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Abortion Law in South Carolina

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I. INTRODUCTION

Aroused by a national trend evident since 1959,[1] South Carolina has taken a giant step forward in the field of abortion law by legalizing therapeutic abortions in prescribed instances and under certain conditions.[2] Prior to January 29, 1970, when the law first took effect, all abortions committed in South Carolina were illegal, unless necessary to preserve life.[3] Now, and during the interval between that date and the present, those abortions performed in compliance with the conditions enumerated in the new law are legal. Thus, the change in South Carolina's abortion law is abrupt, particularly since this state has historically adhered closely to the more traditional common law standards in the area. The statutory and case law which evolved from the Anglo-Saxon traditions survive in South Carolina, and the new law must coexist with it. This may lead to some difficulty for a very basic reason: the old laws and the new law are products of different philosophies, different times, different movements. The old law was based on the common law concept that nature (in this case gestation) may not be interrupted through man's interference.[4] The new therapeutic abortion law is the result of a movement which professes that human intervention may be and is justified in some circumstances.[5] It has been argued that the old laws are the product of the nineteenth century

1. *See* Leavy & Charles, *California's New Therapeutic Abortion Act: An Analysis and Guide to Medical and Legal Procedure,* 15 U.C.L.A. L. REV. 1, 1-2 (1968). *See also* MODEL PENAL CODE §§ 207.11 (Tent. Draft No. 9, 1959), 230.3 (2) (Proposed Official Draft 1962).

2. Act of January 29, 1970, Statutes at Large No. 821 (codified at S. C. CODE ANN. §§ 16-87 to 16-89 (Supp. 1970)).

3. S. C. CODE ANN. §§ 16-82, -83 (1962).

4. Wells v. New England Mut. Life Ins. Co., 43 A. 126, 127, 191 Pa. 207, 208 (1899).

5. Comment, *Abortion Laws: A Constitutional Right to Abortion,* 49 N. C. L. REV. 487, 489 (1971).

6. Note, *Abortion Reform: History, Status, and Prognosis,* 21 CASE W. RES. L. REV. 521, 528 (1970).

tendency to legislate morals.[6] The modern trend in America has led to an increasing acceptance of abortion, "though many doctors and a majority of the public disapprove of the trend."[7] Thus, although disapproving of the trend, the majority does not desire to enforce moral judgments through law as was done in the past. The liberalized therapeutic abortion laws may not mark the end of the modern trend to erode the old criminal laws. There is currently a movement underway to challenge the validity of the new laws on the grounds that they invade a zone of privacy, i.e. marriage, family, and sex, in which a woman has the fundamental right to determine whether or not to bear children.[8]

Although the liberalized abortion laws have precipitated a storm of controversy, this study will abstain from considering the merits of the diverse moral and ethical questions which naturally arise. Recognizing that the controversy has evoked great interest in South Carolina as well as the nation, the scope of this article will be limited to 1) a survey of the law relating to abortion in this state, including the statutory and case law as it evolved prior to the introduction of the therapeutic abortion law, and 2) developments in federal courts which could affect the future status of abortion law in South Carolina and the rest of the nation.

II. Survey of South Carolina Abortion Law

Medicine and law differ over the significance of the term "abortion." Unlike their medical counterparts, lawyers and judges tend to equate "abortion" with "miscarriage." Technically, abortion is the termination of pregnancy "before the time that a living child may possibly be anticipated."[9] Miscarriage, on the other hand, is limited to pregnancies terminating between the 16th and 28th week.[10] The law has adopted the common meaning of the word abortion as being "simply a miscarriage, the premature delivery or expulsion of a human fetus before it is capable of sustaining life."[11] A common

7. *Legal Abortion: Who, Why and Where,* Time, Sept. 27, 1971, at p. 67.

8. *See, e.g.,* People v. Belous, 71 Cal. 2d 954, 458 P. 2d 194, 80 Cal. Rptr. 354 (1969).

9. 1 Am. Jur. 2d *Abortion* § 1 (1962).

10. B. S. Maloy, Medical Dictionary for Lawyers 480 (3rd ed. 1960).

11. Commonwealth v. Smith, 213 Mass. 563, 566, 100 N.E. 1010, 1011 (1913).

law misdemeanor,[12] abortion became a more serious criminal offense when it was willfully procured without justification or excuse.[13] South Carolina's statutes distinguish between two kinds of abortion. The first one reads as follows:

> *§16-82. Death resulting from abortion or attempted abortion.*—Any person who shall administer to any woman with child, prescribe for any such woman or suggest to or advise or procure her to take any medicine, substance, drug, or thing whatever or who shall use or employ or advise the use or employment of any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage, abortion or premature labor of any such woman, unless the same shall have been necessary to preserve her life or the life of such child, shall, in case the death of such child or of such woman results in whole or in part thereform, be deemed guilty of a felony and, upon conviction thereof, shall be punished by imprisonment in the Penitentiary for a term not more than twenty years nor less than five years. But no conviction shall be had under the provisions of this section upon the uncorroborated evidence of such woman.[14]

On initial inspection, it appears that this section encompasses those acts which are done with the intent of artifically inducing a miscarriage, with death resulting to either the woman or the child.[15] However, such an appearance here is misleading since the phrase, "in case the death of such child . . . results"[16] has been interpreted to limit the inclusive scope of the word "child."[17] A detailed examination of South Carolina case law interpreting the two criminal abortion statutes will follow a reproduction of the second crime as it appears in the South Carolina Code. It reads as follows:

> *§16-83. Abortion or attempted abortion not resulting in death.*—Any person who shall administer to any woman with child, prescribe, procure or provide for any such woman to take any medicine, drug, substance or thing whatever or shall use or employ or advise the use or employment of any instrument or other means of force whatever, with intent thereby to cause or produce the miscarriage, abortion or premature labor of any such woman, shall, upon conviction thereof, be punished by imprisonment in the Penitentiary for a term not more than five years or by fine of not more than five thousand dollars or by such fine and imprisonment both, at the discretion of the court. But no con-

12. 1 AM. JUR. 2d *Abortion* § 1 (1962).

13. Mississippi State Bd. of Health v. Johnson, 197 Miss. 417, 427-28, 19 So. 2d 445, 448 (1944).

14. S. C. CODE ANN. § 16-82 (1962).

15. S. C. CODE ANN. § 16-82 (1962).

16. S. C. CODE ANN. §§16-82 (1962).

17. *See* State v. Steadman, 214 S.C. 1, 51 S.E.2d 91 (1948).

> viction shall be had under the provisions of this section upon the uncorroborated evidence of such woman.[18]

Ostensibly, this second section makes the same acts described in the first section criminal and punishable to a lesser extent where death does not result to the woman or child. Like the first section, the second section is a felony.[19]

The leading case which interprets and distinguishes these two statutes is *State v. Steadman*.[20] That case began when the defendant was indicted under two sections of the 1942 South Carolina Code, those being the equivalent of the current sections 16-82 and 16-83, for allegedly performing an illegal abortion upon a woman. The indictment charged two counts, one on each section. The defendant claimed that the two sections provided for two separate and distinct crimes and that a verdict of not guilty should be directed under the first count, based on section 16-82, since no evidence was presented by the State to show that a child was killed. The trial court refused this motion and the jury found the defendant guilty on the first count. The South Carolina Supreme Court, per Chief Justice Baker, *held* that the State had failed to present any evidence that the woman upon whom the abortion was performed was quick with child, and, therefore, reversed the case, since a directed verdict was in order as to the first count, and remanded it for further consideration as to the second count, based on section 16-83.

In determining that an essential element of section 16-82 is that the woman must be quick with child, the court in this first *Steadman* case entered into a discussion of the crime as it existed at common law, before it was converted into a statutory offense. The court pointed out that at common law section 16-82 was not termed "abortion," and section 16-83 was not even a crime, so long as the pregnant woman assented to the act.[21] What distinguished the criminal act from the noncriminal act was the development of the fetus. If the act were committed after the embryo had advanced to such a state that it enjoyed a separate and independent existence, the mother having felt the child move, alive within her womb, then the

18. S. C. Code Ann. § 16-83 (1962).
19. S. C. Code Ann. § 16-11 (1962).
20. 214 S.C. 1, 51 S.E.2d 91.
21. *Id.* at 7, 51 S.E.2d at 93.

crime was committed.[22] Thus, the common law concept was that life commences for the fetus at the moment it first moves, rather than when conceived, or at some other moment prior to birth.[23] The court then traced this distinction down to the current South Carolina statutes. It found that the distinction between the two statutes rested on the common law theory.[24] In the statutory laws a more severe punishment is meted out when the abortion is performed on a woman quick with child. The reasoning behind this would be that it is more reprehensible to destroy that which has a life of its own, independent and separate from the mother, than to destroy that which has not exhibited any of the elements of life. With this in mind, the court found that the word "child" means different things in the two statutes.[25] In section 16-83, the crime with the lesser penalty, "child" refers to the embryo in the early stages of pregnancy, prior to quickening, which the court equates with "separate existence."[26] Relying on this interpretation, the court *held* that the State must present evidence of quickening before a conviction may be had under section 16-82, otherwise, an essential element of the crime will not have been satisfied.

It is worthwhile to note that the court in the first *Steadman* case refrained from stating that acts amounting to a violation of section 16-82 could be considered *a fortiori* also violative of section 16-83.[27] Such a determination would mean that one who committed an act falling within the description in section 16-82 could be convicted of violating section 16-83. The court did not say that "child," as the term appears in section 16-83, means the fetus during the entire gestation period, but only the embryo prior to quicking. This question was left undecided.[28]

One year later, the South Carolina Supreme Court had occasion to review the retrial of *State v. Steadman*.[29] In the first *Steadman* case, the court reversed the trial court's find-

22. *Id.*
23. *See* State v. Cooper, 22 N.J.L. 52, 51 Am. Dec. 248 (1849).
24. 214 S.C. 1, 8, 51 S.E.2d 91, 94.
25. *Id.*
26. *Id.* at 8, 51 S.E.2d at 94.
27. *Id.*
28. *See* State v. Hutto, 252 S.C. 36, 165 S.E.2d 72 (1968).
29. 216 S.C. 579, 59 S.E.2d 168 (1950), *cert. denied*, 340 U.S. 850 (1950), *rehearing denied* 340 U.S. 894 (1950).

ing that the defendant was guilty of violating the then equivalent of section 16-82 of the South Carolina Code. This result, as previously mentioned, was grounded upon the absence of evidence showing that the woman on whom the abortion had been performed was quick with child, i.e., that the child had a separate and independent existence.[30] At the second trial, the defendant was convicted for violating that section of the 1942 South Carolina Code which corresponds to our current section 16-83.[31] Mrs. Steadman appealed on various grounds including procedural challenges and the contention that the retrial had made her subject to double jeopardy. The Supreme Court, in a 3-2 decision, *held* that Mrs. Steadman had not been placed in double jeopardy when she was retried on the second count after obtaining reversal on the first count.[32]

In the second *Steadman* case, the court addressed itself to a controversial question of evidence. It began by stating the general rule that, in a trial for a particular offense, evidence of the commission of a similar, previous offense by the defendant is not admissible.[33] According to an exception adopted by the South Carolina Court, however, evidence of similar offenses, not too remote in time, is admissible in order to lay to rest any possibility that the abortion at issue was performed for reasons of the person's health.[34] Thus, the court *held* that the State could introduce evidence of similar past offenses, but only to prove the essential ingredient of criminal intent; the State has the burden of proving such intent by adequate and substantial evidence in a criminal abortion case.[35] The court added a caveat, however, by instructing that when the defendant denies having committed the act itself, rather than admitting the act and pleading lack of criminal intent, the trial court, upon timely request, should clearly instruct the jury that evidence of prior abortions or attempted abortions may only be used to determine the accused's intent.[36]

30. 214 S.C. 1, 51 S.E.2d 91.

31. S. C. CODE ANN. § 16-83 (1962).

32. 216 S.C. 579, 597, 59 S.E.2d 168, 177.

33. *See* 2 J.H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 302, 359 (3d ed. 1940).

34. 216 S. C. 579, 596-97, 59 S.E.2d 168, 176-77.

35. *See* State v. Sharpe, 138 S.C. 58, 135 S.E. 635 (1926).

36. 216 S.C. 579, 596-97, 59 S.E.2d 168, 176-77. *See also* State v. Doty, 167 Minn. 164, 165, 208 N.W. 760, 761 (1926). *See generally* 2 J.H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 302, 359 (3d ed. 1940).

The Supreme Court in the second *Steadman* case also decided that the trial court had not been in error when it would not allow the defense to elicit the name of the father of the unborn child from a prosecution witness. The court reasoned that there was no probative value to naming the father since the paternity of the child was not at issue.[37]

In the second *Steadman* case, the defense also contended that the conviction should be overturned since it relied on "the uncorroborated evidence"[38] of the woman upon whom the alleged abortion was performed.[39] The question of what kind of evidence satisfies the statutory requirement of corroboration of the woman's testimony had been raised in earlier cases. In *State v. Sharpe*[40] one of the defendants, having been convicted of performing an illegal abortion, contended on appeal that the evidence of the victim was uncorroborated. The South Carolina Supreme Court found there was sufficient corroboration afforded by the circumstances. The court said:

> It is not necessary, under the law, before conviction can be secured in cases of this kind, that some third party shall see the crimes committed. If this were the law, conviction would be a matter of almost utter impossibility. The corroboration may come from words or acts of the defendants, or from circumstances.[41]

The issue of corroboration was raised again in *State v. Parsons*.[42] In that case the defendant appealed from his conviction on several grounds which included the contention that the testimony of the woman upon whom the alleged operation was performed was not corroborated. The South Carolina Supreme Court rejected her claim and found corroboration. Citing an earlier case,[43] the court found the statute to be satisfied by " 'anything which tends to strengthen, add to, add weight, or credulity, or that which makes more certain.' "[44]

37. 216 S.C. 579, 599-600, 59 S.E.2d 168, 178-79.

38. S. C. CODE ANN. § 16-83 (1962). Note that S. C. CODE ANN. § 16-82 (1962) also requires some corroborating evidence other than the mere testimony of the woman upon whom the abortion is performed.

39. 216 S.C. 579, 600-01, 59 S.E.2d 168, 178-79.

40. 138 S.C. 58, 135 S.E. 635 (1926).

41. *Id.* at 73-74, 135 S.E. at 640.

42. 171 S.C. 449, 172 S.E. 424 (1934).

43. State v. Teal, 108 S.C. 455, 95 S.E. 69 (1918).

44. 171 S.C. 449, 453, 172 S.E. 424, 425. The South Carolina Supreme Court cited State v. Teal, 108 S.C. 455, 95 S.E. 69, 70 (1918) and State v. Sharpe, 138 S.C. 58, 135 S.E. 635 (1926) in support.

In the second *Steadman* case[45] the court elaborated on the question of what constitutes corroboration of the evidence of the woman upon whom the abortion was allegedly performed. The court stated that in such cases it isn't necessary that a third party actually witness the commission of the crime. Citing *State v. Sharpe,*[46] the court added that it is only necessary that some corroboration come from the words or acts of the defendants, or from the circumstances.[47]

In the first *Steadman* case[48] the court seemed to clearly distinguish section 16-82 from section 16-83.[49] The late Chief Justice Baker succinctly stated that Section 16-82 applies when the attempted or actual abortion is performed upon a woman who is quick with child, she or the child dying as a result. The crime with the lesser penalty, section 16-83, should apply in those cases "where a woman is aborted, or attempted to be aborted, in the early stages of pregnancy and prior to the time when it could be said that she was 'quick with child,' "[50] and the woman does not die. Thus, according to this passage, the element of quickening makes the two sections exclusive of each other, and it should follow that an allegation of the elements of section 16-82 would not be sufficient as an allegation of section 16-83 for indictment purposes. However, in *State* v. *Hutto* the very opposite was held to be the law.[51]

In the *Hutto* case the defendant was charged and indicted under section 16-82. At the close of the State's case, the defense sought a directed verdict of not guilty on the grounds that the prosecution had failed to show that the fetus had quickened. The State then moved to amend the indictment so that a violation of section 16-83 could be alleged. The trial court judge denied the defendant's motions and granted the State's motion to amend. The South Carolina Supreme Court, per Justice Lewis, interpreted the first *Steadman* case as holding that "proof of guilt under Section 16-82 necessarily established all elements essential to conviction under Section

45. 216 S.C. 579, 59 S.E.2d 168.

46. 138 S.C. 58, 73-74, 135 S.E.2d 635, 640.

47. 216 S.C. 579, 599-600, 59 S.E.2d 168, 178-79. The Court also cited State v. Parsons, 171 S.C. 449, 172 S.E. 424 (1934).

48. 214 S.C. 1, 51 S.E.2d 91.

49. *Id.* at 8-9, 51 S.E.2d 93-94.

50. *Id.* at 9, 51 S.E.2d at 94.

51. 252 S.C. 36, 165 S.E.2d 72 (1968).

16-83. . . ."[52] The court went on to say that the amendment added nothing new to the indictment and did not allege a new offense.[53] The court then noted that any objection that the defendant may have had to the inclusion of two separate offenses in one count was waived since not made before the swearing in of the jurors.[54] The court upheld the conviction.

In an effort to complete as much as possible of the survey of South Carolina abortion law outside of the new therapeutic abortion law,[55] some additional points should be noted. Although the substantive offense of abortion can be committed by one individual, South Carolina also recognizes conspiracy to commit abortion.[56] South Carolina law also provides for punishment of the woman in cases where she submits to any operation intended to induce a miscarriage or where she takes some drug or substance with that same intent. The applicable statute deems a violation to be a misdeameanor punishable by no more than two years imprisonment and/or a maximum fine of one thousand dollars. The statute clearly includes as violations those instances where the woman attempts to perform an abortion upon herself.[57]

In conclusion of the survey, it should be noted that the statute of limitations is two years for all prosecutions under sections 16-82, 16-83, and 16-84. The statute begins to run with the commission of the offense.[58]

With the introduction of its therapeutic abortion law,[59] South Carolina joined the national movement toward reform of existing abortion laws.[60] The South Carolina version of the therapeutic abortion exception allows a licensed physician to recommend or perform an abortion 1) where the woman's life

52. *Id.* at 41, 165 S.E.2d at 74.

53. *Id.* at 42, 165 S.E.2d at 74.

54. *Id. See* S. C. CODE ANN. § 17-409 (1962). *See also* State v. Redmond, 150 S.C. 452, 148 S.E. 474 (1929).

55. S. C. CODE ANN. §§ 16-87 to 16-89 (Supp. 1970).

56. *See* State v. Wells, 249 S.C. 249, 153 S.E.2d 904 (1967).

57. S. C. CODE ANN. § 16-84 (1962).

58. S. C. CODE ANN. § 16-86 (1962).

59. Act of January 29, 1970, Statutes at Large No. 821 (codified at S. C. CODE ANN. §§ 16-87 to 16-89 (Supp. 1970)).

60. *See* Leavy & Charles, *California's New Therapeutic Abortion Act: An Analysis and Guide to Medical and Legal Procedure,* 15 U.C.L.A. L. REV. 1, 1-2 (1968).

or mental or physical health is substantially threatened by the continued pregnancy, or 2) where it can be established that the child will likely be born with a severe mental or physical defect, or 3) where the pregnancy is the result of an alleged rape or an incestuous relationship, in either case, timely reported to local law enforcement authorities who must act in a designated manner.[61] One of these three circumstances must be attested to by "three doctors of medicine no one of whom shall be engaged in private practice with the other, one of whom shall be the person performing the miscarriage. . . ."[62] The written consent of the woman, or her guardian if she is a minor or an incompetent, must be obtained. Unless there is an emergency threatening the woman's life, the written consent of her husband must be obtained if she is living with him. The operation must be performed at a hospital licensed by the State Board of Health, and the doctor's certificate must be submitted to that hospital in advance of the planned operation unless there is an emergency.[63] In addition, the doctor who performs the operation must report it on a standard form to the State Director of Maternal and Child Health within seven days following the abortion.[64] The South Carolina law also provides that any private physician or private or non-governmental hospital may refuse to allow therapeutic abortions within its institutions without threat of liability.[65]

The effects of the new therapeutic abortion law in South Carolina are not as yet discernable. In contrast, the New York therapeutic abortion law has had enormous effects.[66] It is reported that 181,182 women obtained abortions in New York during the first year its new abortion law was in effect.[67] It must be remembered that there is no residency requirement for women wishing to avail themselves of the New York statute,[68] whereas in South Carolina, the woman must have been in the state continuously for ninety days immediately preceeding the abortion.[69] The New York law allows her

61. S. C. CODE ANN. § 16-87 (Supp. 1970).
62. S. C. CODE ANN. § 16-87 (Supp. 1970).
63. S. C. CODE ANN. § 16-87 (Supp. 1970).
64. S. C. CODE ANN. § 16-88 (Supp. 1970).
65. S. C. CODE ANN. § 16-89 (Supp. 1970).
66. N. Y. PENAL LAW § 125.05 (McKinney Supp. 1969).
67. Columbia Record, Oct. 15, 1971, at 5-A, col. 2.
68. N. Y. PENAL LAW § 125.05 (McKinney Supp. 1969).
69. S. C. CODE ANN. § 16-87 (Supp. 1970).

to obtain an abortion within the first twenty-four weeks of her pregnancy simply by obtaining the consent of a licensed physician.[70] The New York State Health Department has tentatively concluded that most women who have obtained abortions under their new law are white, under the age of twenty-five, and nonresidents.[71] Considering that South Carolina's therapeutic abortion is far from being as liberal as New York's, and that South Carolina requires ninety days continuous presence prior to the operation, it is doubtful that South Carolina will experience a tidal wave of legal abortions as New York has.

III. DEVELOPMENTS IN THE FEDERAL COURTS

In recent years, cases challenging the constitutionality of abortion statutes have been finding their way through the federal court system.[72] The first of such cases to reach the United States Supreme Court was *United States* v. *Vuitch*,[73] testing the constitutionality of a District of Columbia abortion statute.[74] The defendant had been indicted for procuring or producing an abortion on a woman. The District Court judge dismissed the indictment on the ground that the abortion statute was unconstitutionally vague.[75] The statute punishes those who procure, produce, or attempt to procure or produce an abortion on a woman, "unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine. . . ."[76] The District Court judge felt the words "as necessary for the preservation of the mother's life or health" were not precise enough to avoid improper limitations upon the physician's execution of his professional responsibilities and were so vague that they interfered with "the woman's right to avoid childbirth for any reason."[77] The Supreme Court *held* that the statute was not unconstitutionally vague

70. N. Y. PENAL LAW § 125.05 (McKinney Supp. 1971-1972).

71. Columbia Record, Oct 15, 1971, at 5-A, col. 2.

72. *See* United States v. Vuitch, 402 U.S. 62 (1971); Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971); Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970); Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970).

73. 402 U.S. 62 (1971).

74. D.C.C.E. § 22-201 (1967).

75. 305 F. Supp. 1032, 1034 (D.D.C. 1969).

76. D.C.C.E. § 22-201 (1967).

77. 305 F. Supp. 1032, 1034.

and reversed the dismissal of the indictment.[78] The Court, per Justice Black, found that the exception incorporated into the statute did not shift the burden of proof to the defendant to show that the abortion was "necessary for the preservation of the mother's life or health."[79] There is no presumption of guilt since the prosecution must prove the defendant falls outside the exception.[80] The Court also found that the term "health" had been interpreted in a prior case,[81] and that the defendant was sufficiently informed of the charge against him and, therefore, not deprived of due process.[82] Justice Black noted in closing that there were "other reasons" for dismissal of the indictment offered by the defendant in the lower court. Those arguments were based on *Griswold* v. *Connecticut*,[83] but the Court read the lower court's opinion as based on a void for vagueness concept and did not reach those arguments.[84]

The *Griswold* arguments are based on the theory that there is a "zone of privacy" protected by the Constitution, and further, that this protected area includes the "fundamental right of the woman to choose whether to bear children."[85] The Supreme Court may yet have occasion to inspect and consider those arguments as there are three federal cases at various states of appeal on the way to the Supreme Court.[86] All three of these cases adopt *dicta* from a California case, *People* v. *Belous*, which basically states that a woman has a right to choose whether to bear children during the early stages of pregnancy up until that point in time in the development of the fetus when the woman's right to choose gives way to the state's interest in preserving life.[87] In *Doe v. Scott*, a majority

78. 402 U.S. 62, 64.

79. D.C.C.E. § 22-201 (1967).

80. 402 U.S. 62, 70-71.

81. Doe v. Gen. Hosp. of the Dist. of Columbia, 313 F. Supp. 1170, 1174-75 (D.D.C. 1970).

82. 402 U.S. 62, 71-72.

83. 381 U.S. 479 (1965).

84. 402 U.S. 62, 72-73.

85. People v. Belous, 71 Cal. 2d 954, 963, 80 Cal. Rptr. 354, 359, 458 P.2d 194, 199 (1969).

86. Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971); Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970); Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970).

87. 71 Cal. 2d 954, 963-64, 80 Cal. Rptr. 354, 359-60, 458 P.2d 194, 199-200. *See also* Doe v. Scott, 321 F. Supp. 1385, 1391; Roe v. Wade, 314 F. Supp. 1217, 1222-23; Babbitz v. McCann, 310 F. Supp. 293, 301-02.

of a three judge panel *held* the statute in question unconstitutional in part since "during the early stages of pregnancy—at least during the first trimester—the state may not prohibit, restrict or otherwise limit women's access to abortion procedures performed by licensed physicians operating in licensed facilities."[88] In *Roe v. Wade* a three-judge court found that Texas abortion statutes interfered with the fundamental right of the woman to choose in the matter of abortion.[89] The panel of federal judges noted that the Texas laws "sweep far beyond any areas of compelling state interest."[90] The panel in *Roe* did recognize that the state had a legitimate concern over the "abortion of the 'quickened' fetus."[91] Similarly in *Babbitz* v. *McCann,* a three-judge panel *held* a Wisconsin abortion law unconstitutional.[92] That court balanced the relative interests of the state and the pregnant woman and *held* that:

> [A] woman's right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the state without a more compelling public necessity than is reflected in the statute in question. When measured against the claimed 'rights' of an embryo of four months or less, we hold that the mother's right transcends that of such an embryo.[93]

Whether the United States Supreme Court will accept these arguments and recognize such a protected status in women is unascertainable. The *Vuitch* decision gives little indication of the leanings of the Court since it was concerned there with other issues.[94] Moreover, the late Justices Black and Harlan, who participated in the *Vuitch* case, have been replaced by Justices Powell and Rehnquist. Thus, so drastic a change in the make-up of the Court renders it near impossible to predict the outcome of those cases concerning the constitutionality of state abortion statutes.

IV. CONCLUSION

If the United State Supreme Court adopts the protected status argument discussed previously,[95] the entire area of

88. 321 F. Supp. 1385, 1391.
89. 314 F. Supp. 1217, 1222.
90. *Id.* at 1223.
91. *Id.*
92. 310 F. Supp. 293, 301-02.
93. *Id.*
94. 402 U.S. 62.
95. 310 F. Supp. 293, 301-02.

abortion law will be overturned. In South Carolina our statutory law, including the therapeutic abortion statute,[96] and our case law would no longer be valid. If such were the case, a woman could choose to have an abortion without fear of breaking the law. Perhaps her choice would be limited to the early months of the pregnancy, in which case our South Carolina law could be preserved at least in part. Our law which makes it a crime to commit the act of abortion before quickening[97] would likely be invalid while the law addressed to abortions committed after quickening[98] might remain unaffected. The new therapeutic abortion exception would be invalid in any case.

If the Supreme Court turns down privacy arguments, South Carolina law will continue intact. If this does indeed occur, the distinction based on quickening will remain at the heart of South Carolina abortion law, and the therapeutic abortion exception will remain valid.

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96. S. C. CODE ANN. § 16-87 (Supp. 1970).
97. S. C. CODE ANN. § 16-83 (1962).
98. S. C. CODE ANN. § 16-82 (1962).