11

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

BRIEF FOR APPELLANTS

ROY LUCAS
James Madison Constitutional
Law Institute
Four Patchin Place
New York, New York 10011

SARAH WEDDINGTON
JAMES R. WEDDINGTON
709 West 14th
Austin, Texas 78701

LINDA N. COFFEE
2130 First Nat'l Bank Bldg.
Dallas, Texas 75202

FRED BRUNER
ROY L. MERRILL, JR.
Daugherty, Bruner, Lastelick &
Anderson
1130 Mercantile Bank Bldg.
Dallas, Texas 75201

Attorneys for Appellants

Of Counsel:

NORMAN DORSEN
School of Law
New York University
Washington Square
New York, N.Y. 10003

INDEX

Table of Authorities

PAGE

Cases:

PAGE

PAGE

PAGE

PAGE

PAGE

PAGE

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

BRIEF FOR APPELLANTS

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

[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).

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.

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,

---

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

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."

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

citizen 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."

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?

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.

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).

---

[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.

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

---

[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.*

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).

---

[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.).

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 physi-

---

[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).

cian 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

[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).

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.

---

[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).

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] 2A Texas Penal Code art. 1196, at 436 (1961).

III. ***Impact 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:

"[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*.

> 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).

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

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

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,

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).

---

[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).

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.

---

[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.*

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

> 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

---

[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).

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 hyper-

[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).

> trophied 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.

> Thus 7/8 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

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 legisla-

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

tion 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.

---

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

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

---

[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).

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

[34] *Id.* at 2.

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

---

[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).

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,

---

[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 Patients Having 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

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

---

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:

"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).

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.

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

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

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,

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

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]

---

[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

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

---

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) (". . .

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.

---

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 . . . .").

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

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

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.

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

> 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] 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).

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.

---

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

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.

[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.

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

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

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. *Connecticut,* 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 ques-

tion. 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.

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.

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

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. 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,

---

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

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 martyr.

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 griev-

---

[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).

ances 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.

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.

---

[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).

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.

---

[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.

(3) There is more 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,*

---

[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).

> "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

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:

---

[60] A. Bickel, The Least Dangerous Branch 149-50 (1962).

> "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

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 unmo-

> lested 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 in-

junction. 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

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

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

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

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

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

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

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

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

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

---

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