

**Transcript of Oral Argument Before Statutory Three-
Judge United States District Court for the Northern
District of Texas, Filed July 30, 1970**

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA NO. 3-3690-B

JANE ROE,

Plaintiff,

—V.—

HENRY WADE,

Defendant,

—V.—

JAMES HUBERT HALLFORD, M.D.,

Intervenor.

CA NO. 3-3691-C

JOHN DOE and MARY DOE,

Plaintiffs,

—V.—

HENRY WADE,

Defendant.

BE IT REMEMBERED that on the 22nd day of May 1970 at Dallas, Texas before the Honorable Irving Goldberg, Judge of Fifth Circuit Court of Appeals; the Honorable Sarah T. Hughes and the Honorable W. M. Taylor, Jr., U. S. District Court Judges, and without a Jury, the above styled and numbered cause came on for hearing as hereinafter shown:

A p p e a r a n c e s :

MISS LINDA COFFEE, Dallas, Texas

and

MRS. SARAH WEDDINGTON, Austin, Texas

for the Plaintiffs

DAUGHERTY, BRUNER, LASTELICK & ANDERSON, Dallas,
Texas

By: Mr. Fred Bruner

and

Mr. Roy L. Merrill, Jr.

for the Intervenor

Dr. James H. Hallford

OFFICE OF DISTRICT ATTORNEY HENRY WADE, Dallas,
Texas

By: Mr. John Tolle

for the Defendant Wade

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF
TEXAS, Austin, Tex.

By: Mr. Jay Floyd

Mr. Ed Mason

For the Defendant Attorney General of Texas

PROCEEDINGS

Dallas, Texas

July 22, 1970

Judge Goldberg: Good afternoon. We have for hearing this afternoon the consolidated cases of ROE, et al versus WADE, 3690 and DOE, et al versus WADE, 3691. Have all the appearances been given to the court reporter?

Mr. Tolle: Yes, Your Honor.

Judge Goldberg: Is everyone ready?

Mr. Tolle: Defendant Wade is ready, Your Honor.

Mr. Bruner: We are ready, Your Honor, the Intervenor is ready.

Miss Coffee: Plaintiffs Doe and Roe are ready, Your Honor.

Judge Goldberg: Will there be any testimony in this case?

Mr. Tolle: No, Your Honor, for purposes of the record, we had previously filed a Motion for a Jury trial, and all facts that were to be in controversy, I think have been resolved by affidavits, and we at this time withdraw that Motion. We will have no evidence to present.

Miss Coffee: We have no evidence to present.

Judge Goldberg: The Intervenor?

Mr. Bruner: The Intervenor has no evidence, Your Honor.

Judge Goldberg: The Court will allocate half an hour to the side for the presentation of your arguments with respect to the Motion for Summary Judgment and the Motion to Dismiss. With that time allocation, we will now hear you. The Intervenor and the Plaintiffs should divide

their half hour. Your positions are the same, are they not, except with respect to standing?

Mr. Fred Bruner: Yes, Your Honor.

May it please the Court, we have agreed upon presentation of the matter before the Court, and ladies first, of course. There are several points to be taken up and we have agreed upon the points to be presented by the respective parties, and we will abide by the Courts' time.

Mr. Floyd: Your Honor, if the Court please, the State of Texas has responded to the Plaintiffs' and the Intervenor's Petitions. We don't know how the Court feels about the allocation of time between the State of Texas and the District Attorney.

Judge Goldberg: Can you divide your half hour?

Mr. Floyd: I think we can.

Judge Goldberg: Let's proceed then.

Miss Coffee: May it please the Court, I am Linda Coffee and I am the attorney representing the Plaintiffs Doe and Roe. We had agreed, my co-counsel and I, to divide up the argument in the following way: I will present the preliminary procedural points, and then my co-counsel, Sarah Weddington, will consider the merits for the Plaintiffs Doe and Roe. In view of the allotted time, I will not attempt to cover all the procedural issues raised for they are many and somewhat complex. I think I must concentrate on the question of whether this Court should abstain from rendering a Declaratory Judgment concerning the validity of the Texas Abortion Laws, and then the question of the propriety of injunctive relief, should they decide that the laws are unconstitutional.

I will first consider the question of declaratory relief. It is our position that the case of *Zwickler* versus *Koota* compels this Court to consider the constitutional question,

compels this Court to give a declaratory judgment concerning the validity of the Texas Abortion statute.

Judge Hughes: Why do you say that?

Miss Coffee: Because in this case the Plaintiffs are contending that there is no possible construction which the State Courts could put on the Texas Abortion Laws which would modify or remove the constitutional question. It could not at least modify all of the questions.

Perhaps the State Court could possibly render a decision explicating and making the statute somewhat less vague, but we are complaining of the statutes not only because they are vague but because they are overbroad. Our contention is that there is no conceivable construction which you can put on the Texas Abortion Laws which would remove the problem of their overbreadth. There is no construction whereby the Court could say Texas Abortion Laws permit abortion or do not punish abortion in the case of a woman who seeks an abortion because of contraceptive failure or because of simply economic reasons, and I would point out that *Zwickler* versus *Koota* is not limited to First Amendment rights, however, if the Court thinks it is important, we do feel that First Amendment rights are involved in our Plaintiffs' constitutional claims.

Judge Hughes: What First Amendment rights?

Miss Coffee: Well, the right of privacy. I think the case of *Stanley* versus *Georgia* clearly extended First Amendment protection to the right of privacy. I think this is clear from the language of the case. However, I don't think—as I said—*Zwickler* versus *Koota* no where indicates it is limited to First Amendment rights.

Judge Goldberg: *Zwickler* was a First Amendment case, wasn't it?

Miss Coffee: It did involve expression—First Amendment rights, however the statement in the case says, "This is especially so when First Amendment rights are involved", implying that the case has as much validity as when First Amendment rights are not involved.

Judge Goldberg: Do you make a distinction between the First Amendment and the Ninth Amendment with respect to perhaps enforcement even if there is no difference with respect to the declaration of unconstitutionality?

Miss Coffee: I think in some cases this may be justified. I don't think it makes any difference in our case because whether you say that the rights involved First Amendment rights or Ninth Amendment rights, I feel that they are so important that they deserve the special protection that has been accorded First Amendment rights. In other words they involve fundamental human freedom, which I think the recent cases have indicated are beginning to be given the same priority treatment that First Amendment rights have already been afforded.

Judge Goldberg: We have been cautioned, however, that we are only to do it in extra ordinary cases where it is liable to have a chilling effect upon First Amendment rights.

Miss Coffee: Well, as I understand, we're talking about injunctive relief now. As I understand it, the traditional rule is that the Courts will not enjoin State criminal proceedings or perhaps proceedings of any kind except in extra ordinary circumstances.

Judge Hughes: What extra ordinary circumstances are involved here? The State has not tried to prosecute unfairly, has it?

Miss Coffee: The State is prosecuting against physicians. I think when the State undertakes to prosecute

against physicians, naturally this will deter physicians from performing abortions even if they feel that in certain cases it's justified.

Judge Goldberg: Well, your position is then that any constitutional invasion of any constitutional right should be protected by an injunction?

Miss Coffee: Not any constitutional right.

Judge Goldberg: Well, where would and where wouldn't you?

Miss Coffee: All right, here's an illustration—where one individual is subjected to an unreasonable search and seizure. As in the present case, this does not really involve what we call public rights, this could be said to be an injury to this one particular individual, and this is not done pursuant to a State statute as in this case, where a State statute clearly authorizes the State to make these prosecutions.

And I think another point is that the members in Jane Roe's class do not have any adequate State remedy. There is no State forum available to the Plaintiff in Jane Roe's class.

Judge Goldberg: Yes, but the State of Texas might hold its statute unconstitutional or the Supreme Court of the United States could hold it unconstitutional when the State has held it constitutional. It's not defenseless.

Miss Coffee: Well, Jane Roe is not personally facing prosecution.

Judge Hughes: Could the Intervenor submit himself to the State Court?

Miss Coffee: He is already before the State Court, the Intervenor is already before the State Court.

Judge Hughes: But can he raise the question?

Miss Coffee: I suppose in his defense he can raise the interest of our Plaintiffs there, but I don't think it's fair to make our Plaintiffs' rights—to make their vindication of their rights be determined on what another class of persons raises.

Judge Goldberg: Do you think the entire statute should be stricken?

Miss Coffee: Yes.

Judge Goldberg: Completely?

Miss Coffee: Yes. I think the Court has no other choice because the scope is so entirely too broad. All the provisions just about are so vague, that I just don't think it's—

Judge Hughes: Suppose we struck out the provision saving the life of the mother in the last section of the law, wouldn't that make the statute constitutional? You would then have that section read, "Nothing in this Chapter applies to an abortion procured or attempted by medical advice."

Miss Coffee: The thing is—this was not the intent—if the Court should do this, then the Court would be re-writing the statute for the State. There is no indication that the State of Texas intended the statute to read that way.

Judge Goldberg: Do you know whether this statute was separable? Did it have a separability provision? When was it passed? When was the Abortion statute passed—1905?

Miss Coffee: I believe this statute was passed around 1919—it might be 1905, but the predecessor was passed in 1886, I am told.

Judge Goldberg: Do you know whether it has a separability provision?

Mr. Tolle: If the Court please, it's 1907, I think.

Judge Goldberg: Does it have a separability provision?

Miss Coffee: I don't know, Your Honor.

Judge Goldberg: Does anyone at the counsel table know?

Mr. Tolle: Not specifically. I believe there is a general provision in the Penal Code providing for separability. I think there is, Judge.

Miss Coffee: Is the Court worried about—

Judge Goldberg: We worry about a lot of things. Don't let that worry you.

Miss Coffee: I was going to suggest if the Court was concerned about there being any criminal sanction against a non-medical personnel performing abortions—

Judge Goldberg: Perhaps—may I suggest—we may be worried, I don't know—that if we struck it down completely, extricated the whole thing, anybody could perform an abortion any place—in a garage or in an attic or any other place? I know you're going to answer about the medical practice, and we'll get to that a little bit later.

Miss Coffee: All right, Your Honor.

In the case of *University Committee to End the War in Vietnam* versus *Dunn*, a court in Austin, a Three-Judge Federal Court in Austin struck down the Texas Breach of the Peace statute.

Judge Goldberg: Yes.

Miss Coffee: They struck down the whole statute, as I understand it, but they stayed the execution of an injunction until the next session of the Legislature out of a Special Order—

Judge Goldberg: You are suggesting we might do that here?

Miss Coffee: That's a possibility. I think the statute is so bad the Court is just really going to have to strike it all down. I don't think it's really worth salvaging. If the

Court made the relief which it mentioned, that would still read "pursuant to medical advice" and that would still be somewhat unclear. The Court would almost have to extricate "by medical advice", whether that's just limited to licensed practitioners of medicine or nurses or what it means. There's nothing in the statute.

Judge Goldberg: You think 63 years of unconstitutionality should have worn everyone's constitutional patience, is that what you're saying?

Miss Coffee: Yes, I think so. I think the State of Texas has had plenty of time to construe this statute, if it can be construed in a constitutional manner.

Judge Goldberg: You've used 13 minutes. Judge Hughes is our timekeeper. Thank you.

Mrs. Weddington: May it please the Court, my name is Sarah Weddington. Since I have very little time left, I would like to speak to two issues, the first being the justification which the State alleges for the State Abortion statute, i.e., the protection of the life of the child; and secondly, whether or not there are substantial constitutional issues involved as protected by the right to privacy.

Since the four recent cases which deal with the Abortion statute have unanimously recognized the right to privacy and have expanded on it to some extent, I would like first to turn to the problem of whether or not—

Judge Goldberg: What four cases are you talking about?

Mrs. Weddington: The four cases I'm talking about are *California v. Belous*, *U. S. v. Vuitch*—

Judge Goldberg: In the District of Columbia—you say that they held that the Ninth Amendment was involved—

Mrs. Weddington: I said that they have all recognized the right to privacy.

Judge Goldberg: I don't read *Vuitch* that way. I think it's stricken down on the basis that it was vague.

Mrs. Weddington: Excuse me—quoting from that Opinion—"There has been moreover an increasing indication in decisions of the Supreme Court of the United States that as a secular matter the woman's liberty and right of privacy extends to family, marriage, and sex matters, and may well include the right to remove an unwanted child at least in the early stages of pregnancy."

Judge Goldberg: You are reading from what, now?

Mrs. Weddington: *U. S. v. Vuitch*. Memorandum Opinion.

I'll be glad to show this to the Court.

Judge Goldberg: I have it.

Judge Hughes: We have it.

Judge Goldberg: We have it.

Mrs. Weddington: Would you like for me to quote further from this?

Judge Hughes: No, you go ahead.

Mrs. Weddington: I will refer to this question again later, if the Court would like.

The only justification which the State has advanced at this point for the justification for the statute is that of protecting what they term the life of the unborne child.

First, I would like to draw to the Courts' attention the fact that life is an ongoing process. It is almost impossible to define a point at which life begins or perhaps even at which life ends. Certainly life in its very general matter is present in the sperm, it's present in the ova. This potential of life depends on a set of circumstances which must then occur. This is a fact recognized by former Justice Clark in an article he wrote. "To say that life is present at conception is to give recognition to the potential rather

than the actual." The unfertilized egg has life and if fertilized it takes on human proportions.

Judge Goldberg: Assuming that there is a Ninth Amendment right here, I want to ask you to address yourself to the question—does the State have any compelling interest that could regulate or modify in any manner that right? Can they for example say that all abortions must be in a hospital or must be certified by one physician, four physicians or 22 physicians? Whether there should be different standards for abortion for married and unmarried people? Can there be a State compelling interest still recognizing the Ninth Amendment right?

Mrs. Weddington: So far as I can see any interest which the State would allege which could be compelling must be based on some sufficient justification. I can see, for example, sufficient justification for keeping a non-licensed medical person from doing the operation.

Judge Goldberg: You can see this?

Mrs. Weddington: There is a public health problem involved.

I cannot see any justification for regulating the abortion when it is done by a doctor.

Judge Goldberg: Whether it be married or unmarried?

Mrs. Weddington: That is true.

Judge Goldberg: Or the state of the pregnancy or anything?

Mrs. Weddington: The state of the pregnancy gives me some pause. I can see, for example, that you could, as I believe *Babbitt* did, say that this right exists only to the fourth month of pregnancy. To me a more persuasive argument is that you could recognize life when the fetus is able to live outside the body of the mother, which is approximately the 22nd or the 26th week of pregnancy.

I think a solution I would like to suggest to the Court is one which has come up in consideration of transplants, as to when death occurs. Instead of whether or not the heart is beating or there are bodily processes going on, the standard is more and more being adopted as to whether or not there are brain functions present as evidenced by EEG. I think this is an excellent way to determine whether or not the fetus has sufficient human characteristics that it should be given the recognition of a human life and protected as such.

So far the earliest that they have been able to get EEG readings on the fetus is about the seventh month of pregnancy.

Judge Hughes: Would you put that in the statute?

Mrs. Weddington: I think it could be used as a determination point. Certainly EEG is a very standard procedure. Doctors are all familiar with it and it could be something that could be easily done or proven that the brain function is evident.

Judge Goldberg: Do you think that the present statute, bad as you say it is, should show some compelling State interest on the part of the State to regulate some phase of this matter?

Mrs. Weddington: Not as it's written. It is so broad at the present time that it denies, or it covers so many women whom I believe under the Ninth Amendment, that those women have a right to abortion, which is denied them by this statute. I think you cannot make any valid distinction on whether or not she's married or unmarried, whether or not the child is conceived out of marriage—

Judge Goldberg: Not whether we can, but the Legislature could.

Mrs. Weddington: I don't believe the Legislature could make such a valid distinction under the distinctions.

Judge Hughes: Do you think that the State has a more compelling interest with reference to unmarried women than married women?

Mrs. Weddington: I do not. For example, at the present time a great many women who are pregnant and desire abortion are unmarried women. I don't believe it can be successfully argued that to enact a statute which would deny them abortion would in fact serve any State interest.

Judge Goldberg: Well, is there any relationship between promiscuity?

Mrs. Weddington: I don't believe there is.

Judge Goldberg: Is there any body of knowledge on the subject?

Mrs. Weddington: Not to my knowledge, other than the fact that they are already promiscuous when the statute is in effect, and in fact these are some of the girls who need this right and who have the most socially compelling arguments why they should be allowed abortions—the young, those still in school, those unable to shoulder the responsibility of a child—these girls should not be put through the pregnancy and should be entitled to an abortion.

Judge Goldberg: Are there any conditions under which the State has a compelling interest to prevent this—any, any situation that you can think of?

Mrs. Weddington: If the abortion is to be performed on a fetus which has been determined to have human life, which I would suggest would either be when brain waves are present or in the cases I suggested earlier, then I believe the State would have a valid right to regulate. Even then I do not believe the State has a valid right to regulate how it is done other than that it be done by a competent, licensed physician.

Judge Goldberg: Do you think if we struck the law down and there could be no indictments and no prosecutions for abortion and some of the abortions were taking place under conditions which you might even agree were unsanitary or unscientific conditions, what would be the situation then?

Mrs. Weddington: First of all, if it is an unlicensed medical personnel, there are remedies under the Penal Code for the practice of medicine.

Judge Goldberg: Do you know what they are? Do you know that it's just a fine and punishable by 30 days?

Mrs. Weddington: Yes.

Judge Goldberg: That's the limit of the punishment?

Mrs. Weddington: That's right, but if you had licensed personnel available and doing the operation, the girls would have the alternative of going to those people, and any woman would tell you that she would much rather place herself in the hands of a doctor under sterile conditions than to be placed in a motel room—

Judge Hughes: It might be dependent upon whether she had the money or not.

Mrs. Weddington: It might be, but for example, in John Hopkins, they are now doing abortions on an out patient basis for from \$75 and \$100. In most of the cases now the girls are raising usually \$150, more generally \$350 for the abortions that they are getting now, which is evidenced by the fact that the girls are coming in, having gone through that abortion and having to be treated.

Judge Goldberg: If the State had to pay for a good many of these abortions, would the State have any compelling interest in keeping the number down from an economic point of view?

Mrs. Weddington: The State would have more of an interest in not having to make the welfare payments to many of those children and their parents when they are later produced, than it would in denying the basic constitutional rights to those women.

I can also point out that Blue Cross has now come out and said that it will definitely consider and feels that it will probably pay medical benefits for abortions in Wisconsin.

Judge Goldberg: One more question—you think this statute is more vulnerable on Ninth Amendment grounds or on vagueness.

Mrs. Weddington: I believe it is more vulnerable on the Ninth Amendment basis.

Judge Goldberg: All right, thank you.

Mr. Bruner: Your Honor, I am Fred Bruner, and I am representing the Intervenor, Dr. Hubert Hallford.

I regret that Mrs. Weddington says on the Ninth Amendment because I was about to argue on the vagueness of the statute.

Judge Hughes: I think you should under the circumstances.

Mr. Bruner: Going back to Judge Hughes' remarks about Article 1196 of the State statute, the question of the exception to an abortion if it's procured or done by or attempted to be done by one on medical advice for the purpose of saving the life of the mother—that's what I'd like to limit my remarks to, and I think it goes without saying that any State law should precisely set out in plain language and intelligible language so that a man of common intelligence could understand the meaning of the law.

It's the position of Dr. Hallford, and I'd like to refer the Courts' attention to his uncontroverted affidavit attached

to my pleadings, that not only is this language vague and hard to understand for the man of common intelligence, but even doctors themselves cannot interpret the language of this statute, and in Dr. Hallford's affidavit he states that even hospitals and doctors cannot determine what they should or shouldn't do, what is permissible and what is not permissible under the language of this particular statute. He points out in his affidavit that a person who comes to a hospital in Dallas, Texas or in the State of Texas pregnant and is going to consult the hospital about the impending pregnancy, that they can't get a decision from the hospital. They sometimes move from one hospital to the other, they sometimes move from doctors' offices to other doctors' offices—it's more or less a passing of the buck, so that doctors themselves can't determine what their liability may or may not be under this particular section of the Texas Abortion Law.

Judge Hughes: Well, if the Court struck out the words "for the purpose of saving the life of the mother", would that make the whole statute constitutional?

Mr. Bruner: You mean, Your Honor, Section 1196 in its entirety?

Judge Hughes: No, just struck out the words "for the purpose of saving the life of the mother"?

Judge Goldberg: There's nothing in this Chapter that applies to an abortion procured or attempted by medical advice—period.

Mr. Bruner: All right—I don't think it would be, Your Honor, because of the fact that "medical advice" as written in this law can be interpreted by many different ways. What is medical advice? Who does it come from?

Judge Goldberg: Can you look it up in a book?

Mr. Bruner: You can't look it up in a book—a dictionary.

Judge Goldberg: Maybe you could look it up in a book by a layman—that might be medical advice, mightn't it?

Mr. Bruner: A layman could look up "medical advice" in a book and he could say, "Come here, young lady, I am a medical advisor and I want to abort you under this law in Texas."

Judge Hughes: But you don't certainly think it would be interpreted that way, do you?

Mr. Bruner: I wouldn't go that far, Your Honor, but it has been interpreted by some to mean people who are pharmacists, who are nurses, who are taxi cab drivers and things of that nature—have interpreted themselves to be one who has medical advice, so I don't want to speculate on what some individual might interpret, but it has been so interpreted in the past that way. So therefore we take the position that this language used in this statute of the State of Texas is vague, and a man of common intelligence can't interpret it. Therefore, under rights to due process under the Constitution of the United States, Article 1196 of the Abortion Law of the State of Texas is unconstitutional.

Going to the life of the mother part of the statute, I might add also before I get away from the medical advice, referring to Dr. Hallford's affidavit, he states in there that when a woman comes into his office and discusses with him an impending pregnancy, that he is afraid to talk to her about it because of this statute; that immediately there becomes a conflict of interest between the physician and the patient in that he's afraid he's going to be prosecuted for abortion, and she's there not worried about the prosecution part of it, she's there for her personal medical

reasons of having an abortion performed; and so then you get into the question of accessory before or after the fact of an abortion. Other doctors will not discuss it with other doctors about the matter of terminating a pregnancy.

Now, on the life of the mother, this part of it we contend—saving the life of the mother. “Saving”—some of the statutes, the *Belous* California statute uses the word “preserve”. I assume that’s synonymous with “save”, and the Court held in the *Belous* case that that language of preserved and saved was vague and could not be interpreted by a man of common intelligence, and I believe that the Court in the District of Columbia dwelt upon that issue. There is a distinction, however, between those cases decided and the *Babbitz* case in Wisconsin in that the exceptions to the Wisconsin statute did use language of this nature. However, it did say that two physicians advised, the point being that the physicians would make the interpretation of whether it was medically permissible to abort the woman, and it would be upon the shoulders of the physicians and not upon the shoulders of the prosecutor.

Judge Goldberg: The constitutionality of 1196 has never been presented to the Court of Criminal Appeals, has it?

Mr. Bruner: There are no cases that we can find where in the Texas Court, the Texas Court of Criminal Appeals has decided upon the constitutionality. They have talked about it.

Judge Hughes: Has it ever been really raised—the constitutional point?

Mr. Bruner: Not on that particular point, Your Honor, not on 1196.

Mr. Merrill: Could I speak on that?

Mr. Bruner: Yes.

Mr. Merrill: Your Honor, in one case it was raised in the sense that there was a Motion to Quash The Indictment, and the Court just summarily said that the exception was constitutional and there was no evidence in the case about why an abortion was performed, and I think it was on medical grounds, and I have that and can give it to the Court.

Judge Hughes: Give it to us later.

Mr. Bruner: In closing, Your Honor, I want to answer, if I may, a question that Judge Goldberg asked Mrs. Weddington about if the fact that this Court knocked this law out and held it was unconstitutional, that it would open up the door for a woman to go out here in a garage or restroom or anywhere else—in a motel—and have an abortion performed. I think that the very fact that they have this Abortion law on the books of Texas has driven women to that sort of thing in the State today, and that if the Abortion Law of the State of Texas were declared unconstitutional, it would give these women the right, the constitutional right, to go to a doctor or go to a qualified person who has the right surgical instruments and have this matter done at their wishes, and I just wanted to say that in closing. Thank you.

Mr. Floyd: Your Honor, I am Jay Floyd, Assistant Attorney General for the State of Texas—

Mr. Merrill: If it please the Court, my name is Roy Merrill and I am one of the attorneys representing the Intervenor, Dr. Hallford. I'd like to cite the three cases that we could find that did deal with the Texas statute 1196. Of course there are numerous cases on the other Articles. One of them is *Link* versus *State* which is in the original Brief filed on behalf of the Doctor, 164 SW 987; another one is *Ex Parte Vick*, 292 SW 889; and the other

one is *Veevers versus State*, 354 SW2d 161. Now, in that case there was a Motion to Quash the indictment on the ground that the Indictment did not allege, that the abortion didn't come under the exception of 1196 and the Court held that that's a proper matter when it's raised as an affirmative defense and no need to quash the Indictment, which is directly related to the point I'd like to argue concerning 1196, that it is unconstitutional on the ground that it places the burden technically of introducing evidence on a Defendant licensed, practicing physician.

I think the Court and everyone here will agree that the State certainly could not pass a law making it a crime for a licensed, practicing physician to perform an abortion to save the life of a mother or where she would die within a few hours if the abortion wasn't performed and it is certainly not the law as it exists now. However, the State does not have any burden when it prosecutes a physician of introducing any evidence that the abortion—why it was performed, and I think when a doctor performs an operation or a procedure such as an abortion, there are two essential elements of the crime as to a doctor. One is that he did perform the abortion, and the other is that his purpose was unlawful. Surely you could not class it a crime just for a doctor to perform an abortion.

Concerning this matter, I think if this exception were viewed as if it were a presumption it would clearly be unconstitutional. If you had a statute saying it shall be unlawful for a physician to perform an abortion, it shall be presumed that the State shows an abortion was performed, that it was performed for an unlawful purpose then clearly those facts are more likely than not, and it would clearly fall, I submit, under the *Leary* decision that it must be substantially certain and it is more likely than not that the

presumption is valid or that the interference is valid. I'm sure the State will distinguish and say, "This is just an affirmative defense, it's not a presumption", and I would like to call one case not mentioned in the original Brief to the Courts' attention, being *Morrison* versus *California*, 291 U.S., and on page 83 the Court deals with strictly the burden of introducing evidence, and it concerned in a case in California being a crime for an alien to be in possession or own real property, and the statute merely provided that the State need only prove that he was in possession, and the burden was on him as a defense to show that he actually had citizenship, and the Court held that placing the burden upon that Defendant was a violation of due process, and in various other cases it implied it can be under the Fifth, Ninth, and the Fourteenth Amendments.

I think the *Leary* cases and the cases preceding them—*Trop* and *Gainey*, if read closely, deal with the problem of presumptions in the same manner in which the Court in *Morrison* dealt with the burden of proof.

Judge Hughes: I think we've had enough of this argument.

Mr. Floyd: Your Honor, I got out of line and I apologize to Counsel.

Judge Goldberg: That's all right.

Mr. Floyd: Your Honor, the validity of State statutes are in question, the State has an interest of course when those statutes are attacked; we have requested leave of the Court to respond to the pleadings and we have been granted that relief and leave, and we are here to present an argument on behalf of the State of Texas.

Your Honors, our first contention is that the parties in this lawsuit have no standing before this Court and that if this Court so decides that there is no controversy to be

decided. Now the fundamental aspect of standing, I think, is that the Court focuses its attention on the parties instead of the issues before the Court. This was brought out in the *Flast* versus *Cohen* case. Though the issue may be justiciable, if the parties have no standing, the Court will not go forward to decide that issue.

I am under the impression that Jane Roe no longer is seeking an abortion; that she has either had her baby or is having it—

Judge Goldberg: She may in the future want to have an abortion?

Mr. Floyd: Yes, but at the present time, Your Honor, I am speaking of.

Judge Goldberg: At the time she filed this suit—are we going to let the delay in the hearing of the case abort the case?

Mr. Floyd: Your Honor, I think the law is whether or not the party has standing at the time the issues are decided in the case.

Judge Goldberg: Well, a lot of these civil rights cases and school desegregation cases, I understand that some of the children are through college by the time they remand and remand and so forth, but go ahead with your argument.

Mr. Floyd: Then my point, Your Honor, is the fact that it is problematical if she will become pregnant in the future, and if so, whether or not she will want to abort the child that she is bearing at that particular time.

The Plaintiff Mary Doe is not pregnant at this time, by the Admissions in her Complaint.

Judge Hughes: If it's to be determined as of today, we don't know, do we?

Mr. Floyd: I have no Amended Complaint or anything of this nature, Your Honor, to indicate that she is pregnant at this time, or that—

Judge Goldberg: But she may want to engage in activities by which she'll become pregnant and maybe she will then want to have an abortion. Does she have any right to present the issue under those circumstances?

Mr. Floyd: But, Your Honor, aren't we becoming involved in contingencies—contingent events that may or may not occur in the future?

Judge Hughes: There's nothing contingent about the Doctor's difficulty, he's been charged and indicted and the case is pending.

Mr. Floyd: That is correct.

Judge Goldberg: And if he has standing, do we need more?

Mr. Floyd: You do not need more, Your Honor.

Of course each of these Plaintiffs has brought a class action and all others similarly situated must fall within or stand in the shoes of the Plaintiff, you might say.

Dr. Hallford's complaint, his Intervenor's complaint, alleges that he has been deprived of certain relationships with his patients, that is, discussing abortions and performing abortions; that his rights or his patient's [*sic*] rights are violated; that he desires to perform abortions in the future. Now, I will make note, Your Honors, for what it's worth to the Court that there may be an injection of monetary benefit in performing an abortion; that he's presently under indictment; that he did not bring this suit or intervene in this action until after the indictments had been handed down by the Dallas County Grand Jury.

Judge Goldberg: He might have presumed the State wouldn't go forward on an unconstitutional statute.

Mr. Floyd: I don't believe that the State can presume that they must go forward with it, it's their duty, I think, Your Honor.

Judge Goldberg: Well, if they came to the conclusion that it's unconstitutional, the statute was passed a long time ago, and they may not prosecute it.

Mr. Floyd: That is correct, they could—the State very easily could.

Judge Goldberg: Go ahead.

Mr. Floyd: Your Honor, we do not believe the parties have standing in this court, that they have not shown an actual controversy before this Court at this time; that this Court is being asked to render an advisory Opinion; that just because maybe there are common interests among the public does not mean that these parties have standing to bring this suit.

As to the matter of a substantial constitutional question—

Judge Goldberg: What would you do with a situation where there was no question about standing, but by the time it got to the Appellate Court it had been mooted because the Plaintiff had the baby? What are you going to do with that kind of situation?

Mr. Floyd: Your Honor, I can't say that they have standing because their standing depends upon a future, contingent event.

Judge Hughes: What would give them standing in a case like this to test the constitutionality of this statute? Apparently you don't think that anybody has standing?

Mr. Floyd: I think that if the matter is adjudicated as in the Vuitch case or else the statute is declared unconstitutional in a State Court, then this is where the standing would come in, not in the Federal Court, but this is where this matter could be resolved. Now, the Vuitch case is before the Supreme Court of the United States and Dr.

Hallford of course can attack the constitutionality of this statute in this present State proceedings.

The constitutional rights—I cannot perceive, Your Honors, how it would fall under religion, speech, or press of the First Amendment.

Judge Hughes: We agree with you on that.

Judge Goldberg: No—go to the Ninth Amendment and what about vagueness?

Mr. Floyd: It appears it is directed to the right of privacy under the Ninth Amendment, and I will not discuss the other constitutional amendments alleged, I think it's unnecessary. However, the Intervenor has contended that his right to practice medicine has been impaired or abridged, and we do not see that it has been. Maybe he cannot do all of the things he wants to do and what he considers to be the practice of medicine, but there has been no denial by him of his right to practice medicine. No one has attempted to deny him that right.

That the physician-client relationship has been impaired or abridged—such a relationship does exist, however, I think you can't stop there and say "the physician-client relationship", I think you have to go further and show some right under that relationship that has been impaired.

Now, Your Honors, they have raised a question of the equal protection of the laws, and I do not see that this is relevant.

Judge Goldberg: Skip it.

Mr. Floyd: They have raised the question of privacy, the fundamental right to choose, or the woman to choose whether or not she will bear a child, which goes to her privacy. Now of course Your Honors will discuss this more in detail, but I will point out here under that particular topic that in the Belous case, where this principle, I think,

was established or else followed, and then the Vuitch case, but going back to the Belous case, the Court went further there than to consider the fundamental right of a woman to choose whether or not to bear a child and a right to privacy, and stated further that the critical issue is not whether such rights, and they were enumerated and listed, many rights involving privacy, exist, but whether the State has a compelling interest in the regulation, or whether the regulation is necessary.

Now, Your Honors, there have been many, many arguments advanced as to when an embryo becomes a human being. There have been religious groups that have joined into this controversy, and it's my understanding, and I'm not setting forth the Catholic faith—

Judge Goldberg: This statute is applicable no matter when the embryo comes in to effect—at the first week?

Mr. Floyd: That is correct.

Judge Goldberg: I don't see how that's getting you anywhere.

Mr. Floyd: But the point is that the State's interest is that it may be a consideration of whether or not murder occurs, that is, if this embryo is considered a human being?

Judge Goldberg: You mean if the embryo is considered a human being the moment of pregnancy?

Mr. Floyd: Yes, Your Honor. Now, I'm not advocating this, I'm saying there's some controversy in regard to this, that at no matter what stage of the pregnancy, the embryo is a human being. There is controversy to that effect. Medical practitioners disagree and speaking of medical advances, we have now reached a point, I think, where a medical practitioner can operate on an unborn child, perform surgery.

The State must give considerations to these various interests and opinions in deciding whether or not it has an interest in the subject matter or a compelling interest in the subject matter.

Judge Goldberg: Well, the State here has asserted its compelling interest to the extent that it make any abortion under any condition practically illegal.

Mr. Floyd: Except to save the life of the mother.

Judge Goldberg: Well, yes, except that.

Mr. Floyd: That is correct.

Judge Hughes: But you don't know what that means—the case which you quoted held that that was too vague and indefinite—the Belous case, and knocked the statute out on that ground.

Mr. Floyd: That is correct—on the right of privacy—there's no question about that.

Judge Hughes: Well then your case isn't authority for your argument.

Mr. Floyd: No, the Belous case—I'm not saying it's authority, I'm getting to the right of privacy.

Judge Goldberg: The Vuitch case says this: "The asserted constitutional right of privacy. Here the unqualified right to refuse to bear children has limitations. Congress can—" it's Congress in this case because it's the District of Columbia and the State would be in the same situation. "Congress can undoubtedly regulate abortion practice in many ways, perhaps even establishing different standards at various phases of pregnancy, if its own legislative findings were made after a modern review of medical, social and constitutional problems presented."

That's the best statement that I can find in any of the cases for your position, but what I say to you, Sir, is that I don't see anything in the Texas statute that would form the basis for this sort of compelling interest.

Mr. Floyd: Well, Your Honor, that particular case—now, the Vuitch case, as I understand it, a Motion for a Hearing has been granted by the Supreme Court, and it is my understanding that that case went further than to preserve the life of the mother. It said to preserve the life and health of the mother. This is not an argument along that point, but of course this case has not been decided finally as yet, as the Court well understands.

The State of Texas is—there are many opinions on privacy, Your Honor, and I don't know whether privacy in my opinion—I'm speaking personally now, and I'm not speaking—

Judge Goldberg: Well, I think it's a bad word in this area, but apparently everybody wants to use it. I think it's something different from privacy, but I haven't come up with a phrase myself yet, but I just know "privacy" won't do, but I know what you're talking about.

Mr. Floyd: Well, it seems to me that privacy would mean that a person is entitled to be secluded, left alone.

Judge Goldberg: This is a right to make a decision about a completely subjective matter which only involves the individual, but we won't get into that.

Mr. Floyd: As to vagueness and uncertainty, Your Honor, I think looking at the Texas Abortion statute, I think the criteria would be what a man of ordinary intelligence would have to guess at the meaning, and I do not believe that anyone would have to guess at the meaning of this particular statute.

Judge Goldberg: What time factor are we going to talk about in saving the life of a mother? Would that be imminent or can the doctor say her life may be shortened by a decade?

Mr. Floyd: Your Honor, in my understanding, it's whether or not that it might result from the birth of this particular child, death might result from the birth of this particular child.

Judge Goldberg: Even though she might die a year later?

Mr. Floyd: Well, I can't say a projection into the future.

Judge Goldberg: It's a medical judgment, it could be a scientific judgment?

Mr. Floyd: Your Honor, I think all things could be possible, but I think they have to make a decision, and I think it's left up to a medical examiner to make this decision as to whether or not the mother's life is in danger as a result of the birth of this child.

Judge Goldberg: I think you have gone over your time, if you want your associate to have his time to make his presentation.

Mr. Tolle: If the Court please, my name is John Tolle, and I represent the Defendant Henry Wade.

Mr. Floyd got into areas I wish to discuss and I'm going to have to overlap a little bit on his argument. It seems they have a disagreement, we have one too. We are not arguing with Dr. Hallford's standing, this Defendant Wade is not, he is being prosecuted under the statute and if he hasn't got standing, nobody does, so I think we're clear on that.

I think as to the Plaintiff Roe bringing a class action, she probably has standing as a class, not herself any more than as a class.

We say that Mary Doe and Joe Doe—these are two prospective applications, however, I think as we set out in that very short Brief we filed, the State only has one interest and that is the protection of the life of the unborn

child. There's a lot of medical opinion on both sides of this issue, and I think that Mrs. Weddington in her argument in a sense upheld our position. We say that at some time in the life of that child before it's born, it becomes a living child. I don't know when and I don't think medical science knows exactly when. The article we cited is a recognized work, I believe, and is Grey's *Anatomy for Attorneys*.

Judge Goldberg: You do not think that a legitimate Judgment could be made, that even though on some technical definition there was life at this particular time, a medical Judgment could be made that there should be an abortion because the mother's health was in being and was in being for a number of years should be continued on a more equitable basis?

Mr. Tolle: It's possible that could be.

You're talking now about the State's right to regulate this field of human life, which is the termination of pregnancy. I believe that in itself gives the State the interest. The only remaining question is whether it is vague or indefinite. However, to answer your first question further, I don't believe there is any—I have not been able to find any firm body of medical opinion that says at what point in the life of an embryo fetus or unborn child or whatever you want to call it, that life occurs. This particular work I referred to says that in their opinion life occurs at conception. The old common-law rule was the term "quickening" which was at the time the mother could feel the child move. As the author of Grey's textbook on medicine pointed out, modern science is able now and at a much earlier age to determine things like fetal heartbeat and muscular movement—things which indicate a living organism of some kind. They refer to the human organism.

Our position is this basically, that the life of every person starts somewhere. Every person in this room at one time was the most primitive form of embryo. We say the State has got a right to protect life that is in being at whatever stage it may be in being, and if there is no absolute fact as to when life occurs, then it becomes, I think, for the purpose of public order, a legislative problem as to when they're going to set up an arbitrary time.

Judge Goldberg: But the statute didn't address itself to that.

Mr. Tolle: That's correct, Your Honor, it doesn't. It says "to save the life of the mother".

Judge Hughes: Suppose we struck out the phrase which we've discussed before—severed it—would that make the statute constitutional, assuming that that phrase does make it unconstitutional on account of its vagueness, would striking it out be a possibility and would it then be constitutional?

Mr. Tolle: I think if you struck it out, it wouldn't make it unconstitutional, it would make the statute virtually meaningless, if it could be done on medical advice—Hallford of course would have no complaint and I don't believe we would have any more controversy on it. I don't think it would be unconstitutional, no. I don't think it's necessary. I believe the statute is constitutional. I believe that when we're talking about rights, I think that the most persuasive right that the Plaintiffs urge as was held in the Babbitz case, and all the cases refer to it quite heavily, is the right of privacy, the Ninth Amendment right of privacy, for want of a better term, and there you get to the point where the State has to regulate conflicting rights—whether the State has got an interest in the life of the unborn child sufficient to regulate the woman's right to pri-

vacy. This is a very difficult question, and I think that is properly a legislative question.

Judge Hughes: Would you discuss the abstention doctrine as applied to this case?

Mr. Tolle: I haven't, Your Honor. Quite frankly, I believe that the Vuitch case and the Babbitz case—the ones that are presently in the process of going before the Supreme Court—I believe in each case, abstention, and as to this case, would not be proper for this reason. Those statutes are different in material aspects from ours. The Vuitch case is very material and one of the things that was struck down was this vague word of “to preserve the life or health” and I believe you could distinguish our case on that ground. The Wisconsin statute goes further than ours in establishing, I believe, a medical review system provided for an abortion, and I believe it says in the case that two doctors agreed that conclusive evidence was needed and prosecution can't occur.

I don't believe that those cases, except for the Ninth Amendment right, will be determining in this case. Now, of course, I think as far as the Ninth Amendment right goes, it will, because if the Supreme Court holds that the right of the female or the mother to privacy under the Ninth Amendment is superior to the right of a young fetus to survive, then of course that will foreclose this issue.

I think that our position is that that is a matter for legislative determination. I don't think a State has to have a law at all regulating abortion. I believe the field is such that it can regulate it constitutionally. I personally, and I think the State's position will be and it is, that the right

of that child to life is superior to that woman's right to privacy. That's basically our position on that.

If I may answer just briefly—of course I think vagueness has been gone over quite heavily in here. We say to preserve the life of the mother means to prevent her death. That's self-explanatory to me. If we're talking about what Dr. Hallford can understand, I can't speak for him. His affidavit refers to his opinion about what he understands and about what other people understand. It doesn't set out as a medical fact or as an absolute fact that other doctors don't understand. It talks about their opinion.

Judge Goldberg: Do you think medical advice can come from a book?

Mr. Tolle: I don't think so. I don't think it will ever be interpreted that way. I don't think there's a statute in the world you couldn't put some unconstitutional interpretation on it, if you look for a way to do it. I believe that this will be—if it ever is attacked and if the statute does stand—will not refer to advice from a book. No—I believe it's going to refer to advice from a doctor or a medical person qualified to give it.

As far as the last thing that was raised of touching very briefly this business about putting the burden on the Defendant to prove his innocence. Mr. Merrill cited two cases—one was Dr. Leary's case and the other one was the case from California preventing aliens from owning land. I think the distinction there is that in each of those cases the thing that was presumed was an element of the offense which the Government had to prove, whereas in this case—this case—our statute is in no way different from the Federal statute regulating tax evasion, 26 U.S.C. 7201.

Judge Goldberg: Or the Dyer Act cases—we have that every day.

Mr. Tolle: Yes—affirmative offenses are present in every case—every criminal prosecution. If the Government makes out a prima facie case, the Defendant has the burden of putting himself under the exception. I believe that answers that. Thank you.

Judge Goldberg: I'd like to ask Miss Coffee or Mrs. Weddington one question—suppose that the only Defendant in this case is enjoined? Where does that leave us with respect to the rest of the State of Texas?

Mrs. Weddington: Excuse me, would you repeat the question?

Judge Goldberg: Suppose the injunction is granted in this case against Henry Wade, District Attorney of Dallas County, every other District Attorney would be free to go ahead, would he?

Mrs. Weddington: It was my understanding that since the Attorney General's Office had chosen to come in and since they are now a party-defendant to the suit—

Judge Goldberg: How are they a party defendant?

Mrs. Weddington: Well, I thought by—

Judge Hughes: I don't believe they have intervened. Has the State intervened?

Mr. Floyd: No.

Judge Goldberg: I don't think so.

Mr. Tolle: If the Court please, I believe we can cite another example—in the Buchanan case, the Courts' injunction ran against Henry Wade only and I don't think it binds anybody else.

Judge Goldberg: Do you have any response to the question?

Mrs. Weddington: We goofed.

Judge Hughes: Miss Coffee, these two cases have not yet been consolidated by Order. Would you prepare one?

Miss Coffee: Yes, Your Honor.

Judge Goldberg: We appreciate very much your argument. We will take the matter under advisement. Thank you very much.

The Marshal: All rise, please.

Court is adjourned.

(THESE PROCEEDINGS CONCLUDED)

[Certification by Court Reporter omitted in printing.]