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Social Security and Public Welfare - Federal Assistance and State Cooperation, Statutes, and Regulations in General - Statute Disallowing Payment of Medicaid Funds for Therapeutic Abortions Held Invalid

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SOCIAL SECURITY AND PUBLIC WELFARE — FEDERAL ASSISTANCE AND STATE COOPERATION, STATUTES, AND REGULATIONS IN GENERAL — STATUTE DISALLOWING PAYMENT OF MEDICAID FUNDS FOR THERAPEUTIC ABORTIONS HELD INVALID.

Three pregnant, indigent females sought Medicaid and public assistance from the state of Pennsylvania in order to terminate their pregnancies.[1] In each case, a physician had certified that a medically necessary, but not life-saving, abortion was needed to preserve the mother's health.[2] Two Pennsylvania statutes which prohibited state medical assistance payments for medically necessary abortions, other than those necessary to save the life of the mother, prevented the plaintiffs from obtaining abortions.[3] As a

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1. Roe v. Casey, 464 F. Supp. 487, 489 (E.D. Pa. 1978). Additional plaintiffs included two physicians, Planned Parenthood of Southeastern Pennsylvania, Elizabeth Blackwell Health Center for Women, Women's Health Services, and Philadelphia Welfare Rights Organization. *Id.*

2. 464 F. Supp. at 490. Roe suffered constant abdominal pain from hyperemis gravidorum, a condition which was complicated by pregnancy and did not allow her to digest food. Moe, a 13-year-old, needed an abortion to preserve her health because her immature pelvis would make labor difficult and possibly cause internal injuries. Hawkins needed an abortion to avoid severe psychological damage. *Id.*

3. *Id.* Pennsylvania Public Act 16A, Appropriations Act of 1978, in pertinent part states:

> No money shall be disbursed from this appropriation [$395,540.00 to the Department of Welfare for Medical Assistance] to pay for, make reimbursement for, or otherwise to support the performance of any abortion except where the abortion is certified in writing by a physician to be necessary to save the life of the mother.

Id. at 491.

Pennsylvania Public Act 148 in pertinent part states:

> [N]o public funds shall be used to promote abortion, no abortion shall be subsidized by any state or local government agency unless there is filed with such agency a certificate signed by a physician stating that the abortion is necessary in order to save the life of the mother. . . .

PA. STAT. ANN. tit. 35, § 6607 (Purdon Supp. 1979).

result of this, the plaintiffs sought injunctive and declaratory relief pursuant to Title XIX of the Social Security Act.[4] The main issue presented was whether the Pennsylvania statutes preventing therapeutic abortions[5] deprived the plaintiffs of their rights under Title XIX.[6] The United States District Court of Pennsylvania *held* that Pennsylvania's prohibitions upon Medicaid funding for abortions other than those necessary to save the life of the mother deprived the plaintiffs of their right to receive reimbursement pursuant to Title XIX of the Social Security Act.[7] *Roe v. Casey,* 464 F. Supp. 487 (E.D. Pa. 1978).

The laws proscribing abortion or limiting abortion to those situations in which abortion is necessary to save the mother's life, are relatively new and were virtually unknown in ancient or common law eras.[8] During the Greek and Roman eras, abortion practices were unrestricted.[9] Ironically, during this time, the Hippocratic Oath, which prohibited abortion, was written.[10] Historians believe, however, that the oath had little influence on the attitudes of ancient physicians.[11] The influence of the Hippocratic Oath appeared in the English common law theory of quickening.[12] Abortion before quickening was not an indictable offense.[13] There was controversy, however, as to exactly what the penalty was for abortion of a quick-fetus.[14] Early American courts

4. 464 F. Supp. at 489. Title XIX of the Social Security Act is commonly referred to as the Medicaid Act. It was enacted for the purpose of assisting each state in providing medical assistance to those whose income and resources are insufficient to meet the costs of necessary medical services. *Id.* at 492-93.

5. *Id.* at 489. A therapeutic abortion is defined as an abortion "medically necessary or medically indicated according to the professional medical judgment of a licensed physician. . . exercised in light of all factors affecting the woman's health." Zbaraz v. Quern, 596 F.2d 196, 197-98 n.3 (7th Cir. 1979).

6. 464 F. Supp. at 489. The court noted substantial issues concerning the plaintiffs' rights under the first, fourth, ninth or fourteenth amendments but found that the constitutional issues need not be determined because the plaintiffs' federal statutory claim was dispositive of the action. *Id.* The court also stated that the named woman plaintiffs on their own behalf and on behalf of the class including all women had standing to assert their claims; the plaintiff doctors had standing to assert claims on their own behalf and on behalf of the doctor class; the health care providers had standing to assert the federal statutory claims, but not the claims of the class including all women; and Welfare Rights had standing to assert the federal statutory claims of its members. *Id.* at 498-99.

7. *Id.* at 489.

8. Roe v. Wade, 410 U.S. 113, 129 (1973).

9. *Id.* at 130.

10. *Id.* at 131. *See generally* L. EDELSTEIN, THE HIPPOCRATIC OATH 6 (1943).

11. 410 U.S. at 132.

12. *Id.* The common law concept of quickening was defined as the "first recognizable movement of the fetus *in utero,* appearing usually from the 16th to the 18th week of pregnancy. . . . " *Id.* (citing DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1261 (24th ed. 1965)).

13. 410 U.S. at 132.

14. *Id.* at 134. English jurist, Sir Edward Coke, believed the abortion of a child after quickening to be a misprision, but not murder. *Id.* at 135. Misprision, derived from the English common law, was translated by early American courts to mean misdemeanor. *Id.* at 136. Recently, however, it has been argued that post-quickening abortion was never established as a common law crime. *Id.* at 135. *See generally* Note, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth Amendment Right about to Arise from the Nineteenth Centrury Legislative Ashes of a Fourteenth-Century Common-Law Liberty*? 17 N.Y.L.F. 335 (1971).

interpreted English common law as dictating that abortion of a quick fetus was a misdemeanor.[15] During the 19th century, legislation was enacted by the states which placed more stringent penalties on those seeking or soliciting abortions.[16] Generally, the new laws made abortion of the quick fetus second degree manslaughter, while abortion of the fetus before quickening was a misdemeanor.[17] The new legislation also recognized therapeutic abortion, if necessary to save the mother's life.[18] By the 1950's, American statutory law had evolved to a point where all abortions were banned unless necessary to save the life of the mother.[19]

The criminal abortion statutes were tested in the early 1970's, commencing with *Roe v. Wade.*[20] In *Roe,* an unmarried pregnant woman was prevented from terminating her pregnancy by a state statute[21] which proscribed abortions unless necessary to save the life of the mother.[22] The state maintained that it had an interest in insuring maximum safety regarding the health of the mother and that it may assert "interests beyond the protection of the pregnant woman alone"[23] when potential life was involved. The Supreme Court found that the state had a legitimate interest in protecting the

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15. 410 U.S. at 136.
16. *Id.* at 138.
17. *Id.*
18. *Id.*
19. *Id.* at 139.
20. *Id.* at 113.
21. *Id.* at 117. Articles 1191-94 and 1196 of the Texas Penal Code provide as follows:

> 1. Article 1191. Abortion
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> If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.
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> Art. 1192. Furnishing the means
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> Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.
>
> Art. 1193. Attempt at abortion
>
> If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.
>
> Art. 1194. Murder in producing abortion
>
> If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.
>
> Art. 1196. By medical advice
>
> Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

TEXAS PENAL CODE ANN. tit. 15, § 1191-1194, 1196 (Vernon 1907) (transferred to TEX. REV. CIV. STAT. ANN., art. 4512.1-4512.4 (1973)).

22. 410 U.S. at 120.
23. *Id.* at 150.

health of the mother which must be balanced against the mother's right to privacy.[24] Thus, the Supreme Court held that the woman's right to privacy included the right to terminate her pregnancy, but such a right was limited by the state's interest in protecting the potential life of the fetus.[25]

Following *Roe v. Wade,* the United States Supreme Court was presented with the question of whether Title XIX of the Social Security Act required participating states to fund the cost of nontherapeutic abortions in *Beal v. Doe.*[26] The respondents in *Beal* contended that Pennsylvania's law, which did not provide Medicaid funding for nontherapeutic abortions, was unreasonable because abortion was economically and medically necessary for those who applied for the aid.[27] The Supreme Court stated that Title XIX did not refer to any particular medical procedure, but required states to provide financial assistance with respect to five broad categories of medical treatment.[28] As such, a state plan which failed to provide assistance for unnecessary, though desirable, medical assistance was not inconsistent with Title XIX.[29] Therefore, recognizing the state's important and legitimate interest

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24. *Id.* at 162.

25. *Id.* at 164-65.

26. 432 U.S. 438 (1977).

27. Beal v. Doe, 432 U.S. 438, 445 (1977). The respondents argued that abortions were generally less expensive than childbirth. Further, if an indigent female was forced to give birth because she was refused aid, the state would eventually bear a greater financial burden in giving aid to the woman for child support. The respondents also argued that an early abortion is of less risk to the woman than childbirth. Thus, the state, by rejecting such argument, was not applying the ordinary health and economic considerations which usually support the reasonableness of state limitations on financing of unnecessary medical services. *Id.*

28. *Id.* at 444. The five broad categories of medical treatment are found in section 1396d of 42 U.S.C., which states in part:

> (a) The term "medical assistance" means payment of part or all of the cost of the following care and services. . . for individuals, and, with respect to physicians' or dentists' services, at the option of the State, to individuals. . . not receiving aid or assistance under any plan of the State. . . .
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> . . . . .
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> . . . but whose income and resources are insufficient to meet all of such cost [shall be entitled to part or full payment of the following:]
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> (1) inpatient hospital services. . .
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> (2) (A) outpatient hospital services. . . .
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> (3) other laboratory and X-ray services;
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> (4) (A) skilled nursing facility services. . .
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> for individuals 21 years of age or older (B) effective July 1, 1969, such early and periodic screening and diagnosis of individuals who are eligible under the plan and are under the age of 21 to ascertain their physical or mental defects, and such health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby, as may be provided in regulations of the Secretary; and (C) family planning services and supplies furnished (directly or under arrangements with others) to individuals of childbearing age (including minors who can be considered sexually active) who are eligible under the State plan and who desire such services and supplies; (5) physicians' services furnished by a physician. . . whether furnished in the office, the patient's home, a hospital, or a skilled nursing facility, or elsewhere.

42 U.S.C. § 1396d (1976).

29. 432 U.S. at 447.

in protecting the potentiality of life, the Supreme Court held that Title XIX of the Social Security law did not require states participating in the Medicaid assistance program to fund the cost of nontherapeutic abortions.[30]

The decision not to require the funding of nontherapeutic abortions was based, in part, on the Supreme Court's interpretation of the Social Security Act, commonly referred to as Medicaid.[31] The Medicaid program was enacted for the purpose of enabling each state to furnish, as far as practical, medical assistance on behalf of certain persons whose income and resources are insufficient to meet the costs of necessary medical services.[32] Medicaid is a joint venture between the state and federal government, with the state solely responsible for the administration of the program.[33] Once a state participates in the Medicaid program, it must comply with federal statutes and regulations in order to remain eligible for funds.[34] Within the Medicaid program, the qualifying state must reimburse those eligible to receive

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30. *Id.*

31. *Id.* at 444-45. Social Security Act of 1965, Pub. L. No. 89-97, § 121(a), 79 Stat. 343 (codified at 42 U.S.C. §§ 1396 to 1396k (1965)).

32. Roe v. Casey, 464 F. Supp. 487, 493 (E.D. Pa. 1978). Section 1396 of 42 U.S.C., or Title XIX of the Social Security Act (commonly referred to as Medicaid), states as follows:

> For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services. . . there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary of Health, Education and Welfare, State plans for medical assistance.

42 U.S.C. § 1396 (1976).

33. 464 F. Supp. at 493.

34. *Id.* Section 139a (a) (10) of 42 U.S.C. states in pertinent part that a state plan for medical assistance must provide the following: .

> (A) for making medical assistance available to all individuals receiving aid or assistance under any plan of the State. . . .;
> (B) that the medical assistance made available to any individual described in clause (A) —
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> (i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual, and
>
> (ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in clause A; and
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> (C) if medical assistance is included for a group of individuals who are not described in clause (A) and who do not meet the income and resources requirements of the appropriate State plan. . .
>
> (i) for making medical assistance available to all individuals who would, except for income and resources, be eligible for aid or assistance under any such State plan. . . and who have insufficient. . . income and resources to meet the costs of necessary medical and remedial care and services, and
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> (ii) that the medical assistance made available to all individuals not described in clause (A) shall be equal in amount, duration, and scope. . . to any other individuals not described in clause (A).

42 U.S.C. § 1396a (a) (10) (1976).

Medicaid under the federal categorical assistance program.[35] The state must also provide at least the first five of the sixteen types of medical services provided within the statute.[36] In addition to the services provided for the "categorically" needy, the state has the option to provide services for the "medically" needy.[37] Pennsylvania has exercised the option and provides medical assistance to both the categorically and the medically needy.[38]

In order to make the Medicaid program operative, certain implementing regulations were devised.[39] These regulations require participating states to specify the amount and/or duration of each item of medical care that will be provided and such items must be sufficient in amount, duration, and scope so as to reasonably achieve their purpose.[40] Further, the state may not arbitrarily deny or reduce the amount, duration, or scope of medical assistance solely because of the diagnosis, type of illness, or condition.[41]

The plaintiffs' contention in *Casey* was that Pennsylvania was arbitrarily denying assistance on the basis of the type of medical treatment needed.[42] The United States Supreme Court has stated that Title XIX requires state medicaid plans to establish reasonable standards for determining the extent of medical assistance.[43] These standards must also be reasonable and consistent with the objectives of Title XIX.[44] The court in *Casey* determined the objective of the Medicaid Act to be the provision of necessary medical services.[45] Accordingly, the state may not use its discretion to eliminate entirely from reimbursement a medical service

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35. 464 F. Supp. at 493-94.

36. *Id.* For section 1396d(1)-(5) of 42 U.S.C.A. *see supra* note 28.

37. 464 F. Supp. at 493-94. Title XIX establishes two groups of needy persons: (1) the "categorically" needy, which includes needy persons with dependent children and the aged, blind and disabled. 42 U.S.C. § 1396a(a)(10)(A) (1976). (2) The "medically" needy are those demonstrating a need for medical assistance, who also meet the categorical requirements of Title XIX, but whose incomes are too high to allow them to qualify for the categorical assistance. 42 U.S.C. § 1396a(a)(10)(C) (1976). If the state takes the option to provide services for the "medically" needy, it must provide the level of services described in clauses (1) through (5) of § 1396d. 42 U.S.C. § 1396a(a)(13)(C)(i)(ii)(1976).

38. 464 F. Supp. at 494.

39. *Id.* at 495. 42 C.F.R. § 446.151 (1977).

40. 42 C.F.R. § 449.10(a)(5)(i)(1977).

41. *Id.*

42. 464 F. Supp. at 496. Pennsylvania Public Acts 16A and 148 do not provide reimbursement for abortions certified by a physician as being medically necessary. *Id.* As such, the plaintiffs contended that the state was denying assistance not because of lack of medical necessity, but because of the type of treatment required and was therefore in violation of the Medicaid Act. *Id. Cf.* White v. Beal, 413 F. Supp. 1141 (E.D. Pa. 1976), *aff'd*, 555 F.2d 1146 (3d Cir. 1977). *White* held that a prerequisite for state participation in the Medicaid program was that all "medically necessary" treatment be reimbursed. *Id.* at 1155, 555 F.2d. at 1150.

43. Beal v. Doe, 432 U.S. 438, 441 (1977).

44. *Id.* at 444.

45. 464 F. Supp. at 500. For text of the pertinent statute *see supra* note 34.

certified by a qualified physician as being medically necessary.[46]

The defendants contended that Title XIX did not explicitly require the funding of abortions.[47] The court in *Casey* stated that the plain meaning of the Medicaid Act was to provide sufficient medical assistance, so that necessary medical services could be provided to those eligible for the program.[48] Medical necessity is determined by the attending physician, using his professional judgment, exercised in light of the patient's age, as well as her physical, emotional, psychological, and familial well being.[49] Accordingly, the court held that Title XIX required participating states to provide all medically necessary services, including medically necessary abortions, to eligible participants of the program.[50]

Interpretation of the Hyde Amendment was also at issue in *Casey*.[51] The language of this amendment prohibits the use of federal funds to perform abortions, except where the life of the mother would be endangered, for medical procedures necessary for the victims of rape, or where severe and long lasting physical health damage to the mother would result.[52] In *Casey,* the plaintiff's contention was that the Hyde Amendment did not alter Title XIX,

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46. 464 F. Supp. at 500. *Accord,* Right to Choose v. Byrne, 165 N.J. Super. 443, 398 A.2d 587 (1979). The court in *Right to Choose* construed "necessary medical services" in the federal law as applicable to abortions even though health, not life, was in danger. *Id.*

47. 464 F. Supp. at 496-97. The defendants are Robert Casey, treasurer of the Commonwealth of Pennsylvania, and Aldo Colautti, Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania. *Id.* at 490. The defendants interpreted the Medicaid Act as providing an outline of general areas of medical treatment not requiring participating states to fund every procedure falling within the five categories of § 139 (a)(1)-(5). *Id.* at 497. For text of section 1396d(a)(1)-(5) *see supra* note 28.

48. 464 F. Supp. at 500. The objective of the Medicaid Act is to provide assistance to those unable to afford necessary medical service. *Id.*

49. *Id. See* Doe v. Bolton, 410 U.S. 179, 192 (1973), where the United States Supreme Court held that a physician may perform an abortion if, after considering all factors relevant to his patient's well being, he concludes, using his best clinical judgment, that an abortion is necessary. *Id.*

50. 464 F. Supp. at 499.

51. *Id.* at 496. The Hyde Amendment is the name given to language which was inserted into the FY 1977 and 1978 Health, Education and Welfare appropriations bill by Congress in 1977. Hyde Amendment, Pub. L. No. 95-205, § 100, 91 Stat. 1460 (unclassified 1977). The amendment was used by Congress as a means of making a substantive change in the Medicaid Law. Zbaraz v. Quern, 596 F.2d 196, 199 (7th Cir. 1979). It has been viewed, however, as binding on the states in the sense that it defines "necessary medical services" in the particular instances of abortions and is a clarification of Title XIX. Right to Choose v. Byrne, 165 N.J. Super. 443, 398 A.2d 587, 591 (1979). The Hyde Amendment provides, in part,

> [N]one of the funds provided for in this paragraph shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest have been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Pub. L. No. 95-205, § 101, 91 Stat. 1460 (unclassified 1977).

52. Publ L. No. 95-205, § 101, 91 Stat. 1460 (unclassified 1977).

but operated to withhold federal matching funds from the federal-state cooperative program, or, in the alternative, that it provided for a broader class of medically necessary abortions than either of the Pennsylvania statutes in question.[53] The court determined that the Hyde Amendment withheld federal matching funds from the federal-state cooperative in the case of nontherapeutic abortions.[54] As such, the court held that the Hyde Amendment did not limit state assistance for abortions, but that it supported such spending "in those instances where severe and long-lasting physical damage to the mother would result if the pregnancy were carried to term when so determined by two physicians."[55]

Casey reaffirms the premise that, if medically necessary, the indigent female may receive assistance in paying for her abortion.[56] In 1979 the North Dakota legislature enacted a statute which provides that no funds shall be used to pay for the performance, or for promoting the performance, of an abortion unless the abortion is necessary to prevent the death of the woman.[57] The North Dakota statute is similar to the Pennsylvania statutes discussed in *Casey,* in that both restrict Medicaid payments unless necessary to prevent the woman's death.[58] Accordingly, the North Dakota Supreme Court would find the *Casey* analysis of Title XIX useful in determining the validity of the North Dakota statute.[59]

The *Casey* court determined that a state's standards for funding must be reasonable and consistent with the purpose of Title XIX.[60] To be reasonable and consistent with Title XIX, a state

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53. 464 F. Supp. at 496.
54. *Id.* at 502.
55. *Id.*
56. *Id.* at 489.
57. Section 14-02.3-01 of the North Dakota Century Code states as follows:

> Between normal childbirth and abortion, it shall be the policy of the state of North Dakota that normal childbirth is to be given preference, encouragement, and support by law and by state action, it being in the best interests of the well-being and common good of North Dakota citizens.
>
> No funds of this state or any agency, county, municipality, or any other subdivision thereof and no federal funds passing through the state treasury or a state agency shall be used to pay for the performance, or for promoting the performance, of an abortion unless the abortion is necessary to prevent the death of the woman.

N.D. CENT. CODE § 14-02.3-01 (Supp. 1979).

58. For text of the Pennsylvania statutes *see supra* note 3.

59. The United States District Court of North Dakota has considered section 14-02.3-02 of the North Dakota Century Code, which prohibits public funding to any person, public or private agency which performs, refers or encourages abortions. In Valley Family Planning v. North Dakota, 474 F. Supp. 100 (N.D. 1979) (order granting preliminary injunction enjoining the application of North Dakota Century Code section 14-02.3-02 against any person or public or private agency which refers or encourages abortion).

60. For text of 42 U.S.C. § 1396, which states the purpose of the Medicaid Act, *see supra* note 32. Section 1396a (a) (17) of 42 U.S.C. provides that a state plan for medical assistance must:

> include reasonable standards (which shall be comparable for all groups and may, in

plan must provide for all necessary medical services and must not arbitrarily discriminate on the basis of the type of illness.[61] The *Casey* court found necessary medical services to include medically necessary abortions.[62] Similarly, other lower courts have interpreted necessary medical services to apply to abortions even though the health, rather than the life, of the mother is endangered.[63] The United States Supreme Court has not addressed the issue specifically, but has stated that if a state Medicaid plan excluded necessary medical treatment from its coverage, serious statutory questions might be presented.[64] The North Dakota statute, by prohibiting medically necessary abortions, raises some possible statutory questions. The answer to such questions will depend upon the United States Supreme Court's interpretation of "necessary medical services." At present, however, the lower courts' interpretation of the phrase would invalidate the North Dakota statute.

The *Casey* court also determined that funding could not be based upon an arbitrary or discriminatory system, where the type of illness was considered exclusively rather than the need for aid.[65] The court in *Preterm, Inc. v. Dukakis*[66] determined that a state has crossed the line between permissible discrimination based on the degree of need and entered into forbidden discrimination based on medical condition, when it restricts the treatment of a medically complicated pregnancy to a life or death situation.[67] The North Dakota statute restricts funding to situations where the mother's life is endangered.[68] Certainly, a valid argument may follow that the North Dakota statute has "entered into forbidden discrimination"[69] by requiring funding to be dependent upon a situation which involves a choice between life and death. The *Preterm* court has pointed out that no other service discussed in the Medicaid Act bases funding on such a distinction.[70] As such, the

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accordance with standards prescribed by the Secretary, differ with respect to income levels . . .) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, ...

42 U.S.C. § 1396a (a) (17) (1976).

61. 464 F. Supp. at 500.

62. *Id.* at 499.

63. *See* Doe v. Kenley, 584 F.2d 1362 (4th Cir. 1978); Emma G. v. Edwards, 434 F. Supp. 1048 (E.D. La. 1977); Right to Choose v. Byrne, 165 N.J. Super. 443, 398 A.2d 587 (1979).

64. 432 U.S. at 444-45. Although the Court stated that serious statutory questions may be presented, it did not specify what these questions were.

65. 464 F. Supp. at 500.

66. 591 F.2d at 121 (1st Cir. 1979).

67. Preterm, Inc. v. Dukakis, 591 F.2d 121, 126 (1st Cir. 1979).

68. For text of the North Dakota statute *see supra* note 57.

69. 591 F.2d at 126.

70. *Id.*

distinction is based upon the type of illness and constitutes an arbitrary discrimination. Accordingly, the North Dakota statute, in light of the *Casey* and *Preterm* decisions, is invalid.

Finally, an analysis of a state's plan for the funding of abortions must include the effect of the Hyde Amendment on the plan. Courts have interpreted the effects of the Hyde Amendment in a variety of ways.[71] The majority of courts agree, however, that abortions must be funded according to the specifications within the Hyde Amendment, one of which requires payment where severe and long-lasting damage to the mother's physical health would otherwise result.[72] Thus, regardless of Congress' intent to alter the substantive requirements of Title XIX,[73] lower court decisions[74] require that abortions to prevent physical health damage to the mother must be funded by Medicaid. The North Dakota statute, which does not consider the effects of childbirth on the woman's health, is certainly inconsistent with these court decisions.

Accordingly, the theory that therapeutic abortions may be limited to those necessary to prevent the death of the mother is not valid. Although it has been found that the state has made the policy choice of encouraging childbirth,[75] this policy must be weighed against the right of the mother to terminate her pregnancy in light of medical complications as diagnosed by her physician. Certainly, the woman's medical health is extremely important.

Thus, it would seem reasonable that the state, rather than encouraging childbirth by indigents resulting in a greater financial burden to the state, would sanction abortions when the procedure is medically necessary.[76] The North Dakota Legislature in drafting a bill[77] which prohibits funding of abortions, except when necessary

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71. *See* Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979), which held that the Hyde Amendment amended the Medicaid Act with regards to abortions, and required states to fund abortions according to the specifications of the amendment, which included cases where severe and long-lasting physical health damage to the mother would result from childbirth. *Id. Cf.* Preterm, Inc. v. Dukakis, 591 F.2d 121, 134 (1st Cir. 1979). The *Preterm* court held that the Hyde Amendment constituted a substantive policy decision which left the states free to fund more abortions than those for which federal funds were made available by the amendment, but that the state could not prohibit reimbursement for all abortions except those necessary to save the life of the mother. *Id. See* Right to Choose v. Byrne, 165 N.J. Super. 443, 398 A.2d 587 (1979). *But see* D_____ R_____ v. Mitchell, 456 F. Supp. 609 (Utah 1978). The court held that the Hyde Amendment substantively changed the funding a state was required, under the Medicaid Act, to pay for abortions and as such the state could limit the funding to cases where the life of the mother would be endangered if the abortion were not performed. *Id.* at 624.

72. Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979).

73. 591 F.2d at 128-31.

74. *See supra* note 71 for theseese lower court decisions.

75. Maher v. Roe, 432 U.S. 464, 477 (1977).

76. 432 U.S. at 458. *See* Horan & Marzen, *The Moral Interest of the State in Abortion Funding: A Comment on Beal, Maher and Poelker*, 22 ST. LOUIS L. J. 566, 578 (1979).

77. For text of the North Dakota statute *see supra* note 57.

to save the mother's life, apparently has rejected this theory. The validity of such statutes will receive final determination when the United States Supreme Court determines what constitutes necessary medical service, the exact effect of the Hyde Amendment on Medicaid funding and finally, whether the Medicaid Act does in fact require the funding of therapeutic abortions. Until these questions are answered, states will continue to enact legislation such as that enacted by North Dakota, which will endanger the health of the indigent pregnant woman and discriminate against her because she cannot afford to secure a medically necessary abortion.

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