California Western Law Review

Volume 24 | Number 1 Article 7

1987

Inmate Abortion Funding in California: A Constitutional Analysis

Todd M. Vukson

Inmate Abortion Funding in California: A Constitutional Analysis

INTRODUCTION

Since the Supreme Court's landmark 1973 decision *Roe v. Wade*,[1] women have had a constitutional right to abortion. *Roe* has not, however, been the Court's last word on abortion. Because legislators continue to pass laws which restrict the right to abortion[2] the Supreme Court has been forced to reaffirm *Roe* on several occasions.[3] One front upon which the abortion right has been successfully attacked, however, is in the area of funding. Since 1976, Congress has passed legislation restricting access to abortion funding[4] and in 1977 the Supreme Court held that there is no right to abortion funding under the federal constitution.[5] Despite this, several states, including California, have upheld the right of indigents to receive state abortion funding under their respective

---

1. 410 U.S. 113 (1973).

2. This type of legislation typically attempts either to: (1) regulate the abortion process itself (*See, e.g., Roe*, discussed *infra* notes 18-35 and accompanying text, where the state statute in question outlined the circumstances under which abortion would be permissible); (2) subrogate the rights of the pregnant woman and her fetus to the rights of a third party (*See, e.g.*, Act of Sept. 27, 1987, ch. 1237, 1987 Gen. Sess., a recently enacted California law which requires minors to obtain written consent from a parent before they are allowed to have an abortion); (3) limit the availability of abortion funding (*See* discussion of abortion funding legislation *infra* notes 36-64 and accompanying text); or (4) increase the cost of abortion by requiring procedures which make abortions more expensive (*See, e.g.*, Aborted or Miscarried Human Fetuses—Disposition of Remains Act, ch. 238, 1987 Minn. Laws 659 which requires medical facilities in which abortions are performed to dispose of the remains of a fetus in a "dignified" manner as by cremation or burial).

3. *See, e.g.*, Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169 (1986) (invalidating requirement that physicians give detailed information regarding abortion procedure to women desiring abortions); City of Akron v. Akron Center for Reproductive Health, 462 U.S 416 (1983) (same); Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983) (invalidating requirement that second trimester abortions be performed in a hospital); Colautti v. Franklin, 439 U.S. 379 (1979) (invalidating law proscribing abortions if physician merely "believes" fetus is viable); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (invalidating law requiring minors to obtain parental consent for abortions).

4. The number of federally funded abortions has dropped dramatically since 1976, the first year Congress enacted legislation restricting access to federal abortion funding. *See* Gold, *After the Hyde Amendment: Public Funding for Abortion in F.Y. 1978*, 12 FAM. PLAN. PERSP. 131 (1980). Consequently, indigent women seeking abortions have been forced to look to state resources and private donations to finance their abortions. Women in states which do not provide state abortion funding have typically been denied their right to abortion because of the inadequacy of private abortion financing programs. Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 275-76, 625 P.2d 779, 793, 172 Cal. Rptr. 866, 880 (1981).

5. *See infra* notes 36-47 and accompanying text.

state constitutions.[6] A question that remains unanswered, however, is whether California state inmates are similarly entitled to state funding for abortions.[7]

The California Department of Corrections (CDC) funds inmates' abortions performed in the first trimester of pregnancy, but normally withholds state funding for abortions performed beyond the first trimester.[8] On the other hand, nonincarcerated women in California are eligible to receive state funding for abortions performed through the second trimester of pregnancy.[9] Thus, by not funding inmates' second trimester abortions, the CDC restricts inmates' access to government benefits available to nonincarcerated women.

This Comment assesses the constitutionality of the CDC's abortion funding policy. It concludes that the policy is unconstitutional in two respects. First, the policy impermissibly infringes on inmates' rights to abortion in light of the California Constitution which stringently safeguards personal privacy rights. Second, as a penal restriction, the policy is inconsistent with the fundamental objectives underlying the prison system.

It will be helpful at the outset to analyze both the parameters of the right to abortion, and the history of the right to abortion fund-

---

6. Massachusetts was the first state to judicially declare such right. Moe v. Secretary of Admin. and Fin., 382 Mass. 629, 417 N.E.2d 387 (1981). In California, the right of indigents to receive state abortion funding was upheld in the face of a legislative attempt to restrict such right in Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981) *See infra* notes 48-64 and accompanying text. Other state courts have also heard challenges against legislative abortion funding restrictions. *See, e.g.*, Doe v. Maher, 40 Conn. Supp. 394, 515 A.2d 134 (1986); Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982); Planned Parenthood, Inc. v. Department of Human Resources, 297 Or. 562, 687 P.2d 785 (1984); Fischer v. Department of Pub. Welfare, 509 Pa. 293, 502 A.2d 114 (1985).

7. In 1985, an inmate at the California Institute for Women brought suit for declaratory and injunctive relief after being denied an abortion at state expense by the California Department of Corrections. The San Bernardino County Superior Court granted a temporary restraining order, ordering the Department of Corrections to provide the inmate with an abortion free of charge. Scrape v. McCarthy, No. OCV-36620 (Cal. Super. Ct. San Bernardino County Oct. 3, 1985) (order granting preliminary injunction).

The constitutionality of the Department of Corrections abortion funding policy is currently being challenged by the American Civil Liberties Union of Southern California. Scrape v. McCarthy, No. OCV-36620 (Cal. Super. Ct. San Bernardino County) (Verified First Amended Complaint for Declaratory and Injunctive Relief filed July 7, 1987).

8. There is no official or written CDC policy concerning the funding of inmate abortions. However, the California Institute for Women has stated that the CDC will pay for abortions performed within the first trimester of pregnancy. Beyond the first trimester, the CDC only funds "therapeutic" inmate abortions, i.e., those abortions which are necessary for the health and welfare of the pregnant inmate based on a physician's medical assessment and judgment. Telephone interview with Dr. K.K. Srivastava, Medical Director for the California Institute for Women (Aug. 24, 1987). This comment addresses itself only to the situation in which an inmate seeks a nontherapeutic abortion.

9. *See infra* notes 48-64 and accompanying text.

ing. This background puts the CDC's abortion funding policy in the proper context for constitutional analysis.[10]

I. ABORTION AND ABORTION FUNDING: RELEVANT BACKGROUND

A. The Right to Abortion in California

Four years before the United States Supreme Court's decision in *Roe v. Wade*, the California Supreme Court recognized the constitutional right to abortion. In *People v. Belous*,[11] California's highest court announced that the implied right of privacy which exists under both the California Constitution[12] and the Federal Constitution[13] gives women the fundamental right to choose whether to bear children.[14]

The court acknowledged that statutes prohibiting abortion served a valid state interest in protecting maternal health when originally enacted.[15] However, the court ruled that because modern medical advancements had made hospital abortions performed

10. Although instances of pregnancy in prison are relatively rare compared to the general public, inmates are entitled to extended and overnight conjugal visits with members of their immediate family. CAL. ADMIN. CODE tit. 15, § 3174 (1982).

11. 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

12. California courts have long recognized an implicit right of privacy under the California Constitution. *See, e.g.*, Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970) (financial disclosure for public officials); People v. Edwards, 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969) (search and seizure); Parrish v. Civil Service Commission, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967) (unannounced raids on the homes of welfare recipients); Perez v. Sharp, 32 Cal. 2d 711, 198 P.2d 17 (1948) (interracial marriage); Custudio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (female sterilization). Also, in 1972, the right of privacy was made explicit when Californians voted to amend article 1, section 1, of the California Constitution to read: "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*." CAL. CONST. art. I, § 1 (emphasis added).

13. The Federal Constitution does not explicitly mention any right of privacy. However, the United States Supreme Court recognizes that a right of privacy does exist under the Constitution, and that the root of that right may be found in the penumbras of the Bill of Rights, most particularly, from the first, third, fourth, fifth, ninth and fourteenth amendments. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972) (dissemination of contraceptives); Stanely v. Georgia, 394 U.S. 557 (1969) (right to view obscene materials in the privacy of one's own home); Katz v. United States, 389 U.S. 347 (1967) (search and seizure); Griswold v. Connecticut, 381 U.S. 479 (1965) (use of contraceptives); Prince v. Massachusetts, 321 U.S. 158 (1944) (minors' rights to sell newspapers on public streets); Skinner v. Oklahoma, 316 U.S. 535 (1942) (sterilization, marriage, and procreation); Palko v. Connecticut, 302 U.S. 319 (1937) (right of criminal defendants to be free from double jeopardy); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right of parents to send their children to private schools); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to teach foreign language in public schools).

14. *Belous*, 71 Cal. 2d at 963, 458 P.2d at 199, 80 Cal. Rptr. at 359.

15. *Id.* at 964-65, 458 P.2d at 200, 80 Cal. Rptr. at 360.

in the early stages of pregnancy as safe as childbirth,[16] the state could no longer justify depriving women of the right to first trimester abortions in the name of maternal health.[17] The question as to whether the state could ever constitutionally regulate the abortion decision was not addressed. That question, however, was soon answered by the United States Supreme Court.

B. The Right to Abortion and the United States Supreme Court: Roe v. Wade

In 1973, the Supreme Court in *Roe v. Wade*[18] held that a statute which permitted abortion only to save the life of the expectant mother was unconstitutional.[19] The Court ruled that the implicit right of privacy which exists under the Federal Constitution[20] "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[21]

The right to abortion is not absolute, however, for it is limited by the state's interests in maternal health and the potential life of the fetus.[22] The *Roe* Court found these interests to be "separate and distinct" and to "grow[] in substantiality as the woman approaches term."[23] Consequently, the degree of regulation which the state may assert over the abortion procedure increases as a woman's pregnancy advances.[24]

The *Roe* Court employed a trimester analysis[25] to delineate the periods in which government regulation of the abortion procedure would be proper. The Court ruled that in the first trimester of pregnancy, neither the state's interest in maternal health nor the potential life of the fetus is great enough to justify state regulation of the abortion procedure.[26] The state's interest in maternal health

---

16. *Id.* at 965, 458 P.2d at 200-01, 80 Cal. Rptr. at 360-61. Surgical advances such as antisepsis and asepsis and the development of antibiotics are major medical advancements of the 20th century which have reduced the health risks associated with abortion. *Id.* at 965, 458 P.2d at 200, 80 Cal. Rptr. at 360.

17. *Id.* at 967, 458 P.2d at 202, 80 Cal. Rptr. at 362. The court also expressed concern with the problem of self induced and black market abortions which were common prior to the legalization of abortion. *Id.* at 965-66, 458 P.2d at 201, 80 Cal. Rptr. at 361.

18. 410 U.S. 113 (1973).

19. *Id.* at 164.

20. *See supra* note 13.

21. *Roe*, 410 U.S. at 153.

22. The Court premised this analytical framework by stating that pregnant women are not isolated in their privacy. *Id.* at 159. The Court also said that a person has never had an absolute "right to do with one's body as one pleases." *Id.* at 154.

23. *Id.* at 162-63.

24. *Id.* at 163.

25. For analytical purposes, the Court divided the pregnancy period into roughly equal trimesters. The first trimester encompasses weeks 1-13, the second, weeks 14-25, and the third, weeks 26-38. *See id.* at 125.

26. *Roe*, 410 U.S. at 163.

is minimal at this time because the health risks for women undergoing hospital abortions in the early stages of pregnancy are no greater than those associated with childbirth.[27] The Court further asserted that because an unborn is not considered a "person" within the language and meaning of the fourteenth amendment, the state could not have an overriding interest in the potential life of a nonviable[28] fetus.[29] Hence, because the state does not have a compelling interest in regulating pregnancy during the first trimester, women are free to choose to obtain an abortion without state interference at this time.[30]

In the second trimester, the state's interest in maternal health increases due to the increased health risks which then accompany abortions.[31] Consequently, the state is empowered to regulate the abortion decision in ways reasonably related to the pregnant woman's health.[32] Thus, during the second trimester, a woman's right to choose abortion may be regulated according to the state's concern for her health.[33]

In the third trimester, the fetus has likely reached the point of viability. The state's interest in potential life takes precedence over the pregnant woman's right of privacy at this time because the fetus is capable of living outside the mother's womb.[34] Therefore, abortion may be regulated or even proscribed in the third trimester, unless an abortion is necessary to preserve the pregnant woman's life or health.[35]

---

27. *Id.* at 149.

28. "Viability" is the point in a woman's pregnancy at which time the fetus has "attained such form and development of organs as to be normally capable of living outside the uterus." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2548 (3d ed. 1971).

29. *Roe*, 410 U.S at 156-63. Viability normally occurs in the third trimester of pregnancy. *See infra* notes 34-35 and accompanying text.

30. *Roe*, 410 U.S. at 163.

31. *See* Grimes, *Second-Trimester Abortions in the United States*, 16 FAM. PLAN. PERSP. 260 (1984).

32. The Court listed requirements as to qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed; as to the licensing of the facility as examples of permissible state regulation in this area. *Roe*, 410 U.S. at 163. In 1967, California passed the Therapeutic Abortion Act, ch. 232, § 1, Stat. 1535 (1967) to regulate the abortion procedure for the protection of pregnant women. Advances in abortion techniques, however, have outdated many of the provisions originally enacted in the Act. It is now undisputed that abortions performed by the dilatation and evacuation (D&E) technique up to the eighteenth week of pregnancy are at least twice as safe as childbirth. Forrest, Sullivan & Tietze, *Abortion in the United States, 1977-78*, 11 FAM. PLAN. PERSP. 329-41 (1979). Also, post-first trimester abortions may now be performed safely in clinics. M.S. BURNHILL, RISKS, BENEFITS AND CONTROVERSIES IN FERTILITY CONTROL 331-47 (1978). Consequently, since its enactment in 1967, many of the provisions of the Therapeutic Abortion Act have been invalidated. *See, e.g.*, People v. Barksdale, 8 Cal. 3d 320, 503 P.2d 257, 105 Cal. Rptr. 1 (1972).

33. *Roe*, 410 U.S. at 163.

34. *Id.* at 163-64.

35. *Id.*

In summary, *Roe* states that it is not until the third trimester of a woman's pregnancy that the state can effectively veto her decision to have an abortion. Prior to that time, the pregnant woman is free to obtain an abortion without any, or at most minimal, interference from the state.

C. *The Right to Federal Abortion Funding*

Despite the fact that women have a constitutional right to abortion, the Supreme Court has ruled that they do not have a federal constitutional right to abortion funding from the federal government. In *Maher v. Roe*,[36] the Court upheld a state regulation which prohibited the use of Medicaid funds to reimburse women for the cost of abortions.[37] The Court found that failure to fund abortions for indigent women did not create a suspect classification,[38] or impinge on a fundamental right.[39] In so concluding, the Court declared that the regulation did not impose any restriction on the right to abortion which was not already there and thus did not unduly burden such right.[40] Applying the rational relationship test of constitutionality,[41] the Court found that encouraging childbirth was sufficient justification to deny women access to federal abortion funding.[42]

A second landmark decision dealing with the federal abortion funding issue is *Harris v. McRae*.[43] In *Harris*, the Supreme Court went a step further than it did in *Maher* in upholding the constitutionality of the 1979 Hyde Amendment,[44] which placed even

---

36. 432 U.S. 464 (1977).

37. Only "medically necessary" first trimester abortions were to be federally funded under this regulatory scheme. Funding for nontherapuetic abortions was prohibited. *Id.* at 466.

38. The Court stated that because financial need alone does not create a suspect class for the purposes of equal protection analysis, no such suspect class could be formed by those unable to pay for an abortion. *Id.* at 471.

39. *Id.* at 474.

40. *Id.* at 473-74. However, Justice Brennan has observed that "[b]y 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." Harris v. McRae, 448 U.S. 297, 333-34 (1980) (Brennan, J., dissenting).

41. A statute will not be set aside under the rational relationship test if any set of facts reasonably may be conceived to justify it. McGowan v. Maryland, 366 U.S. 420, 426 (1961).

42. *Maher*, 432 U.S. at 478.

43. 448 U.S. 297 (1980).

44. Since 1976, Congress has annually enacted the Hyde Amendment, restricting federal abortion funding. The 1978 version examined in *Harris* prohibited federal funding of 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 victims of rape or incest when such rape or incest has been reported promptly." Act of Nov. 20, 1979, Pub. L. No. 96-123, § 109, 93 Stat. 923-26 (1979).

tighter restrictions on the use of Medicaid funds for abortions than the regulation upheld in *Maher*.[45] The Court reasoned that because the government does not create a woman's indigency, it is not obligated to remove such an obstacle from the path of a woman's exercise of her abortion right.[46] Together, *Maher* and *Harris* establish that federal abortion funding is not a constitutional right.[47]

D. The Right to State Abortion Funding in California

California legislators responded to the federal abortion funding decisions by enacting provisions in the California Budget Act restricting access to state abortion funding.[48] The enactments required women to forfeit their constitutional right to abortion in order to qualify for pregnancy-related medical benefits available through the Medi-Cal program.[49]

In *Committee to Defend Reproductive Rights v. Myers*,[50] the California Supreme Court addressed the constitutionality of this legislative scheme. While fulfilling its "independent legal obligation" to review the funding restrictions under the California Constitution,[51] the court rejected the reasoning of federal prece-

---

45. *Harris*, 448 U.S. at 326-27.

46. The Court, reiterating *Maher*, stated that "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." *Id.* at 316. The Court added that "[a]lthough the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Id.* at 317-18.

47. These two federal abortion funding cases, along with the connected cases Williams v. Zbaraz, 448 U.S. 358 (1980) and Beal v. Doe, 432 U.S. 438 (1977), have been heavily criticized. *See, e.g.*, Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRea*, 32 STAN. L. REV. 1113 (1980); Simson, *Abortion, Poverty and the Equal Protection of the Laws*, 13 GA. L. REV. 505 (1979).

48. The enactments essentially limited abortion funding to those cases where pregnancy would endanger the mother's life or cause her severe and long lasting physical health damage, where pregnancy was the result of illegal intercourse, or where abortion was necessary to prevent the birth of severally defective infants. 1978 Budget Act, ch. 359, Stat. 755; 1979 Budget Act, ch. 259, Stat. 576; 1980 Budget Act, ch. 510, Stat. 1069.

49. These kinds of restrictions, which force people to choose between public benefits and constitutionally protected rights have been called "unconstitutional conditions" and have been widely discussed. *See, e.g.*, O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966); Van Alstyne, *The Demise of the Right Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Western, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741 (1981).

50. 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981).

51. "[S]tate courts, in interpreting constitutional guarantees contained in state constitutions, are 'independently responsible for safeguarding the rights of their citizens.'" *Id.* at 261, 625 P.2d at 783, 172 Cal. Rptr. at 870 (quoting People v. Brisendine, 13 Cal. 3d

dent[52] and asserted that any governmental program which conditions receipt of benefits on the forfeiture of a constitutional right demands special scrutiny.[53]

The court thus thrust a heavy burden on the state to justify the withholding of benefits from pregnant women wishing to exercise their abortion right.[54] To pass constitutional muster, the state would have to demonstrate (1) that the funding restrictions related to Medi-Cal's purpose of providing health care to medically indigent persons; (2) that the public benefits which result from the funding restrictions greatly outweigh any resulting injury to a woman's right to abortion; and (3) that it is impossible for the state to further its objectives by any less offensive alternative.[55]

The court found the abortion funding restrictions deficient on all three counts. First, the restrictions bore no relation to the purpose of the Medi-Cal Program.[56] In fact, by denying assistance to women wishing to exercise their constitutional right to abortion, the restrictions impeded Medi-Cal's purpose of aiding those in need of medical help.[57]

Second, the court said that the utility of imposing the proposed restrictions on abortion did not manifestly outweigh the resulting impairment of constitutional rights.[58] Any money saved by not funding indigents' abortions would be spent on their maternity care, childbirth expenses and child support.[59] Thus, the restrictions did not serve the state interest of preserving fiscal resources.[60] Moreover, the state's expressed interest in protecting a nonviable fetus did not outweigh the woman's fundamental right to an abortion.[61]

Finally, the restrictions failed the least offensive alternative requirement because the state could meet the childbirth needs of

---

528, 549-50, 531 P.2d 1099, 1111-13, 119 Cal. Rptr. 315, 328-30 (1975)) (emphasis in original).

52. *See supra* notes 36-47 and accompanying text.

53. *Myers*, 29 Cal. 3d at 257, 625 P.2d at 781, 172 Cal. Rptr. at 868.

54. *Id.* at 265, 625 P.2d at 786, 172 Cal. Rptr. at 873. (quoting Bagley v. Washington Township Hosp. Dist., 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966)).

55. *Myers*, 29 Cal.3d at 258, 625 P.2d at 781, 172 Cal. Rptr. at 868. This standard was first articulated in Bagley v. Washington Township Hosp. Dist., 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966).

56. *Myers*, 29 Cal.3d at 271, 625 P.2d at 790, 172 Cal. Rptr. at 877.

57. *Id.* at 271-73, 625 P.2d at 790-91, 172 Cal. Rptr. at 877-78.

58. *Id.* at 273-82, 625 P.2d at 791-97, 172 Cal. Rptr. at 878-84.

59. *Id.* at 277, 625 P.2d at 794, 172 Cal. Rptr. at 881.

60. *Id.*

61. *Id.* at 278-82, 625 P.2d at 794-97, 172 Cal. Rptr. at 881-84. This point was decided in *Roe*. *See infra* notes 18-35 and accompanying text. The court added that even if protection of a nonviable fetus was a compelling state interest, it would still be likely that the restrictions were unconstitutional because they singled out the poor as victims of this interest. *Id.* at 281, 625 P.2d at 796, 172 Cal. Rptr. at 883.

indigent women without burdening their right to abortion by funding both childbirth and abortion.[62] Therefore, since the state could not meet its burden under the court's test, the funding restrictions were invalidated.[63] *Myers* thus guarantees California women the right to state abortion funding under the California Constitution.[64]

II. The CDC's Abortion Funding Policy and the California Constitution

The CDC's abortion funding policy puts inmates in a situation very similar to that created by the abortion funding restrictions invalidated in *Myers*. As in *Myers*, women are made to choose between state funding or an abortion. An inmate will receive state aid for pregnancy-related expenses if she carries her child to term.[65] However, state aid will be denied should she elect to exercise her abortion right beyond the first trimester.[66] Because the CDC's abortion funding policy makes forfeiture of the right to a second trimester abortion[67] by inmates a condition to their receiving government benefits, *Myers*' three-part test is the proper standard by which to assess its constitutionality.

A. Does the CDC's Abortion Funding Policy Relate to the Purpose of the Legislation Which Gives Inmates the Right to Abortion?

The phrasing of the statutory enactments ensuring inmates access to abortion sheds only a faint ray of light upon the legislative intent concerning inmate abortion funding. California Penal Code section 3405 provides that pregnant inmates shall be "permitted" to obtain an abortion.[68] When introduced to the legislature, however, section 3405 required inmates desiring an abortion to be "as-

62. *Id.* at 282-83, 625 P.2d at 797-98, 172 Cal. Rptr. at 884-85.

63. *Id.* at 285, 625 P.2d at 799, 172 Cal. Rptr. at 886.

64. Since *Myers*, California appellate courts have invalidated similar attempts to restrict state abortion funding. *See, e.g.*, Committee to Defend Reproductive Rights v. Rank, 151 Cal. App. 3d 83, 198 Cal. Rptr. 630 (1984); Committee to Defend Reproductive Rights v. Cory, 132 Cal. App. 3d 852, 183 Cal. Rptr. 475 (1982). In addition, the California Supreme Court has been unwilling to rehear the issue. Consequently, nearly 90,000 women per year receive state funded abortions in California. L.A. Times Nov. 21, 1986, at 3, col. 6.

65. Cal. Penal Code § 3406 (West 1982).

66. *See supra* note 8 and accompanying text.

67. Since none of the limitations passed by the California legislature to protect maternal health apply to pregnant inmates (*see supra* note 32 and accompanying text), an inmate's right to abortion cannot be restricted in the second trimester of pregnancy.

68. Cal. Penal Code § 3405 (West 1982).

sisted" in obtaining it.[69] The change in section 3405 from "assisted" to "permitted" may evince a legislative intent to distinguish between an active obligation on behalf of the CDC to pay for inmate abortions and the more passive role of merely allowing them.[70] If so, the CDC's policy of not funding abortions performed beyond the first trimester would relate to the purpose of section 3405. The CDC would not have a legislative direction to fund any inmate abortions, even those performed in the first trimester.

There is ample support, however, for a different interpretation of the CDC's legislative obligation regarding inmate abortion funding. Section 3350 of Title 15 of the California Administrative Code mandates that all of an inmate's reasonable medical needs be provided by the state.[71] Since an inmate is absolutely entitled to terminate her pregnancy under Penal Code section 3405, it is reasonable to conclude that the state must provide medical services necessary to terminate that pregnancy.[72]

Penal Code section 3405 also provides that no restriction may be placed on an inmate's right to abortion.[73] This language reflects an intent on behalf of the legislature to ensure abortion funding for inmates since denying indigent inmates abortion funding formidably restricts their right to abortion. Any restriction on an inmate's right to abortion, especially the withholding of funds necessary to procure that procedure, violates the letter and spirit of Penal Code section 3405.[74]

Thus, it is unlikely that refusing inmates funding for second trimester abortions relates to the purpose of the legislative enactments which ensure inmates the right to abortion. In fact, the CDC's policy seemingly contravenes the legislative will by inhibiting inmates' access to that procedure.

---

69. Penal Code section 3405 was originally introduced in the California legislature on March 13, 1972, as Assembly Bill No. 1004.

70. Bills are construed in their final form, not in their form as originally introduced in the legislature if subsequent changes have been made. Rich v. State Bd. of Optometry, 235 Cal. App. 2d 591, 607, 45 Cal. Rptr. 512, 522 (1965).

71. CAL. ADMIN. CODE tit. 15, § 3350 (1983).

72. The Supreme Court has stated that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." Estelle v. Gamble, 429 U.S. 97, 104 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)). Two recent United States District Court cases have said that refusing to fund inmate abortions violates the eighth amendment in light of *Estelle*'s "deliberate indifference" standard. *See* Reproductive Health Servs. v. Webster, 655 F. Supp. 1300 (W.D. Mo. 1987); Monmouth County Corrections Inst. Inmates v. Lanzaro, 643 F. Supp. 1217 (D.N.J. 1986).

73. CAL. PENAL CODE § 3405 (West 1982).

74. The fact that the CDC willfully funds inmate abortions performed in the first trimester of pregnancy is also relevant. It is unlikely that the CDC would voluntarily fund first trimester abortions absent a legislative direction to do so.

B. Does the Utility of the CDC's Abortion Funding Policy Greatly Outweigh any Resulting Injury to Inmates' Rights to Abortion?

Under this prong of the *Myers* test, it is necessary to assess the importance of the state's interests served by the CDC's abortion funding policy and the degree to which the policy promotes these interests. Furthermore, the right to abortion and the extent to which it is impaired by the CDC's policy must be examined. The CDC must show that valid state interests are served by their policy and that these interests "manifestly outweigh" any impairment of an inmate's right to abortion.[75]

1. The Nature of the Right to Abortion—The abortion right is grounded in the constitutional right of privacy which has been recognized by the Supreme Court as "implicit in the concept of ordered liberty."[76] In *Myers*, the California Supreme Court said the right to choose abortion 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."[77] In fact, it is well documented that education and employment opportunities for a woman are greatly reduced when she is forced to bear an unwanted child.[78]

In reality, the state imposes an absolute veto on an indigent inmate's abortion right when it fails to fund her abortion. Given the high cost of inmate abortions and the unlikelihood that inmates will have sufficient resources to meet these costs, inmates will normally be forced to have children for whom the state must assume financial responsibility.[79] Because the CDC's abortion funding pol-

---

75. *Myers*, 29 Cal. 2d at 258, 625 P.2d at 781, 172 Cal. Rptr. at 868.

76. *Roe*, 410 U.S. at 152-53 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). *See also* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) where the Court stated that "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." (emphasis in original).

77. *Myers*, 29 Cal. 3d at 275, 625 P.2d at 792, 172 Cal. Rptr. at 879.

78. *See* Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 641 n.90 (1980).

79. The CDC stated the charge for an inmate's abortion as being five thousand dollars. This fee includes the cost of the abortion and the cost of the security guards who are to accompany the inmate to the appropriate medical facility. Scrape v. McCarthy, No. OCV-36620 (Cal. Super. Ct. San Bernardino County) (Verified Complaint for Declaratory and Injunctive Relief filed July 7, 1987). Because an inmate's opportunity to earn money while incarcerated is limited, it is highly unlikely that an indigent inmate would be able to afford to pay for her abortion. Compensation to inmates for labor performed may not exceed one-half the minimum wage provided by federal law. 1982 Cal. Stat. ch. 1549 § 6 (amending CAL. PENAL CODE § 2700). Also, 42 C.F.R. § 435.1008 and CAL. WELFARE & INSTITUTIONS CODE § 14053(a) (West Supp. 1987) prevent inmates from receiving health care services available to nonincarcerated citizens.

icy substantially impairs a fundamental constitutional right,[80] the state must show that the policy serves compelling governmental interests to justify its existence.[81]

2. State Interests

a. Preserve Fiscal Resources—Preserving fiscal resources is a legitimate state interest.[82] However, refusing to fund inmate abortions does not serve this interest. Any savings produced for the state by not funding inmate abortions would be wiped out by the cost of prenatal care.[83] Further, the Supreme Court has stated that "[t]he cost of an . . . abortion . . . holds no comparison whatsoever with the welfare costs that will burden the state for the new indigent and their support in the long, long years ahead."[84] Even if it were true that funding inmate abortions produced an economic burden on the state, that reason alone is insufficient to override a fundamental right.[85]

b. Maternal Health—In *Roe*, the Supreme Court ruled that in the second trimester of a woman's pregnancy, the state may regulate the abortion procedure to protect her health.[86] But even though the state is justified in imposing restrictions on abortion in the second trimester, it is not empowered at this time to restrict the abortion right altogether.[87] In fact, because none of the limitations passed by the California legislature to protect maternal health apply to pregnant inmates,[88] inmates cannot have their abortion right restricted at any stage prior to the third trimester, the time at which the state's interest in the potential life of the fetus overrides the woman's right to privacy.[89]

Moreover, it is conceivable that the CDC's abortion funding

---

80. A fundamental constitutional right has been defined as one which has its origin in the express terms of the Constitution or which is necessarily to be implied from those terms. Sidle v. Majors, 264 Ind. 206, 341 N.E.2d 763, 769 (1973).

81. *Myers*, 29 Cal. 3d at 276, 625 P.2d at 793, 172 Cal. Rptr. at 880.

82. *Id.* at 277, 625 P.2d at 794, 172 Cal. Rptr. at 881.

83. *Id.* An additional expense for the state is caring for the child of indigent women denied abortion funding. *Id.*

84. *Id.* at 277-78, 625 P.2d at 794, 172 Cal. Rptr. at 881. (quoting Beal v. Doe, 432 U.S. 438, 463 (1977)).

85. Bounds v. Smith, 430 U.S. 817, 825 (1977); Molar v. Gates, 98 Cal. App. 3d 1, 17, 159 Cal. Rptr. 239, 249 (1979).

86. *See supra* notes 31-33 and accompanying text.

87. The state's interest in protecting maternal health is mitigated by the woman's right to privacy. *See supra* notes 18-33 and accompanying text.

In City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 431 (1983), the Supreme Court warned that the state cannot "depart from accepted medical practice" or increase the costs and limit the availability of abortions "without promoting important health benefits."

88. *See supra* note 32 and accompanying text.

89. *See supra* notes 18-35 and accompanying text.

policy actually endangers the life and health of inmates desiring abortions. A denial of funding may induce inmates to attempt abortions without medical assistance, a procedure which carries a high risk of injury or death.[90] Furthermore, failure of the CDC to fund abortions will force indigent inmates to carry their unwanted children to term. This creates psychological stress which has been shown to increase the health risks associated with childbirth.[91] Thus, rather than protecting maternal health, the CDC's policy impedes this interest by forcing inmates into a situation which is actually more threatening to their health.

c. The Life of the Fetus—In *Roe*, the Supreme court held that the state's interest in the potential life of the fetus does not become compelling until the third trimester of a woman's pregnancy.[92] Prior to the third trimester, the woman's right of privacy is superior to the states interest in potential life.[93] Therefore, this interest cannot justify the CDC's policy of not funding inmate abortions in the second trimester.

C. Is it Possible for the CDC to Further the State's Interests in a Less Restrictive Manner?

Because the CDC's abortion funding policy does not preserve fiscal resources,[94] a less restrictive means analysis need not be undertaken as to that state interest. The state's interest in maternal health, however, is arguably furthered by not funding inmates' second trimester abortions since health risks related to the abor-

---

90. Cates & Rochat, *Illegal Abortions in the United States, 1972-1974*, 8 FAM. PLAN. PERSP. 86 (1976).

91. In McRae v. Califano, 491 F. Supp. 630 (E.D.N.Y. 1980) (District Court trial of Harris v. McRae, 448 U.S. 297 (1980) discussed *supra* notes 43-47), medical testimony and case histories were presented demonstrating the impact of unwanted pregnancy on a woman's mental health. Unwanted pregnancies were found to be a source of severe depression and anxiety commonly producing psychiatric symptoms and at times leading to suicidal ideation. *Califano*, 491 F. Supp. at 674-76. Also, the Supreme Court has noted that:

> Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

Roe, 410 U.S. at 153. Additionally, one study has found that unwanted children are more likely to lack a secure family life, require psychiatric care, and engage in antisocial and criminal behavior than children born to mothers desiring childbirth. *Califano*, 491 F. Supp. at 677.

92. *See supra* notes 18-35 and accompanying text.

93. *Id.*

94. *See supra* notes 82-84 and accompanying text.

tion procedure increase as a woman's pregnancy advances.[95] Nonetheless, there are several alternatives to denying inmates funding for second trimester abortions which would serve the goal of encouraging inmates desiring abortions to obtain them early in their pregnancies.

First, through counseling, inmates could be alerted to the health risks associated with abortions performed beyond the first trimester. Counseling women into earlier first trimester abortions would serve the state's interest of protecting maternal health in a less restrictive manner than denying inmates funding for second trimester abortions.

Second, the state could implement pregnancy testing programs to discover inmates' pregnancies at an early stage. This would allow inmates an opportunity to procure an abortion at a time in which the procedure is less threatening to their health. A pregnancy detection program would facilitate maternal health since it would lessen the likelihood that an inmate would have to undergo a post first trimester abortion. Such a program would clearly be a less ornerous burden on inmates' abortion rights than the CDC's current abortion funding policy.

In summary, like the statutory scheme invalidated in *Myers*, the CDC's policy of not funding inmates' second trimester abortions falls short of satisfying California's rigid test of constitutionality. It impedes, rather than furthers, the legislative intent to ensure inmates access to abortion. Also, the policy serves no state interests which outweigh the resulting impairment of an inmate's fundamental constitutional right to abortion. Finally, because the CDC's policy is drawn too broadly, it fails the least restrictive alternative requirement. Since the CDC's abortion funding policy fares no better under constitutional scrutiny than the restrictive abortion funding statutes struck down in *Myers*, it too should be invalidated under the Constitution of the State of California.

III. Abortion Funding in the Prison Context

An additional ground for attacking the constitutionality of the CDC's abortion funding policy is that such policy unjustifiably restricts inmates' civil rights. All of an inmate's civil rights are not lost with the slamming of the jailhouse door. In fact, prison regulations which deprive inmates of constitutionally protected rights are particularly subject to strict judicial scrutiny.

---

95. *See supra* notes 31-33 and accompanying text.

A. *Necessary Restrictions on Inmates' Rights*

At one time, inmates were stripped of all civil rights when imprisoned.[96] Today, however, inmates' rights may not be so lightly disregarded.[97] Inmates must be accorded all rights not fundamentally inconsistent with imprisonment[98] and any retraction of inmates' rights must serve legitimate penological interests.[99] The constitutionality of the CDC's abortion funding policy as a restriction on inmates' rights is determined by analyzing the nature of the right to abortion and the penological interests served by restricting such right.[100] The state must show that restricting inmates' access to abortion funding serves the interests of incarceration.[101] Before proceeding with this analysis, it is important to determine the proper standard of review used in assessing the constitutionality of prison regulations.

---

96. This approach, termed "civil death," entirely suspended the civil rights of the imprisoned. 1968 Cal. Stat. ch. 1402, § 1, at 2763 (amending CAL. PENAL CODE § 2600); repealed by 1975 Cal. Stat. ch. 1175, § 3 at 2897.

97. CAL. PENAL CODE § 2600 (West 1982) provides that:

> A person sentenced to imprisonment in a state prison may, during any such period of confinement, be deprived of such rights, and only such rights, as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public.

See also Cruz v. Beto, 405 U.S. 319 (1972) (inmates retain substantial religious freedom under the first and fourteenth amendments upon imprisonment); Younger v. Gilmore, 404 U.S. 15 (1971) (inmates retain right of access to the courts upon imprisonment); Lee v. Washington, 390 U.S. 333 (1968) (inmates are protected under the equal protection clause of the fourteenth amendment from invidious discrimination based on race).

Nonetheless, prison officials do have discretion to restrict a variety of inmates' rights. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979) (condoning prison searches which invade inmates' personal privacy); Pell v. Procunier, 417 U.S. 817 (1974) (restricting inmates' rights to communications with the media); Coleman v. District of Columbia Comm'r, 234 F. Supp. 408 (E.D. Va. 1964) (restricting inmates' practice of religion); Gerrish v. Maine, 89 F. Supp. 244 (D.C. Me. 1950) (allowing censorship of inmate mail); *In re* Price, 25 Cal. 3d 448, 600 P.2d, 158 Cal. Rptr. 873 (1979) (restricting inmates' union meetings); People v. Hill, 12 Cal. 3d 731, 528 P.2d 1, 117 Cal. Rptr. 393 (1974) (allowing jailhouse conversations between inmates and their spouses to be monitored); California Dept. of Corrections v. Superior Court, 131 Cal. App. 3d 245, 182 Cal. Rptr. 294 (1982) (terminating inmates' personal contact visits); People v. Estrada, 93 Cal. App. 3d 76, 155 Cal. Rptr. 731 (1979) (permitting regulation of communications between inmates awaiting trial).

98. Hudson v. Palmer, 468 U.S. 517, 523 (1984).

99. O'Conner v. Keller, 510 F. Supp. 1359, 1368-69 (D. Md. 1981). The Supreme Court has stated that inmates' rights may be restricted in furtherance of any penological objective including, but not limited to, retribution, deterrence, protection of society and rehabilitation. Williams v. New York, 337 U.S. 241, 243 n.13 (1949).

100. In Wolff v. McDonnell, 418 U.S. 539, 556 (1974), the Court stated that "there must be mutual accommodation between institutional needs and objectives and the provisions of the constitution that are of general application."

101. O'Conner v. Keller, 510 F. Supp. 1359, 1368-69 (D. Md. 1981).

B. Standard of Review

Traditionally, courts have taken what has been termed a "hands off" approach toward review of prison regulations.[102] It was believed that it was not the function of the courts to superintend treatment and discipline of prisoners in penitentiaries.[103] Consequently, courts have invested wide discretion in prison authorities to determine what restrictions must be placed on inmates' rights.[104] The "hands off" approach toward review of prison regulations has, not surprisingly, been accompanied by a low standard of review in some cases dealing with the constitutionality of such regulations.[105] Recently, however, significant inroads have been made into the policy of deferring to the judgment of prison officials concerning which restrictions on inmates' rights are necessary. This has been achieved primarily through resort to a heightened standard of review.

In *Procunier v. Martinez*,[106] the Supreme Court reviewed a CDC policy allowing censorship of inmate mail.[107] Because the policy infringed inmates' first amendment rights of free speech, the Court subjected the policy to a rigid standard of review.[108] The Court stated that to be constitutional, the policy must further one or more of the substantial governmental interests of security,

---

102. Barning v. Looney, 213 F.2d 771 (10th Cir. 1954), *cert. denied*, 348 U.S. 859 (1954) (holding courts are without power to supervise administration of prisons or to interfere with prison regulations).

103. Stroud v. Swope, 187 F.2d 850 (9th Cir. 1954) (upheld prison regulation which prevented inmate known as the "Birdman of Alcatraz" from seeking publication for his books written while in prison).

Three factors have been identified as contributing to the judiciary's reluctance to become involved with supervision of prisons. First, management and control of prisons are generally executive and legislative functions. The judiciary by the doctrine of separation of powers, has little to say about the running of penal institutions. Second, claims by state prisoners are not for the federal courts to address, but instead are best left in the hands of state tribunals. Third, because the management of prisons requires expertise in penological matters, the judiciary is seldom qualified to speak on what is appropriate prison policy. J. GOBERT & N. COHEN, RIGHTS OF PRISONERS 7-9 (1981).

104. Smith v. Schneckloth, 414 F.2d 680 (9th Cir. 1969); Mathis v. Pratt, 375 F. Supp. 301, 304 (N.D. Ill. 1974).

105. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 538 (1979) (requiring only a showing that a prison regulation which allowed invidious searches and seizures upon inmates was "rationally connected" to the purpose for which it was assigned); Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977) (while reviewing prison regulations which prohibited labor unions in state prisons, the Court concluded that the restrictions were justified merely because they were "reasonably related" to the state objective of prison security).

106. 416 U.S. 396 (1974).

107. The policy, *inter alia*, proscribed inmates correspondence that "unduly complain[ed]," "magnifi[ed] grievances," "express[ed] inflammatory political, racial, religious or other views or beliefs," or contained matter deemed "defamatory" or "otherwise inappropriate." *Id.* at 399-400.

108. *Id.* at 408.

order and rehabilitation.[109] In addition, the limitation must be no greater than is necessary for the protection of the government interest involved.[110] Under this demanding standard, the policy was declared unconstitutional.[111] Even though mail censorship would serve the legitimate interest of prison security in some instances,[112] the policy in question swept too broadly in that it allowed censorship of material unthreatening to prison order or security.[113]

California courts scrutinize prison regulations with varying degrees of intensity. When fundamental constitutional rights are being suppressed by a regulation, a high standard of review will be employed to judge its constitutionality.[114] Conversely, a lesser standard will suffice when analyzing a regulation which does not infringe upon inmates' fundamental constitutional rights.[115]

In *In re Price*,[116] the California Supreme Court reviewed a CDC policy which prohibited inmate union meetings.[117] The standard of review used in *Price* was one of reasonableness.[118] It required only that the policy be reasonably related to the legitimate state interest of prison security.[119] This standard was satisfied on a showing that the formation of an inmate union would likely create several security problems at the prison.[120] *Price* was decided, however, on the premise that the policy did not implicate any constitutional right of inmates.[121] Because the policy did not violate any

109. *Id.* at 413.
110. *Id.*
111. *Id.* at 415.
112. The Court listed attempts by inmates to mail escape plans or encoded messages as examples of when mail censorship would be justified. *Id.* at 413.
113. The policy allowed censorship of letters "criticizing policy, rules or officials" or letters with "defamatory" or "disrespectful" remarks. *Id.* at 415.
Despite more recent Supreme Court decisions reverting back to a more lenient standard of review of prison regulation (*see supra* note 105), the *Procunier* standard is still used by many federal courts. *See, e.g.*, O'Conner v. Keller, 510 F. Supp. 1359 (D. Md. 1981) and Salisbury v. List, 501 F. Supp. 105 (D. Nev. 1980).
114. *See infra* notes 122-28 and accompanying text.
115. *See infra* notes 116-21 and accompanying text.
116. 25 Cal. 3d 448, 600 P.2d 1330, 158 Cal. Rptr. 873 (1979).
117. The policy prohibited Soledad State Prison inmates from holding meetings of the Prisoner's Union at which inmates and noninmates would be present. *Id.* at 450, 600 P.2d at 1331, 158 Cal. Rptr. at 874.
118. *Id.* at 453, 600 P.2d at 1332, 158 Cal. Rptr. at 875.
119. *Id.*
120. *Id.* at 455, 600 P.2d at 1333, 158 Cal. Rptr. at 876. Inmate strikes and regular contact between inmate and noninmate union representatives were cited as potential security problems associated with inmate unions. *Id.* at 453-54, 600 P.2d at 875-76, 158 Cal. Rptr. at 1332-3.
121. *Id.* at 453, 600 P.2d at 1332, 158 Cal. Rptr. at 875. The court stated that incarceration necessarily prevents prisoners from enjoying unrestricted rights of association and that the United States Supreme Court, in Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977), "unequivocally determined" that prisoner union restrictions offend no

constitutional right of the inmates, the court was justified in using the lower standard of review.

In *Inmates of Sybil Brand Institution for Women v. County of Los Angeles*,[122] the court used a different standard in reviewing several CDC regulations being challenged by inmates. Here, the female inmates alleged unequal treatment and inferior conditions of confinement as compared to state prisons for men.[123] Thus, the women inmates had cognizable equal protection claims under both the California Constitution[124] and the Federal Constitution.[125] The court determined that when inmates' fundamental rights are violated by a prison regulation, such regulation should be subject to strict scrutiny on review.[126] The state thus was required to show that the regulations furthered compelling state interests and that these interests could not be served in a less restrictive manner.[127] The regulations under review were consequently upheld on a showing that they advanced prison security and this interest could not be achieved by less restrictive means.[128]

Price and *Inmates of Sybil Brand* demonstrate that the level of scrutiny a prison regulation should be afforded is determined by examining the right being restricted by the regulation. If, as in *Price*, the right is not fundamental, the regulation need only be reasonable to be constitutional. However, if the right is fundamental, as in *Inmates of Sybil Brand*, the regulation must survive strict scrutiny to be constitutional. Because the CDC's abortion funding policy restricts an inmate's fundamental right to abortion,[129] it must pass strict scrutiny to be constitutional.

C. Strict Scrutiny of the CDC's Abortion Funding Policy

Previous analysis of the purported state interests served by the CDC's abortion funding policy reveals that it is doubtful whether a restriction on inmates' rights to abortion funding serves any legitimate, let alone compelling, state interest.[130] The policy does not advance any goal of the penal system. Retribution is not jeop-

---

constitutional right. *Id.*

122. 130 Cal. App. 3d 89, 181 Cal. Rptr. 599 (1982).

123. The prison regulations under review in this case related to conditions of confinement at a California state prison, e.g., visitation rights, disciplinary procedures, outdoor recreation facility availability and use of "control" facilities for problem inmates. *Id.* at 98, 181 Cal. Rptr. at 603.

124. CAL. CONST. art. I, § 7.

125. U.S. CONST. amend. XIV.

126. *Inmates of Sybil Brand*, 130 Cal. App. 3d at 99, 181 Cal. Rptr. at 603.

127. *Id.*

128. *Id.* at 103-12, 181 Cal. Rptr. at 605-11.

129. *See supra* notes 76-78 and accompanying text.

130. *See supra* notes 82-93 and accompanying text.

ardized, criminal activity is not deterred, society is not made safer, and rehabilitation is not undermined when inmates are provided abortion funding.[131]

Language from a recent United States District Court decision[132] addressing the constitutionality of restrictions on inmates' rights to abortion and abortion funding is relevant in this regard. The court wrote:

> Permitting pregnant inmates to exercise their right to choose and then to carry through with that decision is in no way inconsistent with their status as prisoners or with the goals of the correctional system. Additionally, the prisons should be and are constitutionally required to provide for all the serious medical needs of the inmates, whose financial dependency is . . . a result of their incarceration.[133]

Since no penological interests are served by restricting inmates' access to abortion funding, the CDC's abortion funding policy should be invalidated under the California constitution.

CONCLUSION

The constitutional right to abortion has been the target of both legislative and judicial attack since the Supreme Court announced such right in *Roe v. Wade*. But like other efforts to dilute the right to abortion, the CDC's attempt to restrict the availability of abortion by limiting funding for that procedure is unconstitutional.

In California, state actions which force people to forego constitutional rights in order to qualify for government benefits are subject to stringent judicial scrutiny.[134] This prevents legislators from doing indirectly, through fiscal manipulation, what they cannot do directly, *i.e.*, unduly burden citizens' constitutional rights.[135] Recognizing this, the California Supreme Court in *Myers*, struck down legislation which conditioned receipt of state pregnancy-related benefits on the forfeiture of the constitutional right to abortion. The current CDC's abortion funding policy likewise condi-

131. *See supra* note 99 and accompanying text.

132. Monmouth County Correctional Inst. Inmates v. Lanzaro, 643 F. Supp. 1217 (D.N.J. 1986).

133. *Id.* at 1227.

134. As the California Supreme Court has stated: "There is no greater power than the power of the purse. If the government can use it to nullify consitutional rights, by conditioning benefits only upon the sacrifice of such rights, the Bill of Rights could eventually become a yellowing scrap of paper." *Myers*, 29 Cal. 3d at 284, 625 P.2d at 801, 172 Cal. Rptr. at 888.

135. As stated by one scholar, the government cannot "achieve with carrots what [it] is forbidden to achieve with sticks." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 933 n.77 (1978).

tions state aid on the forfeiture of the abortion right. This Comment has shown that the CDC's policy, like the legislation invalidated in *Myers*, cannot survive the judicial scrutiny it demands.

Additionally, as a penal restriction, the CDC's abortion funding policy does not further any interest society hopes to achieve when it incarcerates criminals. The policy thus violates the right of inmates to be free from unnecessary intrusions into their civil liberties. Inmates should retain the same right to abortion funding as nonincarcerated women. Any attempt to restrict inmates' rights to abortion funding is constitutionally intolerable.

*Todd M. Vukson**

---

* This article is dedicated to my mother and late father, without whose love and support I would not have come this far.