] fund abortions for poor women if the state had not chosen to fund medical services for poor women who choose to bear a child. Rather, we face the much narrower question of whether the state, having enacted a general program to provide medical services to the poor, may selectively withhold such benefits [\*\*\*\*5] from otherwise qualified persons solely because such persons seek to exercise their constitutional [\*257] right of procreative choice in a manner which the state does not favor and does not wish to support.

In defending the constitutionality of the provisions in question, the Attorney General relies most prominently upon the recent decision of the United States Supreme Court in [\*Harris v. McRae\* \(1980\) 448 U.S. 297 \[65 L.Ed.2d 784, 100 S.Ct. 2671\]](#) (hereafter *McRae*). In *McRae*, the Supreme Court, by a closely divided vote (five to four), upheld restrictions on federal Medicaid funding of abortions similar to those in the state acts before us. As the Attorney General acknowledges, however, the *McRae* case did not present any question under the California Constitution and consequently the justices of the high court neither addressed nor resolved the question of the compatibility of such a statutory scheme with our state constitutional guarantees. It is this question of state constitutional law, not resolved by *McRae*, which we must decide in the present case.

In addressing this issue, we shall explain initially that the analysis utilized by the majority [\*\*\*\*6] of the United States Supreme Court in *McRae* differs substantially from the analysis mandated by the

controlling California authorities and thus cannot be followed here. In *McRae*, the five-justice majority acknowledged that the governmental program provided unequal treatment in the distribution of public benefits solely on the basis of how an individual woman exercised her basic constitutional right of procreative choice. The court concluded, however, that the federal Constitution required no special justification for such discriminatory treatment so long as the program placed no new obstacles in the path of the woman seeking to exercise her constitutional right. ([448 U.S. at pp. 315-318 \[65 L.Ed.2d at pp. 804-805, 100 S.Ct. at p. 2688\]](#).)

By contrast, the governing [HN1](#) California cases, discussed at length below, have long held that a discriminatory or restricted government benefit program demands special scrutiny whether or not it erects some new or additional obstacle that impedes the exercise of constitutional rights. In a series of cases reaching back more than three decades, this court has developed and applied a three-part test for evaluating the constitutionality [\*\*\*\*7] of statutory schemes, like the program at issue here, that condition the receipt of benefits upon a recipient's waiver of a constitutional right or upon his exercise of such right in a manner which the government approves.

[\*258] [HN2](#) In order to sustain the constitutionality of such a scheme under the California Constitution, the state must demonstrate (1) "that the imposed conditions relate to the purposes of the legislation which confers the benefit or privilege"; (2) that "the utility of imposing the conditions . . . manifestly [outweighs] any resulting impairment of constitutional rights"; and (3) that there are no "less offensive alternatives" available for achieving the state's objective. ( [Bagley v. Washington Township Hospital Dist. \(1966\) 65 Cal.2d 499, 505-507 \[55 Cal.Rptr. 401, 421 P.2d 409\]](#).)

As we shall see, when measured against this established standard, the statutory scheme at issue

is plainly unconstitutional. First, the Budget Act restrictions are antithetical to the purpose of the Medi-Cal program -- to provide indigents with access to medical services comparable to that enjoyed by more affluent persons. Second, the benefits of the funding restrictions [\*\*\*\*8] do not manifestly outweigh the impairment of the constitutional rights; the fiscal advantages of the restrictions are illusory, and the asserted state interest in protecting fetal life cannot constitutionally claim priority over the woman's fundamental right of procreative choice. Third, the Medi-Cal program as qualified by the Budget Act restrictions clearly does not aid poor women who choose to bear children in a manner least offensive [\*\*\*869] to the rights of those who choose abortion. Accordingly, we conclude that the challenged restrictions cannot stand.

[\*\*782] 1. *Background of the present litigation.*

**HN3** The California Medi-Cal program funds "physician, hospital or clinic outpatient, [and] surgical center" services, as well as "inpatient hospital services," for "recipients of public assistance [and] medically indigent aged and other persons." ( [Welf. & Inst. Code, §§ 14000, 14132, subs. \(a\) & \(b\).](#)) No one disputes that abortions performed by a physician, whether in a hospital, clinic, or office, are medical services which, in the absence of special funding restrictions, would be funded under the foregoing provisions. Prior to 1978, the Medi-Cal program paid [\*\*\*\*9] for legal abortions obtained by Medi-Cal recipients.

The California Legislature, however, inserted into the 1978, 1979, and 1980 Budget Acts provisions restricting Medi-Cal funding of abortions. (Stats. 1978, ch. 359, § 2, item 248, pp. 823-825; Stats. 1979, ch. 259, § 2, item 261.5, pp. 644-646; Stats. 1980, ch. 510, § 2, item [\*259] 287.5, pp. 1146-1148.) **HN4** Although the 1978 enactment differs slightly from the 1979 and 1980 restrictions, all in essence provide funding for abortions only (1) when pregnancy would endanger the mother's life; (2) when pregnancy would cause severe and long-

lasting physical health damage to the mother; (3) when pregnancy is the result of illegal intercourse (rape, incest, or unlawful intercourse with a minor); or (4) when abortion is necessary to prevent the birth of severely defective infants.<sup>1</sup>

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<sup>1</sup> The 1979 and 1980 Budget Acts restrict Medi-Cal abortion funding by specifying that none of the funds appropriated for Medi-Cal shall be used to pay for abortions, except under any of the following circumstances:

"(a) Where the life of the mother would be endangered if the fetus were carried to full term.

"(b) Where the pregnancy is ectopic.

"(c) Where the pregnancy results from an act punishable under [Section 261 of the Penal Code](#), and such act has been reported, within 60 days, to a law enforcement agency or a public health agency which has immediately reported it to a law enforcement agency, and the abortion occurs during the first trimester.

"(d) Where the pregnancy results from an act punishable under [Section 261.5 of the Penal Code](#), and the female is under 18 years of age, and the abortion is performed no later than the first trimester, provided the female's parent or guardian or, if none, an adult of the female's choice is notified at least five days prior to the abortion by the physician who performs the abortion. Regulations governing the notice requirement shall be promulgated by the State Director of Health Services.

"(e) Where the pregnancy results from an act punishable under [Section 285 of the Penal Code](#), and such act has been reported to a law enforcement agency or a public health agency which has immediately reported it to a law enforcement agency and the abortion occurs no later than during the second trimester.

"(f) Where it is determined by prenatal studies limited to amniocentesis, fetal blood sampling, fetal antiography, ultrasound, X-ray, or maternal blood examination that the mother is likely to give birth to a child with a major or severe genetic or congenital abnormality due to the presence of chromosomal abnormalities, neural tube defects, biochemical diseases, hemoglobinopathies, sex-linked diseases, and infectious processes.

"(g) Where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term, when so certified under penalty of perjury by two physicians, one of whom, where practicable, is a specialist in the affected medical discipline, and documentation thereof is provided with the claim for payment."

The primary difference between the 1978 act and the later acts is that the 1978 act provided funding for abortions to avoid severe and long-lasting physical health damage only when that damage arose from 10 enumerated medical conditions. Since the Legislature deleted that language in the 1979 and 1980 enactments, the question of the validity of the 1978 language is moot.

**[\*\*\*\*10]** Before the 1978 restrictions could take effect, plaintiffs filed this suit against Beverlee A. Myers, Director of the State Department of Health Services, to enjoin her from enforcing the restrictions. The trial court upheld the funding restrictions and refused injunctive relief. Plaintiffs appealed from the judgment, the Court of Appeal affirmed in a two-to-one **[\*260]** decision, and we granted a hearing to decide the important constitutional issue presented.<sup>2</sup>

**[\*\*\*870]** While the suit attacking the 1978 Budget Act restrictions was pending before us on **[\*\*783]** petition for hearing, that act expired, to be replaced by the essentially identical provisions of the 1979 Budget Act. Plaintiffs thereupon filed an original petition in this court (Committee to Defend Reproductive Rights v. Cory) seeking mandate to bar enforcement of the 1979 act. We granted **[\*\*\*\*11]** an alternative writ and stayed enforcement of the restrictions pending resolution of the merits.

The 1979 Budget Act expired June 30, 1980. On July 16 the Legislature enacted the 1980 Budget Act, which imposed restrictions on abortion funding identical to those in the 1979 act. Plaintiffs promptly filed an original petition for mandate (Committee to Defend Reproductive Rights v. Unruh) to restrain enforcement of the 1980 act. We issued an alternative writ and stayed enforcement of the funding restrictions pending resolution of the controversy.<sup>3</sup>

**[\*\*\*\*12]** 2. *Our court bears an independent obligation to resolve plaintiffs' claims under the*

*California Constitution on the basis of the governing state constitutional principles.*

In these actions, plaintiffs contend that the statutes violate a number of provisions of both the California and United States Constitutions. As already noted, in defending the challenged budget restrictions the Attorney General relies most heavily on the United States Supreme Court's recent decision in *McRae*, in which a five-justice majority concluded that similar funding restrictions in the federal Medicaid program did not violate the provisions of the *federal* Constitution. *McRae*, of course, did not resolve or even address the question of the validity of such a statutory scheme under the California Constitution.

**[\*261]** CA(1) (1) Under these circumstances, we think it important to reiterate the basic principles of federalism which illuminate our responsibilities in construing our state Constitution. In emphasizing, in *People v. Brisendine* (1975) 13 Cal.3d 528, 549-550 [119 Cal.Rptr. 315, 531 P.2d 1099], "the incontrovertible conclusion that HN5 the California Constitution is, and always has **[\*\*\*\*13]** been, a document of independent force," our court explained that "[it] is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse. . . . The federal Constitution was designed to guard the states as sovereignties against potential abuses of centralized government; state charters, however, were conceived as the first and at one time the only line of protection of the individual against the excesses of local officials." Accordingly, we affirmed in *Brisendine* that HN6 state courts, in interpreting constitutional guarantees contained in state constitutions, are "*independently responsible* for safeguarding the rights of their citizens." (Italics added.) (*Id. at p. 551.*)<sup>4</sup>

<sup>2</sup> Because both the trial court and Court of Appeal issued temporary stay orders, the restrictive provisions of the 1978 act were never implemented.

<sup>3</sup> Since the 1978 and 1979 Budget Acts have expired, the two suits seeking to restrain enforcement of these laws are technically moot. The action involving the 1980 law presently in effect is sufficient to present all issues which the parties seek to raise. The trial record and most of the briefs, however, were filed in connection with the 1978 and 1979 proceedings. Under these circumstances, we concluded that it would be appropriate to consolidate the three actions for purposes of both oral argument and opinion.

<sup>4</sup> Following this reasoning, we have on numerous occasions

[\*\*\*\*14] Contrary to the Attorney General's rhetoric, such independent construction does [\*\*\*871] not represent an unprincipled exercise of [\*\*784] power, but a means of fulfilling our solemn and independent constitutional *obligation* to interpret the safeguards guaranteed by the California Constitution in a manner consistent with the governing principles of California law. As we explained very recently in [People v. Chavez \(1980\) 26 Cal.3d 334, 352 \[161 Cal.Rptr. 762, 605 P.2d 401\]](#): "[[HN7](#) Just] as the United States Supreme Court bears the ultimate judicial responsibility for determining matters of federal law, this court bears the ultimate judicial responsibility for resolving questions of state law, including the proper [\*262] interpretation of provisions of the state Constitution. [Citations.] In fulfilling this difficult and grave responsibility, we cannot properly relegate our task to the judicial guardians of the federal Constitution, but instead must recognize our personal obligation to exercise independent legal judgment in ascertaining the meaning and application of state constitutional provisions." <sup>5</sup>

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construed the California Constitution as providing greater protection than that afforded by parallel provisions of the United States Constitution. A partial listing of such holdings includes: [People v. Pettingill \(1978\) 21 Cal.3d 231 \[145 Cal.Rptr. 861, 578 P.2d 108\]](#) (protection against self-incrimination); [People v. Hannon \(1977\) 19 Cal.3d 588 \[138 Cal.Rptr. 885, 564 P.2d 1203\]](#) (right to speedy trial); [Serrano v. Priest \(1976\) 18 Cal.3d 728 \[135 Cal.Rptr. 345, 557 P.2d 929\]](#) (equal protection); [People v. Disbrow \(1976\) 16 Cal.3d 101 \[127 Cal.Rptr. 360, 545 P.2d 272\]](#) (protection against self-incrimination); [People v. Longwill \(1975\) 14 Cal.3d 943 \[123 Cal.Rptr. 297, 538 P.2d 753\]](#) (search of arrestees); [People v. Brisendine, supra, 13 Cal.3d 528](#) (same); [Curry v. Superior Court \(1970\) 2 Cal.3d 707 \[87 Cal.Rptr. 361, 470 P.2d 345\]](#) (double jeopardy); [Cardenas v. Superior Court \(1961\) 56 Cal.2d 273 \[14 Cal.Rptr. 657, 363 P.2d 889, 100 A.L.R.2d 371\]](#) (same); [People v. Martin \(1955\) 45 Cal.2d 755 \[290 P.2d 855\]](#) (vicarious exclusionary rule).

<sup>5</sup>In 1972, the people adopted [HN8 article I, section 24, of the California Constitution](#) which provides that the rights "guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." This declaration of constitutional independence, as we stressed in [People v. Brisendine, supra, 13 Cal.3d 528, 551](#), "did not originate at [the] election; indeed the voters were told the provision was a mere reaffirmation of existing law."

[\*\*\*\*15] It is from this perspective that we must analyze plaintiffs' claims that the statutes in question are invalid under the California Constitution.

3. [HN9](#) *Although the state has no constitutional obligation to provide medical care to the poor, a long line of California decisions establishes that once the state has decided to make such benefits available, it bears a heavy burden of justification in defending any provision which withholds such benefits from otherwise qualified individuals solely because they choose to exercise a constitutional right.*

In analyzing the constitutionality of the challenged statutory scheme, we start from the premise, not challenged by the Attorney General, that [HN10](#) under [article I, section 1 of the California Constitution](#) all women in this state -- rich and poor alike -- possess a fundamental constitutional right to choose whether or not to bear a child. Our court first recognized the existence of this constitutional right of procreative choice in [People v. Belous \(1969\) 71 Cal.2d 954 \[80 Cal.Rptr. 354, 458 P.2d 194\]](#), four years before the United States Supreme Court in [Roe v. Wade \(1973\) 410 U.S. 113 \[35 L.Ed.2d 147, 93 S.Ct. 705\]](#) acknowledged [\*\*\*\*16] the existence of a comparable constitutional right under the federal Constitution.

In 1972, moreover, the people of this state specifically added the right of "privacy" to the other inalienable rights of individuals enumerated in [article I, section 1 of the state Constitution](#). <sup>6</sup> The federal constitutional right of privacy, by contrast, enjoys no such *explicit* constitutional [\*263] status. Consequently, in [City of Santa Barbara v. Adamson \(1980\) 27 Cal.3d 123 \[164 Cal.Rptr. 539,](#)

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<sup>6</sup>Article I, section 1 (as reworded by constitutional amendment in 1974) presently provides: "[HN11](#) All people are by nature free and independent and have certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness and privacy."

[610 P.2d 436](#)], this court recently refused to rely on federal precedent to restrict the ambit of the California right of privacy. The federal right, we noted, "appears to be narrower than what the voters approved in 1972 when they added 'privacy' to the California Constitution." ([27 Cal.3d at p. 130, fn. 3.](#))

[\*\*\*\*17] [CA\(2\)](#) (2) The Attorney General concedes that under article I, section 1 the state has no authority directly to prohibit rich or poor women from exercising their right of procreative choice as they see fit. He argues, however, that the state violates no constitutional [\*\*785] precept when it does not directly [\*\*\*872] prohibit the protected activity but simply declines to extend a public benefit -- in this case publicly funded medical care -- to those who choose to exercise their constitutional right in a manner the state does not approve and does not wish to subsidize.

This court faced a nearly identical legal contention in a different factual context over 30 years ago in *Danskin v. San Diego Unified Sch. Dist.* ([1946](#)) [28 Cal.2d 536](#) [[171 P.2d 885](#)]. In *Danskin* the state had established a general program under which private organizations were permitted to utilize public school buildings for public meetings, but had structured the program so as to exclude "subversive elements" from the use of such school property. In defending the statutory scheme, the government argued, as the Attorney General does here, that since the state was under no constitutional obligation to make [\*\*\*\*18] school buildings available to private organizations, it was free to permit or withhold access to such facilities as it saw fit in order to avoid "subsidizing" the exercise of subversive ideas it did not wish to encourage.

In *Danskin*, Justice Traynor -- writing for the court -- rejected the state's argument in no uncertain terms: "The state is under no duty to make school buildings available for public meetings. [Citations.] If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings. [Citations.] Nor can it

make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights. [HN12](#) A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is use of state property. [Citations.] [para.] Since the state cannot compel 'subversive elements' directly to renounce their convictions and affiliations, it cannot make such a renunciation a condition of receiving the privilege of free assembly in a school building." ([28 Cal.2d at pp. 545-546.](#))

[\*264] In the more than three decades that [\*\*\*\*19] have passed since the *Danskin* decision, both this court and the California Courts of Appeal have applied the legal principles underlying *Danskin* in a wide variety of factual settings, involving a host of different "public benefit" programs which conditioned the receipt of benefits on the waiver or forfeiture of a broad range of constitutional rights. As these numerous decisions teach, the *Danskin* principles apply whether the public benefit program at issue is access to a public forum, <sup>7</sup> [\*\*\*\*20] public employment, <sup>8</sup> welfare benefits, <sup>9</sup> public housing, <sup>10</sup>

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<sup>7</sup> See e.g., *Danskin*, *supra*, 28 Cal.2d 536; [American Civil Liberties Union v. Board of Education](#) (1961) 55 Cal.2d 167 [[10 Cal.Rptr. 647](#), 359 P.2d 45, 94 A.L.R.2d 1259]; [Wirta v. Alameda-Contra Costa Transit Dist.](#) (1967) 68 Cal.2d 51 [[64 Cal.Rptr. 430](#), 434 P.2d 982].

<sup>8</sup> See, e.g., [Fort v. Civil Service Commission](#) (1964) 61 Cal.2d 331 [[38 Cal.Rptr. 625](#), 392 P.2d 385]; [Kinneer v. City etc. of San Francisco](#) (1964) 61 Cal.2d 341 [[38 Cal.Rptr. 631](#), 392 P.2d 391]; [Bagley v. Washington Township Hospital Dist.](#) (1966) 65 Cal.2d 499 [[55 Cal.Rptr. 401](#), 421 P.2d 409]; [Rosenfield v. Malcolm](#) (1967) 65 Cal.2d 559, 561 [[55 Cal.Rptr. 505](#), 421 P.2d 697]; [Vogel v. County of Los Angeles](#) (1967) 68 Cal.2d 18 [[64 Cal.Rptr. 409](#), 434 P.2d 961]; [City of Carmel-by-the-Sea v. Young](#) (1970) 2 Cal.3d 259 [[85 Cal.Rptr. 1](#), 466 P.2d 225, 37 A.L.R.3d 1313]; [Finot v. Pasadena City Bd. of Education](#) (1967) 250 Cal.App.2d 189 [[58 Cal.Rptr. 520](#)].

<sup>9</sup> See, e.g., [Parrish v. Civil Service Commission](#) (1967) 66 Cal.2d 260 [[57 Cal.Rptr. 623](#), 425 P.2d 223].

<sup>10</sup> See, e.g., [Housing Authority v. Cordova](#) (1955) 130 Cal.App.2d Supp. 883 [[279 P.2d 215](#)]; [Atkisson v. Kern County Housing](#)

unemployment benefits <sup>11</sup> [\*\*\*\*21] or the use of public property <sup>12</sup> and whether the constitutional right singled out for discriminatory treatment is the right of free speech, <sup>13</sup> or, as in this case, [\*\*786] [\*\*\*873] the right of privacy. <sup>14</sup> In these varying contexts, [HN13](#) California courts have repeatedly rejected the argument that because the state is not obligated to provide a general benefit, it may confer such a benefit on a selective basis which excludes certain recipients solely because they seek to exercise a constitutional right. <sup>15</sup>

[\*265] Our decision in [Bagley v. Washington \[\\*\\*\\*\\*22\] Township Hospital Dist., supra, 65 Cal.2d 499](#) served as a touchstone for many of these crucial precedents. (See, e.g., [Vogel, supra, 68 Cal.2d 18](#); [Parrish, supra, 66 Cal.2d 260](#); [City of Carmel-by-the-Sea, supra, 2 Cal.3d 259](#); [Finot, supra, 250 Cal.App.2d 189](#).) In *Bagley*, plaintiff, a nurse's aide employed by the defendant hospital district, was discharged when she refused to discontinue her off-duty pamphletting and petition circulating activities in support of an election

campaign to recall several of the hospital district's directors. The district defended the discharge by reference to a Government Code section which provided broadly that "[no] . . . employee . . . of a local agency . . . shall take an active part in any campaign . . . for or against any ballot measure relating to the recall of any elected official of the local agency." (Former [Gov. Code, § 3205](#).) In *Bagley*, our court rejected the district's defense and struck down the statute on constitutional grounds.

In reaching our conclusion in *Bagley*, we drew upon the cited prior holdings involving conditional benefit programs and on scholarly legal commentaries <sup>16</sup> to construct a framework [\*\*\*\*23] for judicial analysis of restrictions, like those here at issue, which exclude from government benefit programs potential recipients solely on the basis of their exercise of constitutional rights. Stressing that [HN15](#) the "government bears a heavy burden of demonstrating the practical necessity" for such unequal treatment ([65 Cal.2d at p. 505](#)), our court in *Bagley* established a three-part standard that [HN16](#) the state must satisfy to justify such a scheme.

First, we held that "[the state] [\*\*\*\*24] must establish that the imposed conditions relate to the purpose of the legislation which confers the benefit or privilege." ([65 Cal.2d at pp. 505-506](#).) Second, we declared that "[not] only must the conditions annexed to the enjoyment of a publicly conferred benefit reasonably tend to further the purpose sought by conferment of that benefit, but also the utility of imposing the conditions must manifestly outweigh any resulting impairment of constitutional rights." ( [Id., at p. 506](#).) Third, and finally, we

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[Authority \(1976\) 59 Cal.App.3d 89 \[130 Cal.Rptr. 375\].](#)

<sup>11</sup> See, e.g., [King v. Unemployment Ins. Appeals Bd. \(1972\) 25 Cal.App.3d 199 \[101 Cal.Rptr. 660\]](#); [Thornton v. Department of Human Resources Dev. \(1973\) 32 Cal.App.3d 180 \[107 Cal.Rptr. 892\]](#).

<sup>12</sup> See, e.g., [Binet-Montessori, Inc. v. San Francisco Unified School Dist. \(1979\) 98 Cal.App.3d 991 \[160 Cal.Rptr. 38\]](#).

<sup>13</sup> See, e.g., [Danskin, supra, 28 Cal.2d 536](#); [Vogel, supra, 68 Cal.2d 18](#).

<sup>14</sup> See, e.g., [Parrish, supra, 66 Cal.2d 260](#); [City of Carmel-By-the-Sea, supra, 2 Cal.3d 259](#); [Finot, supra, 250 Cal.App.2d 189](#); [King, supra, 25 Cal.App.3d 199](#); [Thornton, supra, 32 Cal.App.3d 180](#).

<sup>15</sup> We have not, of course, held that the government may never condition the receipt of benefits or privileges upon the nonassertion of constitutional rights. Rather, as we explained in [Bagley v. Washington Township Hospital Dist., supra, 65 Cal.2d 499, 505](#): "Just as we have rejected the fallacious argument that the power of government to impose such conditions knows no limit, so must [HN14](#) we acknowledge that government may, when circumstances inexorably so require, impose conditions upon the enjoyment of publicly conferred benefits despite a resulting qualification of constitutional rights."

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<sup>16</sup> See, e.g., O'Neil, *Unconstitutional Conditions: Welfare Benefits With Strings Attached* (1966) 54 Cal.L.Rev. 443; Linde, *Constitutional Rights in the Public Sector* (1965) 40 Wash.L.Rev. 10; Note, *Unconstitutional Conditions* (1960) 73 Harv.L.Rev. 1595; Willcox, *Invasions of the First Amendment Through Conditioned Public Spending* (1955) 41 Cornell L.Q. 12; Hale, *Unconstitutional Conditions and Constitutional Rights* (1935) 35 Colum.L.Rev. 321; Powell, *The Right to Work for the State* (1916) 16 Colum.L.Rev. 99.

established that "in imposing conditions upon the enjoyment of publicly conferred [\*266] benefits, as in the restriction of constitutional rights by more direct means, the state must establish the unavailability of less offensive alternatives and demonstrate that the conditions are drawn with narrow specificity, restricting the exercise of constitutional rights only to the extent necessary to maintain the integrity of the program which confers the benefits." (*Id.*, at p. 507.)

In attempting to avoid the analytical scrutiny mandated in California by the [\*\*787] [\*\*\*874] *Danskin-Bagley* line of decisions, the Attorney General relies on the recent federal decision [\*\*\*\*25] in *McRae*. The Attorney General is simply mistaken, however, in suggesting that the federal approach to unconstitutional conditions corresponds to the California standard established by the *Danskin-Bagley* line of cases. Indeed, a comparison of several recent California and United States Supreme Court decisions demonstrates quite vividly the divergence between state and federal constitutional doctrine in this realm.

In *Parrish v. Civil Service Commission*, *supra*, 66 Cal.2d 260, for example, this court applied the *Bagley* standard in evaluating the constitutionality of a government practice of conditioning the receipt of welfare benefits upon a recipient's waiver of his constitutional right of privacy in his home. Because the government could not satisfy the *Bagley* test, we held the practice unconstitutional. In *Wyman v. James* (1971) 400 U.S. 309 [27 L.Ed.2d 408, 91 S.Ct. 381], by contrast, the United States Supreme Court subjected a similar governmental intrusion upon the rights of welfare recipients to a lesser degree of scrutiny, and -- contrary to our *Parrish* decision -- upheld the government policy against constitutional challenge.

Similarly, [\*\*\*\*26] in *Wirta v. Alameda-Contra Costa Transit Dist.*, *supra*, 68 Cal.2d 51, our court, applying the principles of *Danskin* and *Bagley*, struck down a discriminatory public transit

advertising policy which made advertising space on public buses available for commercial expression but denied this "public benefit" to those who wished to advertise their views upon noncommercial, political subjects. In *Lehman v. City of Shaker Heights* (1974) 418 U.S. 298 [41 L.Ed.2d 770, 94 S.Ct. 2714], however, the United States Supreme Court, when faced with the identical issue presented in *Wirta*, declined to engage in the demanding scrutiny called for by the California precedents and sustained the unequal advertising policy under the federal Constitution.

[\*267] Finally, our court, in *Bagley* itself and in *Fort v. Civil Service Commission* (1964) 61 Cal.2d 331 [38 Cal.Rptr. 625, 392 P.2d 385], tested the constitutionality of limitations on the political activities of public employees by stringent standards and found broadly worded restrictions on such activities to be unconstitutional. In *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers* [\*\*\*\*27] (1973) 413 U.S. 548 [37 L.Ed.2d 796, 93 S.Ct. 2880], however, the United States Supreme Court applied a less demanding standard and upheld comparably broad restrictions on political activities of federal employees.

As these cases indicate, for at least the past decade the federal decisions in this area have not been a reliable barometer of the governing California constitutional principles. Indeed, an examination of *McRae* itself plainly demonstrates that the *McRae* majority, in refusing to closely scrutinize the discriminatory Medicaid funding scheme, relied on factors which have no bearing on our task in applying California law.

First, the *McRae* court conceptualized the selective funding program as placing no additional "obstacles in the path of a woman's exercise of her freedom of choice" (448 U.S. at p. 316 [65 L.Ed.2d at p. 804, 100 S.Ct. at p. 2688]) but simply leaving "an indigent woman with at least the same range of choices in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care

costs at all." (*Id.*) This reasoning, which was central to the *McRae* decision, cannot be reconciled [\*\*\*\*28] with the analysis adopted in the *Danskin-Bagley* line of decisions.<sup>17</sup>

In *Danskin* itself, for example, the government, by providing a public forum for nonsubversive groups, did not place any [\*\*788] [\*\*\*875] additional obstacle in the path of subversive groups who wanted to hold meetings in private buildings, public parks, or any other previously available forum. Nonetheless, our court held that the discriminatory aspect of the government's benefit program rendered it unconstitutional. Similarly, in *Parrish*, the condition which was placed [\*\*\*\*29] on the receipt of welfare benefits posed no additional threat to the privacy rights of those who did not [\*268] seek such benefits; we recognized, however, that the limitation would, in fact, impair the constitutional rights of would-be recipients and accordingly tested it by the standard announced in *Bagley*.

Indeed, [HN17](#) the entire *Danskin-Bagley* doctrine is concerned solely with the validity of conditional prerequisites for the receipt of various benefits which the government has no obligation to provide. In all of these cases, it may be said that the limitation or condition at issue creates no "additional" obstacle to the exercise of rights, for a recipient unhappy with any such condition is always free -- at least theoretically -- to go without the public benefit in question. The California courts, however, have acknowledged both the practical importance of many governmental benefits to individual recipients and the corresponding likelihood that a discriminatory benefit program will effectively nullify important constitutional rights. Thus, [HN18](#) California

holdings uniformly confirm that the absence of an "additional obstacle" to the exercise of one's constitutional rights [\*\*\*\*30] does not eliminate the government's burden of demonstrating the propriety of the condition or limitation under the *Bagley* test.

The Attorney General finds dictum in *McRae* on which he erects two additional arguments against our reliance upon the California doctrine of unconstitutional conditions. First, he argues that we should draw a distinction between a measure which denies other governmental benefits to women who choose to have an abortion and one which simply denies funding for the abortion itself.<sup>18</sup> The former measure, he suggests, imposes an unconstitutional penalty; the latter merely withholds funding for actions which the state does not want to subsidize.

[\*\*\*\*31] The proffered distinction does not conform to California precedent. In *Danskin* itself, for example, the challenged provisions did not broadly disqualify subversive elements from a wide range of benefits, but rather withheld a single benefit -- the use of public schools as a forum -- from those who wanted to use those facilities to exercise constitutional rights the state did not desire to subsidize. Similarly, under the California cases, the state could not escape application of the *Bagley* standard [\*269] if, instead of denying all welfare benefits to recipients who marry someone of another race, the state provided free marriages for poor interracial couples but declined to extend that "single benefit" to poor interracial couples. (See *The Supreme Court, 1976 Term* (1977) 91 Harv.L.Rev. 70, 144. See also [Binet-Montessori, Inc. v. San Francisco Unified School Dist., supra](#),

<sup>17</sup> Indeed, recent academic commentaries on the *McRae* decision have criticized the majority's conclusion on the ground that the ruling is incompatible with the prior federal unconstitutional condition precedents. (See, e.g., Note, *The Supreme Court, 1979 Term* (1980) 94 Harv.L.Rev. 75, 96-107. See also Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae* (1980) 32 Stan.L.Rev. 1113.)

<sup>18</sup> Although the *McRae* majority upheld restrictions which denied poor women federal Medicaid funds for abortion, the majority opinion notes that "[a] substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion." (448 U.S. at p. 317, fn. 19 [65 L.Ed.2d at p. 805, 100 S.Ct. at p. 2688].)

[98 Cal.App.3d 991, 995.](#)) [HN19](#) Under *Danskin-Bagley* principles, whenever the state conditions the receipt of a benefit upon the waiver of a constitutional right or discriminatorily withholds such a benefit from individuals who exercise such right, the state must demonstrate the propriety [\*\*\*\*32] of the condition in terms of the governing three-part test.

The Attorney General also draws upon *McRae's* analogy (see [448 U.S. at p. 318 \[65 L.Ed.2d at p. 805, 100 S.Ct. at pp. 2688-2689\]](#)) between the state's decision to fund childbirth but not abortion and its decision to fund public education but not "private education." In the decisions recognizing a constitutional right to obtain a private education upon which the ostensible analogy rests, however, the principal question presented was whether the state could compel [\*\*789] [\*\*\*876] all children to attend state-run schools; these decisions concluded that the state could not. (See, e.g., [Pierce v. Society of Sisters \(1925\) 268 U.S. 510 \[69 L.Ed. 1070, 45 S.Ct. 571, 39 A.L.R. 468\]](#).) An analogous medical care case would arise if a state law requiring, for example, that all medical care be obtained from a public hospital clashed with an individual's asserted constitutional right to reject state-provided medical care in favor of medical care that he himself chooses. In the present case, of course, no such constitutional right is at issue because the statutory scheme in question does not interfere with an individual's [\*\*\*\*33] right to go elsewhere for medical care.

Thus, the Attorney General's attempted analogy is misleading. It is obvious, of course, that the state, in providing a benefit such as public education, is not thereby compelled to pay the costs incurred by those who choose to relinquish the public benefit in favor of a comparable privately funded benefit. *Danskin* itself, for example, does not suggest that the state in making public schools available as a public forum, obligated itself to reimburse those who chose to exercise their First Amendment right by speaking in *private* meeting halls or, indeed, by refraining from speaking at all.

In short, the *Danskin-Bagley* line of cases is not concerned with a person's liberty to reject an offered public benefit in favor of a private [\*270] counterpart -- the issue in the private school cases. Instead, *Danskin* and *Bagley* hold that [HN20](#) when the state implements a general public benefit program, the California Constitution imposes definite limitations on the state's ability to offer such a benefit in a fashion which discriminates against the exercise of constitutional rights. The statutory program at issue here does afford medical [\*\*\*\*34] care on just such a selective or discriminatory basis.<sup>19</sup>

[\*\*\*\*35] Accordingly, in evaluating the constitutionality of the challenged statutory provisions under the California Constitution, we employ the test established by the California unconstitutional condition cases.

4. *Under the constitutional standard established in Bagley, the statutory provisions which discriminatorily deny generally available medical benefits to poor women solely because they choose to have an abortion are unconstitutional.*

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<sup>19</sup> The state cannot rebut this conclusion by attempting to portray the program as one that does not provide general medical care but rather reimburses only specified medical expenses, such as those for childbirth, while withholding funds for other medical expenses, such as those for abortion. In the first place, the breadth of the Medi-Cal program belies any suggestion that the state in this case is affording only the specialized benefit of medical expense for childbirth. As we have noted, under Medi-Cal the state pays for virtually all necessary medical expenses of the poor, and does not confine its funding only to childbirth expenses.

Moreover, it is obvious that the state cannot circumvent the principles of the *Danskin-Bagley* doctrine by defining the benefit offered in a constitutionally discriminatory fashion. Thus, for example, the result in *Danskin* clearly would not have differed if the state had announced that it was making public schools available solely for patriotic meetings. (Cf. [Wirta v. Alameda-Contra Costa Transit Dist., supra, 68 Cal.2d 51.](#)) Similarly, the *Bagley* analysis could not be avoided by a hospital district's declaration that it has an opening for the position of "apolitical nurse's aide." Contrary to the dissent's reasoning (see p. 298, *post*), the foregoing examples are not rendered constitutionally palatable simply because "everyone" would be free to make patriotic speeches or because "everyone" would be permitted to apply for the apolitical nurse's aide job.

[CA\(3a\)](#) (3a) As noted previously, [HN21](#) *Bagley* posits a threefold inquiry: (1) whether the conditions which are imposed relate to the purposes of the legislation which provide the benefit; (2) whether the utility of the conditions imposed clearly outweighs the resulting impairment of constitutional rights; and (3) whether there are no less offensive alternatives available to achieve the state's objective. We follow these avenues of inquiry, placing particular emphasis upon the second prong of the test in which we must weigh the utility of the funding restrictions against the resulting impairment to the woman's right of procreative choice.

[\*271] [\*\*790] [\*\*\*877] (a) *The restrictions imposed on poor women's right of procreative choice do not relate [\*\*\*\*36] to the purposes of the Medi-Cal program.*

As noted above, *Bagley* provides that, as an initial matter, the state "must establish that the imposed conditions relate to the purposes of the legislation which confers the benefit or privilege." ([65 Cal.2d at pp. 505-506.](#)) Elaborating on this requirement in *Bagley*, we quoted with approval Justice Frankfurter's observation that "[HN22](#) Congress may withhold all sorts of facilities for a better life, but if it affords them it cannot make them available in an obviously arbitrary way or exact surrender of freedoms unrelated to the purpose of the facilities." (Italics added.) ( [American Communication Assn. v. Douds \(1950\) 339 U.S. 382, 417 \[94 L.Ed. 925, 70 S.Ct. 674\]](#) (separate opinion).)

In most of the California public benefit cases, the restrictions on constitutional rights adopted as part of the government programs have borne at least some relation to the purpose of the program. Thus, for example, in cases such as *Bagley* that involved restrictions on the exercise of First Amendment activities by those who obtain the "benefit" of public employment, the restrictions were apparently intended to curtail activities thought [\*\*\*\*37] to have a potential for interfering with the effective performance of the public employee's job.

Similarly, in *Parrish*, the restrictions imposed on welfare recipients' right of privacy related to the elimination of fraud in the welfare system and thus again could be said to further the aims of the benefit program in question.

In the instant case, by contrast, the restriction imposed on poor women who seek to exercise their constitutional right to decide whether or not to have a child bears no relation whatsoever to the fundamental purposes of the Medi-Cal program. [Welfare and Institutions Code section 14000](#) declares that "[the] purpose [of the Medi-Cal program] is to afford health care and related remedial or preventive services to recipients of public assistance and to medically indigent aged and other persons . . ."; <sup>20</sup> [\*\*\*\*39] thus, the program's primary objective is to alleviate the [\*272] hardship and suffering incurred by those who cannot afford needed medical care by enabling them to obtain such medical treatment. The

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<sup>20</sup> [Section 14000](#) provides in full: "The purpose of this chapter is to afford health care and related remedial or preventive services to recipients of public assistance and to medically indigent aged and other persons, including related social services which are necessary for those receiving health care under this chapter.

"The intent of the Legislature is to provide, to the extent practicable, through the provisions of this chapter, for health care for those aged and other persons, including family persons who lack sufficient annual income to meet the costs of health care, and whose other assets are so limited that their application toward the costs of such care would jeopardize the person or family's future minimum self-maintenance and security. It is intended that whenever possible and feasible:

"(a) The means employed shall be such as to allow, to the extent practicable, eligible persons to secure health care in the same manner employed by the public generally, and without discrimination or segregation based purely on their economic disability.

"(b) The benefits available under this chapter shall not duplicate those provided under other federal or state laws or under other contractual or legal entitlements of the person or persons receiving them.

"(c) In the administration of this chapter and in establishing the means to be used, the department shall give due consideration both to the appropriate organization and to the ready accessibility and availability of the facilities and resources for health care to persons eligible under this chapter, and to new and innovative approaches to the delivery of health care services."

restrictions at issue here directly impede this fundamental purpose. Even when an abortion represents the appropriate medical treatment for a poor pregnant [\*\*\*\*38] woman, the statute virtually bars payment for that treatment and thus subjects the poor woman to significant health hazards and in some cases to death.<sup>21</sup>

[\*\*\*\*40] [\*\*791] [\*\*\*878] In this respect, the state's denial of Medi-Cal funds to otherwise qualified women solely because they choose to have an abortion bears a marked similarity to the Los Angeles Housing Authority's policy of [\*273]

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<sup>21</sup>The trial court in *McRae* ( *McRae v. Califano* (E.D.N.Y. 1980) 491 F.Supp. 630) conducted a lengthy factual hearing with extensive medical evidence and concluded that the federal funding restrictions, which are comparable to those under the California Budget Act, hazard the woman's life and health in a variety of ways. The comparable California Budget Act restrictions, we conclude, pose the same hazards to the health of indigent California women. Specifically:

(1) The act permits funding of abortions "[where] the life of the mother would be endangered if the fetus were carried to full term." (Stats. 1979, ch. 259, item 261.5(a), p. 87.) The phrase "would be endangered," however, is vague -- so vague that we held similar language unconstitutional in *People v. Belous*, *supra*, 71 Cal.2d 954. If interpreted to require a substantial certainty or even a reasonable probability of death, it excludes funding in many cases in which the risk of death is sufficient to induce a physician to recommend abortion.

(2) The act also permits abortion "[where] severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term." That language by necessary implication excludes cases in which the damage cannot be described as both severe and long lasting. It also excludes damage to mental health regardless of severity and duration.

(3) A denial of funding will induce some women to attempt abortion without medical assistance, a procedure which carries an extreme risk of injury or death. (See *People v. Belous*, *supra*, 71 Cal.2d at pp. 965-966.)

(4) A denial of funding will induce some women to delay abortion until they can somehow raise the money to pay for a private abortion, although abortions later in pregnancy present a greater risk to life and health.

(5) The denial of funding will induce some women to carry the child to term even though relevant medical considerations -- one of which may be the psychological impact of carrying an unwanted child -- make childbirth much more risky than abortion.

excluding so-called subversive persons from public-supported low-rent housing projects, a policy that was invalidated by a California decision over 25 years ago in *Housing Authority v. Cordova* (1955) 130 Cal.App.2d Supp. 883 [279 P.2d 215]. In finding that exclusionary policy unconstitutional, the *Cordova* court explained: "The purpose of the [housing act] is to eradicate slums and provide housing for persons of low-income class. [Citation.] It is evident that the exclusion of otherwise qualified persons solely because of membership in organizations designated as subversive by the Attorney General has no tendency whatever to further such purpose." (130 Cal.App.2d Supp., at p. 888.)

The state can show a relationship between the Budget Act limitations and the purpose of the Medi-Cal program only by claiming that Medi-Cal seeks not only to provide necessary health care to indigents but also to protect the life and health of the [\*\*\*\*41] fetus. Any attempt to reconcile Medi-Cal objectives with abortion limitations on the theory that the latter protect the fetus, however, impermissibly denigrates the woman's right of choice.

As we explain in discussing the second part of the *Bagley* test, [HN23](#) both California and federal authorities establish that, at least prior to viability, the state may not subordinate a woman's own medical interests or her right of procreative choice to the interests of the fetus. We therefore turn to consider the second part of the *Bagley* test.

(b) *In light of the fundamental and intimate nature of the constitutional right of procreative choice and the severe impairment of that right that will in practice result from the statutory restrictions at issue, the utility of imposing such restrictions does not "manifestly outweigh [the] resulting impairment of constitutional rights."*

Under the second part of *Bagley*, the state must demonstrate that "the utility of imposing the conditions . . . manifestly [outweighs] any resulting impairment of constitutional rights." (65 Cal.2d at

[p. 506](#).) As numerous cases since *Bagley* have elaborated, [HN24](#) a court in undertaking this "weighing" [\*\*\*\*42] or "balancing" process must realistically assess the importance of the state interest served by the restrictions and the degree to which the restrictions actually serve such interest; further the court must carefully evaluate the importance of the constitutional right at stake and gauge the extent to which the individual's ability to exercise that right is [\*\*792] [\*\*\*879] threatened or impaired, as a practical matter, by the [\*274] specific statutory restrictions or conditions at issue. (See, e.g., [Parrish v. Civil Service Commission](#), [supra](#), 66 Cal.2d 260, 270-274; [City of Carmel-by-the-Sea v. Young](#), [supra](#), 2 Cal.3d 259, 265-272; [Finot v. Pasadena City Bd. of Education](#), [supra](#), 250 Cal.App.2d 189, 196-202.) We must canvass the various factors on each side of the scale in order to determine whether the utility of the restrictions "manifestly outweighs" the resulting impairment of constitutional rights. (See generally O'Neil, *op. cit. supra*, 54 Cal.L.Rev. 443, 460-478; Comment, *Another Look at Unconstitutional Conditions* (1968) 117 U.Pa.L.Rev. 144.)

[HN25](#) In undertaking this analysis, we begin by examining the nature and importance of the constitutional [\*\*\*\*43] right at issue, and then consider the degree to which this right is actually threatened by the challenged statutory scheme. In [People v. Belous](#), [supra](#), 71 Cal.2d 954, the seminal California case in this area, we recognized that the constitutional rights at stake are in essence twofold: "The rights involved . . . are the woman's rights to life and to choose whether to bear children." ( [Id.](#), [at p. 963](#).) The first right is implicated because the choice between childbirth and abortion in some instances involves potential risks to the life of the pregnant woman. Moreover, even when a life-threatening condition is not present, the constitutional choice directly involves the woman's fundamental interest in the preservation of her personal health. As this court stated in [Ballard v. Anderson](#) (1971) 4 Cal.3d 873, 879 [95 Cal.Rptr. 1, 484 P.2d 1345, 42 A.L.R.3d 1392]: "[HN26](#) In California, law and medicine recognize that

therapeutic abortion is a legitimate medical treatment which may be necessary for the preservation of a pregnant woman's life and health."

Closely related to this fundamental interest in life and health is the basic recognition that, for a woman, the constitutional [\*\*\*\*44] right of choice is essential to her ability to retain personal control over her own body. As Professor Tribe has observed: "If a man is the involuntary source of a child -- if he is forbidden, for example, to practice contraception -- the violation of his personality is profound; the decision that one wants to engage in sexual intercourse but does not want to parent another human being may reflect the deepest of personal convictions. But if a woman is forced to bear a child -- not simply to provide an ovum but to carry the child to term -- the invasion is incalculably greater. . . . [It] is difficult to imagine a clearer case of bodily intrusion, even if the original conception was in some sense voluntary." (Tribe, *American Constitutional Law* (1977) § 15-10, p. 924.)

[\*275] [CA\(4\)](#) (4) Moreover, as *Belous* makes clear, the restriction at issue undermines the right of privacy guaranteed under our California Constitution in that it threatens not only the woman's interests in life, health, and personal bodily autonomy but also her right to decide for herself whether to parent a child: "[HN27](#) The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's [\*\*\*\*45] and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." ([71 Cal.2d at p. 963](#).)

The Supreme Court has defined the woman's right to choose as an aspect of the privacy right in even more explicit terms: "[HN28](#) If] the right of privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

(Original italics.) ( [\*Eisenstadt v. Baird\* \(1972\) 405 U.S. 438, 453 \[31 L.Ed.2d 349, 362, 92 S.Ct. 1029\]](#).) This right of personal choice is central to a woman's control not only of her own body, but also to the control of her social role and personal destiny. (See Karst, *The Supreme Court, 1976 Term -- Forward Equal Citizenship Under the Fourteenth Amendment* (1977) 91 Harv.L.Rev. 1, 57-58.) As Professor Karst has recently observed: "The implications of an unwanted child for a woman's [\*\*793] [\*\*\*880] education, employment opportunities and associational opportunities (often including marriage opportunities) are of enormous proportion." (Karst, *The Freedom of [\*\*\*\*46] Intimate Association* (1980) 89 Yale L.J. 624, 641, fn. 90.)

[CA\(3b\)](#) (3b) Thus, the constitutional rights at issue here are clearly among the most intimate and fundamental of all constitutional rights. With that understanding in mind, we must consider the extent to which the statutory limitations in controversy will actually impair the individual's exercise of these vitally important constitutional rights.

In resolving that issue, we need only consider the nature of the program in question to recognize that the actual impairment of constitutional rights will be severe indeed. The medical benefits provided by the Medi-Cal program are available only to poor persons who are unable to pay for their own health care; by definition, then, the only women affected by the restrictions at issue are those who lack the money or resources to pay for a medically supervised abortion on their own. Although it may be possible for some poor women to obtain medical abortions with the help of private charities, the existence of the [\*276] Medi-Cal program itself testifies to the fact that private charitable resources do not suffice to meet the medical needs of the poor. Thus, from a realistic perspective, [\*\*\*\*47] we cannot characterize the statutory scheme as merely providing a public benefit which the individual recipient is free to accept or refuse without any impairment of her constitutional rights. On the contrary, the state is utilizing its resources to

ensure that women who are too poor to obtain medical care on their own will exercise their right of procreative choice only in the manner approved by the state.

In this respect, the impairment of constitutional rights resulting from the present statutory restrictions is significantly greater than the impairment of rights involved in almost all the past California cases in this field. In *Danskin*, for example, while the discriminatory benefit scheme denied disfavored persons the use of public school buildings for meetings, it did not effectively *preclude* them from holding meetings or disseminating their views to the public. Similarly, although the restrictive government employment policy in *Bagley* directly impinged upon the public employee's free speech rights in significant respects, it nonetheless left the employee free to engage in much political activity. In the instant case, by contrast, the state's discriminatory treatment [\*\*\*\*48] will prevent the vast majority of poor women from exercising their constitutional right to choose whether or not to bear a child. As Justice Brennan has observed, "By funding all of the expenses associated with childbirth and none of the expenses incurred in terminating pregnancy, the government literally makes an offer that the indigent woman cannot afford to refuse." ( [\*McRae\*, 448 U.S. at pp. 333-334 \[65 L.Ed.2d at p. 815, 100 S.Ct. at p. 2704\]](#) (dis. opn.).)

Having found that the statutory restrictions in question will severely impair or totally deny the actual exercise of this intimate and fundamental constitutional right, we must determine whether the benefits which the state derives from the restrictions "manifestly outweigh" such significant impairment. Obviously, in view of the foregoing discussion, only the most compelling of state interests could possibly satisfy this test. As we shall see, however, it is doubtful whether the restrictions in this case serve any constitutionally legitimate, let alone compelling state interest; furthermore, the interest that the statute does serve is furthered in an underinclusive and discriminatory

manner.<sup>22</sup>

[\*\*\*\*49] [\*277] We begin by identifying the precise state interest that is served by the statutory restrictions [\*\*794] [\*\*\*881] at issue. We note that although the restrictions take the form of curtailing state expenditures, they do not in reality serve the state's legitimate interest in conserving its limited fiscal resources; whatever money is saved by refusing to fund abortions will be spent many times over in paying maternity care and childbirth expenses and supporting the children of indigent mothers.<sup>23</sup> [\*\*\*\*50] In the first place, the cost of an abortion is much less than the cost of maternity care and delivery.<sup>24</sup> Thus, the present statutory scheme, by withholding funds for abortions, requires the state to pay the more expensive childbirth expenses for every poor woman or teenager who becomes pregnant.<sup>25</sup>

<sup>22</sup>Our analysis at this point closely parallels the strict judicial scrutiny used to determine whether an enactment which discriminates against the exercise of a fundamental right denies equal protection of the law. Because the state cannot demonstrate that the statutory scheme is supported by a compelling state interest, we believe that the statutes in question are additionally unconstitutional under established equal protection principles. In light of the similarity of the applicable principles in this context, however, we see no need to undertake a separate analysis of the statutes' equal protection defects.

<sup>23</sup>In *Williams v. Zbaraz* (1980) 448 U.S. 358 [65 L.Ed.2d 831, 100 S.Ct. 2694], a companion case to *McRae*, it was estimated that funding restrictions similar to those at issue here would impose upon the State of Illinois an additional cost "of about \$ 20,000,000 per year." (See 448 U.S. at p. 355, fn. 9 [65 L.Ed.2d at p. 829, 100 S.Ct. at p. 2715] (dis. opn. by Stevens, J.).) Because the population of California is significantly greater than that of Illinois, the added costs would presumably be much higher.

<sup>24</sup>The dissenting opinion asserts that we overlook a third procreative choice available to the indigent woman -- avoiding pregnancy. For the woman who is already pregnant, of course, that choice is unavailable, whether her pregnancy resulted from intentional act, carelessness, ignorance of contraceptive methods, or contraceptive failure. Perhaps in an ideal world no woman who does not want a child would ever become pregnant, and nothing would ever happen after conception to change matters, but that utopian vision is no comfort to the persons whose constitutional freedom of choice is affected by the restrictions on abortion funding.

<sup>25</sup>In the *Zbaraz* case (see fn. 23, *ante*), the trial court found that the average cost to the State of Illinois of an abortion was less than \$

Second, because the present statutes frequently deny funding of abortions to women who face special medical risks if they carry a fetus to term, [\*\*\*\*51] such limitations -- under the current comprehensive Medi-Cal scheme -- will oblige the state to provide additional and often expensive medical care for such women before, during, and after childbirth. But for the challenged restrictions, such expenses would not have been incurred. Finally, this limitation on poor women's constitutional rights will prove enormously expensive in terms of long-range economic costs. As Justice Blackmun has observed: "[The] cost of [an] . . . abortion . . . holds no comparison whatsoever with the welfare costs that will burden [\*278] the State for the new indigents and their support in the long, long years ahead." ( *Beal v. Doe* (1977) 432 U.S. 438, 463 [53 L.Ed.2d 464, 483, 97 S.Ct. 2366] (dis. opn.).)<sup>26</sup>

150, while the average cost of childbirth exceeded \$ 1,350. (See 448 U.S. at p. 355, fn. 9 [65 L.Ed.2d at p. 829, 100 S.Ct. at p. 2715] (dis. opn. of Stevens, J.).)

<sup>26</sup>Ironically, the Supreme Court decision in *McRae*, filed in June 1980, supplies for the 1980 California Budget Act a conceivable economic justification that did not apply to the 1978 and 1979 acts. The 1980 Budget Act abortion funding restrictions, as we have noted, will substantially increase total government outlay, because childbirth is much more expensive than abortion. As a result of the *McRae* decision upholding the Hyde Amendment, however, some of those increased costs will shift from the state to the federal taxpayer; under *McRae*, federal funds are no longer available to subsidize state abortion payments, but remain available to subsidize state maternity and childbirth payments.

The state's interest in shifting expenditures to the federal fisc, however, can hardly be described as a significant one. In the first place, the California taxpayer is also a federal taxpayer, and derives no benefit when money is taken from one pocket instead of another. Second, taking into account not only the required state contribution to maternity and childbirth expenses under Medi-Cal but also the substantial expense of providing state support for unwanted minors, the Budget Act restrictions will ultimately cost the California taxpayer more than would abortion funding. The serious impairment of a fundamental right inflicted by the abortion funding limitations cannot be justified on so flimsy a basis.

The Attorney General also suggests that the Budget Act provisions reflect the state's desire to accommodate those taxpayers who are conscientiously opposed to abortion. The antagonism of taxpayers toward the exercise of a constitutional right, of course, in no way justifies state discrimination against persons who exercise that right.

[\*\*\*\*52] The Attorney General and amici suggest, however, that the restrictions on the funding [\*\*795] [\*\*\*882] of abortions through Medi-Cal relate to a state interest alternatively defined as an interest in "encouraging childbirth" or an interest in "protecting the potential life of the fetus." As far as the interest in "encouraging childbirth" is concerned, the California Legislature has not embraced a general policy of encouraging *unwanted* children; under the present provisions of the Medi-Cal program, for example, funds are specifically authorized to pay for the medical expense of contraception and sterilization. Furthermore, as we explain in the following section, to the extent that the challenged provisions are defended as simply a method of aiding poor women who want to bear children, the provisions clearly do not serve that interest in a manner least offensive to the rights of women who choose not to bear children.

That brings us to the state interest in "protecting the potential life of the fetus," an objective which we think does realistically underlie the [\*279] funding restrictions at issue here. There is no question, of course, that phrased in general terms [\*\*\*\*53] the state has a legitimate interest in protecting the potential life of a fetus. Thus, the state may without doubt legitimately prosecute a person who deliberately injures a fetus, even if no corresponding harm befalls the woman who carries the fetus. In the instant case, however, the state is not merely proposing to protect a fetus from general harm, but rather is asserting an interest in protecting a fetus vis-a-vis the woman of whom the fetus is an integral part. Such a claimed interest, of course, clashes head-on with the woman's own fundamental right of procreative choice.

The argument that the state advances here

essentially parallels that presented to the United States Supreme Court in [Roe v. Wade, supra, 410 U.S. 113](#), when the State of Texas argued that its asserted interest in protecting the fetus justified criminal proscriptions on abortion. The high court carefully examined and weighed the interests implicated by this contention: the woman's interest in deciding for herself a matter which so intimately and fundamentally affects her future life and happiness; her interest in protecting her own life and health; the corresponding state interest in safeguarding [\*\*\*\*54] the woman's life and health; and, finally, the state's interest in protecting the fetus. After an extensive review of the history of abortion laws and consideration of the medical risks of abortion and childbirth, the court held that [HN29](#) during the first two trimesters of pregnancy, when the fetus is not viable, the state's interest in protecting the fetus is not of compelling character. Consequently, the court concluded, the state may not subordinate the woman's fundamental right of procreative choice to the state's interest in protecting a nonviable fetus.

*Roe v. Wade* went on to explain the extent and purpose for which state regulation of abortion is permissible. [HN30](#) Prior to the third trimester of pregnancy, it held, the state may regulate only to protect the woman's health -- not to protect the fetus. In the third trimester the state may enact restrictions to protect the fetus, but may not proscribe abortions necessary to preserve the woman's life or health. ([410 U.S. at pp. 164-165 \[35 L.Ed.2d at p. 183\]](#).)

The restrictions of the California Budget Act do not conform to the careful calculation of competing rights and interests set out in *Roe v. Wade*. The Budget [\*\*\*\*55] Act seeks to limit first and second trimester abortions, not for the permissible purpose of protecting the woman's health, [\*280] but to protect the fetus. The act thus inverts the priority of interests established in *Roe* and improperly subordinates the woman's right of choice to the lesser state interest in protecting a nonviable fetus. Furthermore, although *Roe v.*

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If the Attorney General is suggesting that the state could accommodate objecting taxpayers by allocating their taxes to other state purposes, the short answer is that the Budget Act enacts no such allocation; it bars funding of abortions from all revenue sources whatever, including taxpayers who favor funding of abortions and those who are indifferent on the matter.

*Wade* recognized a compelling interest in protecting a viable fetus, even that interest cannot be invoked to restrict abortions necessary to preserve the woman's health; the Budget Act, however, gives no consideration to danger to the woman's health unless the threatened harm is severe, long-lasting, and relates to physical health.

[\*\*796] [\*\*\*883] In short, *Roe v. Wade* settled that [HN31](#) protection of a nonviable fetus is not a compelling state interest. The subsequent high court decision in *McRae* does not detract from that holding. *McRae* did not measure the restrictions at issue against a compelling interest test. Rather, the Supreme Court assumed that a discriminatory withholding of government benefits, because it imposes no new obstacle to abortion, required only minimal justification. [\*\*\*\*56] That proposition, as we have explained, is inconsistent with California constitutional law. The assumption underlying the high court's analysis, however -- that funding restrictions would fail if required to meet a compelling interest standard -- provides further support for our decision today.

Neither do California decisions support the Attorney General's claim. We considered the state's asserted interest in protecting fetal life in [People v. Belous, supra, 71 Cal.2d 954](#), holding unconstitutionally vague a statute which barred abortions unless necessary to preserve the mother's life. At the outset, we stressed that [HN32](#) a woman's right to choose may be infringed only by regulations necessary to further a compelling interest. (See [71 Cal.2d at p. 964](#).) Although the state urged that it had "a compelling interest in the protection of the embryo and fetus and that such interest warrants the limitation on the woman's constitutional rights" (pp. 967-968), we replied that the asserted state interest derived from statutes and rules which either "require a live birth or reflect the interest of the parents." (*Id.*)

We have already noted that three years after *People v. Belous* [\*\*\*\*57], the people of California amended our state Constitution to provide explicit

protection for the right of privacy, a protection not found in the federal text. We have noted also that the federal right of privacy, the foundation for the decision in [Roe v. Wade, supra, 410 U.S. 113](#), is more [\*281] limited than the corresponding right in the California Constitution. (See [City of Santa Barbara v. Adamson, supra, 27 Cal.3d 123, 130, fn. 3](#).) We therefore conclude that the protection afforded the woman's right of procreative choice as an aspect of the right of privacy under the explicit provisions of our Constitution is at least as broad as that described in *Roe v. Wade*. Consequently, we further conclude that [HN33](#) the asserted state's interest in protecting a nonviable fetus is subordinate to the woman's right of privacy.

Moreover, even if the state could assert a compelling interest in protecting a nonviable fetus, we would have grave doubts that the state could pursue such interest in the discriminatory fashion adopted here. Under the present statutory scheme, the state has not undertaken to protect the potential life of *all* fetuses by promoting their interests [\*\*\*\*58] over the constitutional rights of all women. Instead, by implementing this state interest through restrictions on Medi-Cal funds rather than through more broadly applicable legislation, the state has singled out poor women and has subordinated only their constitutional right of procreative choice to the concern for fetal life.

In the past, this court has been particularly critical of statutory mechanisms that restrict the constitutional rights of the poor more severely than those of the rest of society. (See, e.g., [Serrano v. Priest \(1976\) 18 Cal.3d 728, 765-767 \[135 Cal.Rptr. 345, 557 P.2d 929\]](#); [Serrano v. Priest \(1971\) 5 Cal.3d 584, 597-604 \[96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187\]](#); [In re Antazo \(1970\) 3 Cal.3d 100, 108-112 \[89 Cal.Rptr. 255, 473 P.2d 999\]](#).) Thus, we have implicitly recognized that the indigent poor share many characteristics of other "insular minorities" who may not be adequately protected from discriminatory treatment by the general safeguards of the legislative process. (See generally [U.S. v.](#)

[\*Carolene Products Co. \(1938\) 304 U.S. 144, 152-153, fn. 4 \[82 L.Ed. 1234, 1241-1242, 58 S.Ct. 778\].\*](#)) Although prior cases [\*\*\*\*59] have generally considered this factor in connection with equal protection analysis, Professor O'Neil has identified its relevance to the unconstitutional condition doctrine: limitations upon governmental benefits which apply to rich and poor alike are obviously less invidious than conditions, like [\*\*797] [\*\*\*884] those at issue here, in which the state effectively tells a poor woman "that because [she] is poor . . . [she] must restrict [her exercise of constitutional rights] in ways that the government does not ask self-sufficient people to do." (O'Neil, [\*282] *Unconstitutional Conditions: Welfare Benefits With Strings Attached*, *supra*, 54 Cal.L.Rev. 443, 472.)<sup>27</sup>

[\*\*\*\*60] From this review of the factors which enter into the *Bagley* analysis, we conclude that the alleged "benefits" which flow from the statutory restrictions on Medi-Cal funds in no sense "manifestly outweigh" the resulting impairment of constitutional rights. As we have seen, the state is hard-pressed to demonstrate that the restrictions further any constitutionally legitimate interests at all; at the same time, the restrictions effectively nullify the poor woman's fundamental constitutional right to retain personal control over her own body and her own destiny. The challenged statutory scheme, then, clearly does not pass muster under the second part of the *Bagley* standard.

(c) *The statutory scheme does not serve the state interest in providing medical care for indigents in a*

*manner least offensive to the woman's right of procreative choice.*

The third and final component of the constitutional standard established in *Bagley* requires the state to "establish the unavailability of less offensive alternatives and [to] demonstrate that the conditions are drawn with narrow specificity, restricting the exercise of constitutional rights only to the extent necessary to maintain [\*\*\*\*61] the integrity of the program which confers the benefits." ([65 Cal.2d at p. 507.](#)) [HN34](#) In effect, this part of the *Bagley* test requires the state to adopt the "least offensive alternative" adequate to achieve any legitimate state interest.<sup>28</sup>

[\*283] If we view the Budget Act restrictions as intended to prevent indigent women from obtaining abortions, the doctrine of "least offensive alternative" plays no role; the restrictions fail because the state's interest in protecting the fetus cannot be pursued by subordinating the woman's right of procreative choice. In [\*\*\*\*62] an effort to avoid the unconstitutionality of the funding restrictions, however, the Attorney General suggests an alternative interpretation: he argues that the restrictions should not be considered a legislative attempt to prevent the poor from obtaining abortions, but rather as an effort to aid poor women who have already decided to bear a child but cannot afford the expenses of childbirth. That argument, however, fails the "least restrictive alternative" test, since the state could readily meet the needs of indigent women without burdening their right of procreative choice simply by funding impartially the expenses of childbirth and abortion.

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<sup>27</sup> Indeed, the California Legislature has itself recognized the importance of avoiding such discrimination against the poor as one general purpose of the Medi-Cal program. [Section 14000 of the Welfare and Institutions Code](#), in defining the purpose of the Medi-Cal program, emphasizes that "[it] is intended that whenever possible and feasible . . . [the] means employed shall be such as to allow, to the extent practicable, eligible persons to secure health care in the same manner employed by the public generally, and without discrimination or segregation based purely on their economic disability." As we have seen, the elimination of funds for abortion is not related to preserving the feasibility or practicability of the Medi-Cal program.

<sup>28</sup> Again, this requirement parallels the requirement that the state, to sustain legislation subject to strict judicial scrutiny under the equal protection clause, must demonstrate "not only that it has a *compelling* interest which justifies the law, but that the distinctions drawn by the law are *necessary* to further its purpose." (Original italics.) ([Serrano v. Priest \(1976\) 18 Cal.3d 728, 761 \[135 Cal.Rptr. 345, 557 P.2d 929\].](#))

<sup>29</sup> The Pregnancy Freedom of Choice Act ([Welf. & Inst. Code, §](#)

[\*\*\*\*63] [\*\*798] [\*\*\*885] Moreover, the legislative background of the statute in question belies the Attorney General's suggestion that the legislation was aimed solely at aiding poor women who have already chosen to bear a child. The Budget Act provisions do not increase preexisting levels of childbirth-related benefits or provide any additional aid at all to poor women who choose to bear a child. Instead, the statute simply curtails the medical benefits previously available to poor women who desire to have an abortion. Quite clearly, this legislation cannot be defended as aiding poor women who wish to have children by the means least offensive to the constitutional rights of other women.

[\*284] 5. *Conclusion.*

As noted at the outset, our opinion in this case does not rest upon this court's views as to the morality or immorality of abortion. [HN35](#) The morality of abortion is not a legal or constitutional issue; it is a matter of philosophy, of ethics, and of theology. It is a subject upon which reasonable people can, and

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[16145 et seq.](#)) provides an excellent example of a program designed to aid indigent women who choose to bear children without impinging upon the rights of those who choose abortion. [Section 16145](#) states the purpose of this act: "The Legislature finds that pregnancy among unmarried persons under 21 years of age constitutes an increasing social problem in the State of California. In order to have effective freedom of choice between an abortion and carrying pregnancy to term, the assistance of the state in addition to medical services is required. The problem can be alleviated effectively by a program of structured services, including counseling and residential treatment services, provided by licensed maternity homes." Subsequent sections provide for state reimbursement of expenses incurred by maternity homes in providing the specified services.

The act, by its title and declared purpose, signifies a legislative recognition that women are entitled to *effective* freedom of choice, and that effective freedom of choice may require state-assisted medical services. Because childbirth may involve care and counseling needs beyond those required for abortion, the act establishes a state program to provide those needs. It thus serves a state objective to eliminate financial considerations that make one choice more expensive than the other, thereby granting the woman effective freedom of choice; the Budget Act, by contrast, seeks to make abortion prohibitively expensive relative to childbirth and thereby to control the woman's choice.

do, adhere to vastly divergent convictions and principles.<sup>30</sup>

[\*\*\*\*64] By virtue of the explicit protection afforded an individual's inalienable right of privacy by [article I, section 1 of the California Constitution](#), however, the decision whether to bear a child or to have an abortion is so private and so intimate that each woman in this state -- rich or poor -- is guaranteed the constitutional right to make that decision *as an individual*, uncoerced by governmental intrusion. Because a woman's right to choose whether or not to bear a child is explicitly afforded this constitutional protection, in California the question of whether an individual woman should or should not terminate her pregnancy is not a matter that may be put to a vote of the Legislature.

If the state cannot directly prohibit a woman's right to obtain an abortion, may the state by discriminatory financing indirectly nullify that constitutional right? Can the state tell an indigent person that the state will provide him with welfare benefits only upon the condition that he join a designated political party or subscribe to a particular newspaper that is favored by the government? Can the state tell a poor woman that it will pay for her needed medical care but only if she gives [\*\*\*\*65] up her constitutional right to choose whether or not to have a child?

There is no greater power than the power of the purse. If the government can use it to nullify constitutional rights, by conditioning benefits only upon the sacrifice of such rights, the Bill of Rights could eventually become a yellowing scrap of

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<sup>30</sup> In [Roe v. Wade, supra](#), the United States Supreme Court expressly took note of "the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, . . . and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experience, 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." (410 U.S. at p. 116 [35 L.Ed.2d at p. 156].)

paper. Once the state furnishes medical care to poor women in general, it cannot withdraw part of that care [\*285] solely because a woman exercises her constitutional right to choose to have an abortion.<sup>31</sup>

[\*\*799] [\*\*\*886] Indeed, the statutory [\*\*\*\*66] scheme before us is all the more invidious because its practical effect is to deny to poor women the right of choice guaranteed to the rich.<sup>32</sup> An affluent woman who desires to terminate her pregnancy enjoys the full right to obtain a medical abortion, regardless of the opposition of any legislative majority. By contrast, when the state finances the costs of childbirth, but will not finance the termination of pregnancy, it realistically forces an indigent pregnant woman to choose childbirth even though she has the constitutional right to refuse to do so.

Thus, we conclude that the restrictions in question are invalid under the California Constitution. We note that the Supreme Judicial Court of Massachusetts has very recently reached precisely the same conclusion in adjudicating the validity of a comparable state statute against the guarantees of [\*\*\*\*67] that state's Constitution. (*Moe v. Secretary of Administration & Finance* (1981) *Mass.* [417 N.E.2d 387].) As the Massachusetts high court observed, *HN36* although "the Legislature need not subsidize any of the costs associated with childbearing, or with health care generally . . . once it chooses to enter the constitutionally protected area of choice, it must do so with genuine indifference. It may not weight the options open to the pregnant woman by its

allocation of public funds; in this area, government is not free to 'achieve with carrots what [it] is forbidden to achieve with sticks.' L. Tribe, *American Constitutional Law*, § 15-10 at p. 933 n. 77 (1978)." (*Id.*, at p. 402.)

In S.F. 24069, the judgment is reversed. In S.F. 24053, the alternative writ, having served its purpose, is discharged and the peremptory writ is denied. In S.F. 24192, a peremptory writ of mandate shall issue, directing respondents to refrain from enforcing the unconstitutional restrictions in the Budget Act of 1980 challenged herein. Plaintiffs shall recover their costs in these proceedings, including reasonable attorneys [\*286] fees pursuant to the provisions of [section 1021.5 \[\\*\\*\\*\\*68\] of the Code of Civil Procedure](#). Because these three proceedings are inextricably interrelated, on remand of S.F. 24069 the San Francisco Superior Court shall fix an appropriate cost award, including attorneys fees, by reference to the costs and attorney services expended in all three proceedings.

**Concur by:** BIRD

**Concur**

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**BIRD, C. J.**, Concurring. If a citizen's freedom to choose how to deal with procreation -- contraception, abortion, or childbirth -- is a fundamental constitutional right protected by the right to privacy, may the state constitutionally limit that choice for poor women when their choice is not one of the methods favored by the state? I agree with the lead opinion that the answer to this question is "no." However, I would reach that conclusion by a somewhat different route.

It should be emphasized that this court is not called upon today to enter into the contemporary debate over various moral, religious, and social questions concerning abortion. Emotions on that subject have always run high. However, what we justices, as individuals, may think about these questions bears

<sup>31</sup> The dissenting opinion incorrectly asserts that our opinion assumes that the state must fund the exercise of constitutional rights. To avoid any possible misunderstanding, we reiterate: the state need not fund abortions, childbirth, appendectomies, or any other medical procedure, but when it undertakes to fund medical treatment for indigents, it cannot withhold funds from some eligible persons because they exercise a constitutional right.

<sup>32</sup> As described in a familiar Tin Pan Alley lyric: "The rich get richer and the poor get . . . children." (Excerpted from "Ain't We Got Fun" by Richard Whitney.)

no relationship to the legal issue presented in this case.

That issue is a narrow one. Once [\*\*\*\*69] the state undertakes funding of medical care for the poor, including all types of procreative care, may the state refuse funding for an unpopular but constitutionally protected alternative? There is no claim that poor women have an absolute right to abortion funding. Rather, petitioners argue that the state should not be able to select that choice [\*\*800] [\*\*\*\*887] and influence that private decision by discriminatorily denying funds for one procreative alternative which the state deems unacceptable.

It is important to note that this is *not* a case in which this court must decide whether abortion is the best alternative to pregnancy or whether abortion is morally justifiable. Under the California Constitution, the people of the state have decided that those value judgments must be reserved to the individual citizens whose lives are affected by such decisions. Neither legislators nor judges may constitutionally impose their system of values on a woman who must decide how to deal with procreation.

A woman who faces an unplanned pregnancy confronts a critical and uniquely important decision, the consequences of which will follow her [\*287] throughout her life. Because [\*\*\*\*70] her value system, her life, and her relationships with others are all involved in any determination she makes, a woman's right to decide for herself without the interference of the state is central in a free society. In recognition of the importance of that right, both this court in [People v. Belous \(1969\) 71 Cal.2d 954 \[80 Cal.Rptr. 354, 458 P.2d 194\]](#) and the Supreme Court in [Roe v. Wade \(1973\) 410 U.S. 113 \[35 L.Ed.2d 147, 93 S.Ct. 705\]](#) have held that such a private decision must be given constitutional protection.

It is unfortunate that the dissent focuses on an issue that is not even present here. The court is not appropriating public funds for anything. (Dis. opn.

of Richardson, J., *post*, at p. 305.) The Legislature appropriated funds in its 1980 Budget Act to pay for abortions for Medi-Cal recipients in the event that its restrictions were held to be unconstitutional.<sup>1</sup> In so doing, the Legislature signaled the fact that it harbored doubts about the constitutional validity of the restrictions.

[\*\*\*\*71] A fundamental right has been defined as one which is "implicit in the concept of ordered liberty." ( [Palko v. Connecticut \(1937\) 302 U.S. 319, 325 \[82 L.Ed. 288, 292, 58 S.Ct. 149\]](#).) It is the state's obligation to protect and safeguard these rights. If any action by the state burdens the exercise of any fundamental liberty, the state must justify such an act by a showing of compelling necessity. (E.g., [People v. Belous, supra, 71 Cal.2d 954, 963-964](#); [Roe v. Wade, supra, 410 U.S. 113, 155-156 \[35 L.Ed.2d 147, 178-179\]](#).) As the guardian of our rights, the state is required to show a critical need for any action which curbs the exercise of these freedoms. This is true whether the incursion involves a direct attack on the exercise of the right or an indirect interference with its exercise.

[\*288] An artificial distinction between so-called direct and indirect infringements begs the question as to whether the state has infringed a fundamental

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<sup>1</sup> "Provided further, that if any of the provisions of this item or the application thereof to any person or circumstances is stayed, enjoined, otherwise delayed, or invalidated by court action, the Department of Finance shall authorize the State Controller to transfer from Item 287 to this item such sums determined by the Director of Finance which are necessary to provide for the costs of those abortions fundable as a result of such court action." (Stats. 1980, ch. 510, item 287.5.)

It is clear that the power of the judiciary to invalidate statutes found inconsistent with the Constitution is not limited to those cases in which there is no resulting fiscal burden on the state. ( [Moe v. Secretary of Administration & Finance \(1981\) Mass. \[417 N.E.2d 387, 395\]](#). See, e.g., [Shapiro v. Thompson \(1969\) 394 U.S. 618 \[22 L.Ed.2d 600, 89 S.Ct. 1322\]](#); [Gideon v. Wainwright \(1963\) 372 U.S. 335 \[9 L.Ed.2d 799, 83 S.Ct. 792, 93 A.L.R.2d 733\]](#); [Salas v. Cortez \(1979\) 24 Cal.3d 22 \[154 Cal.Rptr. 529, 593 P.2d 226\]](#); [Payne v. Superior Court \(1976\) 17 Cal.3d 908 \[132 Cal.Rptr. 405, 553 P.2d 565\]](#); [Parrish v. Civil Service Commission \(1967\) 66 Cal.2d 260 \[57 Cal.Rptr. 623, 425 P.2d 223\]](#).)

right. In California, there is no precedent for permitting government to burden the exercise of vital constitutional rights without establishing a compelling need. The fact that the state has not banned the [\*\*\*\*72] exercise of the right entirely is irrelevant to the basic issue. Our courts have frequently struck down restrictions that did not completely prohibit the exercise of a fundamental right. (See, e.g., [Danskin v. San Diego Unified Sch. Dist.](#) [\*\*801] [\*\*\*888] (1946) 28 Cal.2d 536 [171 P.2d 885]; [Parrish v. Civil Service Commission](#), *supra*, 66 Cal.2d 260; [Salas v. Cortez](#), *supra*, 24 Cal.3d 22; [White v. Davis](#) (1975) 13 Cal.3d 757 [120 Cal.Rptr. 94, 533 P.2d 222].) If the exercise of the right is burdened, a compelling interest must be shown to avoid constitutional invalidity regardless of the manner of infringement.

The fundamental right at issue is the right to private procreative choice free from governmental interference. Petitioners assert that where an individual's decision is constitutionally protected, the government is obligated to maintain a neutral stance. As Justice Brennan has observed, "[the] proposition for which these cases stand thus is not that the State is under an affirmative obligation to ensure access to abortions for all who may desire them; *it is that the State must refrain from wielding its enormous power and influence* [\*\*\*\*73] *in a manner that might burden the pregnant woman's freedom to choose whether to have an abortion.* The [restriction's] denial of public funds for medically necessary abortions plainly intrudes upon this constitutionally protected decision, for both by design and in effect it serves to coerce indigent pregnant women to bear children that they would otherwise elect not to have." (Fn. omitted; italics added.) ( [Harris v. McRae](#) (1980) 448 U.S. 297, 329 [65 L.Ed.2d 784, 812, 100 S.Ct. 2671], [Williams v. Zbaraz](#) (1980) 448 U.S. 358 [65 L.Ed.2d 831, 100 S.Ct. 2694, 2702] (dis. opn. of Brennan, J.); see also, *id.*, at pp. 349, 355 [65 L.Ed.2d at pp. 825, 829, 100 S.Ct. at pp. 2712, 2715] (dis. opn. of Stevens, J.); [Moe v. Secretary of Administration & Finance](#), *supra*, 417 N.E.2d at pp. 397-404.)

The practical impact of these restrictions is to burden the right of choice. Women, who are dependent on Medi-Cal for all of their health care needs because of indigency, are effectively denied the choice of abortion except under the most stringent conditions approved by the state. Justice Brennan's words are once again instructive. These restrictions are "a transparent [\*\*\*\*74] attempt by the Legislative Branch to impose [\*289] the political majority's judgment of the morally acceptable and socially desirable preference on a sensitive and intimate decision that the Constitution entrusts to the individual. Worse yet, [the restriction] does not foist that majoritarian viewpoint with equal measure upon everyone in our Nation, rich and poor alike; rather, it imposes that viewpoint only upon that segment of our society which, because of its position of political powerlessness, is least able to defend its privacy rights from the encroachments of state-mandated morality." ( [Harris v. McRae](#), *supra*, 448 U.S. at p. 332 [65 L.Ed.2d at p. 814, 100 S.Ct. at p. 2703].)

I agree with the result reached in the lead opinion of this court. However, I would evaluate these restrictions under the strict judicial scrutiny test used to assess *any* governmental action which burdens the exercise of a fundamental right. ( [People v. Belous](#), *supra*, 71 Cal.2d at pp. 963-964.)

<sup>2</sup> [\*\*\*\*77] In this case, [\*\*802] [\*\*\*889] the

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<sup>2</sup>The majority suggests that the test of [Bagley v. Washington Township Hospital Dist.](#) (1966) 65 Cal.2d 499 [55 Cal.Rptr. 401, 421 P.2d 409] must be used to evaluate governmental benefit programs that restrict the exercise of a fundamental right through the imposition of an indirect burden or a condition. Since I find no constitutional distinction between direct burdens and indirect burdens or conditions (see *post* at p. 290), I would apply the traditional strict scrutiny standard.

*Bagley* was one case in a line of California cases which held that conditions on the exercise of a fundamental right must be reviewed with the same close scrutiny as a direct burden on those rights. (Cf. [Danskin v. San Diego Unified Sch. Dist.](#), *supra*, 28 Cal.2d 536.) At the time *Bagley* was written, the concept of close scrutiny had not been fully developed. *Bagley* represents an early attempt by this court to formulate a standard for this close scrutiny. As such, it contains many of the concepts that were later incorporated into the doctrine of strict scrutiny. However, *Bagley* was not the final word

state must show a compelling interest to justify a curtailment of the right of privacy, a right expressly protected by the California Constitution [\*\*\*\*75]

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of this court on the subject. Its precise formulation of the standard to be used has been superseded by later developments. (See *Purdy & Fitzpatrick v. State of California* (1969) 71 Cal.2d 566, 578-586 [79 Cal.Rptr. 77, 456 P.2d 645, 38 A.L.R.3d 1194]; *People v. Belous*, *supra*.)

*Bagley* has generated some confusion in the Courts of Appeal precisely because its language does not match the language of strict scrutiny found in the cases which followed it. In 1971, this court cited *Bagley* as authority for the proposition that the state could not impair the exercise of a fundamental right without demonstrating a compelling interest. ( *Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 778-779 [97 Cal.Rptr. 657, 489 P.2d 537].) Over the years, the three-pronged test of *Bagley* has not been followed. The only part of the test which has been consistently applied deals with the infringement by the state of a fundamental right and the requirement of greater scrutiny by the courts. ( *Bekiaris v. Board of Education* (1972) 6 Cal.3d 575, 585-586 [100 Cal.Rptr. 16, 493 P.2d 480]; *White v. Davis*, *supra*, 13 Cal.3d 757, 772; *Merco Constr. Engineers, Inc. v. Los Angeles Unified Sch. Dist.* (1969) 274 Cal.App.2d 154, 169 [79 Cal.Rptr. 23]; *Healdsburg Police Officers Assn. v. City of Healdsburg* (1976) 57 Cal.App.3d 444, 450 [129 Cal.Rptr. 216]. See also, *Bogacki v. Board of Supervisors*, *supra*, 5 Cal.3d 771, 796-797, fn. 12 (dis. opn. of Tobriner, J.). But see *Binet-Montessori, Inc. v. San Francisco Unified School Dist.* (1979) 98 Cal.App.3d 991 [160 Cal.Rptr. 38].)

The conclusion in these cases that the *Bagley* standard is equivalent to a compelling state interest standard is understandable in light of its history. (Compare the language of the *Belous* test, *post*, at fn. 3.) *Bagley* has been applied exclusively to cases which involved restrictions on a fundamental right. When the language and result reached in *Bagley* are closely examined, it becomes clear that this court employed a de facto strict scrutiny test.

I disagree with any implication that in future cases an impairment of a right not currently deemed fundamental may be justifiable if the state can show a less than compelling interest. Since the facts of this case do not present this issue, I think it unwise to lay the groundwork for such a decision through dictum, particularly where the issue was neither presented nor briefed. Further, a balancing of degrees of burden and degrees of "fundamentality" presents a task that the judiciary is no more capable of performing in the area of due process than it is in the area of equal protection. (See *Hawkins v. Superior Court* (1978) 22 Cal.3d 584, 607-610 [150 Cal.Rptr. 435, 586 P.2d 916] (conc. opn. of Bird, C. J.).)

*Bagley* does not compel such a balancing of rights and interests. The implication in *Bagley* that restrictions on a less than fundamental right would call for a lesser standard of review is dictum and has been superseded by later developments in the doctrine of fundamental rights.

in its Declaration of Rights (*Cal. Const., art. I, § 1*). ( *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 130 [164 Cal.Rptr. 539, 610 P.2d 436]; *White v. Davis*, *supra*, 13 Cal.3d 757, 772, 775. Cf. *People v. Belous*, *supra*, 71 Cal.2d at p. 964.) [\*290] This compelling interest must be proven by the state whether it directly or indirectly interferes with the exercise of a fundamental right. The facts of this case illustrate how direct or indirect governmental infringement can, with equal force, stifle the assertion of a constitutionally protected right.<sup>3</sup> ( *Moe v. Secretary of Administration & Finance*, *supra*, 417 N.E.2d at pp. 397-404; see, e.g., *Harris v. McRae*, *supra*, 448 U.S. at pp. 334-336 [65 L.Ed.2d at pp. 815-817, 100 S.Ct. at pp. 2704-2705] (dis. opn. of Brennan, J.). Cf. *Healy v. James* (1972) 408 U.S. 169, 183 [33 L.Ed.2d 266, 280-281, 92 S.Ct. 2338]; *N. A. A. C. P. v. Alabama* (1958) 357 U.S. 449, 460-463 [2 L.Ed.2d 1488, 1498-1500, 78 S.Ct. 1163]; *Sherbert v. Verner* (1963) 374 U.S. 398, 404-406 [10 L.Ed.2d 965, 970-972, 83 S.Ct. 1790]; *Danskin v. San Diego Unified Sch. Dist.*, [\*\*\*\*76] *supra*, 28 Cal.2d 536; Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government* (1978) 66 Geo.L.J. 1191, 1196, 1198 [hereinafter cited as *Abortion Funding Cases*].) Consequently, the funding restrictions by the Legislature must be judged by the same standard applicable to any direct burden placed by the state on the right of [\*\*803] [\*\*\*\*890] privacy. This is exactly what the Massachusetts Supreme Court did in *Moe v. Secretary of Administration & Finance*,

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<sup>3</sup>The former criminal statutes prohibiting abortion provide an example of direct infringement in this area. Those statutes were declared unconstitutional. Their impact fell most heavily on women who could not afford costly illegal abortions locally or legal abortions in other countries. (See Callahan, *Abortion: Law, Choice and Morality* (1970) pp. 136-137; Rosen, *Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy*, in *Abortion and the Law* (Smith edit. 1967) pp. 90-92; Charles & Alexander, *Abortions for Poor and Nonwhite Women: A Denial of Equal Protection* (1971) 23 Hastings L.J. 147, 150-156.) This case presents an indirect infringement the results of which are the same. Thus, it is a distinction without a difference to assert that because the governmental action is indirect rather than direct, the infringements which result are of less significance constitutionally.

[supra](#), 417 N.E.2d 387, 397-404.

[\*291] In California, this argument is even more compelling by virtue of this state's long history of providing substantial protection to the right of private choice in intimate affairs. Years [\*\*\*\*78] before the federal courts adopted a similar rule nationally, the California courts recognized the right of privacy in making a decision concerning whether to carry a child to full term or to abort. ([People v. Belous](#), [supra](#), 71 Cal.2d at pp. 963-964.)<sup>4</sup>

[\*\*\*\*79] Moreover, before the federal courts came to acknowledge that the freedom of choice in this intimate area of human activity involved the fundamental right of privacy, the voters of California added an express right of privacy to the state Declaration of Rights. In November 1972, [article I, section 1 of the state Constitution](#) was amended to include privacy among this state's citizens' inalienable rights.<sup>5</sup> The election brochure given to the voters asserted that "[the] right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose . . . . [para.] . . . The right of privacy is an important American heritage and

essential to the fundamental rights guaranteed by the [First](#), [Third](#), [Fourth](#), [Fifth](#), and [Ninth Amendments to the U.S. Constitution](#). This right should be abridged only where there is *compelling public need*." (Italics added.)

[\*\*\*\*80] [\*292] The proponents, in arguing for the amendment's passage, stated that, "[the] right to privacy is much more than 'unnecessary wordage.' It is fundamental in any free society. Privacy is not now guaranteed by our State Constitution. This simple amendment will *extend* various court decisions on privacy to insure protection of our basic rights." <sup>6</sup> (Italics added.)

Our Constitution and our case law have placed California in the forefront of protecting privacy rights. Consistently, decisions by our state courts involving privacy have recognized these important interests before the federal courts and have more broadly defined them. For example, in [Ballard v. Anderson](#), [supra](#), 4 Cal.3d 873, this court prohibited the invasion of a minor's right of privacy when it refused to rewrite a statute to require parental consent for a minor's abortion. The analogous federal case, [Planned Parenthood of Missouri v. Danforth](#) (1976) 428 U.S. 52, 72-75 [49 L.Ed.2d 788, 806-808, 96 S.Ct. 2831], came to a similar conclusion some five years later. (And compare, e.g., [Perez v. Sharp](#) (1948) 32 Cal.2d 711 [198 P.2d 17] with [Loving v. Virginia](#) (1967) 388 U.S. 1 [18 L.Ed.2d 1010, 87 S.Ct. 1817] [right to marry person of one's choice irrespective of race]; [In re Klor](#) (1966) 64 Cal.2d 816 [51 Cal.Rptr. 903, 415 P.2d 791] with [Stanley v. Georgia](#) (1969) 394 U.S. 557 [22 L.Ed.2d [\*\*804] [\*\*\*891] 542, 89 S.Ct. 1243] [right to private possession of obscene material in one's home]; [People v. Ramey](#) (1976) 16 Cal.3d 263, 275-276 [127 Cal.Rptr. 629, 545 P.2d 1333], cert. den., 429 U.S. 929 [50 L.Ed.2d 299, 97

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<sup>4</sup>This court in *Belous* recognized "[the] fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex. [Citations.] . . . [para.] The critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state [citations], whether the regulation is 'necessary . . . to the accomplishment of a permissible state policy' [citations], and whether legislation impinging on constitutionally protected areas is narrowly drawn and not of 'unlimited and indiscriminate sweep' [citations]." (71 Cal.2d at pp. 963-964.)

<sup>5</sup>Article I, section 1 now reads: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Italics added.)

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<sup>6</sup>This extension of court decisions obviously included the extant decisions of this court in the area of freedom of choice and a citizen's right to privacy in areas dealing with procreation. (See [Ballard v. Anderson](#) (1971) 4 Cal.3d 873 [95 Cal.Rptr. 1, 484 P.2d 1345, 42 A.L.R.3d 1392]; [People v. Belous](#), [supra](#), 71 Cal.2d 954.)

S.Ct. 335] with [Payton v. New York \(1980\) 445 U.S. 573 \[63 L.Ed.2d 639, 100 S.Ct. 1371\]](#) [protection from warrantless arrest in the home].)

In addition, the constitutional provision [\*\*\*\*82] giving each California citizen a right of privacy has been held to be greater in scope than similar federal rights. (Compare [City of Santa Barbara v. Adamson, supra, 27 Cal.3d 123, 129](#) with [Village of Belle Terre v. Boraas \(1974\) 416 U.S. 1 \[39 L.Ed.2d 797, 94 S.Ct. 1536\]](#) and [Moore v. East Cleveland \(1977\) 431 U.S. 494 \[52 L.Ed.2d 531, 97 S.Ct. 1932\]](#).)

Further, the California Legislature has often acknowledged the importance of privacy protections. For example, California has recognized [\*293] that adults have a fundamental right to control decisions relating to their medical care. In this regard, the Legislature enacted the Natural Death Act ( [Health & Saf. Code, § 7185 et seq.](#)), which concerns the right of an adult to decide whether to have life-sustaining procedures withheld or withdrawn in the event of a terminal illness. Also, section 1708.5 was added to the Health and Safety Code enabling physicians to lawfully prescribe laetrile or amygdalin to any terminal cancer patient who chooses that form of cancer therapy. (See [People v. Privitera \(1979\) 23 Cal.3d 697, 711 \[153 Cal.Rptr. 431, 591 P.2d 919, 5 A.L.R. 4th 178\]](#) (dis. opn. of [\*\*\*\*83] Bird, C. J.); [id.](#), at p. 740 (dis. opn. of Newman, J.).)

The Legislature has also acted to protect privacy in other areas of its citizens' lives. (See, e.g., [Civ. Code, §§ 34.5- 34.10](#) [right of a minor to obtain medical care without parental consent, for, inter alia, the prevention or treatment of pregnancy, and for rape, sexual assault, and drug or alcohol related problems]; [Ed. Code, § 67140 et seq.](#) [protecting the privacy of students' records]; [Pen. Code, § 626.11](#) [protecting the right of privacy of persons renting rooms in student dormitories owned or operated by a state university, state college, or community college]; [Civ. Code, § 1785.1 et seq.](#) [the Consumer Credit Reporting Agencies Act]; [id.](#),

§ 1786 et seq. [the Investigative Consumer Reporting Agencies Act]; [id.](#), § 1798 et seq. [the Information Practices Act of 1977]; [id.](#), 1799 et seq. [prohibiting the unauthorized disclosure of business records]; [Welf. & Inst. Code, § 5325.1](#) [protecting privacy rights of the mentally ill]; Note, *California "Consenting Adults" Law: The Sex Act in Perspective* (1976) 13 San Diego L.Rev. 439 [discussing the Legislature's repeal of former Penal Code [\*\*\*\*84] restrictions on private sexual behavior between consenting adults].)

Thus, the right of privacy in California has never been dependent upon analogous federal decisions.<sup>7</sup> This state's special concern for individual privacy is understandable when viewed from an historical perspective. The California Constitution has traditionally embodied innovations and concerns for individual liberties. (David, *Our California Constitutions: Retrospections In This Bicentennial Year* (1976) 3 Hastings Const. L.Q. 697.)<sup>8</sup> This is a reflection of California's origins, for [\*294] this state developed from a pioneer society comprised of a diverse group of people. ( *Id.*, at pp. 698-699.)

[\*\*\*\*85] As the lead opinion ably demonstrates, California's protection of individual rights has been a bulwark against an erosion of our citizens' liberties. Predictably, California has advanced beyond the federal analysis when dealing with the selective withholding of governmental benefits based solely on the recipients' exercise of their rights. (See lead opn., *ante*, at pp. 257, 263-267.)

Recognition of the right of privacy in California is an historical fact underscored by our decisional law. California citizens' basic right of privacy has never been dependent [\*\*805] [\*\*\*892] upon federal recognition of a similar right. Therefore,

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<sup>7</sup> Our Constitution provides: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." ([Cal. Const., art. I, § 24.](#))

<sup>8</sup> Judge David notes, for example, the prohibitions against slavery and the grant of women's suffrage long before such tenets were nationally adopted. ( *Id.*, at pp. 713, 727-728.)

this court is not obligated to limit our citizens' rights simply because the federal courts have decided to change direction. The independent obligation to interpret this state's Constitution (see lead opn., *ante*, at pp. 260-262) imposes upon this court the responsibility to be consistent in giving life to the principles which that document embodies. When the federal courts radically depart from *Roe* and its progeny,<sup>9</sup> it is this court's duty to examine this state's constitutional requirements in order to decide if such a change is [\*\*\*\*86] permissible.

As a [\*\*\*\*87] result, the federal cases are of limited use in this context. Our state Constitution mandates a stricter standard than that used by the Supreme Court when examining funding restrictions which impair the right of privacy.

However, it is instructive to consider the reasoning of the Supreme Court when it dealt with this politically sensitive issue. That court held that legislative restrictions on abortion funding do not impair a citizen's right of private choice since they merely discourage the choice of abortion by granting a benefit (maternity care) to "encourage[] [an] [\*295] alternative activity." ( *Harris v. McRae*, *supra*, 448 U.S. at p. 315 [65 L.Ed.2d at p. 803, 100 S.Ct. at p. 2687].) This view allows the state to avoid the requirement of establishing a compelling state interest by engaging in the sophistry that there has been no barrier erected

around a woman's right of choice.

Further, such a holding encourages the state to set up devious intrusions on its citizens' fundamental rights since it can do so with impunity. It is clear that the state may not directly prohibit its citizens' right to choose abortion as a method by which to deal with procreation. [\*\*\*\*88] ( *People v. Belous*, *supra*, 71 Cal.2d 954.) That rule of constitutional law is circumvented when the state refuses to fund abortions for those dependent on the state for medical care. "[Articulating] the purpose [of the challenged restrictions] as 'encouraging normal childbirth' does not camouflage the simple fact that the purpose, more starkly expressed, is discouraging abortion." (*Abortion Funding Cases*, *supra*, 66 Geo. L.J. at p. 1196.)

Additionally, the distinction between prohibitions and benefits arbitrarily separates the existence of a right from the realization and enjoyment of that right. ( *Beal v. Doe* (1977) 432 U.S. 438, 462-463 [53 L.Ed.2d 464, 482-483, 97 S.Ct. 2366] (dis. opn. of Blackmun, J.); see, *Tribe*, *supra*, § 15-10, p. 933, fn. 77.)

In California, traditional constitutional interpretation does not permit such spurious distinctions.<sup>10</sup> For example, in *Salas v. Cortez*, *supra*, 24 Cal.3d 22, this court held that due process entitles an indigent defendant to appointed counsel in a state-prosecuted civil suit to determine paternity. The indigent defendant was not prohibited from appearing in propria persona or from attempting [\*\*\*\*89] to secure the funds to retain counsel or the services of pro bono counsel. Nevertheless, this court held that the significant infringement of both due process rights to a fair trial and a person's fundamental interest in a correct adjudication of the parental relationship could not be upheld absent a compelling [\*\*\*893] [\*\*806]

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<sup>9</sup>The abortion funding cases of the United States Supreme Court have been criticized as inconsistent with *Roe v. Wade*, *supra*, and other federal cases. ( *Moe v. Secretary of Administration & Finance*, *supra*, 417 N.E.2d at pp. 397-404; *Harris v. McRae*, *supra*, 448 U.S. at p. 329 [65 L.Ed.2d at p. 812, 100 S.Ct. at p. 2702] (dis. opn. of Brennan, J.); *id.* at p. 337 [65 L.Ed.2d at p. 817, 100 S.Ct. at p. 2706] (dis. opn. of Marshall, J.); *Abortion Funding Cases*, *supra*, 66 Geo. L.J. at pp. 1197-1201; Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae* (1980) 32 Stan. L.Rev. 1113; Tribe, *American Constitutional Law* (1978) § 15-10, pp. 933-934, fn. 77 [hereinafter cited as Tribe]; Note, *The Supreme Court, 1979 Term* (1980) 94 Harv. L.Rev. 1, 96, 99-102; Note, *Committee to Defend Reproductive Rights v. Myers: Medi-Cal Funding of Abortion* (1979) 9 Golden Gate L. Rev. 361, 384-387.)

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<sup>10</sup>Some writers have noted that federal cases do not permit such a distinction either. ( *Harris v. McRae*, *supra*, 448 U.S. at pp. 334-335 [65 L.Ed.2d at pp. 815-816, 100 S.Ct. at pp. 2704-2705] (dis. opn. of Brennan, J.); Note, *The Supreme Court, 1979 Term*, *supra*, 94 Harv. L.Rev. at pp. 96-107.)

state interest. (*Id.*, at p. 32.)

Another important case along these lines is *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899 [153 Cal.Rptr. 854, 592 P.2d [\*296] 341], affirmed, 447 U.S. 74 [64 L.Ed.2d 741, 100 S.Ct. 2035]. There, this court held that individuals must be permitted to exercise their First Amendment rights at a private shopping [\*\*\*\*90] center notwithstanding the fact that the petitioners admittedly were not prohibited from exercising their free speech rights in other places. (See also, *In re Hoffman* (1967) 67 Cal.2d 845, 852, fn. 7 [64 Cal.Rptr. 97, 434 P.2d 353] [invalidating restrictions on First Amendment activities in railroad station].)

Similarly, *Danskin v. San Diego Unified Sch. Dist.*, *supra*, 28 Cal.2d 536 stands for the proposition that the state may not grant benefits in a manner which discriminates against the exercise of fundamental rights. In that case, this court held unconstitutional a public school's refusal to permit use of its auditorium by "subversive" groups. The court stated, "It is true that the state need not open the doors of a school building as a forum and may at any time choose to close them. Once it opens the doors, however, it cannot demand tickets of admission in the form of convictions and affiliations that it deems acceptable." (*Id.*, at p. 547.) Since the state could not directly compel renunciation of beliefs, it could not make such renunciation a condition of receiving a public benefit. (*Id.*, at p. 546.) Also, in *Fort v. Civil Service Commission* [\*\*\*\*91] (1964) 61 Cal.2d 331 [38 Cal.Rptr. 625, 392 P.2d 385], *Kinnear v. City etc. of San Francisco* (1964) 61 Cal.2d 341 [38 Cal.Rptr. 631, 392 P.2d 391], and *Bagley v. Washington Township Hospital Dist.*, *supra*, 65 Cal.2d 499, this court invalidated restrictions on public employment which forced employees to choose between public employment and their First Amendment rights.

These cases graphically illustrate the principle that a compelling interest must be found to justify direct

or indirect burdens on the exercise of fundamental rights. Thus, the question here is simply whether the Budget Act restrictions at issue actually impair or burden a poor woman's right to procreative choice. It is clear that they do.

The Budget Act limitations are all the more troublesome because they result in increased health hazards to the indigent woman. (*Harris v. McRae*, *supra*, 448 U.S. at pp. 353-356 [65 L. Ed.2d at pp. 827-829, 100 S.Ct. at pp. 2714-2715] (dis. opn. of Stevens, J.)) By disallowing the funding for most abortions, the state leaves the pregnant woman to carry an unwanted pregnancy to term or encourages her to abort without medical assistance. Thus, the funding [\*\*\*\*92] restrictions inject a coercive financial incentive that forces the individual to accept the state's choice [\*297] of either contraception or childbirth. It forces the indigent woman to exercise her choice in the fashion advocated by the state.

The Budget Act restrictions impermissibly limit the constitutionally protected choice of our female citizens. The state's attempt to justify these limitations as noncoercive is illusory. "When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men [and women]. . . ." (*Ho Ah Kow v. Nunan* (D.Cal. 1879) 12 F.Cas. 252, 255 (No. 6546).) As judges and as citizens, we cannot fail to see that if the state is allowed to restrict the exercise of choice for the poor alone in this intimate area, indigent women in our society are forced to become second class citizens.<sup>11</sup>

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**Dissent by: RICHARDSON**

**Dissent**

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<sup>11</sup> The lead opinion's thorough analysis of the state's interest correctly concludes that the justifications advanced by the state are not compelling. (See lead opn., *ante*, at pp. 273-274.)

**RICHARDSON, J.** I respectfully dissent. The consequences of the majority's extended legal analysis may be reduced to a simple proposition: The State of California and its taxpayers are *constitutionally* compelled to pay for the abortions of all Medi-Cal recipients who desire them. The highest court in the land [**\*\*807**] [**\*\*\*894**] has twice held directly to the contrary. No matter. Accepting as valid the very arguments which failed to persuade the Legislature, and disregarding all deference to a coequal branch of government, the majority reaches its conclusion relying on the now familiar "independent state grounds" and on the right of "privacy" embodied in the California Constitution in 1972. As I develop below, in my view this is very dubious reasoning. Before today I had thought that it was very well settled that it was the Legislature, not the courts, which had the ultimate authority to select those benefits and services to be included in a public welfare program.

The majority's thesis is that the Legislature's decision to give public monetary assistance to welfare mothers for their childbirth expenses thereby violates the constitutional [**\*\*\*\*94**] rights of mothers who prefer to abort their child. By funding the childbirth of some women, it is contended that the state "forces" other indigent women to forego their constitutional right to abort. I suggest that such distorted logic defies constitutional analysis and makes no sense. The Legislature's decision to pay for the expenses of childbirth may make birth a more financially attractive alternative than an abortion, but such a decision no more [**\*298**] "forces" women to give up abortion than funding the purchase of false teeth forces one to give up toothbrushes.

The majority indulges in semantic legerdemain, phrasing the issue in terms of the "right to procreative choice," thus broadening the question to permit its argument. It is essential that we remain very clear on what this case is *not* about. The issue is not whether a woman's constitutional right to abort may be exercised without undue governmental *interference* ( [Roe v. Wade \(1973\)](#)

[410 U.S. 113 \[35 L.Ed.2d 147, 93 S.Ct. 705\]](#)) or whether women have a right to an abortion. They do. The essential question before us is whether they have a right to abort *free of charge and at taxpayer expense* [**\*\*\*\*95**] . As I will develop, these two questions involve vastly different considerations.

The majority relies primarily upon a line of cases which is wholly inapposite to the issue before us. (See [Parrish v. Civil Service Commission \(1967\) 66 Cal.2d 260 \[57 Cal.Rptr. 623, 425 P.2d 223\]](#); [Bagley v. Washington Township Hospital Dist. \(1966\) 65 Cal.2d 499 \[55 Cal.Rptr. 401, 421 P.2d 409\]](#); [Danskin v. San Diego Unified Sch. Dist. \(1946\) 28 Cal.2d 536 \[171 P.2d 885\]](#).) It is not surprising that, using a 13-inch ruler as a constitutional measure for the challenged legislation, the majority reaches such an erroneous result.

Thus, in *Danskin* the state improperly required loyalty oaths from those persons who sought permission to use school buildings for their meetings. We held that although the state had no duty to make school buildings available for public meetings, nevertheless, if it elected to do so, it could neither arbitrarily select among permitted users nor impose unconstitutional conditions upon that use. ([28 Cal.2d at pp. 545-546](#).) Application of this *Danskin* principle to the case before us would result in prohibiting the state from the arbitrary extension [**\*\*\*\*96**] of either childbirth or abortion benefits to some but not all recipients or, alternatively, the conditioning of the receipt of such benefits upon the waiver of some constitutional right. Nothing remotely resembling such selective or coercive conduct is involved in the case before us. Contrary to the majority's claim of "discriminatory governmental treatment" (*ante*, p. 256), childbirth benefits are available to *everyone* on a nondiscriminatory basis. Such benefits are not conditioned upon the waiver of the right to abort, for that decision remains the untrammelled and voluntary choice of each aid recipient. Similarly, the limited abortion benefits which are offered by

Medi-Cal are available *to everyone* meeting the [\*299] objective criteria prescribed in the legislation. (See *id.*, at p. 259, fn. 1.) The majority makes no attempt to demonstrate the arbitrariness of any of these criteria. How then can *Danskin* support the majority's holding herein?

[\*\*808] [\*\*\*895] *Bagley* is wholly inapposite. In that case, a hospital district attempted to discharge an employee because of her political activities involving district board elections. In *Bagley* [\*\*\*\*97] , we established strict standards for measuring the propriety of governmental restrictions upon the exercise of constitutional rights as a condition to public employment. (65 Cal.2d at pp. 505-507.) The *Bagley* rationale is not relevant to our consideration of the present case. Its "three-part test" so readily borrowed by the majority is plainly ill-suited for the analytical task before us. As previously noted, the legislative action in the present case imposes no conditions whatever upon the right of particular recipients of available benefits. In contrast, the *Bagley* employee was told to forego her political rights if she wished to remain employed. No similar demands or conditions are imposed upon the beneficiaries which the Legislature has selected for inclusion in the Medi-Cal program. In short, the *Bagley* tripartite test measures the *validity* of conditions imposed upon the receipt of public benefits. The test is wholly inappropriate to measure the constitutional *adequacy* of the benefits so provided, which is the only issue before us in this case.

The third principal case, *Parrish*, is no closer on point than either *Bagley* or *Danskin*. The [\*\*\*\*98] *Parrish* welfare recipients were required to consent to predawn eligibility searches as a condition to the receipt of public aid. We there applied the *Bagley* standards and concluded that this conditional intrusion on constitutional rights was unjustified and improper. In contrast, the present case presents no such similar conditions upon the right to receive the kinds of aid which were funded by the Legislature. With due respect, I

must suggest that the majority's attempt to find refuge in such weak precedents graphically illustrates the poverty of its argument.

The cases on which the majority relies involve the imposition of unconstitutional conditions upon the receipt of public benefits. This is entirely different from the problem herein presented. Yet, relevant precedent is not lacking. It simply will not support the result which the majority obviously struggles to achieve.

[\*300] Two very recent decisions of the United States Supreme Court are directly in point. The high court decided identical issues in *Harris v. McRae* (1980) 448 U.S. 297 [65 L.Ed.2d 784, 100 S.Ct. 2671], and *Maher v. Roe* (1977) 432 U.S. 464, 471-474 [53 L.Ed.2d 484, 492-495, [\*\*\*\*99] 97 S.Ct. 2376], with results diametrically opposite to those achieved by the majority here. In each case the Supreme Court sustained budgetary restrictions upon aid for abortions. The *Maher* court upheld a Connecticut welfare regulation which, as here, provided benefits for medical services incident to childbirth but denied those which related to nontherapeutic abortions. In *Harris*, the Supreme Court upheld the federal "Medicaid" Act and the so-called "Hyde Amendment" thereto which in combined effect denied public funding for some medically necessary abortions. In both cases the high tribunal rejected several constitutional arguments raised against these funding restrictions which are identical to those adopted by the majority, including challenges based on privacy, due process and equal protection principles. The majority herein chooses to ignore the rationale of the highest court in the land which deals specifically with the precise issues presented to us.

The primary issue in *Maher* was whether restrictions upon state aid for nontherapeutic abortions impermissibly infringed upon the rights of privacy or "freedom of choice" which the Supreme Court described in [\*\*\*\*100] *Roe v. Wade*, *supra*, 410 U.S. 113. The *Maher* court observed that although its *Roe* holding "protects the

woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy" ([432 U.S., at pp. 473-474 \[53 L.Ed.2d at p. 494\]](#)) such a decision does not prevent the state from making "a value judgment favoring childbirth over abortion, and . . . [implementing] that judgment by the allocation of public funds." ([Id., at p. 474 \[53 L.Ed.2d at p. 494\]](#).) In its further amplification in *Maher* the United States Supreme Court spoke directly, and **[\*\*809]** **[\*\*\*896]** with compelling authority, to the precise point which is before us, explaining: "The Connecticut regulation before us is different in kind from the laws invalidated in our previous abortions decisions. The Connecticut [one may substitute *California*] regulation places no obstacles -- absolute or otherwise -- in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. **[\*\*\*\*101]** *The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions [\*301] that was not already there. The indigency that may make it difficult -- and in some cases, perhaps, impossible -- for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.*" ([Id., at p. 474 \[53 L.Ed.2d at pp. 494-495\]](#), italics added.) This reasoning, in my view, is directly applicable to the present case. It is also unanswerable. The California Legislature may constitutionally make "a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds." (*Ibid.*) Such a choice may be sociologically unwise but it is not constitutionally illegal.

Last year in *Harris* the high tribunal again focused its attention on the precise issue before us, and flatly rejected the constitutional analysis advanced by the majority that "a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range

of protected choices. The reason why was **[\*\*\*\*102]** explained in *Maher*: although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency. Although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all. We are thus not persuaded that the Hyde Amendment impinges on the constitutionally protected freedom of choice recognized in *Wade*." ([448 U.S. at pp. 316-317 \[65 L.Ed.2d at p. 804, 100 S.Ct. at p. 2688\]](#), fn. omitted.)

In similar fashion, the Supreme Court disposed of the due process argument, holding that there is no Fifth Amendment affirmative entitlement **[\*\*\*\*103]** to government funds necessary to "realize all the advantages of that freedom" recognized by *Roe v. Wade* (pp. 317-318 [[65 L.Ed.2d at p. 805, 100 S.Ct. at p. 2688-2689](#)]).

Finally, *Harris* rejected the reasoning of the majority that the funding restrictions violated equal protection principles by providing medically necessary services other than abortions. ( Pp. 321-327 [[65 L. \[\\*302\] Ed.2d at pp. 807-811, 100 S.Ct. at pp. 2690-2693\]](#).) The high court noted that although the impact of the federal law falls upon the indigent, prior decisions had repeatedly held that poverty, standing alone, is not a suspect classification which would invoke the strict scrutiny form of analysis. ([448 U.S. at pp. 322-323 \[65 L.Ed.2d at pp. 808-809, 100 S.Ct. at p. 2691\]](#).)

Applying this traditional rational basis test to determine whether the federal restrictions bore such a "relationship to its legitimate interest in protecting the potential life of the fetus" (p. 324 [[65 L.Ed.2d at p. 809, 100 S.Ct. at pp. 2691-2692](#)]), the Supreme Court found such a rational basis in the state's interest in protecting the potentiality of human life. The high tribunal observed: "By subsidizing [\*\*\*\*104] the medical expenses of indigent women who carry their pregnancies to term while not subsidizing the comparable expenses of women who undergo abortions (except those whose lives are threatened), Congress has established incentives that make childbirth a more attractive [\*\*\*897] alternative than abortion for persons eligible [\*\*810] for Medicaid. These incentives bear a direct relationship to the legitimate congressional interest in protecting potential life. Nor is it irrational that Congress has authorized federal reimbursement for medically necessary services generally, but not for certain medically necessary abortions. Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life. [para.] Where, as here, the Congress has neither invaded a substantive constitutional right or freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that congressional action be rationally related to a legitimate governmental interest. The Hyde Amendment satisfies that standard." ( Pp. 325-326 [[65 L.Ed.2d at p. 810, 100 \[\\*\\*\\*\\*105\] S.Ct. at pp. 2692-2693](#)], fns. omitted.)

The majority questions the propriety of the California Legislature's interest in promoting childbirth and protecting potential life in the course of applying its inapposite *Bagley* "three-pronged test." Contrary to the high court analysis in *Maher* and *Harris*, the majority bases its holding on the faulty premise that California must somehow demonstrate not only that its foregoing interests *might* be fostered by the funding restriction but that they inevitably *must* be so fostered, and in addition,

in a manner "least offensive" to the aid recipient's "right of procreative choice." (E.g., pp. 281, 282.) The majority's test is not only unduly strict in its evaluation of California's legitimate interests, but the majority's reasoning is wholly circular, entirely begging the question [\*303] whether, indeed, there exists a right to choose between childbirth and a *free abortion performed at state expense*.

The California Legislature could reasonably believe that if free abortions "on demand" were unavailable, some women would elect to bear their children which would thereby promote the legitimate goals of encouraging childbirth [\*\*\*\*106] and protecting fetal life. We cannot assume that the California Legislature is less protective of potential life than is the United States Congress. The Legislature also could assume that other women, no longer able to obtain abortions paid for by the taxpayers, might be encouraged before conception to discover and practice more effective birth control methods, thereby reducing to a considerable degree public welfare expenditures.

Thus, while the majority compares the cost of abortions with the cost of child bearing (*ante*, p. 277), it disregards a third "procreative choice" available to the indigent woman who prefers not to bear a child: use of effective contraception. Numerous birth control methods and techniques of varying degrees of effectiveness are available as alternatives to either pregnancy or abortion. Recognizing of course that no present method is infallible, I suggest that the majority errs in its assumption that "when the state finances the costs of childbirth, but will not finance the termination of pregnancy, it realistically forces the indigent woman to choose childbirth . . . ." (*Ante*, p. 285.) Instead, the Legislature may well have wished to encourage [\*\*\*\*107] a "procreative choice" at an earlier stage by promoting the use of voluntary birth control.

The principal flaw, however, which runs throughout the entirety of the majority's theory is the erroneous assumption that if a woman has a

constitutional right of "freedom of choice" in the matter of whether or not to bear her child it necessarily follows that the State of California and its taxpayers must pay for the costs of the exercise of that right. Fortunately, that sweeping generalization is not so, and never has been so in our constitutional history. A citizen clearly has a constitutional right to travel where and when he pleases. I have never heard it suggested that he is constitutionally entitled to a free trip to the Bahamas paid for from the public treasury. Every citizen has a constitutional right to vote, but he has no constitutional right to a free taxi ride to the polling place. Every citizen [\*\*\*898] may run for public office, but I know of no [\*\*811] case holding that he has a constitutional right to public funds to help him get elected. He has a constitutional right to express his views on [\*304] public affairs, but he has no constitutional right to a free [\*\*\*\*108] mailing of his views, or a free hall paid for by the taxpayers within which he may expound them. Even when, by a divided court, we recently recognized a right of representation for incarcerated indigent civil defendants we very carefully abstained from recognizing that such a right constituted any enforceable claim against the public treasury for the payment of such representation. ( [\*Payne v. Superior Court\* \(1976\) 17 Cal.3d 908, 920, fn. 6 \[132 Cal.Rptr. 405, 553 P.2d 565\]](#).) In short, the recognition of constitutional rights does not carry with it any corollary constitutional obligation on the state Legislature to furnish, out of public funds, the full and unrestricted implementation of those rights. This fact is unaffected by the majority's effort to cast the issue in the form of a "protection of either procreative choice." (*Ante*, p. 256.)

Finally, I think it very doubtful that when the people of California in 1972 approved the Legislature's proposed constitutional amendment adding the "right of privacy" to the list of inalienable rights, they thought they were committing themselves to the payment of free abortions. There is nothing whatever in the history of the [\*\*\*\*109] initiative to suggest such a

bizarre result. Rather, when they added the "right of privacy" to their "inalienable rights" the people were told that the right of privacy "prevents government and business interests from collecting and stockpiling necessary information gathered for one purpose in order to serve other purposes or to embarrass us.

"Fundamental to our privacy is the ability to control circulation of personal information. . . . The proliferation of government and business records over which we have no control limits our ability to control our personal lives. Often we do not know that these records even exist and we are certainly unable to determine who has access to them.

"Even more dangerous is the loss of control over the accuracy of government and business records on individuals.

"The average citizen also does not have control over what information is collected about him. Much is secretly collected. We are required to report some information, regardless of our wishes for privacy or our belief that there is no public need for the information. Each time we apply for a credit card, or a life insurance policy, file a tax return, [\*305] interview for a job, or [\*\*\*\*110] get a drivers license, a dossier is opened and an informational profile is sketched. Modern technology is capable of monitoring, centralizing and computerizing this information which eliminates any possibility of individual privacy." (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972) p. 27.)

The foregoing extracts from the ballot arguments persuade me that when the people in 1972 adopted the constitutional "privacy" measure they thought they were approving restrictions on the dissemination of record information affecting and intruding upon their personal lives. This is the whole spirit of the ballot argument. It may have had wider constitutional implications, but there is nothing in the history of the amendment to suggest that the people intended to create a constitutionally

protected right that was broader than the federal right of privacy declared in [Roe v. Wade, supra](#). Certainly, the people did not intend to extend "privacy" to encompass a *constitutional* access to the public treasury for all indigents who want free abortions. Such a speculative jump in reasoning is of Olympian proportions -- from a restriction on information [\*\*\*\*111] distribution to a constitutional obligation to pay for abortions. With due deference, I suggest that such a consequence is the pure invention of the majority and not constitutionally ordained by any California "right of privacy."

It is the exclusive *legislative* prerogative, and not ours, to determine how public monies shall be appropriated, and for what [\*\*\*899] purposes. The United States Supreme [\*\*812] Court in disposing of the identical arguments adopted by the majority herein has explicitly held "[nor] is it irrational that Congress has authorized federal reimbursement for medically necessary services generally, but not for certain medically necessary abortions." ([448 U.S. at p. 325 \[65 L.Ed.2d at p. 810, 100 S.Ct. at p. 2692\]](#).) The same constitutional considerations which moved the high court to defer to congressional judgment should similarly prompt us to accept the judgment of the California Legislature in its adoption of the Budget Act. The California Constitution prohibits us from rewriting the Budget Act, which budget, it bears repeating, is the Governor's responsibility to propose and the Legislature's to adopt. We seriously err when we continue, on [\*\*\*\*112] misguided constitutional grounds, to usurp the lawmaking function of the California Legislature.

[\*306] I would affirm the judgment in S.F. 24069, and deny the peremptory writs sought in S.F. 24053 and S.F. 24192.



Caution

As of: October 18, 2026 6:38 AM Z

## Conservatorship of O.B.

Supreme Court of California

July 27, 2020, Opinion Filed

S254938

### Reporter

9 Cal. 5th 989 \*; 470 P.3d 41 \*\*; 266 Cal. Rptr. 3d 329 \*\*\*; 2020 Cal. LEXIS 4646 \*\*\*\*; 2020 LX 93605

Conservatorship of the Person of O.B.T.B. et al., as Coconservators, etc., Petitioners and Respondents, v. O.B., Objector and Appellant.

**Subsequent History:** Reported at [Conservatorship of O. B., 2020 Cal. LEXIS 5346 \(Cal., July 27, 2020\)](#)

On remand at, Decision reached on appeal by [O.B. v. O.B., 2020 Cal. App. LEXIS 1144 \(Cal. App. 2d Dist., Dec. 2, 2020\)](#)

**Prior History:** [\*\*\*\*1] Second Appellate District, Division Six, No. B290805. Superior Court of Santa Barbara County, No. 17PR00325, James F. Rigali, Judge.

[Conservatorship of O.B., 32 Cal. App. 5th 626, 244 Cal. Rptr. 3d 192, 2019 Cal. App. LEXIS 153, 2019 WL 926100 \(Feb. 26, 2019\)](#)

### Core Terms

convincing standard, appellate court, trial court, clear and convincing evidence, sufficiency of evidence, substantial evidence, standard of proof, trier of fact, convince, appellate review, clear and convincing proof, beyond a reasonable doubt, the, light most favorable, appoint, reasonable trier of fact, conservatorship, credibility of witnesses, legal significance, high probability, probate, deed, preponderance of evidence, fact finder, deference, credible, substantial evidence to support, preponderance standard, reasonable inference, degree of certainty

## Case Summary

### Overview

**HOLDINGS:** [1]-The Court of Appeal erred in treating the clear and convincing standard of proof as disappearing on appeal when it rejected an evidentiary sufficiency challenge to the appointment of limited coconservators under [Prob. Code, § 1801, subd. \(e\)](#), because appellate courts had to account for the clear and convincing standard in reviewing whether findings made under it had been established under [Evid. Code, § 115](#), asking whether the record as a whole contained substantial evidence from which a reasonable factfinder could have found it highly probable the fact was true, while giving deference as to witness credibility and resolution of conflicting evidence; [2]-An argument that the Legislature believed appellate courts should ignore the clear and convincing standard in conservatorship cases was meritless because nothing in the text or legislative history of [§ 1801](#) so indicated.

### Outcome

Reversed and remanded.

## LexisNexis® Headnotes

Evidence > Burdens of Proof

**HN1 Evidence, Burdens of Proof**

A burden of proof means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. [Evid. Code, § 115](#). The burden of proof may require a party to establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. The standard of proof that applies to a particular determination serves to instruct the fact finder concerning the degree of confidence society deems necessary in the correctness of factual conclusions for a particular type of adjudication, to allocate the risk of error between the litigants, and to indicate the relative importance attached to the ultimate decision.

Evidence > Burdens of Proof > Clear & Convincing Proof

Evidence > Burdens of Proof > Preponderance of Evidence

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

**HN2 Burdens of Proof, Clear & Convincing Proof**

The default standard of proof in civil cases is the preponderance of the evidence. [Evid. Code, § 115](#). This standard simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence. The more demanding standard of proof beyond a reasonable doubt, meanwhile, applies to findings of guilt in criminal matters. Reasonable doubt is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison or consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of

the truth of the charge. [Pen. Code, § 1096](#). The standard of proof known as clear and convincing evidence demands a degree of certainty greater than that involved with the preponderance standard, but less than what is required by the standard of proof beyond a reasonable doubt. This intermediate standard requires a finding of high probability.

Evidence > Burdens of Proof > Clear & Convincing Proof

**HN3 Burdens of Proof, Clear & Convincing Proof**

The precise meaning of "clear and convincing proof" does not lend itself readily to definition. It is, in reality, a question of how strongly the minds of the trier or triers of fact must be convinced that the facts are as contended by the proponent. Where clear and convincing proof is required, the proponent must convince the jury or judge, as the case may be, that it is highly probable that the facts which he asserts are true. He must do more than show that the facts are probably true.

Evidence > Burdens of Proof > Clear & Convincing Proof

**HN4 Burdens of Proof, Clear & Convincing Proof**

The clear and convincing standard has been described as requiring that the evidence be so clear as to leave no substantial doubt; sufficiently strong to command the unhesitating assent of every reasonable mind.

Evidence > Burdens of Proof > Clear & Convincing Proof

**HN5 Burdens of Proof, Clear & Convincing Proof**

The clear and convincing standard applies to various determinations where particularly important individual interests or rights are at stake.

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Evidence > Burdens of Proof > Clear & Convincing Proof

### **HN6 Substantial Evidence, Sufficiency of Evidence**

Even though the standard of clear and convincing evidence directly governs only the determination made by the trier of fact, appellate courts assessing the sufficiency of the evidence still have to take this standard of proof into account by appropriately reframing their inquiry. This adjustment in appellate perspective when the clear and convincing standard applied below does not provide reviewing courts with a liberal license to substitute their views for the conclusions drawn by the trier of fact on matters such as witness credibility and the resolution of conflicts in the evidence.

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Evidence > Burdens of Proof > Clear & Convincing Proof

### **HN7 Substantial Evidence, Sufficiency of Evidence**

When the clear and convincing standard of proof applied in the trial court, an appellate court should review the record for sufficient evidence in a manner mindful of the elevated degree of certainty required by this standard. This guidance often has been coupled with language recognizing the limits

of such review. The evidence in the record on appeal need not be entirely plain and convincing to an appellate court. Questions of fact are for the trial court, and while the appellate court will consider the question as to the sufficiency of the evidence in the light of that rule, it will not disturb the finding of the trial court where there is substantial evidence warranting a clear and satisfactory conviction to that effect. All questions as to preponderance and conflict of evidence are for the trial court.

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Evidence > Burdens of Proof > Clear & Convincing Proof

### **HN8 Substantial Evidence, Sufficiency of Evidence**

The clear and convincing evidence test requires a finding of high probability. Applying that standard, an appellate court asks whether the evidence has that degree of clarity.

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Evidence > Burdens of Proof > Clear & Convincing Proof

### **HN9 Substantial Evidence, Sufficiency of Evidence**

An appellate court evaluating the sufficiency of the evidence in support of a finding must make an appropriate adjustment to its analysis when the clear and convincing standard of proof applied before the trial court. In general, when presented with a challenge to the sufficiency of the evidence associated with a finding requiring clear and convincing evidence, the court must determine

whether the record, viewed as a whole, contains substantial evidence from which a reasonable trier of fact could have made the finding of high probability demanded by this standard of proof.

Civil Procedure > Appeals > Standards of Review

Evidence > Burdens of Proof > Clear & Convincing Proof

### **HN10 Appeals, Standards of Review**

Different forms of appellate review may apply in certain circumstances when a determination has been made by the trier of fact under the clear and convincing standard of proof.

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Evidence > Burdens of Proof > Clear & Convincing Proof

### **HN11 Substantial Evidence, Sufficiency of Evidence**

As a matter of logic, a finding that must be based on clear and convincing evidence cannot be viewed on appeal the same as one that may be sustained on a mere preponderance. The clear and convincing standard of proof normally applies directly only before the trial court; appellate courts normally do not decide whether they themselves believe the evidence was so probative. And the fundamental question before an appellate court reviewing for sufficiency of the evidence is the same, regardless of the standard of proof that applied below: whether any reasonable trier of fact could have made the finding that is now challenged on appeal. But the issue before a reviewing court in a given case is whether the trier of fact could have made the finding it did arrive upon, rather than a hypothetical

finding involving a different standard of proof. Therefore, when reviewing a finding that demands clear and convincing evidence, an appellate court must determine whether the evidence reasonably could have led to a finding made with the specific degree of confidence required by this standard.

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Evidence > Burdens of Proof > Clear & Convincing Proof

### **HN12 Substantial Evidence, Sufficiency of Evidence**

Taking the clear and convincing standard into account in the context of substantial evidence review is logically consistent with the principle that an appellate court addressing a claim of insufficient proof reviews the record for substantial evidence supporting the challenged finding. Substantial evidence is evidence that is of ponderable legal significance, reasonable in nature, credible, and of solid value, and substantial proof of the essentials which the law requires in a particular case. Even if evidence is capable of being regarded as credible, reasonable, and solid, to amount to substantial evidence it also must be of ponderable legal significance. And whether evidence is of ponderable legal significance cannot be properly evaluated without accounting for the heightened standard of proof that applied before the trial court.

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Evidence > Burdens of Proof > Clear & Convincing Proof

### **HN13 Substantial Evidence, Sufficiency of Evidence**

Keeping the clear and convincing standard in mind when reviewing for sufficiency of the evidence helps ensure that an appropriate degree of appellate scrutiny attaches to findings to which this standard applies. The clear and convincing standard is used for various determinations where particularly important individual interests or rights are at stake. The selection of the clear and convincing standard in these situations reflects a very fundamental assessment of the comparative social costs of erroneous factual determinations. That is to say, the significant consequences of an erroneous true finding when these interests or rights are involved — such as an improper deportation, an unnecessary involuntary commitment, or an unjustified termination of parental rights — support the application of a heightened standard of proof, relative to the preponderance standard. Yet the use of a clear and convincing standard of proof before the trial court may not by itself completely protect these interests, because the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions.

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Evidence > Burdens of Proof > Clear & Convincing Proof

#### **HN14 Substantial Evidence, Sufficiency of Evidence**

An appellate court that gives appropriate deference to the trier of fact will not be in a position to detect or correct some errors. But when a review of the record establishes that no reasonable factfinder could have found a matter proved to a degree of high probability, appellate intervention reaffirms that the interests involved are of special importance, that their deprivation requires a greater burden to be surmounted, and that the judicial system operates in a coordinated fashion to ensure as much.

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Evidence > Burdens of Proof > Clear & Convincing Proof

#### **HN15 Substantial Evidence, Sufficiency of Evidence**

As in criminal appeals involving a challenge to the sufficiency of the evidence, an appellate court reviewing a finding made pursuant to the clear and convincing standard does not reweigh the evidence itself. In assessing how the evidence reasonably could have been evaluated by the trier of fact, an appellate court reviewing such a finding is to view the record in the light most favorable to the judgment below; it must indulge reasonable inferences that the trier of fact might have drawn from the evidence; it must accept the factfinder's resolution of conflicting evidence; and it may not insert its own views regarding the credibility of witnesses in place of the assessments conveyed by the judgment. The question before a court reviewing a finding that a fact has been proved by clear and convincing evidence is not whether the appellate court itself regards the evidence as clear and convincing; it is whether a reasonable trier of fact could have regarded the evidence as satisfying this standard of proof.

Civil Procedure > Appeals > Standards of Review

Evidence > Burdens of Proof > Clear & Convincing Proof

#### **HN16 Appeals, Standards of Review**

To say that clear and convincing evidence is not a standard for appellate review is correct in the sense that an appellate court normally does not itself review the record for clear and convincing proof.

Civil Procedure > ... > Standards of  
Review > Substantial Evidence > Sufficiency of  
Evidence

Evidence > Burdens of Proof > Clear &  
Convincing Proof

### **HN17 Substantial Evidence, Sufficiency of Evidence**

Giving full effect to the respondent's evidence, however slight, does not necessarily mean that this evidence will amount to substantial evidence of ponderable legal significance which reasonably could have been regarded as sufficient to establish a fact with the certainty required by the clear and convincing standard.

Civil Procedure > ... > Standards of  
Review > Substantial Evidence > Sufficiency of  
Evidence

Evidence > Burdens of Proof > Clear &  
Convincing Proof

### **HN18 Substantial Evidence, Sufficiency of Evidence**

An appellate court must account for the clear and convincing standard of proof when addressing a claim that the evidence does not support a finding made under this standard. When reviewing a finding that a fact has been proved by clear and convincing evidence, the question before the appellate court is whether the record as a whole contains substantial evidence from which a reasonable factfinder could have found it highly probable that the fact was true. In conducting its review, the court must view the record in the light most favorable to the prevailing party below and give appropriate deference to how the trier of fact may have evaluated the credibility of witnesses, resolved conflicts in the evidence, and drawn reasonable inferences from the evidence.

## **Headnotes/Summary**

### **Summary**

#### **[\*989] CALIFORNIA OFFICIAL REPORTS SUMMARY**

The probate court, sitting as the trier of fact, appointed limited coconservators ([Prob. Code, § 1801, subd. \(e\)](#)) for a person with a disability. (Superior Court of Santa Barbara County, No. 17PR00325, James F. Rigali, Judge.) The Court of Appeal, Second Dist., Div. Six, No. B290805, affirmed.

The Supreme Court reversed the judgment of the Court of Appeal and remanded to that court for further proceedings, concluding that the Court of Appeal erred in treating the clear and convincing standard of proof as disappearing on appeal. Appellate courts must account for the clear and convincing standard in reviewing whether findings made under it have been established ([Evid. Code, § 115](#)), asking whether the record as a whole contains substantial evidence from which a reasonable fact finder could have found it highly probable the fact was true, while giving deference as to witness credibility and resolution of conflicting evidence. An argument that the Legislature believed appellate courts should ignore the clear and convincing standard in conservatorship cases was meritless because nothing in the text or legislative history of [Prob. Code, § 1801](#) so indicates. (Opinion by Cantil-Sakauye, C. J., expressing the unanimous view of the court.)

### **Headnotes**

#### **CALIFORNIA OFFICIAL REPORTS HEADNOTES**

### **CA(1) (1)**

**Evidence § 20—Burden of Proof—What Constitutes.**

A burden of proof means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court ([Evid. Code, § 115](#)). The burden of proof may require a party to establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. The standard of proof that applies to a particular determination serves to instruct the fact finder concerning the degree of [\*990] confidence society deems necessary in the correctness of factual conclusions for a particular type of adjudication, to allocate the risk of error between the litigants, and to indicate the relative importance attached to the ultimate decision.

### [CA\(2\)](#) (2)

#### **Evidence § 20—Burden of Proof—Standards of Proof.**

The default standard of proof in civil cases is the preponderance of the evidence ([Evid. Code, § 115](#)). This standard simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence. The more demanding standard of proof beyond a reasonable doubt, meanwhile, applies to findings of guilt in criminal matters. Reasonable doubt is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge ([Pen. Code, § 1096](#)).

### [CA\(3\)](#) (3)

#### **Evidence § 20—Burden of Proof—Clear and Convincing Proof.**

The standard of proof known as clear and convincing evidence demands a degree of certainty

greater than that involved with the preponderance standard, but less than what is required by the standard of proof beyond a reasonable doubt. This intermediate standard requires a finding of high probability. The precise meaning of “clear and convincing proof” does not lend itself readily to definition. It is, in reality, a question of how strongly the minds of the trier or triers of fact must be convinced that the facts are as contended by the proponent. Where clear and convincing proof is required, the proponent must convince the jury or judge, as the case may be, that it is highly probable that the facts which the proponent asserts are true. The proponent must do more than show that the facts are probably true.

### [CA\(4\)](#) (4)

#### **Evidence § 20—Burden of Proof—Clear and Convincing Proof.**

The clear and convincing standard has been described as requiring that the evidence be so clear as to leave no substantial doubt; sufficiently strong to command the unhesitating assent of every reasonable mind.

### [CA\(5\)](#) (5)

#### **Evidence § 20—Burden of Proof—Clear and Convincing Proof.**

The clear and convincing standard applies to various determinations where particularly important individual interests or rights are at stake, such as termination of parental rights, involuntary commitment, and deportation.

### [CA\(6\)](#) (6)

#### **Appellate Review § 148—Sufficiency of Evidence—Findings Requiring Clear and Convincing Proof.**

Even though the standard of clear and convincing

evidence directly governs only the determination made [\*991] by the trier of fact, appellate courts assessing the sufficiency of the evidence still have to take this standard of proof into account by appropriately reframing their inquiry. This adjustment in appellate perspective when the clear and convincing standard applied below does not provide reviewing courts with a liberal license to substitute their views for the conclusions drawn by the trier of fact on matters such as witness credibility and the resolution of conflicts in the evidence.

### CA(7) (7)

#### **Appellate Review § 148—Sufficiency of Evidence—Findings Requiring Clear and Convincing Proof.**

When the clear and convincing standard of proof applied in the trial court, an appellate court should review the record for sufficient evidence in a manner mindful of the elevated degree of certainty required by this standard. This guidance often has been coupled with language recognizing the limits of such review. The evidence in the record on appeal need not be entirely plain and convincing to an appellate court. Questions of fact are for the trial court, and while the appellate court will consider the question as to the sufficiency of the evidence in the light of that rule, it will not disturb the finding of the trial court where there is substantial evidence warranting a clear and satisfactory conviction to that effect. All questions as to preponderance and conflict of evidence are for the trial court.

### CA(8) (8)

#### **Appellate Review § 148—Sufficiency of Evidence—Findings Requiring Clear and Convincing Proof.**

The clear and convincing evidence test requires a finding of high probability. Applying that standard, an appellate court asks whether the evidence has

that degree of clarity.

### CA(9) (9)

#### **Appellate Review § 148—Sufficiency of Evidence—Findings Requiring Clear and Convincing Proof.**

An appellate court evaluating the sufficiency of the evidence in support of a finding must make an appropriate adjustment to its analysis when the clear and convincing standard of proof applied before the trial court. In general, when presented with a challenge to the sufficiency of the evidence associated with a finding requiring clear and convincing evidence, the court must determine whether the record, viewed as a whole, contains substantial evidence from which a reasonable trier of fact could have made the finding of high probability demanded by this standard of proof. (Disapproving to the extent inconsistent: *In re Marriage of Saslow* (1985) 40 Cal.3d 848 [221 Cal. Rptr. 546, 710 P.2d 346]; *Crail v. Blakely* (1973) 8 Cal.3d 744 [106 Cal. Rptr. 187, 505 P.2d 1027]; and numerous other decisions.)

### CA(10) (10)

#### **Evidence § 20—Burden of Proof—Clear and Convincing Proof—Appellate Review.**

Different forms of appellate review may apply in certain circumstances when a determination has been made by the trier of fact under the clear and convincing standard of proof.

### [\*992] CA(11) (11)

#### **Appellate Review § 148—Sufficiency of Evidence—Findings Requiring Clear and Convincing Proof.**

As a matter of logic, a finding that must be based on clear and convincing evidence cannot be viewed on appeal the same as one that may be sustained on

a mere preponderance. The clear and convincing standard of proof normally applies directly only before the trial court; appellate courts normally do not decide whether they themselves believe the evidence was so probative. And the fundamental question before an appellate court reviewing for sufficiency of the evidence is the same, regardless of the standard of proof that applied below: whether any reasonable trier of fact could have made the finding that is now challenged on appeal. But the issue before a reviewing court in a given case is whether the trier of fact could have made the finding it did arrive upon, rather than a hypothetical finding involving a different standard of proof. Therefore, when reviewing a finding that demands clear and convincing evidence, an appellate court must determine whether the evidence reasonably could have led to a finding made with the specific degree of confidence required by this standard.

#### CA(12) (12)

##### **Appellate Review § 148—Sufficiency of Evidence—Findings Requiring Clear and Convincing Proof.**

Taking the clear and convincing standard into account in the context of substantial evidence review is logically consistent with the principle that an appellate court addressing a claim of insufficient proof reviews the record for substantial evidence supporting the challenged finding. Substantial evidence is evidence that is of ponderable legal significance, reasonable in nature, credible, and of solid value, and substantial proof of the essentials which the law requires in a particular case. Even if evidence is capable of being regarded as credible, reasonable, and solid, to amount to substantial evidence it also must be of ponderable legal significance. And whether evidence is of ponderable legal significance cannot be properly evaluated without accounting for the heightened standard of proof that applied before the trial court.

#### CA(13) (13)

##### **Appellate Review § 148—Sufficiency of Evidence—Findings Requiring Clear and Convincing Proof.**

Keeping the clear and convincing standard in mind when reviewing for sufficiency of the evidence helps ensure that an appropriate degree of appellate scrutiny attaches to findings to which this standard applies. The clear and convincing standard is used for various determinations where particularly important individual interests or rights are at stake. The selection of the clear and convincing standard in these situations reflects a very fundamental assessment of the comparative social costs of erroneous factual determinations. That is to say, the significant consequences of an erroneous true finding when these interests or rights are involved—such as an improper deportation, an unnecessary involuntary commitment, or an unjustified termination of [\*993] parental rights—support the application of a heightened standard of proof, relative to the preponderance standard. Yet the use of a clear and convincing standard of proof before the trial court may not by itself completely protect these interests, because the trier of fact will sometimes, despite best efforts, be wrong in factual conclusions.

#### CA(14) (14)

##### **Appellate Review § 148—Sufficiency of Evidence—Findings Requiring Clear and Convincing Proof.**

An appellate court that gives appropriate deference to the trier of fact will not be in a position to detect or correct some errors. But when a review of the record establishes that no reasonable fact finder could have found a matter proved to a degree of high probability, appellate intervention reaffirms that the interests involved are of special importance, that their deprivation requires a greater burden to be surmounted, and that the judicial system operates in a coordinated fashion to ensure

as much.

### CA(15) (15)

#### **Appellate Review § 148—Sufficiency of Evidence—Findings Requiring Clear and Convincing Proof.**

As in criminal appeals involving a challenge to the sufficiency of the evidence, an appellate court reviewing a finding made pursuant to the clear and convincing standard does not reweigh the evidence itself. In assessing how the evidence reasonably could have been evaluated by the trier of fact, an appellate court reviewing such a finding is to view the record in the light most favorable to the judgment below; it must indulge reasonable inferences that the trier of fact might have drawn from the evidence; it must accept the fact finder's resolution of conflicting evidence; and it may not insert its own views regarding the credibility of witnesses in place of the assessments conveyed by the judgment. The question before a court reviewing a finding that a fact has been proved by clear and convincing evidence is not whether the appellate court itself regards the evidence as clear and convincing; it is whether a reasonable trier of fact could have regarded the evidence as satisfying this standard of proof.

### CA(16) (16)

#### **Appellate Review § 148—Sufficiency of Evidence—Findings Requiring Clear and Convincing Proof.**

To say that clear and convincing evidence is not a standard for appellate review is correct in the sense that an appellate court normally does not itself review the record for clear and convincing proof.

### CA(17) (17)

#### **Appellate Review § 148—Sufficiency of Evidence—Findings Requiring Clear and**

#### **Convincing Proof.**

Giving full effect to the respondent's evidence, however slight, does not necessarily mean that this evidence will amount to substantial evidence of ponderable legal significance which reasonably could have been regarded as sufficient to establish a fact with the certainty required by the clear and convincing standard.

### **[\*994] CA(18) (18)**

#### **Appellate Review § 148—Sufficiency of Evidence—Findings Requiring Clear and Convincing Proof.**

An appellate court must account for the clear and convincing standard of proof when addressing a claim that the evidence does not support a finding made under this standard. When reviewing a finding that a fact has been proved by clear and convincing evidence, the question before the appellate court is whether the record as a whole contains substantial evidence from which a reasonable fact finder could have found it highly probable that the fact was true. In conducting its review, the court must view the record in the light most favorable to the prevailing party below and give appropriate deference to how the trier of fact may have evaluated the credibility of witnesses, resolved conflicts in the evidence, and drawn reasonable inferences from the evidence. Because the Court of Appeal, in reviewing a probate court's conservatorship ruling, believed that the clear and convincing standard of proof disappeared on appeal, a remand to that court was necessary for it to reevaluate the sufficiency of the evidence in light of the above clarification.

[*Cal. Forms of Pleading and Practice (2020) ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.13*; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 371.]

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Horvitz & Levy, Curt Cutting, Jeremy B. Rosen; U.S. Chamber Litigation Center and Janet Galeria for Chamber of Commerce of the United States as Amicus Curiae. [\*995]

Thomas F. Coleman; Fitzgerald Yap Kredito and Brook J. Changala for Spectrum Institute, TASH and Siblings Leadership Network as Amici Curiae.

**Judges:** Opinion by [\*\*\*332] Cantil-Sakauye, C. [\*\*\*\*2] J., with Chin, Corrigan, Liu, Cuéllar, Kruger, and Groban, JJ., concurring.

**Opinion by:** Cantil-Sakauye, C. J.

## Opinion

[\*\*\*332] [\*\*43] CANTIL-SAKAUYE, C. J.—Measured by the certainty each demands, the standard of proof known as clear and convincing evidence—which requires proof making the existence of a fact highly probable—[\*\*44] falls between the “more likely than not” standard commonly referred to as a preponderance of the evidence and the more rigorous standard of proof beyond a reasonable doubt. We granted review in this case to clarify how an appellate court is to review the sufficiency of the evidence associated

with a finding made by the trier of fact pursuant to the clear and convincing standard.

The issue arises here after the probate court appointed limited coconservators for O.B., a young woman with autism. In challenging this order, O.B. argues that the proof before the probate court did not clearly and convincingly establish that a limited conservatorship was warranted. (See [Prob. Code, § 1801, subd. \(e\)](#) [“The standard of proof for the appointment of a conservator pursuant to this section shall be clear and convincing evidence”].)

There is a split of opinion over how an appellate court should address a claim of insufficient evidence such as [\*\*\*\*3] the one advanced here. One approach accounts for the fact that the clear and convincing standard of proof requires greater certainty than the preponderance standard does. Courts adopting this view inquire whether the record developed before the trial court contains substantial evidence allowing a reasonable fact finder to make the challenged finding with the confidence required by the clear and convincing standard. (E.g., [T.J. v. Superior Court \(2018\) 21 Cal.App.5th 1229, 1239–1240 \[230 Cal. Rptr. 3d 928\]](#) (T.J.).) Another position maintains that the clear and convincing standard of proof has no bearing on appellate review for sufficiency of the evidence. (E.g., [In re Marriage of Murray \(2002\) 101 Cal.App.4th 581, 604 \[124 Cal. Rptr. 2d 342\]](#).) From this perspective, a court reviewing a finding requiring clear and convincing proof surveys the record for substantial evidence, without also considering whether this evidence reasonably could have yielded a finding made with the specific degree of certainty required by the clear and convincing standard.

We conclude that appellate review of the sufficiency of the evidence in support of a finding requiring clear and convincing proof must account for the level of confidence this standard demands. In a matter such as the one before us, when reviewing a finding that a fact has been proved by clear and convincing [\*\*\*\*4] evidence, the

question before the appellate court is whether the [\*996] record as a whole contains substantial evidence from which a reasonable fact finder could have found it highly probable that the fact was true. Consistent with well-established principles governing review for sufficiency of the evidence, in making this assessment the appellate court must view the record in the light most favorable to the prevailing party below and give due deference to how the trier of fact may have evaluated the credibility of witnesses, resolved conflicts in the evidence, and drawn reasonable inferences from the evidence.

[\*\*\*333] Because the Court of Appeal below took the position that the clear and convincing standard of proof ““disappears”” on appeal (*Conservatorship of O.B.* (2019) 32 Cal.App.5th 626, 633 [244 Cal. Rptr. 3d 192]) when it rejected O.B.'s challenge to the sufficiency of the evidence, we reverse.

## I. BACKGROUND

In August 2017, respondents T.B. and C.B. filed a petition in Santa Barbara County Superior Court requesting that they be appointed as limited coconservators for O.B., a young woman with autism spectrum disorder. T.B. and C.B. are O.B.'s mother and older sister, respectively. At the time T.B. and C.B. filed their petition, O.B. was 18 years old and resided with her [\*\*\*\*5] great-grandmother, L.K., in Santa Barbara County.

The public defender was appointed as counsel for O.B. (See *Prob. Code*, § 1471.) A contested evidentiary hearing was held in the probate court to determine whether a limited conservatorship should be imposed. This hearing was conducted across several court sessions occurring between September 2017 and May 2018, with the probate court judge sitting as the trier of fact. Several witnesses testified at the hearing. Among them, T.B., C.B., L.K., and a cousin of O.B. testified to their interactions with and observations of O.B. Dr. Kathy Khoie, a psychologist, testified that in her

opinion, O.B. was not a proper candidate for a limited conservatorship. [\*\*45] Christopher Donati, an investigator with the Santa Barbara County Public Guardian's Office, similarly testified that he did not feel a limited conservatorship was necessary.

Before ruling on a limited conservatorship, the judge stated that he had “been involved in numerous hearings, and [O.B.] has been at all of them or most of them. So in addition to some of the different witnesses I am entitled to base my decision based in part on my own observation of [O.B.] at the proceedings.” The judge found that a limited [\*\*\*\*6] conservatorship was “appropriate” and appointed T.B. and C.B. as limited coconservators. The parties were asked if any requested a statement of decision. No one did, and the judge did not otherwise explain in detail how he had arrived at his findings. He said, “I can go through and comment on everybody's testimony. I don't see any reason to do that. The reviewing court can look at the record.”

[\*997]

O.B. appealed, raising several claims of error. The Court of Appeal affirmed. As relevant here, the appellate court rejected O.B.'s argument that the evidence before the probate court was insufficient to justify the appointment of limited coconservators. In making this argument, O.B. explained that the clear and convincing standard of proof applies to the decision to appoint a limited conservator and argued that the Court of Appeal ““must apply the same standard in determining whether “substantial evidence” supports the judgment.”” (*Conservatorship of O.B.*, *supra*, 32 Cal.App.5th at p. 633.) In finding the evidence sufficient, the Court of Appeal observed that, contrary to O.B.'s position, “The “clear and convincing” standard ... is for the edification and guidance of the trial court and not a standard for appellate review. [Citations.] “The sufficiency [\*\*\*\*7] of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question

for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.’ [Citations.]” [Citation.] Thus, on appeal from a judgment required to be based upon clear and convincing evidence, “the clear and convincing test disappears ... [\*\*\*334] [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent’s evidence, however slight, and disregarding the appellant’s evidence, however strong.”” (*Id.*, at pp. 633–634.)<sup>1</sup>

We granted review.

## II. DISCUSSION

Our analysis of the issue before us begins with an explanation of the clear and convincing standard of proof and a survey of its various applications. We next assess how appellate courts have perceived their role in reviewing claims that the evidence before the trial court did or did not satisfy the clear and convincing standard. Ultimately, we conclude that logic, sound policy, and precedent all point toward the same conclusion: When reviewing a finding made pursuant to the clear and convincing standard of [\*\*\*\*8] proof, an appellate court must attune its review for substantial evidence to the heightened degree of certainty required by this standard.

### A. Clear and Convincing Evidence as a Standard of Proof

**HN1 CA(1) (1)** A “[b]urden of proof” means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.” (*Evid. Code, § 115.*) “The burden of proof may require a [\*998] party to ... establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a

reasonable doubt.” (*Ibid.*) The standard of proof that applies to a particular determination serves “to instruct the fact finder concerning the degree of confidence our society deems necessary in the correctness of factual conclusions for a particular type of adjudication, to allocate the risk of error between the litigants, and to indicate the relative importance attached to the ultimate decision.” (*Conservatorship of Wendland (2001) 26 Cal.4th 519, 546 [\*\*46] [110 Cal. Rptr. 2d 412, 28 P.3d 151]* (*Wendland*); see also *In re Winship (1970) 397 U.S. 358, 369–373 [25 L. Ed. 2d 368, 90 S. Ct. 1068]* (conc. opn. of Harlan, J.).)

**HN2 CA(2) (2)** “The default standard of proof in civil cases is the preponderance of the evidence.” (*Wendland, supra, 26 Cal.4th at p. 546*, citing *Evid. Code, § 115.*) This standard “‘simply requires the trier of fact “to believe that the existence of a fact [\*\*\*\*9] is more probable than its nonexistence.”” (*In re Angelia P. (1981) 28 Cal.3d 908, 918 [171 Cal. Rptr. 637, 623 P.2d 198]*.) The more demanding standard of proof beyond a reasonable doubt, meanwhile, applies to findings of guilt in criminal matters. (*In re Winship, supra, 397 U.S. at p. 364.*) Reasonable doubt “‘is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.”” (*Pen. Code, § 1096.*)

**CA(3) (3)** The standard of proof known as clear and convincing evidence demands a degree of certainty greater than that involved with the preponderance standard, but less than what is required by the standard of proof beyond a reasonable doubt. This intermediate standard “requires a finding of high probability.” (*In re Angelia P., supra, 28 Cal.3d at p. 919; [\*\*\*335]* see also *CACI No. 201* [“Certain facts must be proved by clear and convincing evidence ... . This means the party must persuade you that it is highly probable that the fact is

<sup>1</sup>The Court of Appeal also rejected other claims of error raised by O.B. (*Conservatorship of O.B., supra, 32 Cal.App.5th at pp. 632–633, 635–636*), none of which are presently before us.

true”].<sup>2</sup> One commentator has explicated, [HN3](#) “The precise meaning of ‘clear and convincing proof’ does not lend itself readily to definition. It is, in reality, a question of how strongly [\*\*\*\*10] the minds of the trier or triers of fact must be convinced that the facts are as contended by the proponent. ... Where clear and convincing proof is required, the proponent must convince the jury or judge, as the case may be, that it is *highly probable* that the facts which he asserts are true. He [\*999] must do more than show that the facts are probably true.” (Comment, *Evidence: Clear and Convincing Proof: Appellate Review* (1944) 32 Cal. L.Rev. 74, 75.)

[CA\(5\)](#) (5) Today, [HN5](#) the clear and convincing standard applies to various determinations “‘where particularly important individual interests or rights are at stake,’ such as the termination of parental rights, involuntary commitment, and deportation.” (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487 [286 Cal. Rptr. 40, 816 P.2d 892], quoting *Herman & MacLean v. Huddleston* (1983) 459 U.S. 375, 389 [74 L. Ed. 2d 548, 103 S. Ct. 683]; see also *Santosky v. Kramer* (1982) 455 U.S. 745, 769 [71 L. Ed. 2d 599, 102 S. Ct. 1388]; *Addington v. Texas* (1979) 441 U.S. 418, 423–424 [60 L. Ed. 2d 323, 99 S. Ct. 1804]; *Woodby v. Immigration Service* (1966) 385 U.S. 276, 285–286 [17 L. Ed. 2d 362, 87 S. Ct. 483].) Other findings requiring clear and convincing proof include whether a civil defendant is guilty of the “oppression, fraud, or malice” that allows for the imposition of punitive damages (*Civ. Code, § 3294, subd. (a)*), whether a conservator can withdraw life-sustaining care from a conservatee (*Wendland, supra*, 26 Cal.4th at p. 524), whether conditions necessary for the nonconsensual, nonemergency administration of psychiatric medication to a prison inmate have been satisfied (*Pen. Code, § 2602, subd. (c)(8)*), and whether a

publisher acted with the intent (“actual malice”) that must be shown for [\*\*\*\*11] a plaintiff to prevail in certain kinds of defamation cases (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 342 [41 L. Ed. 2d 789, 94 S. Ct. 2997]).

Going further back in time, “[t]he requirement in civil actions of more than a preponderance of the evidence was first applied in equity to claims which experience had shown to be inherently subject to fabrication, lapse of memory, or the flexibility of conscience.” (Note, *Appellate Review in the Federal Courts of Findings Requiring More than a Preponderance of the Evidence* (1946) 60 Harv. L.Rev. 111, 112.) [\*\*47] This court’s early case law addressing the clear and convincing standard of proof commonly involved claims of this character, such as assertions that a written instrument should be reformed on the basis of fraud, mistake, or parol evidence. In one early case of this kind, *Lestrade v. Barth* (1862) 19 Cal. 660, we observed that when the correction of a mistake in a written instrument was sought in equity, the evidence showing such a mistake “must be clear and convincing, making out the mistake to the entire satisfaction of the Court, and not loose, equivocal or contradictory, leaving the mistake open to doubt.” (*Id.*, at p. 675.) We later stated in *Sheehan v. Sullivan* (1899) 126 Cal. 189 [58 P. 543] (Sheehan) [\*\*\*336] that “[t]he authorities are uniform to the point that to justify a court in determining from oral testimony that a deed which purports to [\*\*\*\*12] convey land absolutely in fee simple was intended to be something different, as a mortgage or trust, such testimony must be clear, convincing, and conclusive—something more than that modicum of evidence which appellate courts sometimes hold [\*1000] sufficient to warrant a finding where the matter is not so serious as the overthrow of a clearly expressed deed, solemnly executed and delivered.” (*Id.*, at p. 193.)

*B. Consideration of the Clear and Convincing Standard in Appellate Review for Sufficiency of the Evidence*

<sup>2</sup> [HN4 CA\(4\)](#) (4) The clear and convincing standard also has been described “as requiring that the evidence be “‘so clear as to leave no substantial doubt’; ‘sufficiently strong to command the unhesitating assent of every reasonable mind.’”” (*In re Angelia P.*, *supra*, 28 Cal.3d at p. 919.)

**CA(6) (6)** The court in [Sheehan, supra, 126 Cal. 189](#), also addressed how other appellate courts had evaluated claims that parol evidence introduced before the trial court had not adequately established that a written deed instrument, absolute on its face, was in fact a mortgage or trust. Our opinion in *Sheehan* observed that through such matters (e.g., [Mahoney v. Bostwick \(1892\) 96 Cal. 53 \[30 P. 1020\]](#)) the authorities “clearly declare that the rule, as above stated [requiring clear and convincing evidence that the intent was contrary to the deed's terms], should govern trial courts, and that, where an absolute deed has been found to be something else, the sufficiency of the evidence to support the finding should be considered by the appellate court *in the light of that rule*.” (*Sheehan*, at p. 193, italics [\*\*\*\*13] added.) In other words, **HN6** even though the standard of clear and convincing evidence directly governed only the determination made by the trier of fact, appellate courts assessing the sufficiency of the evidence still had to take this standard of proof into account by appropriately reframing their inquiry.

It was understood even at the time *Sheehan* was decided that this adjustment in appellate perspective when the clear and convincing standard applied below did not provide reviewing courts with a liberal license to substitute their views for the conclusions drawn by the trier of fact on matters such as witness credibility and the resolution of conflicts in the evidence. In [Jarnatt v. Cooper \(1881\) 59 Cal. 703](#), for example, this court had explained, “It is doubtless a well-settled rule that the party alleging fraud or mistake is bound to prove his allegation by clear and convincing evidence. That is, that the evidence which tends to prove the alleged fraud or mistake, if standing alone, uncontradicted, would establish a clear *prima facie* case of fraud or mistake. If it does not, this Court may reverse the judgment on the ground of insufficiency of the evidence to justify the decision. But where the evidence which tends to [\*\*\*\*14] prove fraud or mistake, if standing alone, uncontradicted, is sufficiently clear and convincing, we can not reverse the judgment on the

ground that such evidence is contradicted by other evidence, because the right to pass upon the credibility of witnesses is not vested in this Court.” (*Id.*, at p. 706.)

**CA(7) (7)** Since *Sheehan*, we have reiterated—albeit sometimes subtly—that **HN7** when the clear and convincing standard of proof applied in the trial court, an appellate court should review the record for sufficient evidence in a manner [**\*1001**] mindful of the elevated degree of certainty required by this standard. This guidance often has been coupled with language recognizing the limits of such review. More than a century ago, in [Wadleigh v. Phelps \(1906\) 149 Cal. 627 \[87 P. 93\]](#), we upheld a finding that a deed, absolute on its face, was in fact a mortgage. (*Id.*, at p. 639.) In doing so, we expounded, “It is, of course, the universal rule that the presumption [**\*\*48**] of law, independent of proof, is that such a deed is [**\*\*\*337**] what it purports to be—viz. an absolute conveyance—and that this presumption must prevail unless the evidence to the contrary is entirely plain and convincing. This, however, does not mean that the evidence in the record on appeal must be entirely plain and convincing to [\*\*\*\*15] an appellate court. This question of fact, like other questions of fact, is one for the trial court, and while, as said in [Sheehan](#)[, supra,] 126 Cal. 189, 193 ... , the appellate court will consider the question as to the sufficiency of the evidence in the light of that rule, it will not disturb the finding of the trial court to the effect that the deed is a mortgage, where there is substantial evidence *warranting a clear and satisfactory conviction to that effect*. All questions as to preponderance and conflict of evidence are for the trial court.” (*Id.*, at p. 637, italics added; see also [Title Ins. and Trust Co. v. Ingersoll \(1910\) 158 Cal. 474, 484 \[111 P. 360\]](#); [Couts v. Winston \(1908\) 153 Cal. 686, 688–689 \[96 P. 357\]](#).)

**CA(8) (8)** Several of our more recent decisions involving the clear and convincing standard of proof also have recognized that this standard affects a reviewing court's assessment of the sufficiency of the evidence. In [In re Angelia P., supra, 28 Cal.3d](#)

908, we stated that when reviewing the sufficiency of the evidence supporting an order terminating parental rights, issued upon a finding of clear and convincing evidence (see [Civ. Code, former § 232, subd. \(a\)](#)), “the [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable [\*\*\*\*16] trier of fact could find [that termination of parental rights is appropriate based on clear and convincing evidence].” (*In re Angelia P.*, at p. 924; see also *In re Jasmon O.* (1994) 8 Cal.4th 398, 423 [33 Cal. Rptr. 2d 85, 878 P.2d 1297] [taking a similar view of the appellate court's responsibility in reviewing a finding under [Civ. Code, former § 232](#)].) In *Wendland*, *supra*, 26 Cal.4th 519, where we reviewed a finding by the trial court that the clear and convincing standard had not been satisfied, we described our task as follows: [HN8](#) “The ‘clear and convincing evidence’ test requires a finding of high probability ... . Applying that standard here, we ask whether the evidence ... has that degree of clarity ... .” (*Id.*, at p. 552.) And most recently, in *In re White* (2020) 9 Cal. 5th 455, 465 [262 Cal.Rptr.3d 602, 463 P.3d 802] (*White*), we specified, “To deny bail under [article I, section 12\(b\) \[of the California Constitution\]](#), a trial court must also find, by clear and convincing evidence, ‘a substantial likelihood the person's release would [\*1002] result in great bodily harm to others.’ [Citation.] ... On review, we consider whether any reasonable trier of fact could find, by clear and convincing evidence, a substantial likelihood that the person's release would lead to great bodily harm to others.”

As respondents observe, we have on other occasions provided somewhat different descriptions of the reviewing court's role in [\*\*\*\*17] evaluating a finding requiring clear and convincing evidence. We often have emphasized the appellate court's general responsibility to review the record for substantial evidence, even when the clear and convincing standard of proof applied before the trial court. (E.g., *In re Marriage of Saslow* (1985)

[40 Cal.3d 848, 863 \[221 Cal. Rptr. 546, 710 P.2d 346\]](#); *Crail v. Blakely* (1973) 8 Cal.3d 744, 750 [106 Cal. Rptr. 187, 505 P.2d 1027] (*Crail*); *Nat. Auto & Cas. Co. v. Ind. Acc. Com.* (1949) 34 Cal.2d 20, 25 [206 P.2d 841]; *Viner v. Utrecht* (1945) 26 Cal.2d 261, 267 [158 P.2d 3]; [\*\*\*338] *Stromerson v. Averill* (1943) 22 Cal.2d 808, 815 [141 P.2d 732] (*Stromerson*); *Simonton v. Los Angeles T. & S. Bank* (1928) 205 Cal. 252, 259 [270 P. 672]; *Treadwell v. Nickel* (1924) 194 Cal. 243, 260–261 [228 P. 25]; *Steinberger v. Young* (1917) 175 Cal. 81, 84–85 [165 P. 432] (*Steinberger*).) In *Crail*, we explained that the clear and convincing “standard was adopted ... for the edification and guidance of the trial court, and was not intended as a standard for appellate review. ‘The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, [\*\*49] the determination is not open to review on appeal.’” (*Crail*, at p. 750.) Respondents extract from these decisions the principle that appellate review of a finding made under the clear and convincing standard is limited to whether the finding is supported by evidence that is “credible, reasonable, and solid”—words commonly used in describing “substantial evidence.” (See *Estate of Teed* (1952) 112 Cal.App.2d 638, 644 [247 P.2d 54].)<sup>3</sup>

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<sup>3</sup> Dissenting in *Stromerson*, *supra*, 22 Cal.2d 808, Justice Traynor wrote, “While it rests primarily with the trial court to determine whether the evidence is clear and convincing, its finding is not necessarily conclusive, for in cases governed by the rule requiring such evidence ‘the sufficiency of the evidence to support the finding should be considered by the appellate court in the light of that rule.’” (*Sheehan*, *supra*, 126 Cal. 189, 193 [58 P. 543]; [citation].) In such cases it is the duty of the appellate court in reviewing the evidence to determine, not simply whether the trier of facts could reasonably conclude that it is more probable that the fact to be proved exists than that it does not, as in the ordinary civil case where only a preponderance of the evidence is required ... but to determine whether the trier of facts could reasonably conclude that it is highly probable that the fact exists. When it [is held] that the trial court's finding must be governed by the same test with relation to substantial evidence as ordinarily applies in other civil cases, the rule that the evidence must be clear and convincing becomes

## [\*1003]

The decisions of the Courts of Appeal also do not speak with one clear [\*\*\*\*18] voice regarding how appellate review for sufficiency of the evidence should unfold when the standard of proof before the trial court was clear and convincing evidence. ([T.J., supra, 21 Cal.App.5th at pp. 1238–1239](#) [discussing the views expressed on this subject].) One view downplays the significance of the clear and convincing standard of proof in this context. Within this group, a few courts have flatly stated that a requirement of clear and convincing proof before the trial court does not necessitate any modifications to the conventional approach to appellate review for substantial evidence in a civil matter. ([Ian J. v. Peter M. \(2013\) 213 Cal.App.4th 189, 208 \[152 Cal. Rptr. 3d 323\]](#); [In re Marriage of Ruelas \(2007\) 154 Cal.App.4th 339, 345 \[64 Cal. Rptr. 3d 600\]](#); [In re Marriage of Murray \(2002\) 101 Cal.App.4th 581, 604 \[124 Cal. Rptr. 2d 342\]](#); [Patrick v. Maryland Casualty Co. \(1990\) 217 Cal.App.3d 1566, 1576 \[267 Cal. Rptr. 24\]](#).) Thus it has been said, “[t]he substantial evidence rule that applies on appeal, applies without regard to the standard of proof applicable at trial” ([In re Marriage of Ruelas, at p. 345](#)), meaning that a court reviewing a finding requiring clear and convincing proof is “not required to find more substantial evidence to support the trial court's finding ‘than [it] would if the burden of proof had [\*\*\*339] been only a preponderance of the evidence’” ([Ian J. v. Peter M., at p. 208](#)).

Many courts have drawn a similar lesson from the Witkin treatise on California Procedure, which provides in relevant part, “In a few situations, the law requires that a party produce more than an ordinary [\*\*\*\*19] preponderance; he or she must establish a fact by ‘clear and convincing evidence.’ [Citations.] But the requirement applies only in the

trial court. The judge may reject a showing as not measuring up to the standard, but, if the judge decides in favor of the party with this heavy burden, *the clear and convincing test disappears*. On appeal, the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong.” (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 371, p. 428, italics added.) The assertion that “the clear and convincing test disappears” (*ibid.*) on appeal fairly imparts that this standard of proof has no bearing whatsoever on appellate review for sufficiency of the evidence.<sup>4</sup>

## [\*1004]

[\*\*50] Another viewpoint regards an appellate court as obligated to review the record for substantial evidence in a manner mindful of the fact that the clear and convincing standard of proof applied before the trial court.<sup>5</sup> This approach

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<sup>4</sup>The following Court of Appeal decisions have echoed the Witkin treatise's “disappears” phrasing: [Morgan v. Davidson \(2018\) 29 Cal.App.5th 540, 549 \[240 Cal. Rptr. 3d 235\]](#); [In re Alexander C. \(2017\) 18 Cal.App.5th 438, 451 \[226 Cal. Rptr. 3d 515\]](#); [Parisi v. Mazzaferro \(2016\) 5 Cal.App.5th 1219, 1227, footnote 11 \[210 Cal. Rptr. 3d 574\]](#); [In re Z.G. \(2016\) 5 Cal.App.5th 705, 720 \[210 Cal. Rptr. 3d 187\]](#); [In re F.S. \(2016\) 243 Cal.App.4th 799, 812 \[196 Cal. Rptr. 3d 830\]](#); [In re J.S. \(2014\) 228 Cal.App.4th 1483, 1493 \[176 Cal. Rptr. 3d 746\]](#); [In re Marriage of E. & Stephen P. \(2013\) 213 Cal.App.4th 983, 989–990 \[153 Cal. Rptr. 3d 154\]](#); [Ian J. v. Peter M., supra, 213 Cal.App.4th at page 208](#); [In re A.S. \(2011\) 202 Cal.App.4th 237, 247 \[134 Cal. Rptr. 3d 664\]](#); [In re K.A. \(2011\) 201 Cal.App.4th 905, 909 \[136 Cal. Rptr. 3d 461\]](#); [In re Levi H. \(2011\) 197 Cal.App.4th 1279, 1291 \[128 Cal. Rptr. 3d 814\]](#); [In re E.B. \(2010\) 184 Cal.App.4th 568, 578 \[109 Cal. Rptr. 3d 1\]](#); [In re I.W. \(2009\) 180 Cal.App.4th 1517, 1526 \[103 Cal. Rptr. 3d 538\]](#); [In re Angelique C. \(2003\) 113 Cal.App.4th 509, 519 \[6 Cal. Rptr. 3d 395\]](#); [In re J. I. \(2003\) 108 Cal.App.4th 903, 911 \[134 Cal. Rptr. 2d 342\]](#); [In re Mark L. \(2001\) 94 Cal.App.4th 573, 580–581 \[114 Cal. Rptr. 2d 499\]](#); [Sheila S. v. Superior Court \(2000\) 84 Cal.App.4th 872, 881 \[101 Cal. Rptr. 2d 187\]](#); [Ensworth v. Mullvain \(1990\) 224 Cal.App.3d 1105, 1111, footnote 2 \[274 Cal. Rptr. 447\]](#).

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meaningless.” ([Id., at pp. 817–818](#) (dis. opn. of Traynor, J.)); see also Traynor, The Riddle of Harmless Error (1970) p. 29 [“When it is the responsibility of the trier of fact to observe the requirement of clear and convincing evidence ... it becomes the responsibility of the appellate court to test the finding accordingly”].)

<sup>5</sup>E.g., [Johnson & Johnson Talcum Powder Cases \(2019\) 37 Cal.App.5th 292, 333 \[249 Cal. Rptr. 3d 642\]](#); [T.J., supra, 21 Cal.App.5th at pages 1239–1240](#); [Pulte Home Corp. v. American Safety Indemnity Co. \(2017\) 14 Cal.App.5th 1086, 1125 \[223 Cal. Rptr. 3d 47\]](#); [Pfeifer v. John Crane, Inc. \(2013\) 220 Cal.App.4th 1270, 1299 \[164 Cal. Rptr. 3d 112\]](#); [In re Hailey T. \(2012\) 212](#)

recently was adopted by the court in connection with a dependency proceeding (see [Welf. & Inst. Code, § 366.21, subd. \(g\)\(1\)\(C\)\(ii\)](#)) in [T.J., supra, 21 Cal.App.5th 1229](#). [\*\*\*340] The court in *T.J.* observed that “[i]f the clear and convincing evidence standard ‘disappears’ [\*\*\*\*20] on appellate review, that means the distinction between the preponderance standard and the clear and convincing standard ... is utterly lost on appeal ... .” (*T.J.*, at p. 1239.) Such an outcome was regarded as compromising “the integrity of the review process,” because if the clear and convincing standard has no bearing whatsoever on appellate review, “the ability of the appellate court to correct error is unacceptably weakened.” (*Ibid.*) Moved by these considerations, the court in *T.J.* concluded that it must “‘review the record in the light most favorable to the trial court's order to determine whether there is substantial evidence from which a reasonable trier of fact could make the necessary findings based on the clear and convincing evidence standard.’” (*Ibid.*, quoting [In re Isayah C., supra, 118 Cal.App.4th at p. 694](#).)

All in all, it would be a fair summarization to say that although the trend within our more recent decisions has been to recognize that the application of the clear and convincing standard of proof before the trial court affects appellate review for sufficiency of the evidence, our case law also contains [\*1005] contrary suggestions that have

contributed to what is now a significant split of authority among the Courts of Appeal.

C. [\*\*\*\*21] *The Clear and Convincing Standard of Proof Informs Appellate Review for Substantial Evidence*

[CA\(9\)](#) (9) We now dispel this uncertainty over the proper manner of appellate review by clarifying that [HN9](#) an appellate court evaluating the sufficiency of the evidence in support of a finding must make an appropriate adjustment to its analysis when the clear and convincing standard of proof applied before the trial court. In general, when presented with a challenge to the sufficiency of the evidence associated with a finding requiring clear and convincing evidence, the court must determine whether the record, viewed as a whole, contains substantial evidence from which a reasonable trier of fact could have made the finding of high probability demanded by this [\*\*51] standard of proof.<sup>6</sup>

[CA\(11\)](#) (11) This rule finds support in logic, in the policy interests that are often implicated when clear and convincing evidence supplies the standard of proof, and in precedent. First, [HN11](#) “[a]s a matter of logic, a finding that must be based on clear and convincing evidence cannot be viewed on appeal the same as one that may be sustained on a mere preponderance.” ([In re C.H. \(Tex. 2002\) 89 S.W.3d 17, 25](#).) As we have long acknowledged (see, e.g., [Sheehan, supra, 126 Cal. at p. 193](#)), the clear and convincing standard [\*\*\*\*22] of proof normally applies directly only before the trial court; appellate courts normally do not decide whether they themselves believe the evidence was so probative. And the fundamental question before an appellate court reviewing for sufficiency of the evidence is

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[Cal.App.4th 139, 146 \[151 Cal. Rptr. 3d 1\]; In re Alexis S. \(2012\) 205 Cal.App.4th 48, 54 \[139 Cal. Rptr. 3d 774\]; In re Andy G. \(2010\) 183 Cal.App.4th 1405, 1415 \[107 Cal. Rptr. 3d 923\]; In re William B. \(2008\) 163 Cal.App.4th 1220, 1229 \[78 Cal. Rptr. 3d 91\]; In re Baby Girl M. \(2006\) 135 Cal.App.4th 1528, 1536 \[38 Cal. Rptr. 3d 484\]; In re Henry V. \(2004\) 119 Cal.App.4th 522, 530 \[14 Cal. Rptr. 3d 496\]; In re Isayah C. \(2004\) 118 Cal.App.4th 684, 694 \[13 Cal. Rptr. 3d 198\]; In re Alvin R. \(2003\) 108 Cal.App.4th 962, 971 \[134 Cal. Rptr. 2d 210\]; In re Luke M. \(2003\) 107 Cal.App.4th 1412, 1426 \[132 Cal. Rptr. 2d 907\]; \*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.\* \(2000\) 78 Cal.App.4th 847, 891 \[93 Cal. Rptr. 2d 364\]; \*In re Kristin H.\* \(1996\) 46 Cal.App.4th 1635, 1654 \[54 Cal. Rptr. 2d 722\]; \*In re Basilio T.\* \(1992\) 4 Cal.App.4th 155, 170–171 \[5 Cal. Rptr. 2d 450\]; \*Osai v. United Services Auto. Assn.\* \(1991\) 2 Cal.App.4th 1197, 1200 \[10 Cal. Rptr. 2d 352\]; \*In re Victoria M.\* \(1989\) 207 Cal.App.3d 1317, 1326 \[255 Cal. Rptr. 498\]; \*In re Amos L.\* \(1981\) 124 Cal.App.3d 1031, 1038 \[177 Cal. Rptr. 783\].](#)

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<sup>6</sup> [CA\(10\)](#) (10) In announcing only a general rule, we recognize that [HN10](#) different forms of appellate review may apply in certain circumstances when a determination has been made by the trier of fact under the clear and convincing standard of proof. (See, e.g., [McCoy v. Hearst Corp. \(1986\) 42 Cal.3d 835, 845–846 \[231 Cal. Rptr. 518, 727 P.2d 711\]](#) [discussing appellate review of findings of actual malice in defamation suits].)

the same, regardless of the standard of proof that applied below: whether any reasonable trier of fact could have made the finding that is now challenged on appeal. But the issue before a reviewing court in a given case is whether the trier of fact could [\*\*\*341] have made the finding it *did* arrive upon, rather than a hypothetical finding involving a different standard of proof. Therefore, when reviewing a finding that demands clear and convincing evidence, an appellate court must determine whether the evidence reasonably could have led to a finding made with the specific degree of confidence required by this standard.

HN12 CA(12) (12) Taking the clear and convincing standard into account in this context is also logically consistent with the principle that an appellate court addressing a claim of insufficient proof reviews the record for substantial evidence [\*1006] supporting the challenged finding. Substantial evidence is evidence that is “of ponderable [\*\*\*\*23] legal significance,” “reasonable in nature, credible, and of solid value,” and “‘substantial’ proof of the essentials which the law requires in a particular case.” (*Estate of Teed, supra, 112 Cal.App.2d at p. 644.*) Respondents draw from this definition of substantial evidence in advocating for their approach to appellate review. They assert that “[s]olid, credible evidence is ... by definition, clear and convincing because we have rationally invested with determinative significance the trial court’s rejection—on credibility, persuasiveness, or other grounds—of the evidence to the contrary,” and “[t]he evidence necessary to support the decision below must be credible, reasonable, and solid; otherwise the judgment will be reversed.” But these assertions ignore part of what makes substantial evidence *substantial*. Even if evidence is capable of being regarded as “credible,” “reasonable,” and “solid,” to amount to substantial evidence it also must be “of ponderable legal significance.” (*Estate of Teed, at p. 644.*) And whether evidence is “of ponderable legal significance” (*ibid.*) cannot be properly evaluated in situations such as the one at bar without accounting for the heightened standard of proof that

applied before the trial court.

CA(13) (13) Second, HN13 keeping [\*\*\*\*24] the clear and convincing standard in mind when reviewing for sufficiency of the evidence helps ensure that an appropriate degree of appellate scrutiny attaches to findings to which this standard applies. As previously noted, the clear and convincing standard is used for various determinations where “‘particularly important individual interests or rights are at stake.’” (*Weiner v. Fleischman, supra, 54 Cal.3d at p. 487.*) The selection of the clear and convincing standard in these situations reflects “a very fundamental assessment of the comparative social costs of erroneous factual determinations.” (*In re Winship, supra, 397 U.S. at p. 370* (conc. opn. of Harlan, J.)) That is to say, the significant consequences of an erroneous true finding when these interests or rights are involved—such as an improper deportation, an unnecessary involuntary commitment, or an unjustified termination of parental rights—support the application of a heightened standard of proof, relative to the [\*\*52] preponderance standard. Yet the use of a clear and convincing standard of proof before the trial court may not by itself completely protect these interests, because “the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions.” (*Ibid.*) CA(14) (14) Admittedly, HN14 an appellate [\*\*\*\*25] court that gives appropriate deference to the trier of fact will not be in a position to detect or correct some of these errors. But when a review of the record establishes that *no* reasonable fact finder could have found a matter proved to a degree of high probability, appellate intervention reaffirms that the interests involved are of special importance, that their deprivation requires a greater burden to be surmounted, [\*\*\*342] and that the judicial system operates in a coordinated fashion to ensure as much.

[\*1007]

Third, our holding is more consistent with our recent precedent and with the case law of other

state high courts than would be a contrary rule that would have appellate courts ignore the clear and convincing standard when reviewing for substantial evidence. As discussed *ante*, in *In re Angelia P.*, [supra](#), 28 Cal.3d at page 924, *In re Jasmon O.*, [supra](#), 8 Cal.4th at page 423, *Wendland*, [supra](#), 26 Cal.4th at page 552, and *White*, [supra](#), 9 Cal.5th at page 465, we recognized that the applicability of the clear and convincing standard of proof before the trial court was relevant to appellate review of the evidentiary record. (Cf. *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1082 [124 Cal. Rptr. 2d 142, 52 P.3d 79] (conc. opn. of Brown, J.).) Moreover, a survey of the case law of other state courts of last resort reveals numerous recent decisions in which these courts have calibrated their review for sufficient evidence to reflect that the clear [\*\*\*\*26] and convincing standard of proof applied to the finding at issue. (E.g., *In re N.G.* (Ind. 2016) 51 N.E.3d 1167, 1170; *Moore v. Stills* (Ky. 2010) 307 S.W.3d 71, 82–83; *In re B.D.-Y.* (2008) 286 Kan. 686 [187 P.3d 594, 606]; *Ex parte McInish* (Ala. 2008) 47 So.3d 767, 778; *In re B.T.* (2006) 153 N.H. 255 [891 A.2d 1193, 1198]; *In re S.B.C.* (2002) 2002 OK 83 [64 P.3d 1080, 1083]; *In re C.H.*, [supra](#), 89 S.W.3d at p. 25; *Hudak v. Procek* (Del. 2002) 806 A.2d 140, 150; *Rogers v. Moore* (Minn. 1999) 603 N.W.2d 650, 658; *In re N.H.* (1998) 168 Vt. 508 [724 A.2d 467, 470]; *Estate of Robinson v. Gusta* (Miss. 1989) 540 So.2d 30, 33; *In Interest of Bush* (1988) 113 Idaho 873 [749 P.2d 492, 495]; *Taylor v. Commissioner of Mental Health* (Me. 1984) 481 A.2d 139, 153; *Blackburn v. Blackburn* (1982) 249 Ga. 689 [292 S.E.2d 821, 826].)

Our approach also harmonizes with the firmly established rule in criminal cases that the prosecution's burden of proving a defendant's guilt beyond a reasonable doubt affects how an appellate court reviews the record for substantial evidence. In *Jackson v. Virginia* (1979) 443 U.S. 307 [61 L. Ed. 2d 560, 99 S. Ct. 2781] (*Jackson*), the United States Supreme Court considered “what standard is to be applied in a federal habeas corpus proceeding when the claim is made that a person has been convicted

in a state court upon insufficient evidence.” (*Id.*, at p. 309.) The *Jackson* court decided that “the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (*Id.*, at p. 318.) The high court explained that “this inquiry does not require a court to ‘ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.’ [Citation.] Instead, the relevant question is whether, after viewing the evidence in the [\*\*53] light most favorable to [\*\*\*\*27] the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve [\*1008] conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to [\*\*\*343] the prosecution.” (*Id.*, at pp. 318–319.)

The decision in *Jackson* prompted this court “to review and define the California standard for review” of a claim brought by a defendant on direct appeal alleging that a criminal conviction lacked sufficient support in the evidentiary record. (*People v. Johnson* (1980) 26 Cal.3d 557, 562 [162 Cal. Rptr. 431, 606 P.2d 738].) We concluded in *Johnson* that the standard of review already established by our case law was consistent with the rule announced in *Jackson*. (*Johnson*, at p. 577.) “[W]henver the evidentiary support for a conviction faces a challenge on appeal,” we determined, “the court must review the whole record in the light most favorable to the judgment below to determine [\*\*\*\*28] whether it discloses substantial evidence such that a reasonable trier of fact could find the defendant guilty beyond a

reasonable doubt.” (*Id.*, at p. 562.) We observed that when engaging in this review, an appellate court “‘must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’” (*Id.*, at p. 576.)

**CA(15) (15)** Thus it has long been the law that appellate inquiry into the sufficiency of the evidence associated with a criminal conviction both accounts for the beyond a reasonable doubt standard of proof that applied before the trial court and extends an appropriate degree of deference to the perspective of the trier of fact. And with infrequent exceptions, appellate courts have grasped what this kind of review entails. This experience contradicts respondents' argument that a rule that requires the clear and convincing standard of proof to be taken into account when reviewing for substantial evidence will encourage these same courts to overstep their authority by reweighing the evidence themselves. Out of an abundance of caution, however, we use this opportunity to emphasize that **HN15** as in criminal appeals [\*\*\*\*29] involving a challenge to the sufficiency of the evidence, an appellate court reviewing a finding made pursuant to the clear and convincing standard does not reweigh the evidence itself. In assessing how the evidence reasonably could have been evaluated by the trier of fact, an appellate court reviewing such a finding is to view the record in the light most favorable to the judgment below; it must indulge reasonable inferences that the trier of fact might have drawn from the evidence; it must accept the fact finder's resolution of conflicting evidence; and it may not insert its own views regarding the credibility of witnesses in place of the assessments conveyed by the judgment. (See, e.g., *People v. Veamatahau* (2020) 9 Cal.5th 16, 35–36 [259 Cal. Rptr. 3d 205, 459 P.3d 10]; [\*1009] *People v. Gomez* (2018) 6 Cal.5th 243, 278, 307 [240 Cal. Rptr. 3d 315, 430 P.3d 791].) To paraphrase the high court in *Jackson*, *supra*, 443 U.S. at page 318, the question before a court reviewing a finding that a fact has

been proved by clear and convincing evidence is not whether the appellate court itself regards the evidence as clear and convincing; it is whether a reasonable trier of fact could have regarded the evidence as satisfying this standard of proof.

This court's precedent offers less support for respondents' position that appellate review for sufficiency of the evidence should in no way account for the [\*\*\*\*30] clear and convincing standard of proof that applied before the trial court. As observed *ante*, respondents emphasize language appearing in a line of decisions beginning with *Steinberger*, *supra*, 175 Cal. 81 [\*\*\*344] and including our statement in *Crail*, *supra*, 8 Cal.3d 744, that the clear and convincing “standard was adopted ... for the edification and guidance of the trial court, and was not intended as a standard for appellate review. ‘The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.’” (*Crail*, at p. 750; see also *In re Marriage of Saslow*, *supra*, 40 Cal.3d at p. 863; *Nat. Auto & Cas. Co. v. Ind. Acc. Com.*, *supra*, 34 Cal.2d at p. 25; *Viner v. Utrecht*, *supra*, 26 Cal.2d at p. 267; *Stromerson*, [\*\*54] *supra*, 22 Cal.2d at p. 815; *Simonton v. Los Angeles T. & S. Bank*, *supra*, 205 Cal. at p. 259; *Treadwell v. Nickel*, *supra*, 194 Cal. at pp. 260–261; *Steinberger*, 175 Cal. at pp. 84–85.) Respondents assert that representations such as this commit this court to the position that the clear and convincing standard of proof has no bearing on appellate review for substantial evidence.

**CA(16) (16)** We disagree. For starters, it is not perfectly clear that *Steinberger* and its progeny all stand for the proposition that the clear and convincing standard of proof's application before the trial court has no effect upon appellate review for sufficiency of the evidence. As it appeared in *Steinberger*, *supra*, 175 Cal. 81, the assertion [\*\*\*\*31] that “if there be substantial evidence to support the conclusion reached below,

the finding is not open to review on appeal” served to clarify a point made earlier in the opinion, that it was the province of the fact finder to resolve conflicts in the evidence. (*Id.*, at p. 85.) Statements in our later decisions also could be read as stopping well short of the absolutist position respondents assign to them. [HN16](#) To say that clear and convincing evidence is not a standard for appellate review is correct in the sense that an appellate court normally does not *itself* review the record for clear and convincing proof. Likewise, representations that an appellate court reviews the record for substantial evidence, without further explanation of what that evidence must establish, could be understood as more incomplete than incorrect.

[\*1010]

We nevertheless appreciate that the decisions respondents rely upon have been interpreted, and not entirely without reason, as casting the clear and convincing standard of proof as irrelevant to appellate review for sufficiency of the evidence. (See, e.g., [Morgan v. Davidson](#), *supra*, 29 Cal.App.5th at p. 549.) Even so understood, however, these decisions mean only that our court has in the past sent mixed signals regarding the issue [\*\*\*\*32] before us. As we have explained, the clear trend within our recent case law, which finds support in older decisions of this court, has been to recognize that when a heightened standard of proof applied before the trial court, an appropriate adjustment must be made to appellate review for sufficiency of the evidence. We confirm today that this modern trend is correct. We therefore disapprove [In re Marriage of Saslow](#), *supra*, 40 Cal.3d 848; [Crail v. Blakely](#), *supra*, 8 Cal.3d 744; *Nat. Auto. & Cas. Co. v. Ind. Acc. Com.*, *supra*, 34 Cal.2d 20; [Viner v. Utrecht](#), *supra*, 26 Cal.2d 261; [Stromerson v. Averill](#), *supra*, 22 Cal.2d 808; [Simonton v. Los Angeles T. & S. Bank](#), *supra*, 205 Cal. 252; [Treadwell v. Nickel](#), *supra*, 194 Cal. 243; and [Steinberger v. Young](#), *supra*, 175 Cal. 81, [\*\*\*345] to the extent each could be read as regarding the use of the clear and convincing standard of proof before the trial court as having no effect on appellate review for

sufficiency of the evidence. (See [Moss v. Superior Court](#) (1998) 17 Cal.4th 396, 401 [71 Cal. Rptr. 2d 215, 950 P.2d 59]; [People v. Carbajal](#) (1995) 10 Cal.4th 1114, 1126 [43 Cal. Rptr. 2d 681, 899 P.2d 67].)<sup>7</sup>

[\*1011]

[\*\*55] Finally, respondents raise a narrower argument sounding in legislative intent. They assert that even if we were to conclude here that the clear and convincing standard of proof does not simply disappear when an appellate court reviews for substantial evidence, the Legislature *thought* this standard vanished on appeal when it enacted the limited conservatorship statute (Stats. 1990, ch. 79,

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<sup>7</sup>Insofar as they are inconsistent with our holding, we also disapprove [Ian J. v. Peter M.](#), *supra*, 213 Cal.App.4th 189, [In re Marriage of Ruelas](#), *supra*, 154 Cal.App.4th 339, [In re Marriage of Murray](#), *supra*, 101 Cal.App.4th 581, and [Patrick v. Maryland Casualty Co.](#), *supra*, 217 Cal.App.3d 1566, as well as the Court of Appeal decisions that have described the clear and convincing standard as disappearing on appeal: [Morgan v. Davidson](#), *supra*, 29 Cal.App.5th 540; [In re Alexander C.](#), *supra*, 18 Cal.App.5th 438; [Parisi v. Mazzaferro](#), *supra*, 5 Cal.App.5th 1219; [In re Z.G.](#), *supra*, 5 Cal.App.5th 705; [In re F.S.](#), *supra*, 243 Cal.App.4th 799; [In re J.S.](#), *supra*, 228 Cal.App.4th 1483; [In re Marriage of E. & Stephen P.](#), *supra*, 213 Cal.App.4th 983; [In re A.S.](#), *supra*, 202 Cal.App.4th 237; [In re K.A.](#), *supra*, 201 Cal.App.4th 905; [In re Levi H.](#), *supra*, 197 Cal.App.4th 1279; [In re E.B.](#), *supra*, 184 Cal.App.4th 568; [In re I.W.](#), *supra*, 180 Cal.App.4th 1517; [In re Angelique C.](#), *supra*, 113 Cal.App.4th 509; [In re J. I.](#), *supra*, 108 Cal.App.4th 903; [In re Mark L.](#), *supra*, 94 Cal.App.4th 573; [Sheila S. v. Superior Court](#), *supra*, 84 Cal.App.4th 872; and [Ensworth v. Mullvain](#), *supra*, 224 Cal.App.3d 1105.

[CA\(17\)](#) (17) We also use this opportunity to comment upon another provision within the Witkin treatise’s discussion of appellate review of findings involving clear and convincing evidence. After observing that “the clear and convincing test disappears” on appeal, the treatise adds that “[o]n appeal, the usual rule of conflicting evidence is applied, giving full effect to the respondent’s evidence, however slight, and disregarding the appellant’s evidence, however strong.” (9 Witkin, Cal. Procedure, *supra*, Appeal, § 371, p. 428.) It should be understood that even if conflicts in the evidence are viewed this way by a reviewing court, [HN17](#) giving “full effect” to the respondent’s evidence, “however slight” (*ibid.*), does not necessarily mean that this evidence will amount to *substantial* evidence of “ponderable legal significance” ([Estate of Teed](#), *supra*, 112 Cal.App.2d at p. 644) which reasonably could have been regarded as sufficient to establish a fact with the certainty required by the clear and convincing standard.

§ 14, pp. 463, 523; see also Stats. 1980, ch. 1304, § 6, p. 4400) and specified that the standard of proof for the appointment of a conservator is clear and convincing evidence (Stats. 1995, [\*\*\*\*33] ch. 842, § 7, pp. 6409–6410). Respondents argue that we should defer to this expectation in interpreting the requirement of clear and convincing evidence found in [Probate Code section 1801, subdivision \(e\)](#).

This argument is not persuasive. Respondents fail to identify anything within the text or legislative history of [Probate Code section 1801](#) affirmatively establishing that the Legislature believed the clear and convincing standard of proof should be ignored by an appellate court reviewing a record for substantial evidence. Instead, respondents assert that when the Legislature recognized limited conservatorships and directed that the clear and convincing standard of proof applies to the appointment of a conservator, “it did so against [\*\*\*346] the backdrop of 150 years of consistent precedent from this Court squarely holding that such standards [of proof] direct only the trial court, and do not apply (‘disappear’) on appeal.” Thus, respondents claim, the Legislature should be regarded as having implicitly incorporated this judicially created rule within the statute. As we have explained, however, our precedent did *not* consistently articulate the view respondents ascribe to it. Therefore, even if we were to regard our case law as informing prevailing expectations among [\*\*\*\*34] legislators, and these expectations as reflective of legislative intent, respondents’ argument would still falter at the outset. Given the mixed signals sent by our past decisions, we still could not reasonably conclude that when the Legislature provided for limited conservatorships and specified in [section 1801, subdivision \(e\)](#) that the appointment of a conservator requires clear and convincing evidence, it intended for appellate courts to completely disregard this standard of proof when reviewing the record developed before the probate court for substantial evidence.

appellate court must account for the clear and convincing standard of proof when addressing a claim that the evidence does not support a finding made under this standard. When reviewing a finding that a fact has been proved by clear and convincing evidence, the question before the appellate court is whether the record as a whole contains substantial evidence from which a reasonable fact finder could have found it highly probable that the fact was true. In conducting its review, the court must view the record in the light most favorable to the prevailing party below and give appropriate deference to how the trier of fact [\*\*\*\*35] may have evaluated the credibility of witnesses, resolved conflicts in the evidence, and [\*1012] drawn reasonable inferences from the evidence. Because the Court of Appeal below believed that the clear and convincing standard of proof “disappears” on appeal ([Conservatorship of O.B., supra, 32 Cal.App.5th at p. 633](#)), we remand the cause to that court for it to reevaluate the sufficiency of the evidence in light of the clarification we have provided.

### III. DISPOSITION

We reverse the judgment of the Court of Appeal and remand the cause to that court [\*\*56] for further proceedings consistent with this opinion.

Chin, J., Corrigan, J., Liu, J., Cuéllar, J., Kruger, J., and Groban, J., concurred.

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[CA\(18\)](#) (18) To summarize, we hold that [HN18](#) an

## Conservatorship of Valerie N.

Supreme Court of California

October 21, 1985

S.F. No. 24745

### Reporter

40 Cal. 3d 143 \*; 707 P.2d 760 \*\*; 219 Cal. Rptr. 387 \*\*\*; 1985 Cal. LEXIS 401 \*\*\*\*

Conservatorship of the Person of VALERIE N.  
MILDRED G., as Conservator, etc., et al.,  
Petitioners and Appellants, v. VALERIE N.,  
Objector and Respondent

(California) denying appellants' petition for authorization to have a tubal ligation (salpingectomy) performed on respondent, their adult developmentally disabled daughter.

**Prior History:** [\*\*\*\*1] Superior Court of Santa Clara County, No. 100974, Bruce F. Allen, Judge.

**Disposition:** Inasmuch as there was neither evidence of necessity for contraception, nor sufficient evidence that less intrusive means of contraception are not presently available to Valerie, the judgment is affirmed. The affirmance is, however, without prejudice to a renewed application for additional powers at such time as appellants have available adequate supporting evidence.

### Core Terms

sterilize, incompetent, developmental disability, procreate, conservatee, contraception, fundamental rights, procreative choice, woman, constitutional right, right to privacy, mentally retarded, pregnancy, bear a child, disabled, doctrine, retard, developmentally disabled person, state interest, privacy, habilitation, intrusive, adult, birth, regional center, psychological, compulsory, incapable, deprive, patient

### Case Summary

#### Procedural Posture

Appellant conservators challenged a judgment of the Superior Court of Santa Clara County

### Overview

Appellant conservators sought authorization from the court to have a tubal ligation (salpingectomy) performed on respondent, appellants' adult developmentally disabled daughter. The probate court denied the petition for authorization on the ground that the court lacked jurisdiction to grant the petition. Appellants challenged the judgment and contended that [Cal. Prob. Code § 2356\(d\)](#) deprived respondent of her constitutional right of procreative choice by precluding the only means of contraception realistically available to her. [Cal. Prob. Code § 2356\(d\)](#) provided that no ward or conservatee could be sterilized under the provisions of that code division. The reviewing court found that the legislative scheme did absolutely preclude the sterilization option and impermissibly deprived developmentally disabled persons of privacy and liberty interests protected by [U.S. Const. amend XIV](#) and [Cal. Const. art. I, § 1](#). However, there was not sufficient evidence of a necessity for contraception for respondent nor sufficient evidence that less intrusive means of contraception were not presently available to respondent. Therefore, the judgment was affirmed.

### Outcome

The judgment denying appellants' petition for authorization to have a tubal ligation performed on respondent was affirmed. Although the statutory

scheme which deprived developmentally disabled persons the right to sterilization presented an unconstitutional violation of rights to privacy and liberty interests, evidence was not sufficient to show necessity or lack of less intrusive means of contraception.

## **LexisNexis® Headnotes**

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Healthcare Law > Medical  
Treatment > Incompetent, Mentally Disabled &  
Minors > General Overview

### **HN1 Medical Treatment, Incompetent, Mentally Disabled & Minors**

*Cal. Welf. & Inst. Code § 4512* defines "developmental disability" as a disability which originates before an individual attains 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial handicap for such individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include handicapping conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

Healthcare Law > Medical  
Treatment > Incompetent, Mentally Disabled &  
Minors > General Overview

### **HN2 Medical Treatment, Incompetent, Mentally Disabled & Minors**

See [Cal. Prob. Code § 2356\(d\)](#).

Estate, Gift & Trust Law > ... > Conservators &  
Guardians > Conservators > Duties & Rights

Healthcare Law > Medical  
Treatment > Incompetent, Mentally Disabled &  
Minors > General Overview

Healthcare Law > Medical Treatment > General  
Overview

Healthcare Law > Medical Treatment > Patient  
Consent > General Overview

### **HN3 Conservators, Duties & Rights**

[Cal. Prob. Code § 1880](#) authorizes a judicial determination of inability to give informed consent, in which case the conservator is empowered to consent to medical treatment, except as provided in [Cal. Prob. Code § 2355](#): If the court determines that there is no form of medical treatment for which the conservatee has the capacity to give an informed consent, the court shall (1) adjudge that the conservatee lacks the capacity to give informed consent for medical treatment and (2) by order give the conservator of the person the powers specified in [Cal. Prob. Code § 2355](#). If an order is made under this section, the letters of conservatorship shall include a statement that the conservator has the powers specified in [Cal. Prob. Code § 2355](#).

Healthcare Law > Medical  
Treatment > Incompetent, Mentally Disabled &  
Minors > General Overview

Healthcare Law > Medical Treatment > General  
Overview

Healthcare Law > Medical Treatment > Patient  
Consent > General Overview

### **HN4 Medical Treatment, Incompetent, Mentally Disabled & Minors**

See [Cal. Prob. Code § 2355](#).

Constitutional Law > ... > Fundamental  
 Freedoms > Judicial & Legislative  
 Restraints > Overbreadth & Vagueness of  
 Legislation

Healthcare Law > Medical  
 Treatment > Incompetent, Mentally Disabled &  
 Minors > General Overview

Constitutional Law > Bill of Rights > General  
 Overview

### **HN5 Judicial & Legislative Restraints, Overbreadth & Vagueness of Legislation**

Treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty. [42 U.S.C.S. § 6010\(1\) & \(2\).](#)

Healthcare Law > Medical  
 Treatment > Incompetent, Mentally Disabled &  
 Minors > General Overview

Public Health & Welfare Law > Social  
 Services > Mentally Ill & Mentally Retarded  
 Individuals > General Overview

Public Health & Welfare  
 Law > Healthcare > Services for Disabled &  
 Elderly Persons > Rehabilitation

### **HN6 Medical Treatment, Incompetent, Mentally Disabled & Minors**

[Cal. Welf. & Inst. Code § 19352](#) presently defines "habilitation" in the context of services to be provided by the Department of Rehabilitation as those community-based services purchased or provided for adults with developmental disabilities to prepare them for competitive employment, to prepare and maintain them at their highest level of vocational functioning, or to prepare them for referral to vocational rehabilitation services.

Although the Legislature declared that these services were to be provided in order to guarantee the rights stated in [Cal. Welf. & Inst. Code § 4502, Cal. Welf. & Inst. Code § 19350](#), it is manifest from the context in which the term is used in [Welf. & Inst. Code §§ 4502, 4512\(b\)](#) (social, personal, physical, or economic habilitation), and 4670, that "habilitation" comprehends services designed to maximize the human potential for the developmentally disabled even though he or she may never be employable.

Healthcare Law > Medical  
 Treatment > Incompetent, Mentally Disabled &  
 Minors > General Overview

### **HN7 Medical Treatment, Incompetent, Mentally Disabled & Minors**

"Habilitation" is the term of art used to refer to that education, training, and care required by retarded individuals to reach their maximum development.

Family Law > Family Protection &  
 Welfare > Dependent & Disabled  
 Adults > Services

Healthcare Law > Medical Treatment > Patient  
 Consent > General Overview

Public Health & Welfare Law > Social  
 Services > Disabled & Elderly  
 Persons > General Overview

Healthcare Law > Medical  
 Treatment > Incompetent, Mentally Disabled &  
 Minors > General Overview

### **HN8 Dependent & Disabled Adults, Services**

Under the Lanterman Developmental Disabilities Services Act, [Cal. Welf. & Inst. Code § 4500 et seq.](#), regional centers contract with the Department of Developmental Services to seek out and assist developmentally disabled persons within the

service area for which they are responsible. Among the services available to persons within a regional center's service area are "preventive services" needed by persons identified as being at risk of parenting a developmentally disabled infant. [Cal. Welf. & Inst. Code §4644](#). The "preventive services" to be provided for such clients may include sterilization of consenting adults. If so, however, the section would authorize sterilization only on request of a client, and only for the purpose of avoiding a high risk of parenting a developmentally disabled infant.

Healthcare Law > Medical  
Treatment > Incompetent, Mentally Disabled &  
Minors > General Overview

Public Health & Welfare  
Law > Healthcare > Services for Disabled &  
Elderly Persons > General Overview

#### **[HN9](#) Medical Treatment, Incompetent, Mentally Disabled & Minors**

See [Cal. Welf. & Inst. Code § 4644](#).

Healthcare Law > Medical  
Treatment > Incompetent, Mentally Disabled &  
Minors > General Overview

Public Health & Welfare  
Law > Healthcare > Services for Disabled &  
Elderly Persons > General Overview

#### **[HN10](#) Medical Treatment, Incompetent, Mentally Disabled & Minors**

The regional center must also undertake activities necessary to the achievement of the goals of the individual program plan it devises for a client. Among these activities is program coordination which may include securing, through purchase or referral, services specified in the person's plan, coordination of service programs, information

collection and dissemination, and measurement of progress toward objectives contained in the person's plan. *Cal. Welf. & Inst. Code, §4648(a)*.

Healthcare Law > Medical  
Treatment > Incompetent, Mentally Disabled &  
Minors > General Overview

Public Health & Welfare  
Law > Healthcare > Services for Disabled &  
Elderly Persons > General Overview

Public Health & Welfare Law > ... > Disabled  
& Elderly Persons > Education &  
Training > General Overview

#### **[HN11](#) Medical Treatment, Incompetent, Mentally Disabled & Minors**

*Cal. Welf. & Inst. Code § 4512(b)* itemizes a variety of services within its definition of that term: "Services for persons with developmental disabilities" means specialized services or special adaptations of generic services directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with such a disability, and includes, but is not limited to, diagnosis, evaluation, treatment, personal care, day care, domiciliary care, special living arrangements, physical, occupational, and speech therapy, training, education, sheltered employment, mental health services, recreation, counseling of the individual with such disability and of his family, protective and other social and sociolegal services, information and referral services, follow-along services, and transportation services necessary to assure delivery of services to persons with developmental disabilities.

Healthcare Law > Medical  
Treatment > Incompetent, Mentally Disabled &  
Minors > General Overview

Public Health & Welfare  
 Law > Healthcare > Services for Disabled &  
 Elderly Persons > General Overview

### **HN12 Medical Treatment, Incompetent, Mentally Disabled & Minors**

Neither the provision for preventive services nor any other provision of the Lanterman Developmental Disabilities Services Act (LDDSA), [Cal. Welf. & Inst. Code § 4500 et seq.](#), authorizes sterilization of nonconsenting persons even when necessary to achieve maximum developmental potential, and the legislature took no action to amend the LDDSA either in conjunction with the enactment of Cal. Welf. & Inst. Code § 2356(d) or once the repeal of [Cal. Welf. & Inst. Code § 7254](#) became effective.

Constitutional Law > Bill of  
 Rights > Fundamental Freedoms > General  
 Overview

Healthcare Law > Medical Treatment > End-of-  
 Life Decisions > General Overview

Constitutional Law > Substantive Due  
 Process > Privacy > General Overview

Constitutional Law > Substantive Due  
 Process > Privacy > Personal Decisions

Healthcare Law > Medical  
 Treatment > Abortion > Right to Privacy

### **HN13 Bill of Rights, Fundamental Freedoms**

The right to marriage and procreation are now recognized as fundamental, constitutionally protected interests. So, too, is the right of a woman to choose not to bear children, and to implement that choice by use of contraceptive devices or medication, and, subject to reasonable restrictions, to terminate a pregnancy. These rights are aspects of the right of privacy which exists within the penumbra of the [U.S. Const. amend. I](#), and is

express in [Cal. Const. art. I, § 1](#), which includes among the inalienable rights possessed by all persons in the state, that of "privacy." They are also within the concept of liberty protected against arbitrary restrictions by the [U.S. Const. amend. XIV](#).

Constitutional Law > Substantive Due  
 Process > Privacy > Personal Decisions

Constitutional Law > Substantive Due  
 Process > Privacy > General Overview

### **HN14 Privacy, Personal Decisions**

That sterilization is encompassed within the right to privacy has been acknowledged in California.

Constitutional Law > Equal  
 Protection > Parentage

Constitutional Law > Substantive Due  
 Process > Privacy > General Overview

Constitutional Law > Substantive Due  
 Process > Privacy > Personal Decisions

### **HN15 Equal Protection, Parentage**

An unmarried woman's fundamental right not to bear children could be found within the right to privacy, whether the privacy right arises out of the penumbra of the [U.S. Const. amend. I](#) or the liberty right protected by the [U.S. Const. amend. XIV](#). In so doing the court recognized that this interest is not limited to the intimacy of the marital relationship, but encompasses also the individual's right to determine the course of his or her future life.

Constitutional Law > Substantive Due  
 Process > Scope

### **HN16 Constitutional Law, Substantive Due Process**

Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Constitutional Law > Substantive Due Process > Scope

### **HN17 Equal Protection, Nature & Scope of Protection**

When the rights involved are fundamental the permissibility of the restriction must be justified by a "compelling state interest," and may be no broader than necessary to protect that interest.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > Substantive Due Process > Privacy > General Overview

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

### **HN18 Equal Protection, Nature & Scope of Protection**

[Cal. Const. art. I, § 1](#), confirms the right not only to privacy, but to pursue happiness and enjoy liberty. The right of a woman to choose whether or not to bear a child and thus to control her social role and

personal destiny, is a fundamental right protected by that provision. Since the right to elect sterilization as a method of contraception is generally available to adult women in California, the restriction must be justified by a compelling state interest under either [Cal. Const. art. I, § 1](#), or under the equal protection guarantee of [Cal. Const. art. I, § 7](#).

Constitutional Law > Equal Protection > Disability

Governments > Police Powers

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

### **HN19 Equal Protection, Disability**

Under equal protection analysis the court must determine whether the state has a compelling interest in restricting access to sterilization for incompetent developmentally disabled adults, and, if so, whether banning all such sterilization is necessary to accomplish the state purpose. Similarly, in assessing any restriction on the exercise of a fundamental constitutional right, the court must determine whether the state has a compelling interest that is within the police power of the state in regulating the subject, whether the regulation is necessary to accomplish that purpose, and if the restriction is narrowly drawn.

Civil Procedure > Appeals > Standards of Review > General Overview

### **HN20 Appeals, Standards of Review**

When a ruling or decision is correct the reasoning on which it is based is irrelevant.

## **Headnotes/Summary**

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## Summary

### CALIFORNIA OFFICIAL REPORTS SUMMARY

The parents and coconservators of the person of an adult developmentally disabled woman petitioned the probate court for authority to have the daughter sterilized. The probate court, while agreeing with the parents that the procedure was medically safe and would enhance the quality of the daughter's life, concluded that it lacked jurisdiction to grant the petition. (Superior Court of Santa Clara County, No. 100974, Bruce F. Allen, Judge.)

The Supreme Court affirmed the judgment without prejudice to a renewed petition and hearing at which the parents might make the requisite showing. The court held that the Legislature, in enacting [Prob. Code, § 2356, subd. \(d\)](#), which provides that no ward or conservatee can be sterilized under the provisions of the guardianship-conservatorship law, while contemporaneously repealing [Welf. & Inst. Code, § 7254](#), which authorized sterilization of incompetents confined in state mental hospitals, intended to discontinue the longstanding, but discredited, practice of eugenic sterilization, and to deny guardians and conservators authorization to have the procedure performed on their wards and conservatees. Moreover, the court held that the Lanterman Developmental Disabilities Services Act ([Welf. & Inst. Code, § 4500 et seq.](#)) did not afford an alternative source of authority for non-therapeutic sterilization of developmentally disabled conservatees. It also held, however, that the present statutory scheme denies incompetent developmentally disabled persons rights which are accorded to other persons in violation of state and federal constitutional guarantees of privacy. It nevertheless affirmed the judgment, because the record did not support a conclusion that sterilization was necessary to the daughter's habilitation and did not support the trial court's implicit conclusion that less intrusive means by which to avoid conception were unavailable to the daughter. (Opinion by Grodin, J., with Mosk,

Broussard, JJ., and Kaus, J., \* concurring. Separate concurring and dissenting opinions by Reynoso, J., and by Lucas, J. Separate dissenting opinion by Bird, C. J.)

## Headnotes

### [CA\(1\)](#) (1)

#### **Incompetent Persons § 6—Custody, Control and Protection—Non-therapeutic Sterilization of Conservatees—Statutory Authorization.**

--The provisions of the Lanterman Developmental Disabilities Services Act ([Welf. & Inst. Code, § 4500 et seq.](#)) do not authorize a probate court to order the nontherapeutic sterilization of a severely retarded conservatee. Although the Legislature clearly intended that a variety of services be provided to developmentally disabled persons to assist them in achieving their maximum developmental potential, neither the provision of "preventive services" ([Welf. & Inst. Code, § 4644](#)), which might include sterilization of consenting adults, nor any other provision of the act authorized sterilization of nonconsenting persons, even when necessary to achieve the goals of the act, and the Legislature took no action to amend the act, either in conjunction with the enactment of [Prob. Code, § 2356, subd. \(d\)](#), which provides that no ward or conservatee may be sterilized under the provisions of the guardianship-conservatorship law, or the repeal of [Welf. & Inst. Code, § 7254](#), which authorized nonconsensual sterilization of persons confined to state mental hospitals.

### [CA\(2a\)](#) (2a) [CA\(2b\)](#) (2b) [CA\(2c\)](#) (2c) [CA\(2d\)](#) (2d)

#### **Incompetent Persons § 6—Custody, Control and Protection—Sterilization of Incompetents—Statutory Denial of Authority—Constitutionality.**

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\*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

--The legislative scheme, which absolutely precludes sterilization of incompetent, developmentally disabled persons, impermissibly deprives them of privacy and liberty interests protected by [U.S. Const., 14th Amend.](#), and [Cal. Const., art. I, § 1](#). In its enactment of [Prob. Code, § 2356, subd. \(d\)](#), which prohibits the sterilization of wards and conservatees under the guardianship-conservatorship law, and the omission of any provision in other legislation authorizing sterilization of incompetent developmentally disabled persons, the Legislature has denied incompetent women the procreative choice that is recognized as a fundamental, constitutionally protected right of all other adult women. While the prohibition against sterilization might be a reasonable means by which to protect some conservatees' right to procreation choice, it swept too broadly because it extended to individuals who could not make that choice and would not be able to do so in the future. Moreover, although the power to authorize sterilization of incompetents has, in the past, been subject to abuse, there were alternatives less restrictive than total prohibition available through statutory and procedural safeguards.

### [CA\(3\)](#) (3)

#### **Constitutional Law § 58—First Amendment and Other Fundamental Rights of Citizens—Scope and Nature—Right of Privacy—Right to Marriage and Procreation.**

--The right to marriage and procreation are now recognized as fundamental, constitutionally protected interests. So too is the right of a woman to choose not to bear children, and to implement that choice by use of contraceptive devices or medication, and, subject to reasonable restrictions, to terminate a pregnancy. These rights are aspects of the right of privacy which exists within the penumbra of [U.S. Const., 1st Amend.](#), and is express in [Cal. Const., art. I, § 1](#), which includes among the inalienable rights possessed by all

persons in this state, that of "privacy." They are also within the concept of liberty protected against arbitrary restrictions by [U.S. Const., 14th Amend.](#)

### [CA\(4\)](#) (4)

#### **Constitutional Law § 104—Due Process—Operation and Scope—Liberty Interest.**

--The liberty interest which the United States Supreme Court has recognized as a substantive right protected against arbitrary deprivation by the due process clause of [U.S. Const., 14th Amend.](#), includes the right of the individual to be free in the enjoyment of all of his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; and to pursue any livelihood or avocation. Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling. Although the term "liberty" has not been defined with any great precision, it is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.

### [CA\(5\)](#) (5)

#### **Constitutional Law § 58—First Amendment and Other Fundamental Right of Citizens—Scope and Nature—Right of Privacy—Procreational Rights.**

--The right of a woman to choose whether or not to bear a child and thus to control her social role and personal destiny is a fundamental right protected by [Cal. Const., art. I, § 1](#).

### [CA\(6\)](#) (6)

#### **Incompetent Persons § 6—Custody, Control and Protection—Sterilization of Incompetents—**

**Sufficiency of Evidence to Support Application for.** Bird, C. J.

--In proceedings by the parents of an adult developmentally disabled woman, as coconservators of their daughter's person, seeking an order from the probate court authorizing sterilization of their daughter, the record was inadequate to establish that the trial court erred in denying the parents' application. Inasmuch as the court believed it lacked power to grant the application, the record was devoid of any specification of the factors which the court found relevant, or any findings as to their existence. Nor would the evidence support an order granting the application. Although there was an implicit assumption that the daughter might become pregnant, there was no evidence in the record that she was capable of conceiving. Moreover, even if this assumption was accepted, there was no evidence that less intrusive methods of preventing conception were unavailable to the daughter. The Legislature has required a judicial determination that the condition of the conservatee "requires the recommended course of medical treatment." (*Prob. Code, § 2357, subd. (h)(1)*.) There was neither a finding that sterilization was "required" nor evidence that would support such a finding.

**Counsel:** Allen H. Fleishman and Fleishman & Jensen for Petitioners and Appellants.

Frank O. Bell, Jr., and Quin Denvir, State Public Defenders, under appointment by the Court of Appeal, Paul D. Fogel and Ezra Hendon, Deputy State Public Defenders, for Objector and Respondent.

Eric R. Gelber and Carolyn Schneider as Amici Curiae on behalf of Objector and Respondent.

**Judges:** Opinion by Grodin, J., with Mosk, Broussard, JJ., and Kaus, J., \* concurring. Separate concurring and dissenting opinions by Reynoso, J., and by Lucas, J. Separate dissenting opinion by

**Opinion by:** GRODIN

## Opinion

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[\*146] [\*\*761] [\*\*\*388] [\*\*\*\*2] Mildred and Eugene G., her mother and stepfather, are coconservators of the person of their adult developmentally disabled daughter [\*147] Valerie. <sup>1</sup> They appeal from a judgment of the probate court denying their petition for authorization to have a [\*\*762] [\*\*\*389] tubal ligation (salpingectomy) performed on Valerie. The primary purpose of the proposed operation is habilitation. Any therapeutic benefit would be incidental. The probate court, while agreeing with appellants that the procedure was medically safe and would enhance the quality of Valerie's life, concluded that it lacked jurisdiction to grant the petition.

[\*\*\*\*3] We are asked to determine whether *section 2356, subdivision (d)*, <sup>2</sup> upon which the trial court relied, precludes the sterilization of a severely retarded conservatee <sup>3</sup> in all circumstances and, if

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<sup>1</sup> *HN1 Welfare and Institutions Code section 4512* defines "[developmental] disability" as "a disability which originates before an individual attains 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial handicap for such individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include handicapping conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature." (See also *Prob. Code, § 1420*.)

All future statutory references, unless otherwise indicated, are to the Probate Code.

<sup>2</sup> *HN2 Section 2356, subdivision (d)*, provides: "No ward or conservatee may be sterilized under the provisions of this division."

<sup>3</sup> One percent of the general population meets the criteria of the American Psychiatric Association for mental retardation. Of these, 1 percent are classified as profoundly retarded with an IQ below 20, and 7 percent are classified as severely retarded with an IQ of 20 to

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\*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

so, whether application of that **[\*148]** prohibition to Valerie denies her the benefits of state and/or federal constitutional guarantees of privacy, equal protection, and due process.

**[\*\*\*\*4]** We shall conclude that the Legislature, in enacting subdivision (d) of section 2356, while contemporaneously repealing Welfare and Institutions Code section 7254, intended to discontinue the longstanding, but discredited, practice of eugenic sterilization,<sup>4</sup> and to deny

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34. It is possible that persons classified as moderately retarded may be adjudged incompetent to consent to any medical treatment. This group, whose IQ is from 35 to 49, make up 12 percent of the mentally retarded. This classification includes persons who "during the pre-school period can talk or learn to communicate, but they have only poor awareness of social conventions. They may profit from vocational training and can take care of themselves with moderate supervision. During the school-age period, they can profit from training in social and occupational skills, but are unlikely to progress beyond the second-grade level in academic subjects. They may learn to travel alone in familiar places. During their adult years they may be able to contribute to their own support by performing unskilled or semiskilled work under close supervision in sheltered workshops. They need supervision and guidance when under mild social or economic stress."

Those who are severely retarded evidence "poor motor development and minimal speech" during the preschool period and "develop little or no communicative speech. During the school-age period, they may learn to talk and can be trained in elementary hygiene skills. They are generally unable to profit from vocational training. During their adult years they may be able to perform simple work tasks under close supervision."

The profoundly mentally retarded "display minimal capacity for sensorimotor functioning. A highly structured environment, with constant aid and supervision, is required. During the school-age period, some further motor development may occur and the children may respond to minimal or limited training in self-care. Some speech and further motor development may take place during the adult years, and very limited self-care may be possible, in a highly structured environment with constant aid and supervision." (American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (3d ed. 1980) pp. 38-40.)

Biological abnormalities such as Down's Syndrome and phenylketonuria are believed to be the cause of 25 percent of the incidence of retardation, and cause moderate to profound retardation. (*Id.*, at p. 38.) No statistical breakdown of the incidence of retardation by sex is included in this volume.

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<sup>4</sup>"Eugenical sterilization" was an early enthusiastic application of Mendelian genetics to what were then perceived to be hereditary mental and physical defects. (See *Sterilization and Mental*

guardians and conservators authorization to have the procedure performed on their wards and conservatees. The judgment must be affirmed because the record does not support a conclusion that sterilization is necessary to Valerie's habilitation and does not support the trial court's implicit conclusion that less intrusive means by which to avoid conception are unavailable to Valerie. We shall also conclude, however, that the present statutory scheme denies incompetent developmentally disabled persons rights which are accorded all other persons in violation of state and federal constitutional guarantees of privacy. Our affirmance of the judgment therefore is without prejudice to a renewed petition and hearing at which the requisite showing may be made.

#### **[\*\*\*\*5] I.**

Valerie was born on July 13, 1955, apparently a victim of Downs Syndrome as a **[\*\*763]** **[\*\*\*390]** result of which she is severely retarded. Her IQ is estimated to be 30. She is now 29 years old. She lives with her mother and stepfather. Although she has no comprehension of the nature of these proceedings, she has expressed her wish to continue to have her parents care for her. Her parents' long range plan for Valerie is that she will move to a residential home should they become mentally or physically unable to care for her. She has received therapy and training for behavior modification which was not successful in eliminating her aggressive sexual advances toward men. Her parents are attempting to prepare her for the time when they can no longer care for her, and to broaden her social activities as an aspect of this preparation. They have concluded that other methods of birth control are inadequate in Valerie's case.

On September 5, 1980, appellants filed their petition to be named conservators of Valerie's person in the Santa Clara County Superior Court

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*Retardation* (1965) 51 A.B.A. J. 1059; Robitscher, *The Powers of Psychiatry* (1980) pp. 266-275.)

pursuant to section 1820. In the same petition they sought the additional power to authorize "a Salpingectomy [\*\*\*\*6] or any other operation that will permanently sterilize" Valerie. The petition was supported by the declaration [\*149] of Valerie's personal physician who stated that the tubal ligation procedure is "advisable and medically appropriate."

On September 25, 1980, after review of a court investigator's report which stated that Valerie had no comprehension of the proceedings, could not complete an affidavit of voter registration, and gave no pertinent response when asked if she objected to being disqualified from voting, the probate court granted the petition insofar as it sought appointment of appellants as coconservators. The court continued the hearing on the request for additional powers, however, and appointed counsel to represent Valerie.<sup>5</sup>

On December 10, 1980, when the hearing resumed, appellants submitted a declaration by a physician who had treated Valerie from the time she was 10 [\*\*\*\*7] years old. He stated that in his opinion a tubal ligation procedure was "advisable and medically appropriate in that a potential pregnancy would cause psychiatric harm to Valerie." A second declaration, this by a licensed marriage, family and child counselor having a masters degree in developmental psychology, was also submitted. This declarant had worked with Valerie on a weekly basis for a year during 1977-1978. She believed that a tubal ligation was "an appropriate means of guarding against pregnancy," and had observed that Valerie acted "affectionately" toward adult men and made "inappropriate" sexual advances toward them. This declarant was of the opinion that because Valerie's parents had found it necessary to be overly restrictive in order to avoid a possible pregnancy which would have "severe psychologically damaging consequences" to Valerie, close monitoring had severely hampered

Valerie's ability to form social relationships. She also believed that the level of Valerie's retardation meant that no alternative birth control methods were available that would ensure against pregnancy.

Valerie's mother testified that Valerie had not been sexually active, apart from masturbation, [\*\*\*\*8] because she had been closely supervised. She was aggressive and affectionate toward boys. On the street she approached men, hugged and kissed them, climbed on them, and wanted to sit on their laps. Valerie had been given birth control pills in her early teens, but she rejected them and became ill. Her doctor then recommended the tubal ligation. Valerie was unable to apply other methods of birth control such as a diaphragm, and would not cooperate in a pelvic examination for an intrauterine device which the witness believed was unsafe in any event.

[\*150] No evidence was offered by counsel representing Valerie, although he did argue [\*\*764] [\*\*\*391] that less drastic alternatives to sterilization should be used, and also questioned the jurisdiction of the probate court to authorize the surgery. It was conceded that the court had the power to authorize an abortion should Valerie become pregnant.<sup>6</sup>

[\*\*\*\*9] No evidence was offered to establish that Valerie is capable of conceiving, and other than the

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<sup>6</sup> Counsel for Valerie has since asked this court to take judicial notice (*Evid. Code, §§ 459, 452, subd. (d)*), of a memorandum of points and authorities filed in another matter then pending in the superior court by the North Bay Regional Center. In that document the center argued that there is no California statutory authority which sanctions either sterilization or abortion of nonconsenting conservatees. The authority to authorize an abortion is not an issue in the instant case, and while the request to take judicial notice has been granted, it is doubtful that the views of a single regional center are entitled to consideration as reflecting an administrative construction of the relevant statutes. (Cf. *Nipper v. California Auto. Assigned Risk Plan* (1977) 19 Cal.3d 35, 45 [136 Cal. Rptr. 854, 560 P.2d 743].)

Although invited to do so, neither the Attorney General nor the responsible statewide agency, the Department of Developmental Services, has sought to intervene or file a brief amicus curiae addressing the statutory and constitutional questions presented.

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<sup>5</sup> See sections 1823, subdivision (b), and 2357, subdivision (d). The appointment has been continued in this court.

opinions of her mother and the family counselor no evidence was offered to establish that alternative less intrusive methods of birth control are unavailable.

The trial judge then denied the request for additional powers, explaining he believed both that sterilization was in order and that [subdivision \(d\) of section 2356](#) was unconstitutional, but was obliged to follow [Guardianship of Tulley \(1978\) 83 Cal. App. 3d 698 \[146 Cal. Rptr. 266\]](#), which had held that the probate court lacks jurisdiction to authorize the sterilization of a conservatee.

**CA(1) (1)** The parties agree that [section 2356](#) bars nontherapeutic sterilization of conservatees. Because that section provides that the procedure may not be authorized "under the provisions of this division," however, we invited additional briefing addressed to whether the Lanterman Developmental Disabilities Services Act ([Welf. & Inst. Code, § 4500 et seq.](#)) afforded an alternative source of authority. The parties argue that it does not. We conclude that the history of [section 2356](#) supports the parties.

II.

### Statutory Development

#### A. Involuntary [\*\*\*\*10] Sterilization in California.

In 1909, California enacted this state's first statute permitting sterilization of developmentally disabled individuals. That authority extended only to **[\*151]** persons committed to state institutions or prisons, and provided: "Whenever in the opinion of the medical superintendent of any state hospital, or the superintendent of the California Home for the Care and Training of Feeble-Minded Children, or of the resident physician in any state prison, it would be beneficial and conducive to the benefit of the physical, mental or moral condition of any inmate of said state hospital, home, or state prison, to be asexualized, then such superintendent or

resident physician shall call in consultation the general superintendent of state hospitals and the secretary of the state board of health, and they shall jointly examine into all of the particulars of the case with the said superintendent or resident physician, and if in their opinion, or in the opinion of any two of them, asexualization will be beneficial to such inmate, patient, or convict, they may perform the same; . . ." (Stats. 1909, ch. 720, § 1, pp. 1093-1094.)

That law was repealed in 1913, **[\*\*\*\*11]** and replaced with authority to "asexualize" committed mental patients and developmentally disabled persons prior to their release from state institutions, and developmentally disabled minor and adult patients in state hospitals.<sup>7</sup> In 1917 section 1 of the statute **[\*\*765] [\*\*\*392]** was amended to make it applicable to developmentally disabled adults. It then provided that prior to discharge a person "who is afflicted with mental disease which may have been inherited and is likely to be transmitted to descendants, the various grades of feeble-mindedness, those suffering from perversion or marked departures from normal mentality or from

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<sup>7</sup>That part of the 1909 law which authorized this procedure for the "benefit" of the person was restricted to prisoners in specified categories. As to other persons subject to the law, the statute provided:

"Section 1. Before any person who has been lawfully committed to any state hospital for the insane, or who has been an inmate of the Sonoma State Home, and who is afflicted with hereditary insanity or incurable chronic mania or dementia shall be released or discharged therefrom, the state commission in lunacy may in its discretion, after a careful investigation of all the circumstances of the case, cause such person to be asexualized, and such asexualization whether with or without the consent of the patient shall be lawful and shall not render the said commission, its members or any person participating in the operation liable either civilly or criminally.

". . .

"Section 3. Any idiot if a minor, may be asexualized by or under the direction of the medical superintendent of any state hospital, with the written consent of his or her parent or guardian, and if an adult, then with the written consent of his or her lawfully appointed guardian, and upon the written request of the parent or guardian of any such idiot or fool, the superintendent of any state hospital shall perform such operation or cause the same to be performed without charge therefor." (Stats. 1913, ch. 363, pp. 775-776.)

disease of a syphilitic nature," might be asexualized. (Stats. 1917, ch. 489, § 1, p. 571.) No hearing procedure was provided and no judicial approval was required under any of these statutes.

[\*\*\*\*12] Twenty-two states enacted similar legislation and, as a "pioneer" in the field, California performed the greatest number of sterilization operations. [\*152] One of the first legal commentaries on the practice noted that "[between] 1907 and 1921 California sterilized 2,558 of the 3,233 total for all United States in that period." (Comment, *Constitutional Law -- . . . Sterilization of Defectives* (1927) 1 So.Cal.L. Rev. 73, 74, fn. 5.) The same author quoting from an article by Popenoe, *Eugenic Sterilization in California*, published in the *Journal of Social Hygiene* in May 1927, reported that "[the] total number of operations performed to date is more than 5,000, which is four times as many as have been performed for eugenic reasons, in governmental institutions, in all the rest of the world together, so far as known." (*Id.*, at p. 74, fn. 5.) Although challenged on a variety of constitutional grounds, principally denial of due process and equal protection, most of these statutes were upheld, if adequate procedural safeguards, including a hearing for the patient, were afforded.<sup>8</sup>

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<sup>8</sup>For a more detailed description of the various types of state laws and the manner in which they fared in the courts see 1 So.Cal.L. Rev., *supra*, at page 73; and Comment, *Constitutional Law: Insane and Defective Persons: Sterilization of Defectives* (1929) 17 Cal.L. Rev. 270.

The prevalent attitude, reflective of the limited knowledge of the nature of developmental disabilities then available, appeared in the oft-quoted opinion of Justice Holmes in *Buck v. Bell* (1927) 274 U.S. 200 [71 L. Ed. 1000, 47 S. Ct. 584], upholding a Virginia statute that permitted sterilization of persons believed to suffer from hereditary conditions when the welfare of the patient and society would benefit. After noting the declaration of the Legislature that the Commonwealth was supporting patients in hospitals who might be discharged and become self-supporting if unable to procreate, and that heredity was important in the transmission of insanity and imbecility, he upheld the law with the following reasoning: "In view of the general declarations of the legislature and the specific findings of the Court, obviously we cannot say as a matter of law that the grounds do not exist, and if they exist they justify the result. We

[\*\*\*\*13] Codified as [section 6624 of the Welfare and Institutions Code](#) in 1937 (Stats. 1937, [\*\*766] [\*\*\*393] ch. 369, § 6624, p. 1155), the substantive aspects of the California law remained essentially unchanged over the next 40 years.<sup>9</sup> [\*\*\*\*14] In 1951 [\*153] significant procedural protections were added, the nomenclature of eligible patients was changed to substitute "mental deficiency" for "feeble-mindedness," and subdivisions (c) and (d) were combined into a single category of persons exhibiting "marked departures from normal mentality."<sup>10</sup> After being

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have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts*, 197 U.S. 11. Three generations of imbeciles are enough." (274 U.S. at p. 207 [71 L. Ed. at p. 1002].)

In *Jacobson v. Massachusetts* (1905) 197 U.S. 11, 27 [49 L. Ed. 643, 650, 25 S. Ct. 358], the court had upheld a compulsory vaccination law enacted to halt the spread of smallpox, concluding that the statute was one within the police power of the Commonwealth, declaring that "[upon] the principle of self-defense, or paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."

<sup>9</sup>[Welfare and Institutions Code section 6624](#) provided: "The provisions of this section apply to any person who has been lawfully committed to any State hospital, and who is afflicted with, or suffers from, any of the following conditions:

"(a) Mental disease which may have been inherited and is likely to be transmitted to descendants.

"(b) Feeble-mindedness, in any of its various grades.

"(c) Perversion or marked departures from normal mentality.

"(d) Disease of a syphilitic nature.

"Before any such person is released or discharged from a State hospital, the State Department of Institutions may, in its discretion, cause such person to be sterilized. Such a sterilization, whether performed with or without the consent of the patient, shall be lawful and shall not render the department, its officers or employees, or any person participating in the operation liable either civilly or criminally."

<sup>10</sup> Statutes 1951, chapter 552, section 1, page 1706.

renumbered as [Welfare and Institutions Code section 7254](#) in 1967, this authority for nonconsensual sterilization was finally repealed in 1979,<sup>11</sup> operative January 1, 1980.<sup>12</sup>

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<sup>11</sup> Statutes 1979, chapter 552, section 1, page 1762; Statutes 1979, chapter 730, section 156.5, page 2540.

<sup>12</sup> At the time of its repeal, [Welfare and Institutions Code section 7254](#) authorized sterilization of patients in state institutions, afforded opportunity for judicial review, and reflected primarily a eugenic-based policy. As amended in 1977 (Stats. 1977, ch. 1252, § 658, p. 4609), the section read: "The provisions of this section apply to any person who has been lawfully committed or admitted to any state hospital for the mentally disordered or mentally retarded and who is afflicted with, or suffers from, any of the following conditions:

"(a) Mental disease which may have been inherited and is likely to be transmitted to descendants.

"(b) Mental retardation, in any of its various grades.

"(c) Marked departures from normal mentality.

"The State Department of Mental Health, with respect to a patient or resident in a state hospital or home under its jurisdiction, and the State Department of Developmental Services with respect to a patient or resident in a state hospital or home under its jurisdiction, upon compliance with the provisions of this section, may cause any such person to be sterilized by the operation of vasectomy upon the patient if a male and of salpingectomy if a female or any other operation or treatment that will permanently sterilize but not unsex the patient. When the superintendent of the state hospital or state home is of the opinion that a patient who is afflicted with or suffering from any of the conditions specified in this section should be sterilized, he shall certify such opinion to the director of the department having jurisdiction over the hospital or home and shall at the same time give written notice of such certification to the patient and to his known parents, spouse, adult children, or guardian, if any, by registered mail to their last known address. If the patient has no known relatives or guardian, such notice shall be given to the person who petitioned for the patient's commitment. Such notice shall further state that written objection or written consent to the proposed sterilization, should be filed with the director of the department having jurisdiction over the hospital or home at his office in Sacramento within 30 days by the patient, spouse, next of kin or guardian.

"When a written consent is filed, or if no objection is filed within the 30 days, the director of the department having jurisdiction over the hospital or home, if satisfied that the sterilization will not unduly endanger the patient's health and that it is a proper case for sterilization, may authorize the superintendent to proceed with the sterilization of the patient. The director may cause such examination of the patient and other inquiry to be made as he deems advisable before issuing the authorization to the superintendent.

"If a written objection is filed within 30 days by the patient, his

[\*\*\*\*15] [\*154] [\*\*767] [\*\*\*394] B. *Revision of the Guardianship-Conservatorship Law.*

During the 40-year period during which involuntary sterilization was permissible significant advances occurred both in understanding of the causes of mental retardation, and in public awareness that many developmentally disabled persons lead self-sufficient, fulfilling lives, and become loving, competent, and caring marriage partners and parents.<sup>13</sup> In 1978 the California Law Revision Commission submitted to the Legislature a draft of a new guardianship-conservatorship law which expressly denied the probate court jurisdiction to grant conservators the power to cause their wards and conservatees to be sterilized.<sup>14</sup> Affording

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spouse, next of kin, or guardian, and in those cases where the patient has no known relatives or guardian, the proposed sterilization shall not be authorized or performed until the director of the department having jurisdiction over the hospital or home has determined the matter. He shall make full inquiry into the case, and may hold a hearing at the institution at which hearing the patient shall be present, and the objecting party and others interested on behalf of the patient may be heard. If the decision of the director is that the patient shall not be sterilized, he shall so order and notify the superintendent, the patient and the objecting party. If the decision of the director is that the patient should be sterilized, he shall send notice of such decision to the patient, his known parents, spouse, adult children, and guardian, if any, and the objecting party, by registered mail to their last known address. Such notice shall further state that any such party has the right within 30 days to petition the superior court of the county in which the institution is situated or of the county of the patient's residence for a review of the decision.

"If such petition is filed in court within 30 days, and a true copy thereof is served upon the director of the department having jurisdiction over the hospital or home, the patient shall not be sterilized unless and until the court, after hearing, issues an order authorizing the sterilization of the patient in accordance with the provisions of this section. If such petition is not filed in court within 30 days, the director may authorize the superintendent to proceed with such sterilization. The sterilization of a patient in accordance with the provisions of this section, whether performed with or without the consent of the patient, shall be lawful and shall not render the department, its officers or employees, or any persons participating in the operation liable either civilly or criminally."

<sup>13</sup> See Katzman, *Parental Rights of the Mentally Retarded* (1981) 16 Colum. J.L. & Soc. Probs. 521.

<sup>14</sup> The commission was asked to study revision of the Guardianship-Conservatorship Law by Senate Concurrent Resolution No. 6 in 1972. (Stats. 1972 (Reg. Sess.) res. ch. 27, p. 3227.)

safeguards, rather than barring sterilization, was the basis for the proposal, however, and sterilization would have been available under this proposal if the conservatee were admitted to a state hospital. As proposed, [section 2356, subdivision \(d\)](#), read: "A ward or conservatee may be sterilized only as provided in [Section 7254 of the Welfare and Institutions Code](#)." The comment accompanying the section explained: "Subdivisions (b)-(d) are new and make clear that the [\*\*\*\*16] provisions of other codes relating to highly intrusive forms of medical treatment are the only provisions under which such treatment may be authorized for a ward or conservatee, *thus assuring that the procedural safeguards contained in those provisions will be applied*. Subdivision (d) is consistent with [Guardianship of Tulley](#), 83 Cal. App. 3d 698, 146 Cal. Rptr. 266 (1978) [\*155] and [Guardianship of Kemp](#), 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974)." (14 Cal. Law Revision Com. Rep. (1978) p. 725, italics added.)

Before enacting the new Guardianship-Conservatorship Law recommended by the Law Revision Commission, however, the Legislature repealed [Welfare and Institutions Code section 7254](#). That section, therefore, no [\*\*\*\*17] longer afforded authorization for the sterilization of mentally retarded wards or conservatees, even if they were admitted to state institutions and were afforded the procedural protections contemplated by the commission. The intent of the Legislature is clear. Neither the probate court, nor state hospital personnel were to retain authority to permit a nontherapeutic sterilization of a conservatee who is unable to personally consent to the procedure.<sup>15</sup>

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<sup>15</sup> [HN3 Section 1880](#) authorizes a judicial determination of inability to give informed consent, in which case the conservator is empowered to consent to medical treatment, except as provided in [section 2355](#): "If the court determines that there is no form of medical treatment for which the conservatee has the capacity to give an informed consent, the court shall (1) adjudge that the conservatee lacks the capacity to give informed consent for medical treatment and (2) by order give the conservator of the person the powers specified in [Section 2355](#). If an order is made under this section, the letters of conservatorship shall include a statement that the

[\*\*\*\*18] [\*\*768] [\*\*\*395] C. *The Lanterman Developmental Disabilities Services Act*.

In 1977, the Legislature, possibly concerned about the rising tide of criticism of compulsory sterilization,<sup>16</sup> and by then fully aware of the importance of providing services to developmentally disabled persons to assist them in remaining in noninstitutional settings, enacted the Lanterman Developmental Disabilities Services Act (LDDSA). ([Welf. & Inst. Code, § 4500 et seq.](#))

The LDDSA reflected a change in legislative attitude toward the mentally retarded, a change which found impetus [\*\*\*\*19] in the recommendation of the Study [\*156] Commission on Mental Retardation which reported to the Governor and Legislature in January 1965. The commission proposed a variety of state supported services for the retarded, including rehabilitation and educational services aimed at vocational training, and the creation of regional centers as a means by which services would be brought to the families of mentally retarded children to assist them in making "an appropriate lifetime plan." (See

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conservator has the powers specified in [Section 2355](#)."

[HN4 Section 2355](#) provides: "(a) If the conservatee has been adjudicated to lack the capacity to give informed consent for medical treatment, the conservator has the exclusive authority to give consent for such medical treatment to be performed on the conservatee as the conservator in good faith based on medical advice determines to be necessary and the conservator may require the conservatee to receive such medical treatment, whether or not the conservatee objects. In any such case, the consent of the conservator alone is sufficient and no person is liable because the medical treatment is performed upon the conservatee without the conservatee's consent. [para. ] (b) If prior to the establishment of the conservatorship the conservatee was an adherent of a religion whose tenets and practices call for reliance on prayer alone for healing, the treatment required by the conservator under the provisions of this section shall be by an accredited practitioner of that religion."

<sup>16</sup> For an overview of the course of changing knowledge and attitude, and introduction to the recent literature, see Note, *Procreation: A Choice for the Mentally Retarded* (1984) 23 Washburn L.J. 359. See also [Maxon v. Superior Court](#) (1982) 135 Cal. App. 3d 626 [185 Cal. Rptr. 516]; [Matter of A.W.](#) (Colo. 1981) 637 P.2d 366, 368; Ferster, *Eliminating the Unfit -- Is Sterilization the Answer?* (1966) 27 Ohio St. L.J. 591, 602.

Study Com. on Mental Retardation, *The Undeveloped Resource, A Plan for the Mentally Retarded in California* (1965) p. 46.)

The centers were to make community services accessible, provide special services where necessary, and provide home services for the "mildly retarded [who] may be enabled to live at home if they receive occasional visits from a public health nurse or homemaker . . . ." (*Id.*, at p. 53.)<sup>17</sup>

[\*\*\*\*20] The report also recommended that residential facilities be provided for mentally retarded persons who could not live independently, but were not in need of the services of a state hospital which then was the only public institution for the mentally retarded in California. (*Id.*, at pp. 70-71.) These facilities "would reflect a concern with these people as individuals and would make it possible for them to enter into community life insofar as they are able. It would also facilitate normal family and neighborly relationships, which are harder to achieve in a large institution." (*Id.*, at p. 74.) The study commission recommended further study of a proposal that sterilization be made available when necessary to achieve this purpose.

The Legislature undertook to implement the proposed reforms in a series of steps which culminated in the LDDSA. The California Mental Retardation Services Act of 1969 was enacted to restructure the provision of services to the mentally retarded which had been the responsibility of eight state agencies and numerous local programs. That act, former division 25 of the Health and Safety Code (commencing at former § 38000; Stats. 1969, ch. 1594, § [\*\*\*\*21] 1, p. 3234) provided for regional centers to be operated by private, nonprofit community [\*\*769] [\*\*\*396] and local agencies to provide services to the mentally retarded and

their families. It prohibited judicial commitment of persons who were not a danger to themselves or others to state hospitals on referral by a regional center, and authorized the regional centers to purchase out-of-hospital care for the mentally retarded.<sup>18</sup>

[\*\*\*\*22] [157] The final impetus for the LDDSA occurred in 1975 when federal legislation expanded the type of services to be afforded the developmentally disabled by states receiving federal funding for their programs. In that year Congress enacted the Developmental Disabilities Assistance and Bill of Rights Act (DDA) (Pub.L. No. 94-103), included in which was recognition of a right to "HN5 treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty." (42 U.S.C. § 6010(1) & (2).)<sup>19</sup>

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<sup>18</sup> The 1969 act was adopted after the Assembly Office of Research and the staff of the Assembly Ways and Means Committee, pursuant to Assemblyman Lanterman's request and House Resolution No. 372 (3 Assem. J. (1968 Reg. Sess.) p. 4548), had submitted "A Proposal to Reorganize California's Fragmented System of Services for the Mentally Retarded" to the Assembly Ways and Means Committee. That report made no mention of the recommended study of the state's experience with sterilization, and the procedure continued to be available to mentally retarded persons only if they were first committed to a state hospital.

<sup>19</sup> No California statute or regulation (Cal. Admin. Code, tit. 17, § 50501) other than HN6 Welfare and Institutions Code section 19352 presently defines "habilitation." In the context of services to be provided by the Department of Rehabilitation the term is defined as "those community-based services purchased or provided for adults with developmental disabilities to prepare them for competitive employment, to prepare and maintain them at their highest level of vocational functioning, or to prepare them for referral to vocational rehabilitation services." (§ 19352.) Although the Legislature declared that these services were to be provided "in order to guarantee the rights stated in Section 4502" (§ 19350), it is manifest from the context in which the term is used in Welfare and Institutions Code sections 4502, 4512, subdivision (b) ("social, personal, physical, or economic habilitation") (former § 19350 et seq.), and 4670, that "habilitation" comprehends services designed to maximize the human potential for the developmentally disabled even though he or she may never be employable.

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<sup>17</sup> The evolution of the regional center concept in California is described by three former staff members of the California State Council on Developmental Disabilities in their article: Myers et al., *Legislative Evolution of a Statewide Service System: California's Regional Centers for Developmentally Disabled Persons* (1983) 14 Rutgers L.J. 653.

[\*\*\*\*23] When the LDDSA was enacted in 1977 sterilization continued to be available under [Welfare and Institutions Code section 7254](#), the repeal of which did not become effective until January 1, 1980. (Stats. 1979, ch. 552, § 1, p. 1762; Stats. 1979, ch. 730, § 156.5, p. 2540.) Accordingly, the LDDSA contained no provision by which sterilization of a conservatee could be [\*158] included among the services provided by the regional centers to nonconsenting clients.

[HN8](#) Under the LDDSA, regional centers contract with the Department of Developmental Services to seek out and assist developmentally disabled persons within the service area for which they are responsible. <sup>20</sup> [\*\*\*397] Among the services

available to persons [\*\*770] within a regional center's service area are "preventive services" needed by persons identified as being at risk of parenting a developmentally disabled infant. ([Welf. & Inst. Code, § 4644](#).) The "preventive services" to be provided for such clients may include sterilization of consenting adults. <sup>21</sup> [\*\*\*\*25] If so, however, the section would authorize sterilization only on request of a client, and only for the purpose of avoiding a high risk of parenting a developmentally [\*\*\*\*24] disabled infant. Although Valerie might qualify, <sup>22</sup> she is incapable of requesting or consenting to that procedure, and the LDDSA includes no provision for request or

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665.) (See, *ante*, fn. 17.)

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The word is used repeatedly in the federal DDA and implementing regulations (see, e.g., [45 C.F.R. §§ 1386.4, 1386.30](#)), but is not defined there. In [Pennhurst State School v. Halderman \(1981\) 451 U.S. 1, 7](#), footnote 2 [[67 L. Ed. 2d 694, 701, 101 S. Ct. 1531](#)], the court paraphrased the explanation of the district court explaining: "There is a technical difference between 'treatment,' which applies to curable mental illness, and 'habilitation,' which consists of education and training for those, such as the mentally retarded, who are not ill." The district court's more comprehensive definition explains: "[HN7](#) 'Habilitation' is the term of art used to refer to that education, training and care required by retarded individuals to reach their maximum development." ( [Halderman v. Pennhurst State School & Hospital \(E.D. Pa. 1977\) 446 F. Supp. 1295, 1298](#), *affd.* in part & *revd.* in part [Halderman v. Pennhurst State Sch. & Hospital \(3d Cir. 1979\) 612 F.2d 84](#), *revd.* in part [Pennhurst State School v. Halderman \(1981\) 451 U.S. 1 \[67 L. Ed. 2d 694, 101 S. Ct. 1531\]](#).)

Although these courts note that the concept of habilitation differs from treatment, they and other courts use the terms interchangeably. (See, e.g., [Petition of Ackerman \(Ind. App. 1980\) 409 N.E.2d 1211, 1213, fn. 1](#).) Treatment, education, and training are underinclusive as used to describe the continuing process of habilitation during which, in addition to education, counseling, equipment, supervision, assistance with daily living, and other services are provided to enable the developmentally disabled person to function at his optimum level.

<sup>20</sup> By 1983 the state had achieved its goal of establishing a network of regional centers adequate to serve residents throughout the state. From the two centers serving 471 retarded clients at the outset of the program, the system has evolved into 21 regional centers serving 65,000 clients in active caseloads. The expanded definition of developmental disability has extended those services to persons with cerebral palsy, epilepsy, autism, and related conditions, as well as to the mentally retarded. (See Myers et al., *supra*, 14 Rutgers L.J. at p.

<sup>21</sup> [HN9 Welfare and Institutions Code section 4644](#) provides: "(a) In addition to any person eligible for initial intake or assessment services, regional centers may cause to be provided preventive services to any potential parent requesting these services. . . . It is the intent of the Legislature that preventive services shall be given equal priority with all other basic regional center services. These services shall, inasmuch as feasible, be provided by appropriate generic agencies, including, but not limited to, county departments of health, perinatal centers, and genetic centers. The department shall implement operating procedures to ensure that prevention activities are funded from regional center purchase of service funds only when funding for these services is unavailable from local generic agencies. In no case, shall regional center funds be used to supplant funds budgeted by any agency which has a responsibility to provide prevention services to the general public.

"(b) For purposes of this section, 'generic agency' means any agency which has a legal responsibility to serve all members of the general public and which is receiving public funds for providing such services."

<sup>22</sup> Were she able to give consent, Valerie might qualify for these services as a person having a high risk of parenting a developmentally disabled infant within the meaning of the statute. It has been suggested that a woman whose retardation is caused by the genetic defect manifested by Downs Syndrome has a 50 percent chance of bearing a child having the same condition, and if the father is similarly afflicted the probability nears 100 percent. (See [Matter of C.D.M. \(Alaska 1981\) 627 P.2d 607, 608](#).)

Downs Syndrome occurs in persons who have 47 chromosomes, rather than 46. The extra chromosome is a third No. 21 chromosome rather than the normal pair, from which the disorder takes the scientific name "trisomy." (See [In re Grady \(1981\) 85 N.J. 235 \[426 A.2d 467, 469, fn. 1\]](#), and sources cited.) The record in this case reflects no evidence of the cause of Valerie's retardation and, as noted above, no evidence that she is capable of conceiving.

consent by a conservator.

[\*159] [HN10](#) The regional center must also undertake activities necessary to the achievement of the goals of the individual program plan (IPP) [\*\*\*\*26] it devises for a client. Among these activities is "[program] coordination which may include securing, through purchase or referral, services specified in the person's plan, coordination of service programs, information collection and dissemination, and measurement of progress toward objectives contained in the person's plan." (*Welf. & Inst. Code*, § 4648, *subd. (a)*.)

The Legislature has given high priority to the provisions of services necessary to enable children to remain in the home of their parents when this is a preferred objective in an IPP. (*Welf. & Inst. Code*, § 4685.)

The regional center is also authorized to purchase out-of-home care for developmentally disabled clients in licensed community care facilities, or assist in placement and follow-along services for those individuals who cannot remain in the home of a parent or relative. (*Welf. & Inst. Code*, § 4648, *subd. (b)*.) It is the intent of the LDDSA that services for such clients continue to provide "an unbroken chain of experience, maximum personal growth and liberty," under "conditions of everyday life which are as close as possible to the norms and patterns of the mainstream of society." (*Welf. & Inst. Code*, [\*\*\*\*27] § 4830; see also § 4501.)

The legislative intent that developmentally disabled persons be assisted in achieving [\*\*\*398] their maximum developmental potential is express in the findings set forth in *Welfare and Institutions Code section 4501* which [\*\*771] explain that coordinated services are required to "insure that no gaps occur in communication or provision of services" and that "[services] should be planned and provided as part of a continuum . . . sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life." It is also express in the legislative statement of the

rights of the developmentally disabled to "[treatment] and habilitation services [to] foster the developmental potential of the person . . . provided with the least restrictive conditions necessary to achieve the purposes of treatment" (*Welf. & Inst. Code*, § 4502, *subd. (a)*) and in the right to "social interaction and participation in community activities . . . to physical exercise and recreational opportunities," and to be "free from . . . isolation." (*Welf. & Inst. Code*, § 4502, *subds. (f)-(h)*.) Finally, it [\*\*\*\*28] appears in the breadth of services which the LDDSA authorizes.<sup>23</sup>

[\*\*\*\*29] [\*160] Nonetheless, [HN12](#) neither the provision for preventive services nor any other provision of the LDDSA authorizes sterilization of nonconsenting persons even when necessary to achieve these goals, and the Legislature took no action to amend the LDDSA either in conjunction with the enactment of [section 2356, subdivision \(d\)](#) or once the repeal of [Welfare and Institutions Code section 7254](#) became effective. We conclude therefore that this legislation does not presently afford a mechanism by which sterilization of Valerie may be authorized.

III.

### *Constitutional Rights of the Developmentally Disabled*

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<sup>23</sup>In addition to those already noted, [HN11](#) subdivision (b) of *Welfare and Institutions Code section 4512* itemizes a variety of services within its definition of that term: "'Services for persons with developmental disabilities' means specialized services or special adaptations of generic services directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with such a disability, and includes, but is not limited to, diagnosis, evaluation, treatment, personal care, day care, domiciliary care, special living arrangements, physical, occupational, and speech therapy, training, education, sheltered employment, mental health services, recreation, counseling of the individual with such disability and of his family, protective and other social and sociolegal services, information and referral services, follow-along services, and transportation services necessary to assure delivery of services to persons with developmental disabilities."

**CA(2a) (2a)** Our conclusion regarding the present legislative scheme requires that we confront appellants' contention that the scheme is unconstitutional. Both appellants and counsel for Valerie pose the constitutional question in terms of the right of procreative choice. Appellants argue that subdivision (d) of section 2356 deprives Valerie of that right by precluding the only means of contraception realistically available to her, while counsel for Valerie contends that the legislation furthers that right by protecting her against sterilization forced upon her by the will of others. The [\*\*\*\*30] sad but irrefragable truth, however, is that Valerie is not now nor will she ever be competent to choose between bearing or not bearing children, or among methods of contraception. The question is whether she has a constitutional right to have these decisions made for her, in this case by her parents as conservators, in order to protect her interests in living the fullest and most rewarding life of which she is capable. At present her conservators may, on Valerie's behalf, elect that she not bear or rear children. As means of avoiding the severe psychological harm which assertedly would result from pregnancy, they may choose abortion should she become pregnant; they may arrange for any child Valerie might bear to be removed from her custody; and they may impose on her other methods of contraception, including isolation from members of the opposite sex. They are precluded from making, and Valerie from obtaining the advantage of, the one choice that may be best for her, and which is available to all women competent to [\*\*\*399] choose -- contraception through sterilization. We conclude that the present legislative scheme, which absolutely precludes the sterilization option, impermissibly [\*\*\*\*31] deprives [\*\*772] developmentally disabled persons of privacy and liberty interests protected [\*161] by the Fourteenth Amendment to the United States Constitution, and article I, section 1 of the California Constitution.

**CA(3) (3)** HN13 The right to marriage and procreation are now recognized as fundamental,

constitutionally protected interests. ( Loving v. Virginia (1967) 388 U.S. 1, 12 [18 L. Ed. 2d 1010, 1018, 87 S. Ct. 1817]; Skinner v. Oklahoma (1942) 316 U.S. 535, 541 [86 L. Ed. 1655, 1660, 62 S. Ct. 1110]; Perez v. Sharp (1948) 32 Cal.2d 711, 714 [198 P.2d 17]; People v. Pointer (1984) 151 Cal. App. 3d 1128, 1139 [199 Cal. Rptr. 357].) So too, is the right of a woman to choose not to bear children, and to implement that choice by use of contraceptive devices or medication, and, subject to reasonable restrictions, to terminate a pregnancy. These rights are aspects of the right of privacy which exists within the penumbra of the First Amendment to the United States Constitution ( Roe v. Wade (1973) 410 U.S. 113, 154 [35 L. Ed. 2d 147, 177, 93 S. Ct. 705]; Eisenstadt v. Baird (1972) 405 U.S. 438, 453 [31 L. Ed. 2d 349, 362, 92 S. Ct. 1029]; [\*\*\*\*32] Griswold v. Connecticut (1965) 381 U.S. 479, 485 [14 L. Ed. 2d 510, 515, 85 S. Ct. 1678]), and is express in section 1 of article I of the California Constitution which includes among the inalienable rights possessed by all persons in this state, that of "privacy." ( Committee to Defend Reproductive Rights v. Myers (1981) 29 Cal.3d 252, 262 [172 Cal. Rptr. 866, 625 P.2d 779, 20 A.L.R.4th 1118]; see also People v. Belous (1969) 71 Cal.2d 954, 963 [80 Cal. Rptr. 354, 458 P.2d 194]; Carey v. Population Services International (1977) 431 U.S. 678 [52 L. Ed. 2d 675, 97 S. Ct. 2010]; Planned Parenthood of Missouri v. Danforth (1976) 428 U.S. 52 [49 L. Ed. 2d 788, 96 S. Ct. 2831].) They are also within the concept of liberty protected against arbitrary restrictions by the Fourteenth Amendment.

Although the Supreme Court has not considered the precise question of the right to contraception in the context of an assertion that the right includes sterilization, HN14 that sterilization is encompassed within the right to privacy has been acknowledged in this state. ( Jessin v. County of Shasta (1969) 274 Cal. App. 2d 737, 748 [79 Cal. Rptr. 359, 35 A.L.R.3d [\*\*\*\*33] 1433].) Since Jessin was decided this court has affirmed the constitutional stature of the right of women to exercise procreative choice "as they see fit." (

[\*Committee to Defend Reproductive Rights v. Myers\*, \*supra\*, 29 Cal.3d 252, 263.\)](#) (410 U.S. at p. 153 [35 L. Ed. 2d at p. 177].)

**CA(2b) (2b)** In its enactment of [section 2356, subdivision \(d\)](#), and the omission of any provision in other legislation authorizing sterilization of incompetent developmentally disabled persons, the Legislature has denied incompetent women the procreative choice that is recognized as a fundamental, constitutionally protected right of all other adult women. We realize that election of the method of contraception to be utilized, or indeed whether to choose contraception at all, cannot realistically be deemed a "choice" available to **[\*162]** an incompetent since any election must of necessity be made on behalf of the incompetent by others. The interests of the incompetent which mandate recognition of procreative choice as an aspect of the fundamental right to privacy and liberty do not differ from the interests of women able to give voluntary consent to this procedure, however. That these interests include the individual's right to personal growth **[\*\*\*\*34]** and development is implicit in decisions of both the United States Supreme Court and this court.

In [Roe v. Wade, \*supra\*, 410 U.S. 113](#), the court concluded that [HN15](#) an unmarried woman's fundamental right not to bear children could be found within the right to privacy, whether the privacy right arises out of the penumbra of the First Amendment or the liberty right protected by the Fourteenth Amendment.<sup>24</sup> In so doing the court recognized **[\*\*\*400]** that this interest is not limited to the intimacy **[\*\*773]** of the marital relationship, but encompasses also the individual's right to determine the course of his or her future life. The court made reference to the impact denial of the right of procreative choice might have in causing a woman a "distressful life and future."

**[\*\*\*\*35] CA(4) (4)** The liberty interest which the court recognized as a substantive right protected against arbitrary deprivation by the due process clause of the Fourteenth Amendment includes the right of the individual "to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling [and] to pursue any livelihood or avocation . . . ." ([Allgeyer v. Louisiana \(1897\) 165 U.S. 578, 589 \[41 L. Ed. 832, 835, 17 S. Ct. 427\]](#); see also [Grosjean v. American Press Co. \(1936\) 297 U.S. 233, 244 \[80 L. Ed. 660, 665, 56 S. Ct. 444\]](#).) "Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling." ([Smith v. Texas \(1914\) 233 U.S. 630, 636 \[58 L. Ed. 1129, 1132, 34 S. Ct. 681\]](#).) "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. [HN16](#) Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except **[\*\*\*\*36]** for a proper governmental objective." ([Bolling v. Sharpe \(1954\) 347 U.S. 497, 499-500 \[98 L. Ed. 884, 887, 74 S. Ct. 693\]](#).)

**CA(2c) (2c)** Although denominated "habilitation" in the context of the developmentally disabled, the right in issue, one which we have no doubt is **[\*163]** entitled to constitutional protection, is the right of every citizen to have the personal liberty to develop, whether by education, training, labor, or simply fortuity, to his or her maximum economic, intellectual, and social level. That all persons may not seek to exercise this right in no way diminishes its importance. It lies at the core of the liberty interest protected by the [Fourteenth Amendment to the United States Constitution](#), and [article I, section 1 of the California Constitution](#).

An incompetent developmentally disabled woman

<sup>24</sup> Both Stewart, J., in his concurring opinion ([410 U.S. at p. 167 \[35 L. Ed. 2d at p. 193\]](#)) and Rehnquist, J., dissenting ([410 U.S. at p. 171 \[35 L. Ed. 2d at p. 196\]](#)) acknowledge the reliance of the majority on the substantive due process protection of the Fourteenth Amendment.

has no less interest in a satisfying or fulfilling life free from the burdens of an unwanted pregnancy than does her competent sister. Her interest in maximizing her opportunities for such a life through habilitation is recognized and given statutory protection by both the LDDSA and the DDA. If the state withholds from her the only safe and reliable method of contraception [\*\*\*\*37] suitable to her condition, it necessarily limits her opportunity for habilitation and thereby her freedom to pursue a fulfilling life.<sup>25</sup> Therefore, whether approached as an infringement of the right of privacy under the First Amendment or the privacy right that is found within the liberty protected by the Fourteenth Amendment, and whether analyzed under due process or equal protection principles, the issue is [\*\*\*401] whether withholding the option of sterilization as a method of contraception to this class of women is constitutionally permissible. [HN17](#) Because the rights involved are fundamental the permissibility of the restriction [\*\*774] must be justified by a "compelling state interest," and may be no broader than necessary to protect that interest. ( [Roe v. Wade, supra, 410 U.S. at p. 155 \[35 L. Ed. 2d at p. 178\].](#) )

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<sup>25</sup> Although specifics are lacking in this record, the impact of the restrictions necessarily placed upon sexually mature mentally retarded women in the effort to prevent pregnancy have been described elsewhere. (See, e.g., [In re Grady, supra, 426 A.2d 467](#) [dependable contraception a prerequisite to participation out of home in sheltered workshop or group home]; [Matter of C.D.M., supra, 627 P.2d 607](#) [controlled housing with maximum opportunity for personal independence and social interaction make it quite possible that woman would become pregnant]; [Matter of Guardianship of Eberhardy \(1981\) 102 Wis.2d 239 \[307 N.W.2d 881\]](#) [coeducational summer camp for retarded persons available but woman could become pregnant if not under total and complete supervision at all times].)

See also [Foy v. Greenblott \(1983\) 141 Cal. App. 3d 1 \[190 Cal. Rptr. 84\]](#), holding that the failure of mental health professionals to police the sexual conduct of a gravely disabled ([Welf. & Inst. Code, § 5008](#)) conservatee is not actionable since policing of patients in institutions would violate the patients' right to the least restrictive conditions and would interfere with the patients' individual autonomy including privacy and social interaction.

[\*\*\*\*38] [HN18](#)

The California Constitution accords similar protection. Article I, section 1, confirms the right not only to privacy, but to pursue happiness and enjoy liberty. [CA\(5\) \(5\)](#) The right of a woman to choose whether or not to bear a child and thus to control her social role and personal destiny, is a fundamental right protected by that provision. ( [Committee to Defend Reproductive Rights v. Myers, supra, 29 Cal.3d 252, 275.](#) ) Since the right to elect sterilization [\*\*164] as a method of contraception is generally available to adult women in this state, the restriction must be justified by a compelling state interest under either [article I, section 1](#), or under the equal protection guarantee of [article I, section 7, of the California Constitution](#). ( [Id., at pp. 276-277.](#) )<sup>26</sup> [HN19](#) Under equal protection analysis we must determine whether the state has a compelling interest in restricting access to sterilization for incompetent developmentally disabled adults, and, if so, whether banning all such sterilization is necessary to accomplish the state purpose. ( [Johnson v. Hamilton \(1975\) 15 Cal.3d 461, 466 \[125 Cal. Rptr. 129, 541 P.2d 881\].](#) ) Similarly, in assessing any restriction on [\*\*\*\*39] the exercise of a fundamental constitutional right, we must determine whether the state has a compelling interest that is within the police power of the state in regulating the subject, whether the regulation is necessary to accomplish that purpose, and if the restriction is narrowly drawn. ( [People v. Belous \(1969\) 71 Cal.2d 954, 964 \[80 Cal. Rptr. 354, 458 P.2d 194\].](#) )

[CA\(2d\) \(2d\)](#) Respondent suggests that the interest of the state in safeguarding the right of an incompetent *not* to be sterilized justifies barring all nontherapeutic sterilization of conservatees who are unable personally to consent. We do not doubt that

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<sup>26</sup> No suggestion is made here that the restriction is justified because the medical procedure poses a significant danger to the health of the patient. We need not consider, therefore, whether a lesser interest would meet the constitutional imperative. (Cf. [People v. Privitera \(1979\) 23 Cal.3d 697, 702 \[153 Cal. Rptr. 431, 591 P.2d 919, 5 A.L.R.4th 178\].](#) )

it is within the police power [\*\*\*\*40] of the state to enact legislation designed to protect the liberties of its residents. The inquiry does not end there, however, since the means selected are not simply protective of a liberty interest, but restrict the exercise of other fundamental rights by or on behalf of the incompetent. The state has not asserted an interest in protecting the right of the incompetent to bear children. Neither the "involuntary imposition" of other forms of contraception, nor abortion, has been banned. A conservator is permitted to exercise his or her own judgment as to the best interests of the conservatee in these matters, excepting only the election of sterilization as a means of preventing conception.

The state interest therefore must be in precluding the option of sterilization because it is in most cases an irreversible procedure. Necessarily implicit in the interest asserted by the state is an assumption that the conservatee may at some future time elect to bear children. While the prohibition of sterilization may be a reasonable means by which to protect some conservatees' right to procreative choice, here it sweeps too broadly for it extends to individuals who cannot make that choice [\*\*\*\*41] and will not be able to do so in the future. The restriction prohibits sterilization when this means of contraception is necessary to the conservatee's ability to exercise other fundamental rights, without fulfilling the stated purpose of protecting the [\*165] right of the conservatee to choose to bear children. That right has been taken from her both by nature which has rendered her incapable of making a voluntary choice, and by the state through the powers already conferred upon the conservator.

[\*\*\*402] Respondent argues that the ban is, nonetheless, necessary because past experience demonstrates that when the power to authorize sterilization of incompetents has been conferred on the judiciary it has been [\*\*775] subject to abuse. Again, however, the rationale fails since less restrictive alternatives to total prohibition are available in statutory and procedural safeguards as yet untried in this state. Respondent offers no

evidence of abuse in other jurisdictions in which the option has been made available.

The courts of several of our sister states share our view that sterilization may not be denied to incompetent women when necessary to their habilitation if [\*\*\*\*42] that determination is made in proceedings which accord safeguards adequate to prevent the abuses feared by respondent. Among the first to do so was the Supreme Court of Washington which, faced with the same conflicting interests, reviewed the factors to be considered in a decision to permit sterilization and suggested procedural safeguards appropriate to avoid abuse. Those procedures have since been accepted by courts in other states in which the judiciary had jurisdiction to authorize sterilization.

In [\*Matter of Guardianship of Hayes \(1980\) 93 Wn.2d 228 \[608 P.2d 635, 640-641\]\*](#), the Washington court concluded: "[In] the rare case sterilization may indeed be in the best interests of the retarded person. . . . However, the court must exercise care to protect the individual's right of privacy, and thereby not unnecessarily invade that right. Substantial medical evidence must be adduced, and the burden on the proponent of sterilization will be to show by clear, cogent and convincing evidence that such a procedure is in the best interest of the retarded person.

"Among the factors to be considered are the age and educability of the individual. For example, a child in her [\*\*\*\*43] early teens may be incapable at present of understanding the consequences of sexual activity, or exercising judgment in relations with the opposite sex, but may also have the potential to develop the required understanding and judgment through continued education and developmental programs.

"A related consideration is the potential of the individual as a parent. . . . [Many] retarded persons are capable of becoming good parents, and in only a fraction of cases is it likely that offspring would inherit a genetic form of mental retardation that would make parenting more difficult.

**[\*166]** "Another group of relevant factors involve the degree to which sterilization is medically indicated as the last and best resort for the individual. Can it be shown by clear, cogent and convincing evidence, for example, that other methods of birth control are inapplicable or unworkable?

". . . .

"The decision can only be made in a superior court proceeding in which (1) the incompetent individual is represented by a disinterested guardian ad litem, (2) the court has received independent advice based upon a comprehensive medical, psychological, and social evaluation of the individual, and **[\*\*\*\*44]** (3) to the greatest extent possible, the court has elicited and taken into account the view of the incompetent individual.

"Within this framework, the judge must first find by clear, cogent and convincing evidence that the individual is (1) incapable of making his or her own decision about sterilization, and (2) unlikely to develop sufficiently to make an informed judgment about sterilization in the foreseeable future.

"Next, it must be proved by clear, cogent and convincing evidence that there is a need for contraception. The judge must find that the individual is (1) physically capable of procreation, and (2) likely to engage in sexual activity at the present or in the near future under circumstances likely to result in pregnancy, and must find in addition that (3) the nature and extent of the individual's disability, as determined by empirical evidence and not solely on the basis of standardized tests, renders him or her permanently incapable of caring for a child, even with reasonable assistance.

" **[\*\*\*403]** Finally, there must be no alternative to sterilization. The judge must find by clear, cogent and convincing evidence (1) all less drastic contraceptive methods, including **[\*\*\*\*45]** supervision, education and training, have been proved unworkable or inapplicable, and (2) the proposed method of sterilization **[\*\*776]** entails

the least invasion of the body of the individual. In addition, it must be shown by clear, cogent and convincing evidence that (3) the current state of scientific and medical knowledge does not suggest either (a) that a reversible sterilization procedure or other less drastic contraceptive method will shortly be available, or (b) that science is on the threshold of an advance in the treatment of the individual's disability."

The Massachusetts Supreme Court, noting that denying the same right to procreative choice to persons whose disability makes them reliant on others as it extends to competent persons degrades the disabled, and therefore has construed that state's statute which prohibits sterilization except with the knowledgeable consent of the patient as permitting the consent to be given **[\*167]** through the court-approved substituted judgment of the parent or guardian. ( [\*Matter of Moe\* \(1982\) 385 Mass. 555 \[432 N.E.2d 712, 720\]](#).) Although decided as a matter of statutory construction, the court concluded in that opinion that **[\*\*\*\*46]** an incompetent's inability to choose "should not result in a loss of the person's constitutional interests. . . . To speak solely in terms of the 'best interests' of the ward, or of the State's interest, is to obscure the fundamental issue: Is the State to impose a solution on an incompetent based on external criteria, or is it to seek to protect and implement the individual's personal rights and integrity? We reject the former possibility. Each approach has its own difficulties, but the use of the doctrine of substituted judgment promotes best the interests of the individual, no matter how difficult the task involved may be." (*Ibid.*)

The New Jersey Supreme Court, rejecting an argument that absent statutory authority the court may not approve sterilization of an incompetent, has expressly recognized that an incompetent has the same constitutional right of privacy to choose whether or not to be sterilized as does a competent person, and has concluded that the court has inherent power to permit the procedure to be performed. "We do not pretend that the choice of

[the incompetent's] parents, her guardian *ad litem*, or a court is her own choice. But it is a genuine choice [\*\*\*\*47] nevertheless -- one designed to further the same interests she might pursue had she the ability to decide herself. We believe that having the choice made in her behalf produces a more just and compassionate result than leaving [her] with no way of exercising a constitutional right. Our Court should accept the responsibility of providing her with a choice to compensate for her inability to exercise personally an important constitutional right." ( *In re Grady, supra*, 426 A.2d at p. 481.) The Alaska Supreme Court reached a similar result, holding that as a court of general jurisdiction the Alaska Superior Court had the power as part of its *parens patriae* authority to entertain a petition by the guardian of an incompetent and to approve sterilization. ( *Matter of C.D.M., supra*, 627 P.2d 607.)<sup>27</sup>

[\*\*\*\*48] We do not suggest that the procedures adopted by these courts are the only or the best criteria and procedures adequate to simultaneously preserve the right of an incompetent person to bear children and to be free of intrusive medical and surgical procedures, while permitting the exercise by others of an incompetent's countervailing right not to bear children when the individual is incapable of personally exercising these rights. We note them by way of example as less drastic alternatives to [section 2356](#), subdivision [\*168] (d), under which sterilization is denied to all developmentally disabled persons who are unable [\*\*\*404] to consent regardless of the effect of that denial on the quality of their lives and their ability to develop their maximum human potential. In the absence of evidence that these and similar criteria and procedures adopted in other states have proven inadequate to prevent recurrence of past abuses, respondent [\*\*777] has failed to support the

argument that [section 2356, subdivision \(d\)](#), is necessary to or does in fact protect the rights of incompetent developmentally disabled persons.

True protection of procreative choice can be accomplished only [\*\*\*\*49] if the state permits the court-supervised substituted judgment of the conservator to be exercised on behalf of a conservatee who is unable to personally exercise this right. Limiting the exercise of that judgment by denying the right to effective contraception through sterilization to this class of conservatees denies them a right held not only by conservatees who are competent to consent, but by all other women. Respondent has demonstrated neither a compelling state interest in restricting this right nor a basis on which to conclude that the prohibition contained in [section 2356, subdivision \(d\)](#), is necessary to achieve the identified purpose of furthering the incompetent's right not to be sterilized.

Our conclusion that [section 2356, subdivision \(d\)](#), is constitutionally overbroad, and may not be invoked to deny the probate court authority to grant a conservator the power to consent to sterilization in those cases in which no less intrusive method of contraception is available to a severely retarded conservatee, does not open the way to unrestricted approval of applications for additional powers. Pending action by the Legislature to establish criteria and procedural protections [\*\*\*\*50] governing these applications the procedures governing approval of intrusive medical procedures set forth in [section 2357](#) should be adapted and applied. Those procedures are adequate to insure that the conservatee will receive independent representation, and that clear and convincing evidence of the necessity for the procedure will be introduced by the applicant as a prerequisite to judicial approval. In ruling on such applications the court should consider the criteria developed by the Washington Supreme Court in *In Matter of Guardianship of Hayes, supra*, 608 P.2d 635, 640-641, as well as any other relevant factors brought to the attention of the court by the parties and give

<sup>27</sup> See also *In re Penny N.* (1980) 120 N.H. 269 [414 A.2d 541, 543]; *Matter of Truesdell* (1983) 63 N.C. App. 258 [304 S.E.2d 793, 806]; *Wentzel v. Montgomery General Hosp., Inc.* (1982) 293 Md. 685 [447 A.2d 1244, 1253-1254]; *Matter of Terwilliger* (1982) 304 Pa. Super. 553 [450 A.2d 1376, 1382-1384].

approval only if the findings enumerated by that court have been made on the basis of clear and convincing evidence. In order to ensure that careful consideration is given to the determinative factors, and that meaningful appellate review may be accorded an order granting or denying an application for approval of the power to consent to sterilization of a conservatee the court should identify evidence on which it relies in support of those findings.

**[\*169]** CA(6) (6) The record in this case is inadequate to **[\*\*\*\*51]** establish that the trial court erred in denying the application by appellants. Inasmuch as the trial court believed that it lacked power to grant the application the record is devoid of any specification of the factors which the court found relevant, or any findings as to their existence. Nor would the evidence support an order granting the application. Although there is an implicit assumption by the parties and the trial court that Valerie may become pregnant, there is no evidence in this record that she is capable of conceiving. Even were we to accept this assumption arguendo there is no evidence that less intrusive methods of preventing conception are unavailable to Valerie. There is medical evidence that an intrauterine device is contraindicated in Valerie's case, but the only other evidence regarding alternative methods of birth control is the testimony of Valerie's mother that several years ago Valerie became ill and refused to ingest birth control pills. The record does not reveal whether more than one formulation of birth control pill was tried, <sup>28</sup> or whether **[\*\*\*405]** alternative methods of administering these contraceptive drugs are available and were considered. **[\*\*\*\*52]**

Even as to those intrusive medical procedures permitted after court authorization the Legislature

has required a judicial **[\*\*778]** determination that the condition of the conservatee "requires the recommended course of medical treatment." (§ 2357, subd. (h)(1).) Here there was neither a finding that sterilization is "required" nor evidence that would support such a finding. Under these circumstances the order of the trial court denying appellants petition was proper. <sup>29</sup>

**[\*\*\*\*53]** Inasmuch as there was neither evidence of necessity for contraception, nor sufficient evidence that less intrusive means of contraception are not presently available to Valerie, the judgment is affirmed. The affirmance is, however, without prejudice to a renewed application for additional powers at such time as appellants have available adequate supporting evidence.

**Concur by:** REYNOSO (In Part); LUCAS (In Part)

**Dissent by:** REYNOSO (In Part); LUCAS (In Part); BIRD

## Dissent

**REYNOSO, J.** I concur and dissent. I concur in the affirmance of the judgment. On this record Valerie should not be subjected to an operation.

**[\*170]** I dissent, based on much of the Chief Justice's analysis, from the majority's conclusion that the present statutory scheme denies the developmentally disabled the right of privacy. The Legislature, after study of the sad historical reality pertaining to sterilization of developmentally disabled, has decreed that those official actions cease. That was a prudent and constitutionally permitted legislative action.

**LUCAS, J.,** Concurring and Dissenting. I concur in the affirmance of the judgment, but I cannot join in the majority's analysis which leaves open

<sup>28</sup>Forty-nine oral contraceptives are identified in the 1984 Physicians' Desk Reference (38th ed. 1984) 214 (hereafter 1984 PDR), many of which vary both as to composition and strength. Manufacturers' information included in PDR also indicates that while nausea is an occasional side effect it is so during the initial cycle. (See, e.g., 1984 PDR, pp. 1428, 1490, 1845.)

<sup>29</sup>HN20 When a ruling or decision is correct the reasoning on which it is based is irrelevant. ( D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 19 [112 Cal. Rptr. 786, 520 P.2d 10]. )

the [\*\*\*\*54] possibility of Valerie N.'s sterilization, done in the name of her "habilitation."

Our opinion in *In re Hop* (1981) 29 Cal.3d 82 [171 Cal. Rptr. 721, 623 P.2d 282], affords an illuminating backdrop for this case. There, we considered a scheme under which nonobjecting mentally retarded persons incompetent to request hospital placement could "voluntarily" be so placed at the request of a person other than a duly authorized conservator or guardian. No judicial determination of disability or need for such placement was required. In the course of disapproving that procedure, we noted a contradiction inherent in the scheme: "Hop is presumed sufficiently *competent* to understand the need for her to object to her placement when it has been initiated by a third party, her mother. At the same time she is presumed *incompetent* to a degree which would prevent her from requesting admission or, once confined, obtaining unilaterally and without review her own release." ( *Id.*, at p. 90.)

The analytical fallacy we explored in *Hop* is echoed and expanded upon in the present case. The majority acknowledges that the incompetent is, by definition, unable to make a choice. Nonetheless, [\*\*\*\*55] it concludes that "she has a constitutional right to have these decisions made for her, in this case by her parents as conservators, in order to protect her interests in living the fullest and most rewarding life of which she is capable." (*Ante*, at p. 160.) However, while she has a constitutional right to have a "substituted choice" made on her behalf to effectuate her constitutional rights to be free of [\*\*\*406] her procreative capabilities in order to advance her right to habilitation, the former "right" is severely circumscribed by the assertion that there is no intention to "open the way to unrestricted approval of applications for additional powers" to enable sterilizations to take place. (*Ante*, at p. 168.) The sweeping terminology utilized to discern constitutional imperatives permitting [\*\*779] sterilization suddenly narrows when the significant

past abuses in this area are recalled. To that end the majority proposes adoption of an "adapted" version of *Probate Code section 2357*'s requirements to be applied in conjunction with the standards enunciated by the Washington Supreme [\*171] Court in *Matter of Guardianship of Hayes* (1980) 93 Wn.2d 228 [608 [\*\*\*\*56] P.2d 635, 640-641].

As the majority mentions, and the Chief Justice's dissent emphasizes, the history of sterilization of mentally incompetent persons is not one of which we should be proud. My colleagues refer to the "prevalent attitude, reflective of the limited knowledge of the nature of developmental disabilities then available." (*Ante*, at p. 152, fn. 8.) Many of those responsible for eugenic sterilizations acted in accord with those "prevalent" views and out of high personal and societal motives. Nonetheless, the extremes to which eugenics could be misapplied were more than amply demonstrated during World War II.

I find fundamentally problematic my colleagues' conclusion that there is a constitutional right to "substituted consent" in this context. The statutory scheme providing for habilitation *concededly* does not itself permit sterilization of persons such as Valerie. The majority nonetheless has transmuted the *process* of habilitation set forth in the applicable laws into a constitutional "right" which encompasses the "right" to be sterilized if one's conservator so elects. I worry whether the "rights" which we are "protecting" are in fact more likely to [\*\*\*\*57] become those of the incompetent's caretaker.

In *In re Hop, supra*, we expressly considered the argument that we should afford deference to those like Ms. Hop's mother who acted in the best interests of their charges. We responded: "In justifying disparate treatment of the developmentally disabled, we are unable to substitute for constitutional safeguards the admitted good intent both of the state and of those treating the developmentally disabled . . . ." (29 Cal.3d at p. 93.) Here, that "good intent" is used as a basis for

concluding that an incompetent has a constitutional right to sterilization which outweighs her rights to be free of intrusive medical procedures and to retain her procreative capacity.

It is especially interesting to take a closer look at the record which has produced the majority's exegesis on constitutional rights. Petitioner presented in support of the application for sterilization the briefest of written declarations by Valerie's pediatrician and a counselor specializing in working with developmentally disabled clients. Valerie's pediatrician, after observing that Valerie was mentally retarded apparently as a result of Down's syndrome, stated in relevant [\*\*\*\*58] part: "4. I am aware of the family's desire to have a tubal ligation performed on Valerie. This operation will permanently sterilize but not unisex [*sic*] the conservatee. [para. ] 5. In my opinion this procedure is advisable and medically appropriate in that a potential pregnancy would cause psychiatric harm to Valerie." That is the sum and substance of the doctor's evidence. Significant in this offering are his mention [\*172] of "the family's desire" to have the operation performed and the complete lack of information showing that as a pediatrician he had the training and the relevant information necessary to determine what might or might not affect Valerie's psychiatric well-being. I wonder what effect we would give a similar conclusory declaration by an obstetrician that a patient's broken leg would cause "psychiatric harm."

The next declaration was by a licensed counselor holding a master's degree in developmental psychology. The counselor specializes in "behavior management with [\*\*\*407] developmentally disabled clients" and has acted as a vendor providing services to clients connected with regional centers set up to serve the developmentally disabled. She [\*\*\*\*59] had worked with Valerie weekly for approximately one year ending about two years before the court hearing. The counselor declared that "From my numerous contacts with Valerie as well as her [\*\*780] family, I am of the opinion that a tubal ligation is an appropriate means

of guarding against pregnancy." Specifically she had observed "Valerie act affectionately" towards men and had worked with Valerie's family "on Valerie's problem concerning her inappropriate sexual attention to adult males." No specifics regarding the conduct involved are provided.

After reciting these factors, the counselor states "Because of the parents' fear of a pregnancy which might result from Valerie's inappropriate sexual advances, they have felt compelled to overly restrict her social activities. This close monitoring has severely hampered her from being able to form social relationships appropriate to her developmental level." The focus is on the *parents'* fears and the conclusion they have "overly restricted" Valerie's activities. No actual description of the supervision afforded Valerie or any alternatives available is given. Nor is there mention of whether there might be ways to modify the [\*\*\*\*60] parents' conduct if indeed they are "overly restrictive."

The declaration then concludes "It is my professional opinion that if Valerie were to become pregnant, the pregnancy itself would have severe psychologically damaging consequences to Valerie." Moreover, "[because] of Valerie's severe mental retardation there appears to be in my judgement [*sic*] no alternative birth control measures available to her which would guarantee that she would not become pregnant." As in the pediatrician's report, there is no specific basis given for the conclusion that Valerie would be psychologically harmed by pregnancy. If the harm is the same as that which would occur to any similarly disabled person, then the specter of wholesale sterilization of such persons looms more concrete. Indeed, there is absolutely nothing in the medical evidence presented that significantly differentiates Valerie's medical and psychological condition from that of any other severely developmentally disabled woman in similar circumstances.

[\*173] In addition to this information, Valerie's

mother and conservator testified at the hearing. She stated Valerie's social behavior was "not acceptable." Valerie [\*\*\*\*61] was not, to her knowledge, sexually active, "[but] she is very aggressive, very affectionate -- likes boys." Her conduct included hugging, kissing, climbing on men and wanting to sit on their laps.

As to training, behavior modification had been tried: "Shaking hands, you know, not being so aggressive." Valerie remained "aggressive." When Valerie was in her early teens, two kinds of birth control pills were tried, but she "rejected [them] and became ill." Therefore, according to Valerie's mother, the pediatrician recommended tubal ligation to avoid potential psychological and medical problems. Valerie had not cooperated in attempts to have a pelvic examination. Finally, when asked why sterilization of Valerie was sought, her mother stated "Because I do not wish her to become pregnant, but I would still like her to be able to broaden her social activities."

The above constitutes the relevant medical and psychological information presented to the court. After hearing argument, the trial judge stated that "I think, sterilization, from what I've heard, I think it is desirable and should be ordered." He concluded that "on the basis of what I've heard so far, I would rule sterilization [\*\*\*\*62] is in order except for the lack of jurisdiction." (See [Guardianship of Tulley \(1978\) 83 Cal. App. 3d 698 \[146 Cal. Rptr. 266\]; Prob. Code, § 2356, subd. \(d\).](#))

The point of my recitation of the facts adduced at the hearing and the trial judge's response is not to cast aspersions on the sincere beliefs and good intentions of those concerned with Valerie's welfare. Rather, [\*\*\*408] it is to demonstrate that on this skimpy and, I believe, totally inadequate record the trial court, but for clear restraints, would have ordered sterilization. Moreover, on this record the majority of this court has seen fit to posit a denial of constitutional rights. Consider the situation of other incompetents who might be deemed incapable [\*\*781] of making decisions

regarding sterilization, such as the mentally ill or juveniles. It is clear to me that any appellate court would consider the inadequacies of this record woefully apparent and find it an insufficient basis for concluding that sterilization should be authorized. The difference when we consider the case of the developmentally disabled arises in large part, I submit, because of societal attitudes, as well as the admittedly significant [\*\*\*\*63] problems which may be involved in their care. The difficulty, however, is that those responsible for the decision may be more willing, for the sake of convenience and relying upon the benevolence of those making the request, to allow such surgery. However, generalized "good intentions" simply are not enough to support the constitutional framework erected by the majority.

[\*174] My fear of the potential for abuse of the sterilization procedure is neither embroidered out of whole cloth, nor alleviated by the assertion that eugenics and convenience for the caretaker and society are now historic anomalies. The Chief Justice's citation to recent cases where, for example, parental consent was deemed adequate to permit sterilization demonstrates that the misuse of sterilization in such a way is still quite possible. (See *post*, at p. 177, fn. 5 (dis. opn. by Bird, C. J.)) Under the circumstances, I cannot conclude that the Legislature's determination that barring sterilization of those unable to consent to the procedure amounts to an unconstitutional invasion of an incompetent's rights.<sup>1</sup>

[\*\*\*\*64] Our purpose here is to consider whether [Probate Code section 2356, subdivision \(d\)](#), prohibiting sterilization of incompetents such as Valerie, is unconstitutional. I conclude that whether one uses a compelling state interest or rational basis test to measure this regulation, the Legislature had sufficient cause to act as it did. It may well have decided that in light of past history the risks of abuse for those incompetent to consent

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<sup>1</sup>Of course, sterilization necessitated by an incompetent's medical condition would be permissible under the present statutory scheme.

to sterilization were simply too great. It may therefore justifiably have determined that to allow an exercise of discretion in this arena by courts and those responsible for the care of the incompetent posed an unacceptable hazard. The approach selected is further supported by the fact that not only is the nature of the procedure contemplated such that it is irreversible, but also the interests of those concerned may be served by utilizing other available alternatives to avoid unwanted pregnancies.

In conclusion, I cannot join with the majority in finding that the Legislature's action amounted to an unconstitutional intrusion into the rights of Valerie N. or any similarly situated incompetent person. The Legislature may well have found a compelling [\*\*\*\*65] state interest in limiting the power of even the best-intentioned persons. The state of the record here, although found by the majority insufficient to support sterilization under the new standards enunciated, nonetheless serves only to heighten my concern that sterilization of persons such as Valerie will become pro forma commonplace occurrences even under the standards proposed. With that I cannot agree.

**BIRD, C. J.** I respectfully dissent.

Today's holding will permit the state, through the legal fiction of substituted consent, to deprive many women permanently of the right to conceive and bear children. The majority run roughshod over this fundamental constitutional right in a misguided [\*\*\*409] attempt to guarantee a right of procreative [\*175] choice for one they assume has never been capable of choice and never will be. Yet precisely because choice and consent are meaningless concepts when applied to such a person, the majority's invocation of the theory of procreative choice and the [\*\*782] fiction of substituted consent cannot withstand constitutional scrutiny.

The majority opinion opens the door to abusive sterilization practices which will serve [\*\*\*\*66] the convenience of conservators, parents, and

service providers rather than incompetent conservatees. The ugly history of sterilization abuse against developmentally disabled persons in the name of seemingly enlightened social policies counsels a different choice.

Fortunately, the Legislature has already made that choice. The state has a compelling interest in protecting the fundamental right of its citizens to bear children. The prohibition on sterilization of incompetent conservatees in [Probate Code section 2356, subdivision \(d\)](#) is necessary to effectuate that interest.<sup>1</sup> I would hold that [section 2356, subdivision \(d\)](#) is constitutional and, on that basis, affirm the judgment.

I.

The history of involuntary sterilization of incompetent, developmentally disabled individuals over the past 80 years is a history of wholesale violations of constitutional rights carried out with the approval of the highest judicial tribunals. [\*\*\*\*67] (See, e.g., [Buck v. Bell \(1927\) 274 U.S. 200 \[71 L. Ed. 1000, 47 S. Ct. 584\]](#).) In the first half of this century, approximately 60,000 people were subjected to compulsory sterilization in the United States. A disproportionate number of these operations was carried out in California -- nearly 20,000 between 1900 and 1960. (See State Council on Developmental Disabilities, Cal. Developmental Disabilities State Plan, 1984-1986, pp. 58-59 [hereafter *State Plan*].)<sup>2</sup>

This phenomenon was fueled by a widely held but incorrect belief that virtually all developmental disabilities were inherited and could be eliminated by preventing those affected from reproducing.<sup>3</sup>

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<sup>1</sup> All subsequent statutory references are to the Probate Code unless otherwise noted.

<sup>2</sup> Many of the compulsory sterilizations performed in this state were undertaken on the same rationale advocated by the majority in this case -- that sterilization was necessary in order to permit developmentally disabled persons unsupervised social contact with members of the opposite sex. ([State Plan, supra, at pp. 58-59.](#))

<sup>3</sup> This theory, known as "negative eugenics," was also applied to the

(Price & [\*\*\*\*68] Burt, *Sterilization, State Action, and the Concept of Consent* (1975) 1 L. & Psychology [\*176] Rev. 57, 61-62 [hereafter *The Concept of Consent*]; Burghdorf & Burghdorf, *The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons* (1977) 50 Temple L.Q. 995, 1007-1008 [hereafter *The Wicked Witch*].)

It is now recognized that many forms of mental retardation have no hereditary component, while in others heredity is but one of several contributing factors. ( [Matter of Guardianship of Hayes \(1980\) 93 Wn.2d 228 \[608 P.2d 635, 640\]](#); Brakel & Rock, *The Mentally Disabled and the Law* (rev. ed. 1971) p. 211 [hereafter *Brakel & Rock*]; Robitscher, *Eugenic Sterilization* (1973) pp. 113-116; Friedman, *The Rights of Mentally Retarded Persons* [\*\*\*\*69] (1976) pp. 115-117.) Eighty to ninety percent of mentally disabled children are born to normal parents. (Murdock, *Sterilization of the Retarded: A Problem or a Solution?* (1974) 62 Cal.L. Rev. 917, 926 [hereafter *Problem or Solution*].)

The majority scarcely acknowledge this shameful history. Instead, they quote at length and largely without comment from the statutes and decisions which made such abuses possible. When they do comment, it is to explain sympathetically that the legal justifications advanced during that period were merely expressions of "[the] prevalent attitude, reflective of the limited [\*\*\*410] knowledge of the nature of developmental disabilities then available . . . ." (Maj. opn., ante, at p. 152, fn. 8.) The extensive literature recording the scope of the abuses and the constitutional infirmities of the [\*\*783] statutes and decisions which permitted them is cavalierly ignored.<sup>4</sup>

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mentally ill and to persons convicted of certain types of crime. (See Note, *Eugenic Sterilization -- A Scientific Analysis* (1969) 46 Denver L.J. 631.)

<sup>4</sup>See, e.g., *Problem or Solution*, supra, 62 Cal.L. Rev. 917; *The Concept of Consent*, supra, at pages 62-65; Comment, *Sterilization of the Developmentally Disabled: Shedding Some Myth-Conceptions* (1981) 9 Fla.St. U. L. Rev. 599 [hereafter *Shedding Myth-*

[\*\*\*\*70] Most importantly, the majority fail to note that abuses continue to occur. For example, the North Carolina Court of Appeals recently permitted the involuntary sterilization of a 23-year-old woman on the grounds that she was mildly retarded and "had exhibited emotional immaturity, the absence of a sense of responsibility, a lack of patience with children, and continuous nightly adventures with boyfriends followed by daily sleep and bedrest. Such conduct and personality traits in addition to mental retardation," the court said, "clearly . . . show that respondent failed to meet any acceptable standard of fitness to care for a child by providing a reasonable domestic [\*177] environment." ( [Matter of Johnson \(1980\) 45 N.C. App. 649 \[263 S.E.2d 805, 809\]](#); see *Problem or Solution*, op. cit. supra, at pp. 928-932 [arguing against parental unfitness as a basis for sterilization of developmentally disabled persons on overbreadth and underinclusiveness grounds]; *Brakel & Rock*, op. cit. supra, p. 217; *The Concept of Consent*, op. cit. supra, at pp. 72-73.)<sup>5</sup>

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*Conceptions*]; Kindregan, *Sixty Years of Compulsory Eugenic Sterilization: "Three Generations of Imbeciles" and the Constitution of the United States* (1966) 43 Chi.-Kent L. Rev. 123; *The Wicked Witch*, op. cit. supra, 50 Temple L.Q. 995; Note, *In re Grady: The Mentally Retarded Individual's Right to Choose Sterilization* (1981) 6 Am. J. L. & Med. 559, 568-570 [hereafter *Right to Choose*]; Note, *Eugenic Sterilization -- A Scientific Analysis*, op. cit. supra, 46 Denver L.J. at page 642; [Maxon v. Superior Court \(1982\) 135 Cal. App. 3d 626, 632 \[185 Cal. Rptr. 516\]](#); [Matter of A. W. \(Colo. 1981\) 637 P.2d 366, 368-369.](#))

<sup>5</sup>This is not to suggest that contemporary sterilization abuse is attributable solely to compulsory sterilization statutes. (See, e.g., [Stump v. Sparkman \(1978\) 435 U.S. 349 \[55 L. Ed. 2d 331, 98 S. Ct. 1099\]](#) ["[somewhat] retarded" 15-year-old girl sterilized without her knowledge after judge approved her mother's petition to authorize the operation in an ex parte proceeding without notice to the daughter, appointment of a guardian ad litem, or hearing]; [Downs v. Sawtelle \(1st Cir. 1978\) 574 F.2d 1, 5-6](#) [21-year-old deaf-mute woman sterilized with consent of her spendthrift guardian by doctor whose report recommended the operation "'based 90% on this girl's low mentality involving poor judgment and her lack of restraint on sex appetite and its consequences.'"].)

As the Colorado Supreme Court has explained, "[consent] by parents to the sterilization of their mentally retarded offspring has a history of abuse which indicates that parents, at least in this limited context, cannot be presumed to have an identity of interest with their

[\*\*\*\*71] Of course, compulsory sterilization, initiated by the state, is not the issue in this case. As the majority note, California no longer has a compulsory sterilization statute. (See former [Welf. & Inst. Code, § 7254](#), repealed by Stats. 1979, ch. 730, § 156.5, p. 2540; maj. opn., ante, at p. 150.) However, the history of compulsory sterilization under such statutes provides the frame of reference for evaluating the constitutionality of the Legislature's ban on sterilization of incompetent conservatees. It is also useful in assessing the ostensibly "consensual" approaches which have been adopted in other states and which the majority adopt today.

As Professors Price and Burt have argued, the trend away from compulsory sterilization and toward sterilization on the basis of substituted consent obscures the fact that the issue remains one of state action threatening the fundamental right of procreation. "Forms of state control and intervention change and become so sophisticated, appealing, subtle, and delicate that modern governmental action seems to be less and less restricted by an ordinary application [\*\*\*411] of constitutional protections. For example, when government [\*\*\*\*72] intervention primarily took the form of institutionalization, particularly compulsory institutionalization, certain ideals of due process which had developed in the criminal law system could be brought to bear . . . to increase [\*\*784] the protection of the individual from arbitrary state action . . . .

". . . .

[\*178] "When a modern state determines to intervene, for example by means of . . . sterilization, it offers modern justifications. 'Positive eugenics' are no longer in vogue, but the intense competition for tax dollars has merely

replaced genetic considerations with fiscal and psychological ones. Where the Holmes[] statement, 'three generations of imbeciles are enough,' was sufficient to uphold the constitutionality of intervention by sterilization a half-century ago, we talk confidently in the compulsory 1970's about 'parenting,' of 'breaking the vicious cycle' of three generations of welfare clients. Beyond these justifications, there is an additional factor . . . : through adroit statutory change and through nonstatutory efforts to confer power to consent on persons other than the individual directly affected, the always thin line between involuntary and voluntary [\*\*\*\*73] action has been further attenuated to the point of disappearance." (*The Concept of Consent*, op. cit. supra, at pp. 59-60, fns. omitted.) Writing in 1975, Price and Burt predicted "a trend toward third-party consent to cover many transactions that would have been justified by pure state intervention at a time when such action was more palatable and available." (*Id.*, at p. 78.)

That prediction has been borne out in the intervening years. Courts in a number of jurisdictions without compulsory sterilization statutes or where such statutes had been repealed or were inapplicable under the circumstances of a particular case have permitted third persons to consent to sterilization of incompetent, developmentally disabled women. (See [Matter of Guardianship of Hayes](#), supra, 608 P.2d at pp. 638-641; [Matter of C. D. M. \(Alaska 1981\)](#) 627 P.2d 607, 610; [Matter of A. W.](#), supra, 637 P.2d at pp. 370-375; [Matter of Moe \(1982\)](#) 385 Mass. 555 [432 N.E.2d 712, 719-720]; [In re Grady \(1981\)](#) 85 N.J. 235 [426 A.2d 467, 480-481]; [Ruby v. Massey \(D. Conn. 1978\)](#) 452 F. Supp. 361, 368-369.)

Like the majority here, these courts have turned to the substituted consent device [\*\*\*\*74] after concluding that the right to be sterilized is an aspect of a constitutional right of procreative choice enjoyed equally by all persons, whether or not they are developmentally disabled. The justifications that have been advanced for applying both the

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children. The inconvenience of caring for the incompetent child coupled with fears of sexual promiscuity or exploitation may lead parents to seek a solution which infringes their offspring's fundamental procreative rights." ( [Matter of A. W.](#), supra, 637 P.2d at p. 370, fn. omitted.)

underlying constitutional theory of procreative choice and the doctrine of substituted consent to individuals who never were and never will be capable of choice cannot withstand critical scrutiny. Because the majority's use of the procreative choice theory presents the more fundamental problem, it will be addressed first. A detailed critique of the majority's use of the substituted consent doctrine will follow.

## II.

That the "right to have offspring" is a fundamental right was first recognized in *Skinner v. Oklahoma* (1942) 316 U.S. 535, 536 [86 L. Ed. 1655, 1657, 62 S. Ct. 1110]. That case involved Oklahoma's Habitual Criminal [\*179] Sterilization Act, which, with exceptions for certain white collar crimes, permitted sterilization for multiple convictions of felonies involving moral turpitude. The high court held the statute violated the equal protection clause as applied to a man who had been convicted once of [\*\*\*\*75] stealing chickens and twice of robbery.<sup>6</sup>

[\*\*\*412] None of the opinions in *Skinner* characterized the right to procreate as a right of choice or privacy.<sup>7</sup> Rather, the majority [\*\*785] referred to the right to bear and beget children as "a basic liberty" and as "one of the basic civil rights of man." ( *Id.*, at p. 541 [86 L. Ed. at p. 1660].) In a

concurring opinion, Justice Jackson observed [\*\*\*\*76] that involuntary sterilization implicated "the dignity and personality and natural powers of a minority . . . ." ( *Id.*, at p. 546 [86 L. Ed. at p. 1663].) In another concurring opinion, Chief Justice Stone spoke of involuntary sterilization as an invasion of the personal liberty of the individual. ( *Id.*, at p. 544 [86 L. Ed. at p. 1662].) <sup>8</sup>

[\*\*\*\*77] The terms employed by the *Skinner* opinions suggest that the interests implicated by sterilization are more primal than the retention of control over decisions in important areas of personal life. As one commentator has observed, "the great conceptual background for due process privacy law [is] bodily autonomy . . . . At present only the most powerless members of society appear to need to rely on the Constitution for such a basic right. The courts have . . . recognized individual liberty in things of the body as a touchstone." (Note, *Due Process Privacy and the Path of Progress* (1979) U. Ill. L.F. 469, 515 [hereafter *Due Process Privacy*]; *id.*, at pp. 504-505; see *Union Pacific R. Co. v. Botsford* (1891) 141 U.S. 250, 251-252 [35 L. Ed. 734, 737, 11 S. Ct. 1000] [common law right of personal injury plaintiff to be free of compulsory physical examination], cited in *Roe v. Wade* (1973) 410 U.S. 113, 152 [35 L. Ed. 2d 147, 176, 93 S. Ct. 705]; *Schmerber* [\*180] v. *California* (1966) 384 U.S. 757, 778-779 [16 L. Ed. 2d 908, 924, 86 S. Ct. 1826] (dis. opn. of Douglas, J.); *Breithaupt v. Abram* (1957) 352 U.S. 432, 441-442 [1 L. Ed. 2d [\*\*\*\*78] 448, 454, 77 S. Ct. 408] (dis. opn. of Warren, C. J.); *id.*, at pp. 443-444 [1 L. Ed. 2d at p. 455] (dis. opn. of Douglas, J.).)

Our own courts have recognized that the right to procreate has roots that go deeper than and do not

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<sup>6</sup>The court observed that "[the] power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear." ( *Skinner v. Oklahoma*, *supra*, 316 U.S. at p. 541 [86 L. Ed. at p. 1660].) *Skinner* has thus been described as "the leading instance in which a new star appears to have been added to the firmament of preferred freedoms primarily because of concerns about invidious discrimination and majoritarian domination." (Tribe, *American Constitutional Law* (1978) p. 1011.)

<sup>7</sup>The high court first referred to *Skinner* as a privacy case 23 years later when it struck down a statute forbidding use of contraceptives. ( *Griswold v. Connecticut* (1965) 381 U.S. 479, 485 [14 L. Ed. 2d 510, 515, 85 S. Ct. 1678]; see also *Eisenstadt v. Baird* (1972) 405 U.S. 438, 453-454 [31 L. Ed. 2d 349, 362-363, 92 S. Ct. 1029]; *San Antonio School District v. Rodriguez* (1973) 411 U.S. 1, 34, fn. 76 [36 L. Ed. 2d 16, 44, 93 S. Ct. 1278].)

<sup>8</sup>For one of the concurring justices, "the only facts which could justify so drastic a measure" would be proof of the inheritability of the individual's "socially injurious tendencies." ( *Skinner v. Oklahoma*, *supra*, 316 U.S. at p. 544 [86 L. Ed. at p. 1662] (conc. opn. of Stone, C. J.); see *id.*, at p. 546 [86 L. Ed. at pp. 1662-1663] (conc. opn. of Jackson, J.).)

depend upon a capacity for rational choice. "[The] preservation of one's *bodily reproductive functions* is a fundamental right, and the termination thereof constitutes a serious invasion of the sanctity of the person." ( [\*Guardianship of Tulley\* \(1978\) 83 Cal. App. 3d 698, 705 \[146 Cal. Rptr. 266\]](#), italics added.)

By contrast, sterilization, abortion, and contraception all necessarily involve the exercise of choice. Hence, restrictions or prohibitions on such choices implicate not only the fundamental right to procreate recognized in *Skinner* but also the right to *choose* not to procreate. The courts have invoked the constitutional right of privacy to strike down statutes which prohibit or unduly restrict access to contraceptive devices and information, abortion, and voluntary sterilization. The individual's right to make her own decision in this highly personal area was stressed. In [\*Eisenstadt v. Baird\*, supra, 405 U.S. 438](#), a contraception [\*\*\*\*79] case, the United States Supreme Court recast the right of privacy first recognized in *Skinner* as "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the *decision* whether to bear or beget a child." ( [\*Id.\*, at p. 453 \[31 L. Ed. 2d at p. 362\]](#), italics added and omitted.)

Other decisions have sounded the same theme. (See [\*Roe v. Wade\*, supra, 410 U.S. at p. 153 \[35 L. Ed. 2d at p. 177\]](#) [the right of privacy is "broad enough to encompass a [\*\*\*413] woman's decision whether or not to terminate her pregnancy"]; [\*Committee to Defend Reproductive Rights v. Myers\* \(1981\) 29 Cal.3d 252, 263 \[172 Cal. Rptr. 866, 625 P.2d 779, 20 A.L.R.4th 1118\]](#); [\*People v. Belous\* \(1969\) 71 Cal.2d 954, 963 \[80 Cal. Rptr. 354, 458 P.2d 194\]](#); [\*Jessin v. County of Shasta\* \(1969\) 274 Cal. App. 2d 737, 748 \[79 Cal. Rptr. 359, 35 A.L.R.3d 1433\]](#) [privacy [\*\*786] right to seek sterilization].) Even Justice Douglas, the author of the majority opinion in *Skinner*, later referred to the existence of a body of fundamental privacy rights safeguarding "freedom of *choice*" in [\*\*\*\*80] the basic *decisions* of one's life

respecting marriage, divorce, procreation, contraception, and the education and upbringing of children." ( [\*Doe v. Bolton\* \(1973\) 410 U.S. 179, 211 \[35 L. Ed. 2d 201, 187, 93 S. Ct. 1410\]](#) (conc. opn. of Douglas, J.), italics added.)

With regard to individuals competent to make such decisions, the recognition of a comprehensive right of procreative choice, linking the right to [\*\*181] procreate with the right to prevent procreation through sterilization or other less permanent means, was a positive and logical advance. Yet if applied unaltered to incompetent, developmentally disabled individuals, the concept of procreative choice obscures more than it clarifies.

The choice model creates a false impression of equivalence between the "decision" to procreate and the "decision" to be sterilized. On closer examination, it is apparent that only the right to be sterilized is necessarily premised on a capacity for rational, informed choice and decision. Sterilization, like abortion and the use of contraceptives, requires a conscious decision by someone aware of the significance of pregnancy and childbearing. Sterilization and abortion in particular, [\*\*\*\*81] as medical procedures, clearly take place only as the result of choices made by individuals aware of the consequences of their actions. By contrast, procreation is a natural function which can and often does occur without the exercise of a rational or knowing choice. This is true for both competent and incompetent individuals.

Thus, a constitutional theory which treats the right to *prevent* procreation as an aspect of a larger right of procreative choice is sensible, since the actions necessary to exercise the right require conscious choice and decision. On the other hand, the right to procreate is more than a byproduct of a right of choice. Its roots go deeper; they are *constitutional* in the physical sense, implicating the individual's rights to physical integrity and to retention of the biological capabilities with which he or she was born into this world. Hence, even in the case of a

mentally competent individual, it is somewhat illogical to treat the right to procreate solely as a matter of control over basic personal decisions. In the case of a permanently incompetent individual, such logic has no place whatsoever. (See [\*Matter of Storar\* \(1981\) 438 N.Y.S.2d 266 \[\\*\\*\\*\\*82\] \[420 N.E.2d 64, 71-73\]](#) [fundamental right to life paramount to right to decline medical treatment where terminally ill patient has never been competent to understand or make a reasoned decision about medical treatment].)

In their discussion of appellants' equal protection challenge, the majority disregard these differences between the right to procreate and the right to prevent procreation. By adopting the procreative choice model, they assume that, regardless of whether the woman is competent or incompetent, the sterilization decision requires the same choice between equally weighted competing interests. The majority conclude in essence that the state's interest in protecting a severely disabled woman's right to procreate is not sufficiently compelling to justify the denial of her right to be sterilized. This reasoning cannot withstand scrutiny.

Unlike the right to bear children, the right to be sterilized is a function of the capacity for rational choice, a capacity the incompetent, developmentally [\*182] disabled woman lacks. Thus, the balance between the two rights is not the same for an incompetent, developmentally disabled woman as it is for her competent, nondisabled [\*\*\*\*83] counterpart.

[\*\*\*414] In the case of an incompetent, severely disabled woman, the conditions upon which to premise a constitutional right to be sterilized are essentially nonexistent. By contrast, her right to procreate, which is not rooted in or dependent upon a capacity for informed decision, is undiminished. Indeed, it requires even greater protection due to her legally dependent status and limited capacity to defend her own rights. [\*\*787] In this context, the state's interest in prohibiting sterilization is a compelling one.

The majority also find a constitutional right to sterilization in Valerie's due process liberty interest in minimizing restrictions on her social interactions. (See maj. opn., *ante*, at pp. 161-163.) That conclusion is flawed by the absence of any showing that the restrictions are truly necessary and by the majority's failure to balance the deprivation of liberty resulting from such restrictions against the irreversible loss of her fundamental right to procreate if she is sterilized.

The majority concede the inadequacy of the evidence as to the nature and effects of the restrictions placed on Valerie's activities in the attempt to prevent [\*\*\*\*84] her becoming pregnant. However, relying on descriptions in other cases, they readily assume that unacceptable restrictions are "necessarily placed upon sexually mature mentally retarded women in the effort to prevent pregnancy . . . ." (Maj. opn., *ante*, at p. 163, fn. 25.)

In this case, the restrictions on Valerie's activities have been imposed by her parents rather than by the state. Nonetheless, it is essential to require a showing that the state has a compelling interest in preventing Valerie from becoming pregnant and that the restrictions are no broader than necessary to protect that interest. (See [\*Roe v. Wade\*, \*supra\*, 410 U.S. at p. 155 \[35 L. Ed. 2d at p. 178\]](#).) Only then may the right to "personal growth and development" be weighed against the right of procreation. This, the majority has not attempted to do.

If such an analysis were attempted, it would become clear that any unavoidable adverse impact of the sterilization ban on a developmentally disabled, incompetent conservatee's liberty interests is insufficient to justify the permanent deprivation of her right to procreate. This conclusion flows inexorably from a comparison of the intrusions on the two [\*\*\*\*85] rights. Sterilization results in a complete and irreversible deprivation of the right to

procreate.<sup>9</sup> **[\*183]** By contrast, any restriction on social activities that results from a ban on sterilization constitutes at most a partial deprivation of liberty.

The majority's failure to engage in a meaningful weighing of these interests is indicative of a basic problem with their analysis. In their effort to protect Valerie's rights of liberty and procreative "choice," they fail to seriously acknowledge her right to procreate. The majority make several unsupported assumptions which suggest **[\*\*\*\*86]** that they recognize Valerie's right to procreate for purposes of conceptual symmetry only. They do not regard it as a *real* right, entitled to meaningful protection.

For example, the majority assert without citation to any authority that Valerie's conservators may legally compel her to undergo an abortion or to surrender custody over any child she might bear. (Maj. opn., *ante*, at pp. 160-161; but see *id.*, at p. [150](#) & fn. 6; *The Concept of Consent*, *op. cit. supra*, at pp. 72-74.) Indeed, having incorrectly cast Valerie's fundamental right to procreate as a right of procreative *choice*, the majority summarily conclude that she will never have the right to bear children because she will never be competent. **[\*\*\*\*415]** That right has been taken from her both by nature which has rendered her incapable of making a voluntary choice, and by the state through the powers already conferred upon the conservator." (Maj. opn., *ante*, at p. 165.)

I strongly disagree. As explained above, the roots of the fundamental right to procreate go deeper. A woman should not be **[\*\*788]** stripped of that right by conditioning its recognition on her capacity to make informed choices.

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<sup>9</sup>Other methods of contraception do not irreversibly prevent procreation, nor do they require the surgical destruction of any biological capacity for a nonmedical purpose. Nothing in this opinion is intended to question the conservators' reasonable exercise of the power to select an appropriate form of contraception for Valerie. I agree with the majority that the unavailability of this option has not been sufficiently proven.

**[\*\*\*\*87]** In sum, the majority's constitutional analysis fails to give proper weight to the fundamental right to procreate. It also fails to acknowledge that the right to procreate has independent roots which, in contrast to the right to sterilization, are not linked to a capacity for decision and choice. Finally, the majority fail to weigh the impact of the irreversible deprivation of the right to procreate against the partial impairment of liberty which they cite to strike down [section 2356, subdivision \(d\)](#). When proper consideration is given to these questions, it is apparent that the statute's ban on sterilization, which applies only to incompetent, developmentally disabled conservatees, is constitutionally sound.

### **[\*184]** III.

The majority's use of the substituted consent doctrine to permit sterilization of an incompetent individual underscores and exacerbates the problems inherent in applying the constitutional "choice" model which forms the core of their analysis. Like the theory of procreative choice, substituted consent derives its legitimacy from the premise that the affected individual once possessed a capacity to make informed choices or will be able to do so at some point **[\*\*\*\*88]** in the future. Even so, the doctrine requires a court to engage in a questionable legal fiction. This departure from reality reaches its zenith when the third party deciding on a matter as vital as whether to undergo sterilization purports to stand in the shoes of a severely retarded adult who has since birth been incapable of making such choices.

In many situations, the law prohibits actions affecting an individual's rights without his or her informed consent. Courts developed the doctrine of substituted consent so that third persons could make decisions on behalf of incompetents in these situations. (E.g., Annot., Power of Court or Guardian to Make Noncharitable Gifts or Allowances Out of Funds of Incompetent Ward (1969) [24 A.L.R.3d 863](#); see generally [Superintendent of Belchertown v. Saikewicz \(1977\)](#)

[373 Mass. 728 \[370 N.E.2d 417, 431\].](#))

The substituted consent doctrine is often invoked to permit surgery on incompetent conservatees, since a surgical operation performed without consent is a battery. (See [§§ 2355, 2357](#); 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, §§ 199, 200, pp. 2485-2486.) On similar grounds, substituted consent is also employed to permit **[\*\*\*\*89]** consent by parents or guardians to surgery on minors. (See § 2353; 4 Witkin, *supra*, at p. 2486.) The familiarity of the doctrine in the surgery context explains why courts have so readily turned to it when confronted with a request to authorize the surgical sterilization of an incompetent, developmentally disabled individual. (See *Right to Choose, op. cit. supra*, at pp. 565-566.)

Substituted consent is problematic even in cases where the affected individual once possessed the capacity to make informed decisions. In the well-known Karen Quinlan case, a 22-year-old woman who had fallen into a permanent coma was living in a "non-cognitive, vegetative" state. ( [Matter of Quinlan \(1976\) 70 N.J. 10 \[355 A.2d 647, 664, 79 A.L.R.3d 205\]](#).) The New Jersey Supreme Court invoked the substituted consent doctrine to permit a parent and guardian, with the concurrence of other family members, attending physicians, and a medical ethics committee, to consent to the removal of life-support equipment. (*Id.*, at p. 671.)

The court held that the constitutional privacy right of the comatose woman included the right to decline physically invasive and seemingly pointless **[\*185] [\*\*\*\*90]** treatment.<sup>10</sup> **[\*\*\*416]** ( [Quinlan, supra, 355 A.2d at p. 664](#).) It concluded that this right could only be protected by permitting "the guardian and family of Karen to render their best judgment . . . **[\*\*789]** as to whether she would exercise it in these circumstances." (*Ibid.*)<sup>11</sup>

<sup>10</sup> The life-support apparatus included a respirator, a catheter, and a feeding tube.

<sup>11</sup> The opinion also suggests that the court considered *itself* to be capable of determining that Karen or any other lucid, competent

**[\*\*\*\*91]** Several constitutional scholars, while sympathizing with the plight of the Quinlan family, have questioned the court's constitutional analysis as well as its application of the substituted consent doctrine. Professor Tribe has observed that "[given] the supposedly vegetative state that alone justified the court's holding, attributing 'rights' to Karen at all was problematic; more realistically at stake were the desire of her anguished parents to be rid of their torment and the interest of society in freeing medical decision makers from blind adherence to a practice of keeping vegetating persons 'alive' simply out of a fear of prosecution. But to give *those* interests constitutional status even where the state interposes an objection in the interest of the child's life seems most troubling." (Tribe, American Constitutional Law, *op. cit. supra*, at pp. 936-937, fn. omitted.)

Focusing more specifically on the use of the substituted consent doctrine, Professor Kamisar has challenged the court's willingness to guess at what Karen Quinlan would want if she could decide for herself. "What the court is really saying, I believe, is that if Karen's constitutional right of privacy **[\*\*\*\*92]** includes a right to elect to die and she presently lacks the capacity to choose and we cannot discern from her previous statements how she as a particular individual would have chosen, we may *surmise* that she would have chosen to die because we *presume* that the great majority of those in her situation would so chose. . . . If, in the absence of hard evidence about a patient's wishes when actually put in a *Quinlan*-type situation, a court is to indulge in presumptions,

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adult would decide to disconnect life-support equipment from themselves under similar circumstances: "We have no doubt, in these unhappy circumstances, that if Karen were herself miraculously lucid for an interval (not altering the existing prognosis of the condition to which she would soon return) and perceptive of her irreversible condition, she could effectively decide upon discontinuance of the life-support apparatus, even if it meant the prospect of natural death." ([355 A.2d at p. 663](#).) The court also stated that a decision by the family to terminate the life-support measures "should be accepted by a society the overwhelming majority of whose members would, we think, in similar circumstances, exercise such a choice in the same way for themselves . . . ." (*Id.*, at p. 664.)

one would think that it would presume *just the opposite* of what it did in *Quinlan*." (Kamisar, *A Life Not (or No Longer) Worth Living: Are We Deciding the Issue Without Facing It?* (Nov. 10, 1977) Mitchell [\*186] Lecture delivered at the State University of Buffalo, quoted in *Due Process Privacy*, *op. cit.* [supra](#), at p. 518, fn. 238.)<sup>12</sup>

[\*\*\*\*93] [\*\*790] [\*\*\*417] If the substituted consent doctrine poses difficult problems in a case where the affected individual was once competent, those problems magnify tenfold in the case of an individual whose incompetency is lifelong. Yet,

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<sup>12</sup>The justification for presuming, as the majority do, that Valerie would choose to be sterilized is even weaker. Research has debunked the myth that retarded persons do not object to sterilization and suffer no adverse emotional effects from the loss of their procreative capacities. This myth was reflected in [Buck v. Bell](#), [supra](#), where Justice Holmes opined that the loss of procreative capacity through compulsory sterilization of developmentally disabled persons is "often not felt to be a sacrifice by those concerned." (274 U.S. at p. 207 [71 L. Ed. at p. 1002].)

An exhaustive survey of scientific literature on the subject supports the opposite conclusion. One of the reports covered by the survey revealed that, "of 50 sterilized retarded individuals discharged from Pacific State Hospital (California) between 1949 and 1958, . . . 68% disapproved of the operation, while only 20% clearly approved. Only 9% of the women approved, in contrast to 35% of the men." (Roos, *Psychological Impact of Sterilization on the Individual* (1975) 1 L. & Psychology Rev. 45, 50.)

The author of the survey, then the executive director of the National Association for Retarded Citizens, summarized his conclusions as follows: "Assumptions that mentally retarded persons are insensitive to the consequences of sterilization have been vitiated by recent studies. The psychological impact of sterilization on the mentally retarded is likely to be particularly damaging in those instances where the procedure is the result of coercion and when the retarded person has not previously had children. Existential anxieties commonly associated with mental retardation are likely to be seriously reinforced by coercive sterilization of those who have had no children. Common sources of these anxieties include low self-esteem, feelings of helplessness, and need to avoid failure, loneliness, concern over body integrity and the threat of death." (*Id.*, at p. 54.)

The mildly and moderately retarded individuals surveyed were admittedly more articulate than Valerie. However, counsel for respondent argue persuasively that these individuals' perceptions of the world are more likely to correspond to Valerie's than are those of a social worker, a conservator or even a parent.

the majority rely on just such cases to support their application of the doctrine. (Maj. opn., *ante*, at pp. 166-167; [Matter of Moe](#), [supra](#), 432 N.E.2d 712; [In re Grady](#), [supra](#), 426 A.2d 467.)

In *Grady*, the New Jersey Supreme Court relied on the substituted consent analysis of *Quinlan* to hold that the parents of a developmentally disabled, noninstitutionalized, 18-year-old woman could consent on her behalf to a sterilization operation. ([Grady](#), [supra](#), 426 A.2d at pp. 480-481.) Whatever merit there may have been in authorizing the exercise of substituted consent in *Quinlan*, its use in *Grady* was logically unsupportable. Indeed, *Grady* exemplifies the way in which substituted consent fosters the ascendancy of legal fiction over reality.

In *Quinlan*, the court stressed the strong bonds of "familial love" that had existed between Karen and her family when she still possessed normal mental capacities. (See [\*\*\*\*94] [Quinlan](#), [supra](#), 355 A.2d at p. 657.) It was precisely [\*187] the family's knowledge of Karen's way of thinking that the court believed would enable the family to determine the choice she would make if she were still capable of choosing. (See [id.](#), at p. 664.)

In *Grady*, however, as in this case, there was no basis for a similar assumption. Like Valerie, the daughter in *Grady* had never been capable of articulating choices. There was not the slightest bit of evidence regarding the ability of the parents to determine that their daughters would choose to be sterilized. Hence, "a decision by the parents [was] mere speculation, rather than an ascertainment of the incompetent's preferences based on prior observations and conversations, as in *Quinlan*." (*Right to Choose*, *op. cit.* [supra](#), at p. 584; see Note (1981) 12 Seton Hall L. Rev. 96, 110-111.)

Courts in several jurisdictions have recognized the absurdity of applying the substituted consent doctrine to individuals whose incompetence is the result of severe, lifelong developmental disability. In [Matter of Storar](#), [supra](#), 420 N.E.2d 64, the New

York Court of Appeals held that blood transfusions could not [\*\*\*\*95] be withheld from a severely retarded man suffering from a terminal illness. (*Id.*, at p. 73.)

The court acknowledged the right of a competent patient to refuse medical treatment. It also recognized that a third person might be permitted to make the decision for an incompetent patient under certain circumstances. However, the court emphasized that unlike Karen Quinlan, "John Storar was never competent at any time in his life. He was always totally incapable of understanding or making a reasoned decision about medical treatment. Thus it is unrealistic to attempt to determine whether he would want to continue potentially life prolonging treatment if he were competent. As one of the experts testified . . . , that would be similar to asking whether 'if it snowed all summer would it then be winter?'" (*Id.*, at pp. 72-73.) As a result, the court concluded that Storar's right to life took precedence over the right to refuse treatment which he would have had if he were competent. A judgment denying permission to continue the transfusions was reversed. (See *ibid.*)

Courts faced with requests to authorize sterilization have recognized the same [\*\*\*418] problem. In *Matter [\*\*\*\*96] of Guardianship of Eberhardy (1981) 102 Wis.2d 539 [307 N.W.2d 881]*, the Wisconsin Supreme Court criticized the *Grady* court's attempt to equate "a decision made by others with the choice of the person to be sterilized. It clearly is not a personal choice, and no [\*\*791] amount of legal legerdemain can make it so." (*Id.*, at p. 893.) In *In the Matter of Terwilliger (1982) 304 Pa. Super. 553 [450 A.2d 1376]*, the court reached a similar conclusion, noting that "if the trial court . . . determines that [the conservatee] lacks the ability to make [the] choice for herself, we do not [\*188] pretend that the choice of her guardian to consent to sterilization would be her own choice." (*Id.*, at p. 1381, fn. 1; see also *Ruby v. Massey*, *supra*, 452 F. Supp. at pp. 370-371, fn. 24; *Grady*, *supra*, 426 A.2d at p. 487 (conc. opn. of Handler, J.); *Superintendent of Belchertown v. Saikewicz*,

*supra*, 370 N.E.2d at p. 430; *In re Hop (1981) 29 Cal.3d 82, 90-91 [171 Cal. Rptr. 721]*; cf. *Farber v. Olkon (1953) 40 Cal.2d 503 [254 P.2d 520]*.)

Commentators have expressed stronger reservations. Professors Price and Burt have attacked the use [\*\*\*\*97] of substituted consent in the sterilization context as "nothing short of an extended conceit on the proposition of voluntariness. It is a fiction which authorizes the state to intervene because a party other than the subject provides the green light. Often that third party is the parent of the subject individual, but the doctrine is equally applicable when the third party is . . . a guardian ad litem[] or a conservator. By characterizing the transaction as 'consensual' rather than 'compulsory,' third-party consent allows the truly involuntary to be declared voluntary, thus bypassing constitutional, ethical, and moral questions, and avoiding the violation of taboos. Third-party consent is a miraculous creation of the law -- adroit, flexible, and useful in covering the unseemly reality of conflict with the patina of cooperation." (*The Concept of Consent*, *op. cit. supra*, at p. 58, fns. omitted.)

Other writers have stressed the inability of the third person to know the wishes of the incompetent individual. "While substituted parental consent may be legally and morally appropriate in circumstances with less potentially harmful results, parental consent in [the] non-therapeutic [\*\*\*\*98] sterilization context is less legitimate, for it may not be easily presumed that [a developmentally disabled] child, upon reaching majority, would choose sexual sterilization for him/herself." (*Shedding Myth-Conceptions*, *op. cit. supra*, at p. 635, fn. omitted.)

Still others have stressed the likelihood that the third party decisionmaker, the court and the incompetent person will have conflicting interests. "Judicial refusal to recognize substituted consent as a proper alternative to an incompetent's consent to sterilization is indicative of its inadequacies. A part of this reluctance may be due to a belief that a

parent's interests in the sterilization may not be consistent with the incompetent's best interests. For example, a parent seeking sterilization for the incompetent may be motivated by such concerns as illegitimate mentally deficient offspring, and the care and financial support of such offspring. These concerns, although considerable, do not reflect the personal welfare and interests of the incompetent in improving her condition through sterilization. In addition, substituted judgment leaves great discretion in the judiciary and could lead to inconsistent application." [\*\*\*\*99] (Note, *Addressing the Consent Issue Involved in the Sterilization [\*189] of Mentally Incompetent Females* (1979) 43 Albany L. Rev. 322, 328, fns. omitted.)

#### IV.

Notwithstanding all of the foregoing problems, courts in other jurisdictions have concluded that incompetent, developmentally disabled persons have a constitutional right to be sterilized, a right which can be vindicated only by giving to others the power to make this awesome decision.

For the reasons stated earlier in this opinion, the procreative choice model and the substituted consent device are ill-suited to the situation confronting this court. As [\*\*\*419] a result, the sister state decisions which rely on this approach fail to provide adequate protection for the incompetent, developmentally disabled person's fundamental right to procreate. (See *Hayes, supra*, 608 P.2d at pp. 640-641; *Grady, supra*, 426 A.2d at pp. 481-483; *In re Penny N.* (1980) 120 N.H. 269 [414 A.2d 541, 543]; *Matter of A. W., supra*, 637 P.2d at pp. 375-376; *Matter of C. D. M., supra*, 627 P.2d at pp. 612-613.)

[\*\*792] The majority patch together a test which combines the standards and procedural requirements set [\*\*\*\*100] forth in one of these decisions -- *Hayes* -- with those of *section 2357*. (See maj. opn., *ante*, at pp. 165-166, 168.)

Even the most cursory examination of *section 2357*

reveals that it is intended for application in entirely different circumstances and is ill-suited to the task. *Section 2357* was designed for decisions regarding treatment of medical conditions posing a threat to the life or health of an incompetent conservatee. Judicial authorization of a conservator's request for medical treatment is permitted only where, "[if] untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the *physical* health of the . . . conservatee." (*§ 2357, subd. (h)(2)*, italics added.) In Valerie's case, this prerequisite is nonexistent, since no one has even suggested that her capacity to procreate, assuming that she is in fact fertile, constitutes a threat to her physical health.

*Section 2357* does require the conservator to show what, if any, efforts have been made to obtain an informed consent from the conservatee. (*§ 2357, subd. (c)(6)*.) However, it does not require a finding that the conservatee's inability to make a decision [\*\*\*\*101] about treatment is permanent. (See *§ 2357, subd. (h)(3)*.) This omission is probably due to the fact that the section is designed for use in medical emergencies presenting a moderate degree of time urgency, a situation in which such a requirement would be inappropriate. Similarly, *section 2357* does not require a court to find that [\*190] a less drastic and irreversible alternative is unlikely to become available in the near future. In the sterilization context, that omission is shocking.

The *Hayes* standards remedy some of the more glaring deficiencies in *section 2357*. However, *Hayes* suffers from all the problems inherent in the application of the procreative choice model and the substituted consent device in this context. Moreover, it includes fitness for parenthood among its criteria. ( *Hayes, supra*, 608 P.2d at p. 640; accord *Grady, supra*, 426 A.2d at p. 483.) There is merit in respondent's argument that this criterion is inconsistent with the notion that the choice being made is the one the conservatee would make. Considering fitness for parenthood is also inconsistent with the goal of putting an incompetent

conservatee in the same position as normal [\*\*\*\*102] individuals, who are free to bear or beget children without reference to their fitness as parents. Employing parental fitness as a criterion may also be constitutionally impermissible on overbreadth and underinclusiveness grounds. (See *Problem or Solution*, *op. cit. supra*, at pp. 928-932; Note, *Developments in the Law -- The Constitution and the Family* (1980) 93 Harv. L. Rev. 1296, 1302-1313; *Right to Choose*, *op. cit. supra*, at p. 569, fn. 54.)

At least one of the other *Hayes* requirements conflicts with the theory of the majority opinion. The majority rest much of their constitutional analysis on Valerie's liberty interest in minimizing restrictions on her social interactions. Yet *Hayes* permits a trial court to authorize the sterilization of an incompetent, developmentally disabled woman only if it finds "by clear, cogent and convincing evidence" that "all less drastic contraceptive methods, including supervision . . . have been proved *unworkable* or *inapplicable*." ( *Hayes*, *supra*, 608 P.2d at p. 641, italics added.) The majority do not explain how this requirement, which they purport to adopt, can be squared with their theory that Valerie has a [\*\*\*\*103] liberty interest in being sterilized in order to be free of parental supervision.

[\*\*\*420] In sum, the majority compound the errors of their constitutional analysis with the adoption of an unsatisfactory patchwork of contradictory standards. I cannot subscribe to this careless exercise in judicial legislation, particularly where such a fundamental right is at stake.

V.

Respondent has demonstrated a compelling state interest in protecting an incompetent, developmentally disabled conservatee's fundamental right to procreate. Contrary to the majority's effort to merge this [\*\*793] right into a general right of procreative choice, the right to procreate has an independent foundation. For a permanently incompetent individual who is

incapable of making [\*191] choices about sterilization, the right to procreate must be regarded as paramount to any "right to be sterilized." The latter right, as a component of the right of procreative choice, is meaningful only in the case of an individual capable of making such choices.

The adverse impact of a sterilization ban on a developmentally disabled conservatee's liberty is also insufficient to justify jeopardizing her right to procreate. [\*\*\*\*104] Sterilization results in a complete and irrevocable deprivation of the right to procreate, while restrictions on an individual's activities resulting from a ban on sterilization constitute at most a partial deprivation of that individual's liberty.

The ban on sterilization of incompetent conservatees in [section 2356, subdivision \(d\)](#) is necessary to effectuate the state's compelling purpose of protecting the fundamental right to procreate. Manifestly, the legal fiction of substituted consent is inadequate to protect this fundamental right. Accordingly, I would hold that [section 2356, subdivision \(d\)](#) is constitutional.

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