1971 WL 128054 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Jane ROE, John Doe, Mary Doe, and James Hubert Hallford, M.D., Appellants,
v.
Henry WADE, District Attorney of Dallas County, Texas, Appellee.

No. 70-18.
Term, 1971.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

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***1** Appellants bring this direct appeal from a June 17, 1970 judgment (A. 124-126) [1] of the United States District Court for the Northern District of Texas, Goldberg, Cir. J., and Hughes & Taylor, D.JJ. The judgment related to two separate actions and an action commenced by an intervening plaintiff. [2] As to the action by Appellants John and Mary Doe, the Court found the Does lacked standing and so dismissed their complaint (A. 124, 126), denying declaratory ***2** and injunctive relief against enforcement of the Texas abortion law, which prohibits the medical procedure of induced abortion unless undertaken "by medical advice for the purpose of saving the life of the mother." 2A TEXAS PENAL CODE art. 1196, at 436 (1961) (A. 126). As to the action by Jane Roe and the complaint of Intervenor Dr. Hallford, the court granted the declaratory relief prayed for, declaring the Texas abortion law unconstitutional, but denied injunctive relief against future enforcement of the statute (A. 124-126). Plaintiffs John and Mary Doe appeal from the dismissal of their complaint and the denial of injunctive relief (A. 127). Plaintiff Jane Roe and Intervenor-Plaintiff Dr. Hallford also appeal from the denial of injunctive relief (A. 127).

Appellants submit this brief to show that this is a direct appeal over which the Court has jurisdiction, and that the lower court should have granted declaratory and injunctive relief to the plaintiffs in each of the three actions below.

Citation to Opinion Below

The June 17, 1970 opinion of the statutory three-judge United States District Court for the Northern District of Texas is reported as *Roe v. Wade,* 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam), and set out at A. 111-123.

***3 Jurisdiction**

(i) On March 3, 1970, Appellant Jane Roe filed her original complaint, basing jurisdiction on 28 U.S.C. §1343(3) (1964 ed.), and complementary remedial statutes, 28 U.S.C. §2201 (1964); 42 U.S.C. §1983 (1964). On the same day Appellants John and Mary Doe filed a complaint predicating federal jurisdiction on the same statutes. On March 23, 1970, the District Court granted leave for Appellant James H. Hallford, M.D., to intervene as a party-plaintiff, on the same jurisdictional grounds set out above (A. 22-36). Subsequently, on April 22, 1970, Appellant Jane Roe amended her complaint to sue "on behalf of herself and all others similarly situated" (A. 10). Appellants John and Mary Doe also amended their complaints to assert a class action (A. 15). All appellants, from their respective positions as married couples, pregnant single women, and practicing physicians asked that the Texas abortion law [3] which restricts the medical procedure of induced abortion be declared unconstitutional, and that future enforcement be enjoined. A statutory three-judge United States District Court was requested and convened (A. 6, 8) pursuant to 28 U.S.C. § §2281, 2284 (1964).

(ii) The final judgment of the statutory three-judge District Court was entered on June 17, 1970 (A. 124). On Monday, August 17, 1970, all appellants filed with the United States District Court for the Northern District of Texas notices of appeal to this Court (A. 127), pursuant to 28 U.S.C. §2101(b) (1964), and SUP. CT. RULES 11, ***4** 34 (July 1, 1970 ed.), 398 U.S. 1015, 1021, 1045 (1970). Protective appeals to the United States Court of Appeals for the Fifth Circuit were noticed on July 23, 1970, by Appellant Hallford (A. 134), and on July 24, 1970, by Appellant Jane Roe (A. 133).

(iii) Jurisdiction of this Court to review by direct appeal the three-judge District Court's final judgment denying a permanent injunction is conferred by 28 U.S.C. §1253 (1964). The question of jurisdiction was postponed to the hearing on the merits by this Court's order of May 3, 1971, 402 U.S. ----.

Statutes Involved

2A TEXAS PENAL CODE art. 1196, at 436 (1961):

> "Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

2A TEXAS PENAL CODE art. 1191, at 429 (1961):

> "If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied; and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By

> 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused."

***5** 2A TEXAS PENAL CODE art. 1192, at 433 (1961):

> "Whoever furnishes the means for procuring an abortion knowing the purpose intended is an accomplice."

2A TEXAS PENAL CODE art. 1193, at 434 (1961):

> "If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result and shall be fined not less than one hundred nor more than one thousand dollars."

2A TEXAS PENAL CODE art. 1194, at 435 (1961):

> "If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder."

UNITED STATES CODE, Title 28, §1343(3) (1964):
"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * *

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States ...."

UNITED STATES CODE, Title 42, §1983 (1964):

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any ***6** citizeh of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

UNITED STATES CODE, Title 28, §2201 (1964):

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

UNITED STATES CODE, Title 28, §1253 (1964):

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

***7** Questions Presented

I. Whether the Statutory Three-Judge Court Improperly Denied Standing, and Declaratory and Injunctive Relief, to the Class of Married Couple Plaintiffs, Who Were Damaged in Their Marital Relations by the Impact of the Statutes in Question, Unable to Utilize Effective Means of Contraception, at Risk of Serious Injury to Health in the Event of Pregnancy, and Without a Remedy at Law or Equity in the Event of Unplanned Pregnancy?

II. Whether the District Court Should Have Enjoined Future Enforcement of the Texas Abortion Laws on Behalf of the Classes of Pregnant Women Plaintiffs and Physician Plaintiffs, After Having Granted Declaratory Relief, Where an Injunction Was Necessary to Prevent Continuing Grave and Irreparable Injury and to Effectuate the Judgment by Clarifying the Status of the Statute Pending Appeal?

III. Whether These Three Appeals from the District Court Necessitate Plenary Review of Both Jurisdictional and Substantive Features of the Decision Below?

IV. Whether the Provisions in the Texas Penal Code, Articles 1191-1194 and 1196, Which Prohibit the Medical Procedure of Induced Abortion Unless "procured or attempted by medical advice for the purpose of saving the life of the mother," Abridge Fundamental Personal Rights of Appellants Secured by the First, Ninth, and Fourteenth Amendments?

***8** V. Whether the Texas Abortion Law Is Unconstitutionally Vague and Indefinite, in That the Statutory Language Is Not Meaningfully Correlated With Medical Practice, and Provides Wholly Inadequate Warning to Physicians, Their Counsel, Judges, and Jurors, of the Physical, Mental, and Personal Factors Which May Be Considered When Assessing the Applicability of the Statutory Exception?

VI. Whether the Texas Abortion Law, as Applied to Impose Upon a Physician the Burden of Pleading and Proving That a Medical Abortion Procedure Was "procured or attempted by medical advice for the purpose of saving the life of the mother," Violates the Due Process Guarantee of Presumed Innocence and Invades the Privilege Against Self-Incrimination?

Statement of the Case

This appeal was taken by the parties in three independent civil actions heard and decided by a statutory three-judge United States District. Court for the Northern District of Texas. *Roe v. Wade,* Civ. No. CA-3-3690-B (N.D. Tex., filed Mar. 3, 1970); *Doe v. Wade,* Civ. No. CA-3-3691-C (N.D. Tex., filed Mar. 3, 1970); *Hallford, Intervenor v. Wade,* Civ. No. CA-3-3690-B (N.D. Tex., filed Mar. 23, 1970).

I. *Facts Regarding Appellants Which Gave Rise to the Actions*

The facts which gave rise to these three actions will be considered in the context of each class of Appellant-Plaintiffs.

*9 A. Jane Roe

Appellant Jane Roe sued as an unmarried pregnant adult woman on behalf of herself "and all other women who have sought, are seeking, or in the future will seek to obtain a legal, medically safe abortion but whose lives are not critically threatened by the pregnancy" (A. 12). At the time the action was filed, Jane Roe had been "unable to secure a legal abortion in Dallas County because of the existence of the Texas Abortion Laws" (A. 11). She had sought this medical procedure "because of the economic hardship which pregnancy entailed and because of the social stigma attached to the bearing of illegitimate children in our society" (A. 57).[4] Miss Roe admitted that insofar as her own interpretation of Texas law was concerned, her "life [did] not appear to be threatened by the continuation of her pregnancy" (A. 11), other than in a qualitative sense, and in the "extreme difficulty in securing employment of any kind" (A. 57) because of her pregnant condition.

Jane Roe suffered emotional trauma when unable to obtain a legal abortion in Texas (A. 11). She regarded herself as a law-abiding citizen and did not want to participate in a felony offense by obtaining an illegal abortion (A. 57). Also, she had only a tenth grade education and no well-paying job which might provide sufficient funds to travel to another jurisdiction for a legal abortion in a safe, clinical setting (A. 58).

***10** In her complaint filed in federal court, Jane Roe alleged that the Texas abortion law deprived her of various fundamental personal rights protected by decisions of this Court and Amendments to the Constitution, including the "right to safe and adequate medical advice pertaining to the decision of whether to carry a given pregnancy to term."[5]

B. Mary and John Doe

Appellants in the second action are a childless married couple, suing on behalf of all married couples at risk of unwanted pregnancy, and fearful of adverse health consequences. Mary Doe presents the frequent case of a married woman whose health, but not life, would be seriously affected by unwanted pregnancy (A. 17). She has been so advised by her physician (A. 16), and this fact is not contradicted nor challenged in the record. Although her physician has told her to avoid pregnancy for these health reasons, he has also advised her, in light of a neural-chemical disorder, not to use the highly effective oral contraceptives (A. 16). Alternate methods of contraception present significant risks of failure, as detailed on pp. 43-44, *infra,* of this brief.

Mary and John Doe face a realistic risk of unwanted pregnancy which presently injures the harmony of their marital relationship. It was uncontradicted that they "face the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible ***11** pregnancy" (A. 18). When the class action feature of the Doe claim is taken into account, it is clear not

only that a large number of married couples faced a similar dilemma, but also that many of the class would become pregnant during the litigation and be unable to obtain legal abortions in Texas because of the delays involved in securing adequate judicial relief.

According to the 1965 National Fertility Study (NFS), among *married* couples in the United States, nearly 20 percent of all recent births were unwanted. Bumpass & Westoff, *The "Perfect Contraceptive" Population,* 169 SCIENCE 1177, 1180 (1970); Supp. App. 340, 342. [6] Of the 220,000 births in Texas in 1969, [7] 20% would equal 44,000 births resulting from an unwanted pregnancy. Not one of these 44,000 women, however, would have been adequately protected by a judicial proceeding brought *after* pregnancy had begun. A full fifteen weeks passed between the March 3, 1970, filing date of Mary Doe's complaint, and the June 17, 1970, date of the decision on the merits. The medical procedure of induced abortion after the twelfth week of pregnancy poses continually increasing hazards to the patient, as contrasted with the exceptionally safe procedures available in early pregnancy (A. 52; *see also* pp. 30-34, *infra*). For these sensible reasons, Mary and John. Doe sought judicial relief to prevent the present injury caused by a realistic fear of unwanted pregnancy shared by the class. The Does raised constitutional claims similar to those of Jane Roe (A. 19-21).

***12 C. James H. Hallford, M.D.**

The third separate action was commenced by a complaint filed on behalf of Dr. Hallford as an intervening plaintiff (A. 24-35). [8] Dr. Hallford is a licensed physician in Dallas who complained of the regular and recurring effect of the statute. He pointed out that the statute's terminology gave no guidance as to how it should be applied in the common types of situations wherein a patient requested the medical procedure of induced abortion (A. 27-29, 33, 63-70). The verified complaint and affidavit of Dr. Hallford explain carefully how he and his patients were injured by the statute and the precise manner in which the statute affected his and their conduct in recurring types of instances (*Id.*). For example, his patients had included those seeking medical abortions because of rape, incest, cancer, uncertain or slight danger of suicide, and recent infection with German measles (rubella) (A. 64-65).

No administrative mechanism exists for interpreting the law; the language of the statute does not correlate with the regular and recurring medical indications of patients; and other physicians and hospital committees are extremely reluctant to implicate themselves in a definitive opinion, according to the experience of Dr. Hallford (A. 64-70). Moreover, the enforcement practices of police officers were devoid of any effort to seek an explanation from a physician ***13** of the reasons for a given abortion (A. 62). The burden of pleading and proving that an abortion was lawful rests with the physician in Texas. Law enforcement authorities and the courts assume that *all* medical abortion procedures are felonious unless the physician proves the contrary. See *Veevers v. State,* 354 S.W.2d 161 (Tex. Crim. App. 1962).

To rectify this on-going governmental invasion of the physician-patient relationship, Dr. Hallford brought this action. No relief was requested against the two indictments then pending against him (A. 73, 74). Dr. Hallford's claim was primarily against the continuing impact of the statute upon him, other members of the medical profession, and their patients.

II. *Decision by the District Court*

Argument was heard from the plaintiffs in each action at a single hearing before the three-judge court (A. 75-110). On June 17, 1970, the court entered judgment and issued an opinion dealing with the substantive and procedural questions at issue (A. 111-126).

As to Mary and John Doe, the three-judge court refused to grant either declaratory or injunctive relief, and dismissed the complaint for lack of standing (A. 124). However, Jane Roe and Dr. Hallford were held to have standing to contest the statute. [9] Both presented a "ripe" case ***14** or controversy. [10] Abstention was deemed unjustifiable because no reasonably foreseeable state law interpretation would resolve the federal questions. [11]

On the merits, the three-judge court accepted the claims of plaintiffs that "the Texas Abortion Laws must be declared unconstitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children" (A. 116). Reliance was placed on decisions by this Court establishing "[r]elative sanctuaries for such 'fundamental' interests [as] the family, [12] the marital couple, [13] and the individual." [14] Further precedent was found in similar decisions by other federal and state courts, [15] as well as in a major treatment of the abortion question by Retired Justice Tom C. Clark, *see* Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal,* 2 LOYOLA UNIV. (L.A.) L. REV. 1 (1969); reprinted in Supp. App. at 315-326.

***15** Not only were the statutes overbroad, and not justified by a narrowly drawn compelling State interest, but the language of the statutes was unconstitutionally vague. Although a physician might lawfully perform an abortion "for the purpose of saving the life of the [pregnant woman]," [16] the circumstances giving rise to such necessity were far from clear. The district court detailed a few of the more apparent ambiguities:

"How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered" (A. 121).

After finding the Texas statute unconstitutional on two grounds, the district court considered the propriety of injunctive relief. Without noticing that no criminal prosecutions were pending against appellants Jane Roe, John and Mary Doe, and that Dr. Hallford had not requested specific relief from outstanding indictments, the court declined to enforce the declaratory judgments, citing *Dombrowski v. Pfister,* 380 U.S. 479 (1965) (A. 122). The result, which might reasonably have been foreseen by the lower court, was the issuance of a judgment without meaningful effect.

16 III.** ***Impaci of the Denial of Injunctive Relief

In assessing the district court's judgment denying an injunction, it is necessary to look both to facts preceding the decision and those which followed. These will establish beyond a reasonable doubt that the bare declaratory judgment was ignored and was without force or effect.

Over one year after the declaratory judgment was rendered, Appellee-Defendant Wade's office openly avowed to "continue to enforce Articles 1191, 1192, 1193, 1194, and 1196 of the Texas Penal Code in all abortion cases in which indictments are returned by the Dallas County Grand Jury." A copy of the letter to that effect from District Attorney Wade's office to counsel for appellants is included as Appendix A to this brief, *infra,* at A-1.

As verified by Dr. Paul C. MacDonald, Chairman of the Department of Obstetrics and Gynecology, The University of Texas Southwestern Medical School at Dallas, the declaratory judgment had no effect at that institution which "is virtually the only source of medical services available to the medically indigent of Dallas and Dallas County ...." Affidavit of Paul C. MacDonald, M.D., Appendix B, *infra,* at B-1. "[T]he only marked impact of the *Roe v. Wade* decision was to increase the frustration felt by many of the faculty members ... regarding the matter of abortion." *Id.* Appellee Henry Wade, District Attorney, is also

the official legal counsel for the hospital staffed by members of the medical school faculty. A representative of Wade's office had communicated the decision to ignore the declaratory judgment to Mr. C. J. Price, hospital administrator, who had in turn conveyed the decision to Dr. MacDonald as follows:
***17** "[P]ertinent points which the District Attorney's Office considers of importance are:

1. The law is still what it has been,

2. The Statutes pertaining to abortion are still on the books,

3. The District Attorney's Office has ruling [*sic*] by the Federal judges under appeal.

4. The Federal judges did not issue any injunctions against the District Attorney to preclude prosecution or following the state law ...." Appendix B, at B-4 to B-5.

Since but minimal respect for the federal declaratory judgment was shown by appellees, the medical profession had no choice but to yield to the official law enforcement policy. Otherwise, indictments would have been forthcoming.

Dr. Joseph Seitchik, Chairman of the Department of Obstetrics and Gynecology, The University of Texas Medical School at San Antonio, verified that the District Attorney of Bexar County considered that "the Texas law still stood and that it would still be enforced." Appendix C, at C-4. A similar understanding prevailed at The University of Texas Medical Branch, Galveston, According to Dr. William J. McGanity, Chairman of the Department of Obstetrics and Gynecology there,
"The situation regarding when, under what circumstances, and after what administrative procedures an abortion may be performed in John Sealy Hospital is exactly what it was prior to the June 17, 1970 decision of the three-judge court in *Roe v. Wade.* ***18** The decision has had no impact on medical practice in the Medical Branch hospitals." Appendix D, at D-3 to D-4.

Not only have the medical centers in Texas continued to fear prosecution after the June 17, 1970 declaratory judgment, but this fear has been realistic. Appendix E to this brief includes an indictment on abortion charges against a physician filed on June 8, 1971, almost a year after the federal decision, and illustrates the basis for anxiety. It is not difficult to understand why 728 Texas women travelled to New York City from July 1, 1970 to March 31, 1971, to obtain legal abortions. Chase, *Abortions to Out-of-State Residents* (June 29, 1971) (Report of the Health Services Administration, City of New York).

Relevant Background and Medical Facts

I. *The Medical Nature of Abortion*

A. Spontaneous and Induced Rejection of Pregnancy

The standard text on obstetrics and gynecology defines abortion, both *spontaneous* and *induced,* as follows:
"Abortion is the termination of a pregnancy at any time before the fetus has attained a stage of viability. Interpretations of the word 'viability' have varied between fetal weights of 400 g (about 20 weeks of gestation) and 1,000 g (about 28 weeks of gestation) .... Although our smallest surviving infant weighed 540 g at birth, survival even at 700 or 800 g is unusual." L. HELLMAN & J. PRITCHARD, WILLIAMS OBSTETRICS 493 (14th ed. 1971).

***19** Both *induced* and *spontaneous* abortions amount to a rejection of pregnancy. The procedure of *induced* abortion differs from *spontaneous* not in the result, nor in the underlying reason for the abortion but primarily in its being conscious and volitional. For example, a patient infected with rubella (German measles) may abort spontaneously, because her *body* rejects a badly damaged embryo. Another similarly situated patient may seek an *induced* abortion as part of a reasoned *mental* judgment to reject a damaged embryo in favor of a subsequent normal pregnancy. From this perspective, "spontaneous abortion can be regarded as an important biologic mechanism which has evolved in viviparous animals to deal with the numerous embryologic errors arising during development." Potts, *Postconceptive Control of Fertility,* 8 INT'L J. GYN. & OBST. 957 (1970).

The importance and biologic necessity of spontaneous abortion cannot be denied:

> "If spontaneous abortion did not occur, life as we know it would be impossible. At present approximately 1 in 50 of the population is congenitally abnormal, but fortunately most defects are minor. If all the abnormal embryos that were conceived survived, then 1 in 10 to 1 in 5 of the population would be abnormal and most of the defects would be gross and incapacitating. Potts, *The Problem of Abortion,* in BIOLOGY AND ETHICS 3 (1969).

Spontaneous abortions cannot be brought about, under current technology, solely by the will of the patient. Yet, the bio-chemical systems of patients play an increasing role in what had previously been regarded as an accidental ***20** phenomenon. One recent study of spontaneously aborted embryos showed that 38% "had a chromosomal abnormality." Carr, *Chromosome Studies in Selected Spontaneous Abortions,* 37 OBSTETRICS & GYNECOLOGY 750 (1971). Not only do fetal defects frequently cause spontaneous abortion, but numerous other causes beyond the patient's control, and often working in her favor, appear to be involved. In fact, "[w]hen pregnancy is defined as beginning at fertilization or implantation, then the rate of spontaneous wastage is even higher and may approach 50%." Potts, *supra.*

No law requires that a patient seek or a physician provide treatment to prevent *spontaneous* abortion. Neither nature nor the law values an embryo which the patient's bio-chemical system rejects. In such cases the needs of the patient and the treatment provided by the physician are committed by law in every state to the discretion of the physician and patient. No hospital committees interfere with this relationship; no government programs seek to promote confinement and treatment in cases of threatened spontaneous abortion.

Indeed, spontaneous abortions before the fourth week of pregnancy are "perceived by the patient as delayed menstruation or may not be recognized at all." L. HELLMAN & J. PRITCHARD, WILLIAMS OBSTETRICS 496 (14th ed. 1971). This is perhaps the case because in early pregnancy, when the overwhelming number of all abortions take place, embryonic development has scarcely begun. "The 4 weeks old embryo measures 5 mm. [1/5 in.]...." Shettles, *Fertilization and Early Development From the Inner Cell Mass,* in SCIENTIFIC FOUNDATIONS OF OBSTETRICS AND ***21** GYNECOLOGY 154 (E. E. Philipp, *et al.,* eds. 1970). As noted in standard embryology texts,

"during these early stages, the development of all mammals is fundamentally the same. The specific characteristics of any form emerge but slowly, and relatively late.... The illustrations of sections of 5-mm human embryos are quite applicable, for example, to similarly located sections of 5-mm pig embryos. The basic plan of early body structure is amazingly similar." B. PATTEN, HUMAN EMBRYOLOGY 5 (3d ed. 1968).

The 5-mm embryo, for example, still has "a conspicuous *tail* ...." L. AREY, DEVELOPMENTAL ANATOMY 98 (7th ed. 1965) (italics in original). Indeed, "[f]or the first week of development the human embryo is invisible to the naked eye ...." Potts, *The Problem of Abortion,* in BIOLOGY AND ETHICS 1 (1969).

Neither the medical profession nor state health authorities treat spontaneous or induced abortions prior to 20 weeks of development as events which in any way are comparable to the loss of human life. As one prominent physician recently stated: "To the medical profession operating within its present framework, the conceptus, prior to twenty weeks of age, does not have the same legal status as one after that time. Should there be an untimely birth before twenty weeks, the act is considered an abortion, not a delivery, and is not listed on the mother's parity record. A birth or death certificate is not required and the body is handled as a pathological specimen without requiring legal interment." Ryan, ***22** *Humane Abortion Laws and the Health Needs of Society,* 17 W. RES. L. REV. 424, 427 (1965).

B. Frequency of Medically Induced Abortion in the United States and Texas

In the United States on the whole, induced abortion under medical auspices was relatively restricted until 1967, when the first of twelve states, Colorado, enacted the American Law Institute abortion law proposal in the Model Penal Code. [17]

Only 5,000 therapeutic abortions were estimated to have been done in United States medical facilities in 1963, [18] as contrasted with 200,000 to 1,000,000 unwanted pregnancies thought to be terminated annually outside of the clinical setting. [19] These are over and above the "nearly 20 percent of all recent births [which] were unwanted," according to the 1965 National Fertility Study (NFS). Bumpass & Westoff, *The "Perfect Contraceptive" Population,* 169 SCIENCE 1177, 1180 (1970).

***23** Since 1967, the incidence of abortions in medical facilities has risen substantially, but only in the few states which have removed virtually all restrictions that previously differentiated abortion from other forms of medical treatment. In New York City alone, for example, approximately 120,000 abortions were performed between July 1, 1970 and March 31, 1971. [20] Nearly 40,500 of these women were not residents of New York State! [21] 728 were from Texas, and a total of 36,006 were from states with the Texas-type restrictive law. [22] It goes without saying that only the well-informed and financed women from out-of-state were able to undertake the expense and effort to travel to New York.

C. Medical Safety Aspects of Induced Abortion in Surgical Practice

The law on abortion cannot be understood without reviewing the pertinent aspects of medical and legal history which gave rise to the law. When this is done, it becomes abundantly clear that public health considerations motivated this type of legislation, and that these factors no longer justify maintaining such stringent restrictions in the criminal code.

1. *Induced Abortion in 19th Century Medicine*

In the 1820's when the first American abortion statutes were enacted, there was no medical profession as we know it. Physicians and quacks alike advertised their treatments and potions in the same marketplace. Both had little to offer the public.

***24** Medical science, an infant branch of learning in the 1800's, did not uncover the need for clean hands in gynecological examinations until the 1840's. Even then,

"[d]uring the period 1850-70, there was no gynecology worthy of the name. This had to wait for the twentieth century and the development of an understanding of ovarian function, recognition of the details of the menstrual cycle, establishment of safe surgery, and a host of other things. Obstetrics was, of course, old, but it was still in the hands of midwives whose only interest lay in practical problems." McKelvey, *Ninety Years of Obstetrics and Gynecology,* THE LANCET 242 (May 1960).

The first work published in this area was produced by none other than Oliver Wendell Holmes (Sr.), a physician who was better known as a writer and father of the great jurist. Holmes discovered that puerperal fever was spread by physicians who attended infected patients and corpses, and then went into the maternity wards without washing or changing clothes. These findings were first presented to the Boston Society for Medical Improvement on February 13, 1843. Holmes, *The Contagiousness of Puerperal Fever,* 1 NEW ENG. QUARTERLY J. OF MEDICINE 503 (1842-43).

Virtually simultaneous discoveries along the same lines were made by I. P. Semmelweis, working in Vienna:
"The story of Semmelweis is more generally known. His main work was done in the first Women's Clinic in Vienna, where he recognized that the horrible mortality rates from puerperal infection were ***25** the result of something which was introduced by the hands of the physicians who examined the women in labor.... The average mortality rate in this clinic for the year 1846 was 13.7 per cent, and almost all of this was due to puerperal infection. In May 1847, Semmelweis introduced careful hand washing with various compounds, and for the year 1848, the mortality rate dropped to 1.27 per cent."[23] McKelvey, *Ninety Years of Obstetrics and Gynecology,* THE LANCET 242, 243 (May 1960).

Not until 1867, however, did Joseph Lister put forth the novel concept that *in all surgery* antiseptic techniques were necessary to prevent infection and death. *See* Lister, *On A New Method of Treating Compound Fracture, Abscess, etc.,* 1 THE LANCET 328 (Mar. 16, 1867):
"In 1867, Lister published the first series of cases on the virtue of carbolic acid in the management of compound fractures. Of the 11 consecutive cases, one required amputation, and another died of secondary hemorrhage several months later. The remaining 9 ***26** recovered, a remarkable percentage in that era." J. TALBOTT, *Lord Lister (1827-1912),* in A BIOGRAPHICAL HISTORY OF MEDICINE 755, 756 (1970).

Data on pre-Listerian mortality rates from simple, not to mention complex, surgery present a frightening spectacle.[24] A review of 19th century operations reported the following:

"There were the almost inevitable suppuration of the wound, the putrefaction and sloughing off of tissue, the sickening odor, the high fever, the danger of hemorrhage, the slow healing, the complications of blood poisoning, erysipelas, gangrene and tetanus, the physical and mental anguish, and the uncertainty of the final outcome. *The mortality from major operations was from 50 to 100 per cent."* F. S. LEE, SCIENTIFIC FEATURES OF MODERN MEDICINE (1911) (emphasis added).

Reports on gynecological surgery revealed a recurring theme. Relatively external surgery was undertaken cautiously and rarely. Internal surgery was frowned upon unless death were imminent. As an early history of gynecological surgery pointed out:
"General surgery in the first part of the nineteenth century was in the hands of more skillful surgeons, but it was the surgery of amputations, disarticulations, ligations of large vascular trunks and removal of superficial tumors. Gynecological surgery was limited to the removal of polyps, excision of a hypertrophied ***27** clitoris, incision of an imperforate hymen and attempts at repair of a third degree perineal laceration. The more daring undertook repair of a vesco- or recto-vaginal fistula, an occasional ovariotomy, a cervical amputation, or vaginal hysterectomy for malignancy, an abdominal hysterectomy for fibroids or an operation for abdominal pregnancy, amputation of an inverted uterus, drainage of a pelvic abscess and a rare extraction of

an extra-foetal mass or even a full term living foetus, either by vaginotomy or abdominal incision. For the greater part of the century, no one ventured a laparotomy for removal of a tubal pregnancy or a tubo-ovarian inflammatory mass. But success and popularization of all these major therapeutic measures awaited the three fundamentals--anaesthesia, asepsis, and haemostatis which ushered in the golden age of surgery and operative gynecology." J. RICCI, DEVELOPMENT OF GYNECOLOGICAL SURGERY AND INSTRUMENTS 279 (1949).

The author emphasized not only the dangers of routine external surgery, but the near impossibility of a patient's recovery from any operation which involved entry into the abdominal cavity. With respect to this contrast in gynecological surgery, Dr. Ricci states:
"If ovariotomy was considered a dangerous operation during the greater part of the nineteenth century, prior to antiseptic decades, intra-abdominal uterine surgery was looked upon as almost impossible. While the most common cause of death in ovariotomy was peritonitis, in uterine surgery the added facts of shock and hemorrhage increased the mortality rate. ***28** Thus ⅞ of the attempts to remove a fibroid uterus prior to 1863 were either abandoned or ended fatally. The voices of medical practioners rose in unison against this phase of surgery. C. D. Meigs (*Females and Their Diseases,* Phila., p. 266, 1848) stated that doing anything about those fibroids was hopeless. He detested all abdominal surgery save that which was clearly warranted 'by the otherwise imminent death of the patient.' " *Id.* at 501-502.

This did not end after 1867. Lister's techniques were slow to reach the United States, and even slower of acceptance. One American physician, Roswell Park, reported with horror his earliest experience in hospitals in this country:
"[W]hen I began my work, in 1876 ... in one of the largest hospitals in this country, it happened that during my first winter's experience--with but one or two exceptions--every patient operated upon in that hospital, and that by men who were esteemed the peers of anyone in their day, died of blood poisoning, while I myself nearly perished from the same disease. This was in an absolutely new building, where expenditures had been lavish; one whose walls were not reeking with germs, as is the case yet in many of the old and well-established institutions." R. PARK, AN EPITOME OF THE HISTORY OF MEDICINE 326 (1898).

The same experience was reported everywhere in the United States. A significant chapter in this history is the contribution made by the Mayo Brothers, who brought antisepsis and safe surgery to Minnesota, and the midwest, and then made improvements from which the remainder ***29** of the American medical profession could benefit and learn.

H. CLAPESATTLE, THE DOCTORS MAYO (1941), details this experience. The significant facts are as follows:

(1) By 1874 "only five attempts at ovariotomy [25] had been made in the entire state [of Minnesota].... All five patients had died." *Id.* at 140.

(2) The Senior "Dr. Mayo piled up a record of thirty-six ovariotomies during the decade [1870-1879], with ... [a] mortality of twenty-five per cent...." *Id.* at 214.
(3) In the mid-1890's Drs. Will and Charlie Mayo began to perform appendectomies. "Although their mortality rate was not the thirty per cent admitted by some city hospitals it was still twelve to fifteen per cent, too high to justify operation if the patient had a chance without it." *Id.* at 305.

(4) "Word of the work of Pasteur and Lister was getting around by 1880, but more as the story of an outlandish new fad than as the report of scientific truth." *Id.* at 143.

It was only after a tour of hospitals on the continent of Europe, in 1889, that the Mayo brothers could envision "the prospect of a surgery of expediency, of operating that would not be just a last desperate throw of the dice with death but a means of restoring health ...." *Id.* at 269.

The year 1890 was separated by a continent and almost four decades from the 1854 enactment of abortion legislation ***30** in Texas. [26] Still, surgical dangers warned against any medical procedure. Induced abortion, in particular, involved internal use of surgical instruments, and the inevitable introduction of infection into the womb. Far better, the legislature obviously deemed, that a woman risk childbirth, than death on the operating table. Only when the risks cancelled themselves out did she have an option.

Today the comparative risks weigh heavily in favor of permitting induced abortion, not as an emergency matter as in 1851, but as an elective medical procedure. Surgery in those times was almost always fatal. As the next section shows, medicine is a different science today.

2. *Induced Abortion in Contemporary Surgery*

Induced abortion, in medical practice today, is a relatively minor surgical procedure, insofar as risks to the patient's physical or mental well-being are concerned. This exceptional safety consideration was noted by Dr. John McKelvey, former head of obstetrics and gynecology at the University of Minnesota:
"Under ideal circumstances, abortions can be done with very little vital risk. The procedures which are open to the poor on the contrary can be very risky not only to the life of the individual but to her future health." McKelvey, *The Abortion Problem,* 50 MINN. MED. 119, 124 (1967).

The degree of safety can be readily seen by comparing patient mortality rates for induced abortion with those of childbirth and other typical medical procedures.

***31** The maternal mortality rate in the United States for 1967 averaged 28.0 deaths per 100,000 live births. For nonwhites the rate was almost three times as high, 69.5 deaths per 100,000 live births. [27] The comparable mortality rates for various surgical procedures in the United States, per 100,000 operations, have been as follows: [28] Appendectomy [29] --400 per 100,000; Cholecystectomy [30] (gall bladder operation)--1,600 per 100,000; Tonsillectomy/adenoidectomy [31] --5.2 per 100,000.

In the years 1963 to 1968, therapeutic abortions were unavailable in the United States on any large scale. Most patients had to show serious physical or mental disease to obtain the procedure. Of the 9,722 therapeutic abortions in the 1963-68 survey by the Commission on Professional and Hospital Activities only a single death "unequivocally resulted from the operation." [32] This death represents the equivalent of a mortality rate of 10.3 per 100,000 therapeutic abortions. Even this figure is misleadingly high in that the abortion was induced by an abdominal operation ***32** (hysterotomy) which poses substantial hazards of its own. Nonetheless, a 10.3 rate is 2.7 times safer than childbirth, 38.8 times safer than appendectomy, and 155 times safer than cholecystectomy, all other factors being equal.

A more correct estimation of the surgical risks from induced abortion can be made by examining the induced abortion mortality rates from jurisdictions in which abortion is available as an elective procedure in cases of contraceptive failure.

The experience in New York City following the amending of the New York State abortion statute to permit elective abortion, the first such experience with abortion on a large scale in the United States, further demonstrates the safety of the procedure. 165,000

abortions were performed in New York City in the first eleven months under the new law. The mortality rate for legal abortion during this period was only 5.3 per 100,000. [33] New York City health officials expect this low rate to decline even further with time. According to City Health Administrator Gordon Chase, "the safety record is improving, probably because doctors are gaining experience with the procedure, and certainly because the proportion of first trimester abortions ... has been increasing." "Complications are decreasing steadily in both early and later abortions...." [34] That the mortality rate has already declined is evidenced by the fact that not one abortion related mortality occurred in the last four months of this eleven month period.

***33** In New York City the percentage of second trimester abortions, which in the City's experience entailed a six times higher complication rate than for first trimester abortions, has fallen to below 25%. [35] Only in eastern Europe, where "almost all legal abortions are performed in the first trimester of pregnancy with the majority in the second month," [36] have mortality rates dropped to as few as 1.2 per 100,000 operations (Hungary: 1964-67, 9 deaths, 739,000 legal abortions).

The extent to which elective induced abortion for healthy women is enormously safer than childbirth and various other medical procedures can be seen by tabulating the figures given above:

MEDICAL PROCEDURE OR EVENT	MORTALITY (per 100,000 procedures)
Elective induced abortion (Hungary: 1964-67)	1.2
Tonsillectomy (U. S.: PAS 1969)	5.2
Elective induced abortion (N.Y.C.: 1970-1971)	5.3
Therapeutic induced abortion (U. S.: 1963-68)	10.3
Childbirth (U. S.: 1967)	28.0
Appendectomy (U. S.: PAS 1968)	400
Cholecystectomy (U. S.: PAS 1968)	1,600

On another level as well, abortion is a safe procedure: it is without clinically significant psychiatric sequellae. A number of recent studies confirm that abortion does not ***34** produce serious psychological side-effects damaging to the mental well-being of the patient. [37]

In sum, the medical procedure of induced abortion, which is severely restricted by the statute involved in this case, is potentially 23.3 (28/1.2) times as safe as the process of going through ordinary childbirth and without psychiatric side-effects.

II. *Legal and Medical Standards of Practice Regarding Induced Abortion in Texas and the United States.*

A. Induced Abortion at Common Law

At common law, abortion could be induced by a physician, midwife, or anyone without penalty, prior to the period of pregnancy called "quickening," *i.e.,* 16-18 weeks. *See* L. AREY, DEVELOPMENTAL ANATOMY 106-07 (Reference Table of Correlated Human Development) (1965 ed.). This principle was accepted in the overwhelming majority of American jurisdictions. [38] From

1828 onward, however, ***35** states began to modify the common law rule by legislation which prohibited all forms of abortion (other than spontaneous) at all stages of pregnancy. [39]

B. Legislative History of the Texas Abortion Law

The first Texas law deviating from the common law on abortion was approved February 8, 1854. TEXAS LAWS OF 1854, ch. 49, §1, at 58, in 3 GAMMEL, LAWS OF TEXAS 1502 (1898). The text is set out in the note below. [40] Two ***36** years later, the law on abortion was modified [41] into language which is substantially the same as that of the statute currently in force, 2A TEXAS PENAL CODE arts. 1191-1194, 1196, at 429-36 (1961). Intervening revisions and codifications made no changes of any significance.

> "If any person, with the intent to procure the miscarriage of any woman being with child, unlawfully and maliciously shall administer to her or cause to be taken by her any poison or other noxious thing, or shall use any instrument or any means whatever, with like intent ... shall be punished ...." TEXAS LAWS of 1854, Ch. 49, §1, at 58.

> "[I]f any person or persons, maliciously or without lawful justification, with intent to cause and procure the miscarriage of a woman then pregnant with child, shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine or noxious thing ...." N.J. LAWS at 266 (1849).

The sole evidence of statutory intent is found in the circumstances under which the 1854 Act was passed, and its derivation. As shown earlier in this brief, at pp. 26-29, the dangers of internal surgery in the mid 1800's were formidable. Public health justifications were readily available for outlawing all or most surgery, and intra-abdominal surgery in particular. Indeed, because of the demand for drugs and procedures for interrupting unwanted pregnancy, this area in particular required surveillance to protect the health of women from backroom practitioners, offering drugs and noxious things for bringing about a miscarriage.

Contemporaneous judicial explication of 19th century American abortion legislation can be found in an 1858 decision interpreting the 1849 New Jersey statute, which from all appearances was the likely model for the Texas statute. As stated by the highest court of New Jersey in *State v. Murphy,* 27 N.J.L. (3 Dutcher) 112, 114-15 (Sup. Ct. 1858):
"The design of the statute was not to prevent the procuring of abortions, so much as *to guard the health and life of the mother against the consequences of such attempts* .... It is immaterial whether the foetus is destroyed, or whether it has quickened or not. * * *

"The offense of third persons, under the statute, *is mainly against her life and health.* The statute regards ***37** her as the victim of crime, not as the criminal; as the object of protection, rather than of punishment." (Emphasis added.)

The Reviser's Notes to 1829 New York legislation plainly show the same purpose. A section was proposed, but not enacted, to prohibit all major surgical procedures:

> "Every person who shall perform any surgical operation, by which human life shall be destroyed or endangered, such as the amputation of a limb, or of the breast, trepanning, cutting for the stone, or for hernia, unless it appear that the same was necessary for the preservation of life, or was advised, by at least two physicians, shall be adjudged guilty of a misdemeanor." [42]

The purpose of this bill was stated by the Revisers:

> "Reviser's Note: The rashness of many young practitioners in performing the most important surgical operations for the mere purpose of distinguishing themselves, has been a subject of much complaint, and we are advised by old and experienced surgeons, that the loss of life occasioned by the practice, is alarming. The above section furnishes the means of indemnity [impunity], by a consultation, or leaves the propriety of the operation to be determined by the testimony of competent men. This offense is not included among the mal-practices in manslaughter, because, there may be cases in which the severest punishments ought not to be inflicted. By making it a misdemeanor, ***38** and leaving the punishment discretionary, a just medium seems to be preserved." [43]

Even religious doctrine with respect to abortion was unavailable in 1851 to support the law. Pope Pius IX's *Apostolicae Sedis* in 1869 was the first enduring break from the theory that an embryo had life at 40 days if male and 80 days if female. In 1854 induced abortion was not an excommunicable offense when undertaken in the early stages.

Today, only abortions performed in non-medical environments present significant risks of morbidity and mortality; with proper medical supervision, abortions are safe and simple procedures. In keeping with modern medical practice, this Court would reinforce the purpose of early abortion legislation if it invalidated the statute. This would permit abortions to be done by licensed physicians in adequate medical facilities and discourage abortions by unskilled practitioners. Moreover, it would preserve the 117-year-old purpose of the law, and the common law.

C. Contemporary Legislation on Induced Abortion

Item No. 1, p. 1 of the Supplementary Appendix to this brief contains an accurate chart on the current status of laws in the United States regulating the medical procedure of induced abortion. The statutes vary in restrictiveness. Those in Texas and thirty-one other states sharply limit the justifications for abortion to instances wherein the woman's life would otherwise be sacrificed. [44] ***39** Others, patterned after the UNIFORM ABORTION ACT (2d Tent. Draft 1970), follow the American Medical Association's position and that of the American College of Obstetricians, by treating induced abortion the same as spontaneous abortion--a medical procedure to be considered in light of the patient's overall life situation.

D. Contemporary Standards of Medical Practice Regarding Induced Abortion

1. *National Medical Organizations*

Evidence of American standards of medical practice respecting induced abortion is found in the policy statements of professional organizations. Both the American ***40** Medical Association and the American College of Obstetricians and Gynecologists have set standards of professional practice in recent years.

ACOG policy sanctions therapeutic and elective abortion "to safeguard the patient's health or improve her family life situation." ACOG recognizes that "abortion may be performed at the patient's request ...." Supp. App. at 23. A very similar position

was taken by the American Medical Association. The AMA at one time had followed the A.L.I. model, listing four or five vaguely defined situations for sanctioned abortion. This proved unworkable, and the policy was changed in order not to limit the physicians' traditional responsibility for evaluating "the merits of each individual case...." Supp. App. at 33.

***41** From this it is clear that the Texas law sharply interferes with professional medical practice.

2. *The Texas Medical Association*

On May 6, 1966, a special committee to study and consider the modernization of abortion law in Texas was appointed as a result of a resolution adopted by the Texas Medical Association's House of Delegates, meeting in annual convention. This action was prompted by a resolution previously adopted by the Texas Association of Obstetricians and Gynecologists under the leadership of Dr. Hugh Savage calling for the T.M.A. to give serious study to determine the need for modernizing the Texas abortion law.

The Special Committee's report called for the amendment of the Texas law to allow abortion in cases of rape, incest, impairment of the physical or mental health of the woman, or substantial risk of a child born with a grave physical or mental defect. The report was approved by the Executive Board of the Association on October 2, 1966. *Report of Executive Board,* TRANSACTIONS OF THE HOUSE OF DELEGATES, TEXAS MEDICAL ASSOCIATION 43 (1967).

The 1968 Report of the Special Committee on Abortion Laws in Texas, TRANSACTIONS OF THE HOUSE OF DELEGATES, TEXAS MEDICAL ASSOCIATION 79 (1968), included the results of a survey of Texas hospitals covering the years 1965-1967. The results indicated that 81 abortions had been done in Texas hospitals for fetal indications, 1 for rape, and 1 for incest, even though such abortions were illegal. It again concluded that the Texas abortion law should be changed.

Further studies were undertaken, and in 1968 a written poll was taken in which the Association's members were ***42** asked to state whether they felt the current Texas abortion law should be amended. Of the 9,338 doctors polled, 53% responded. 4,435 physicians stated that they desired a change in the present statute, while 536 responded negatively. Members were also asked to indicate the reasons for which an abortion should be performed. Maternal indications approved by those voting included physical health, mental health, socio-economic factors, and cases of criminal incest and rape. Fetal indications of viral diseases, drug-induced deformities, and diagnosed intrauterine abnormalities were approved. All of the maternal and fetal indications except socio-economic factors were approved by margins ranging from 10 to 1 to 100 to 1. Socio-economic factors were approved by a 3 to 2 margin. *Report of Special Committee on Abortion Laws in Texas,* TRANSACTIONS OF THE HOUSE OF DELEGATES, TEXAS MEDICAL ASSOCIATION 96 (1969).

On September 20, 1970, the Association's Executive Board adopted as policy the recommendation that:
"WHEREAS, Abortion, like any other medical procedure, should not be performed when contrary to the best interests of the patient since good medical practice requires due consideration for the patient's welfare and not mere acquiescence to the patient's demands; and

"WHEREAS, The standards of sound clinical judgment, which, together with informed patient consent should be determined according to the merits of each individual case; therefore be it

"RESOLVED, That abortion is a medical procedure and should be performed only by a duly licensed physician ***43** and surgeon in a licensed hospital acting only in conformance with standards of good medical practice, and after proper medical consultation; be it further

"RESOLVED, That no physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor personnel shall be required to perform any act which violates moral principles which they might hold." *Report of Executive Board,* TRANSACTION OF THE HOUSE OF DELEGATES, TEXAS MEDICAL ASSOCIATION (1970).

This resolution was adopted by the Association's House of Delegates at its 1971 annual convention with the following addition:

> "RESOLVED, This definition of position shall not be interpreted as endorsement of abortion on demand or request; further, it shall not be interpreted as endorsement of the use of abortion as a part of a social movement."

III. *Relationship Between Contraception and the Medical Procedure of Induced Abortion*

Widespread lack of information about contraception, and significant contraceptive failure rates are two of the many factors which must be understood in assessing the impact of abortion laws on families and individuals in Texas and the United States.

*44 A. Lack of Public Access to Information and Medical Services for Family Limitation by Use of Contraceptives

All too frequently it is presumed that people have access to and are able to use highly effective contraceptives, and are themselves at fault in cases of unwanted or unplanned pregnancy. This assumption could not be further from medical reality. Contraception is not widely available in the United States. In fact, Congress passed the *Family Planning Services and Population Research Act of 1970,* Pub. L. No. 91-572 (Dec. 24, 1970), with an overall appropriation exceeding $380 million "to assist in making comprehensive voluntary family planning services readily available to all persons...." National studies on the magnitude of unwanted births, such as data from HEW's 1965 National Fertility Study, for example, showed:

> "[In] the period 1960 to 1965 there were 4.7 million births that would have been prevented by 'perfect contraception.' These births represent one fifth of all births during the period. Approximately two million of these births occurred among the poor and the near-poor and half of these among Negro poor and near-poor." [45]

The most recent studies identify as a principal problem the absence of adequate information and services for people with a need to know about contraception, and when that fails, medically induced abortion. As late as the close of 1969,

> "some 4.3 million women in need of subsidized family planning services were not receiving them insofar as *45 could be determined from reports of organized programs; no programs at all could be identified in

1,636 counties-- 53 percent of all counties--containing one-fourth of the unmet need. Services continue to be concentrated in relatively few populous counties....” [46]

The basic 1968 study covered each State by county. In Texas a total of 355,120 medically indigent women in need of family planning information were shown to be unserved. This amounted to 89% of such women. [47] These individuals can hardly be thought to be able to protect their marital and personal privacy through contraception, when that is altogether unavailable to them.

This deficiency is not confined to patients. Only a few short years ago, a review of texts used in medical schools revealed that “[t]wo thirds of the texts (25 texts) contained either no mention of contraception or only isolated reference to it, with no complete discussion.” Tietze, *et al., Teaching of Fertility Regulation in Medical Schools,* 196 J. AMERICAN MEDICAL ASS'N 20, 23 (1966).

Patients have limited access to contraceptive methods and information. Physicians have limited willingness to prescribe contraception. As if this were not enough, contraceptive devices, techniques, and use are far from effective as a means whereby a family can determine how many children they will have and no more.

***46 B. Ineffectiveness of Contraceptives Due to Significant Degree of Failure in Method and Use**

The most effective contraceptive known, “the pill” or oral contraceptive, has in practice produced side effects “disagreeable enough to cause a 20 to 40 per cent drop-out rate” among those patients who were informed of and chose to use the method in the first place. E. NOVAK, *et al.,* TEXTBOOK OF GYNECOLOGY 647 (8th ed. 1970). The vast proportion of the population not receiving family planning services never reach that option, of course. Other methods are less effective in practice than the 99% effective oral contraceptive. *Id.* These range from the intrauterine devices, which pose problems of their own and vary in effectiveness, to abstention and rhythm, which are not seriously regarded by the medical profession in this century. [48]

The chart on the following page illustrates the contraceptive failure problem.

Failure Rates of Contraceptive Methods

Method	*Pregnancy rates for 100 woman-years of use* [49]	
	High	*Low*
No contraceptive	80 [50]	80
Aerosol foam	--	29
Foam tablets	43	12
Suppositories	42	4
Jelly or cream	38	4

Douche	41	21
Diaphragm and jelly	35	4
Sponge and foam powder	35	28
Condom	28	7
Coitus interruptus	38	10
Rhythm	38	0
Lactation	26	24
Steroid contraception (the "pill")	2.7	0
Abortion	0	0
Intrauterine contraception (averages) Lippes loop (large)		
0-12 months	2.4	
12-24 months	1.4	

SOURCE: Berelson et al., *Family Planning and Population Programs,* University of Chicago Press, 1966.

***48** Summary of Argument

This case presents three separate actions: (1) that of Jane Roe, an unmarried pregnant woman, who sues on behalf of herself and other women unable to obtain a legal abortion because of the Texas abortion laws; (2) that of John and Mary Doe, a childless married couple who sue on behalf of themselves and others similarly situated complaining of the adverse effect of the Texas abortion law on their marital relations; and (3) that of James Hubert Hallford, M.D., a Texas physician who intervenes on behalf of himself and other doctors similarly situated, alleging the constraint of the Texas abortion law on the practice of medicine.

The parties requested that articles 1191-1194 and 1196 of the Texas Penal Code, which make abortion a crime unless performed "upon medical advice for the purpose of saving the life of the mother," be declared unconstitutional and that Defendant Henry Wade be enjoined from instituting future prosections thereunder.

The three-judge federal court declared the statutes unconstitutional on two grounds: first "because they deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children" and are overbroad and not supported by compelling state interests; and second because they are unconstitutionally vague. The court, however, refused to grant an injunction and found that John and Mary Doe had no standing.

Appellants appeal to this Court from the denial of injunctive relief and from the holding that John and Mary ***49** Doe have no standing; they urge the Court to go beyond jurisdictional points to a consideration of the merits of the statute in question.

Appellants urge first that John and Mary Doe do have standing to challenge the Texas abortion law and that they do present a case or controversy. The Does are complaining not of a future, anticipated injury resulting from the unavailability of legal

abortions, but rather are complaining of the effect that unavailability is currently having upon their marital relationship. They are facing a dilemma forced upon them by the abortion statute: whether to discontinue normal marital intimacies or to risk contraceptive failure, which would be detrimental to Mary's health. Mary could not obtain a legal abortion in Texas since pregnancy would pose no immediate danger to her life. The continuing spectre of pregnancy is having a divisive effect upon their marriage. They are vitally affected by the Texas abortion law and do present a case or controversy within the meaning of those terms as established by prior decisions of this Court. *Flast v. Cohen,* 392 U.S. 83 (1968); *Investment Co. Institute v. Camp,* 401 U.S. 617 (1971).

Appellants urge that they are entitled to injunctive relief to effectuate the rights established by the decision of the three-judge court and that the court erred in refusing to grant the injunction.

Appellants have suffered and are continuing to suffer irreparable injuries which are both great and immediate, and there is no opportunity for them to eliminate the threat to their rights posed by the abortion statute through the defense of a single prosecution. Under the standards laid ***50** down in *Younger v. Harris,* 401 U.S. 37 (1971), they have brought their case within those special circumstances where Federal equitable relief against the enforcement of state criminal statutes is justified. *Ex parte Young,* 209 U.S. 123 (1908).

Appellants required an injunction to vindicate their rights; since no injunction was issued, appellee continues to consider the laws to be in force and effect and Dallas physicians, reasonably fearful of prosecution, continue to refuse to perform medical abortions. As a consequence, safe abortion procedures are no more available now in Texas than they were prior to the district court's decision holding the Texas law unconstitutional.

Further, appellants contend that injunctive relief was appropriate and should have been granted since no adequate state remedy is available (particularly as to appellants Roe and Doe) due to the unique Texas division of criminal and civil jurisdiction.

As to the merits, appellants contend that the Texas abortion law is unconstitutional since it interferes with the exercise of fundamental rights and is neither narrowly drawn nor supported by a compelling state interest. *Griswold v. Gonnecticut,* 381 U.S. 479 (1965). The law abridges rights emanating from the First, Fourth, Ninth, and Fourteenth Amendments to seek and receive health care, to privacy and autonomy in deciding whether to continue pregnancy, and, as to physicians, to administer medical care according to the highest professional standards. The right of personal and marital privacy has been recognized by this Court and by numerous state and lower federal courts, and is grievously infringed by the statute in question. ***51** The law is unconstitutional since it is overboard and since it does not support any compelling state interest.

The primary interest asserted by appellee in the lower court was an interest in protecting fetal life, yet appellants have clearly shown that the state's position is fatally inconsistent since it does not exhibit any interest in or provide any protection of fetal life in any circumstance other than the medical procedure of abortion.

Additionally, the Texas abortion law is unconstitutionally vague since it gives no meaningful indication to physicians of the conditions under which an abortion may legally be performed.

Finally, the law in question imposes an unconstitutional burden of proof on a physician accused of having performed an abortion to establish that an alleged abortion was within the statutory exception established by article 1196.

In summary, appellants urge this Court to render a decision holding that the three-judge court erred in refusing to grant injunctive relief; that the three-judge court erred in holding that John and Mary Doe presented no case or controversy and did not have standing to challenge the Texas abortion law; and affirming the decision of the three-judge court that articles 1191-1194 and 1196 of the Texas Penal Code are unconstitutional.

***52 ARGUMENT AND AUTHORITIES**

Obviously a single brief cannot present all of the considerations which should be brought to bear on the issue of the constitutionality of the Texas abortion law. Beyond the authority applicable to the questions of injunctive relief and standing, Counsel for Appellants have chosen primarily to amplify the constitutional issues relied upon by the lower court.

Counsel for Appellants invite this Court's attention to each of the *amicus curiae* briefs filed herein on appellants' behalf. Each presents unique aspects of legal, medical and social science factors relating to the question of abortion which this Court is urged to consider in deciding the instant case.

I.

The Statutory Three-Judge District Court Was Properly Convened and Had Jurisdiction to Grant Declaratory Relief to the Three Complaining Classes of Party Plaintiffs.

A. The Class of Adversely Affected Married Couples: Mary and John Doe

1. *Standing of Mary and John Doe*

The uncontradicted allegations of Mary and John Doe have been discussed at pp. 10-11 of this brief. It is not contested that the Texas abortion law has a recurring, present adverse impact upon their marital relations. This Court has frequently upheld the standing of parties with far less at stake than marital harmony and overall health. ***53** As to standing in itself, there exists a "nexus between the status asserted by the litigant[s] and the claim[s] [they present]." *Flast v. Cohen,* 392 U.S. 83, 102 (1968). Laws regulating the medical procedure of induced abortion inevitably affect the class of married couples.

2. *Case or Controversy Between the Does and Defendant-Appellee*

Nothing in Article III nor considerations of judicial policy justified the determination below that the Does failed to present a case or controversy.

Regardless of the possibility that a married couple might present a *more* concrete controversy, Mary and John Doe satisfy all of the logical and constitutional prerequisites for invoking the jurisdiction of a court over their controversy with appellees.

Unspecified economic injury between a litigant and a *potential* business competitor was held to create a case or controversy in *Investment Co. Institute v. Camp,* 401 U.S. 617 (1971); *accord, Arnold Tours v. Camp,* 400 U.S. 45 (1970) (per curiam). Mary and John Doe, who assert a *present* personal injury to their marital harmony, not measurable in economic terms, are in a dilemma of far greater reality than that in *Investment Co. Institute.*

The Arkansas Monkey-Law case, *Epperson v. Arkansas,* 393 U.S. 97 (1968), is more akin to this problem. There a teacher posed a case or controversy with state officials because she was inhibited by a statute which had never been enforced. The inhibition in the present case is more serious. Both present a realistic case or controversy, and both cases have been vigorously pursued by the parties. The decisions ***54** above, and the long line of loyalty oath cases, show a realistic approach to Article III and recognize that the quantifiable impact of a statute, rather than the imminence of jail, is a sound criteria. *See also LSCRRC v. Wadmond,* 401 U.S. 154, 158-59 (1971); *Baggett v. Bullitt,* 377 U.S. 360 (1964).

B. The Class of Adversely Affected Pregnant Women Denied Medical Care: Jane Roe

1. *Standing of Jane Roe*

At the time she filed her complaint, Jane Roe was pregnant and had been denied a legal, hospital abortion in Texas because of the law. She sought to contest the statute on behalf of herself and others presently or in the future similarly situated. The lower court upheld her standing, and this has not been questioned.

2. *Case or Controversy Between the Jane Roes and Defendant-Appellee*

The fact that Jane Roe was forced to continue her pregnancy pending determination of her suit and that she could not then obtain a safe abortion does not moot the appeal in any sense, particularly in light of the class allegations. "The problem is ... 'capable of repetition, yet evading review,' *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515 (1911). The need for its resolution thus reflects a continuing controversy...." *Moore v. Ogilvie,* 394 U.S. 814, 816 (1969). The case is the same as those in which events of nature or conduct by one of the parties threatens to obscure a substantial, on-going problem which must be finally resolved. *See, e.g., Gaddis v. Wyman,* 304 F. Supp. 713, 717 (S.D.N.Y. 1969), *aff'd mem. sub nom.* ***55** *Wyman v. Bowens,* 397 U.S. 49 (1970); *Kelly v. Wyman,* 294 F. Supp. 887, 890, 893 (S.D.N.Y. 1968), *aff'd sub nom. Goldberg v. Kelly,* 397 U.S. 254, 257 n. 2 (1970). The 728 Texas women who were forced to travel to New York City for medical care from July 1, 1970, to March 31, 1971 [51] --a rate of 81 per month--illustrate the continuing controversy. This Court has held that a "mere possibility of [[recurrence] ... serves to keep the case alive." *United States v. W. T. Grant Co.,* 345 U.S. 629, 633 (1953). In the present context, mere possibility has been replaced with the inevitability of Texas women being forced to seek out unknown doctors at medical facilities in distant states at great expense.

C. The Class of Adversely Affected Physicians Prohibited on a Regular and Recurring Basis From Providing Necessary Medical-Care for Their Patients: James H. Hallford, M.D.

1. *Standing of Dr. Hallford*

The action on behalf of physicians, represented by Dr. Hallford, alleged throughout that the abortion statute directly curtailed the interests in providing adequate medical advice and treatment for patients. These interests are aspects of "liberty," "property," and association directly protected by the Fourteenth and First Amendments. The opportunity to pursue one's profession is encompassed within the concepts of "liberty" and "property." This has been the teaching of decisions involving members of and aspirants to the bar, *Willner v. Committee on Character and Fitness,* 373 U.S. 96, 102-03 (1963); teachers, *Slochower v. Board of Higher Educ.,* 350 U.S. 551 (1956); scientists, ***56** *Greene v. McElroy,* 360 U.S. 474, 492 (1959); and physicians as well, *Birnbaum v. Trussell,* 371 F.2d 672 (2d Cir. 1966).

The present case, therefore, is wholly unlike *Tileston v. Ullman,* 318 U.S. 44 (1943) (per curiam). There a physician, who claimed no rights whatsoever of his own, sought declaratory relief against a statute which prohibited *patients* from using contraceptives. Here, physicians are drastically affected by direct enforcement provisions of the challenged statute. Tileston, however, had made "no allegations asserting any claim under the Fourteenth Amendment of infringement of [his] liberty or his property rights." 318 U.S. at 44. It is abundantly clear that the physician sub-class,
"alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr,* 369 U.S. 186, 204 (1962), quoted in *Flast v. Cohen,* 392 U.S. 83, 99 (1968).

2. *Standing of the Physician-Class to Assert the Rights of Patients to Seek the Medical Care of Induced Abortion*

Dr. Hallford also invoked the rights of present, past, and prospective patients. A pregnant woman is generally in no position to undertake protracted litigation to establish her right to an abortion, and none has ever been prosecuted. Neither a physician's rights, nor those of his patients, should depend upon the ability to find a cooperative martyF.

***57** This case, then, is a close parallel to *Griswold v. Connecticut,* 381 U.S. 479 (1965), because,
"[t]he rights of [patients] are likely to be diluted or adversely affected unless those rights are considered in a suit involving [physicians] who have this kind of confidential relationship to them." 381 U.S. at 479.

Similarly, it has been held in abortion prosecutions that the physician may assert his patient's rights, a proposition which the lower court correctly accepted, and *California v. Belous* [52] considered so self-evident as to justify no more than a footnote. In fact, each federal and state court decision in recent months has concluded, without the need for extensive discussion, that physicians in both declaratory and defensive actions have standing to assert the rights of patients. *E.g., United States ex rel. Dr. Jesse Williams, II v. Zelker,* ---- F.2d ----, No. 35381 (2d Cir. July 2, 1971) (Tom C. Clark, J.); *Crossen v. Breckenridge,* ---- F.2d ----, No. 20852 (6th Cir. June 23, 1971) (Miller, J.). *See also Truax v. Raich,* 239 U.S. 33 (1915); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *see generally* Sedler, *Standing to Assert Constitutional Jus Tertii,* 71 YALE L.J. 599 (1962).

Physicians, in light of their direct involvement in the day to day effects and enforcement of the statute, are situated in much the same way as the defendant-covenantor in *Barrows v. Jackson,* 346 U.S. 249 (1953), because here as there "it would be difficult if not impossible for the persons whose rights are asserted to present their grievances ***58** before any court." 346 U.S. at 257. In any medical context it is meaningless to speak of physicians without patients and patients without physicians. In law it would be equally meaningless to hold that a physician may not rely upon her or his patients' rights.

3. *The Recurring Case or Controversy Between the Physician-Class and Defendant-Appellee*

"There can be little doubt that fear of the law is a determining factor in the policy adopted by hospitals and surgeons, both in the United States and in Great Britain." G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 168 (1966). Medical professionals, commendably, do not habitually flout laws in order to contest their validity. This Court, and lower courts, should not force such anti-social conduct by taking an unduly narrow view of the Article III case or controversy requirement. Nothing in Article III, prior decisions by this Court, or considerations of judicial management remotely suggests that a physician must flout a statute, undertake piecemeal defense of repeated prosecutions and risk fines, imprisonment, and license revocation in order to challenge a law which poses concrete cases and controversies in the physician's office day after day.

The nature of the recurring case or controversy produced by the challenged statute is understandable, specific, and fully manageable within sound judicial procedures. Physicians do not simply " 'feel inhibited' " by the restrictions on reasons and procedures for medical abortions in Texas. *See Younger v. Harris,* 401 U.S. 37, 42 (1971). They *are inhibited* in a very serious, plainly demonstrable, concrete, and specific manner.

***59** Federal courts in Wisconsin, [53] Colorado, [54] Illinois, [55] North Carolina, [56] and Ohio [57] have faced the same questions of recurring case or controversy, and ruled in the manner suggested by Appellants.

Prospective lawyers are not required to be disbarred or refused admission to the bar in order to contest statutes which affect the conduct of law students. *LSCRRC v. Wadmond,* 401 U.S. 154, 158-59 (1971). The teachers in *Epperson v. Arkansas,* 393 U.S. 97

(1968), and *Baggett v. Bullitt,* 377 U.S. 360 (1964), did not face a court-imposed dilemma forcing them to flout an anti-evolution statute in the Scopes tradition, or risk entanglement in a perjury prosecution which might follow the signing of a loyalty oath.

Similarly, the drug companies in *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967), were permitted by this Court to make a broad attack on labelling regulations promulgated by the Commissioner of Food and Drugs. Physicians, even more than drug companies, "deal in a sensitive [profession], in which public confidence," 387 U.S. at 153, is especially important.

***60** Indeed, even the earlier "ripeness" cases which found no controversy support the presence of a sufficient degree of justiciable adversity on the facts presented here. [58]

A bare majority in *Poe v. Ullman,* 367 U.S. 497 (1961), for example, found no controversy over the unenforced Connecticut law against the use of contraceptives. Justice Frankfurter's plurality opinion relied upon four factors: (1) a history of non-enforcement of the statutes against physicians and patients. 367 U.S. at 501-02; (2) the fact that "contraceptives are commonly and notoriously sold in Connecticut stores. Yet no prosecutions are recorded...." 367 U.S. at 502; (3) the absence of "real threat of enforcement," 367 U.S. at 507; and (4) the failure to find "deterrent effect ... grounded in a realistic fear of prosecution." 367 U.S. at 508.

Each of these features is different in the present case, and additional considerations make this case even more appropriate for decision, on the merits.

(1) The Texas abortion statutes are regularly enforced by criminal prosecutions and license revocations. In addition, hospital committees in effect enforce the laws within their institutions. Neither *Poe* nor *Griswold* indicated that hospital committees in Connecticut regulated the prescription of contraceptives to patients.

(2) Abortions in Texas hospitals are obviously not "commonly and notoriously" available upon request.

***61** (3) There ?? than "real threat of enforcement" of the Texas abortion laws. There is frequent actual enforcement.

The above analysis considers the *Poe* plurality opinion in isolation and assumes the case was correctly decided. However, *Poe* was handed down over persuasive dissents by Justices Harlan and Douglas, and memorandum notations of dissent from Justices Stewart and Black. *Poe* has been repeatedly criticized and suggestions made that it be or was limited to its facts. [59]

Poe appears to be one of the exceedingly few decisions which requires a litigant to invite and undergo criminal prosecution. Ultimately, the physicians prevailed, seven-to-two, four years later. Suppose they had not? The *Poe* decision would have consigned them to accepting the penalty. Other decisions, as Justices Harlan and Douglas pointed out, dissenting in *Poe,* imposed no such Hobson's choice.

Justice Harlan's dissent in *Poe* undertook at length to demonstrate that the majority was in substantial error. 367 U.S. at 522-39. The Justice placed chief reliance on *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), and *Truax v. Raich,* 239 U.S. 33 (1915). Both permitted anticipatory relief to avoid damage caused by the present *effect* of a statute rather than imminence of enforcement. Significantly, in *Pierce,*

***62** "a Court which included Justices Holmes, Brandeis, and Stone rejected a claim of prematureness and then passed upon and held unconstitutional a state statute whose sanctions were not even to become effective for more than seventeen months after the time the case was argued...." *Poe v. Ullman,* 367 U.S. 497, 538 (1961) (Harlan, J., dissenting).

See also West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) (students allowed to challenge possible expulsions prior to actual dismissal, and prior to effective date of rule which, if enforced, would have required expulsion); *Terrace v. Thompson,* 263 U.S. 197, 216 (1923) ("They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights").

Congress, in passing the Declaratory Judgment Act, recognized the need to provide a federal anticipatory remedy in lieu of defense to a criminal prosecution. A Senate Report reflected this specific concern:
"It is often necessary in the absence of the declaratory judgment procedure, to violate or purport to violate a statute in order to obtain a judicial determination of its meaning or validity." S. Rep. No. 1005, 73d Cong., 2d Sess., at 2-3.

In the instant case, physicians positively refrain from treating and advising patients for the reason that they fear criminal prosecution, or administrative sanctions. They are not uninterested citizens urging an academic question, but are a class of citizens greatly affected and deterred by the challenged statutes. As Professor Bickel ***63** suggested, in a slightly different context, "it may be true that by hypothesis no more suitable case can ever be constructed, because those who are unjustifiably deterred will never be prosecuted, and what deters them is precisely the prospect of litigation." [60]

In light of the considerations set out above, the lower court correctly recognized the claims of the physician class as presenting a recurring case or controversy within the meaning of Article III.

II.

The Three-Judge Court Should Have Granted Injunctive Relief to the Three Complaining Classes of Plaintiffs.

The relief sought by Appellants below did not include any order against actual pending or contemplated state court proceedings. Appellants' claims met the requirements of equitable jurisdiction, and posed a situation justifying injunctive relief against future enforcement of the abortion statutes. By denying the requested injunction, the Court below in effect failed to enforce the very Constitutional rights which that Court had found to be in jeopardy.

A. Injunctions Against Future Enforcement of State Criminal Statutes Are Proper Absent a Showing of Bad-Faith Enforcement for the Purpose of Discouraging Protected Rights.

The District Court based its refusal to issue an injunction on an erroneous interpretation of *Dombrowski v. Pfister,* 380 U.S. 479 (1965), stating that:
***64** "This federal policy of non-interference with state criminal prosecutions must be followed except in cases where 'statutes are justifiably attacked on their face as abridging free expression,' or where statutes are justifiably attacked 'as applied for the purpose of discouraging protected activities.' *Dombrowski v. Pfister,* 380 U.S. at 489-490. Neither of the above prerequisites can be found here." *Roe v. Wade* (314 F. Supp. at 1224; A. 122).

The district court's opinion seemed to require literal threats of bad-faith prosecution for the purpose of discouraging plaintiffs' constitutionally-protected activities before the plaintiffs would have been entitled to an injunction. However, the quoted phrases from *Dombrowski* relate to the appropriateness of abstention in cases where a statute might be construed by a state court to be inapplicable to the conduct of the federal court plaintiff. While the facts in *Dombrowski* included a threat to freedom of expression and bad faith on the part of the local law enforcement officials, the case should not be read as a restriction of the law relating to equitable relief from unconstitutional criminal statutes.

The correct standard by which the claims of the appellants for injunctive relief should have been judged was restated by Mr. Justice Black in *Younger v. Harris,* 401 U.S. 37, 47 (1971). The plaintiff must show: (1) irreparable injury; (2) that the irreparable injury is both great and immediate; and (3) that the threat to plaintiff's federally protected rights is one that cannot be eliminated by his defense against a single criminal prosecution. *Ex parte Young,* 290 U.S. 123 (1908), and injunction cases ***65** decided since, indicate that the three prerequisites for injunctive relief may be met absent actual threats of bad-faith enforcement.

The actions resulting in *Ex parte Young,* 209 U.S. 123 (1908), were initiated on the day *before* the statute in question took effect. It was not until a temporary injunction had been issued against the attorney general of Minnesota that he took any action against the railroad involved. The pleadings of the plaintiffs merely alleged that *should* the railroad fail to observe the law, "such failure *might result* in an action against the company or criminal proceeding against its officers ..." *Id.* at 131 (emphasis added). In fact, the plaintiffs were stockholders in the railroad and could not have been subjected to either civil or criminal action. Their interest was only monetary.

In *Truax v. Raich,* 239 U.S. 33 (1915), the plaintiff filed his bill in the district court one day after the statute in question (establishing penalties against employers who employed fewer than 80 per cent native-born citizens) was signed into law. The immediate and irreparable injury about to be suffered by Raich, an alien, was that his employer, fearing criminal sanction, was planning to discharge him. After Raich applied for an injunction against the local prosecutor, the employer was arrested. Raich was not arrested, nor was he threatened. There were no allegations of bad faith. Rather, this Court emphasized the inadequacy of the plaintiff's remedy at law and spoke of the exception to the rule against interference with criminal prosecution that existed, "when the prevention of such prosecutions is essential to the safeguarding of rights of property. The right to earn a livelihood and continue in employment unmolested ***66** by efforts to enforce void enactments should similarly be entitled to protection...." 239 U.S. at 37-38. (Citations omitted.)

In *Terrace v. Thompson,* 263 U.S. 197 (1923), this Court spoke of the "threatened enforcement of the law" in question as being subject to an injunction if necessary to protect federal rights. There was no allegation that the threats were anything more than good-faith willingness on the part of the state officials to enforce a law on the books.

Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925), involving a New York statute establishing penalties for falsely representing meat as "kosher," perhaps represents the "low-water" mark in the quality of allegations necessary to support equitable jurisdiction. The offenses in question were classified as misdemeanors with a maximum fine of $500.00, and the "threats" of prosecution were general, directed to the public. Yet, the Court's unanimous opinion stated that: "if the statutes under review are unconstitutional, appellants are entitled to equitable relief...." 266 U.S. at 500.

Perhaps because of a constant parade into the federal courts of litigants such as those in *Hygrade,* whose anticipated injuries consisted of small fines under economic regulation statutes, this Court began to tighten the prerequisites for equitable interference with state criminal statutes. Thus, in a series of economic regulation statute cases including *Fenner v. Boykin,* 271 U.S. 240 (1926); *Beal v. Missouri Pac. R.R. Corporation,* 312 U.S. 45 (1941); *Spielman Motor Sales Co. v. Dodge,* 295 U.S. 89 (1935); and *Watson v. Buck,* 313 U.S. 387 (1941); this Court somewhat narrowed the *factual* requirements necessary to obtain an injunction. ***67** That the substantive law was not changed or narrowed can be gleaned from the individual facts of the cases. In *Fenner,* the state statute made participation in certain assignments for purchase or sale of future commodities a crime. The plaintiffs were commodity dealers. The district court concluded that the statute only applied to gambling transactions, and dismissed the bill. This Court affirmed holding that the plaintiffs should first set up their defense in state court, unless it plainly appeared that such a course would not afford adequate protection. *Fenner, supra,* at 244. Thus, not only was it unclear that the statute jeopardized the plaintiff's federal rights, but it was clear that the validity of the statute depended upon whether it would apply to plaintiffs.

Spielman involved a misdemeanor statute with a maximum $500 fine. The defendant-prosecutor stipulated only one prosecution until a decision on the constitutionality of the state statute was reached and it was not clear that plaintiff's business would be seriously hurt. This Court stressed that the injury must be both great and immediate to warrant equitable relief. Obviously from the facts, Spielman's anticipated injury was not.

Beal also dealt with the problem of single versus multiple prosecutions. The penalty was a fine and it was an issue of fact, undecided by the district court, whether multiple prosecutions were contemplated. If there was to be only one, this Court felt that the injury entailed in a single defense with only the possibility of a fine at stake was not great enough to warrant injunction. *Beal, supra,* at 50.

In *Watson,* the statutes in question (regulating music copyrights) were extremely complicated and had not been ***68** construed by the state courts. The district court had enjoined enforcement of the entire statute, whereas only part of it was constitutionally suspect. Whether multiple prosecutions were contemplated was also in doubt. In fact this Court spoke of "an absence of any showing of a definite and expressed intent to enforce particular clauses of a broad, comprehensive and multi-provisioned statute." *Watson, supra,* at 400.

Contrasted with the above cases, the facts of *Hague v. CIO,* 307 U.S. 496 (1939), decided during the same period, are particularly enlightening. There, the injuries alleged involved ordinances which among other things flatly prohibited distributing any newspapers, paper, periodical, book, magazine, circular, card or pamphlet on any public street or public place. The plaintiffs had been denied the right to meet, had been arrested and at times "thrown out of town." While much was said in the opinion concerning the "rights and immunities" of citizens of the United States and the states, and whether free speech and assembly were included in the Civil Rights Acts, there was never any indication that only violations of speech and assembly rights would establish a case for equitable relief.

In *Douglas v. City of Jeannette,* 319 U.S. 157 (1943), an injunction was denied but the decision did not hinge on the question of threats or bad-faith enforcement to discourage federally protected rights. First, the ordinance was general, relating to all peddlers and was only unconstitutional as applied to plaintiffs and other Jehovah's Witnesses; second, there was no factual allegation of multiple prosecutions and it appeared that the plaintiffs could completely present their claims in the defense of a single suit--especially since this Court had that day held the statute void as to those in plaintiffs' class; third, since ***69** the ordinance was not void as to all applications, the district court would have had to attempt to envision all possible applications, enjoining some and leaving others alone; and finally, the rather unique situation that existed in this Court's having declared the ordinance as applied unconstitutional in a companion case effectively mooted whatever injuries might have been suffered in the future by the plaintiffs.

Stefanelli v. Minard, 342 U.S. 117 (1951), and *Cleary v. Bolger,* 371 U.S. 392 (1963), are often cited as precedents against injunctions involving state criminal process, but both cases involved pending prosecutions. The rights in jeopardy were procedural rather than substantive and involved only the single trials in which the plaintiffs were being prosecuted. Also, another policy, that of avoiding piecemeal review of cases, militated against an injunction.

In *Dombrowski v. Pfister,* 380 U.S. 479 (1965), this Court spoke again of the reluctance of federal courts to intervene when a plaintiff's rights might be fully determined in the defense and ultimate Supreme Court review of a single indictment, but held that such was not the situation in the case being considered.
"[T]he allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights." 380 U.S. at 485.

The rights could not be vindicated by setting up a defense in a criminal trial because the prosecutions were in bad-faith and for the purpose of harassment. The special vulnerability of speech to such tactics made the injuries irreparable, immediate and great. This, taken with the ***70** bad-faith prosecutions, made out a case for equitable relief. That free expression and bad faith on the part of state prosecutors were the determinative factors in *Dombrowski* cannot be denied, but to hold that these are the only factors justifying an injunction is to ignore the substantive law contained in *Ex parte Young,* 209 U.S. 123 (1908), *Truax v. Raich,* 239 U.S. 33 (1915), and other cases cited above while keying upon the peculiar factual situation to which the substantive law was applied in *Dombrowski.*

That *Dombrowski*-type situations are not the only cases in which federal interference is justified was affirmed by this Court last term in the case of *Wisconsin v. Constantineau,* 400 U.S. 433 (1971). There the threats to the plaintiff's rights were not in the form of threats of prosecution either in good or bad faith. The only criminal sanctions involved applied to those who sold alcoholic beverages to persons whose names had been posted. The statute itself, by allowing officials and relatives to "post" a person's name without notice or hearing, posed the threat to the plaintiff's rights. The rights could not be vindicated by defending a single state prosecution.

B. The Question of Relief by Injunction Against the Texas Abortion Statute Is Not Foreclosed by the Decisions in *Younger v. Harris* and Companion Cases.

Younger v. Harris, 401 U.S. 37 (1971), *Samuels v. Mackell,* 401 U.S. 66 (1971), *Dyson v. Stein,* 401 U.S. 200 (1971), *Byrne v. Karalexis,* 401 U.S. 216 (1971), *Boyle v. Landry,* 401 U.S. 77 (1971) and *Perez v. Ledesma,* 401 U.S. 82 (1971), all involved, in part, the requested injunction of a *pending* prosecution. Since those plaintiffs who were being prosecuted did not make out a case of bad ***71** faith on the part of the local officials, they failed to satisfy the requirement that the threats to their rights must be such that they could not be vindicated in the defense of a single prosecution. As Mr. Justice Stewart pointed out in his concurring opinion to *Younger v. Harris,* 401 U.S. 37, 54-55 (1971):

> "[T]he Court today does not resolve the problems involved when a federal court is asked to give injunctive or declaratory relief from *future* state criminal prosecutions."

Although the plaintiff, Dr. Hallford, was being prosecuted under the Texas Abortion Statutes at the time he filed his motion to intervene and complaint, he requested an injunction only against future prosecutions under the statutes, reserving the right to ask for an injunction against the *pending* prosecutions against him (A. 34). In fact, as the record discloses, he never asked the district court to enjoin the pending prosecutions. Plaintiffs Roe and Doe were not in any sense involved in the pending prosecutions. Under the authority of *Hale v. Bimco Trading, Inc.,* 306 U.S. 375 (1939), neither the Anti-Injunction Statute, 28 U.S.C. §2283, nor collateral court-made rules relating to comity would bar their actions as strangers to the pending prosecution of Dr. Hallford. To hold otherwise would be to ignore that three different rights are being claimed: (1) The physician's right to perform an abortion; (2) the pregnant woman's right to obtain an abortion and (3) the married couple's right to the assurance of abortion as a back-up procedure to protect their marital harmony. Dr. Hallford might fail to vindicate his rights in defending the criminal action. He may rely in part upon the rights of his patients, but ***72** there is no guarantee that those rights will be reviewed by this Court. Plaintiffs Doe and Roe are not required to leave the defense of their personal rights to another. *Pearlman v. United States,* 247 U.S. 7 (1918). The fact that the pending state action did not involve the same parties as the federal action eliminates the danger of the type of gratuitous interference with state court litigation spoken of in *Brillhart v. Excess Ins. Co. of America,* 316 U.S. 491, 495 (1942).

In both *Younger v. Harris,* 401 U.S. 37 (1971), and *Boyle v. Landry,* 401 U.S. 77. (1971), there were plaintiffs who were not being prosecuted under the statutes in question. However, in both instances it was not clear that the statutes prohibited what those plaintiffs wished to do. In *Boyle* the statute involved threatening to commit a criminal offense. The majority opinion by Mr. Justice Black indicates that the plaintiffs were asking for an injunction because they feared bad-faith enforcement of the statutes, not because the statutes on their face forbade any activity in which plaintiffs wished to participate. Since no facts showing that actual threats or arrests had been received were introduced in the district court, plaintiffs failed to make out a case of bad-faith harassment. In *Younger,* the three plaintiffs who were not being prosecuted only alleged that they felt "inhibited" by the statute. It was not clear that the statute would apply to them, nor that their inhibitions were at all justified. *Younger v. Harris, supra,* at 57, 58 (Mr. Justice Brennan concurring).

By contrast, Plaintiffs Roe, Doe and Hallford in the present case presented factual allegations to the District Court which clearly brought them within the criteria necessary to invoke equitable relief from the statute. Whether ***73** the rights alleged by the plaintiffs are federally protected has yet to be decided by this Court, and arguments related to those rights are treated in this brief in the section on the merits of the statutes in question. Similarly, the arguments relating to the impact of an unwanted pregnancy and a physician's right to use his best medical judgment are also treated elsewhere in this brief. It is enough for purposes of this section to point out that in the case of plaintiff Jane Roe and the class she represents, the economic, social, psychological, and physiological effects of being forced to go through an unwanted pregnancy and deal with an unwanted child certainly represent irreparable injuries. When she and those in her class are forced to continue an unwanted pregnancy their lives are irremediably altered. They have no action for damages or any other traditional legal action which in fact or theory can remedy their situation. That problems concerning pregnancy are both great and immediate obviously follows from even a cursory consideration of the nature of the condition. Plaintiff Roe and those in her class cannot eliminate the threat to their rights by setting up a defense in a single prosecution or any number of prosecutions since under Texas law a woman upon whom an abortion is performed cannot be prosecuted as either a principal or an accomplice. *Gray v. State,* 77 Tex. Cr. R. 221, 178 S.W. 411 (1915); *Moore v. State,* 37 Tex. Cr. R. 552, 40 S.W. 287 (1897). Plaintiff Roe in her complaint and in her affidavit, which was uncontroverted by the defendant, presented a factual resumé consisting of pregnancy out-of-wedlock, social stigma and economic hardship due to that pregnancy, a desire to put an end to that condition, and an inability to do so under conditions which would not jeopardize her life. That there are many in ***74** her situation is uncontroverted. If Jane Roe and those in her class have a constitutional right to an abortion, there is but one way to effectuate that right--by enjoining the enforcement of the statute so that physicians will be willing to attend to their health needs.

Plaintiffs John and Mary Doe presented claims and facts to the district court which showed a pervasive and continuing injury to their most intimate marital relations. The Texas abortion statute poses a constant threat to their ability to plan their family and avoid possible injury to Mary Doe's health. Each day that they must face this uncertainty represents a great and immediate injury. Like Plaintiff Roe, there is no way that they can eliminate this threat to the rights of marital privacy by setting up a constitutional defense in a criminal prosecution. Mary Doe could not be prosecuted. While her husband could theoretically be prosecuted as an accomplice should Mary undergo an illegal abortion, his defense on constitutional grounds would come too late to prevent the disruption of their marital relations prior to pregnancy. For it is not their right to end an unwanted pregnancy at present that is being violated by the statute, but rather, the right to engage in normal marital relations with the assurance that should contraception fail, Mary's health would not be endangered. Again, if John and Mary have a constitutional right to the availability of abortion as means to insure normal marital relations, there is only one way they can be secure in that right--the enforcement of the statutes must be enjoined.

Plaintiff Dr. Hallford's threatened rights include his license to practice medicine and earn a livelihood, his right to administer to his patients to the best of his medical ***75** ability, and his right to be free from arbitrary regulation which furthers no legitimate state interest. The abortion statute and its enforcement pose a constant threat and interference to those rights. Of course, Dr. Hallford's case for equitable relief differs in one respect from that of the other plaintiffs. He is being prosecuted, so that theoretically he could vindicate his rights by his defense in the criminal prosecution. However, several problems arise in this

context. Under Texas law, the State has no appeal in any criminal case. TEX. CODE CRIM. PROC., art. 44.02, TEX. CONST., art. 5, §26. Therefore, even if Dr. Hallford's trial judge determines that the abortion statute is unconstitutional, the decision would affect only that trial judge. Should Dr. Hallford perform an abortion in the future not within the statutory exception, he could be brought to trial again in a different court before another trial judge who would in no way be bound by the first judge's ruling. Also, how far must Dr. Hallford go in attempting to vindicate his rights? Must he deliberately eschew all other defenses save that based on the Federal Constitution so as to be sure that the issue will be preserved for ultimate review by this Court? If he is acquitted by the jury on the facts he can be prosecuted again if he performs abortions in the future.

C. No Effective State Remedy was Available to Appellants Roe and Doe.

The underlying considerations for the professed policy against federal court interference with state criminal process have been stated by this Court many times. They include basic factors unique to federalism, a reluctance to embarrass state officials, and the fact that state courts are under a duty to protect constitutional rights. Despite ***76** these considerations, this Court has affirmed time and again that when absolutely necessary to protect federal rights the policy may be set aside. Certainly one basic factor to be considered in determining whether such absolute necessity exists is the availability of a state remedy by which one whose rights are affected may test the allegedly unconstitutional statute.

Due to a rather unique situation existing in Texas, Plaintiffs Roe and Doe had absolutely no effective method of testing the Abortion Statutes in a state court.

The Texas Declaratory Judgment Act, TEX. REV. CIV. STAT. art. 2524-1, only provides a remedy for determining property rights. Furthermore, the general rule is that there is no right to a declaratory judgment involving any penal statute unless property rights are concerned. *State v. Parr,* 293 S.W.2d 62 (Tex. Crim. App. 1956);[61] *Bean v. Town of Vidor,* 440 S.W.2d 676 (Tex. Civ. App. 1969).

Likewise, the same general rule applies to injunctions against enforcement of a penal statute. They are not allowed unless property is about to be destroyed. *City of Austin v. Austin City Cemetery Ass'n,* 28 S.W. 528 (Tex. 1894); *City of Richardson v. Kaplan,* 438 S.W.2d 366 (Tex. 1969).

While the Texas Supreme Court recently held in *Passel v. Fort Worth Independent School District,* 440 S.W.2d 61 (1969), that it would be possible in the case of an unconstitutional statute to obtain an injunction even though only personal rights are involved, the opinion pointed out that ***77** in that case the plaintiffs were not seeking to enjoin prosecutions. *Id.,* at 63.

At best the practical availability of the remedies is still questionable, especially if one seeks to enjoin prosecution under a penal statute. But even if Plaintiff Roe or Plaintiffs Doe could manage to obtain an injunction in state court restraining enforcement of the abortion statutes, they would still not have an effective remedy. The Texas Constitution, Article 5, §3 grants appellate jurisdiction over civil matters to the Texas Supreme Court, while Article 5, §5 gives appellate jurisdiction over criminal matters to the Texas Court of Criminal Appeals. Thus if Plaintiffs sought the civil remedy of an injunction, their case would eventually be reviewed in the Texas Supreme Court. But a judgment in their favor from that court would be, in effect, useless since the Supreme Court has ruled that it has no jurisdiction to mandamus a trial court to dismiss a prosecution, even though the statute in question is clearly unconstitutional, because to do so would encroach upon the jurisdiction of the Court of Criminal Appeals. *Pope v. Ferguson,* 445 S.W.2d 950 (Tex. 1969). And in *State ex rel. Flowers v. Woodruff,* 200 S.W.2d 178, 182-183 (Tex. Crim. App. 1947), the Court of Criminal Appeals issued a writ of prohibition to a district court prohibiting it from enforcing its injunction against enforcement of a penal statute, saying that the district court had no jurisdiction to enjoin a penal statute. To do so would deprive the Court of Criminal Appeals of its jurisdiction.

As might be expected there are problems concerning the precedential value of one court's opinion over the other. A dramatic illustration of the problem may be found in *Barnes v. State,* 170 S.W. 548, 554 (Tex. Crim. App. 1914), ***78** where the Court of Criminal Appeals was dealing with a penal statute which had been ruled constitutional by the State Supreme Court. The Court of Criminal Appeals pointed out that the two courts were of equal dignity, said the Supreme Court's opinion was not binding in any way, and held the statute to be unconstitutional.

Thus had the plaintiffs resorted to state court they could have *at best* gotten a declaratory judgment or injunction which could not be enforced and possibly a decision that would not preclude future prosecutions under the statute. As has been stated before, they could not be prosecuted under the statutes. They were completely without state remedy. Surely no concept of federalism can dictate that these plaintiffs must live with a law that vitally affects their lives-- not on occasion, but each day and yet have no right to test that law in a court--anywhere.

D. The Existence of a Pending Prosecution Against One of the Plaintiffs Below Does Not Foreclose Equitable Relief Against Future Prosecutions.

Under the *holdings* of this Court, the special considerations and facts present in this case make it one in which federal intervention by injunction is both necessary and proper. The fact that all plaintiffs brought class actions; that no injunction against pending prosecutions was asked; that even if injunctive or declaratory relief might be considered improper in Dr. Hallford's case because of the decision in *Samuels v. Mackell,* 401 U.S. 66 (1971), plaintiffs Doe and Roe are claiming rights which are distinct from those of Dr. Hallford and do not and should not have to rely upon him to vindicate those rights; and finally that while Dr. Hallford may have some opportunity ***79** to present his claims at the defense of his prosecution, Plaintiffs Doe and Roe have no opportunity whatsoever to test the statutes either by incurring prosecution or seeking state adjudication of their rights, leave no doubt that the *actual holdings* of this Court do not foreclose *all* of the plaintiffs.

However, certain language in the majority opinion of *Samuels v. Mackell, supra,* at 72-73, and Mr. Justice Brennan's separate opinion in *Perez v. Ledesma,* 401 U.S. 93, 118-121, is susceptible to two different interpretations. It might be concluded that in speaking of the reluctance of federal courts to interfere with pending state prosecutions, the same considerations apply to both prosecutions pending against the parties before the federal court and any other prosecutions. Such an interpretation, however, is not only a direct departure from precedent, but if adopted would cause hopeless confusion among the federal courts and render the procedure of testing unconstitutional statutes by suit for injunction into a theoretical tool of interest only to historians.

That such an interpretation is not dictated by *Younger v. Harris, supra,* and companion cases is demonstrated by the fact that in both *Younger* and *Boyle v. Landry, supra,* this Court determined the appropriateness of the relief, which was requested by the plaintiffs who were *not* being prosecuted, on traditional equitable grounds, rather than by merely stating that the pending prosecutions against their co-plaintiffs foreclosed any discussion.

In the present case, Plaintiffs Roe and Doe initially brought their actions with no knowledge of the prosecution pending against Dr. Hallford. Because of his intervention the fact became apparent. Were there other ***80** prosecutions pending in other parts of the state? At the time the actions resulting in *Dombrowski v. Pfister,* 380 U.S. 479 (1965), were brought, were there other, *good-faith* prosecutions pending in another part of the state? Must a federal plaintiff in Texarkana, Texas, ascertain that the statute he is contesting is not the basis of a prosecution in El Paso, Texas, 780 miles away and must the three-judge court also determine that fact? Obviously, if the statute in question has any vitality at all, there is always the danger that somewhere a state prosecution is pending which will be "affected," if not legally then psychologically, by either an injunction or declaratory judgment.

The special concerns over friction between the Federal and State judiciaries do not dictate that injunctions against future prosecutions should never issue when there is a pending state prosecution dealing with the statute in question. Obviously, in

the situation posed in *Steffanelli v. Minard,* 342 U.S. 117 (1951), and *Cleary v. Bolger,* 371 U.S. 392 (1963), friction would be imminent, for the arm of the federal government would literally be interjected into the state court room to pluck out all or part of the case. It is easy to see why such an action would be unseemly. However, in the case of a federal injunction against future prosecutions issued while a prosecution concerning the statute dealt with in the federal action is in process, the state judge may use his own discretion. If he agrees with the interpretation of the federal court, he may stay proceedings pending this Court's review of the injunction and avoid the possible waste of both his time and that of everyone else concerned. If not, he may proceed in the belief that the federal court's ruling on the statute will be reversed.

***81 E. The Special Considerations Underlying the Doctrine of Comity Are Inapplicable to the Present Case.**

Volumes have been written concerning the principles of comity and federal-state relations in the area of state enforcement of criminal statutes. Appellants do not presume that they could add to the discussions of the historical and philosophical background of that policy in the opinions written in *Younger v. Harris* and companion cases last term. That the principles of comity avoid confusion and friction in some instances cannot be doubted, but in cases like the present the very reluctance of federal courts to intervene in the state criminal process produces confusion and friction and wastes the efforts of state judges, juries, and state officials.

The issue is not procedure, as in *Steffanelli.* The issue is not a statute which may proscribe both harmful and protected activity as in *Cameron v. Johnson,* 390 U.S. 611 (1968), or *Boyle v. Landry* and thus if enjoined would leave the states confused as to what they may or may not legislate against. Rather, the case involves a set of statutes with deep and fundamental constitutional infirmities. Thus, even if federal courts do not intervene, the issue of abortion will continue to cause confusion and delay in the state's criminal process until a decision is reached by this Court.

While it seems likely that eventually the question of whether a woman has a right to an abortion will reach this Court in the context of review of a criminal conviction, that process might very well entail the convening of countless state courts, both trial and appellate, the assembling of countless jurors, and the occupation of countless prosecutors, not to mention the untold anxiety, expense and ***82** humiliation of those physicians willing to offer themselves as potential sacrificial lambs to test the statutes.

Added to the waste of manpower will be the unquantifiable effect of the willful violation by respectable citizens of criminal laws for the purpose of testing them. Perhaps it may be moral to defy a law that one considers unjust and unconstitutional, but to hold that "except in rare circumstances" that is the only way to judicially bring about an end to such laws places a stamp of approval on the activity which can lead to chaos. Is the orderly adjudication of suspect statutes to be abandoned to those who delight in confrontation with those who enforce the laws?

Consider the moral dilemma of a Texas trial judge when presented with a constitutional defense to the violation of the abortion statute. He is of course obligated to uphold the United States Constitution. His zealousness in protecting federal rights may equal or surpass that of his brother in the federal judiciary. He may be firmly convinced that the statute is totally unconstitutional. And yet, if he dismisses the indictment the State cannot appeal. [62] The question will be foreclosed from appellate consideration. Another factor he must bear in mind is that if he dismisses the indictment his action may very well become the basis of a political attack when he must run for reelection, turning the question of who will sit on the bench into one not of competence or intellect, but of religion or political philosophy. In the face of such considerations the state judge may feel that he has no choice but to enforce an unconstitutional statute. Far from resenting the "intrusion" ***83** of a federal court, he may well welcome the end to his moral quandry--the reprieve from his threatened violation of oath and conscience.

On the state appellate level, the considerations involving the "politicization of the judiciary" also apply since, in Texas, all judges are elected. Also, should the Texas Court of Criminal Appeals hold the statute unconstitutional, the State must either violate

Article 5, §26 of the Texas Constitution, which provides that the State shall have no appeal in a criminal case, by appealing the decision to this Court, or let the matter rest.

Contrasted with the problems above, the institution of a suit for injunction in federal court represents a much more orderly, civilized method for the vindication of federal rights. If the three-judge court is unsure of the effects of an injunction upon state law enforcement, the judgment can be stayed pending appeal to this Court. That the invalidation of a state statute will cause friction is not denied, but there is no reason to assume that federal-state relations are damaged more in the case of an injunction proceeding than when this Court reverses a conviction based on a statute which until reaching this Court had been ruled constitutional. The friction is caused by the act of intercession of federal constitutional concerns with individual notions of morality and "law and order," not by the particular procedure of intercession. It is not the federal court that interferes with the enforcement of a state statute, but the Constitution itself. Such an interference can never be accomplished without friction, for it is clear that there are many who would repeal that Constitution, especially where it protects the rights of a racial, religious or political minority.

***84 F. Having Decided That the Texas Abortion Statute Unconstitutionally Infringes Upon Plaintiffs' Rights, the Three Judge Court by Failing to Grant an Injunction Against Future Prosecutions Effectively Failed to Protect Those Rights.**

The three-judge court was presented with allegations and uncontroverted facts that set up a class action in which the right of women to have an abortion was claimed. The affidavit of a medical expert, whose qualifications and opinions were uncontroverted by any evidence from the defendant-district attorney, stated that physicians in Texas refused to do abortions because of fear of jeopardizing their careers. Were abortions legal, the physician-expert stated that he and other physicians would perform them. Affidavit of Paul C. Trickett, M.D. (A. 54-55). Plaintiff Intervenor Dr. Hallford also testified by way of affidavit that physicians in the Dallas area feared criminal prosecution under the abortion statutes and for that reason refused to do abortions (A. 67). The Court below found that:
"Since the Texas Abortion Laws infringe upon plaintiffs' fundamental right to choose whether to have children, the burden is on the defendant to demonstrate to the satisfaction of the Court that such infringement is necessary to support a compelling state interest. The defendant has failed to meet this burden." *Roe v. Wade,* 314 F. Supp. 1212, 1222 (1970) (A. 118, 119) [footnotes omitted].

Yet, despite the conclusion that rights were being infringed, the Court failed to grant the only relief that could reasonably allow the class bringing the suit to exercise their "fundamental right to choose whether to have children."

***85** In explaining the denial of injunctive relief, the Court below quoted from *Dombrowski v. Pfister,* 380 U.S. 479, 484-485 (1965):
"It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." *Roe, supra* at 1224 (A. 122).

However, it is precisely the "mere possibility of erroneous initial application of constitutional standards" that effectively forecloses any possibility of the women within the classes represented being able to obtain an abortion. Having obtained an affirmance of their rights these women must still depend on the willingness of physicians to risk prosecution if state officials choose to ignore the declaratory judgment. If the women themselves were subject to prosecution, at least some of them might be willing to take the risk. But they must rely upon strangers for help. In view of the fact that a declaratory judgment "neither

mandates nor prohibits state action" *Perez v. Ledesma,* 401 U.S. 82, 124 (1971) (Brennan, *J.*) individual physicians, having no personal issue at stake, would be foolhardy to risk performing an abortion.

In fact, the declaratory judgment was ignored, as is evidenced by the affidavits of the chairmen of obstetrics and gynecology (Appendices B, C, D at B-1, C-1, D-1) letter from Defendant's office, Appendix A at A-1 and indictments brought since the Three-Judge Court's judgment (Appendix E at E-1). No facts or pleadings were ***86** presented to the Court below that could have led to any conclusion but that such would be the case.

Given the affidavits of the physicians, the special problems of the class of women who must rely on others in order to exercise their fundamental rights, and the omission of any evidence whatsoever that Defendant would abide by the declaratory judgment, it follows that the Court below was not relying on any separate factual ground in denying an injunction. Their decision was based wholly on an erroneous view that no allegations had been presented which required that considerations of comity in the area of state criminal enforcement be disregarded.

Although the decision of whether or not to grant an injunction is spoken of as being "discretionary," *Bokulich v. Jury Commission of Greene County, Alabama,* 394 U.S. 97, 98 (1969), *Abbott Laboratories v. Gardner,* 387 U.S. 138, 148 (1967), it is clear that if the claims of the plaintiffs present "sufficient irreparable injury to justify equitable relief," the case should be remanded with instructions to enter a decree enjoining enforcement of the statute. *Dombrowski v. Pfister,* 380 U.S. 479, 497 (1965). [63]

***87 III.**

The Appeals Were Properly Taken Directly to This Court and Represent the Entire Case for Plenary Review by This Court.

The appeals are "from an order ... denying ... [a] permanent injunction," pursuant to 28 U.S.C. §1253. The actions attacked state statutes on constitutional grounds and requested declaratory and injunctive relief from enforcement of the statutes which are applicable statewide. The defendant was and is a state officer and the complaints presented a substantial federal question. Thus all requirements for direct appeal to this Court are met. *Spielman Motor Sales Co. v. Dodge,* 295 U.S. 89 (1935). *Bell v. Waterfront Commission of New York,* 279 F.2d 853 (2d Cir. 1960).

Although appellants technically "won" the issue of declaratory relief in the Court below, they join with appellee in urging this Court to decide the merits and constitutionality of the Texas abortion statute, regardless of its decision on other aspects of the case. That such action is within this Court's jurisdiction is illustrated by its action in the case of *Carter v. Jury Commission of Greene County,* 396 U.S. 320 (1969). There, the plaintiffs had requested (1) a declaration that qualified Negroes were systematically excluded from grand and petit juries; that the Alabama statutes governing jury selection were unconstitutional and that the jury commission was a deliberately segregated agency; (2) injunctions forbidding systematic exclusion of Negroes and the enforcement of the jury selection statutes; and, (3) an order vacating the appointments of the Governor to the commission. The ***88** three-judge district court found that Negroes were being excluded and enjoined their systematic exclusion. The plaintiffs appealed the denial of injunctive relief against the jury selection statute and the Governor's appointments. In affirming the District Court, this Court not only discussed the questions concerning the constitutionality of the jury selection statute and the Governor's appointments, but also discussed the merits of the district court's finding of systematic exclusion and the injunction against that exclusion. No mention of appeal by the defendants from the granting of the injunction against systematic exclusion is made, so that theoretically the issue was not before the Court.

In a slightly different context, but of value, is Mr. Justice Frankfurter's statement in *Florida Lime and Avacado Growers, Inc. v. Jacobsen,* 362 U.S. 73 (1960):

"Cases in this Court ... have consistently adhered to the view that, in an injunction action challenging a state statute on substantial federal constitutional grounds, a three judge court ... has--just as we have on a direct appeal from its action--jurisdiction over *all* claims raised against the statute." 362 U.S. at 80, 81.

The statutes here were attacked on the basis of: overbroad denial of the fundamental rights of privacy, choice as to giving birth to children, to seek health care, and to practice medicine without arbitrary restraint; vagueness; and denial of due process concerning burden of proof. It is certain that appellee will base a major portion of his argument on a defense of the statutes, so as to insure that all of the issues above are fully briefed and argued ***89** before the Court thus meeting the requirements set out in *Dandridge v. Williams,* 397 U.S. 471, 475, n. 6. (1970). [64]

Thus the question hinges, not on this Court's power to reach the merits, but on whether the judicial inefficiency and confusion which will result from its failure to do so outweigh the professed doctrine that the Court will usually avoid reaching a constitutional issue if possible. This Court's willingness to consider the effect of a decision upon pending cases in state and federal courts was illustrated last term in Mr. Justice Black's opinion in *United States v. Vuitch,* 402 U.S. 62 (1971).
"In the last several years, abortion laws have been attacked as unconstitutionally vague in both state and federal courts with widely varying results. A number of these cases are now pending on the docket. A refusal to accept jurisdiction here would only compound confusion for doctors, their patients, and law enforcement officials. As this case makes abundantly clear, a ruling on the validity of a statute applicable only to the District can contribute to great disparities and confusion in the enforcement of criminal laws." 402 U.S. at 66.

The confusion spoken of in *Vuitch* has not subsided. The abortion laws of Texas, [65] Wisconsin, [66] Illinois, [67] Cali ***90** fornia, [68] and Georgia [69] have been partially or completely declared invalid as denying fundamental rights, while abortion laws in Ohio, [70] Louisiana [71] and North Carolina [72] have been upheld. At least three appeals involving physicians indicted for violations of abortion statutes are presently pending in state courts. [73]

Appellants respectfully submit that nothing will be gained by another round of consideration by lower courts. It seems obvious that, rather than reaching a consensus, the federal district courts will continue to split on the question. It also seems obvious that this difference of opinion will carry over to the courts of appeals if they are ***91** required to decide the issue. Considering its effect on the area of marital relations, illegitimacy, poverty, women's rights, women's mental and physical health, mentally and physically deformed children, and the practice of medicine, the question of abortion potentially and actually affects virtually every person in the United States. The question itself compels an answer and appellants urge this Court to reach the merits.

IV.

The Provisions in the Texas Penal Code, Articles 1191-1194 and 1196, Which Prohibit the Medical Procedure of Induced Abortion Unless "procured or attempted by medical advice for the purpose of saving the life of the mother," Abridge Fundamental Personal Rights of Appellants Secured by the First, Fourth, Ninth, and Fourteenth Amendments, and Do Not Advance a Narrowly Drawn, Compelling State Interest.

As former Supreme Court Justice Tom C. Clark has said:
"The result of [Griswold and its predecessors] is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children, and day-to-day living habits. This is one

of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution." Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal,* 2 LOYOLA UNIV. (L.A.) L. REV. 1, 8 (1969).

***92** The Constitution does not specifically enumerate a "right to seek abortion," or a "right of privacy." That such a right is not enumerated in the Constitution is no impediment to the existence of the right. Other rights not specifically enumerated have been recognized as fundamental rights entitled to constitutional protection [74] including the right to marry, [75] the right to have offspring, [76] the right to use contraceptives to avoid having offspring, [77] the right to direct the upbringing and education of one's children, [78] as well as the right to travel. [79]

The difficulty in identifying the precise sources and limits of these rights has long been evident. In 1923 in *Meyer v. Nebraska,* 262 U.S. 390 (1923), this Court outlined some of the protections afforded by the Due Process Clause of the Fourteenth Amendment:

***93** "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and *some of the included things have been definitely stated.* Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men." 262 U.S. at 399. [Emphasis added.]

The 1965 Court, in *Griswold v. Connecticut,* 381 U.S. 479 (1965), demonstrated the variety of sources of these fundamental rights. [80]

Appellants contend that fundamental rights [81] entitled to constitutional protection are involved in the instant case, ***94** namely the right of individuals to seek and receive health care unhindered by arbitrary state restraint; the right of married couples and of women to privacy and autonomy in the control of reproduction; and the right of physicians to practice medicine according to the highest professional standards. These asserted rights meet constitutional standards arising from several sources and expressed in decisions of this Court. The Texas abortion law infringes these rights, and since the law is not supported by a compelling justification, it is therefore unconstitutional.

A. *The Right to Seek and Receive Medical Care for the Protection of Health and Well-Being Is a Fundamental Personal Liberty Recognised by Decisions of This Court and by International and National Understanding.*

In *Jacobson v. Massachusetts,* 197 U.S. 11 (1904), the defendant resisted his conviction under a compulsory vaccination statute by asserting "the inherent right of every freeman to care for his own body and health in such way as to him seems best." 197 U.S. at 26. Appropriately, this Court responded that liberties secured by the Constitution are not wholly free from restraint and found the dangers of widespread smallpox justified the statute. Far from downgrading the importance of defendant's asserted rights, however, the Court repeatedly emphasized the imminence of pervasive disease; "the evils of smallpox ... ***95** imperiled an entire population." 197 U.S. at 31. In explaining the principle underlying the decision, the Court paralleled the statute's intrusion upon personal liberty with military conscription to protect national security, and emphasized the compelling interest necessary to justify the invasion of personal rights:

"There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government,--especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of

its members the rights of the individual in respect of his liberty may at times, *under the pressure of great dangers,* be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand ... It is not, therefore, true that the power of the public to *guard itself against imminent danger* depends in every case involving the control of one's body upon his willingness to submit to reasonable regulations established by the constituted authorities, under the sanction of the state, for the purpose of protecting the public effectively against such danger." 197 U.S. at 29-30. [Emphasis added.]

The reference for the Court's standard of reasonableness was the compelling interest of the state in meeting the danger of epidemic smallpox. *Jacobson* thus embodies the principle that the personal right to care for one's health is a fundamental right which can be abridged by state law only when justified by a compelling interest.

***96** The personal right to care for and protect one's health in the manner one deems best has been honored by legislatures, except as to measures necessary to check widespread disease and except for the intrusion of restrictive contraception, abortion, and sterilization laws.

Although this Court has not expressly delineated a right to seek health care, the importance of such care has been recognized and the existence of such a right suggested. In *United States v. Vuitch,* 402 U.S. 62 (1971), this Court reaffirmed society's expectation that patients receive "such treatment as is necessary to preserve their health." 402 U.S. at 71. In this Court's invalidation of Connecticut's proscription against contraception, Justice White noted that statute's intrusion upon "access to medical assistance ... in respect to proper methods of birth control." *Griswold v. Connecticut,* 381 U.S. 479, 503 (1965) (White, J., concurring).

A right of access to health care has been held necessary in other factual settings. *McCollum v. Mayfield,* 130 F. Supp. 112 (N.D. Cal. 1955), involved an accused prisoner injured while in custody awaiting trial. The sheriff and jailer refused him medical care. As a result he became paralyzed. The court upheld a claim for relief under the Civil Rights Act based on deprivation of the plaintiff's life, liberty, and property without due process. *Accord, Coleman v. Johnson,* 247 F.2d 273 (7th Cir. 1957); *Edwards v. Duncan,* 355 F.2d 993 (4th Cir. 1966); *Tolbert v. Eyman,* 434 F.2d 625 (9th Cir. 1970). Custodial patients have been afforded a constitutional right to receive sufficient treatment to provide a realistic opportunity to improve or to be cured. *Wyatt v. Stickney,* 325 F. Supp. 781 (M.D. Ala. 1971). ***97** *Chrisman v. Sisters of St. Joseph of Newark,* Civ. No. 70-430 (D. Ore., July 22, 1971), held that a hospital's refusal, for non-medical reasons, to permit voluntary sterilization of a plaintiff violated her federal rights. And *EDF v. Hoerner Waldorf,* 1 E.R. 1960 (D. Mont. 1970), recognized a right to protection of health against environmental pollution.

The existence of other types of state statutes, not under constitutional attack, which affect matters of personal health does not negate the right asserted here. In contrast to laws which intrude upon the protection of personal health, statutes which prescribe working conditions have an indirect, positive impact on the person's well-being. None intrude so far as the assault alleged in *Jacobson* or the compulsory pregnancy asserted here. *See, e.g., Prince v. Massachusetts,* 321 U.S. 158; *West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937). Similarly, laws prescribing requisites for medical practice are designed to assure qualified practitioners, not to impose upon a citizen's person. *See, e.g., Dent v. West Virginia,* 129 U.S. 114 (1889); *Graves v. Minnesota,* 272 U.S. 425 (1926).

Finally, policy statements of national and international organizations indicate a pervasive recognition of the right to seek health care. For example, the Constitution of the World Health Organization provides:

> "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition." [82]

***98** Congress, in passing the Comprehensive Health Planning Act of 1966, took a similar position:

> "[T]he fulfillment of our national purpose depends on promoting and assuring the highest level of health attainable for every person, in an environment which contributes positively to healthful individual and family living...." [83]

Abortion is an accepted medical procedure for terminating pregnancy. *See* pp. 30-35, *supra. Amici* medical organizations recognize the acceptability of abortion, as their policy statements indicate; they draw no distinction between abortion and other medical procedures.

The Texas abortion law effectively denies Appellants Roe and Doe access to health care. Jane Roe was forced to bear a pregnancy to term though an abortion would have involved considerably less risk to her health. *See* p. 34 *supra.* Physicians who would otherwise be willing to perform an abortion in clinical surroundings are deterred by the fear of prosecution. Since Appellant Roe could not afford to travel elsewhere to secure a safe abortion, to avoid continuation of pregnancy she would have been forced to resort to an unskilled layman and accept all the health hazards attendant to such a procedure. [84] Even had she been able to travel out of state, the time required to make financial and travel arrangements would have entailed greater-health risks inherent in later abortions. *See* p. 33 *supra.*

99 B.** ***The Fundamental Rights to Marital and Personal Privacy Are Acknowledged in Decisions of This Court as Protected by the First, Fourth, Ninth, and Fourteenth Amendments.

1. The Right to Marital Privacy

The importance of the institution of marriage and of the family has long been recognized by this Court. Consequently the Court and its members have often affirmed the sanctity of the marital relationship and of the family union. In *Maynard v. Hill,* 125 U.S. 190, 211 (1888), mar riage was called "the foundation of the family and of society, without which there would be neither civilization nor progress." The opinion of the Court in *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942), spoke of marriage and procreation as being "fundamental to the very existence and survival of the race." Mr. Justice Harlan, for example, has written: "[T]he integrity of [family] life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.... Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations." *Poe v. Ullman,* 367 U.S. 497, 551-52 (1961) (Mr. Justice Harlan, dissenting).

Mr. Justice Douglas, in delivering the opinion of the Court in *Griswold v. Connecticut,* 381 U.S. 479 (1965), wrote of marriage as being
"a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not ***100** causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association or as noble a purpose as any involved in our prior decisions." 381 U.S. at 486.

Most recently in *Boddie v. Connecticut,* 401 U.S. 371 (1971), this Court reaffirmed "the basic position of the marriage relationship in this society's hierarchy of values" 401 U.S. at 374, and reiterated that "[a]s this Court on more than one occasion has recognized, marriage involves interests of basic importance in our society." 401 U.S. at 376.

Recognition of the sanctity of the marital relationship has resulted in recognition of a right of marital privacy, or as the *Griswold* decision states, "notions of privacy surrounding the marriage relationship", 381 U.S. at 486, and of rights attendant to the marital state. Protection has been extended to such rights as the rights to marry and have offspring because of their fundamental nature, even though such rights are not expressly enumerated in the Bill of Rights. These decisions support the proposition that there is a sphere of marital privacy and that important interests associated with marriage and the family are, and should be, protected from arbitrary government intrusion.

Loving v. Commonwealth, 388 U.S. 1, 12 (1967) (alternate ground of decision), specifically held that the due process clause of the Fourteenth Amendment protects "[t]he freedom to marry ... as one of the vital personal rights essential to the orderly pursuit of happiness by men." *Loving* stands for the proposition that "the right to marry" is protected by the due process clause although not specifically mentioned in the Bill of Rights. Yet the ***101** right *to* marry is meaningful only to the extent that there are rights *of* marriage, *i.e.,* rights attendant to the marital state which promote the happiness of the couple.

Associated with the right to marry is the right to have children, if one chooses, without arbitrary governmental interference. This Court unanimously held that "the right to have offspring" is a constitutionally protected "human right" which cannot be taken away by a discriminatory statute requiring the sterilization of some persons convicted of crime, but not of others similarly situated. *Skinner v. Oklahoma,* 316 U.S. 535, 536 (1942). The *Skinner* Court recognized a constitutionally protected right *to have* offspring even though such right is not mentioned in the Bill of Rights; a right *not to have* offspring should be of equal constitutional stature.

Further cases supporting these family rights include *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), and *Meyer v. Nebraska,* 262 U.S. 390 (1923), both of which were reaffirmed in *Griswold v. Connecticut,* 381 U.S. 479, 483 (1965). A unanimous Court in *Pierce* recognized a right to send one's children to private school. This right derived from "the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. at 534-35. This liberty, and the responsibility it implies, suggests a concomitant right of persons to determine the number of children whose "upbringing and education" they will direct.

Similar in principle is *Meyer,* a 7-2 decision invalidating a State statute which prohibited teaching German to pupils below the eighth grade. The *Meyer* Court stated that the due process clause includes "the right ... to marry, establish a home and bring up children." ***102** 262 U.S. at 399. Again the Court recognized a fundamental right not enumerated in the Constitution entitled to Constitutional protection.

Griswold reaffirms these privacy concepts, and makes it clear that a husband and wife are constitutionally privileged to control the size and spacing of their family at least by contraception.

Taken together, the *Griswold, Loving, Skinner, Pierce* and *Meyer* decisions illustrate that the Constitution protects certain privacy and family interests from governmental intrusion unless a compelling justification exists for the legislation. The right of a family to determine whether to have additional children, and to terminate a pregnancy in its early stages if a negative decision is reached, is such a right and is fully entitled to protection.

The number and spacing of children obviously have a profound impact upon the marital union. Certainly the members of this Court know from personal experience the emotional and financial expenditures parenthood demands. For those couples who are less fortunate financially and especially for those who are struggling to provide the necessities of life, additional financial responsibilities can be economically disastrous. For families who require two incomes for economic survival, the pregnancy can be ruinous since the wife will generally have to resign her job. In many other situations, such as where husband and wife are working to put themselves through school, pregnancy at a particular time can present a crisis.

Pregnancy can be a significant added problem in marriages. The added pressures of prospective parenthood can be "the last straw."

***103** This Court has previously upheld the right to use contraceptives to avoid unwanted pregnancy.

> "[I]t would seem that if there is a right to use contraception, this right must also take account of the fact that most techniques are not 100 per cent protective. If the contraceptive method fails and the *Griswold* right of choice is preserved, it is a strong argument toward recognizing the right to an abortion." [85]

As did the law considered in *Griswold,* "[t]his law ... operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation." 381 U.S. 482. The Texas abortion law in forbidding resort to the procedure of medical abortion, has a maximum destructive impact upon the marriage relationship.

2. The Related Rights to Personal Privacy and Physical Integrity

In addition to rights associated with marital privacy, an overlapping body of precedent extends significant constitutional protection to the citizen's sovereignty over his or her own physical person.

As early as 1891 this Court stated:
"No right is more sacred, [n]or is more carefully guarded ... than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said ***104** to be a right of complete immunity: to be let alone.' " *Union Pac. Ry. v. Botsford,* 141 U.S. 250, 251 (1891), quoted in *Terry v. Ohio,* 392 U.S. 1, 8-9 (1968).

This right, like all rights, does have some limitations, as illustrated by *Jacobson v. Massachusetts,* 197 U.S. 11 (1904), *supra* at 94 *et seq.* Nonetheless, absent a compelling justification, one is entitled to personal autonomy.

In family matters relating to child rearing and procreation, the Court has recognized and sustained individual rights on a constitutional plane. "The freedom to marry ...," *Loving v. Commonwealth,* 388 U.S. 1, 12 (1967); "the right to have offspring,"

Skinner v. Oklahoma, 316 U.S. 535, 536 (1942); "the liberty of parents and guardians to direct the upbringing and education of children under their control," *Pierce v. Society of Sisters,* 268 U.S. 510, 534-35 (1925); as well as the right, at least of a married woman, to use contraceptives, *Griswold v. Connecticut,* 381 U.S. 479 (1965), are all protected constitutionally.

Most recently the Court reaffirmed the "fundamental ... right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy," *Stanley v. Georgia,* 394 U.S. 557, 564 (1969) (Marshall, J.), and embraced with approval Mr. Justice Brandeis' dissent in *Olmstead v. United States:*
"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They ***105** sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized man." 277 U.S. at 478.

The Chief Justice, then a Circuit Judge, in *Application of Georgetown College, Inc.,* 331 F.2d 1010, 1016-17 (D.C. Cir.) (en banc), *cert. denied,* 377 U.S. 978 (1964), also urged a right to be let alone, in the context of a religious objection to blood transfusions, which could include "even absurd ideas which do not conform, such as refusing medical treatment even at great risk." 331 F.2d at 1017.

Pregnancy obviously does have an overwhelming impact on the woman. The most readily observable impact of pregnancy, of course, is that of carrying the pregnancy for nine months. Additionally there are numerous more subtle but no less drastic impacts. [86]

3. The Right to Terminate Unwanted Pregnancy Is an Integral Part of Privacy Rights

Without the right to respond to unwanted pregnancy, a woman is at the mercy of possible contraceptive failure, particularly if she is unable or unwilling to utilize the most effective measures. [87] Failure to use contraceptives effectively, ***106** if pregnancy ensues, exacts an exceedingly high price.

The court in *Baird v. Eisenstadt,* 429 F.2d 1398 (1st Cir. 1970), *prob. juris. noted,* 401 U.S. 934 (U.S. No. 70-17, 1971 Term), recognized the inhumane severity of laws which impose continued pregnancy and compulsory parenthood as the cost of inadequate contraception. The statute there proscribed distribution of contraceptives to unmarried women, but the deciding principle applies to restrictive abortion laws as well. [88]

"... [P]ersons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights." 429 F.2d at 1402.

Baird involved contraceptives unavailable to unmarried women; this case involves measures unavailable to all women. The impact of the two statutes is identical for the women affected. Moreover, the magnitude of the impact is substantial.

When pregnancy begins, a woman is faced with a governmental mandate compelling her to serve as an incubator for months and then as an ostensibly willing mother for up to twenty or more years. She must often forego further education or a career and often must endure economic and social hardships. Under the present law of Texas she is given no other choice. Continued pregnancy is compulsory, unless she can persuade the authorities ***107** that she is potentially suicidal or that her life is otherwise

endangered. TEXAS PENAL CODE, arts. 1191-1194, 1196 (1961). The law impinges severely upon her dignity, her life plan and often her marital relationship. The Texas abortion law constitutes an invasion of her privacy with irreparable consequences. Absent the right to remedy contraceptive failure, other rights of personal and marital privacy are largely diluted.

Commentators and courts have articulated and recognized the privacy which restrictive abortion laws invade:

> "[A]bortion falls within that sensitive area of privacy--the marital relation. One of the basic values of this privacy is birth control, as evidenced by the *Griswold* decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention has failed?" [89]

The decisions of this Court which implicitly recognize rights of marital and personal privacy have been followed by state and federal court decisions expressly holding the decision of abortion to be within the sphere of constitutionally protected privacy.

That there is a fundamental constitutional right to abortion was the conclusion of the court below in the instant case:
"On the merits, plaintiffs argue as their principal contention that the Texas Abortion Laws must be ***108** declared unconstitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment to choose whether to have children. We agree.

"The essence of the interest sought to be protected here is the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals." (A. 116)

That view has been shared by a number of other courts which have considered the question and have affirmed that this is a fundamental right. [90] The progression of decisions by courts which have indicated their recognition of abortion as an aspect of protected privacy rights includes the following:

"The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of ***109** a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." *California v. Belous,* 71 Cal. 2d 954, 458 P.2d 194, 199, 80 Cal. Rptr. 354 (1969), *cert. denied,* 397 U.S. 915 (1970).
"For whatever reason, the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy. Like the decision to use contraceptive devices, the decision to terminate an unwanted pregnancy is sheltered from state regulation which seeks broadly to limit the reasons for which an abortion may be legally obtained." *Doe v. Bolton,* 319 F. Supp. 1048, 1055 (N.D. Ga. 1970) (per curiam).

"It is as true after conception as before that 'there is no topic more closely interwoven with the intimacy of the home and marriage than that which relates to the conception and bearing of progeny.' We believe that *Griswold* and related cases establish that matters pertaining to procreation, as well as to marriage, the family, and sex are surrounded by a zone of privacy which protects activities concerning such matters from unjustified governmental intrusion." *Doe v. Scott,* 321 F. Supp. 1385, 1389-90 (N.D. Ill.) *appeal docketed sub nom. Hanrahan v. Doe,* 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (No. 70-105, 1971 Term).

Without the ability to control their reproductive capacity, women and couples are largely unable to control determinative aspects of their lives and marriages. If the concept of "fundamental rights" means anything, it must surely include the right to determine when and under what circumstances to have children.

***110 4. Physicians Have a Fundamental Right to Administer Health Care Without Arbitrary State Interference**

The First, Ninth, and Fourteenth Amendments protect the right of every citizen to follow any lawful calling, business, or profession he may choose, subject only to rational regulation by the state as necessary for the protection of legitimate public interests. *See, e.g., Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957); *Smith v. Texas,* 233 U.S. 630 (1914); *Dent v. West Virginia,* 129 U.S. 114 (1889). In reviewing legislation affecting the medical profession, courts have particularly respected the knowledge and skill necessary for medical practice, the broad professional discretion necessary to apply it, and the concomitant state interest in guaranteeing the quality of medical practitioners:
"Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which life and health depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind.

... Every one may have occasion to consult [the physician], but comparatively few can judge the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license ... that he possesses the requisite qualifications." *Dent v. West Virginia,* 129 U.S. 114, 122-23 (1889).

***111** Similarly, courts have been alert to protect medical practice from rash or arbitrary legislative interference. Thus, the court in *United States v. Freund,* 290 Fed. 411 (D. Mont. 1923), invalidated a Prohibition-era statute restricting the amount of alcohol a physician could prescribe:

> "It is an extravagant and unreasonable attempt to subordinate the judgment of the attending physician to that of Congress, in respect to matters with which the former alone is competent to deal, and infringes upon the duty of the physician to prescribe in accord with his honest judgment, and upon the right of the patient to receive the benefit of the judgment of the physician of his choice."

Most recently, this Court, in *United States v. Vuitch,* 402 U.S. 62 (1971), recognized that "doctors are encouraged by society's expectations ... and by their own professional standards to give their patients such treatment as is necessary to preserve their health." 402 U.S. at 71. The *Vuitch* decision went on to construe the term health to encompass "psychological as well as physical health," and " 'the state of being sound in body or mind.' "

Here, the practice of medicine clearly includes the treatment of pregnancy and conditions associated with it. However, the Texas statute prohibits physicians from administering the appropriate remedy to preserve the patient's health or well-being. Physicians are not required to forego the right to make medically sound judgments and to act upon them with respect to any other human disease or condition. With appropriate consents they may administer electric shock therapy, excise vital organs, perform prefrontal lobotomies and take any other drastic action they ***112** believe indicated. They are not indictable for these

actions. However, obstetricians and gynecologists who are asked to abort their patients for sound medical reasons risk a prison sentence if they do so. The statute severely infringes their practice and seriously compromises their professional judgments.

The state must demonstrate a legitimate interest to impair doctors' rights to practice their profession. *Dent v. West Virginia,* 219 U.S. 114 (1889). Historically, the interest asserted by the state is a health interest, and courts have upheld laws designed to ensure the quality of medical practice, *e.g., Dent v. West Virginia, supra; Douglas v. Noble,* 261 U.S. 165 (1923); *Graves v. Minnesota,* 272 U.S. 425 (1926). Similarly, statutes have been upheld which require doctors' intervention in sales of medically-related products in order to protect public health. *See, e.g., Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483 (1955) (doctor's prescription required for optician to perform eyeglass fitting operations); *see also Head v. New Mexico Board of Examiners in Optometry,* 374 U.S. 424 (1963) (prohibition against eyeglass price advertising).

None of the above interests are applicable here, however. The statute in question here does not protect the public from unqualified practitioners. *Cf. Dent v. West Virginia,* 129 U.S. 114 (1889); *Douglas v. Noble,* 261 U.S. 168 (1923); *Graves v. Minnesota,* 272 U.S. 425 (1926); *Schware v. Board of Examiners,* 353 U.S. 232 (1957). Rather the statute applies to laymen and physicians alike. Indeed, it endangers patients' health by unduly confining doctors' exercise of medical judgment. This endangering of health distinguishes the case from *Williamson;* the court there afforded broad discretion to the legislature *because public* ***113** *health was at stake.* Further, the statute addresses no other legitimate state interest. *See* pp. 115-124, *infra.*

C. Appellants' Rights to Seek Medical Care, and to Marital and Individual Privacy May Not Be Abridged Unless the State Can Establish a Compelling Interest Which Can Not Be Protected By Less Restrictive Means.

In his concurring opinion in *Griswold v. Connecticut,* 381 U.S. 479, 497 (1965), Justice Goldberg indicated the stricter standard of review that applies when state laws affect personal rights:
"In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' "

This Court has applied the stricter standard to protect marital privacy, *Griswold v. Connecticut, supra;* religious freedom, *Sherbert v. Verner,* 374 U.S. 398 (1963); freedom of expression and of association, *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963); freedom to travel, *Shapiro v. Thompson,* 394 U.S. 618 (1968); and access to courts, *Boddie v. Connecticut,* 401 U.S. 371 (1971). As argued above, the Texas abortion laws infringe privacy rights here as much as the Connecticut statute did in *Griswold.* As in that case, the compelling interest test is the proper standard for reviewing the Texas statute. See also ***114** *Roe v. Wade,* 314 F. Supp. 1217, 1222 (N.D. Tex. 1970); *Doe v. Scott,* 321 F. Supp. 1385, 1390 (N.D. Ill. 1971); *Babbitz v. McCann,* 310 F. Supp. 293, 301 (E.D. Wis. 1970); *California v. Belous,* 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354, 360 (1968), *cert. denied* 397 U.S. 915 (1970).

Appellants further urge this Court to reaffirm the personal right to health care recognized in *Jacobson v. Massachusetts,* 197 U.S. 11 (1904). The infringements upon personal health care caused by the Texas law are described earlier, pp. 94-98. The physical and psychological harm caused by the statute fully warrants a demonstration of compelling justification to sustain it.

A further constitutional condition of the statute's intrusion upon fundamental rights is that the law must be minimally restrictive: "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Griswold v. Connecticut,* 381 U.S. 479, 498 (1965) (Goldberg, J., concurring).

Here, the availability of adultery and fornication statutes to enforce strictures on sexual behavior, the absence of any distinctions based on gestation period in the abortion statute, and its blanket application to gynecologists and laymen alike suggest classifications which are overly broad. To meet these constitutional objections, the State must show that a less restrictive statute will not effectuate any compelling interests it can establish.

***115 D. The Texas Statute Does Not Advance Any State Interest of Compelling Importance in a Manner Which is Narrowly Drawn.**

1. The Statute Is Not Rationally Related to Any Legitimate Public Health Interest.

As shown earlier, at pages 30-35, medical abortion is a safe and simple procedure when performed during the early stages of pregnancy; indeed, it is safer than childbirth. This fact alone vitiates any contention that the statute here serves a public health interest. Numerous state and federal courts have taken notice of this fact and concurred that no health rationale supports a statute like the one here. *See, e.g., California v. Belous,* 71 Cal. 2d 954, 965, 458 P.2d 194, 200, 80 Cal. Rptr. 354, 360 (1969), *cert. den.,* 397 U.S. 915 (1970); *McCann v. Babbitz,* 310 F. Supp. 293, 301 (E.D. Wis. 1970), *appeal dismissed,* 400 U.S. 1 (1970) (per curiam); *Doe v. Scott,* 321 F. Supp. 1385, 1391 (N.D. Ill. 1971).

Moreover, no concern for mental health justifies the statute, for it does not permit abortion even if a woman's mental health is threatened. Such a view is untenable for the additional reason that abortion is a procedure without clinically significant psychiatric sequellae.

Additional data reveal that statutes like the one here actually *create* "a public health problem of pandemic proportions"[91] by denying women the opportunity to seek safe medical treatment. Severe infection, permanent sterility, pelvic disease, and other serious complications accompany ***116** the illegal abortions to which women are driven by laws like this one.[92]

Any notion that less restrictive abortion laws would produce excessive demands on medical resources and thereby endanger public health also is unfounded. The experience in New York City after one year under an elective abortion law dispels any such fears:
"New York City has accounted for the lion's share of abortions in the State and has been a resource for women all over the country. Nevertheless, the catastrophe many foresaw a year ago failed to materialize: we have been able to serve our residents as well as substantial numbers of out-of-state women, and, most important, we are serving women safely." Chase, "Twelve Month Report on Abortions in New York City" (Health Services Administration, City of New York, June 29, 1971).

The absence of a public health problem accompanying less restrictive abortion is indicated by comparative mortality rates: for the first eleven months of operation, the mortality for abortion in New York City is approximately equal to that of tonsillectomy in the United States.[93]

***117** Against this background of medical fact, there is no support whatever for the suggestion that public health is an interest protected by this statute.

2. The Statute Is Not Rationally Related to Any Legitimate Interest In Regulating Private Sexual Conduct.

One of the constitutional defects in the Connecticut statute struck down in *Griswold v. Connecticut,* 381 U.S. 479 (1965) was its overbreadth; the law there prohibited use of contraceptives by married couples as well as unmarried ones. Thus, the statute could not be justified as a device to discourage pre-marital or extra-marital relations, for it had the same impact on marital relations.

The Texas abortion law operates identically. No distinction is made between married and unmarried women, and married women who seek abortion are not required to reveal whether they were impregnated through a lawful marital relation. The Texas statute, if explained as a deterrent to illegal sexual conduct, is unconstitutionally overbroad for failing to make these distinctions.

Moreover, if the state desires to discourage certain sexual conduct, it may enforce laws prohibiting adultery and fornication. To view the abortion law as protecting public morals by making pregnancy the penalty for forbidden conduct would ascribe a monstrous intention to the Texas legislature. *State v. Baird,* 50 N.J.L. 376, 235 A.2d 673, 677 (1967). Furthermore, using the abortion law for such a purpose would be overbroad and beyond the competence of the state. *Baird v. Eisenstadt,* 429 F.2d 1398, *jur. noted,* 401 U.S. 934 (1971) (No. 70-17, 1971 Term); *King v. Smith,* 392 U.S. 309, 320 (1968); ***118** *Griswold v. Connecticut,* 381 U.S. 479, 498 (1965) (Goldberg, J., concurring). *See also* Brief *Amicus Curiae* on Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Action Coalition, at 44 *et seq.*

No evidence exists that limited access to abortion curtails promiscuity, nor is it conceivable that such a correlation could exist. The widespread availability of contraception would seem to be a more significant factor. In any event, from the physician's standpoint, a patient is no less worthy of medical care simply because she has unfortunately conceived out of wedlock. Moreover, as one prominent physician observed, "[t]he fear that the availability of abortion will lead to promiscuity is sheer nonsense...." Ryan, *Humane Abortion Laws and the Health Needs of Society,* 17 W. RES. L. REV. 424, 432 (1965).

3. The Statute Does Not Advance Any Public Interest in Protecting Human Life.

As counsel for appellee admitted during oral argument, "the State only has one interest and that is the protection of the life of the unborn child" (A. 104-105). The question then becomes whether this interest is sufficiently compelling to overcome the couple's or woman's fundamental right to privacy and autonomy. In this regard it is revealing to examine other aspects of the State's attitude toward the fetus. Such an inquiry reveals that only in the area of abortion does the State exhibit an interest in the fetus or treat it as having legal personality.

First, the pregnant woman who searches out a person willing to perform an abortion and who consents to, if not pleads for, the procedure is guilty of no crime. Texas ***119** courts have repeatedly held that the woman is neither a principal nor an accomplice. *Willingham v. State,* 33 Cr. R. 98, 25 S.W. 424 (1894); *Shaw v. State,* 73 Cr. R. 337, 165 S.W. 930 (1914); *Moore v. State,* 37 Cr. R. 552, 40 S.W. 287 (1897); *Cave v. State,* 33 Cr. R. 335, 26 S.W. 503 (1894). Similarly, the women who travel from Texas to states with less restrictive abortion laws in order to secure medical abortions and avoid the alleged state interest in protecting the fetus are guilty of no crime. Moreover, self-abortion has never been treated as a criminal act. The State has failed to seek to deter through criminal sanctions the person whose interests are most likely to be adverse to those of the fetus. This suggests a statutory purpose other than protecting embryonic life.

An unborn fetus is not a "human being" and killing a fetus is not murder or any other form of homicide. "Homicide" in Texas is defined as "the destruction of the life of one human being by the act, agency, procurement, or culpable omission of another," 2A TEX. PEN. CODE art. 1201 (1961). Since the common law definition of "human being" is applicable, a fetus neither born nor in the process of birth is not a "human being" within the meaning of those words as they appear in the homicide statute. In *Keeler v. Superior Court,* 2 Cal. 3d 619, 470 P.2d 662, 87 Cal. Rptr. 481 (1970), a pregnant woman was assaulted by her former husband; a Caesarean section and examination *in utero* revealed that the fetus, of approximately thirty-five weeks gestation, had died of a severely fractured skull and resultant hemorrhaging. The California Supreme Court held the man could not be

guilty of murder; the same result would apply in Texas. A fetus is not considered ***120** equal to a "human being," and its destruction involves a significantly lesser penalty." [94]

The State does not require that a pregnant woman with a history of spontaneous abortion go into seclusion in an attempt to save the pregnancy. No pregnant woman having knowingly engaged in conduct which she reasonably could have foreseen would result in injury to the fetus (such as skiing in late pregnancy) has ever been charged with negligent homicide.

No formalities of death are observed regarding a fetus of less than five months gestation. Property rights are contingent upon being born alive. There has never been a tort recovery in Texas as the result of injury to a fetus not born alive. No benefits are given prior to birth in situations, such as workman's compensation, where benefits are normally allowed for "children." [95]

Appellants realize that the fact that states have failed in most instances to protect the rights of the fetus does not automatically mean that a state would not have a compelling interest in doing so. One assumes that if a state ***121** had never enacted a statute prohibiting theft, a constitutional right to steal would not necessarily follow. However, the traditional subjects of legislation which bear upon individual liberty have, of necessity, always guided our notions of what the state may or may not do. The fact that the fetus has only been protected in the area of abortion, and not even then when the mother's life is in danger or she performs the abortion herself, together with the strong evidence that abortion laws were passed in response to the dangers of surgery, makes out a strong case for a traditional right of the mother to abort the fetus which was only taken away for her own protection. The converse is that the state has no *traditional* interest in protection of the fetus. If an interest exists, it must be relatively recent in its discovery.

It is sometimes argued that scientific discoveries show that human life exists in the fetus. Scientific studies in embryology have greatly expanded our understanding of the process of fertilization and development of the fetus and studies relating to the basic elements of life have shown that life is not only present in the fertilized egg, sperm and ova but that each cell contains elements which could conceivably constitute the beginning of a new human organism. Such studies are significant to science but only confuse the problem of defining human life.
"When a fetus is destroyed, has something valuable been destroyed? The fetus has the potentiality of becoming a human being. Therefore, is not the fetus of equal value? This question must be answered.

"It can be answered, but not briefly. What does the embryo receive from its parents that might be of value? There are only three possibilities: substance, ***122** energy and information. As for the substance, it is not remarkable: merely the sort of thing one might find in any piece of meat, human or animal, and there is very little of it--only one and half micrograms, which is about a half of a billionth of an ounce. The energy content of this tiny amount of material is likewise negligible. As the zygote develops into an embryo, both its substance and energy content increase (at the expense of the mother); but this is not a very important matter--even an adult from this standpoint is only a hundred and fifty pounds of meat.

"Clearly, the humanly significant thing that is contributed to the zygote by the parents is the information that 'tells' the fertilized egg how to develop into a human called 'DNA.' ... The DNA constitutes the information needed to produce a valuable human being. The question is: is this information precious? I have argued elsewhere that it is not....

"People who worry about the moral danger of abortion do so because they think of the fetus as a human being, hence equate feticide with murder. Whether the fetus is or is not a human being is a matter of definition, not fact, and we can define it any way we wish." Hardin, *Abortion or Compulsory Pregnancy?* 30 J. MAR. & FAM. No. 2 (May, 1968).

Thus science only leads to a worse quandary for obviously if one goes far enough back along the continuum of human development one encounters the existence of sub-microscopic double-helix molecules which have human life potential. When does something become human? As Judge Cassibry pointed out in his dissent in ***123** *Rosen v. Louisiana State Board of Medical Examiners,* 318 F. Supp. 1217, 1232 (E.D. La. 1970) appealed docketed 39 U.S.L.W. 3302 (U.S. Dec. 27, 1970) (No. 1010), the "meaning of the term 'human life' is a relative one which depends on the purpose for which the term is being defined." [96]

Once the fact that science can offer no guidance on the question of when human life begins is conceded, arguments concerning preservation of the fetus almost always fall back to the proposition of potential life. Despite disagreements as to when human characteristics are assumed by the fetus, its would-be protectors argue that since there is potential human life present, which, unlike "DNA" molecules *can* be protected, it must be preserved. But matters are not so simple. Obviously all potential life may not be protected. A legislative decision to cut appropriations for slum clearance, for medical facilities, for food subsidies; a declaration of war; a court's refusal to consider the habeas corpus petition of a condemned man--all in some way destroy life. And, to the extent that past experience shows that in the future "x" number of lives will be lost if the decisions are made, they are conscious decisions.

It is obvious that the legislative decision forbidding abortions also destroys potential life--that of the pregnant woman--just as a legislative decision to permit abortions destroys potential life. [97] The question then becomes not one ***124** of destroying or preserving potential, but one of who shall make the decision. Obviously some decisions are better left to a representative process since individual decisions on medical facilities, wars, or the release of a convict would tend toward the chaotic. It is our contention that the decision on abortion is exactly the opposite. A representative or majority decision making process has led to chaos. Indeed, in the face of two difficult, unresolvable choices--to destroy life potential in either a fetus or its host-- the choice can only be left to one of the entities whose potential is threatened.

The above argument is perhaps only another way of stating that when fundamental rights are infringed upon, the State bears the burden of demonstrating a compelling interest for doing so. The question of the life of the fetus versus the woman's right to choose whether she will be the host for that life is incapable of answer through the legislative fact-finding process. Whether one considers the fetus a human being is a problem of definition rather than fact. Given a decision which cannot be reached on the basis of fact, the State must give way to the individual for it can never bear its burden of demonstrating that facts exist which set up a compelling state interest for denying individual rights.

***125 V.**

The Provisions in Articles 1191-1194 and 1196 of the Texas Penal Code, Which Prohibit Medically Induced Abortions Unless Undertaken "by medical advice for the purpose of saving the life of the mother" Are Unconstitutionally Vague and Indefinite, Facially and in Application, Because the Language Is Not Meaningful in Medical Practice, and Provides Wholly Inadequate Warning to Physicians, Their Counsel, Judges, and Jurors, of Which Physical, Mental, and Personal Factors May Be Taken Into Consideration When Assessing Necessity.

Appellants successfully challenged the statutory exception in the lower court on grounds of unconstitutional uncertainty. The provision sanctioning the medical procedure of induced abortion for "saving the life" of the woman, on its face and as interpreted in practice, provides insufficient prior warning of what conduct it proscribes, and what it authorizes. It shows the difficulties encountered when an instrument as blunt as the criminal law crudely attempts to define and regulate "those subtle and mysterious influences upon which life and health depend ...." *Dent v. West Virginia,* 129 U.S. 114, 122 (1889).

A vast body of case law exists on the problem of uncon stitutional uncertainty. [98] This doctrine has, moreover, several ***126** complementary, and competing strands. The test most frequently articulated has been that

"a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process...." [99]

This is partly because

> "it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large." [100]

Clearly, "[v]ague laws in any area suffer a constitutional infirmity," [101] be they of common law antiquity, [102] administrative, [103] or criminal. [104] Furthermore, statutes challenged ***127** for vagueness which impinge upon sensitive human rights are to be closely scrutinized. *Griswold* dealt with "a right of privacy older than the Bill of Rights ..." [105] and that right is invoked again here, as well as the rights to seek and administer medical care. Thus, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." [106]

This Court has never ruled on a vagueness challenge to a similar statute, and accordingly this case must be decided on its own merits as one largely of first impression. *United States v. Vuitch,* 402 U.S. 62 (1971), is in no way dispositive, moreover, having involved not only a differently worded statute, having been based upon no record whatever of statutory application in practice, and having been concerned with *federal* legislation which this Court might construe. The Texas courts have upheld this statute against vagueness claims, *Jackson v. State,* 55 Tex. Crim. 79, 115 S.W. 262 (1908), and it stands construed as written. In any event no construction could possibly meet the claim of physicians and patients to access to the medical procedure of induced abortion in cases of contraceptive failure, where the procedure would in no way be detrimental to the patient.

Both medical and legal commentary have recognized the uncertainty of American abortion laws, of which the Texas statute is a typical example. Retired Justice Clark recently remarked:

> "The increasing number of abortions subjects physicians to increased dangers of liability for incorrectly ***128** interpreting a statute .... [D]octors face an uncertain fate when performing an abortion. This uncertainty will continue unless the legislatures or courts provide relief from liability." [107]

Christopher Tietze, M.D., perhaps internationally the most knowledgeable authority on abortion practices and statistics, commented

> "The application of these laws, however, varies greatly between localities and between hospitals." [108]

Similarly, a 1967 study concluded:

> "Abortion policies vary not only from hospital to hospital but also from service to service within the same hospital. They also vary widely from doctor to doctor on the same service of the same hospital." [109]

Case No??	Authors' Evaluation of Legality of Abortion	Hospital Would Perform Abort on	
		Yes	No
1	Yes	21	1
2	No	10	12
3	No	6	16
4	No	15	7
5	No	8	13
6	No	8	14
7	Yes	17	4
8	No	5	17
9	Prob. Yes	10	11
10	Maybe	17	4
11	No	1	20

***129** And, as Dr. Alan F. Guttmacher indicated in an early study, "[t]he doctor's dilemma lies in the phrase 'preserving the life of the woman.'" [110]

The medical profession has no experience in applying the provisions of felony statutes to the day-to-day practice of their science. [111] It is not an offense to perform an appendectomy ***130** far in advance of rupture, and when only necessary to prevent a risk that might never materialize. General ***131** malpractice principles, which take all circumstances into account,

govern the physician's everyday practice, not the criminal law. Nor is an instance of malpractice *per se* ever a cause for license revocation, much less criminal prosecution, unless so serious, wanton, and reckless as to constitute criminal negligence. The physician's professional role is directed toward preserving a patient's *health,* that term is used in its broadest sense:

***132** "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition." [112]

In no sphere of medicine other than abortion does a criminal statute impose such a burden upon a physician, and in no other sphere of medical practice is treatment restricted by criminal law to those instances in which it is necessary to save the patient's life. The Court might consider the impact on the lives of all citizens if a penal statute prohibited gall bladder surgery, kidney stone removal, the prescription of contraceptives, [113] use of antibiotics, vaccination, or even the taking of aspirin "unless necessary for the preservation of the life or health" of the patient. There are not and never have been such laws or practices.

An increasing number of federal and state courts have been asked to declare similarly worded statutes unconstitutionally vague. A comparison of the analysis by invalidating judges with that by others is instructive. The case language discussing vagueness in the two types of decision can be compared as follows:

VAGUE	NOT VAGUE
"[T]here are grave and manifold uncertainties in the application of Article 1196. How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered." *Roe v. Wade,* 314 F. Supp. 1217, 1223 (N.D. Tex. 1970) (per curiam); Supp. App. at 83.	"We have examined the challenged phraseology and are persuaded that it is not indefinite or vague. In our opinion, the word 'necessary' and the expression 'to save the life of the mother' are both reasonably comprehensible in their meaning. * * * [T]he Callfornia court found that the words 'necessary to preserve her life' in that state's abortion statute were unconstitutionally vague. While the Wisconsin statute uses slightly different language ('necessary to save'), we doubt that the distinction between the words used in the two statutes is significant. However, we do not share the view of the majority in *Belous* that such language is so vague that one must guess at its meaning." *Babbitz v. McCann,* 310 F. Supp. 293, 297-98 (E.D. Wis. 1970) (per curiam); Supp. App. at 145-46.
"If courts cannot agree on what is the essential meaning of 'necessary for the preservation of the woman's life' and like words, we fail to see how those who may be subject to the statute's proscriptions can know what it prohibits.... One need not inquire in great depth as to the meaning of such words as 'necessary' and 'preserve' to conclude that the holdings of those cases are correct. 'Necessary' has been characterized as vague by the United States Supreme Court and has been similarly described by other courts. It is 'a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, proper, or conducive to the end sought.'	"On the vagueness question I first observe that we have before us no contention by any party that an actual situation exists where a licensed physician acting in good faith is in jeopardy of prosecution for performing an abortion he believed to be 'necessary for the preservation of the woman's life.' In other words we are presented with no actual circumstance where the vagueness question is in issue. The rather forced game of semantics urged by plaintiffs and adopted by the majority has not presented any *actual* controversy but is merely a convenient vehicle for these plaintiffs to challenge a law which they believe is unwise....

"The word 'preserve' is similarly susceptible of so broad a range of connotations as to render its meaning in the statute gravely amorphous, since it may mean anything from maintaining something in its status quo to preventing the total destruction of something." *Doe v. Scott,* 321 F. Supp. 1385, 1388-89 (N.D. Ill. 1971); Supp. App. at 128-29.

"Dictionary definitions and judicial interpretations fail to provide a clear meaning for the words, 'necessary' or 'preserve.' There is, of course, no standard definition of 'necessary to preserve,' and taking the words separately, no clear meaning emerges, 'Necessary' is defined as: '1. Essential to a desirable or projected end or condition; not to be dispensed with without loss, damage, inefficiency, or the like; * * *' (Webster's New International Dictionary (2d ed.), unabridged.) The courts have recognized that ' "necessary" has not a fixed meaning, but is nexible and relative.' (Westphal v. Westphal, 122 Cal. App. 379, 382, 10 P.2d 119, 120; see also, City of Dayton v. Borchers (Ohio Com. Pl., 1967) 13 Ohio Misc. 273, 232 N.E.2d 437, 441 ['A *necessary* thing may supply a wide range of wants, from mere convenience to logical completeness.'].)

"The definition of 'preserve' is even less enlightening. It is defined as: '1. To keep or save from injury or destruction; to guard or defend from evil; to protect; save. 2. To keep in existence or intact; * * * To save from decomposition, * * * 3. To maintain; to keep up; * * *' (Webster's New International Dictionary, *supra.*) The meanings for 'preserve' range from the concept of maintaining the status quo--that is, the woman's condition of life at the time of pregnancy--to maintaining the biological or medical definition of 'life'--that is, as opposed to the biological or medical definition of 'death'. * * *

"Various possible meanings of 'necessary to preserve * * * life' have been suggested. However, none of the proposed definitions will sustain the statute." *California v. Belous,* 71 Cal. 2d 954, 961-62, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied,* 397 U.S. 915 (1970); Supp. App. at 104.

"It is my opinion that the difficulty with the statute in question is not its failure to be phrased in 'numerous paragraphs of fine-spun legal terminology', but rather its attempt to define a medical problem in terms that are not understandable by the medical profession. A continuing complaint of the medical profession is that the laws in general, and judicial decisions, are not responsive to the realities of medical science. It is interesting to note that

"The words of the Illinois Abortion Statute taken in their ordinary meaning sufficiently convey definite warning as to the proscribed conduct ...." *Doe v. Scott,* 321 F. Supp. 1385, 1392-93 (N.D. Ill. 1971) (Campbell, J., dissenting); Supp. App. at 132-33.

"Amici for appellant, 178 deans of medical schools, state that ... 'the medical profession has "approved" abortions in cases [in which the objective was not to preserve the life of the woman and therefore] clearly outside of Penal Code section 274. Packer & Gampell, Therapeutic Abortion: A Problem in Law and Medicine, 11 Stan.L.Rev. 417, 447. * * *' However, that sentence must be understood to mean recognized and approved by such persons as being required to preserve the life of the patient.

"The word 'preserve' is defined in the dictionary as '1. To keep or save from injury or destruction; * * * to protect; save 2. To keep in existence or intact; * * * To save from decomposition * * *.' (See Webster's New Internat. Dict. (3d ed. 1961).) As used in section 274, the word 'preserve' has been regarded as synonymous with 'save' * * * and to save a life ordinarily is understood as meaning to save from destruction, i.e. dying--not merely from injury. Thus the precipitation of a psychosis in the absence of a genuine threat of suicide is not a threat to life under section 274." *California v. Belous,* 71 Cal. 2d 954, 974-75, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) (Burke, J., dissenting); Supp. App. at 112-13.

"[O]ne would think that the English language which has been the sensitive instrument of our system of law for over 500 years, has lost, by the mere passage of time, all capacity for clarity of expression.... There is no mystique enveloping the statute and ... the clause now challenged has stood the test of over a hundred years, and presumably of countless human incidents falling within its scope, apparently without evoking a single whimpering cry against it." *Id.* at 979-80 (O'Sullivan, J., dissenting).

"If appears to us that the vagueness which disturbs the plaintiffs herein results from their own strained construction of the language used, coupled with the modern notion among law review writers that anything that is not couched in numerous paragraphs of fine-spun legal terminology is too imprecise to support a criminal conviction.... The words of the Ohio statute, taken in their ordinary meaning, have over a long period of years proved entirely adequate

while the body of the statute condemns the attempt to procure a 'miscarriage', the statute is captioned 'Attempt to procure abortion.' This failure of this statute, and others like it, to observe the medical distinction between abortion and miscarriage has been noted, and it is said that the two terms are used indiscriminately by the courts.... I should like to set forth what I believe to be a primary example of the vagueness of the Ohio statute: the suicidal patient.

"A pregnant woman informs her physician that if her pregnancy goes to term she will take her own life. Is an abortion *necessary to prescrve* the life of that patient? The patient will not die from any physiological condition related to her pregnancy. Suicide is an intentional act (although, perhaps, not truly a volitional one), and the patient may not, in fact, carry out her threat. Assuming that the physician has strong and valid reasons to believe that his patient will take her own life, does this statute tell him whether he may legally terminate the pregnancy?

"There are other questions created by this statute How imminent must the threat of death be to warrant an abortion 'to preserve life?' If permitting a pregnancy to go to term would clearly shorten the mother's life by a substantial number of years, would a physician be justified in performing an abortion in accordance with the term 'necessary to preserve her life?'

"An Ohio court has recently defined a 'necessary thing' as follows:

'A necessary thing may supply a wide range of wants, from mere convenience to logical completeness.' City of Dayton v. Borchers, 13 Ohio Misc. 273, 232 N.E.2d 437, 441, 42 O.O.2d 193, 197 (Ohio Com.Pl.1967)

Such a definition certainly does not advise what is permitted and what is forbidden.

"With regard to the assertion that the lessons of time have compensated for the deficiencies of the statute, I do not find that to be the case. I have endeavored to examine all to inform the public, including both lay and professional people, of what is forbidden. The problem of the plaintiffs is not that they do not understand, but that basically they do not accept, its proscription." *Steinberg v. Brown,* 321 F. Supp. 741, 745 (N.D. Ohio 1970); Supp. App. at 193.

"We have examined the challenged language and are persuaded that it is neither vague nor indefinite, but is instead reasonably comprehensible in its meaning, with its reach delineated in words of common understanding.

The clause 'unless done for the relief of a woman whose life appears in peril' requires no guessing at its meaning. Rosen focuses upon the words 'relief.' 'appears,' and 'life.' These are widely used and well understood words, particularly when read in the context of section 37: 1285(6). We conclude that the statute was intended to permit an induced abortion of an embryo or fetus only when the physician, after due consultation with another licensed physician, determines in good faith that continuation of the pregnancy will directly and proximately result in the death of the woman. In our opinion, the statute so read provides fair warning that Louisiana does not suffer the performance of all medically indicated abortions, however wise in the physician's estimation such an operation might be in a particular case, but rather allows the induced abortion of an embryo or fetus to be performed without sanction only when the life of the mother is directly endangered by the condition of pregnancy itself." *Rosen v. Louisiana State Bd. of Medical Examiners,* 318 F. Supp. 1217, 1220 (E.D. La. 1970); Supp. App. at 214.

recorded Ohio decisions construing O.R.C. §2901.16 and the predecessor thereto, and find that not one of the cases I have reviewed construes the statutory phrase 'necessary to preserve her life', or the language of similar import in the earlier statutes. (A listing of the said decisions is appended hereto): A study of the Ohio case histories offers little guidance to the physician searching for the meaning of the language 'necessary to preserve her life.' " *Steinberg v. Brown,* 321 F. Supp. 741, 749-50 (N.D. Ohio 1970) (Green, J., dissenting); Supp. App. at 197-98.

***139** Little can be added to the analysis offered by numerous distinguished state and federal judges on the vagueness questions raised here. It is sufficient to note that the courts upholding the statute as not vague committed three plain errors. First, the validating courts completely and deliberately ignored the discussions in medical literature which carefully explain why and how interpretative difficulties arise. Second, those courts did not even discuss the various possible interpretations of the statutory language, and point to any likelihood that state courts would adopt or had adopted a specific meaning. Third, the validating courts did not draw the obvious distinction between the fluid and varying standards of ordinary medical practice, and the different standards brought about with respect to induced abortion by the variant ethic views of physicians that are compounded by the threat of felony punishment and license revocation for committing what would at most be a medical misunderstanding in any other context.

***140 VI.**

Texas Penal Code Articles 1191-1194 and 1196, as Applied to Impose Upon a Physician the Burden of Pleading and Proving That a Medical Abortion Procedure Was "procured or attempted by medical advice for the purpose of saving the life of the mother," Reverses the Due Process Guarantee of Presumed Innocence and Invades the Privilege Against Self-Incrimination.

The Texas abortion law comes to this Court with a supplementary gloss of state law that cannot be squared with the Fourteenth Amendment. According to *Veevers v. State,* 354 S.W.2d 161, 166 (Tex. Crim. App. 1962), and numerous prior decisions, "[it] is unnecessary for the State to allege that the act was 'unlawfully' done." Although Article 1196 permits the medical procedure of induced abortion in a limited class of cases, the State need not inquire whether the exception applied. As the *Veevers* case held, "[t]his is a separate statute, and it need not be negated in the allegations of the indictment. It would be an affirmative defense available in the proper case to an accused." *Id.* at 166.

The import of the *Veevers* gloss is that a physician may be indicted and tried before a jury each time he undertakes the medical procedure of induced abortion. It is up to him to raise Article 1196 as a defense, admit complicity in the offense, and prove that the medical procedure was done "for the purpose of saving the life of the mother."

Indictments contained in the record (A. 73, 74; Appendix E, E-1 to E-9) illustrate this practice. Law enforcement authorities are free to seek indictments without even the bare courtesy of seeking an explanation from the physician.

***141** Medical literature has shown at least one Dallas, Texas hospital which has generally performed 1 abortion for each 680 deliveries. [114] If this ratio has been consistent on a statewide basis, then the 220,000 births in Texas during 1969 [115] permit an inference that there were also 324 medical abortions done in Texas hospitals. Under Texas law, the physicians, their cooperating associates, and perhaps the hospitals themselves could have been indicted without warning on abortion charges in any of the 324 cases.

This Court's decision in *United States v. Vuitch,* 402 U.S. 62 (1971), and the weight of authonity, support the contention that lack of medical justification for the abortion "is an objective element of the crime." George, *Current Abortion Laws: Proposals and Movements for Reform,* 17 W. RES. L. REV. 371, 377 (1965). As the Court in *Vuitch* stated:
"Certainly a statute that outlawed only a limited category of abortions but 'presumed' guilt whenever the mere fact of abortion was established, would at the very least present serious constitutional problems under this Court's previous decisions interpreting the Fifth Amendment." 402 U.S. at 70.

An initial infirmity of the *Veevers* rule inheres in its inevitable invasion of the Fifth Amendment privilege against self-incrimination. *Veevers* requires that the physician bring forth evidence that the abortion was necessary to preserve the patient's "life." This means that ***142** the accused physician stands mute at penalty of certain conviction because of his failure to testify. If he testifies, however, he must admit the very fact of the abortion, *i.e.,* complicity in one element of the offense, and then attempt to persuade the jury that the second element of the offense was not present. If the jury finds his justifications insufficient, or that his "good faith" was not "good enough," the physician has been convicted upon his own testimony. Moreover, if the jury had not believed the prosecution's evidence that an abortion was performed, the physician's testimony could supply proof from his own mouth of *both* elements of the offense.

Leary v. United States, 395 U.S. 6 (1969), teaches that the *Veevers* rule must be held to violate the privilege against self-incrimination. In *Leary,* registration and payment under the Marihuana Tax Act "compelled [an accused] to expose himself to a 'real and appreciable' risk of self-incrimination ...." 395 U.S. at 16. Such registration "would surely prove a significant 'link in a chain' of evidence tending to establish ... guilt." *Marchetti v. United States,* 390 U.S. 39, 48 (1968).

So it is with the *Veevers* rule. If the physician comes forward with evidence that the abortion was necessary for medical reasons, he must perforce admit presence at the scene, and performance of the very act charged in the indictment. His own testimony will suffice to corroborate the first element of the offense, namely, that he performed the abortion. Not only will his own testimony provide a "link" in the chain, it may provide both links to a two-link chain, that is, the entire chain. He will have admitted performing the abortion and the jury may not believe his reasons for justification. Accordingly, a weak prosecution ***143** case may be fortified and proved from the physician's own testimony. Since *Veevers* requires that testimony, the rule invades the physician's privilege against self-incrimination. Under *Leary,* and earlier supporting decisions, [116] this is not permissible.

The Texas felony abortion statute, as construed in *Veevers,* also violates the due process clause of the Fourteenth Amendment by reversing the presumption of innocence. The physician must take the burden upon himself of proving that the abortion was necessary to save the patient's life. To undertake such proof, the physician must first waive any defense based upon not having participated at all in the alleged offense. He must admit what the indictment states, that he performed the abortion, and prove that the act was justified.

A long line of decisions by this Court, carefully reviewed by the Eight Circuit *en banc* in *Stump v. Bennett,* 398 F.2d 111 (8th Cir. 1968) (*en banc*), establishes the presumption of innocence on its constitutional plane. [117] As this Court stated in *Deutch v. United States:*

" 'One of the rightful boasts of Western civilization is that the [[prosecution] has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the ***144** safeguards of a fair procedure.' Irving v. Dowd, 366 U.S. 717, 729. Among these is the presumption of the defendant's innocence." 367 U.S. 456, 471 (1961).

Plainly, this right is invaded when a physician can be convicted solely because he performed an abortion, and without further proof.

Necessity is not a collateral matter, like self-defense. With respect to abortion, the circumstances under which the procedure was undertaken go to the very heart of the matter. It is not every abortion which the statute condemns, but only a special, opaquely defined class. *Veevers* incorrectly suggests that the exceptions are collateral and affirmative justifications. In every physician case, however, the center of the controversy will be whether the abortion in question fell within the exception. Abortions *per se* are no offense. It is only unnecessary abortions which the statute proscribes. Under a broad definition of "life" there are many necessary abortions. Under other definitions, there may be more. By presuming that all abortions are legally unnecessary, the State may convict, as it did in *Veevers,* upon no more than a showing persuasive to the jury, that the physician performed the abortion. It is presumed, unless the physician shows otherwise, that the abortion was unnecessary. In other words, Texas practice presumes, upon proof of one element of the offense, that the second element is present, that the accused is guilty. This presumption of guilt cannot stand in light of the constitutional status of the presumption of innocence under the due process clause of the Fifth Amendment, as applied through the Fourteenth.

***145 CONCLUSION**

For the reasons stated in this brief this Court should reverse the lower court's judgment denying standing to Appellants Doe and denying injunctive relief, declare that the Texas Abortion Statutes, Arts. 1191, 1192, 1193, 1194, 1196, TEXAS PENAL CODE, violate the United States Constitution and remand with instructions that a permanent injunction against enforcement of said statutes be entered.

***1A APPENDICES**

APPENDIX A

2613

HENRY WADE

DISTRICT ATTORNEY

DALLAS COUNTY GOVERNMENT CENTER

DALLAS?? TEXAS 75202

July 22, 1971

Mrs. Sarah Weddington

c/o The James Madison Constitutional Law Institute

Four Patchin Place

New York, N. Y. 10011
Re: Roe v. Wade

Dear Mrs. Weddington:

This is to advise you that this office will continue to enforce Articles 1191, 1192, 1193, 1194, and 1196 of the Texas Penal Code in all abortion cases in which indictments are returned by the Dallas County Grand Jury.
Very truly yours,

JOHN B. TOLLE

ASSISTANT DISTRICT ATTORNEY

DALLAS COUNTY, TEXAS

JBT:hc

APPENDIX B

***1aa Affidavit of Paul C. MacDonald, M.D.**

IN THE SUPREME COURT OF THE UNITED STATES

No. 70-18, 1971 TERM

JANE ROE, JOHN DOE, MARY DOE, and JAMES HUBERT HALLFORD, M.D., *Appellants,*

--v.--

HENRY WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS, *Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

STATE OF TEXAS

COUNTY OF DALLAS

BEFORE ME, the undersigned authority, on this day personally appeared PAUL C. MACDONALD, M.D., to me well known, who, after being first duly sworn, did depose and say as follows:

My name is Paul C. MacDonald. The copies of my "Curriculum Vitae" and "Bibliography" attached hereto accurately reflect my medical background and the articles I have had published.

***2aa** As the attached "Curriculum Vitae" indicates, I am Chairman of the Department of Obstetrics and Gynecology of The University of Texas Southwestern Medical School (5323 Harry Hines Boulevard, Dallas, Texas 75235), the only medical school located in Dallas, Texas. As Chairman of the Department of Obstetrics and Gynecology, I am also Chief of the Obstetrics and Gynecology Service at Parkland Memorial Hospital (the hospital associated with the medical school), which is the city and county hospital. The hospital has full responsibility for furnishing medical and hospital care to the medically indigent who

reside in the hospital district, which includes the City of Dallas and Dallas County. My time is approximately equally divided between teaching and clinical duties.

Parkland Memorial Hospital is under the jurisdiction of the Commissioners' Court of Dallas County and the Dallas County Hospital District. Henry Wade, the District Attorney of Dallas County and the appellee herein, is the attorney of record for the hospital district and for Parkland Memorial Hospital.

Almost all of the patients served by Parkland are medically indigent. I would estimate that about 50% of them are virtually in a no-pay category and, because of their inability to pay, are not charged for the medical services they receive. Persons in the other 50% are charged varying percentages of the usual costs of medical services, depending upon individual financial situations.

The medical policies adopted and enforced by the hospital are important for at least two reasons: first, because Parkland is virtually the only source of medical services available to the medically indigent of Dallas and Dallas County; and second because the physicians of the city and of the surrounding area generally "key on" and ***3aa** adopt the standards and policies of Parkland regarding evolving areas of medicine. Theoretically the policies and procedures of the medical school and thus of Parkland exemplify the scholarly and most advanced approach to the practice of medicine.

Prior to June 17, 1970, the date of the decision of the U.S. District Court in *Roe v. Wade,* the following general procedures were followed at Parkland Hospital in regard to requests for abortion: For an abortion to be performed required written permission of the patient, her physician, the Chief of the Obstetrics and Gynecology Service, and a representative of the hospital administration (generally a senior administrator). To secure permission from the Chief of the Obstetrics and Gynecology Service required the recommendation of a full-time member of the medical school obstetrics and gynecology department and of a full-time member of the medical school department or medical specialty with expertise regarding the condition of the patient which prompted consideration of an abortion (such as a member of the cardiology department if the patient had a heart condition). In addition, abortions were generally performed only upon the recommendation of two other consulting physicians. There was no hospital committee *per se* which reviewed requests for abortion.

In keeping with the Texas abortion law, abortions were performed only "for the purpose of saving the life of the mother." Thus such procedures were allowed only where each of the persons involved felt that the patient's medical condition came within the language of the statute. Conditions given careful consideration, as grounds possibly within the statute, included carcinoma of the cervix, severe renal disease, various heart diseases, and severe hypertension.

***4aa** Prior to the *Roe v. Wade* decision an abortions policy committee, a subcommittee of the Medical Advisory Council of the Hospital, was appointed at my request. The purpose of the committee was to make plans as to the mechanics of meeting the anticipated increase in abortion procedures were the Texas abortion law to be declared unconstitutional.

Following the U.S. District Court decision in *Roe v. Wade* on June 17, 1970, which declared the Texas abortion law unconstitutional, I, in my capacities as Chairman of the Department of Obstetrics and Gynecology and as Chief of the Obstetrics and Gynecology Service, sought to ascertain the implications of that decision for medical practice. I made an inquiry of Mr. C. J. Price, the Administrator of Parkland Memorial Hospital, regarding the impact of the ruling; on June 29, 1970, I received the following reply, a copy of which is attached hereto:
Dear Paul:

I have just returned from a conference with Wilson Johnson of District Attorney Henry Wade's Office where we discussed the possible affects of the recent three-judge Federal ruling on the constitutionality of the State's laws on abortion.

Mr. Johnson reaffirmed our recent telephone conversation regarding this matter. The policy for us to follow is the same policy which has prevailed in the past, as regards to any abortion.

Mr. Johnson stated that pertinent points which the District Attorney's Office considers of importance are:

1. The law is still what it has been,

***5aa** 2. The Statutes pertaining to abortion are still on the books,

3. The District Attorney's Office has ruling by the Federal judges under appeal.

4. The Federal judges did not issue any injunctions against the District Attorney to preclude prosecution or following the state law,

5. The District Attorney is prosecuting the Doctor involved in the case.

John Tolle, a member of District Attorney Henry Wade's Staff has been assigned to work with your committee when you are ready to schedule a meeting. You may be interested to know that Mr. Tolle was involved in the case referred to the Federal judges so he is familiar with all aspects of the state law as well as the Federal judges' opinion.

When you are ready to call a meeting of your committee, if you will let me know I will be glad to coordinate it with the medical members, members of the Administrative Staff and the District Attorney's Office.

Very truly yours,

/s/ Jack

C. J. Price, FACHA

Administrator

In light of the letter and Henry Wade's stated attitude toward the federal decision, no meeting of the abortions policy committee was ever held and the pre-June 17, 1970, ***6aa** requirements regarding abortion procedures continue to be in effect pending a Supreme Court decision.

Because of the position taken by Henry Wade, the only marked impact of the *Roe v. Wade* decision was to increase the frustration felt by many of the faculty members of my department regarding the matter of abortion. A majority of them strongly believe that an abortion procedure is appropriate in a variety of circumstances other than where a termination of the pregnancy is necessary to preserve the life of the woman in the most narrow sense.

Even the doctors on my staff do not agree as to the meaning of the statute or the medical indications it encompasses. Aside from the insurmountable difficulty of determining what conditions are severe enough to threaten a pregnant woman's life, in my view an entirely different and more pervasive vagueness is embodied in the current Texas law because of the impossibility of determining the precise degree of risk to life a given condition poses in regard to a particular patient's pregnancy. It is rare that a doctor can even confidently describe the risks attendant to a given condition of a given patient in such broad terms as “minimal risk”, “some risk”, “great risk”, etc. Every woman who is pregnant is generally submitted to a greater degree of risk to her life

than a woman of similar age and health who is not pregnant. There is a great arena of problems which accrue in pregnancy and which may increase the risk of pregnancy to one degree or another. Yet the Texas law requires a doctor to weigh intangibles in each individual case and to precisely determine the statistical risk applicable to a patient's individual accumulation of problems. Such is medically impossible.

The fear of prosecution under the Texas abortion law is the sole reason no change was made in Parkland ***7aa** Memorial Hospital's abortion requirements. Because of a fear of prosecution, abortion procedures continue to be allowed only where deemed necessary to preserve the woman's life, as that standard can best be determined. It is my personal opinion that the policy of the hospital and of this obstetrics and gynecology department would undoubtedly have been significantly liberalized absent Henry Wade's position that the Texas abortion law, though declared unconstitutional, still has force and effect.
/s/ PAUL C. MACDONALD, M.D.

STATE OF TEXAS

COUNTY OF DALLAS

SWORN TO AND SUBSCRIBED TO before me on this the 28 day of July, 1971.
/s/ ELIZABETH A. CAREY

Notary Public in and for Dallas County, Texas

8AA** ***DALLAS COUNTY HOSPITAL DISTRICT OFFICE MEMORANDUM

To--Dr. Paul MacDonald, Chairman June 29, 1970

MAC Sub Committee
Subject:

Dear Paul:

I have just returned from a conference with Wilson Johnson of District Attorney Henry Wade's Office where we discussed the possible affects of the recent three-judge Federal ruling on the constitutionality of the State's laws on abortion.

Mr. Johnson reaffirmed our recent telephone conversation regarding this matter. The policy for us to follow is the same policy which has prevailed in the past, as regards to any abortion.

Mr. Johnson stated that pertinent points which the District Attorney's Office considers of importance are:

1. The law is still what it has been,

2. The Statues pertaining to abortion are still on the books,

3. The District Attorney's Office has ruling by the Federal judges under appeal.

4. The Federal judges did not issue any injunctions against the District Attorney to preclude prosecution or following the state law,

5. The District Attorney is prosecuting the Doctor involved in the case.

John Tolle, a member of District Attorney Henry Wade's Staff has been assigned to work with your committee when you are ready to schedule a meeting. You may be interested to know that Mr. Tolle was involved in the case referred to the Federal judges so he is familiar with all aspects of the state law as well as the Federal judges' opinion.

When you are ready to call a meeting of your committee, if you will let me know I will be glad to coordinate it with the medical members, members of the Administrative Staff and the District Attorney's Office.

Very truly yours,

C. J. Price, FACHA

Administrator

g

cc - Charles F. Gregory, M.D.

M. T. Jenkins, M.D.

Robert L. Stubblefield, M.D.

Paul Gross

FORM # 4220

***9aa Curriculum Vitae**

Name: Paul C. MacDonald
Born: September 14, 1930, McAlester, Oklahoma

Undergraduate Work: Southern Methodist University, Dallas, B.S., 1951

Medical School: The University of Texas (Southwestern) Medical School, M.D., 1955

Internship: Rotating Internship, Methodist Hospital, Dallas, 1955-56

Residency: Parkland Memorial Hospital, Dallas, 1957-60

Fellowships: 1960--Dr. Joseph W. Jailer, Columbia University College of Physicians and Surgeons, New York, New York

1960-62--Dr. Seymour Lieberman, Columbia University College of Physicians and Surgeons, New York, New York

Academic Positions: Chairman, Department of Obstetries and Gynecology, The University of Texas (Southwestern) Medical School--1970--

Professor and Acting Chairman, Department of Obstetrics and Gynecology, The University of Texas (Southwestern) Medical School, 1969-1970

Professor, Obstetrics and Gynecology, The University of Texas (Southwestern) Medical School, 1966-1969

Associate Professor, Obstetrics and Gynecology, The University of Texas (Southwestern) Medical School 1965-1966

***10aa** Assistant Professor, Obstetrics and Gynecology, The University of Texas (Southwestern) Medical School 1962-1965

Instructor, Obstetrics and Gynecology, The University of Texas (Southwestern) Medical School, 1960-1962 (on leave of absence)

Societies, Memberships, Etc.: AOA; Society for Gynecologic Investigation; American Society for Clinical Investigation; Endocrine Society; American Federation for Clinical Research; Dallas-Fort Worth Obstetrics and Gynecological Society; County, State and American Medical Association; Fellow, American College of Obstetricians and Gynecologists; Diplomate, American Board of Obstetrics and Gynecology; Consultant, American Medical. Association Council on Drugs; Member, Reproductive Biology Study Section, NIH, USPHS (1966-1970); Recipient, Career Development Award, USPHS (1964-1969).

Hospital Affiliations: Chief, Obstetrics and Gynecology Service, Parkland Memorial Hospital, Dallas, Texas

Consultant, Dallas Presbyterian Hospital, Dallas, Texas

Military Service: Medical Officer, U.S. Navy, 1956-57

***11aa Bibliography**

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APPENDIX C

***1aaa Affidavit of Joseph Seitchik, M.D.**

IN THE SUPREME COURT OF THE UNITED STATES

No. 70-18, 1971 TERM

JANE ROE, JOHN DOE, MARY DOE, and JAMES HUBERT HALLFORD, M.D., *Appellants,*

--v.--

HENRY WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS, *Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

STATE OF TEXAS

COUNTY OF BEXAR

BEFORE ME, the undersigned authority, on this day personally appeared JOSEPH SEITCHIK, M.D., to me well known, who, after being first duly sworn, did depose and say as follows:

My name is Joseph Seitchik, M.D. The copies of my "Curriculum Vitae" and "Bibliography" attached hereto accurately reflect my medical background and the articles I have had published.

***2aaa** As the attached "Curriculum Vitae" indicates, I am Professor and Chairman, Department of Obstetrics and Gynecology, The University of Texas Medical School at San Antonio (7703 Floyd Gurl Dr., San Antonio, Texas 78229). As Chairman of the Department of Obstetrics and Gynecology, I am also Chief of the Obstetrics and Gynecology Service at both the hospitals of the Bexar County Hospital District, Bexar County Hospital (which abuts the medical school) and Robert B. Green Hospital. Members of the medical school faculty constitute the staff of such hospitals.

The doctors under my supervision as regards obstetrics and gynecology include eight full-time faculty members, twenty clinical faculty members (local physicians who donate time), and sixteen house officers (residents and interns).

The Bexar County Hospital District is responsible for the medical care of persons who are medically indigent and who reside in San Antonio and/or Bexar County; its two hospitals are the chief medical facilities for such persons. Although some private patients are treated at Bexar County and Robert B. Green Hospitals, the overwhelming number of patients are medically indigent. "Medically indigent" refers both to persons with no income and to a larger number of persons with limited incomes.

The obstetrics and gynecology staff, under my supervision, in 1970 cared for approximately 16,000 out-patients and 6,000 in-patients. The number of patients seen to date in 1971 indicates that over 20,000 out-patients will be treated by the obstetrics and gynecology staff this year.

Last year about 18,000 birth certificates were issued in the metropolitan hospitals; about 3,000 of the 18,000 birth certificates were issued in military hospitals and about ***3aaa** 15,000 in civilian hospitals. Approximately 4,000 of the 18,000 certificates were issued at Bexar County and Robert B. Green Hospitals. Therefore about 22% of all births in the metropolitan area and about 27% of all births in civilian institutions occurred in Bexar County and Robert B. Green Hospitals.

During 1970, approximately 500 patients were treated for the after-effects of abortion in Bexar County and Robert B. Green Hospitals. Physicians on the gynecology and obstetrics service see an average of 1 patient per week with evidence of infection as the result of an induced abortion performed by a nonphysician in undesirable surroundings; additionally they see approximately 1 patient per week who is moderately to desperately ill as the result of such an induced abortion. Those physicians also have an average of one patient every other month who enters the clinic or hospital with medical complications resulting from induced abortion which require surgical procedures that cause sterility for the patient.

Prior to July 1, 1970, few--if any--abortions had been performed in either Bexar County or Robert B. Green Hospitals. A strict construction had prevailed as to the language of the Texas abortion law that abortions are lawful only "for the purpose of saving the life of the mother". Such language had been interpreted to require an immediate (one year or less), severe, and professionally undebatable threat to life; abortion procedures were not allowed by the hospitals absent such a threat.

When I learned of the three-judge decision of June 17, 1970, holding the Texas abortion law to be unconstitutional, I called Mr. R. Emmett Cater, who at that time was the Assistant District Attorney of Bexar County assigned to the hospital district, to ask the implication of the decision ***4aaa** for medical practice. He called back about a week later and said that the Texas law still stood and that it would still be enforced. Thus it is my understanding and that of the doctors on my staff that the Texas abortion law still stands and a possibility of prosecution for allegedly performing an illegal abortion still exists.

Since the court decisions, abortions have continued to be performed only when the persons involved feel that the procedure is justified "for the purpose of saving the life of the mother." However, there has been some change as regards the performance of abortion procedures in Bexar County and Robert B. Green Hospitals in that staff physicians are now allowed more leeway in making decisions as to whether the condition of a given patient warrants (according to the physician's interpretation of the statute) an abortion. Each faculty member functions according to his individual conscience. There is no departmental policy defining the circumstances where the Texas law is considered to allow an abortion procedure.

Other local hospitals severely restrict their staff members regarding when an abortion may be performed; those hospitals enforce the traditional narrow interpretation of Texas law. However as stated, physicians on the staff of Bexar County and Robert B. Green Hospitals are now allowed to exercise their own judgment as to the legality of performing an abortion in a given medical context. Since individual physicians differ as to the meaning and appropriate interpretation of the statutory exception, the exercise of individual judgment often results in a more liberal approach to the Texas law. Thus when a local physician determines that a patient is within the statutory exception and should be aborted, the patient is often referred ***5aaa** to a member of my staff because the referring physician would not be allowed to perform the abortion in the hospitals where he has staff privileges. The physicians of Bexar County are reacting to the problem of unwanted pregnancy in two distinct manners: as individuals they often state in writing their opinion that a given patient comes within the statutory exception yet as a group in hospitals they are unwilling to allow the performance of the same procedure.

The situation in Bexar County demonstrates the vagueness of the Texas abortion law. All physicians are complying with the Texas law as they understand it; yet completely different levels of performance exist because of a difference in interpretation.

Although there has been no attempt to develop a hospital policy on abortion for the hospitals of the Bexar County Hospital District, last spring I did submit to the hospital administration a detailed protocol for the administrative mechanics--a "how to" system--for caring for the large number of patients whom we anticipate will need abortion procedures in the event the Texas law at some future point ceases to be in force. The protocol, developed on the premise that the law will change, involved a combination of managers, nurses, social workers and physicians who would work together to provide efficient counselling and care for a large number of abortion patients without interferring with the health care of other types of patients. However the law is still considered to be in force, and the proposed protocol has never been answered or acted upon by the hospital administration.

As to administrative steps preceding an abortion, the procedure must be recommended by two physicians and my own signature must be obtained. Not more than one ***6aaa** of the two recommending physicians may be a full-time member of the obstetrics and gynecology staff. The second recommending physician is generally a local physician or a staff member of another medical specialty. Only the consent of the woman is required if she is past 21 years of age and unmarried. If she is married, her husband's consent is also required. If she is a minor, the consent of a guardian or parent is also required.

We prefer that all abortion patients be seen by a social worker prior to the procedure since we are interested in continuing care for the patients and since they often are experiencing difficulties other than pregnancy.

Several additional points relating to the current status and effect of the Texas abortion law are pertinent. First, there is a considerable lack of uniformity even among the doctors on my staff as regards the meaning and correct interpretation of the language of the Texas statute, "for the purpose of saving the life of the mother". Patients are often seen either in the clinic or as a hospital admittee whose request for an abortion is considered by some staff members to be within the statutory exception and considered by other staff members to be outside the statutory exception. Further it is often difficult to determine the exact degree of danger a particular medical condition presents; similarly psychiatrists often honestly differ as to how much threat a given pregnancy poses to the mental health of the patient.

Second, members of the staff and faculty are often asked to perform an abortion by patients experiencing an unwanted pregnancy. Such cases often involve medical indications or circumstances that seem to warrant abortion, yet it generally appears that the case would not come within the statutory exception, either because there does ***7aaa** not appear to be sufficient danger to the woman's health, because the health problem is one anticipated from sources other than the pregnancy, or because the woman is physically capable of carrying the pregnancy to term.

One problematic situation is where the threat to the patient's health and life arises from a circumstance other than her present physicial condition, as when the girl is threatening to go or has given evidence that she will go to an illegal abortionist. It is common knowledge among the members of the hospital staff that some of the patients refused an abortion by our doctors because of the Texas abortion law will eventually resort to going to one of the local persons with no medical training who perform abortions.

As an example, nine months ago we treated a girl who was seriously ill as the result of a criminal abortion. Recently she returned to our clinic and, when she learned that she was again pregnant, told the physician that unless a staff physician performed an abortion she would return again to the same lay-abortionist. The attending physician was convinced that she would in fact obtain another illegal abortion. Knowing the patient's medical history, would the performance of an abortion for the purpose of preventing the very real threat to her life posed by a septic abortion be one “for the purpose of saving” her life within the meaning of the statute?

A recent example of the situations where an abortion seems indicated although the woman is physically capable of carrying the pregnancy to term is that of a feebleminded patient who was pregnant. The 25-year-old girl had a feeble-minded mother and two feeble-minded sisters. The family was supported by the girl's 75-year-old grandfather and a normal brother who was married and supporting ***8aaa** three children of his own. The apparent probability that the pregnancy would produce a feeble-minded child and the problem of its support indicated that an abortion should be considered, assuming effective consent, yet such pregnancy apparently does not come within the statutory exception. Another example was a pregnant 13-year-old girl who could not even care for herself to the point of menstruating on the schoolroom floor; she obviously could not care for herself during pregnancy nor for a baby.

Similarly in cases of congenital anomaly many physicians feel that an abortion is indicated although the mother is physically capable of carrying the pregnancy to term. In such a case the physician might determine that the mother would become insane if forced to have the child, but in all probability that decision would be prompted more by the fact of the anomaly than by considerations regarding the mother's mental or physical health.

Other members of the medical staff oppose the present Texas abortion law because of the obviously discriminatory effect on our patients. Non-indigents are now able to travel to other states and to obtain safe abortions performed in sterile surroundings. Our patients, the medically indigent, for financial reasons are not able to travel to other cities to obtain safe abortions and are forced to resort to crude substitutes in order to terminate an unwanted pregnancy.

It is my opinion that the staff of Bexar County and Robert B. Green Hospitals would now be caring for our medically indigent patients who need abortions, but who do not seem to be within the statutory exception, if the Texas abortion law were not in effect. Because of the stated policy of the local District Attorney's office and the resulting fear of prosecution, abortion procedures continue ***9aaa** to be performed only where deemed necessary for the purpose of saying the woman's life.
/S/ JOSEPH SEITCHIK, M.D.

STATE OF TEXAS

COUNTY OF BEXAR

SWORN TO AND SUBSCRIBED TO before me on this the 9th day of August, 1971.
/S/ RUTH E. RICHARDSON

Notary Public in and for Bexar County, Texas

***10aaa Curriculum Vitae**

Joseph Seitchik, M.D.

BORN:

October 22, 1915--Philadelphia, Pennsylvania

EDUCATION:

High School: West Philadelphia High School	1932
College: University of Pennsylvania, Philadelphia, Pennsylvania, B.A.	1936
University of Pennsylvania, Philadelphia, Pennsylvania, M.A.	1937
Medical School: University of Pennsylvania, Philadelphia, Pennsylvania, M.D.	1942

INTERNSHIP:

Mt. Sinai Hospital, Philadelphia, Pennsylvania	1942-43

RESIDENCY:

Obstetrics and Gynecology, Vanderbilt University Hospital, Nashville, Tennessee.	1943-45

PRIVATE PRACTICE:

Philadelphia, Pennsylvania	1946-47

APPOINTMENTS:

Instructor, Obstetrics and Gynecology, Vanderbilt University School of Medicine, Nashville, Tennessee.	1945-46
Instructor, Hahnemann Medical College, Philadelphia, Pennsylvania	1947-48
Assistant Professor, Hahnemann Medical College, Philadelphia, Pennsylvania.	1948-50
Associate Professor, Hahnemann Medical College, Philadelphia, Pennsylvania.	1950-54
Clinical Professor, Hahnemann Medical College, Philadelphia, Pennsylvania.	1954-61
Obstetrician and Gynecologist-in-Chief, Sinai Hospital of Baltimore, Inc., Baltimore, Maryland.	1961-68
Associate Professor, The Johns Hopkins University School of Medicine, Baltimore, Maryland.	1961-68
Professor and Chairman, Department of Obstetrics and Gynecology, The University of Texas Medical School at San Antonio.	1968-present

ORGANIZATIONS:

American Society for the Study of Sterility	
Diplomate, American Board of Obstetrics and Gynecology	1950
Sigma Xi	1951
Fellow, American College of Surgeons	1951
Fellow, Philadelphia College of Physicians	1952
Society for Gynecologic Investigation (President-elect 1970-71)	1956
American College of Obstetricians and Gynecologists	1956
American Institute of Nutrition (Clinical Division)	1961-68
Member, Human Embryology and Development Study Section, National Institutes of Health	1964-68
American Association of Obstetricians and Gynecologists	1967
Member Obstetrics and Gynecology Residency Review Committee, Council on Education, American Medical Association	1968

Bexar County Medical Society	1969
American Gynecological Society	1969
Central Association of Obstetricians and Gynecologists	1971

***12aaa Publications**

1. Seitchik, J. Mechanism of the production of exophalmos in exophthalmic goiter. Arch Ophth 27:762, 1942.
2. Burch, L. E. and Seitchik, J. Ectopic gestation: Amer J Obstet Gynec 50:765, 1945.

3. Seitchik, J. "Appendix of useful drugs" Menstrual Disorders and Sterility. 2nd Ed. Paul C. Hoeber, Inc., New York, 1946.

4. Seitchik, J. and Agerty, H. A. Experimental use of methyl testosterone in premature infants. Pediatrics 5:200, 1950.

5. Seitchik, J. The urinary excretion of pregnanediol in pregnant women receiving diethylstibestrol. Amer J Obstet Gynec 60:877, 1950.

***13aaa** 6. Agerty, H. and Seitchik, J. Experimental use of methyl testosterone and testosterone in premature infants. Pediatrics 10:28, 1952.

7. Seitchik, J. Observations on the renal tubular resorption of uric acid. Amer J Obstet Gynec 65:981, 1954.

8. Seitchik, J. and Alper, C. The body compartments of normal pregnant, edematous pregnant and pre-eclamptic women. Amer J Obstet Gynec 68:1540, 1954.

9. Seitchik, J. and Alper, C. The relationship of body composition to changes in weight during pregnancy Surg Clin N Amer 34:1535, 1954.

10. Seitchik, J. and Alper, C. The effect of dietary protein intake on the metabolism of N^{15} labelled glycine in pregnant women. Surg Forum 6:451, 1956.

11. Seitchik, J. and Alper C. The estimation of changes in body composition in normal pregnancy by measurement of body water. Amer J Obstet Gynec 71:1165, 1956.

12. Seitchik, J. The metabolism of urate in pre-eclampsia. Amer J Obstet Gynec 72:40, 1956.

13. Seitchik, J. Changes in body composition and displacement volume in pregnancy. Report of the First Ross Obstetric Conference. 14-16, 1956.

14. Alper, C. and Seitchik, J. Comparison of the Archibald-Kern and Stransky colorimetric procedure and the praetorius enzymatic procedure for the determination of uric acid. Clin Chem 3:95, 1957.

15. Seitchik, J., Szutka, A., and Alper, C., Further studies on the metabolism of N^{15} labelled uric acid in normal ***14aaa** and in toxemic women. Amer J Obstet Gynec 76:1151, 1958.

16. Seitchik, J. Fluid and electrolyte metabolism in toxemia of pregnancy. Clin Obstet Gynec 1:309, 1958.

17. Seitchik, J. “Fluid and electrolyte metabolism in pregnancy” Edema, W. B. Saunders Company, Philadelphia, 1960.

18. Seitchik, J. Endometriosis and hormone therapy. Amer J Obstet Gynec 81:183, 1961.

19. Seitchik, J. Postoperative water, electrolyte, and transfusion therapy. Clin Obstet Gynec 5:567, 1962.

20. Seitchik, J., Alper, C., and Szutka, A. Changes in body composition during pregnancy. Ann N.Y. Acad Sci 110:821, 1963.

21. Seitchick, J. Water and electrolyte metabolism in hormal pregnancy. Obstet Gynec 7:185, 1964.

22. Seitchik, J. and Cushner, I. M. “Bleeding complications of pregnancy” Gynecology Obstetrics Guide, Vol 1. Commerce Clearing House, Inc., Chicago, 1964.

23. Seitchik, J. and Cushner, I. M. “Obstetrical Hemorrhage” Surgical Bleeding. Blakiston Div McGraw-Hill, New York, 1966.

24. Yousem, H., Seitchik, J., and Solomon, D. Maternal estriol escretion and fetal dysmaturity. Obstet Gynec 28:491, 1966.

25. Seitchik, J. Total body water and total body density of pregnant women. Obstet Gynec 29:155, 1967.

***15aaa** 26. Seitchik, J. Body composition and energy expenditure during rest and work in pregnancy. Amer J Obstet Gynec 97:701, 1967.

27. Seitchik, J., Goldberg, E., Goldsmith, J., and Pauerstein, C. J. Pharmacodynamic studies of the human fallopian tube in vitro. Amer J Obstet Gynec 102:727, 1968.

APPENDIX D

***1aaaa Affidavit of William J. McGanity, M.D.**

IN THE SUPREME COURT OF THE UNITED STATES

No. 70-18, 1971 TERM

JANE ROE, JOHN DOE, MARY DOE, MARY DOE, and JAMES HUBERT HALLFORD, M.D., *Appellants,*

--v.--

HENRY WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS, *Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

STATE OF TEXAS

COUNTY OF GALVESTON

BEFORE ME, the undersigned authority, on this day personally appeared WILLIAM J. MCGANITY, M.D., to me well known, who, after being first duly sworn, did depose and say as follows:

My name is William J. McGanity. The copies of my "Curriculum Vitae" and "Bibliography" attached hereto accurately reflect my medical background and the articles I have had published.

***2aaaa** As the attached "Curriculum Vitae" indicates, I am Professor and Chairman, Department of Obstetrics and Gynecology, The University of Texas Medical Branch, Galveston, Texas 77550. As Chairman of the Department of Obstetrics and Gynecology, I am also Chief of the Obstetrics and Gynecology Service at The University of Texas Medical Branch hospitals. At least thirty percent of my time is devoted to the medical care and treatment of obstetrics and gynecology patients.

The seven hospitals that comprise the Medical Branch Hospitals are supported in large part by the State of Texas. They are charged with the care and treatment of both private and medically indigent patients who are referred to The University of Texas Medical Branch physicians by their local physicians or health related governmental agencies. The larger metropolitan areas in Texas have their own hospital districts which serve the medically indigent residing within the districts. The Medical Branch Hospitals serve as referral hospitals for such hospital districts, as well as the several million Texans who do not reside in a hospital district. Upon referral, the staff of the Medical Branch Hospitals are directly responsible for the medical care of those persons, be they private or medically indigent patients. The John Sealy Hospital is the largest general hospital unit on our campus.

Approximately 27,000 out-patient examinations are performed by physicians on the obstetrics and gynecology service each year; of this number, 12,000 visits are for family planning services. About 3,500 obstetrics and gynecology patients are admitted to The University of Texas Medical. Branch Hospitals annually.

Physicians on the obstetrics and gynecology service have frequently been requested by patients in early pregnancy ***3aaaa** to perform abortions. It is likely that even more requests would be received were it not for the fact that many of the medically indigent patients served by our hospital live a considerable distance from Galveston and often enter prenatal care only late in their pregnancy, beyond the abortion period of gestation.

Before a therapeutic abortion may be performed in our hospital, the procedure must be recommended by the patient's physician plus a consulting physician, and approved by a three-member therapeutic abortion board of the hospital. On this board there must be at least three disinterested physicians (i.e. persons other than the recommending and consulting physicians). The board always includes an obstetrics and gynecology specialist, usually a psychiatrist, with a doctor from the medical discipline which specializes in the treatment of the patient's medical problem which served as the basis for the recommendation. If the board approves performance of the interruption procedure, such approval is recorded in the minutes of the meeting and the chairman (a person of senior faculty level) completes and signs a formal consult form, which contains a summary of the findings of the board. The statements of the recommending and the consulting physicians are placed on the patient's chart along with the signed summary form with the therapeutic abortion board's recommendation.

In addition to the standard operative permit which the patient must sign, a therapeutic abortion permit must be signed by the persons whose consent is required for the procedure. If she is married, the consent of the patient's husband must also be obtained. If she is a minor, consent of the patient's parent or guardian is also required. Only the consent of the pregnant woman is required if she is over 21 years-of-age and single.

***4aaaa** The situation regarding when, under what lifesaving maternal circumstances, and after what administrative procedures an abortion may be performed in John Sealy Hospital is exactly what it was prior to the June 17, 1970 decision of the three-judge court in *Roe v. Wade.* The decision has had no impact on medical practice in the Medical Branch Hospitals. Abortions are performed only when the procedure is deemed to be indicated "for the purpose of saving the life of the mother," although that standard is often difficult to define and to apply.

Physicians on our hospital staff continue to disagree regarding the circumstances under which a requested abortion is within the statutory exception. Disagreements are most pronounced regarding psychiatric indications; some physicians feel that there are bona fide psychiatric disorders that jeopardize a woman's life, while other physicians feel that there are no psychiatric indications which would justify an abortion under current Texas law. There is more agreement regarding straightforward medical indications, such as a general agreement that pregnancy associated with severe heart or renal disease or malignancy would constitute a threat to the woman's life.

Texas doctors, including the members of my staff, are reluctant to perform medical abortions except when unquestionably indicated because of the ambiguity of the meaning and status of the Texas abortion law. That ambiguity and the resulting possibility and fear of prosecution is an effective restraint, for physicians are understandably anxious to avoid any possible involvement in criminal litigation. Several factors contribute to the fear of prosecution: the Court's refusal to issue an injunction against enforcement of the Texas law; the fact that the local district attorney has not indicated any change in ***5aaaa** applicability of the law; statements of other district attorneys that the law is still in effect; reports of indictments being returned against Texas doctors in other cities for allegedly performing illegal abortions; and a great reluctance to engage in procedures or conduct which *may* lead to even the threat of criminal prosecution.

It is my opinion that the policy of the Medical Branch Hospitals, including that of John Sealy Hospital, regarding abortion prior to the twentieth week of pregnancy will be significantly altered if the Texas law becomes null and void. It can be anticipated that local hospitals or appropriate health care facilities will not be available for performing abortions in many Texas counties. Medically indigent patients who are in need of medical abortions from such localities and/or counties will be referred for care to the Medical Branch Hospitals. The Department of Obstetrics and Gynecology will have to consider the ways and means of providing care for the large number of patients one can anticipate will be seeking abortions should the law be changed.
/s/ WILLIAM J. MCGANITY, M.D.

STATE OF TEXAS

COUNTY OF GALVESTON

SWORN TO AND SUBSCRIBED TO before me on this the thirteenth day of August, 1971.
/s/ NANCY. BYRD

Notary Public in and for Galveston County, Texas

***6aaaa Curriculum Vitae**

WILLIAM JAMES MCGANITY, M.D.

Business Address:

Department of Obstetrics and Gynecology, University of Texas Medical Branch, Galveston, Texas

Home Address:

1402 Harbor View Drive, Galveston, Texas

Born:
Kitchener, Ontario, Canada--September 21, 1923

Citizenship:
American--Naturalized December 18, 1957

Wife:
Mary Kathryn Hambrock McGanity

Married on December 11, 1948

Children:

Peter Louis James McGanity	(December 1, 1949)
Martha Lee Jane McGanity	(November 5, 1951)
Brian David McGanity	(December 17, 1954)

Education:

1941	High School, Grade 13, Kitchener Waterloo Collegiate Institute, Kitchener, Ontario, Canada
1946 (Feb.)	M.D. Degree, University of Toronto Medical School, Toronto, Ontario, Canada
1946-47	Internship, Toronto General Hospital, Toronto, Canada
1949-52	Residence in Obstetrics and Gynecology, University of Toronto and Toronto General Hospital, under Doctors H. B. Van Wyck and D. E. Cannell

***7aaaa** Honors and Fellowships:

1946	Hendry Prize in Obstetrics and Gynecology, University of Toronto

1947-48	Research Fellow in Nutrition, Department of Public Health Nutrition under Dr. E. W. McHenry, University of Toronto
1948-49	Research Fellow in Nutrition, Division of Nutrition under Dr. W. J. Darby, Vanderbilt University, Nashville, Tennessee
1953	F.R.C.S. (Canada) Royal College of Surgeons of Canada, Ottawa, Ontario, Canada
1954-56	Lowell M. Palmer Senior for Medical Sciences

Military:

Royal Canadian Army Medical Corps, 1944-46-52

Appointments--Faculty:

1949-52	Part-time lecturer in Nutrition, Department of Public Health Nutrition, University of Toronto
1952-53	Instructor in Obstetrics and Gynecology, Vanderbilt University School of Medicine
1953-56	Assistant Professor of Obstetrics and Gynecology, Vanderbilt University School of Medicine
1956-59	Associate Professor of Obstetrics and Gynecology, Vanderbilt School of Medicine
1960-Present	Professor and Chairman, Department of Obstetrics and Gynecology, University of Texas Medical Branch
1964-67	Dean of Medicine, University of Texas Medical Branch

***8aaaa** Appointments--Consultant:

1956-Present	Consultant for the Nutrition Program, Office of International Research, National Institutes of Health: formerly ICNND
1959-63	Food and Nutrition Board of National Research Council-Committees on Dietary Allowances and International Nutrition
1966-70	Committee on Maternal Nutrition
1960-Present	Consultant of Department of Air Force
1960-67	Consultant of Department of Army

1960-63	Consultant to Food and Drug Administration, Committee to Consider Folic Acid
1961-67	T.M.A.--Committee on Maternal Mortality (Chairman) and Scientific Activities
1963-66	Member of Council on Foods and Nutrition--AMA
1963-67	Nutrition Study Section--USPHS--NIH
1964-66	Children's Bureau (HEW)--Research Panel--Maternal and Child Health
1964-66	Governor's Committee (Texas) on Mental Retardation
1967	Committee on Maternal Nutrition--NRC--Food and Nutrition Board

***9aaaa** Licensed to Practice Medicine:

1946	Province of Ontario, Canada
1958	State of Mississippi
1959	State of Tennessee
1960	State of Texas

Professional Organizations and Societies:
American Association of Obstetricians and Gynecologists

American College of Obstetricians and Gynecologists

American Institute of Nutrition

American Medical Association

American Society for Clinical Nutrition (President Elect)

Association of Professors of Gynecology and Obstetrics

Central Association of Obstetricians and Gynecologists

Galveston County Medical Society

Royal College of Physicians and Surgeons of Canada

Sigma Xi Society

Society for Gynecologic Investigation

Southern Society for Clinical Research

Southwest Cancer Chemotherapy Group

***10aaaa** Texas Association of Obstetricians and Gynecologists

Texas Medical Association

Publications:
Approximately 80 in the field of reproductive physiology and pathology and nutrition

Publications

WILLIAM JAMES MCGANITY, M.D.

Books

1. *McGanity, William J.,* et al., Manual on Nutrition Surveys, 1st Edition, Chapter 5 and 9, 1957
2. *McGanity, William J.,* et al., Manual on Nutrition Surveys, 2nd Edition, Chapter 5 and 9, 1963

Papers

1. *McGanity, W. J.,* E. W. McHenry, H. B. Van Wyck, and G. L. Watt, "An Effect of Pyridoxine on Blood Urea in Human Subjects", J. Biol. Chem., 178:511, 1949
2. McHenry, E. W. and *W. J. McGanity,* "The Levels of Several Metabolites in Blood and Urine During Normal Pregnancy", Am. J. Obstet. & Gynec., 62:156, 1951

3. Beaton, J. R., *W. J. McGanity,* and E. W. McHenry, "Plasma Clutamic Acid Levels in Malignancy", J. Canad. Med. Assoc., 65:219, 1951

***11aaaa** 4. Cannell, D. E. and *W. J. McGanity,* "Treatment of Premature Separation of Placenta", Arch. Medico de Cuba, 3:534, 1952

5. *McGanity, W. J.* and J. C. Burch, "Estrogen Preparations", J. Biol. Data, 1953

6. *McGanity, W. J.,* "Review of Obstetrics and Gynecology", Medicine of the Year, 1953, Am. Pract., March 1953

7. *McGanity, W. J.* and J. C. Burch, "Pain in the Right Lower Quadrant of the Female Abdomen", Bul. Chicago Med. Society, 1953

8. Byrd, B. F. and *W. J. McGanity,* "Effect of Pregnancy on Clinical Course of Malignant Melanoma", Sou. Med. J., 47:196, 1954

9. Woodruff, C. W., *W. J. McGanity,* A. Stockwell and W. J. Darby, "Ascorbic Acid, Pterylglutamates and Other Factors in Scorbutic Hydroxyphenyluria", Proc. Nutrition Soc., 12:329, 1953

10. Darby, W. J., *W. J. McGanity,* et al., "The Vanderbilt Cooperative Study of Maternal and Infant Nutrition--IV", J. Nutrition, 51:565, 1953

11. *McGanity, W. J.,* et al., "The Vanderbilt Cooperative Study of Maternal and Infant Nutrition--V", Am. J. Obstet. and Gynec., 67:501, 1954

12. *McGanity, W. J.,* et al., "The Vanderbilt Cooperative Study of Maternal and Infant Nutrition--VI", Am. J. Obstet. and Gynec., 67:501, 1954

13. *McGanity, W. J.* and W. J. Darby, Some Considerations in Making Therapeutic Trials, Methods for ***12aaaa** Evaluation of Nutritional Adequacy and Status", Advisory Board on Quartermaster Research and Development Committee on Foods, pp. 82-88, 1954

14. Ferguson, M. E., *W. J. McGanity,* W. J. Darby, et al., "The Vanderbilt Cooperative Study of Maternal and Infant Nutrition--VII", J. Nutrition, 55:305, 1955

15. *McGanity, W. J.,* et al., "The Vanderbilt Cooperative Study of Maternal and Infant Nutrition--VIII", J. Am. Dietetic Assoc., 31:582, 1955

16. Darby, W. J. and *W. J. McGanity,* et al., "The Vanderbilt Cooperative Study of Maternal and Infant Nutrition--IX", Obstet. and Gynec., 5:528, 1955

17. Darby, W. J., *W. J. McGanity,* et al., "A Study of the Dietary Background and Nutrition of the Navajo Indian", J. Nutrition, Vol. 60, suppl. 2, 1956

18. Peerman, C. G. and *W. J. McGanity,* "Cortisone and Antibiotic Therapy in Resistant Pelvic Inflammatory Disease", Sou. Med. J., 50:3, 1957

19. Hartmann, R. C. and *W. J. McGanity,* "Fibrinogen Deficiency in Pregnancy", Obstet. and Gynec., 9:4, 1957

20. Martin, M. P., E. B. Bridgforth, *W. J. McGanity,* and W. J. Darby, "The Vanderbilt Cooperative Study of Maternal and Infant Nutrition--X", J. Nutrition, 62:2, 1957

21. Williams, R. R., G. F. Combs, *W. J. McGanity,* and Z. I. Kertesz, "A Nutrition Survey of the Armed Forces of the Republic of Korea", J. Nutrition Supp:1 Vol. 63: 1959

***13aaaa** 22. Martin, M. P., E. B. Bridgforth, *W. J. McGanity,* and W. J. Darby, "The Vanderbilt Cooperative Study of Maternal and Infant Nutrition--XI", J. Nutrition, 1958

23. *McGanity, W. J.,* et al., "The Vanderbilt Cooperative Study of Maternal and Infant Nutrition--XII", J. Am. Med. Assoc., 168:2138, 1959

24. *McGanity, W. J.,* "Vitamin B_{12} Requirement in Adult Men", Am. J. Med. 25:726, 1959

25. *McGanity, W. J.,* "Development of Vitamin B_{12} Deficiency in Man", Am. J. Clin. Nutrition, 6:513, 1959

26. *McGanity, W. J.,* "Nutrition and Its Relation to Public Health in the Middle East, Transactions of the Middle East Medical Assembly, presented May 8, 1959

27. *McGanity, W. J.* and R. O. Cannon, "Iron Deficiency in Gynecologic Patients", Am. J. Clin. Nut., 7:633, 1959

28. Darby, W. J. and *W. J. McGanity,* "A Nutrition Survey of the Armed Forces of the Philippines", Am. J. Clin. Nut., 7:657, 1959

29. *McGanity, W. J.,* "Nutrition in Pregnancy", Modern Medicine, 28:108, 1960

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31. Coal, G. B., Richey, L. E., *McGanity, W. J.,* "Localization of the Placenta with Aortography", Am. J. Ob. Gyn., 83:1150, 1962

32. Schreiber, M. H., M. M. Nichols, and *W. J. McGanity,* "Epiphyseal Ossification Center Visualization", J. Am. Med. Assoc., 184:504, 1963

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34. LeBlanc, A. L. and *W. J. McGanity,* "Bacteriuria in Pregnancy-- Preliminary Report", Tex. State Med. J., 60:137, 1964

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36. Wilson, C. S., A. E. Schaefer, W. J. Darby, E. B. Bridgforth, W. N. Pearson, G. F. Combs, E. C. Leatherwood, J. C. Greene, L. J. Teply, I. C. Plough, *W. J. McGanity,* D. B. Hand, Z. I. Kertesz, and C. W. Woodruff, "A Review of Methods Used in Nutrition Surveys Conducted by the Interdepartmental Committee on Nutrition for National Defense (ICNND)", Am. J. Clin. Nut., 15:29, 1964

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38. Laubach, J. B., *McGanity, W. J.,* "Hysterectomy Post Conization of the Cervix", Am. J. of Ob. Gyn., 91:3, 1965

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40. Fujino, M., Dawson, E. B., *McGanity, W. J.,* "Vitamin C and Vanil-Mandelic Acid Economy During Surgical Stress", Fed. Proc., 24:2, 1965

***15aaaa** 41. Fujino, M., Dawson, E. B., Holeman, T. and *McGanity, W. J.,* "Interrelationships Between Estrogenic Activity, Serum Iron and Ascorbic Acid Levels During the Menstrual Cycle", Am. J. of Clin. Nut., Vol. 18, 1966

42. *McGanity, W. J.,* Fujino, M. and Dawson, E. B., "Nutritional Aspects of Gynecic Stress," Am. J. Ob. & Gyn., 97:6, 1967

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44. Dawson, E.B., Clark, R.R., and *McGanity, W.J.,* "Trace Metals and Vitamins in Adolescent Pregnancy", Am. J. of OB-GYN.

45. Dawson, E.B., Clark, R.R. and *McGanity, W.J.* "Determination of Urine Thiamine by Automated Fluorometry", Am. J. of OB-GYN.

46. Dawson, E.B., Clark, R.R., and *McGanity, W.J.,* "Determination of Urine Riboflavin by Antomated Fluorometry", Am. J. of OB-GYN.

47. Dawson, E.B., Clark, R.R., and *McGanity, W.J.,* "Season Variation in Adenosine Triphosphate and Nicotinamide Adenosine Dinucleotide in Normal Term Placenae", Am. J. of OB-GYN.

48. Dawson, E.B., Clark, R.R., and *McGanity, W.J.,* "Plasma Vitamins and Trace Metal Changes During Teenage Pregnancy", Am. J. of OB-GYN.

49. Dawson, E.B., *McGanity, W.J.,* "A Study of Nine Cation Levels in Term Placentae: (2) Changes Associated ***16aaaa** with Toxemia of Pregnancy and, Fetal Prematurity", Am. J. of OB-GYN.

50. *McGanity, W.J.,* "Nutrition Survey in Texas", Texas Medicine.

51. Dawson, E.B., and *McGanity, W.J.,* "Plasma Amino Acid Alteration During Teenage Pregnancy", Am. J. of OB-GYN.

52. Dawson, E.B., Moore, T.D., and *McGanity, W.J.,* "The Mathematical Relation of Drinking Water Lithium and Rainfall to Mental Hospital Admission", Diseases of the Nervous System.

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4. Dawson, E.B., Croft, H., McCoy, T.C., *McGanity, W.J.* Seasonal Variation in Placental Macro-Metals. Annual Meeting of the American Institute of Nutrition, Atlantic City, New Jersey, April 11-16, 1966

***17aaaa** 5. Fujino, M., Holeman, T., Dawson, E.B., *McGanity, W.J.,* Interrelationships Between Estrogenic Activity, Serum Iron, and Vitamin C During Menstrual Cycle. Fifth Annual Meeting of the American Society of Clinical Nutrition, Atlantic City, New Jersey, May 1, 1965.

6. Fujino, M., Dawson, E.B., *McGanity, W.J.* Vitamin C and Vanilmandelic Acid Economy During Surgical Stress. Annual Meeting of the American Institute of Nutrition, Atlantic City, New Jersey, April, 1965

7. *McGanity, W.J.,* et al., "Convulsions Occurring in Suckling Young of Maternal Rats Fed Pyridoxine Restricted Diets", Fed. Proc., 14:444, 1955

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1. Korea, Nutrition Survey, April 1957
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3. Ethiopia, Nutrition Survey, September 1959

4. Vietnam, Nutrition Survey, July 1960

5. Lebanon, Nutrition Survey, May 1962

6. Jordan, Nutrition Survey, May 1963

7. Gaza, Nutrition Survey, November 1964

8. Fort Belknap Indian Reservation, Nutrition Survey, December 1964

9. Blackfeet Indian Reservation, Nutrition Survey, December 1964

10. Central America Panel Reports--Nicaragua, April 1966

Costa Rica, July 1966

Honduras, December 1966

Panama, April 1967

APPENDIX E

***1aaaaa INDICTMENT D.A.430**

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS

THE GRAND JURORS OF THE STATE OF Texas, duly elected, tried, empaneled, sworn and charged to inquire of offenses committed in Tarrant County, in the State of Texas, upon their oaths do present in and to the Criminal District Court #1 of said County that one BILL BROCK, JR. hereinafter styled Defendant, in the County of Tarrant and State aforesaid, on or about the 11th day of April, in the year of our Lord One Thousand Nine Hundred Seventy-one, in and upon Deborah Jean Smith, a woman, then and there pregnant, did then and there unlawfully, willfully, and designedly, with the consent of the said Deborah Jean

Smith, thrust and force into the womb and private parts of the said Deborah Jean Smith a certain metallic instrument calculated to produce abortion, and did then and there procure an abortion of the said Deborah Jean Smith, and did then and there destroy the life of the fetus or embryo in the womb of the said Deborah Jean Smith, contrary to the form of the Statutes in such cases made and provided and against the peace and dignity of the State.

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***4aaaaa INDICTMENT D.A.430**

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS

THE GRAND JURORS OF THE STATE OF Texas, duly elected, tried, empaneled, sworn and charged to inquire of offenses committed in Tarrant County, in the State of Texas, upon their oaths do present in and to the Criminal District Court #1 of said County that one JUDY K. MOORE hereinafter styled Defendant, in the County of Tarrant and State aforesaid, on or about the 11th day of April, in the year of our Lord One Thousand Nine Hundred Seventy-one did in and upon Deborah Jean Smith, a woman, then and there pregnant, did then and there unlawfully, willfully, and designedly, with the consent of the said Deborah Jean Smith, thrust and force into the womb and private parts of the said Deborah Jean Smith a certain metallic instrument calculated to produce abortion, and did then and there procure an abortion of the said Deborah Jean Smith, and did then and there destroy the life of the fetus or embryo in the womb of the said Deborah Jean Smith, contrary to the form of the Statutes in such cases made and provided and against the peace and dignity of the State.

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***7aaaaa INDICTMENT D.A.430**

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS

THE GRAND JURORS OF THE STATE OF Texas, duly elected, tried, empaneled, sworn and charged to inquire of offenses committed in Tarrant County, in the State of Texas, upon their oaths do present in and to the Criminal District Court #1 of said County that one JIMMY DEFONTES hereinafter styled Defendant, in the County of Tarrant and State aforesaid, on or about the 11th day of April, in the year of our Lord One Thousand Nine Hundred Seventy-one did in and upon Deborah Jean Smith, a woman, then and there pregnant, did then and there unlawfully, willfully, and designedly, with the consent of the said Deborah Jean Smith, thrust and force into the womb and private parts of the said Deborah Jean Smith a certain metallic instrument calculated to produce abortion, and did then and there procure an abortion of the said Deborah Jean Smith, and did then and there destroy the life of the fetus or embryo in the womb of the said Deborah Jean Smith, contrary to the form of the Statutes in such cases made and provided and against the peace and dignity of the State.

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Footnotes

1 Citations are to the Single Appendix.

2 James Hubert Hallford, M.D., filed his Application for Leave to Intervene in the *Roe* case March 19, 1970 (A. 22).

3 The law, 2A TEXAS PENAL CODE arts. 1191-1194, 1196, at 429-36 (1961), are set out verbatim, *infra,* at 4-5.

4 Over 339,200 out-of-wedlock children were born during 1968 in the United States. U.S. BUREAU OF THE CENSUS, *Statistical Abstract of the United States: 1970,* Table 58, at 50 (91st ed.). 80.5% (273.600) of these children were born to women between the ages of 11 and 24 years.

5 Other rights asserted by Jane Roe were: "the fundamental right of all women to choose whether and when to bear children"; "[the] right to privacy in the physician-patient relationship"; and the "right to personal privacy" (A. 13). The origin and extent of these rights are discussed *infra.*

6 "Supp. App." hereinafter refers to the *Supplementary Appendix to Brief of Appellants,* the offset bound volume filed with this brief.

7 U.S. BUREAU OF THE CENSUS, *Statistical Abstract of the United States: 1970,* Table 57, at 49 (91st ed.).

8 While Texas does not punish the woman who persuades a physician to abort her, the anti-abortion statute imposes a felony sanction of up to five years for the physician. 2A TEXAS PENAL CODE art. 1191, at 429 (1961). Moreover, the physician risks cancellation of his license to practice. 12B TEXAS CIV. STAT. art. 4505, at 541 (1966); *id.* art. 4506, at 132 (Supp. 1969-70). Also, the hospital can lose its operating license for permitting an illegal abortion within its facilities. 12B TEXAS CIV. STAT. art. 4437f, §9, at 216 (1966).

9 Jane Roe and Dr. Hallford had standing because they "occupy positions *vis-à-vis* the Texas Abortion Laws sufficient to differentiate them from the general public" (A. 113). Also, Dr. Hallford had standing to raise the "rights of his patients, single women and married couples, as well as rights of his own" (A. 113, n. 3).

10 The district court was "satisfied that there presently exists a degree of contentiousness between Roe and Hallford and the defendant to establish a 'case of actual controversy' ...." (A. 114.)

11 Zwickler v. Koota, 389 U.S. 241, 248-49 (1967), was sufficient authority to preclude abstention.

12 *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); Prince v. Massachusetts, 321 U.S. 158 (1944), all cited by the district court.

13 *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

14 *See* Skinner v. Oklahoma, 316 U.S. 535 (1942); Stanley v. Georgia, 394 U.S. 557 (1969).

15 *See, e.g.,* McCann v. Babbitz, 310 F. Supp. 293 (E.D. Wis. 1970) (per curiam); United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969); California v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied,* 397 U.S. 915 (1970).

16 2A TEXAS PENAL CODE art. 1196, at 436 1961).

17 MODEL PENAL CODE §230.3(2) (Proposed Official Draft, 1962). The twelve states are Arkansas, California, Colorado, Delaware, Georgia, Kansas, Maryland, New Mexico, North Carolina, Oregon, South Carolina, and Virginia. *See generally* Roemer, *Abortion Law Reform and Repeal: Legislative and Judicial Developments,* 61 AM. J. PUBLIC HEALTH, 500 (1971); Supp. App. at 329.

18 Tietze, *United States: Therapeutic Abortions, 1963-1968,* 59 STUDIES IN FAMILY PLANNING 5 (1970).

19 Secret induced abortions are inherently incapable of quantification. Nonetheless, one can be certain that the number is very high. For estimates, see Fisher, *Criminal Abortion,* in ABORTION IN AMERICA 3-6 (H. Rosen ed. 1967); M. CALDERONE (ed.), ABORTION IN THE UNITED STATES 180 (1958); P. GEBHARD *et al.,* PREGNANCY, BIRTH AND ABORTION 136-37 (1958); F. TAUSSIG, ABORTION: SPONTANEOUS AND INDUCED 25 (1936); Regine, *A Study of Pregnancy Wastage,* 13 MILBANK MEM. FUND QUART. No. 4, at 347-65 (1935).

20 Chase, *Twelve Month Report on Abortions in New York City* (Health Services Administration, City of New York, June 29, 1971).

21 *Id.*

22 *Id.*

23 Dr. McKelvey's basic point about the dangers of pre-Lister "medical" care is well taken, although his figures here are somewhat inaccurate. The clinic was known as the "First Obstetric Clinic at the Allgemeines Krankenhaus [General Hospital]," not the Women's Clinic. J. TALBOTT, *Ignaz Phillip Semmelweis (1818-1865),* in A BIOGRAPHICAL HISTORY OF MEDICINE 660 (1970). The mortality rate in 1846 "was 11.4% in the First Division [[physicians] and 2.7% in the Second Division [midwives]." *Id.* at 661. Chlorine disinfection was used in 1848 to reduce the First Division mortality rate to "slightly less than the mortality in the Second Division," *id.,* which had been 2.7%. It was 1861, however, before Dr. Semmelweis published his findings in German. I. P. SEMMELWEIS, ETIOLOGY, CONCEPT AND PROPHYLAXIS OF CHILDBED FEVER (1861), *transl. in* 5 MEDICAL CLASSICS 339-715 (1941).

24 *See generally* H. ROBB, ASEPTIC SURGICAL TECHNIQUE WITH ESPECIAL REFERENCE TO GYNAECOLOGICAL OPERATIONS (1875); C. HAAGENSEN & W. LLOYD, A HUNDRED YEARS OF MEDICINE (1943).

25 "Ovariotomy" is the abdominal operation for removal of an ovarian tumor.

26 TEXAS LAWS OF 1854, ch. 49, §1, at 58, in 3 GAMMEL, LAWS OF TEXAS 1502 (1898).

27 U.S. Bureau of the Census: *Statistical Abstracts of the United States: 1970,* Table 69, at 55 (91st ed.).

28 The data are derived from surveys by the Commission on Professional and Hospital Activities, in Ann Arbor, Michigan, which are published in the Professional Activities Survey (PAS) Reporter. Over 1,200 hospitals provide the Commission with data for more than 10 million patients per year. *See PAS Hospitals,* 8 PAS REPORTER No. 1, at 1 (Jan. 12, 1970).

29 *Appendectomy Profile, 1968,* 7 PAS REPORTER No. 16, at 1-4 (Dec. 22, 1969).

30 *Cholecystectomy Mortality,* 8 PAS REPORTER No. 8, at 1 (Apr. 20, 1970).

31 *T & A Profile,* 8 PAS REPORTER No. 5 (Mar. 9, 1970).

32 Tietze, *United States: Therapeutic Abortions, 1963-1968,* 59 STUDIES IN FAMILY PLANNING 5, 7 (1970).

33 Chase, *Twelve Month Report on Abortions in New York City* (Health Services Administration, City of New York, June 29, 1971).

34 *Id.* at 2.

35 *Id.*

36 Tietze, *Abortion Laws and Abortion Practices in Europe,* in V ADVANCES IN PLANNED PARENTHOOD 194, 208 (1969) (Proceedings of the Seventh Annual Meeting of the American Ass'n of Planned Parenthood Physicians).

37 Fleck, *Some Psychiatric Aspects of Abortion,* 151 J. NERV. & MENT. DIS: 42 (1970); Simon, *Psychological and Emotional Indications for Therapeutic Abortion,* 2 SEM'RS IN PSYCH. 283, 295 (1970); Margolis, et al., *Therapeutic Abortion Follow-up Study,* 110 AM. J. OB. GYN. 243 (1971); Notman, et al., *Psychological Outcome in Patient Therapeutic Abortions,* Paper presented at Third International Congress of Psychosomatic Problems in Obstetrics and Gynecology, London, April, 1970 (Available at Beth Israel Hosp., Boston, Mass.); Whittington, *Evaluation of Therapeutic Abortion as an Element of Preventive Psychiatry,* 126 AM. J. PSYCH. 1224 (1970).

38 *See* Gray v. State, 77 Tex. Crim. 221, 178 S.W. 337 (1915); Smith v. Gaffard, 31 Ala. 45 (1857); Hunter v. Wheate, 53 App. D.C. 206 (D.C. Cir. 1923); Eggart v. Florida, 40 Fla. 527, 25 So. 144 (1898); State v. Alcorn, 7 Idaho 599, 64 Pac. 1014 (1901); Abrams v. Foshee, 3 Iowa 274, 66 Am. Dec. 77 (1856); Mitchell v. Commonwealth, 78 Ky. 204, 39 Am. Rep. 227 (1879); Lamp v. Maryland, 67 Md. 524, 10 Atl. 298 (1887); Smith v. State, 33 Me. 48, 54 Am. Dec. 607 (1851); Commonwealth v. Bangs, 9 Mass. 387 (1812); Evans v. People, 49 N.Y. 86 (1872); Edwards v. State, 79 Neb. 251, 112 N.W. 511 (1907); State v. Cooper, 22 N.J.L. (2 Zab.) 52, 51 Am. Dec. 248 (1849); State v. Tippie, 89 Ohio St. 35, 105 N.E. 75 (1913); State v. Ousplund, 86 Ore. 121, 167 Pac. 1019 (1917), *appeal dismissed per stip.,* 251 U.S. 563 (1919); Miller v. Bennet, 190 Va. 162, 56 S.E.2d 217 (1949); State v. Dickinson, 41 Wis. 299 (1877). *See generally* Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality,* 14 N.Y.L.F. 411 (1968) [hereinafter Means]. *Contra:* Mills v. Commonwealth, 13 Pa. St. 631 (1850); Willis v. O'Brien, 151 W.Va. 628, 153 S.E.2d 178, *cert. denied,* 389 U.S. 848 (1967); State v. Slagle, 83 N.C. 630 (1880).

39 *See, e.g.,* N.Y. REV. STAT., pt. IV, ch. 1, tit. 6, §§20-22 (1829); ILL. REV. CODE, §46 (1827); *see generally* George, *Current Abortion Laws. Proposals and Movements for Reform,* 17 W. RES. L. REV. 371 (1966); Lucas, *Laws of the United States,* in I ABORTION IN A CHANGING WORLD 127 (R. Hall ed. 1970); Roemer, *Abortion Law Reform and Repeal: Legislative and Judicial Developments,* 61 AM. J. PUBLIC HEALTH 500 (1971).

40 Setting out the New Jersey abortion law of 1849 beside the 1854 Texas law is instructive:

41 TEXAS PENAL CODE, ch. VII, arts. 531-536 (1857).

42 6 Revisers' Notes, pt. IV, ch. 1, tit. 6, §28, at 75 (1828).

43 *Id.* This significant historical evidence was first disclosed in Means, *supra* note 39, at 451-453.

44 *See* ALA. CODE tit. 14, §9 (1958) ("... unless the same is necessary to preserve her life or health ...."); ARIZ. REV. STAT. ANN. §13-211 (1956) ("... unless it is necessary to save her life ...."); CONN. GEN. STAT. ANN. §53-29 (1960) ("... unless the same is necessary to preserve her life or that of her unborn child ...."); FLA. STAT. ANN. §782.10 (1965) ("... unless the same shall have been necessary to preserve the life of the mother ...."); IDAHO CODE ANN. tit. 18, §601 (1948) ("... necessary to preserve her life ...."); ILL. ANN. STAT. ch. 38. §23-1 (1970) ("... necessary for the preservation of the woman's life."); IND. ANN. STAT. §10-105 (1956) ("... necessary to preserve her life ...."); IOWA

CODE ANN. §701.1 (1950) ("... necessary to save her life ...."); KY. REV. STAT. ANN. §436.020 (1970) ("... necessary to preserve her life ...."); LA. REV. STAT. §14:87 (1951) ("... unless done for the relief of a woman whose life appears in peril ..."); ME. REV. STAT. ANN. tit. 17, §51 (1965) ("... necessary for the preservation of the mother's life ...."); MASS. GEN. LAWS ANN. ch. 272, §19 (1970) (prohibits unlawful abortions, interpreted by court to allow abortions by a surgeon if, "... necessary for the preservation of the life or health of the woman." Kudish v. Bd. of Registration, 248 N.E.2d 264 (1969)); MICH. STAT. ANN. §28.209 (1967) ("... necessary to preserve the life of such woman ...."); MINN. STAT. ANN. §617.18 (1964) ("... unless the same is necessary to preserve her life or that of the child with which she is pregnant ...."); MISS. CODE ANN. §2223 (1966) ("... necessary for the preservation of the mother's life ...."); MO. REV. STAT. §559:100 (1953) ("... unless the same is necessary to preserve her life or that of an unborn child ...."); MONT. REV. CODES ANN. §94-401 (1969) ("... necessary to preserve her life ..."); NEB. REV. STAT. §28-405 (1965) ("... necessary to preserve the life of such woman ...."); NEV. REV. STAT. ch. 201.120 (1967) ("... necessary to preserve her life or that of the child with which she is pregnant ....".); N.H. REV. STAT. ANN. §585.13 (1955) ("... unless by reason of some malformation or of difficult or protracted labor, it shall have been necessary, to preserve the life of the woman ...."); N.J. STAT. ANN. §2A:87-1 (1969) (prohibits abortions when done maliciously or without lawful justification; lawful justification has been interpreted as perhaps being limited to the preservation of the mother's life. State v. Moretti, 52 N.J. 182, 244 A.2d 499, *cert. denied,* 393 U.S. 952 (1968): *compare* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967)); N.D. CENT. CODE ANN. §12-25-01 (1960) ("... necessary to preserve her life ...."); OHIO REV. CODE ANN. §2901.16 (1954) ("necessary to preserve her life ...."); OKLA. STAT. tit. 21, §861 (1958) ("... necessary ... to preserve her life ...."); P.R. LAWS ANN. tit. 33, §1053 (1969) ("... necessary to preserve her life ...."); R.I. GEN. LAWS ANN. §11-3-1 (1970) ("... necessary to preserve her life ...."); S.D. COM. LAWS ANN. §22-17-1 (1969) ("... necessary to preserve her life ...."); TENN. CODE ANN. §39-301 (1955) ("... to preserve the life of the mother ...."); UTAH CODE ANN. §76-2-1 (1953) ("... necessary to preserve her life ...."); VT. STAT. ANN. tit. 13, §101 (1958) ("... necessary to preserve her life ...."); W. VA. CODE §61-2-8 (1966) ("... with the intention of saving the life of such woman or child ...."); WIS. STAT. ANN. §940.04 (1958) ("... necessary ... to save the life of the mother ...."); WYO. STAT. ANN. §6-77 (1959) ("... necessary to preserve her life ....").

45 Bumpass & Westoff, *The "Perfect Contraceptive" Population,* 169 SCIENCE 1177, 1179 (1970).

46 Dryfoos, *et al., Eighteen Months Later: Family Planning Services in the United States, 1969,* 3 FAMILY PLANNING PERSPECTIVES No. 2, at 29 (Apr. 1971).

47 *Need for Subsidized Family Planning Services: United States, Each State and County, 1968,* Table I, p. 92, cols. 10 & 11 (OEO, 1968).

48 For discussion of contraceptive-techniques, effectiveness, and the full range of complex factors involved, *see generally* J. PEEL & M. POTTS, CONTRACEPTIVE PRACTICE (1969).

49 The factor of patient *use,* or non-use is always relevant. Well motivated, sophisticated users might have no failure with a contraceptive foam, for example.

50 The number 80 in the first line indicates that among 100 women utilizing no contraception for one year, 80 will become pregnant.

51 Chase, *Twelve Month Report on Abortions in New York City* (June 29, 1971) (Health Services Administration, City of New York).

52 71 Cal.2d 954, 963 n. 5. 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969) ("Dr. Belous' standing to raise this right is unchallenged."), *cert. denied,* 397 U.S. 915 (1970).

53 McCann v. Babbitz, 310 F. Supp. 293 (E.D. Wis.) (per curiam), *appeal dismissed,* 400 U.S. 1 (1970) (per curiam).

54 Doe v. Dunbar, 320 F. Supp. 1297 (D. Colo. 1970).

55 Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill.), *appeal docketed sub nom.* Hanrahan v. Doe, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (No. 70-105, 1971 Term).

56 Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C.), *appeal docketed,* 40 U.S.L.W. 3048 (U.S. July 17, 1971) (No. 71-92, 1971 Term).

57 Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970).

58 This is not a case like *Hall v. Beals,* 396 U.S. 45 (1969) (per curiam), where no continuing injury whatsoever was present. Nor is *Brockington v. Rhodes,* 396 U.S. 41 (1969) (per curiam), pertinent. There the relief sought was limited in nature and rendered impossible to grant by the passage of time.

59 *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 143-55 (1962); Note, 62 COLUM. L. REV. 106 (1962); Comment, 50 CALIF. L. REV. 137 (1962). For an excellent general discussion of the "ripeness" question in the context of criminal law, see Note, *Declaratory Relief in the Criminal Law,* 80 HARV. L. REV. 1490 (1967).

60 A. BICKEL, THE LEAST DANGEROUS BRANCH 149-50 (1962).

61 *Parr* involved an original petition for declaratory judgment by the State of Texas. The petition was denied.

62 Art. 44.01; Tex. Code Crim. App., states: "The States shall have no right of appeal in criminal actions."

63 In *Bokulich,* the Court held that the District Court had not "abused its discretion" in failing to grant the injunction; however, it then proceeded to state that the plaintiffs' claims could be raised at their criminal trial and thus the case was not a "proper" one for injunction. 394 U.S. at 98, 99.

64 See also, Mercer v. Theriot, 377 U.S. 152 (1964); Reece v. Georgia, 350 U.S. 85 (1955); Urie v. Thompson, 337 U.S. 163 (1939).

Professor Wright indicates that while the Court is severely limited in its review of direct appeals under the Criminal Appeals Act, it is not so limited on other direct appeals from district courts. C. Wright, HANDBOOK OF THE LAW OF FEDERAL COURTS 431 (1963).

65 The present case.

66 Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis.) (*per curiam*), *appeal dismissed,* 400 U.S. 1 (1970) (*per curiam*).

67 Doe v. Scott, 321 F. Supp. 1384 (N.D. 1971), *appeals docketed, sub noms.* Hanrahan v. Doe and Heffernan v. Doe, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) Nos. 1522, 1523, 1970 Term; renumbered Nos. 70-105, 70-106, 1971 Term).

68 People v. Barksdale, Docket No. 1 Crim. 9526 (Calif. Ct. of Appeal, First App. Dist., Division 1, July 22, 1971).

69 Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970) (per curiam), *ques. of juris. postponed to merits,* 91 S. Ct. 1614 (1971) (No. 971, 1970 Term; renumbered No. 70-40, 1971 Term).

70 Steinberg v. Brown, 321 F. Supp. 741 (W.D. Ohio, 1970).

71 Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970), *appeal docketed,* 39 U.S.L.W. 3247 (U.S. Nov. 27, 1970) (No. 1010, 1970 Term; renumbered No. 70-42, 1971 Term).

72 Corkey v. Edwards, 322 F. Supp. 1248 (W.D. N.C. 1971), *appeal docketed,* 40 U.S.L.W. 3048 (U.S. July 17, 1971) (No. 71-92).

73 Hodgson v. State of Minnesota, No. 42966, Minnesota Supreme Court; State v. Munson, South Dakota Supreme Court, State of Kansas v. Jamieson, No. 46150, Kansas Supreme Court.

74 "The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice--whether public or private or parochial--is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the first Amendment has been construed to include certain of those rights." Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

75 Loving v. Commonwealth, 388 U.S. 1, 12 (1967) (alternate ground of decision).

76 Skinner v. Oklahoma, 316 U.S. 535, 536 (1942).

77 Griswold v. Connecticut, 381 U.S. 479 (1965).

78 Pierce v. Society of Sisters, 268 U.S. 510 (1925).

79 United States v. Guest, 383 U.S. 745 (1966). What was said by Mr. Justice Stewart in that opinion may be aptly paraphrased to apply in the present context:

"The Constitutional right [of marital privacy] ... occupies a position fundamental to the concept of our Federal Union. * * * [T]hat right finds no explicit mention in the Coustitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be ... necessary ...." 383 U.S. at 757.

80 Justice Douglas, delivering the opinion of the Court that Connecticut could not constitutionally outlaw the use of contraceptives, relied upon the penumbras of specific guarantees in the Bill of Rights, "formed by emanations from those guarantees that help give them life and substance." 381 U.S. at 484. Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, concurred, relying upon the Ninth Amendment. Justice Harlan's concurring opinion stated the inquiry to be whether the statute infringed the Due Process Clause of the Fourteenth Amendment by violating basic values implicit in the concept of liberty. 381 U.S. 500. Justice White found that the law deprived plaintiffs of "liberty" without due process, as used in the Fourteenth Amendment. 381 U.S. 502.

81 The complaints of appellants invoked the jurisdiction of the district court under the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments (A. 10-11, 15-16, 24). The district court confined its consideration to the Ninth Amendment and vagueness arguments and did not pass upon the "array of constitutional arguments" (A. 116). Appellants have chosen in this brief to stress the application of the First, Ninth, and Fourteenth Amendments. However, the arguments relating to application of other Amendments and particularly the Eighth Amendment, are well developed in the Brief *Amicus Curiae* filed in this case by Attorney Nancy Stearns. Brief *Amicus Curiae* on Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Coalition, at 34 *et seq.* (Eighth Amendment).

82 BASIC DOCUMENTS OF THE WORLD HEALTH ORGANIZATION 1 (Geneva 1969 ed.). *See also* Curran, *The Right to Health in National and International Law,* 284 NEW ENG. J. OF MEDICINE 1258 (1971).

83 Public Law 89-749.

84 *See* Brief *Amici Curiae* for Planned Parenthood Federation of America, Inc. and American Association of Planned Parenthood Physicians, at 22-24.

85 Brodie, *Marital Procreation,* 49 ORE. L. REV. 245, 256 (1970).

86 For a discussion of the impacts of pregnancy on women *see* Brief *Amici Curiae* on Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Action Coalition filed herein by Nancy Stearns as follows: employment, at 17-21, 27-28; education, at 21-22; responsibility for the child, at 29-30; emotional, at 38-42.

87 *See* Brief *Amici Curiae* for Planned Parenthood Federation of America, Inc. and American Association of Planned Parenthood Physicians filed herein, "The Facts About Contraception," pp. 12-21.

88 *See* Lamm & Davison, *Abortion Reform,* 1 YALE REV. L. & SOC'L ACTION, No. 4, at 55, 58-59 (Spring 1971).

89 Tom C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal,* 2 LOYOLA UNIV. (L.A.) L. REV. 1, 9 (1969).

90 *E.g., Doe v. Bolton,* 319 F. Supp. 1048 (N.D. Ga. 1970) (per curiam), *ques. of juris. postponed to merits;* 91 S. Ct. 1614 (1971) (No. 971, 1970 Term; renumbered No. 70-40, 1971 Term); Doe v. Scott, 321 F. Supp. 1384 (N.D. Ill.), *appeals docketed sub noms.* Hanrahan v. Doe and Heffernan v. Doe, 39 U.S.L.W. 3438 (U. S. Mar. 29, 1971) (Nos. 1522, 1523, 1970 Term; renumbered Nos. 70-105, 70-106, 1971 Term); Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis.) (per curiam), *appeal dismissed,* 400 U.S. 1 (1970) (per curiam); California v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied,* 397 U.S. 915 (1970); People v. Barksdale, ---- Cal. App. 3d ----, ---- Cal. Rptr. ----, 1 Crim. 9526 (Calif. Dist. Ct. App. July 22, 1971); *contra,* Corkey v. Edwards, 322 F. Supp. 1248 (W.D. N.C. 1971), *appeal docketed,* 40 U.S.L.W. 3048 (U. S. July 17, 1971) (No. 71-92); Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970), *appeal docketed,* 39 U.S.L.W. 3247 (U. S. Nov. 27, 1970) (No. 1010, 1970 Term; renumbered No. 70-42, 1971 Term).

91 Hall, "Abortion in American Hospitals," 57 *Am. J. Pub. Health* 1933, 1934 (1967).

92 *See* Brief *Amici Curiae* for Planned Parenthood Federation of America, Inc. and American Association of Planned Parenthood Physlcians, at 22-24.

93 There were 8 deaths in over 150,000 abortions during the first eleven months, a rate of 5.3 per 100,000. Chase, Twelve Month *Report on Abortions in New York City* (June 29, 1971) (Health Services Administration, City of New York). The 1969 mortality rate for tonsillectomy in the United States was 5.2 per 100,000. *T&A Profile,* 8 PROFESSIONAL ACTIVITIES SURVEY (PAS) REPORTER No. 5 (Mar. 9, 1970).

94 Abortion, if the woman consented, is punishable by confinement in the penitentiary for not less than two nor more than five years. 2A TEX. PEN. CODE art. 1191 (1961). The punishment for murder is death or confinement in the penitentiary for life or for any term of years not less than two. 2A TEX. PEN. CODE art. 1257 (1961).

95 Although parents of stillborn or miscarried fetuses have recovered under wrongful death statutes in some states, it is very likely that what is really being compensated is the "mental anguish" of the parents. PROSSER, TORTS §§105, 715 (2nd ed. 1955). The general subject of civil law treatment of the fetus is exhaustively treated in Gordon, *The Unborn Plaintiff,* 63 MICH. L. REV. 579 (1965), and Lamm & Davison, *Abortion Reform,* 1 YALE REV. OF LAW & SOC. ACTION 55 (1971).

96 Section 1 of the Fourteenth Amendment of the United States Constitution refers to "All persons born or naturalized in the United States...." There are no cases which hold that fetuses are protected by the Fourteenth Amendment.

97 "Potential life" is used here in the sense that each living person has a life "potential" in the future which may or may not be realized (i.e., the person may die in the next few moments or live "x" number of years). When speaking of the "potential life" of the mother being destroyed, not only is an actual cessation of brain waves included, but damage to her health, emotional security and happiness--all things which may result from an unwanted pregnancy, in effect those things which can destroy "life" while leaving a living organism.

98 *See generally,* Amsterdam, *The Void for Vagueness Doctrine,* 109 U. PA. L. REV. 67 (1960); Collings, *Unconstitutional Uncertainty--An Appraisal,* 40 CORN. L.Q. 195 (1955); Aigler, *Legislation in Vague or General Terms,* 21 MICH. L. Rev. 831 (1923); Freund, *The Use of Indefinite Terms in Statutes,* 30 YALE L.J. 437 (1921); Note, 62 HARV. L. REV. 77 (1948).

99 Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

100 United States v. Reese, 92 U.S. 214, 221 (1875).

101 Ashton v. Kentucky, 384 U.S. 195, 200 (1966) (ancient common law offense of "criminal libel" void for uncertainty).

102 Lanzetta v. New Jersey, 306 U.S. 451, 454-55 (1939); Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 242-43 (1932). *See also,* United States v. Evans, 333 U.S. 483 (1948), in which the statute had been passed in 1917; and Giaccio v. Pennsylvania, 382 U.S. 399 (1966), in which the statute had been passed in 1860.

As Professor Amsterdam stated in his extensive study of vagueness, "common-law terms may have no more illuminating clarity to the layman offender than the neologisms of Ronsard...." Amsterdam, *supra,* note 136, 109 U. PA. L. REV. at 84.

103 *See, e.g.,* Keyishian v. Regents, 385 U.S. 589 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964).

104 Lanzetta v. New Jersey, 306 U.S. 451 (1939).

105 Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

106 NAACP v. Button, 371 U.S. 415, 438 (1963).

107 Tom C. Clark, *Religion, Mortality, and Abortion: A Constitutional Appraisal,* 2 LOYOLA UNIV. (L.A.) L. REV. 1. 7 (1969) [hereafter "Clark"].

108 Tietze, *Maternal Mortality Associated With Legal Abortion,* Proceedings of the Fifth International Conference on Planned Parenthood 24 (Oct. 1955) (Tokyo).

109 Hall, *Abortion in American Hospitals,* 57 AM. J. PUB. HEALTH 1933, 1935 (1967). Dr. Hall continues:

"The victim of all this confusion is, of course, the American female ... [[S]he must find Doctor X in hospital Y with policy Z in order to have it done." *Id.*

For a vivid illustration of the variations among hospitals in assessing the legality of therapeutic abortion on a given set of facts, see the questionnaire study and analysis of results in Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine,* 11 STAN. L. REV. 417, 423 (1959). The study, directed to 29 San Francisco Bay Area and Los

Angeles hospitals (*id.,* at p. 423) based on hypothetical cases involving pregnant women seeking abortions, yielded the following results (*id.,* at p. 444):

110 Guttmacher, *Therapeutic Abortion: The Doctor's Dilemma,* 21 J. MT. SINAI HOSP. 111 (1954).

111 Materials from medical and psychiatric literature which illustrate the wide-ranging interpretations of language in laws on abortion, and the sometimes arbitrary implementation of these laws include the following authorities:

(1) M. CALDERONE, (ed.), ABORTION IN THE UNITED STATES 34-35, 52 (1958):

> "[N]ecessity as a sine qua non of performing an abortion ... leaves the doctor's position perilous and uncertain * * * The current laws provide no accurate criteria by which the doctor can govern his actions."

(2) White, *Induced Abortions: A. Survey of their Psychiatric Implications, Complications, and Indications,* 24 TEX. REPS. OF BIOLOGY & MEDICINE 531, 541 (1966):

> "[T]he enormous variability in the frequency of therapeutic abortions from one hospital to another ... must surely reflect, more than anything else, differences in the personal values, religious beliefs, and social ideology of the staffs of the respective hospitals about the matter of abortion."

(3) R. H. SCHWARZ, SEPTIC ABORTION 11 (1968):

> "The legal status of abortion varies not only throughout the world but from state to state. Interpretation and enforcement differ from community to community; professional assessment varies from hospital to hospital, and from physician to physician."

(4) GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, THE RIGHT TO ABORTION: A PSYCHIATRIC VIEW 40 (Comm. on Law & Psychiatry, 1970):

> "[T]he rate of therapeutic abortion varies dramatically from hospital to hospital within a state, even though all are supposedly governed by the same statutes."

In addition to the above authorities, who stress variations from place-to-place and person-to-person, much research and analysis has examined some of the many reasons why physicians and psychiatrists have difficulty with the statutes, including specific aspects of confusion:

(5) Ryan, *Humane Abortion Laws and the Health Needs of Society,* 17 W. RES. L. REV. 424, 431 (1965):

> "Distinctions between physical and mental health are meaningless in terms of modern medical thinking. Health cannot be divorced from socio-economic factors which influence people's lives since health is a product of these conditions."

(6) White, *supra* no. (2), at 532:

> "[T]here are no generally accepted policies, little or no systematically gathered data, and remarkably few well and objectively substantiated points of view among psychiatrists about 'legally' or 'illegally' induced abortions."

(7) Pike, *Therapeutic Abortion and Mental Health,* 111 CALIF. MED. 318, 319 (Oct. 1969).

"One of the controversial aspects of the situation is the undeniable effect of sociological factors on an individual's mental health. The stress and consequences of an unwanted pregnancy as they affect mental health must be determined for an individual patient, taking into consideration her total life situation. Factors such as marital status, family support, economic conditions, subcultural attitudes toward the pregnancy, and personality structure all contribute toward her ability to maintain and complete her pregnancy without damage to her mental functioning.

The new law requires physicians to make judgments that are difficult to make, impossible to prove and of crucial importance to the patient's welfare and the welfare of those dependent on her and intimately involved with her."

(8) Sir Dugald Baird, *The Obstetrician and Society,* 60 AM. J PUBLIC HEALTH 628, 635 (1970).

> "[E]ven in a basically stable woman, emotional health and subsequently physical health can be undermined by adverse social conditions: for example, substandard housing, overcrowding, illness in other children, elderly or bedridden parents, alcoholic husband, and economic necessity for the mother to work outside the home."

(9) Thompson, Cowen & Berris, *Therapeutic Abortion: A Two-Year Experience in One Hospital,* 213 J.A.M.A. 991, 994 (1970):

> "Psychiatric and socioeconomic problems are so intertwined that it is difficult for the Therapeutic Abortion Board to extract the relevant data in order to make a just and lawful decision.... In light of the previously stated vagueness of the law, the evaluation of the patient for psychiatric indications has been one of our major problems."

(10) Moyers, *Abortion Laws: A Study in Social Change,* 7 SAN DIEGO L. REV. 237, 241 (1970):

> "Although some hospitals in the state have done away with the requirement, most committees still require psychiatric consultation when a request for abortion is presented on this [mental health] ground."

112 *Constitution of the World Health Organization,* in BASIC DOCUMENTS OF THE WORLD HEALTH ORGANIZATION 1 (Geneva 1969 ed.).

113 Griswold v. Connecticut, 381 U.S. 479 (1965), at least implies that such a requirement would violate the patient's right of privacy, but Connecticut, for obvious reasons, made no such contention.

114 Hall, *Therapeutic Abortion, Sterilization, and Contraception,* 91 AM. J. OBSTETRICS & GYNECOLOGY 518, 524-25, Table VI, line 2 (1965); Supp. App. at 402.

115 U. S. BUREAU OF THE CENSUS. *Statistical Abstract of the United States: 1970,* Table 57, at 49 (91st ed.).

116 *See, e.g.,* Haynes v. United States, 390 U.S. 85 (1968); Tot v. United States, 319 U.S. 463 (1943).

117 Authorities recognizing the constitutional status of the presumption of innocence go back to Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 328 (1866). *See also* United States v. Romano, 382 U.S. 136, 139-44 (1965) (presence at still does not justify inference that accused possesses or controls the still); Speiser v. Randall, 357 U.S. 513, 525-26 (1958); Morissette v. United States, 342 U.S. 246, 274-75 (1952); Morrison v. California, 291 U.S. 82 (1934).

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