Documents. Aux origines du critère de la « viabilité » dans l'arrêt *Roe v. Wade* de la Cour suprême : Larry Hammond

« Dans *Roe v. Wade* (1973), la Cour suprême des Etats-Unis a reconnu un « droit à l'avortement ». Plus exactement, elle a conclu à l'inconstitutionnalité de toute législation qui n'absoudrait que l'interruption de grossesse pour motif médical (la préservation de la vie de la mère) sans considération du stade de grossesse et des « autres intérêts » susceptibles de légitimer une *interruption volontaire de grossesse*[1]. En dehors de ce principe élémentaire, tout est *juridiquement* complexe dans la question de l'avortement aux États-Unis.

Le guide législatif proposé par la Cour à travers l'opinion du juge BLACKMUN n'a pas moins été critiqué dans son principe autant qu'à propos de son exigibilité pratique. La Cour avait en effet considéré que : 1/ dans les trois premiers mois de la grossesse, la décision d'avorter et les modalités de sa mise en œuvre étaient du ressort du « *jugement médical* » (*medical judgment*) de la femme enceinte, qui sollicite à cette fin un « *médecin* », au sens donné à cette dernière expression par les pouvoirs publics ; 2/ à partir d'une période commençant « *approximativement* » au terme des trois premiers mois de grossesse, les pouvoirs publics, eu égard à leur « *intérêt à protéger la santé de la mère* », peuvent, s'ils le souhaitent, réglementer les modalités procédurales de l'avortement « *dans des conditions qui soient raisonnablement déterminées par la santé maternelle* » ; 3/ à partir de la période de « *viabilité* » (*viability*) [de l'enfant à naître], les pouvoirs publics, mus par la considération d'une « *vie humaine potentielle* », peuvent réglementer l'avortement, et même l'interdire, à moins que celui-ci ne soit nécessaire à la lumière d'un avis médical approprié en vue de la préservation de la vie et de la santé de la mère.

C'est ce guide législatif que certains (juristes ou non) sont convenus de résumer dans l'idée selon laquelle *Roe v. Wade* a posé un *double critère trimestriel* et un *critère de la viabilité*. »[2]

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[1] Ce gallicisme ne figure pas littéralement dans l'arrêt de la Cour suprême.

[2] Le "droit à l'avortement" dans l'agenda constitutionnel et politique américain contemporain, *Politeia*, n°27, p. 597-618 http://lexpolamerica.com/Le-droit-a-l-avortement-dans-l.html

Le deuxième critère – celui de la viabilité de l'enfant à naître – a une histoire originale : il n'a pas été plaidé devant la Cour. Il n'apparaît pour la première fois dans un document dans lequel il n'était pas supposé apparaître, soit **un rapport en vue de l'audience remis en octobre 1972 au juge Lewis Powell par l'un de ses assistants, Larry Hammond**. Loin de s'en tenir, selon l'usage, à un strict exposé des faits et des arguments des parties, Larry Hammond avait cru pouvoir attirer l'attention de « son » juge sur la disponibilité de ce critère. « La note d'audience de Hammond à Powell en octobre 1972, écrit le juriste James D. Robenalt, est sans doute la plus importante jamais produite par un assistant juridique de la Cour suprême ».

Larry Hammond est né en 1946 à El Paso de parents épiscopaliens « ayant de fortes convictions religieuses ». Il étudia le droit au Texas avant d'être engagé comme stagiaire par la cour fédérale d'appel à Washington, d'où il rejoignit l'été 1971 le juge Hugo Black à la Cour suprême. En septembre 1971, le décès du juge Black de crises cardiaques fit de Larry Hammond un assistant sans juge. « Il en était réduit à accompagner des écoliers lors de visites de la Cour suprême, à jouer au basket-ball dans les locaux de la Cour et à passer ses après-midi à discuter avec le juge Thurgood Marshall », écrit James D. Robenalt. « Selon la tradition, il aurait dû quitter ses fonctions à la fin du mandat de la Cour, mais le destin est intervenu. Le président Richard Nixon nomme l'avocat de Virginie Lewis Powell pour remplacer Black, et Powell décide de garder Hammond. Leur partenariat a été immédiat. Powell écrira à Hammond lorsqu'il aura terminé son stage : *"Je pense que vous êtes l'un des avocats les plus compétents avec qui j'ai jamais travaillé. Votre capacité d'analyse juridique pénétrante est exceptionnelle"* ».

Larry Hammond est décédé en 2020.

*

Sur Larry Hammond et son rapport d'audience au juge Powell, voir James Robenalt, *January 1973: Watergate, Roe V. Wade, Vietnam, and the Month That Changed America Forever*, Chicago Review Press, 2017.

Voir également : Joan Biskupic, « How the Supreme Court crafted its Roe v. Wade decision and what it means today », *CNN*, 23 septembre 2021.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 18, 1972

Dear Chief:

This is in response to your memorandum of January 17 concerning reargruments.

I nominate for reargument the two abortion cases, No. 70-18, Roe v. Wade, and No. 70-40, Doe v. Bolton. It seems to me that the importance of the issues is such that the cases merit full bench treatment.

I think another candidate is No. 70-58, Fein v. Selective Service System.

So far as your nominations are concerned, my reaction is that No. 70-45, United States v. Brewster, because of its fundamental importance and precedent, deserves reargument, and that No. 70-5061, Kirby v. Illinois, should also be reconsidered. Justice White's separate concurrence certainly so indicates.

In summary, I vote to set down for reargument Nos. 70-18 and 70-40, No. 70-45 and No. 70-5061. I shall abide by the Conference's reaction as to No. 70-58.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 18, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 70-18 - Roe v. Wade

Herewith is a first and tentative draft for this case.

Due to the presence of multiple parties and the existence of issues of standing and of appellate routes, it may be somewhat difficult to obtain a consensus on all aspects. My notes indicate, however, that we were generally in agreement to affirm on the merits. That is where I come out on the theory that the Texas statute, despite its narrowness, is unconstitutionally vague.

I think that this would be all that is necessary for disposition of the case, and that we need not get into the more complex Ninth Amendment issue. This may or may not appeal to you.

In any event, I am still flexible as to results, and I shall do my best to arrive at something which would command a court. Would it be advisable, rather than having numerous concurring and dissenting opinions immediately written, to have each of you express his general views in order to see if we can come together on something?

The Georgia case, yet to come, is more complex. I am still tentatively of the view, as I have been all along, that the Georgia case merits reargument before a full bench. I shall try to produce something, however, so that we may look at it before any decision as to that is made.

Sincerely,

H. A. B.

Reviewed 10/2/72 I doubt the validity of the Texas statute as an unduly (perhaps) but I am not persuaded that it is vague.

Why not consolidate Texas + Ga cases + rely on Ga. & type analysis — if we are to invalidate these laws? (There are "off-cuff" reactions & are subject to further study.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Blackmun, J.

Circulated: 5/18/72

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 70-18

Jane Roe et al., Appellants, v. Henry Wade.	On Appeal from the United States District Court for the Northern District of Texas.

[May —, 1972]

Memorandum of MR. JUSTICE BLACKMUN.

Under constitutional attack here are abortion laws of the State of Texas.[1] 2A Texas Penal Code, Arts.

[1] "Article 1191. Abortion

"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.

"Art. 1192. Furnishing the means

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

"Art. 1193. Attempt at abortion

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

"Art. 1194. Murder in producing abortion

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

"Art. 1196. By medical advice

"Nothing in this chapter applies to an abortion procured or at-

1191–1194 and 1196 (1961). These statutes make it a crime to "procure an abortion," as therein defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

"saving life of M." mother only lawful basis

I

Jane Roe,[1] a single woman residing in Dallas County, Texas, in March 1970 instituted this federal suit against the District Attorney of the county. The plaintiff sought (1) a declaratory judgment that the Texas abortion laws are unconstitutional on their face and (2) an injunction restraining the defendant from enforcing the challenged statutes.

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure there a legal abortion under safe conditions. By an amendment to her complaint, Roe purported to sue "on behalf of herself and all other women" similarly situated. She claimed a deprival of rights protected by the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments.

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tempted by medical advice for the purpose of saving the life of the mother."

"The foregoing Articles, together with Art. 1195, comprise Chapter 9 of Title 15 of the Penal Code. Article 1195, not attacked here, reads:

"Art. 195. Destroying unborn child

"Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years."

[1] The name is a pseudonym.

James Hubert Hallford, a physician licensed under Texas law, sought, and was granted, leave to intervene in the Roe suit. In his complaint in intervention the doctor specified types of conditions he saw in pregnant women who came to him as patients.

John and Mary Doe,[2] a married couple, filed a companion complaint to that of Roe. This also names the District Attorney as defendant, claimed like constitutional deprivations, and sought declaratory and injunctive relief. The Does alleged that they were a childless couple; that Mrs. Doe was suffering from a "neural-chemical" disorder; that her physician had "advised her to avoid pregnancy until such time as her condition was materially improved, although a pregnancy at the present time would not present a serious risk" to her life; that pursuant to medical advice she had discontinued use of birth control pills; and that if she should become pregnant, she would want to terminate the pregnancy by an abortion performed by a competent, licensed physician under safe, clinical conditions. By an amendment to their complaint, the Does purported to sue "on behalf of themselves and all couples similarly situated."

The two actions were consolidated and heard together by a duly convened three-judge district court. The suits thus presented the situations of the pregnant single woman, the childless and nonpregnant married couple, and the licensed practicing physician, all joining in the attack upon the Texas abortion laws. Upon the filing of affidavits, motions were made to dismiss and for summary judgment. The court found that Roe and Dr. Hallford, and members of their respective classes, had standing, but that the Does had failed to allege facts sufficient to state a present controversy and therefore

[2] These names also are pseudonyms.

did not have standing. It concluded that, on the declaratory judgment request, abstention was not warranted; that the "fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment"; that the Texas abortion laws were void on their face because they were both overbroad and vague; and that abstention was warranted with respect to the request for an injunction. The court then dismissed the Doe complaint, declared the abortion laws void, and dismissed the application for an injunction. 314 F. Supp. 1217 (ND Tex. 1970).

The plaintiffs Roe and Doe and the intervenor, pursuant to 28 U. S. C. § 1253, appealed to this Court from that part of the District Court's judgment denying injunctive relief. The defendant District Attorney filed a notice of appeal, pursuant to the same statute, from the District Court's grant of declaratory relief to Roe and Dr. Hallford. Both sides also have taken protective appeals to the United States Court of Appeals for the Fifth Circuit; that court ordered those appeals held in abeyance pending decision here.

We postponed the decision on jurisdiction to the hearing on the merits. 402 U. S. 941 (1971).

II

It might have been preferable if the defendant, pursuant to our Rule 20, had presented to us a petition for certiorari before judgment in the Court of Appeals with respect to the granting, adverse to him, of declaratory relief. Furthermore, we are aware that, under *Mitchell* v. *Donovan*, 398 U. S. 427 (1970), and *Gunn* v. *University Committee*, 399 U. S. 383 (1970), § 1253 does not authorize an appeal to this Court from the grant or the denial of declaratory relief alone. We conclude, nevertheless, that those decisions do not prevent

our review of both the injunctive and the declaratory aspects of a case of this kind when it is properly here, as this one is, on appeal under § 1253 from specific denial of injunctive relief, and the arguments as to both aspects are necessarily identical. See *Carter* v. *Jury Commission*, 396 U. S. 320 (1970), and *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73, 80–81 (1960). It would be destructive of time and energy for all concerned were we to rule otherwise.

III

We are next confronted with issues of justiciability, standing and abstention. Do Roe and the Does have that "personal stake in the outcome of the controversy," *Baker* v. *Carr*, 369 U. S. 186, 204 (1962), that insures that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution," *Flast* v. *Cohen*, 392 U. S. 83, 101 (1968), and *Sierra Club* v. *Morton*, — U. S. — (1972)? And what effect does the pendency of criminal charges against Dr. Hallford in state court, for violating the same Texas abortion laws, have upon the propriety of the federal court's granting relief to him as a plaintiff-intervenor?

A. Jane Roe. Despite the use of the pseudonym, it is not suggested that Roe is a fictitious person. For purposes of her case, we accept as true her existence, her pregnant state as of the time of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit with the District Court, and her inability to secure a legal abortion in Texas.

Viewing Roe's case as of the time of its filing and as late as May 21, there can be little dispute that it then presented a case or controversy and that, wholly apart from the class aspects, she, as a pregnant single

woman thwarted by the State's abortion laws, had standing to challenge them. Indeed, we do not read the appellee's brief as really asserting anything to the contrary. The "logical nexus between the status asserted and the claim sought to be adjudicated," *Flast* v. *Cohen*, 392 U. S., at 102, and the necessary degree of contentiousness, *Golden* v. *Zwickler*, 394 U. S. 103 (1969), are both present.

The appellee notes, however, that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970,* or on June 17 when the court's opinion and judgment were filed. He therefore suggests that Roe's case is now moot because she and all others like her are no longer subject to any 1970 pregnancy.

The usual rule in federal cases is that the existence of an actual controversy is necessary at all stages of appellate or certiorari review and not only at the date the action is initiated. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39–41 (1950); *Golden* v. *Zwickler*, 394 U. S., at 108; *SEC* v. *Medical Committee for Human Rights*, 404 U. S. 403, 405 (1972). But if, as here, pregnancy is a significant fact in litigation, the 266-day human gestation period is so short that the pregnancy will have terminated before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom, if ever, will survive beyond the trial stage, if then, and appellate review will be effectively denied. Our law is not that rigid. Pregnancy often comes more than once to the same woman

* The appellee's brief, p. 13, twice states that the hearing before the District Court was held on July 22, 1970. The docket entries, Appendix 2, and the transcript, Appendix 76, disclose this to be an error. The July date apparently is the time of the reporter's transcription. Appendix 77.

and in the general population, if man is to survive, it is always with us.

Pregnancy provides almost a classic justification for a conclusion of nonmootness. Otherwise, it is "capable of repetition, yet evading review." See *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 515 (1911); *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969); *Carroll* v. *President and Commissioners*, 393 U. S. 175, 178–179 (1968); *Sibron* v. *New York*, 392 U. S. 40, 50–53 (1968); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632–633 (1953).

We therefore agree with the District Court that Jane Roe had standing to undertake this litigation and that the termination of her 1970 pregnancy did not render the case moot.

① standing
② mootness

B. Dr. Hallford. The doctor's position is different from that of Roe and from that of the Does. He came into Roe's litigation as a plaintiff-intervenor alleging in his complaint that he:

> "in the past has been arrested for violating the Texas Abortion Laws and at the present time stands charged by indictment with violating said laws in the Criminal District Court of Dallas County, Texas to-wit: (1) The State of Texas vs. James H. Hallford, No. C-69-5307-IH, and (2) The State of Texas vs. James H. Hallford, No. C-69-2524-H. In both cases the defendant is charged with abortion . . . ."

In his immediately preceding application for leave to intervene the doctor made like representations as to the abortion charges pending in the state court. These representations were also repeated in the affidavit he executed and filed in support of his motion for summary judgment.

Dr. Hallford is therefore in the situation of seeking, in a federal court, declaratory and injunctive relief with respect to the same state statutes under which he is charged in criminal prosecutions simultaneously pending in state court. Although he stated that he has been arrested in the past for violating the State's abortion laws, he makes no allegation of any extraordinary circumstance, where the danger of irreparable loss is great and immediate in posing a threat to any federally protected right, that cannot be eliminated by his defense against the state prosecutions. Neither is there any allegation of harassment or bad faith prosecution. He seeks now, for purposes of standing, to draw a distinction between pending prosecutions and possible future ones. We see no merit in that distinction. Under the circumstances, therefore, our decision last Term in *Samuels* v. *Mackell*, 401 U. S. 66 (1971), compels the conclusion that the District Court erred when it granted declaratory relief to Dr. Hallford and failed to refrain from doing so. The court, of course, was correct in refusing to grant injunctive relief to the doctor; the reasons supportive of that action, however, are those expressed in *Samuels* v. *Mackell*, *supra*, and in *Younger* v. *Harris*, 401 U. S. 37 (1971); *Boyle* v. *Landry*, 401 U. S. 77 (1971); *Perez* v. *Ledesma*, 401 U. S. 82 (1971); and *Byrne* v. *Karalexis*, 401 U. S. 216 (1971). See also *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). We note, in passing, that *Younger* and its companion cases were decided after the three-judge District Court's decision here.

Dr. Hallford's complaint in intervention, therefore, is to be dismissed.[5] He is remitted to his defenses in

[5] We need not consider what different result, if any, would follow if Dr. Hallford's intervention were on behalf of a class. His complaint in intervention does not purport to assert a class suit and makes no reference to any class apart from an allegation that he "and others similarly situated" must necessarily guess at the mean-

the state criminal proceedings against him. We therefore reverse the judgment of the District Court to the extent that it granted Dr. Hallford relief and failed to dismiss his complaint in intervention.

C. The Does. In view of our ruling as to Roe's standing in her case, the issue of the Does' standing in their case has little significance. The claims they assert are essentially the same as those of Roe, and the statutes they attack are the same. Nevertheless, we briefly refer to the Does' posture.

Their pleadings present them as a childless married couple, the female not being pregnant, who have no desire to have children at this time because of their having received medical advice that Mrs. Doe should avoid pregnancy, and for "other highly personal reasons." But they "fear . . . they may face the prospect of becoming parents." And if pregnancy ensues, they "would want to terminate" it by an abortion. They then assert the inability to obtain an abortion legally in Texas and, consequently, their facing the alternatives of an illegal abortion there or of going outside Texas to some place where the procedure could be obtained legally and competently.

We thus have a married couple as plaintiffs who have, as their asserted immediate and present injury, only an alleged "detrimental effect upon [their] marital happiness' because they are forced to "the choice of refraining from normal sexual relations or of endangering

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ing of Art. 1196. His application for leave to intervene goes a little further for it asserts that plaintiff Roe does not adequately protect the interest of the doctor "and the class of people who are physicians . . . and the class of people who are . . . patients . . . ." The leave application, however, is not the complaint. Despite the District Court's statement to the contrary, 314 F. Supp., at 1225, we fail to perceive the bare essentials of a class suit in the Hallford complaint.

Mary Doe's health through a possible pregnancy." But they are a couple who, in the future, might develop a condition on Mrs. Doe's part brought about by future intercourse and the future failure of those contraceptive measures they feel they might safely employ, and who thereupon, at that time in the future, might want an abortion that might then be unavailable to them legally under the Texas statute.

This very phrasing of the Doe's position reveals the speculative basis of their alleged injury. It is well settled in Texas that Mrs. Doe may not be a principal or an accomplice under Art. 1191 with respect to any abortion upon her and thus is not herself subject to prosecution under the Texas abortion laws. *Watson* v. *State*, 9 Tex. App. 237, 244-245 (1880); *Moore* v. *State*, 37 Tex. Cr. Rep. 552, 561, 40 S. W. 287, 290 (1897); *Shaw* v. *State*, 73 Tex. Cr. Rep. 337, 339, 165 S. W. 930, 931 (1914); *Fondren* v. *State*, 74 Tex. Cr. Rep. 552, 557, 169 S. W. 411, 414 (1914); *Gray* v. *State*, 77 Tex. Cr. Rep. 221, 229, 178 S. W. 337, 341 (1915).[8] And their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place and all may not combine. These possibilities, in the Does' estimation, might have some real or imagined impact upon their marital

[8] There is no immunity in Texas for the father who is not married to the mother. *Hammett* v. *State*, 84 Tex. Cr. Rep. 635, 209 S. E. 661 (1919). But we have found no case that determines the issue as to the husband of the aborted mother. Since the appellants do not claim or demonstrate that the statute has been used against husbands, and since prosecution is dependent upon the further contingency that Mrs. Doe's husband aid in obtaining an abortion, if one becomes necessary or desirable, we conclude that Doe's status in this case is not materially different from his wife's.

happiness. But we are not prepared to say that the bare allegation of so indirect an injury is sufficient for their case to present an actual case or controversy. We conclude, as a consequence, that they have no standing to pursue the lawsuit they have initiated. *Golden* v. *Zwickler*, *supra*, 394 U. S., at 109–110 (1969); *Younger* v. *Harris*, 401 U. S., at 41–42. Their purported case falls far short factually of those resolved otherwise in the cases, *Investment Company Institute* v. *Camp*, 401 U. S. 617 (1971), *Data Processing Service* v. *Camp*, 397 U. S. 150 (1970), and *Epperson* v. *Arkansas*, 393 U. S. 97 (1968), that the Does urge upon us.

The Does, therefore, are not appropriate plaintiffs in this litigation. Their complaint was properly dismissed by the District Court and we affirm that dismissal.

IV

We turn to the merits. The Texas abortion laws are not new. They appeared in essentially their present form as Arts. 1071–1076 of Texas Revised Criminal Statutes, 1911. And they read substantially the same as Arts. 536–541 of Revised Statutes of Texas, 1879, and as Arts. 2192–2197 of Paschal's Laws of Texas, 1866. The final article in each of these compilations made reference, as does the present Art. 1196, to "medical advice for the purpose of saving the life of the mother."

1866

A. Long ago a suggestion apparently was made that the Texas statutes were unconstitutionally vague because of definitional deficiencies. The Texas Court of Criminal Appeals had little difficulty with that suggestion for it disposed of it peremptorily:

> "It is also insisted in the motion in arrest of judgment that the statute is unconstitutional and void in that it does not sufficiently define or describe the offense of abortion. We do not concur [with

counsel] in respect to this question." *Jackson* v. *State*, 55 Tex. Cr. Rep. 79, 89; 115 S. W. 262, 268 (1908).

We are advised, however, that the same court, on November 2, 1971, in *Thompson* v. *State*, No. 44,071, an opinion apparently not yet published, held, against constitutional challenge, that the Texas abortion laws are not vague or overbroad. The copy of the opinion with which we have been furnished indicates that the court held "that the State of Texas has a compelling interest to protect fetal life"; that Art. 1191 "is designed to protect fetal life," citing *Mayberry* v. *State*, 271 S. W. 2d 635 (Tex. Crim. App. 1954); that the Texas homicide statutes, particularly 2A Texas Penal Code Art. 1205, are intended to protect a person "in existence by actual birth" and thereby implicitly recognize other human life that is not "in existence by actual birth"; that the definition of human life is for the legislature and not the courts; that Art. 1196 "is more definite than the District of Columbia statute upheld in *Vuitch*"; and that the Texas statute "is not vague and indefinite or overbroad." A physician's abortion conviction was therefore affirmed.[1] The *Thompson* case thus appears to be a flat and recent holding by the Texas court that the State's abortion laws are not unconstitutional for vagueness.

Thompson

Elsewhere, decisions on constitutional challenges, on various grounds, to other state abortion statutes do not appear to be fully consistent. See *Babbitz* v. *McCann*, 310 F. Supp. 293, 297–298 (ED Wis. 1970), appeal dismissed, 400 U. S. 1 (1970); *Rosen* v. *Louisiana State*

[1] In a footnote the Texas court observed that any issue as to the burden of proof under the exemption of Art. 1196 "is not before us." See *Veevers* v. *State*, 354 S. W. 2d 161, 166 (Tex. Cr. App. 1962). Cf. *United States* v. *Vuitch*, 402 U. S. 62, 69–71 (1971).

Board of Medical Examiners, 318 F. Supp. 1217 (ED La. 1970), appeal pending; *Steinberg* v. *Brown*, 321 F. Supp. 741 (ND Ohio 1970); *Doe* v. *Scott*, 321 F. Supp. 1385 (ND Ill. 1971), appeal pending; *Corkey* v. *Edwards*, 322 F. Supp. 1248 (WDNC 1971), appeal pending; *Doe* v. *Rampton*, — F. Supp. — (Utah 1971), appeal pending; *People* v. *Belous*, 71 Cal. 2d 954, 458 P. 2d 194 (1969), cert. denied, 397 U. S. 915 (1970).

B. Last Term, in *United States* v. *Vuitch*, 402 U. S. 62 (1971), decided after the District Court's ruling in the present cases was handed down, we had under consideration a District of Columbia statute that made the procuring of an abortion a crime unless it "were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine." The District Court had dismissed a physician's indictment under that statute on the ground that it was unconstitutionally vague. This Court reversed that dismissal and remanded the case. MR. JUSTICE DOUGLAS was of the view that the statute failed to meet the requirements of procedural due process, 402 U. S., at 74, and dissented in part. MR. JUSTICE STEWART, also dissenting in part, 402 U. S., at 96, was of the opinion that a "competent licensed practitioner of medicine" was wholly immune from being charged with the commission of a criminal offense under the District of Columbia statute.

The vagueness claim in *Vuitch* focused only on the word "health" in the District statute and on its application to mental as well as to physical well-being. The Texas statute, Art. 1196, with which we are here concerned, exempts from criminal abortion, described in Art. 1191, only an abortion procured "by medical advice for the purpose of saving the life of the mother." No reference whatsoever is made to health. Saving the mother's life is the sole standard. *Vuitch*'s analysis was

that the word "health" in the statute was employed in accord with general usage and modern understanding and included psychological as well as physical well-being, and thus presented no problem of vagueness, because this "is a judgment that physicians are obviously called upon to make routinely," 402 U. S., at 72, and is of little assistance here. Certainly it provides no answer to the constitutional challenge to the Texas statute.

C. We are not here concerned with broad areas of medical judgment as to health generally. We are concerned, in contrast, with a procedure that is exempt from criminality only if it is "for the purpose of saving the life of the mother." So viewed, we encounter difficulties of great consequence under the vagueness challenge.

The exempting Art. 1196, of course, has application only to one rendering "medical advice." Although even this is by no means certain or clear, we assume, for purposes of simplifying the issue, that this protective provision is available only to the licensed physician, and is not available to the unlicensed physician or particularly to the nonphysician who would procure the abortion under the guise of rendering "medical advice," whatever that may mean as applied to him. But what does the statute say even for the licensed physician? Does it mean that he may procure an abortion only when, without it, the patient will surely die? Or only when the odds are greater than even that she will die? Or when there is a mere possibility that she will not survive? So far as we can determine, the Texas courts have not limited the statute and have only repeated its phrasing. See *Ex parte Vick*, 292 S. W. 889, 890 (Tex. Crim. App. 1927). Further, who is to exercise that judgment—the physician alone in the light of his training and experience, or a group or committee of his peers, or a medical association, or a hospital review committee? And when is the saving of a life to be measured in the time scale?

Vuitch held not vague since could decide as a commonly known term

① when is life in danger

② who makes judgment

Must death be imminent? Or is it enough if life is prolonged for a year, a month, a few days, overnight? Is a mother's life "saved" if a post-rape or post-incest or "fourteenth-child" abortion preserves, or tends to preserve, her mental health? If the procedure is generally favorable to the mother's health, is her life thereby "saved" within the meaning of the statute? One's well-being and the very continuance of life depends sometimes on slender differences in medical treatment, in body chemistry, in exposure to infection, and in medical knowledge.

does one more nearly expressed

The applicable standard is whether the statute is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application," *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926); *Cameron* v. *Johnson*, 390 U. S. 611, 616 (1968), or, phrased another way:

> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio* v. *Pennsylvania*, 382 U. S. 399, 402–403 (1966).

We conclude that Art. 1196, with its sole criterion for exemption as "saving the life of the mother," is insufficiently informative to the physician to whom it purports to afford a measure of professional protection but who must measure its indefinite meaning at the risk of his liberty, and that the statute cannot withstand constitutional challenge on vagueness grounds.

V

This conclusion that Art. 1196 is unconstitutionally vague means, of course, that the Texas abortion laws,

as a unit, must fall. The medical exception of Art. 1196 does not go out alone for then the State would be left with a statute proscribing all abortion procedures no matter how medically urgent the cause. Then, too, the physician's professional obligation and duty would be improperly thwarted.

Our holding today does not imply that a State has no legitimate interest in the subject of abortions or that abortion procedures may not be subjected to control by the State. The nub of the matter is the appropriateness of the control when criminal sanctions are imposed. We do not accept the argument of the appellants and of some of the *amici* that a pregnant woman has an unlimited right to do with her body as she pleases. The long acceptance of statutes regulating the possession of certain drugs and other harmful substances, and making criminal indecent exposure in public, or an attempt at suicide, clearly indicate the contrary.

There is no need in Roe's case to pass upon her contention that under the Ninth Amendment a pregnant woman has an absolute right to an abortion, or even to consider the opposing rights of the embryo or fetus during the respective prenatal trimesters. We are literally showered with briefs—with physicians and paramedical and other knowledgeable people on both sides—but this case, as it comes to us, does not require the resolution of those issues.

VI

Although the District Court granted plaintiff Roe and intervenor Hallford declaratory relief, it stopped short of issuing an injunction against enforcement of the Texas abortion laws. The Court has recognized that different *considerations enter into a federal court's determination* of declaratory relief, on the one hand, and injunctive relief, on the other. *Zwickler* v. *Koota*, 389 U. S. 241,

252–255 (1967); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). We are not dealing here with a statute that, on its face, appears to abridge free expression, an area of particular concern under *Dombrowski* and refined in *Younger* v. *Harris*, 401 U. S., at 50.

We find it unnecessary to decide whether the District Court erred in withholding injunctive relief for we assume that the Texas prosecutorial authorities will give full credence to the decision of this Court relative to the constitutional invalidity of the Texas abortion laws.

The judgment of the District Court as to intervenor Hallford is reversed and Dr. Hallford's complaint in intervention is dismissed. In all other respects, the judgment of the District Court is affirmed. Costs are allowed to the appellee.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: White, J.

Circulated: 5-29-72

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 70-18

Jane Roe et al., Appellants, v. Henry Wade. | On Appeal from the United States District Court for the Northern District of Texas.

[May —, 1972]

Reviewed 10/2/72 I agree that Texas statute is not unconst. vague. But I'm not clear as to what this draft leaves the Texas statute. Does J. White think Tex. statute is valid?

MR. JUSTICE WHITE, dissenting.

I dissent from the Court's decision that the Texas abortion statute, which allows abortions only when they are "procured or attempted by medical advice for the purpose of saving the life of the mother," 2A Texas Penal Code Art. 1196, is unconstitutionally vague.

This decision necessarily overrules *United States* v. *Vuitch*, 402 U. S. 62 (1971), decided only last Term, which upheld against vagueness attack D. C. Code Ann. § 22-201 which allowed abortion only when "necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine." In that case, a district court had dismissed an indictment on the ground that the statutory standard was unconstitutionally vague, 305 F. Supp. 1032, and the Government appealed directly to this Court, which reversed the District Court's decision. The vagueness discussion in *Vuitch* did not, as the majority asserts, "focus . . . only on the word 'health,'" although the greater part of the discussion in this Court's opinion and in that of the District Court was devoted to parsing that phrase. The lower court had treated the statutory standard as the "preservation-of-life-or-health standard," 305 F. Supp., at 1035, as did this Court, 402 U. S., at 70, 71. Furthermore, the decision that the "preservation-of-life" standard is not impermissibly vague was a necessary part

of the Court's holding, since it would otherwise have been forced to affirm the District Court's decision voiding the statute, despite the fact that it had overruled that court's decision regarding the vagueness of the "preservation-of-health" standard. Instead, the Court upheld the D. C. statute in its entirety.

If called upon to reconsider this Court's decision in *Vuitch*, I would reaffirm it and would not, therefore, void the Texas statute on vagueness grounds. If a standard which refers to the "health" of the mother, a referent which necessarily entails the resolution of perplexing questions about the interrelationship of physical, emotional, and mental well-being, is not impermissibly vague, a statutory standard which focuses only on "saving the life" of the mother would appear to be *a fortiori* acceptable. The Court's observation that "whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered," 402 U. S., at 72 (footnote omitted), is particularly applicable to medical decisions as to when the life of a mother is endangered, since the relevant factors in the latter situation are less numerous and are primarily physiological.

Finally, the vagueness claim is not properly presented in appellant Roe's attack on the Texas statute. There is no question that Art. 1196 does not authorize abortions-by-request and that it instead articulates a standard which a woman seeking an abortion would recognize as relevant to her case. Any Texas doctor would similarly realize that an abortion could not be performed unless the requirements of Art. 1196, whatever they might be, were met. On its face, therefore, the statute divides women seeking abortions into two classes: those who make some claim that an abortion is necessary to save their life and those who do not. Assuming that the stat-

utory standard is impermissibly vague, confusion and uncertainty will be created among women in the former group. Appellant Roe, however, falls into the latter group, since her complaint asserts that she desires an abortion "[b]ecause of the economic hardships and social stigmas involved in bearing an illegitimate child," and admits that her "life does not appear to be threatened by the continuation of her pregnancy." (R., at 11.) Indeed, appellant Roe argues at length that the right to terminate an unwanted pregnancy, for whatever reason, is an integral part of constitutionally protected rights of privacy. (Brief of Appellants, at 99–109.) For such women, who make no claim that an abortion is necessary for the purpose of saving their life, the possible vagueness of the statutory standard is irrelevant since, however, the class of women is defined who qualify for an abortion because their life is somehow endangered, they are *ipso facto* outside of this class. "The underlying principle [of the void for vagueness doctrine] is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss*, 347 U. S. 612, 617 (1954). See also: *United States* v. *National Dairy Corp.*, 372 U. S. 29, 32–33 (1963); *Jordan* v. *De George*, 341 U. S. 223, 231 (1951); *United States* v. *Petrillo*, 332 U. S. 1, 7 (1947). Whatever merit appellant's Ninth Amendment and related claims may have, it cannot be rationally contended that it is not perfectly apparent that the abortion she desires is clearly prohibited by the Texas statute. This is not a case involving "the transcendent value to all society of constitutionally protected expression," *Gooding* v. *Wilson*, 405 U. S. —, — (1972), in which appellant might have standing to attack the possible infirmity of the statute as applied to members of another class. Cf. *Baggett* v. *Bullitt*, 377 U. S. 360, 366 (1964); *NAACP* v. *Button*, 371 U. S. 415, 433 (1963).

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: White, J.

Circulated: 5-29-72

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 70-18

Jane Roe et al., Appellants, v. Henry Wade. | On Appeal from the United States District Court for the Northern District of Texas.

[May —, 1972]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 30, 1972

72-40 - Doe v. Bolton

Dear Harry,

Confirming our telephone conversation of yesterday, I am in basic agreement with your memorandum in this case, subject to modifications which I understand you intend to make.

Sincerely yours,

HAB

Mr. Justice Blackmun

Copies to the Conference

5/31/72--LAH

Re: Abortion cases

File

Judge:

Attached is a flurry of notes that have been circulated today in these abortion cases. Justice Blackmun, the author of the opinions for the Court in these two cases striking down the Texas and Georgia statutes, has gingerly suggested the possibility of reargument. The vote is 5-2. Justices Marshall, Douglas, and Brennan have circulated notes urging the contrary course. I assume that, consistent with the principle you have adhered to heretofore, you will wish to state no view on these cases. If you desire, however, I will supply you with copies of the opinions and abstracts them for you.

LAH

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 31, 1972

Re: No. 18 - Roe v. Wade
No. 49 - Doe v. Bolton

Dear Harry:

I like Bill Rehnquist, I, too, am opposed to reargument of these cases.

Sincerely,

T.M.

Mr. Justice Blackmun

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 31, 1972

MEMORANDUM TO THE CONFERENCE

Re: Abortion Cases

I have had a great many problems with these cases from the outset. They are not as simple for me as they appear to be for others. The states have, I should think, as much concern in this area as in any within their province; federal power has only that which can be traced to a specific provision of the Constitution.

Perhaps my problem arises from the mediocre to poor help from counsel. On reargument, I would propose we appoint amici for both sides, but that can wait. This is as sensitive and difficult an issue as any in this Court in my time and I want to hear more and think more when I am not trying to sort out several dozen other difficult cases.

Hence, I vote to reargue early in the next Term.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 31, 1972

Re: Abortion Cases

Dear Harry:

I have your memorandum submitted to the Conference with the suggestion that these cases be reargued.

I feel quite strongly that they should not be reargued. My reasons are as follows.

In the first place, these cases which were argued last October have been as thoroughly worked over and considered as any cases ever before the Court in my time.

I know you have done yeoman service and have written two difficult cases, and you have opinions now for a majority, which is 5.

There are always minor differences in style, one writing differently than another. But those two opinions of yours in Texas and Georgia are creditable jobs of craftsmanship and will, I think, stand the test of time.

While we could sit around and make pages of suggestions, I really don't think that is important. The important thing is to get them down.

In the second place, I have a feeling that where the Court is split 4-4 or 4-2-1 or even in an important constitutional case 4-3, reargument may be desirable. But you have a firm 5 and the firm 5 will be behind you in these two opinions until they come down. It is a difficult field and a difficult subject. But where there is that solid agreement of the majority I think it is important to announce the cases, and let the result be known so that the legislatures can go to work and draft their new laws.

Again, congratulations on a fine job. I hope the 5 can agree to get the cases down this Term, so that we can spend our energies next Term on other matters.

W. O. D.

Mr. Justice Blackmun

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 31, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 70-18 - Roe v. Wade
No. 70-40 - Doe v. Bolton

Nearly all of you, other than Lewis Powell and Bill Rehnquist, have been in touch with me about these cases. A number of helpful and valid suggestions have been made.

You will recall that when we were canvassing the list for possible candidates for reargument when the bench would be full, I suggested that, although the Texas case perhaps might come down, the Georgia case should go over. This suggestion was not enthusiastically received. It was the consensus, as I recall, that I produce some drafts and we would see what reactions ensued. I have done this and, frankly, I prepared the Texas memorandum the way I did in the hope that we might come near to agreement there irrespective of the disposition of the Georgia case.

Although it would prove costly to me personally, in the light of energy and hours expended, I have now concluded, somewhat reluctantly, that reargument in both cases at an early date in the next term, would perhaps be advisable. I feel this way because:

1. I believe, on an issue so sensitive and so emotional as this one, the country deserves the conclusion of a nine-man, not a seven-man court, whatever the ultimate decision may be.

2. Although I have worked on these cases with some concentration, I am not yet certain about all the details. Should we make the Georgia case the primary opinion and recast Texas in its light? Should we refrain from emasculation of the Georgia statute and, instead, hold it unconstitutional in its entirety and let the state legislature reconstruct from the beginning? Should we spell out -- although it would then necessarily be largely dictum -- just what aspects are controllable by the State and to what extent? For example, it has been suggested that upholding Georgia's provision as to a licensed hospital should be held unconstitutional, and the Court should approve performance of an abortion in a "licensed medical facility." These are some of the suggestions that have been made and that prompt me to think about a summer's delay.

I therefore conclude, and move, that both cases go over the Term.

Sincerely,

H. A. B.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 31, 1972

RE: No. 70-18 -Roe v. Wade
No. 70-40 - Doe v. Bolton

Dear Harry:

As I suggested, I see no reason to put these cases over for reargument. I am glad also, as I understand it, there are five of us (Bill Douglas, Potter, Thurgood, you and I) in substantial agreement with both opinions and in that circumstance I question that reargument would change things.

Sincerely,

WO

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 23rd
1970

Dear Chief:

I have your memo to the Conference dated May 21, 1970 on Abortion Cases.

If the vote of the Conference is to reargue, then I will file a statement telling what is happening to us and the tragedy it entails.

William O. Douglas

The Chief Justice
cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 1, 1972

MEMORANDUM TO THE CONFERENCE

Re: Abortion Cases

The question is whether the abortion cases should be reargued.

In the early weeks of my service on the Court a number of possible candidates for reargument were considered by the Conference. I took the position then, as did Bill Rehnquist, that the other seven Justices were better qualified to make these decisions. I therefore took no part in any of them.

The present question arises in a different context. I have been on the Court for more than half a term. It may be that I now have a duty to participate in this decision, although from a purely personal viewpoint I would be more than happy to leave this one to others. I have not read the briefs; nor have I read either of Harry's opinions. I am too concerned about circulating my own remaining opinions to be studying cases in which I did not participate. I certainly do not know how I would vote if the cases are reargued.

In any event, I have concluded that it is appropriate for me to participate in the pending question. I have read the memoranda circulated, and am persuaded to favor reargument primarily by the fact that Harry Blackmun, the author of the opinions, thinks the cases should be carried over and reargued next fall. His position, based on months of study, suggests enough doubt on an issue of large national importance to justify the few months delay.

Sincerely,

Sally

June 1, 1972

MEMORANDUM TO THE CONFERENCE

Re: Abortion cases

I concur in the views expressed by Lewis Powell in his memorandum to the Conference of June 1st, and therefore vote in favor of reargument.

Sincerely,

WMW

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 1, 1972

MEMORANDUM TO THE CONFERENCE

Re: Abortion Cases

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Sincerely,

Lewis

file

To : The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

6th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 70–18 AND 70–40

From: Douglas, J.

6/12/72

Jane Roe et al., Appellants,
70–18 *v.*
Henry Wade.

On Appeal from the United States District Court for the Northern District of Texas.

Mary Doe et al., Appellants,
70–40 *v.*
Arthur K. Bolton, as Attorney General of the State of Georgia, et al.

On Appeal from the United States District Court for the Northern District of Georgia.

We were advised on 6/19 that Douglas will not file this dissent.

[June —, 1972]

MR. JUSTICE DOUGLAS.

I dissent from the order putting these cases down for reargument.

The problem involving state abortion legislation is not a brand new one to the Court. *United States* v. *Vuitch*, 402 U. S. 62, involved the District of Columbia statute. It was argued January 12, 1971, and decided April 21, 1971. The case presented a troublesome question of the jurisdiction of this Court as well as a substantial constitutional question. Yet it was disposed of in shortly over three months after oral argument, Mr. Justice Black writing for the majority.

The present abortion cases involve the statute of Texas and the statute of Georgia. They were put down for argument last Term and were heard December 13, 1971. The Conference on the two cases was held on December 16, 1971.

THE CHIEF JUSTICE represented the minority view in the Conference and forcefully urged his viewpoint on

the issues. It was a seven-man Court that heard these cases and voted on them. Out of that seven there were four who initially took a majority view. Hence traditionally the senior Justice in the majority—who in this case was not myself—should have made the assignment of the opinion. For the tradition is a longstanding one that the senior Justice in the majority makes the assignment.[1] The cases were, however, assigned by THE CHIEF JUSTICE.

The matter of assignment is not merely a matter of protocol. The main function of the Conference is to find the consensus.[2] When that is known, it is only logical that the majority decide who their spokesman should be; and traditionally the selection has been made after a very informal discussion among the majority.

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[1] Chief Justice Hughes described the opinion assignment process as follows: "After a decision has been reached, the Chief Justice assigns the case for opinion to one of the members of the Court, that is, of course, to one of the majority if there is a division and the Chief Justice is a member of the majority. If he is in a minority, the senior Associate Justice in the majority assigns the case for opinion." C. Hughes, The Supreme Court of the United States 58–59 (1966). See also W. Brennan, Inside View of the High Court, The New York Time Magazine, October 6, 1963, at 35, 102; F. Frankfurter, Chief Justices I Have Known, in A. Westin, An Autobiography of The Supreme Court 211, 231 (1963); J. Harlan, Some Aspects of the Judicial Process in the Supreme Court of the United States, 33 Aust. L. J. 108, 116 (1959); T. Clark, Internal Operation of the United States Supreme Court, 43 J. Am. Jud. Soc. 45, 50–51 (1959).

[2] Chief Justice Hughes said of the Conference: "In the Supreme Court every judge comes to the conference to express his views and to vote, not knowing but that he may have the responsibility of writing the opinion which will accord with the vote. He is thus keenly aware of his responsibility in voting. It is not the practice in the Supreme Court to postpone voting until an opinion has been brought in by one of the judges which may be plausible enough to win the adherence of another judge who has not studied the case carefully." Op. cit., 59.

When that procedure is followed, the majority view is promptly written out and circulated, after which dissents or concurrences may be prepared.

When, however, the minority seeks to control the assignment, there is a destructive force at work in the Court.

Perhaps the purpose of the minority in the *Abortion Cases* is to try to keep control of the merits. If that is the aim, the plan has been unsuccessful. Opinions in these two cases have been circulated and each commands the votes of five members of the Court. The decisions should therefore be announced.[3]

The plea that the cases be reargued is merely another strategy by a minority somehow to suppress the majority view with the hope that exigencies of time will change the result. That might be achieved of course by death or conceivably retirement. But that kind of strategy dilutes the integrity of the Court.

Historically this institution has been composed of fiercely independent men with fiercely opposed views. There have been—and will always be—clashes of views. The Conference, though deeply disagreeing on legal and constitutional issues, has traditionally been a group marked by good-will. A majority view, no matter how unacceptable to the minority, has been honored as such. The incumbents have honored and revered the institution more than their own view of the public good.

The *Abortion Cases* are symptomatic. This is an election year. Both political parties have made abortion an issue. What the political parties say or do is none of our

[3] Last Fall we all agreed to deny a motion for additional oral argument in spite of counsel's admonition that the issues warranted more extended airing. 404 U. S. 813. And, though we again were advised that the cases were of paramount significance, we nonetheless denied a request by Texas to postpone argument until it could be heard by a full bench. 404 U. S. 981. That should have settled it.

business. We sit here not to make the path of any candidate easier or more difficult. We decide questions only on their constitutional merits. To prolong these *Abortion Cases* into the next election would in the eyes of many be a political gesture unworthy of the Court.

Five members of the Court have agreed on a disposition of the Texas and Georgia *Abortion Cases*. One dissent has already been written. Those opinions should come down forthwith.

A number of abortion cases are being held * for the present two cases. The log jam should be broken.

I dissent with the deepest regret that we are allowing the consensus of the Court to be frustrated.

---

* The cases now being held for the Texas and Georgia *Abortion Cases* are:

Rosen v. *Louisiana State Bd. of Medical Examiners*, 70–42 (La.)
Rodgers v. *Danforth*, 70-89 (Missouri)
Hanrahan v. *Doe*, 70–105 (Illinois)
Heffernan v. *Doe*, 70–106 (Illinois)
Corkey v. *Edwards*, 71–92 (North Carolina)
Thompson v. *Texas*, 71–1200 (Texas)
Doe v. *Rampton*, 71–5666 (Utah)

The State in parenthesis indicates the statute involved.

MEMORANDUM

TO: Mr. Larry A. Hammond DATE: October 6, 1972

FROM: Lewis F. Powell, Jr.

Abortion Cases

I have just read your cert note in 70-98 Abele v. Markle, in which Judges Lumbard and Newman, Circ. dissenting, struck down Connecticut's 1860 abortion law.

When we come to decision time in the pending abortion cases, keep in mind that we may wish to take a look at the Lumbard/Newman opinions.

L. F. P., Jr.

10/9/72--LHA
(Good memo)

BENCH MEMO

No. 70-18 OT 1972
Roe v. Wade
Appeal from USDC ND Texas

No. 70-40 OT 1972
Doe v. Bolton
Appeal from USDC ND Georgia

In view of the unusual posture of the abortion cases at present--with first draft opinions already circulated and a promise of recirculation from Justice Blackmun--it may be best not to treat this as an ordinary bench memo. Instead, I would like to outline the existing opinions by Justices Blackmun and White and to suggest the manner in which these cases might be disposed of best. I will also attempt to flag a number of the questions that we might wish to explore in more detail.

I. FACTS

(1) Roe v. Wade, No. 70-18

This case is actually two suits consolidated into a

single case by the three-judge ct in the USDC ND Texas. The plaintiff in one was was a fictitiously named pregnant woman who desired an abortion but was not sufficiently threatened in terms of her life to satisfy the statutory requirement. The plaintiffs in the second case were a fictitiously named married couple who were childless. The wife suffers from some disorder that has caused her physician to recommend that she avoid pregnancy. She was also advised to discontinue use of the more effective birth control methods. They would like to continue freely enjoying their marital relationship but feel deterred by the knowledge that if the wife becomes pregnant they may not have the means available to obtain an abortion. Finally, a third party has intervened in the case--a Dr. J.H. Hallford. He was the named defendant in a pending criminal state prosecution.

On a number of grounds, these plaintiffs sought injunctive and declaratory relief against enforecement of the Texas aborti on statute which permits a physician to perform an abortion only to "save the life of the mother." The DC, first, held that the individual pregnant woman (and her class) had standing and that the Dr. also had standing. Second, it found that the married couple's claim did not raise sufficient facts to state a present controversy. Third, it struck down the Texas abortion law on two grounds: (1) interference with a woman's fundamental right to control her reproductive process unsupported by a compelling state interest, and (2) vagueness of the word "life." On these

but for reasons of comity and respect for state-federal relationships refused to enjoin the Texas statute. The three classes of plaintiffs below appealed the denial of injunctive relief.

(2) Doe v. Bolton, No. 70-40

This is an action for declaratory and injunctive relief heard by a three-judge ct which was instituted by pregnant women, single and married, physicians, nurses, clergymen, and social workers, and nonprofit Georgia corporations. Plaintiff-Doe was an indigent, married woman who was pregnant and who had been advised that less danger to her health would be caused by an abortion than by having the child. She applied to the Abortion committee of one of the hospitals and her application was denied because her case did not fall within one of the categories of cases in which an abortion would be proper. The DC found that only the pregnant woman's claim was sufficiently controverted and immediate to satisfy the "case or controversy" requirement of Article III. On the merits, the DC recognized, as did the Texas DC, a fundamental right of a woman to deicde for herself whether she wished to continue her pregnancy. The DC held that insofar as the statute endeavored to restrict the circumstances or categories of cases in which an abortion would be permissible, it was unconstitutional. Insofar as it merely prescribed the manner in which the operation was to be performed, the restrictions were not found to be sufficiently intrusive of that fundamental right to warrant striking them down.

issue an injunction.

II JUSTICE BLACKMUN'S OPINIONS

(1) Roe v. Wade

Before reaching the constitutional issues, the opnion tackles the several jurisdictional claims. First, it finds that the fictitiously named pregnant woman and her class have standing to challenge the Texas law. The fact that the initial plaintiff is no longer pregnant is not preclusive since the very nature of the right asserted is one that arises frequently and, for obvious reasons, may easily evade review. This is standard mootness reasoning applied in cases in which the questions only arise in hurried circumstances. Second, the Doctor who was a defendant in a pending state criminal prosecution was found not to be properly allowed to intervene. This judgment was based on Samuels v. Mackell and Younger v. Harris. Those cases, decided after the DC opinions in these two cases, establish that federal courts should only intervene in extraordinary circumstances in the cases in which a state criminal prosecution is pending. Third, the opinion agrees with the DC that the married couple have not presented a basis for standing of sufficient immediacy to warrant considering their claim. Justice Blackmun concedes, however, that the absence of these parties does not make any difference in the case since the pregnant woman can present the requisite constitutional challenge.

On the merits the opinion rests on the vagueness grounds.

convey to the doctor in advance the circumstances in which he may perform an abortion. His reason follows closely the Texas DC reasoning. Must the doctor conclude that the patient will surely die before be may act? Or, may he act when there is more or less than a 50% chance of death if an abortion is not performed? Is the mere possibility of death of the mother enough? He also focuses indirectly on the word "save" in conjunction with the word "life" and wonders whether a life that is improved in terms of the mental or physical health of the patient is "saved."

His analysis differs from the DC only in that he must grapple with a precedent decided by this Ct after the Texas DC judgment--United States v. Vuitch, 402 U.S. 62 (1971). Vuitch held that the DC abortion law was not vague. That law allowed the doctor to perform an abortion if "necessary for the preservation of the mother's life or health." Justice Black held that "health" meant mental health as well as physical health and that the word was not vague because doctors were well familiar with determinign within their expertise whether the patient's condition called for any particular medical procedure. Justice Blackmun distinguishes Vuitch on this latter ground. He seems to conclude that the Vuitch statute was OK because it opened up the decision to the broad (and essentially unreviewable) discretion of the physician, while under a "life" statute the doctor's judgment is not given a free rein. The statute is insufficiently informative to be enforceable. What Justice Blackmun is really saying, I believe, is that "life and health" is a good

within an area of his professional expertise. Whatever a D.C. doctor concludes about the propriety of an abortion now will be approved because, presumptively, he will be making a judgment that the operation is called for to preserve the health and life of the mother. A narrower standard, however, is subject to attack because it makes the physician rest his medical judgment on a small and ambiguous determination of the saving of the mother's life.

Having struck down the law on vagueness grounds, Justice Blackmun does not reach the substantive challenge based on the fundamental "privacy" right. Finally, the opinion does not enjoin the statute since the Ct is confident that Texas will comply.

Justice White dissented and made three points in his short opinion. (1) Vuitch, in his view, impliedly held that the word "life" was not vague, and, therefore, the instant decision overrules Vuitch. (2) "Life" is a more exact standard than "health" and is a standard with which the medical profession is quite familiar. The major considerations in a "life" decision will be psyiological and not so sweeping as health determinations. (3) If the pregnant woman is the only plaintiff with standing she cannot attack the law on this ground because, whatever its parameters, it is not vague as to her since she virtually concedes that abortion is not necessary to preserve or save her life.

(2) Doe v. Bolton

In this opinion, at the outset, the pregnant woman is

as well as the physician. The question was closer as to the nurses, clergymen, and counsellors whose claim was less immediate and direct. But, because the other plaintiffs were conferred sufficient standing to raise all the issues, it was unnecessary to reach a final conclusion as to them.

On the merits, Justice Blackmun was forced to look at two sorts of restrictions in the Georgia law. The law had both substantive and procedural restrictions. The DC had struck down the three categories of circumstances under which an abortion would be permissible ((1) continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently impair her health; (2) the fetus is very likely to be born with an irremediable mental or physical defect; (3) the pregnancy resulted from rape). The propriety of that judgment was not before the Ct since the State would be the only aggrieved party and its appeal had already been dismissed for lack of jurisdiction. However, the striking of those restrictions left the statute requiring only that the abortion be based on the physician's best clinical judgment that it is necessary. Justice Blackmun finds this not too vague. He relies on Vuitch because it stresses that a statute is not vague when it commits medical decisions to the expertise of a physician. And, on the ground that each factor has a bearing on health, Justice Blackmunstates that it would be proper for the Dr. to consider "emotional, economic, psychological, familial, and physical" ###### factors.

He then turned to consider the procedural restrictions.

personal right to marital and personal privacy. While he agrees that a "woman's interest in making the fundamental personal decision whether or not to bear an unwanted child is within the scope of personal rights protected by the 9th and 14th Amendments," he finds that the right is not absolute. Applying the compelling state interest analysis, he sees an interest in protecting the life of the unborn and views that interest as increasing as the pregnant woman approaches term. Because of the existence of a compelling state interest in the life of the baby, and because of an interest in the health of the mother, the state may regulate abortions to some extent. The task is to examine each state imposition or restriction with particularity to gauge its impact on the fundamental right.

With this analytical framework set out, Justice Blackmun proceeds to strike down a number of provisions of the state statute. (1) The state statute required that abortions be performed only in accredited hospitals. He finds that the accreditation procedures of the Joint Comm'n on Accreditation of Hospitals (JCAH) are unrelated to safety in performing abortions but that they relate to other matters such as length the hospital has been in existence and the presence of certain advanced equipment and progrmas. While a state surely has an interest in safety in the operat ion, it may not justify the present restriction on that ground. (2) The requirement of final approval by the hospital committee is rejected because it serves no useful purpose not already served by other provisions of the statute and was unduly

that a physician gaintthe concurrence of two other physicians was also struck down on the grounds that the medical judgment of the originating physician should be sufficient, that no other medical procedure requires such consultataion as a matter of law, and it is unrelated to the patient's needs and infringes the physician's right to practice. (4) He also strikes down the residency requirement .

He does not accept the argument that the Georgia abortion law discriminates against the poor--especially in light of the several restrictive portions that have been struck down. In this case, too, he does not issue an injunction but assumes that the state will comply.

There is no circulated dissent.

In summary--looking at both what the DC and Justice Blackmun's opinions would do to the Georgia statute--it now would have only the following provisions. The abortion must be performed by a (1) licensed physician based on his best clinical judgment than an abortion is necessary. His (2) judgment must be reduced to writng. The operation must be (3) performed in a hospital licensed by the State Bd of Health. (4) Finally, no hospital is compelled to allow abortions to be performed and no physician or nurse is required to perform or assist in the performance of an abortion if it offends them on moral or religious grounds.

Ga. law in light of B's opinion

III. DISCUSSION

While I am torn because of my strong agreement with the result in these opinions and because of my prior assertions

that the cases should have come down last Term, I must now confess that upon a close reading I find these two opinions very difficult to accept. They were hurried efforts and I am confident that the recirculations will be vastly improved. At present, however, I would not ask you to join him.

Opinion not recommended

In the Texas case I find the vagueness rationale unpersuasive in light of Vuitch. Justice White's dissent makes that a hard position to stand behind. In the Gerogia case I think I am in basic agreement with Justice Blackmun's conclusions but would prefer to see a more tightly written and carefully analysed opinion.

You have suggested that we should scrap the vagueness rationale since we reach the fundamental rights determination in the Georgia case anyway. There is only one problem that may make that a difficult course to pursue. At present, because the Georgia case requires only an examination of the procedural restrictions, there is no need to weigh the state's countervailing interest in protecting the life of the unborn. Justice Blackmun specifically states that he does not reach that question. While he need not in the Georgia case he would have to reach it in the Texas case.

With the thought in mind of suggesting a convincing rationale for the balancing problem presented, I have read carefully Judge Newman's recent Connecticut opinion and have attached a copy for your use. (This was drafted in part by Andy Hurwitz so you may gain some feeling as well for his writing ability.) The thesis of the Newman opinion is similar to the one I would find most supportable on existing

For various reasons, most Justices recognize the existence of a "fundamental rights" doctrine, i.e., somewhere in the Constitution most Justices find a number of individual personal rights that are generally to be shielded from state or federal interference. The seminal precedent is Griswold v. Connecticut, 381 U.S. 479 (1965) in which the Ct struck down the Connecticut law prohibiting the distribution of contraceptives. The opinion for the Ct (Douglas & Clark) found the right of privacy of the marital relationship to be protected by the Constitution. This is the famous "penumbras" opinion in which the rights of privacy in the marital relationship was found in the emanations from several provisions of the Bill of Rights (including the 1st, 3d, 4th, 5th, 9th and 14th Amendments). Three concurring Justices (Goldberg, Warren, Brennan) found that the concept of liberty protects personal rights that are fundamental and that this protection can be found in the 9th Amendment; "The enumeration in the Const, of certain rights, shall not be construed to deny or disparage others retained by the people." Justice White also finds the statute unconstitutionalon the ground that it deprives "liberty" under the due process clause. Finally, Harlan finds the fundamental privacy interest in the concept of ordered liberty protected by the due process clause.

It would not be difficult for this Ct to find a fundamental right of a woman to control the decision whether to go through the experience of pregnancy and assume the responsibilities that occur thereafter.

But, that rt would not be absolute but, since it is of high and fundamental importance, it could be abridged only in the face of a compelling state interest. Here the most compelling state interest is in preserving the life of the unborn. From that point you might reason as Judge Newman does that the state interest becomes more dominant when the fetus is capable of independent existence (or becomes "vaible"). The closer to term the unborn fetus is the greater is the state's concern. And, since the state would not be imposing an absolute bar to abortional freedom but only a time restriction a balance might be permissible that would allow a state to sustain a statute saying that abortion may be prohibited after the 6th month. Indeed, it might be able to support an earlier time as long as the prohibition was not absolute. The crux of Judge Newman's analysis is that the state may not bar abortional freedom altogether on the basis of a proposition that is subject to such great public debate and affects individuals so personally. A law that affects fundamental personal privacy interests is of a different order than other state laws. If there is great dispute between people of good faith about the significance of the state's interest in the life of the unborn, we will not allow it to take the right to decide away from the individual.

Of course this is still a tentative judgment but I do believe that a well reasoned opinion can be written reaching this result without placing the Ct in the position of deciding as a super-legislature whether it will permit abortions at

I think, too, we might consider the possibility of writing a short opinion ourselves if we cannot be satisfied with Justice Blackmun's proposal efforts. In an area of constitutional articulation which is as paramount as this is there is no reason for each Justice not to state his own constitutional philosophy and since yours may be closest to Harlan's among the Griswold opinions, we might wish to set it out separately.

Please call me what lessons you find hardest to tackle and I will devote more time to them.

LFP

Miss. Weddington

Rely on 5th & 14th Amend.

Cited 2nd Comm. case (J. Newman)

State's "only interest" (as alleged) in protecting life of fetus

Two recent cases held that fetus has no const. rights (Byrn v. N.Y. and McGarvey (?) Hospital)

Tex. statute draws no time distinction. Some statutes (e.g. N.Y.) allow during a specified time (e.g. N.Y. 24 weeks) - with certain exceptions.

If fetus is a person, she admits appellants would have no case.

Texas Case 3

Douglas, J. Affirm

Marshall, J.

Agrees with [illegible] opinion

Brennan, J. Affirm

Blackmun, J.

Vagueness is sound approach

Stewart, J. Affirm

See notes on Ga. case.

Powell, J.

White, J. Pass

Rehnquist, J.

Mem: C.J. — Affirm

Rehnquist, J.
Powell, J.
Blackmun, J.
Marshall, J.
White, J.
Stewart, J.
Brennan, J.
Douglas, J.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 1, 1972

Re: Abortion Cases

Dear Harry:

I have been struggling with these cases. I shall probably end up concurring in part and dissenting in part.

Sincerely,

HAB

Mr. Justice Blackmun

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 4, 1972

Re: Abortion Cases

Dear Lewis:

I appreciate your letter of November 29 with its suggestions.

I cannot know, of course, where we shall end up. I have not had any intimation of violent disagreement, but I am informed that Byron and Bill Rehnquist will dissent at least in part. Bill Douglas' dissent seems to be confined to his footnote 1 and the Younger v. Harris issue. Bill Brennan has indicated that he also is concerned about Younger because of his posture in that case when it was decided.

I have no particular commitment to the point marking the end of the first trimester as contrasted with some other point, such as quickening or viability. I selected the earliest of the three because medical statistics and the statistical writings seemed to focus on it and to draw their contrasts between the first three months and the remainder of the pregnancy. In addition, I thought it might be easier for some of the Justices than a designated later point.

I could go along with viability if it could command a court. By that time the state's interest has grown large indeed. I suspect that my preference, however, is to stay with the end of the first trimester for the following reasons: (1) It is more likely to command a court. (2) A state is still free to make its decision on the liberal side and fix a later point in the abortion statutes it enacts. (3) I may be wrong, but I have the impression that many physicians are concerned about facilities and, for example, the need of hospitalization,

after the first trimester. I would like to leave the states free to draw their own medical conclusions with respect to the period after three months and until viability. The states' judgment of the health needs of the mother, I feel, ought, on balance, to be honored.

I would be willing to state, either in the opinion or in a footnote, what is essentially the obvious--namely, that a state is free to leave the decision to the attending physician and to regulate at a later date than the end of the first trimester.

These are just passing thoughts.

Bearing somewhat on this is correspondence that has passed between Bill Rehnquist and me. I enclose copies of it for your information.

Sincerely,

Harry

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 4, 1972

Re: Abortion Cases

Dear Harry:

I am about where Byron said he was with respect to these cases; I will probably concur in part and dissent in part.

Sincerely,

WOD

Mr. Justice Blackmun

Copies to the Conference

December 3, 1973

Abortion Cases

Dear Harry:

As I have said to you, I am generally in accord with your fine opinions in these cases.

I may have a few suggestions, but expect to counter in due time.

Sincerely,

Mr. Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 11, 1972

Dear Harry:

re: Abortion Cases

I favor the first trimester, rather than viability.

William O. Douglas

Mr. Justice Blackmun

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 11, 1972

MEMORANDUM TO THE CONFERENCE

Re: Abortion Cases

One of the members of the Conference has asked whether my choice of the end of the first trimester, as the point beyond which a state may appropriately regulate abortion practices, is critical. He asks whether the point of viability might not be a better choice.

The inquiry is a valid one and deserves serious consideration. I selected the earlier point because I felt that it would be more easily accepted (by us as well as others) and because most medical statistics and statistical studies appear to me to be centered there. Viability, however, has its own strong points. It has logical and biological justifications. There is a practical aspect, too, for I am sure that there are many pregnant women, particularly younger girls, who may refuse to face the fact of pregnancy and who, for one reason or another, do not get around to medical consultation until the end of the first trimester is upon them or, indeed, has passed.

I suspect that few could argue, or would argue, that a state's interest by the time of viability, when independent life is presumably possible, is not sufficiently developed to justify appropriate regulation. What we are talking about, therefore, is the interval from approximately 12 weeks to about 28 weeks.

One argument for the earlier date is that the state may well be concerned about facilities and such things as the need of hospitalization from and after the first trimester. If the point of viability is selected, a decision of this kind is necessarily left to the attending physician.

I would be willing to recast the opinions at the later date, but I do not wish to do so if it would alienate any Justice who has expressed to me, either by writing or orally, that he is in general agreement, on the merits, with the circulated memorandum.

I might add that some of the district courts that have been confronted with the abortion issue have spoken in general, but not specific, terms of viability. See, for example, Judge Newman's observation in the last Abele v. Markle decision.

May I have your reactions to this suggestion?

Sincerely,

LAH 12/11/72

RE: Abortion Cases

From: LAH

Judge:

I have received a copy of Justice Blackmun's letter to the conference concerning the line-drawing problem in the abortion cases, i.e. whether 3 months, 6 months or never is to be the rule.

First, his note is couched in terms that convince me that his first interest is to have a solid block for whatever position is taken. He appears willing to sacrifice his personal view for the benefit of getting a full Court.

Second, although he still prefers, apparently, the 3-month rule, he sees certain benefits of the "viability" rule. Indeed he expresses what I feel is the most important practical consideration. For many poor, or frightened, or uneducated, or unsophisticated girls the decision to seek help may not occur during the first 12 weeks. The girl might be simply hoping against hope that she is not pregnant but is just missing periods. Or she might know perfectly well that she is pregnant but be unwilling to make the decision--unwilling to tell her parents or her boyfriend.

Third, he expresses a single argument in oppostion to the viability rule:

> "One argument for the earlier date is that the state may well be concerned about facilities and such things as the need of hospitalization from and after the first trimester. If the point of

No necessarily left to the attending physician." (p. 2 of HAB's memo)

He appears to be suggesting that whatever point is selected must be the point with respect to every proffered state interest. This does not comport with the tenor of his two opinions. They suggest that each asserted interest of the state must be examined on its own merit. Therefore, the Ct might well approve a rule of a state saying that all abortions after the first trimester must be performed in a hospital. The state might support its judgment on the basis of empirical evidence indicating that the dangers of complications, and the need for postoperative care is greater during the second trimester. In the same opinion the Ct could well say that where the interest asserted by the State is protection of fetal life or "potential life" no point earlier than viability is permissible (for the reasons stated in Judge Newman's opinion in Abele).

RECOMMENDATION

I suggest that you respond to Justice Blackmun's note by indicating that you prefer the point of viability for purposes of the State's right to protect potential life argument. And, that you see no reason why a state might not require that abortions performed earlier be performed in a hospital if there are sound health reasons to support it. You might also indicate that it is your preference (as I understand it) to go ahead and say in this opinion, by way of dictum as was done in Dunn

you might add, if stating a particular point in the greater than promises to going to divide the Court you, like Justice Blackmun, would be willing to leave the matter open. Moreover, you might go so far as to explain why you think it desirable to state a specific point in order that women and state legislatures will have a standard to rely on.

LAS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 12, 1972

Re: Abortion Cases

Dear Harry:

I am inclined to agree that drawing the line at viability accommodates the interests at stake better than drawing it at the end of the first trimester. Given the difficulties which many women may have in believing that they are pregnant and in deciding to seek an abortion, I fear that the earlier date may not in practice serve the interests of those women, which your opinion does seek to serve.

At the same time, however, I share your concern for recognizing the State's interest in insuring that abortions be done under safe conditions. If the opinion stated explicitly that, between the end of the first trimester and viability, state regulations directed at health and safety alone were permissible, I believe that those concerns would be adequately met.

It is implicit in your opinion that at some point the State's interest in preserving the potential life of the unborn child overrides any individual interests of the women. I would be disturbed if that point were set before viability, and I am afraid that the opinion's present focus on the end of the first trimester would lead states to prohibit abortions completely at any later date.

In short, I believe that, as the opinion now stands, viability is a better accommodation of the interests involved, but that the end of the first trimester would be acceptable if additions along the lines I have suggested were made.

Sincerely,

T.M.

Mr. Justice Blackmun
cc: Conference

Judge; This is the substance of the note I suggested to you yesterday. You might now simply indicate your basic concurrence with TM.

LAH

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 12, 1972

Re: Abortion Cases

Dear Harry:

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In short, I believe that, as the opinion now stands, viability is a better accommodation of the interests involved, but that the end of the first trimester would be acceptable if additions along the lines I have suggested were made.

Sincerely,

T.M.

Mr. Justice Blackmun
cc: Conference

LAH 12/12/72

Re: ABORTION: WOD's memo

From: LAH

Judge,

I am shocked at Justice Douglas' memo. The Justice, who more than anyone else on this Court stakes his judicial reputation on protecting the poor and the black (see his separate dissent in Kras), cannot fail to recognize that a first trimester rule falls most heavily on these classes. After Rodriguez and Chambers (maybe over the Xmas holidays) I will find time to devote a day to seeing what empirical research is available on the question of how long it takes women--especially the young, the poor, and the minorities--to recognize their predicament.

LAH

We are not certain the original of this letter was ever sent to J. Blackmun or circulated to the Conference -

December 13, 1972

Abortion Cases

Dear Harry:

This refers to your memorandum inviting expressions as to a choice between the "first trimester" and "viability."

Once we take the major step of affirming a woman's constitutional right, it seems to me that viability is a more logical and defensible time for identifying the point at which the state's overriding right to protect potential life becomes evident.

There are other reasons, mentioned in your memorandum, which also lead me to the same conclusion. My guess is that older women, married women and others who are experienced or sophisticated will know when they are pregnant and be willing to acknowledge it. They also will know where abortions can be obtained (e.g. in New York), and how to go about arranging for them. But the women who most need the benefit of liberalized abortion laws are likely to be young, inexperienced, unsure, frightened and perhaps unmarried. It may well be that many in this category either would not know enough to be sure of pregnancy in the early weeks, or be too embarrassed to seek medical advice prior to the expiration of the first trimester. If there is a constitutional right to an abortion, there is much to be said for making it effective where and when it may well be needed most.

As I believe I mentioned at Conference, I was favorably impressed by the CA 2 opinion (Judges Newman and Lumbard) in Abele which identified viability as the critical time from the viewpoint of the state.

Sincerely,

Mr. Justice Blackmum

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 13, 1972

Re: Abortion Cases

Dear Harry:

I have more "ploughing" to do on your memo but one thing that occurs to me is the possible need to deal with whether husbands as such or parents of minors have "rights" in this area. Then, too, since the Court gave "illegitimate fathers" the same rights as a lawful parent, we must face up to that.

I will have some other comments but they may be washed out by suggestions from others.

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 14, 1972

Re: Abortion Cases

Dear Harry,

This is in response to your memorandum of December 11. One of my concerns with your opinion as presently written is the specificity of its dictum--particularly in its fixing of the end of the first trimester as the critical point for valid state action. I appreciate the inevitability and indeed wisdom of dicta in the Court's opinion, but I wonder about the desirability of the dicta being quite so inflexibly "legislative."

My present inclination would be to allow the States more latitude to make policy judgments between the alternatives mentioned in your memorandum, and perhaps others. I had hoped to prepare a tentative concurring opinion by now. I shall certainly get something written and circulated during the Christmas recess.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 15, 1972

MEMORANDUM TO THE CONFERENCE:

Re: Abortion Cases

I appreciate the helpful suggestions that have come to me in response to my memorandum of December 11. I now feel somewhat optimistic that the issues are in focus and that an agreement in some general areas may be in prospect.

With your permission, I would like the opportunity to revise the proposed opinions in the light of these suggestions. I have in mind associating the end of the first trimester with an emphasis on health, and associating viability with an emphasis on the State's interest in potential life. The period between the two points would be treated with flexibility. I shall try to do this revision next week and circulate another draft before the end of the year. It is my earnest hope, as you know, that on this sensitive issue we may avoid excessive fractionation of the Court, and that the cases may come down no later than the week of January 15 to tie in with the convening of most state legislatures.

Sincerely,

H. A. B.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 23, 1970

Dear Harry:

I have your circulations of December 21 in No. 70-18 - Doe v. Wade and No. 70-40 - Doe v. Bolton. Please join me.

W. O. D.

Mr. Justice Blackmun

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 28, 1972

Re: No. 70-18 - Roe v. Wade
No. 70-40 - Doe v. Bolton

Dear Harry:

Please join me in your memoranda

of December 21 in the subject cases.

Sincerely,

T.M.

Mr. Justice Blackmun

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 21, 1972

MEMORANDUM TO THE CONFERENCE

Re: Abortion Cases

Herewith are revised drafts of the Texas and Georgia memoranda.

I have endeavored to accommodate the various views expressed to me orally or by letter. The principal change in the Texas memorandum is at page 47 et seq. Here I have tried to recognize the dual state interests of protecting the mother's health and of protecting potential life. This, I believe, is a better approach than that contained in the initial memorandum. I have tried to follow the lines suggested by Bill Brennan and Thurgood.

The Chief has expressed concern about the rights of the father. I have mentioned these in footnote 67. This will not be very satisfying, but I am somewhat reluctant to try to cover the point in cases where the father's rights, if any, are not at issue. I suspect there will be other aspects of abortion that will have to be dealt with at a future time.

Sincerely,

H.A.B.

Dp/ss rec 12/21/78

MEMORANDUM

TO: Mr. Larry A. Hammond DATE: December 21, 1978

FROM: Lewis F. Powell, Jr.

Abortion Cases

I am indebted to you Harry Blackmun in his latest circulations.

He has made some improvements, which resulted - in significant degree - from the suggestions you made to me.

There is no great hurry about my joining, so long as I let Harry know my position prior to the Conference on January 5. Accordingly, your first priorities should remain Rodrigues, Chambers and Bayes.

L. F. P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 27, 1972

Re: Abortion Cases

Dear Harry,

Over the week-end I re-read your memoranda in these cases. I think your most recent circulations are even better than the original ones, and I was again greatly impressed with the thoroughness and care with which you have accomplished a very difficult job.

I have now decided to discard the rather lengthy concurring opinion on which I have been working, and to file instead a brief monograph on substantive due process, joining your opinions. My short concurring statement will, I hope, be circulated before the end of this week.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 27, 1972

RE: No. 70-18 & No. 70-40 - Roe v. Wade
and Doe v. Bolton

Dear Harry:

I agree with your circulation of Decem-
ber 21.

Sincerely,

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 21, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 70-18 - Roe v. Wade

Herewith is a memorandum (1972 fall edition) on the Texas abortion case.

This has proved for me to be both difficult and elusive. In its present form it contains dictum, but I suspect that in this area some dictum is indicated and not to be avoided.

You will observe that I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary.

I have attempted to preserve Vuitch in its entirety. You will recall that the attack on the Vuitch statute was restricted to the issue of vagueness. 402 U. S. at 73. I would dislike to have to undergo another assault on the District of Columbia statute based, this time, on privacy grounds. I, for one, am willing to continue the approval of the Vuitch-type statute on privacy as well as on vagueness. The summary here attempts to do just that. You may not agree.

I apologize for the rambling character of the memorandum and for its undue length. It has been an interesting assignment. As I stated in conference, the decision, however made, will probably result in the Court's being severely criticized.

Sincerely,

H.A.B.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 24, 1972

Re: Abortion Cases: No. 70-18 - Roe v. Wade and
No. 70-40 - Doe v. Bolton

Dear Harry:

I have read your "fall" editions in the above-entitled cases, and although I am still in significant disagreement with parts of them, I have to take my hat off to you for marshalling as well as I think could be done the arguments on your side. I think I will probably still file a dissent, although more limited than I had contemplated after the Conference discussion; therefore, this inquiry should be viewed as one coming from a potentially adverse party, rather than from an ally.

I have the feeling that the position that you, I, the Chief, and Lewis at least in part have been adhering to in the Gooding type cases would limit the concept of "overbreadth" even in the First Amendment area. If I am right in this, ought not your Texas opinion to invalidate the Texas abortion statute only as applied to a litigant who seeks abortion within the first "trimester", rather than, as I understand you to do, invalidating it in toto?

Second, would you permit any more latitude to Georgia in her procedural requirements after the first trimester, when apparently she is to be accorded greater latitude in the substantive determination of the circumstances under which an abortion may be had?

Sincerely,

WER

Mr. Justice Blackmun

LAH--11/27/72

Re: Abortion Cases (No. 70-18 & 70-40)

Judge:

We have received Justice Blackmun's majority opinions in the two abortion cases. We have also received Justice Douglas' concurrence in each along with his separate comments.

In compliance with your suggestion at conference, he has scratched the vagueness approach and has embraced the straightforward constitutional view taken by Judge Newman in the Connecticut case. Undisputably, these are better drafts than were circulated last Term. They are more scholarly, they show Justice Blackmun's efforts over the summer, and they, in the main, do not have the disquieting appearance of judicial fiat which lurked in the opinions last year. Of course, I urge you to join him. However, there are a number of aspects of the opinion that I deem important enough to bring to your attention. In the order in which each problem arises in the opinions, I raise the following questions:

ROE v. WADE

(1) Pp. 12-14. HAB holds that the married couple, the Does, do not present an "actual case or controversy" because their claims are too remote and speculative. He finds that the injury alleged by the couple "rests on possible future contraceptive failure, possible future pregnancy, etc." It seems to me that their concern rests more directly with their present marital relationship. Irrespective how speculative the possibility of pregnancy is, married couples often do

take these family planning problems very seriously. For some, the knowledge that contraceptive failure may lead to pregnancy (which is heightened in this case because of the woman's physiological problems requiring a restriction upon her choice of contraceptives) is enough to deter present sexual activity--or, at least, to place emotional limitations on the enjoyment of that relationship. In an opinion that elevates the fundamanetal right of privacy it seems unwise to denegrate the legitimacy of a couple's family planning considerations.

HAB intimates (p. 12) that the claims raised by the couple "are essentially the same as those of Roe," and therefore the "issue of the Does' standing . . . has little significance." Note that in an analagous situation in Doe v. Bolton, he decides not to pass on the "case orcontroversy" question regarding nurses, social workers and clergymen "for the issues are adequately and sufficiently presented by Doe and the physician." (p. 9). I see no reason for him not to apply the same approach in Roe. The case-or-controversy issue is a close one; in some measure his disposition undercuts the sanctity of the marital relationship; it is unnecessary to the disposition of the case.

(2) P. 37 & p. 48. In his discussion of the concept of constitutional privacy, HAB properly cites the applicable cases and accurately indicates that the right to privacy has been found in several different places. Then he states:

> "This right of privacy, whether it be found in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is it broad enough to encompass a woman's decision whether or not to terminate her pregnancy." (emphasis mine)

He thus declares that it is the Ct's view that the right of privacy inheres in the concept of "liberty" under the 14th Amendment. (He underlines thi holding in the summation on page 48 when he says that the rt is in the due process clause of the 14th Amendment.)

I do not think he needed to say where in the Constitution he finds the right. As Griswold indicates there is great differences of opinion on this question. Moreover, he does not state that it is not elsewhere so the possibility is still open that it is in some other provision. Nowhere does he explain why he finds it in the due proess clause rather than in the 9th Amendment or in the "penumbra." The point he makes in the quoted sentence is that the Ct has found the right heretofore and, no matter where it resides, it covers this case. I, therefore, view the underlined clause as a gratuity unnecesaary to the result. He could probably be persuaded to delete the clause and make the necessary word change on page 48 as well.

Passed gratuitously

(3) P. 47 & 48. This is the most important reservation I have about the opinion. After establishing the necessity of balancing, and after recognizing that the state may have some legitimate interest in protecting potential life, he

> "We repeat that the state does have an important and legitimate interest in the potentiality of human life and that this interest grows in strength as the woman approaches term. At some point ~~in~~ this interest becomes "compelling." We fix that point at, or at any time after, the end of the first trimester."

Again, on page 48, in his recapitulation, he states that the state's right is out balanced during the first trimester.

Nowhere does he state the basis for that "fixing." It is clear that this is where he thinks the line may properly be drawn, i.e., where the balance should be struck, but he does not explain how that decision is arrived at.

In this case, since the statutory prohibiton was total, it is unnecessary to the result that we draw the line. If a line ultimately must be drawn, it seems that "viability" provides a better point. This is where Judge Newman would have drawn the line. It is consistent with common law history. Moreover, it comports with the rationale that the ~~decision to have or abort is~~ controversy over the finding of the time of beginning of "life" is so great, and affects such intensely personal interests, that the Ct will not allow the state to make that judgment. At some point the controversy does not appear to be so great. Most people would probably agree that the state has a much greater interest in protecting a viable entity than it does at some earlier time.

If an earlier time is to be accepted I think it incumbant upon HAB to explain how he finds and draws that line.

As a political matter, it is my guess that if the

24 weeks. We may eventually get a case involving a "first-trimester" statute but I would have the Ct await that event and not anticipate it in advance.

(4) P. 49. HAB has placed considerable emphasis on the role of the physician and the free exercise of his professional judgment. Indeed, on page 49, he states, " the abortion decision inherently is a medical one, and the responsobility for that decision must rest with the physician." Doesn't it seem that this language overstates the doctor's role and undercuts the woman's personal interest in the decision? All medical decisions are the product of an agreement between patient and doctor. I see no reason, therefore, not to add a clause to this sentence indicating that the abortion decision must rest "with the physician and his patient."

DOE v. BOLTON

Generally, I am not as enthusiastic about this opinion as I am about Roe v. Wade. While I do agree with his analysis on each of the major points, I have difficulty finding the rationale for his judgments. If he were following through clearly with the analysis launched in Roe he would address each of the state restrictions in terms of whether they satisfy some compelling state interest sufficient to overcome the fundamental right. In effect I think that this is what he does but his language has too much of a ring of substantive due process. He seems to hold that (1) the accreditation provision, (2) the hospital committee require-

physicians do not serve any legitimate state interest of sufficient weight to overcome the woman's and her personal physician's interests. He does not talk enough in the careful language of "compelling state interest" although he embraces that basic approach.

There is not much that can be done about this point since it does not lend itself either to easy alteration of the opinion or to easy explanation. Moreover, it is not critical since the language is sufficiently ambiguous to elude any charge of overt substantive due process.

RECOMMENDATION

I would urge you to talk to HAB about each of the 4 things I have outlined in the Roe case. Each could be easily handled and each would, in my view, improve the opinion and protect the Ct at the same time. I view point 3 ("first trimester") as of overriding importance and would counsel that you not join until that matter has been aired. The other points I view as "nice to have" but not critical. I guess that you should not make any comments about Doe v. Bolton but ~~did~~ use complimentary remarks regarding that opinion to offset any minor criticism of the other.

LAH

I have no comments re WOD's opinion.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 27, 1972

Re: No. 70-18, Jane Roe v. Henry Wade
No. 70-40, Mary Doe v. Arthur K. Bolton

Dear Harry,

You have done an admirably thorough job in these two cases, and I am in basic agreement with the results you reach. I shall perhaps write separately in concurrence.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

November 27, 1972

Re: Abortion Cases

Dear Bill:

I think that my answers to the two questions you raise in your note of November 24 are as follows:

1. I would have conceptual difficulty in invalidating the Texas statute only as applied to a litigant within the first trimester. I am not now prepared to say that immediately after the first trimester a very restrictive statute of this kind would pass constitutional muster. Part of my difficulty, of course, may be due to the approach I originally preferred to the Texas statute. You may recall that in the "Spring Edition" I would have struck the statute on vagueness grounds. I still think it is vague and could not withstand careful analysis. I do not know, and I doubt if any physician can know, what is meant when the statute speaks of "the purpose of saving the life of the mother." We sustained the D. C. statute in Vuitch only because it also related to "health." My vagueness approach, however, did not find favor. Byron disagreed with it, and most of the others preferred to get to what they called the "core issue." Thus, this time around, I used the Texas case as the primary one and did not reach the issue of vagueness.

2. The answer to your second question is definitely in the affirmative. I agree that after the first trimester a state is entitled to more latitude procedurally as well as substantively.

Sincerely,

Mr. Justice Rehnquist

November 29, 1972

Abortion Cases

Dear Harry:

As I have said, I am enthusiastic about your abortion opinions. They reflect impressive scholarship and analysis, and I have no doubt that they will command a court.

In view of the complexity and delicacy of the subject and the issue involved, I suppose there will be - however - some suggestions and reservations before the votes are finally in.

I write at this time to inquire whether you view your choice of "the first trimester" as essential to your decision. In your covering memorandum of November 21 you suggest that this in an "arbitrary" time, but that any other selected point might be equally arbitrary.

I have wondered whether drawing the line at "viability" - if we conclude to designate a particular point of time - would not be more defensible in logic and biologically than perhaps any other single time. I have reread Judge Newman's opinion in Abele v. Markel (concurred in by Ed Lumbard). In addressing this issue, he says:

> ". . . the state interest in protecting the life of a fetus capable of living outside the uterus could be shown to be more generally accepted and, therefore, of more weight in the constitutional sense than the interest in preventing the abortion of a fetus that is not viable. The issue might well turn on whether the time period selected could be shown to permit survival of the fetus in a generally

> accepted sense, rather than for the brief span of hours and under the abnormal conditions illustrated by some of the state's evidence. As to the latter situation, the nature of the state's interest might well not be generally accepted. Finally, and most important, such a statute would not be a direct abridgement of the woman's constitutional right, but at most a limitation on the time when her right could be exercised."

I rather agree with the view that the interest of the state is clearly identifiable, in a manner which would be generally understood, when the fetus becomes viable. At any point in time prior thereto, it is more difficult to justify a cutoff date.

Of course, it is not essential that we express an opinion as to such a date. Judge Newman did not do this explicitly. In holding the Connecticut statute unconstitutional, he pointed the way generally toward "viability" without making this an explicit ruling.

I am not sending a copy of this letter to other members of the Court. No doubt we will discuss your opinion in Conference, and I thought it might be helpful - to you and certainly to me - if you had the opportunity in advance to consider my reservation as above expressed.

Sincerely,

Mr. Justice Blackmun

lfp/ss

bc: Larry

Memo to: Larry Hammond

From: Lewis F. Powell, Jr. January 3, 1973

Abortion Cases

I have now read more carefully the third draft, and I am prepared to join - unless you have some last minute advice.

It seems to me that Justice Blackmun has reached a constitutionally sound result and stated it clearly. Although he gives credit in his memo of December 1 to others, I suggest that you are entitled - particularly in view of your education of me on the viability issue - to credit that is nonetheless substantial because it will never be recognized. I think I was perhaps the first to press for viability change.

L. F. P., Jr.

LFP, Jr.:pls

January 4, 1973

Abortion Cases

Dear Harry:

I had the opportunity over the "holidays" to review more carefully your circulation of December 21, and I am happy with the revisions.

I commend you on the exceptional scholarship of the opinions.

Please join me.

Sincerely,

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM J. BRENNAN, JR.

January 11, 1973

Re: Abortion Cases

Dear Byron,

Please join me in your dissenting opinion in these cases.

Sincerely,

Mr. Justice White

Copies to the Conference

January 18, 1973

Abortion Cases

Dear Harry:

I think your proposed announcement is excellent, and will contribute to the understanding of the Court's decision.

Sincerely,

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 16, 1973

Re: No. 70-18 - Roe v. Wade
No. 70-40 - Doe v. Bolton

Dear Harry:

I am working over some concurrences in the above cases and will try to have them in your hands and circulated sometime tomorrow. I do not believe they will involve any significant change in what you have written.

I see no reason why we cannot schedule these cases for Monday.

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 16, 1973

MEMORANDUM TO THE CONFERENCE:

Re: Abortion Cases

I anticipate the headlines that will be produced over the country when the abortion decisions are announced.

Accordingly, I have typed out what I propose as the announcement from the bench in these two cases. I enclose a copy of it for your review and advice. Please note the penultimate paragraph.

I suggest that copies of this be given to Mr. Whittington for distribution to the press if any reporters desire it. It will in effect be a transcript of what I shall say, and there should be at least some reason for the press not going all the way off the deep end.

Sincerely,

H. A. B.

No. 70-18 - Roe v. Wade

No. 70-40 - Doe v. Bolton

These are the abortion cases that were argued first in December 1971 and again last October. They are appeals from three-judge federal courts in the Northern Districts of Texas and Georgia, respectively.

The law suits attack the constitutionality of the Texas and Georgia abortion statutes. The actions were instituted by pregnant women, both married and unmarried, by a married couple in the Texas case, and by physicians and others alleging an interest in the subject matter.

The Texas statute is representative of those that are presently in effect in a majority of our states and that, for the most part, were enacted during the last half of the nineteenth century. The Texas statute prohibits any abortion, or any attempt at an abortion, except where it is procured by medical advice for the purpose of saving the life of the woman. It makes no reference to health, as does the District of Columbia statute considered in United States v. Vuitch decided here in the 1970 Term.

The Georgia statute, on the other hand, was enacted only in 1968. It is a modern statute patterned after the American Law Institute's

Model Penal Code. It is representative of recent legislation enacted in approximately one-quarter of our states. It makes an abortion a criminal act with certain exceptions. The exceptions are those where the abortion is performed by a licensed physician and, "based upon his best clinical judgment," the abortion is necessary because the pregnancy if continued would endanger the life or health of the woman, or the fetus would very likely be born with a grave and permanent mental or physical defect, or the pregnancy resulted from forcible or statutory rape. The Georgia statute also imposes procedural conditions for the obtaining of the abortion. These are several in number, but among them are (1) Georgia residence, (2) concurrence in the abortion decision by two additional licensed physicians, (3) performance of the procedure in a hospital both licensed by the state and accredited by the Joint Commission on Accreditation of Hospitals, and (4) approval by a hospital abortion committee.

The Texas federal court held that a woman had a right, protected by the Ninth and Fourteen Amendments, to choose whether to have children and that the Texas statute was void on its face. It, therefore, held the state statute unconstitutional.

The Georgia federal court invalidated certain parts of the

Georgia statute including the portion specifying particular circumstances in which an abortion may be sought, but upheld the balance of that state's statute.

The plaintiffs in both cases took appeals here, and we set the cases down for argument successively.

The abortion issue, of course, is a most sensitive, emotional and controversial one, perhaps one of the most emotional that has reached the Court for some time. The issue is a matter of great public interest and is not confined to lawyers and their law suits. Attitudes are firmly rooted and firmly held. At the same time, attitudes by no means are uniform. We are aware of this, and we are fully aware that, however the Court decides these cases, the controversy will continue. Our task, however, is to decide them on constitutional principles as we perceive those principles to be.

In the Texas case we have filed a lengthy opinion that attempts to review the history of attitudes toward abortion, popular, legal, civic, and moral, from ancient times down to the present. We have endeavored, too, to note the change in attitudes over the last century of professional bodies such as the American Medical Association, the American Public Health Association, and the American Bar Association, and, indeed, the changing attitudes among the courts of the country,

both federal and state. This examination revealed a number of interesting things. One is the fact that most of the strict abortion statutes were enacted by the States about a hundred years ago. Another is the conclusion that it is very doubtful that abortion was ever firmly established as a common law crime, even with respect to the destruction of a quick fetus. A third is that there is little consensus, even among religious or medical groups, as to when life begins. Some would fix it at the moment of conception. Others focus on quickening. Still others accept live birth as the significant point.

We have concluded again, as the Court has done before, that there is a right of personal privacy under the Constitution. It is not spelled out in so many words, but the Court has recognized this right before in many cases and in varying contexts. We feel that it is founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action. We further conclude that this right of personal privacy includes the abortion decision, but we emphasize that the right is not unqualified and that it must be considered against important state interests in regulating abortion.

There are, we feel, two important interests that a state possesses and that if it so desires, it may seek to protect by legislation. The first is the state's interest in preserving and protecting the health

of the pregnant woman. The second is the state's interest in protecting the potentiality of human life, irrespective of the moment when life actually begins. These interests are separate and distinct. Each grows in substantiality as the woman approaches term, and at some point during pregnancy each becomes "compelling."

We thus have, in tension, the pregnant woman's right of privacy, on the one hand, and these two distinct state interests, on the other.

We conclude:

1. For that portion of the pregnancy stage prior to approximately the end of the first trimester, the woman's privacy right dominates the interests of the state. It follows that, during this period, the abortion decision must be left to the medical judgment of the woman's attending physician.

2. From that point on, however, the state's interest in protecting the health of the mother looms ever greater. As a consequence, the state, in promoting its interest in health, may, if it chooses, regulate the abortion procedures in ways that are reasonably related to maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility

where the procedure is to be performed; and as to the licensing of the facility.

3. From and after viability, which is usually at the end of approximately the 26th or 27th week, and which is the point at which the fetus has a reasonable chance of independent life if it were then born or removed from the mother, the state's interest in protecting the potentiality of human life dominates the woman's right to privacy. It follows that the state may, if it chooses, regulate and even proscribe, that is, prohibit, abortion, except where it is necessary in appropriate medical judgment for the preservation of the life or health of the mother.

4. The state may define the term physician to mean only a licensed physician, and it may proscribe any abortion by a person who is not a physician.

We feel that this holding is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the attitude of the common law toward abortion, and with the demands of the profound problems of the present day. The states are thus left free to place increasing restrictions on abortion as the period of pregnancy lengthens so long as those restrictions are tailored to the recognized state interests. The decision, we also feel, vindicates the right of the physician and is consistent with the fact

that abortion is essentially a medical decision until, of course, those points in pregnancy are reached when the state interests become dominant.

Viewed under this analysis, the Texas statute must fall, and we, therefore, affirm, with one procedural exception, the judgment of the federal court of the Northern District of Texas.

In the Georgia case we hold that the procedural requirements for J. C. A. H. accreditation for the hospital, for the hospital abortion committee, and for the two-doctor concurrence are unduly restrictive of the patient's rights and of the attending physician's rights. Similarly, we do not uphold the provision that the patient be a resident of Georgia. The remainder of the Georgia statute is allowed to stand.

We thus strike a balance between the interests of a pregnant woman and the interests of the state in health and in potential life. Fortunately, the decisions come down at a time when a majority of the legislatures of the states are in session. Presumably where these decisions cast doubt as to the constitutional validity of a state's abortion statute, the legislature of that state may immediately review its statute and amend it to bring it into line with the constitutional requirements we have endeavored to spell out today. If this is done, there is no need whatsoever for any prolonged period of unregulated abortion practice.

In closing, I emphasize what the Court does not do by these decisions. I fear what the headlines may be, but it should be stressed that the Court does not today hold that the Constitution compels abortion on demand. It does not today pronounce that a pregnant woman has an absolute right to an abortion. It does, for the first trimester of pregnancy, cast the abortion decision and the responsibility for it upon the attending physician. Thereafter, the decisions permit the state, if it chooses, to impose reasonable regulations for the protection of maternal and fetal health. And, after viability, they give the state full right to proscribe all abortions except those that may be necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

The Chief Justice, Mr. Justice Douglas and Mr. Justice Stewart have each filed separate concurring opinions. Mr. Justice White has filed a dissenting opinion, and Mr. Justice Rehnquist has joined him in that dissent. Mr. Justice Rehnquist has also filed separate dissenting opinions for the two cases.

H. A. B.

LAH 1/16/73

File

Re: Stewart's opinion in the abortion cases

Judge:

You have asked me whether there are any reasons why you should resist joining in Stewart's concurrence. While I cannot answer the question unequivocally, there are four things that come to my mind that should probably bear on your decision:

I agree with Larry's analysis. I will not join. Potter

(1) The opinion is, primarily, a personal one. It is Stewart's explanation of how it is possible that he can join the majority now even though he dissented in Griswold. He wrote a lengthy dissent in Griswold (and joined another lengthy dissent by Justice Black) decrying substantive due process and felt some duty to justify his switch. Written with that motive in mind, I doubt (a) whether he anticipates that others whill join him, and (b) whether it is the sort of opinion that one ought to join.

(2) Substantively, as I read it, it adds nothing new to HAB's opinions. It makes no points that are not made or are under-stressed in his opinion.

(3) In one respect, however, it tends to obscure the holding of the majority opinion. Note on pp 4-5. PS says that "legitimate objectives are . . . perhaps sufficient" to justify more stringent regulations. There are few "perhapses" in Hab's opinion. Also he notes that health considerations are adequate to permit the State to "regulate aborions as it does other surgical procedures."

trimester the State's power will be significantly limited, possibly even more limited than its general power to regulate surgical procedures. My only point here is that Stewart's concurrence in this area contributes to the ambiguity of HAB's opinions and you may think it undesirable to add a second vote to the confusion.

(4) Finally, apart from the PS opinion itself, what do you think will be HAB's personal reaction to your joinder? Do you think it will in any way hurt his feelings? When you write an opinion for the Ct is disappoints me to have others writing separately repeating what I had hoped we had said aa fully and as completely as necessary. Is it possible that HAB will view your decision to join PS as an indication that PS says something that he did not say adequately himself?

On balance, I lean toward recommending that you not join PS, although if you think PS will be pleased none of the thoughts I have expressed seem preclusive.

LAH

LAH

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 23, 1973

MEMORANDUM TO THE CONFERENCE:

Re: Abortion Holds

The Clerk has supplied me with a list of cases being held for the abortion decisions. Presumably, these will appear on a supplemental list for the Conference of February 19. I have chosen to review these holds now, while abortion is fresh in the minds of all of us, rather than immediately before the February Conference.

The following cases do not concern the basic abortion issue. One or more of them are being held, not only for Abortion but for Obscenity. In any event, I am inclined to hold all of them further for obscenity:

No. 70-1 - Grove Press Inc. v. Flask

No. 70-10 - Florida Ex. Rel. Faircloth v. M & W Theatres, Inc.

No. 70-23 - Thompson v. United Artists Theatre Circuit, Inc.

No. 70-24 - Grove Press, Inc. v. Bailey

No. 70-25 - Spivak v. Shriver

No. 70-30 - United Artists Theatre Circuit, Inc. v. Thompson

No. 70-35 - Austin v. Meyer

No. 70-41 - Meyer v. Austin

No. 70-304 - Byrne v. P.B.I.C., Inc. (This is the Massachusetts "Hair" case.)

The following cases, it seems to me, really involve Younger v. Harris problems. None of them concern the basic abortion issue. I make no recommendation as to these cases, for I feel that each of us should approach them independently.

No. 70-102 - Cahn v. Long Island Vietnam Moratorium Committee

No. 70-120 - Mailliard v. Gonzalez

No. 71-439 - Barlow v. Gallant

The following are abortion cases:

No. 70-42 - Rosen v. Louisiana State Board of Medical Examiners

This case concerns the Louisiana statute which is similar to but not identical with the Texas statute. The three-judge court by a two-to-one decision upheld the statute. Thus, strictly on the abortion issue, I would be inclined to

vacate and remand for reconsideration in the light of No. 70-18, Roe v. Wade. There is, however, an interesting Younger v. Harris abstention angle in the case. The appellant, who is a licensed physician, was charged under the abortion statute. He claims that he was released on bail and never brought to trial. Soon after his arrest, the appellee Board notified the doctor to appear and show cause why his medical license should not be revoked. Before the hearing took place, Doctor Rosen instituted this federal action for declaratory and injunctive relief.

The State, appellee, claims that in light of pending administrative proceedings before the Board, the federal court should have abstained. [This is an interesting assertion, as the State won below.] Appellant claims that the administrative board could have given no effective relief. There is no provision, according to appellants, for judicial review of the Board's determination. Thus, Younger and other cases would not apply.

I am inclined to agree with appellants, but as a similar issue is raised in Gibson v. Berryhill, No. 71-653, this case might be held for that decision, and thereafter

remanded in light of both Gibson and the abortion decisions.

No. 70-89 - Rodgers v. Danforth

This is an action by physicians, clergymen and women challenging the Missouri abortion statute. That statute is of the Texas type. The three-judge court abstained on the ground that no case or controversy existed (since there was no allegation that any of the plaintiffs had performed, or had performed upon them, an abortion, or that any prosecution was pending or threatened, and stressing that there was as yet no authoritative state construction of the challenged statute). The motion to dismiss is based soley on untimely docketing. I would vacate and remand for reconsideration in the light of No. 70-18, Roe v. Wade, and No. 70-40, Doe v. Bolton.

No. 70-105 - Hanrahan v. Doe

This is a challenge to the Illinois abortion statute. The Illinois Act is of the Texas form. The suit is a class action by four physicians and two women. The three-judge court declared the Illinois statute unconstitutional insofar as it restricts the performance of abortions during the first trimester of pregnancy by licensed physicians in a licensed hospital or medical facility. Injunctive relief was granted. Judge Campbell dissented. You will recall that we have

heretofore granted a stay in this case. I would vacate and remand for reconsideration in the light of No. 70-18, Roe v. Wade.

No. 70-106 - Heffernan v. Doe

This is a companion to the preceding case. It is an appeal by a defendent-intervenor and guardian ad litem for the class of unborn children. I would have the disposition of this case follow that of No. 70-105.

No. 71-92 - Corkey v. Edwards

This is a challenge to the North Carolina abortion statute. The statute is of the modern type adapted after the ALI model and is close to that of Georgia. I made reference to it in footnote 67 of the Texas opinion. The statute in some respects is more detailed than Georgia's, for it requires, when the pregnant woman is a minor, the written consent of the spouse or parents. The plaintiffs here were physicians and a layman. The three-judge court upheld the statute except for a four-month residency requirement. It denied the request for injunctive relief. Our Georgia decision bears directly on this case, and I would, therefore, vacate and remand for reconsideration in light of both No. 70-18, Roe v. Wade and No. 70-40, Doe v. Bolton.

No. 71-1200 - Thompson v. Texas

This is another case concerning the Texas statute. The appellant, however, is a licensed physician who was convicted of performing an abortion in violation of the statute. The Court of Criminal Appeals upheld the conviction. I would either (a) reverse outright or (b) vacate and remand for reconsideration in the light of No. 70-18, Roe v. Wade. On balance, I would prefer to vacate and remand.

No. 71-5666 - Doe v. Rampton

This involves the Utah statute which is of the Texas type. The three-judge court, by a divided vote, upheld the statute and denied declaratory and injunctive relief. I would vacate and remand for reconsideration in the light of No. 70-18, Roe v. Wade.

No. 72-56 - Markle v. Abele

This is the first Connecticut case. Under attack was the former Connecticut statute. It was similar to that of Texas except that an abortion was legal "unless the same is necessary to preserve [the mother's] life or that of her unborn child." The three-judge court by a divided vote declared the statute unconstitutional, and the state appeals. Thereafter, the Connecticut General Assembly was called into

emergency session, and a new bill was passed. This new bill is the subject of a second appeal hereinafter listed. It does not in so many words repeal the old statute. I would be inclined to vacate and remand for reconsideration of the issue of mootness. An alternative would be to affirm. I prefer the former.

No. 72-69 - Kruze v. Ohio

Here the Ohio statute is under attack. It is of the Texas type but refrains from declaring illegal an abortion "necessary to preserve [the mother's] life, or . . . advised by two physicians to be necessary for that purpose." The petitioner is a physician who, apparently in a negligent manner, performed an abortion on a young girl who threatened suicide. Later she did commit suicide. The doctor was convicted by a jury. He challenges the statute and in addition asserts prosecutorial misconduct and ineffective representation of counsel. The latter contentions, it seems to me, are not certworthy. I would grant, vacate and remand for reconsideration in the light of No. 70-18, in Roe v. Wade.

No. 72-434 - Bryn v. New York City Health and Hospital Corporation

This is the New York abortion case. The New York Court of Appeals refused to invalidate the liberal New York

abortion law. Among other things, it held that a fetus is not a person within the meaning of the Fourteenth Amendment. The court went on to hold that the issue is not justiciable and that its resolution is to be left to the legislature. I would dismiss for want of a substantial federal question.

No. 72-730 - Markle v. Abele

This is the second Connecticut appeal. It concerns the 1972 Connecticut statute enacted after the first had been held unconstitutional. The new statute prohibits an abortion except one performed by a licensed physician when the abortion "is necessary to preserve the physical life of the mother and when such abortion is performed in a hospital licensed by the State of Connecticut." The same three-judge court was convened and by the same divided vote it held the statute unconstitutional. I could (a) affirm or (b) vacate and remand for reconsideration in the light of No. 70-18, Roe v. Wade, and No. 70-40, Doe v. Bolton. On balance, I lean toward affirmance.

I should point out that in No. 71-106 no motion to dismiss or affirm has been filed. It is my understanding that with respect to an appeal the absence of such a motion does not prevent our discussion of the case.

H.A.B. H.A.B.

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
						10/24/72		
Concurring opinion circulated 1/18/73	concurring 11/25/72 formal circulated 12/11/72		Concurring 11/27/72 memo to HAB 12/14/72		memo to HAB 12/12/72	3rd draft 12/21/72 4th draft 1/17/73	~~agreed to concur 12/5/72~~ agreed to concur 12/5/72	Concur in part dissent in part 12/9/72 Circulated dissent 1st draft 1/11/73
	Join HAB 12/22/72	Join HAB 12/27/72	Will circulate concurring opinion 12/27/72	dissent circulated 1/11/73	Join HAB 12/22/72		join HAB 1/3/73	Join BRW 1/11/73
	Concurring opinion 2nd draft 12/29/72 3rd draft 1/2/73		2nd draft 12/28/72	2nd draft 1/13/73 3rd draft 1/16/73				

70-18 Roe v. Wade

MEMORANDUM

TO: Messrs. Hammond, Kelly and Wilkinson

DATE: February 2, 1973

FROM: Lewis F. Powell, Jr.

Mr. Justice Blackmun's memorandum of January 23 re abortion holds

I plan to follow Mr. Justice Blackmun in all of his recommendations, subject to discussion at the Conference.

He makes no recommendations, however, as to three cases on p. 2 of his memorandum in which Younger issues are raised, namely: 70-102, 70-120 and 71-439.

I would appreciate it if you (the responsible clerk) would give me your recommendation with respect to each of these prior to the February 16 Conference.

L. F. P., Jr.

MEMORANDUM

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DATE: February 2, 1973

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L. F. P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 2, 1973

MEMORANDUM TO THE CONFERENCE:

In the light of Justice Blackmun's memorandum of ~~January 23~~ I suggest we request the Clerk to strike the first nine cases (under the "Hold for" category) from the Conference list, page 16, for February 2.

Unless I hear to the contrary I will so instruct the Clerk, requesting that the cases be relisted after the obscenity opinions have been announced.

Regards,

WEB

LAH 2/21/73

No. 70-18 & 70-40
Roe v. Wade; Doe v. Bolton

The remaining petitions in the abortion cases add nothing. I thought that you'd be interested to know that the State of Georgia relies on your opinion in Shadwick v. Tampa, 407 U.S. 345 (1972) in which you warned against "converting desirable practices into constitutional commandments." . . .

RENT

LAH

Powell
(Renewed 10/10/72)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

FILED
SEP 20 11 00 AM '72
U.S. DISTRICT COURT
HARTFORD, CONN.

JANICE ABELE, et al :

-vs- : Civil No. B-521

ARNOLD MARKLE, et al :

JUDGMENT

This action came on for hearing before the three-judge district court, Honorable J. Edward Lumbard, United States Senior Circuit Judge, Honorable T. Emmet Clarie, United States District Judge, and Honorable Jon O. Newman, United States District Judge, and the issues having been duly heard and a memorandum of decision, dated September 20, 1972, having been duly rendered, it is

ORDERED that plaintiffs' prayer for a judgment declaring Public Act No. 1, May 1972, special session, Connecticut General Assembly, unconstitutional be, and hereby is, granted; and it is further

ORDERED that defendants, their agents, servants, em-

Dated this 20th day of September, 1972.

J. Edward Lumbard
United States Senior Circuit Judge

Jon O. Newman
United States District Judge
I dissent from the Judgment, for the reasons expressed in my accompanying opinion.

T. Emmet Clarie
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JANICE ABELE, et al :

-vs- : Civil No. B-521

ARNOLD MARKLE, et al :

FILED
SEP 20 11 00 AM '72
CLERK
U.S. DISTRICT COURT
HARTFORD, CONN.

BEFORE: LUMBARD, Circuit Judge, CLARIE and NEWMAN, District Judges

MEMORANDUM OF DECISION

Newman, District Judge:

The issue in this case is the constitutionality of Connecticut's recently enacted law prohibiting all abortions except those necessary to save the physical life of the mother.[1/] Public Act No. 1, May 1972, special session. The case is an outgrowth of previous litigation before the same judges who comprise this Court. Our prior decision, rendered on April 18, 1972, declared unconstitutional §§ 53-29, 53-30, and 53-31 of the Connecticut General Statutes, statutes enacted in 1860 that had prohibited abortions subject to virtually the same exception as the present statute and had

latter having jurisdiction to prosecute for violations of the challenged statute.

After our earlier decision, the Connecticut General Assembly met in a special session and on May 23, 1972, enacted Public Act No. 1. Thereafter plaintiffs filed in the prior case a motion to enjoin the enforcement of the new statute.[2] On May 31, 1972, the Chief Judge of this Circuit designated the three judges who had heard the prior case to be members of a new three-judge district court, pursuant to 28 U.S.C. § 2284, to hear the constitutional challenge to the new statute. Believing that this challenge should be heard in a separate case, we ordered that the motion papers be considered a complaint and filed with a new case number.[3] A hearing was subsequently held at which both sides presented witnesses. In addition various documents and photographs have also been presented and considered, and we have had the benefit of helpful briefs by amici curiae supporting both sides.

The substantive provisions of the 1972 legislation pro-

year for encouraging an abortion have all been set at five years. More significantly, while the former statutes made no explicit reference to the state interest they were purporting to advance, the first section of the 1972 legislation reads as follows:

> "The public policy of the state and the intent of the legislature is to protect and preserve human life from the moment of conception . . . ." 4/

Thus the Connecticut General Assembly has expressed its judgment, in the text of the challenged statute, that the life of a fetus should be protected. 5/ That specification of legislative purpose raises the constitutional question of whether the state has power to advance such a purpose by abridging almost totally the constitutionally protected right of a woman to privacy and personal choice in matters of sex and family life.

The existence of a woman's constitutional right to such privacy has been set forth by the Supreme Court.

decision whether to bear or beget a child."
405 U.S. at 453 (second emphasis added).

In any event, the woman's right exists, and there is no question that the statute here challenged is a direct abridgement of her right. It is not a regulation of the manner in which abortions may be performed, such as in appropriate medical facilities or by appropriate medical personnel. It is an absolute prohibition. And the prohibition applies to every case of a pregnant woman with the sole exception of an abortion necessary to preserve the woman's life.

Griswold illustrates two approaches to the constitutional issue posed by this case. The opinion of Justice Douglas appears to posit the right of marital privacy as an absolute right, totally immune from state abridgement. The opinions of Justices Harlan, White and Goldberg, however, all concede that the right may be abridged if the state can demonstrate that its regulation is founded upon a sufficiently compelling state interest.

school protected in Pierce v. Society of Sisters, 268 U.S. 510 (1925), or the right to teach a foreign language protected in Meyer v. Nebraska, 262 U.S. 390 (1923). The Supreme Court has observed that the Meyer and Pierce decisions "have respected the private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166 (1944)(emphasis added). The right to an abortion is of even greater concern to the woman than the right to use a contraceptive protected in Griswold v. Connecticut, supra, for contraception is not the only means of preventing pregnancy, whereas abortion is the only means of terminating an unwanted pregnancy. The significance of the woman's right might be discounted somewhat if she simply changed her mind after a deliberate decision to become pregnant. But the significance of the right is extremely high if pregnancy results because the woman is ignorant, or because through no fault of her own a contraceptive device has failed, and the significance is at the utmost when pregnancy results because the woman has been raped. The

of the woman's constitutional right. But there are two distinguishing aspects of this case that require consideration before the state interest can be weighed against the woman's right. The first concerns the nature of the rights possessed by the fetus for whose benefit the state interest is asserted. The second concerns the nature of the state interest being asserted.

A. The initial inquiry is whether the fetus is a person, within the meaning of the fourteenth amendment, having a constitutionally protected right to life. If it is, then a legislature may well have some discretion to protect that right even at the expense of someone else's constitutional right. But if the fetus lacks constitutional rights, the question then becomes whether a legislature may accord a purely statutory right at the expense of another person's constitutional right.

Our conclusion, based on the text and history of the Constitution and on cases interpreting it, is that a fetus is not a person within the meaning of

struing the statute to permit abortions to protect not only the mother's life and physical health but her mental health as well. If a fetus was a person with a fourteenth amendment right not to be deprived of life except by due process of law, it is inconceivable that the Court would have resolved a doubtful question of statutory construction by enlarging the situations in which such a life could be extinguished. Moreover, while Vuitch did not rule on either the constitutional right of the fetus or the constitutional right of the woman, the decision casts not the slightest doubt on the validity of a statute permitting an abortion to protect a woman's mental health. Surely the Court would have withheld even tacit approval of abortions in such circumstances if the consequence was the termination of a life entitled to fourteenth amendment protection.

No decision has come to our attention holding that a fetus has fourteenth amendment rights. The issue was squarely faced by at least two of the courts that have sustained the constitutionality of state laws permitting abortions. Byrn v. New York City Health & Hospitals Corp., __N.Y.2d__ (1972); McGarvey v. Magee-Women's Hospital, 340 F.Supp. 751 (W.D. Pa. 1971). Cf. Poe v. Menghini, 339 F. Supp. 986 (D. Kan. 1972). Byrn and McGarvey reject the claim that a fetus has fourteenth amendment rights.[7/] Indeed, it is difficult to imagine how a statute permitting abortion could be constitutional if the fetus had fourteenth amend-

ment rights. Even one of the few decisions sustaining the constitutionality of a restrictive abortion statute casts no doubt on the propriety of a legislative judgment permitting abortion where there is substantial risk that the mother's health would be gravely impaired or where pregnancy resulted from rape or incest. Corkey v. Edwards, 322 F.Supp. 1248 (W.D. N.C. 1971). We do not believe such circumstances could justify terminating the life of a person with fourteenth amendment rights.[8]

If the fetus survives the period of gestation, it will be born and then become a person entitled to the legal protections of the Constitution. But its capacity to become such a person does not mean that during gestation it is such a person. The unfertilized ovum also has the capacity to become a living human being, but the Constitution does not endow it with rights which the state may protect by interfering with the individual's choice of whether the ovum will be fertilized. Griswold v. Connecticut, supra.

Of course, the fact that a fetus is not a person en-

feasor has no constitutional right to inflict injury on a fetus. When government acts through legislation to confer upon a fetus the absolute right to be born contrary to the preference of a pregnant woman, it abridges her constitutional right to marital and sexual privacy. Whether it may do so cannot be established by the fact that other protections can be accorded which do not abridge another's constitutional rights.

It is one thing to permit a legislature some discretion in adjusting conflicting rights between groups of people, each of whom has a claim to constitutional protection. See, e.g., Katzenbach v. McClung, 379 U.S. 294 (1964); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). It is altogether different to suggest that a legislature can accord a statutory right to a fetus which lacks constitutional rights when doing so requires the abridgement of a woman's own constitutional right. No doubt a right to be born is of greater significance than the right to receive compensation for tortious injury or other pecuniary or property rights. But

have been claimed, in other cases, to be sufficiently compelling to justify impairment of constitutional rights. A compelling state interest has generally been one where the nature of the interest was broadly accepted, with dispute remaining only as to whether the state could constitutionally advance that interest by the specific means being challenged. When Americans of Japanese descent were placed in relocation camps as a protection in the event of invasion, it was widely accepted that there was an important governmental interest in military security, even though it was a matter of sharp dispute whether that interest could justify an abridgement of constitutional rights based on a racial classification. Korematsu v. United States, 323 U.S. 214 (1944). Even where a governmental interest has been found not sufficiently compelling, there is usually no dispute about the nature of the state interest. For example, in N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958), the state of Alabama had a generally accepted interest in the enforcement of its corporate laws; the constitutional issue waswhether that acknowledged interest was sufficient to justify disclosure of N.A.A.C.P. membership lists, an impairment of first amendment rights.

In this case the constitutional issue would be difficult enough if it involved determining whether the woman's right to privacy is outweighed by the state interest in protecting the life of the fetus. But here there is serious

dispute concerning the nature of the state interest to be weighed. Some believe the fetus is in every respect a human being from the moment of conception. Others believe there is a point during the pregnancy when it becomes in many respects a human being. Still others believe that until it is born, a fetus is merely a mass of protoplasm, which, though it may have some attributes of a human being such as hunger and a nervous system, is not a human being in any sense.[9/] No decision of the Supreme Court has ever permitted anyone's constitutional right to be directly abridged to protect a state interest which is subject to such a variety of personal judgments. Whatever discretion a legislature may have in deciding, within constitutional limits, to assert a generally acknowledged state interest at the expense of a constitutional right, it cannot do so here where the significance of the constitutional right is extraordinarily high, and the nature of the state interest asserted is itself a matter of such diverse personal judgment. Such an interest cannot acquire the force of a governmental decree

tainty. In their view, perhaps in the view of some of the legislators who enacted this statute, abortion is considered the deliberate killing of a human being. We do not doubt the sincerity of those who hold this view, nor minimize the depth of their conviction in this regard. But under the Constitution, their judgment must remain a personal judgment, one that they may follow in their personal lives and seek to persuade others to follow, but a judgment they may not impose upon others by force of law.

Well said.

There are those who believe it is destructive of patriotism to permit individual school children to decline to pledge allegiance to the flag because of their personal religious views. There are those who believe it is destructive of religion to bar public school authorities from conducting religious exercises in schools. There are those who believe it is destructive of family life to permit the use of contraceptives. In each instance, the viewpoint behind the challenged governmental action was a serious, thoughtful judgment, deeply held by large numbers of people.

religion, and family life will flourish better in an environment of individual freedom if state regimentation of thought is prohibited. The same premise leads to the conclusion that a woman's right to decide whether to have an abortion cannot be completely abridged by a state statute imposing upon her the uniformity of thought about the nature of a fetus which is reflected in Public Act No. 1.

Thus, the compelling state interest test cannot be applied in this case in the same way it has been applied in other cases. The fetus, for whose benefit the state interest is asserted, does not have constitutional rights. Moreover, the state interest being asserted is subject to widely varying personal views. Of course, legislation is not rendered unconstitutional simply because it advances a social policy about which people differ. Normally it is the legislative function to resolve such differences. But where a state interest subject to such variety of viewpoint is asserted on behalf of a fetus which lacks constitutional rights, and where the assertion of such an interest would accomplish

several hours after an abortion operation. It is not entirely clear which of two alternative contentions the state is making: (a) that the state has a compelling interest in protecting the life of a fetus which actually survives an abortion operation; or (b) that the state has a compelling interest in protecting the life of a fetus in utero which has progressed to the point during pregnancy when it could survive outside the uterus. Of course, neither contention justifies Public Act No. 1, because the abridgement of the woman's constitutional right accomplished by this statute is far more extensive than what would be required to protect the life of a fetus in either of the situations just described. A statute may not advance a governmental interest at the expense of a fundamental constitutional right if that interest may be advanced by a less drastic abridgement. See, e.g., United States v. Robel, 389 U.S. 258 (1967). And while we need not and should not express any conclusion about statutes advancing such more limited interests, analysis of them does serve to highlight the invalidity of the statute before us.

protect. Moreover, a statute protecting the life of such a surviving fetus would not impair the woman's right to an abortion. The woman has had the abortion; it simply has not been successful.

If a statute sought to protect the lives of all fetuses which could survive outside the uterus, such a statute would be a legislative acceptance of the concept of viability. While authorities may differ on the precise time, there is no doubt that at some point during pregnancy a fetus is capable, with proper medical attention, of surviving outside the uterus. And it is equally clear that there is a minimum point before which survival outside the uterus is not possible.[10/] A statute designed to prevent the destruction of fetuses after viability has been reached would be subject to these considerations. Like the present statute, it would be conferring statutory rights on a fetus which does not have constitutional rights. However, the state interest in protecting the life of a fetus capable of living outside the uterus could be shown to be more generally accepted and,

situations, the nature of the state interest might well not be generally accepted. Finally, and most important, such a statute would not be a direct abridgement of the woman's constitutional right, but at most a limitation on the time when her right could be exercised. The present statute, however, does not present any of the considerations favorable to the state that might be found in either type of statute of more limited scope.

For these reasons, we hold, as have most courts that have considered similar statutes,[11] that plaintiffs are entitled to a judgment declaring Public Act No. 1 unconstitutional. Such a judgment does not limit the power of the state to enact reasonable regulations specifying the facilities where abortions may be performed or the personnel qualified to perform them. For the reasons set forth in the prior litigation, 342 F.Supp. at 812, we also hold that plaintiffs are entitled to an injunction prohibiting enforcement of Public Act No. 1.[12]

Dated: September 20, 1972

FOOTNOTES

1/ "Section 1. The public policy of the state and the intent of the legislature is to protect and preserve human life from the moment of conception and in order to effectuate this public policy and intent:

"(a) No person shall give or administer to any female person, advise or cause her to take or use anything, or use any means, with intent to procure upon her a miscarriage or abortion, nor shall any female person do or suffer anything to be done, with intent thereby to produce upon herself a miscarriage or abortion.

"(b) No person shall sell or advertise medicines or instruments or other devices for the commission of a miscarriage or abortion, except to a licensed physician or a hospital licensed by the state of Connecticut.

"(c) The provisions of subsections (a) and (b) of this section shall not apply to an abortion or miscarriage performed by a licensed physician when such abortion or miscarriage is necessary to preserve the physical life of the mother and when such abortion is performed in a hospital licensed by the state of Connecticut.

"(d) A violation of this section shall be a Class D felony.

"Section 2. If any part of this act shall be held invalid, such holding shall not affect the validity of the remaining parts of this act. If a part of this act is invalid in one or more of its applications, the remaining parts of this act shall remain in effect in all valid applications that are severable from the invalid applications.

3/ Defendants have objected to the case proceeding in this fashion, pointing out that a new summons was never issued upon the new "complaint." See Fed.R.Civ.P. 4(a). We fail to see how any rights of the defendants have in any way been prejudiced. The new papers were all served upon defendants' counsel, and defendants have had full and fair notice of the claims being made and a full opportunity to be heard. The formal requirement for personal service of a summons and complaint upon defendants alerts them to the possibility that default will enter for failure to respond, a prospect of no applicability to this case.

Plaintiffs subsequently filed in the new case a substituted complaint, which was served upon defendants' counsel.

4/ For the author of this opinion, this statement of legislative purpose makes the issue posed by plaintiffs' challenge to Connecticut's new abortion statute quite different from the issue raised by the challenge to the prior statutes. From my review of the relevant materials I concluded that the state interest sought to be advanced by the prior statutes was protection of the mother's health. However the situation might have been in 1860, that interest could not possibly justify invasion of the mother's right to privacy in 1972 when the undisputed medical facts established that abortion poses a lesser health risk to the mother than does childbirth. Since the state interest being advanced was factually unsound, it plainly could not be used to justify an abridgement of the mother's constitutional rights. 342 F.Supp. at 805-11. The state interest now specified, however, is not factually unsound. A statute of this sort, as I previously indicated, 342 F.Supp. at 810 and 811 n.13, poses a far more difficult question, one that I did not believe should be decided unless such a statute was enacted.

plicitly applied in two situations. The first is where a regulation touching upon a fundamental interest or based on a suspect criterion is challenged on equal protection grounds. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969); Loving v. Virginia, 388 U.S. 1 (1967). The second is where a regulation impairs the exercise of a constitutional right rather than prohibits its exercise. See, e.g., N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958); Sherbert v. Verner, 374 U.S. 398 (1963). See Branzburg v. Hayes, ___ U.S. ___, at n. 18 (1972). This case, like Griswold, fits neither pattern. The assertion of a constitutional right to marital privacy stands independent of any equal protection claim, and the exercise of that right is directly prohibited by Public Act No. 1, rather than merely impaired.

7/ See also Doe v. Bolton, 319 F.Supp. 1048, 1055 (N.D. Ga. 1970), prob. juris. postponed to hearing on the merits, 402 U.S. 941 (1971).

While Byrn and McGarvey also expressed the view that the extent of protection to be accorded a fetus was appropriately a matter of legislative concern, we think this aspect of those decisions failed to give adequate recognition to the significance of the woman's constitutional right or to the variety of personal judgments concerning the state interest advanced to abridge her right, which renders the state interest insufficient to justify the almost total abridgement of the woman's right accomplished by the statute here challenged. See part B of text, infra.

8/ The brief of the amicus curiae Planned Parenthood Federation of America, Inc., suggests two other reasons to doubt the existence of fourteenth amendment rights in a fetus. They point out that the fourteenth amendment provides for the apportionment of members of the House of Representatives based on the whole number of "persons" counted in each state, and that fetuses have never been counted for this purpose. The argument is of interest but not determinative, since

or naturalized in the United States; the fetus was plainly not born in the United States whether or not it was deemed a person while here.

9/ The range of views on this subject can be found not only in the fields of philosophy and religion. There is in the record in this litigation substantial evidence of the variety of views held by highly regarded members of the medical profession. Plaintiffs have submitted a statement by 100 professors of obstetrics and gynecology, from nearly all the leading medical schools in the country, 112 American Journal of Obstetrics and Gynecology 992-98, April 1, 1972, a policy statement adopted by the executive board of the American College of Obstetricians and Gynecologists in August 1970, and a resolution adopted by the House of Delegates of the American Medical Women's Ass'n, Inc., on November 7, 1969, all supporting the woman's right to an abortion. Defendants have responded with affidavits from 39 doctors, all, in varying degrees, expressing an opposing view.

10/ While we need not make any finding on this point, we note that the affidavit of Dr. Virginia N. Stuermer, of New Haven, sets forth what appears to be a medical consensus that the fetus normally becomes viable approximately 28 weeks after conception.

11/ The cases are collected in the prior decision in this litigation, 342 F.Supp. at 803 n.14.

12/ The injunction will also make it certain that jurisdiction to consider an appeal taken by defendants from our judgment

Abele

v.

Markle

CLARIE, District Judge, dissenting:

My earlier dissenting opinion in Abele v. Markle, 342 F.Supp. 800, 812 (D. Conn. 1972) concluded that the Legislature, not the Judiciary, was designed by our founding fathers to reflect the standards of human decency which must be weighed in any choice between the competing moral values which are to guide governmental policy. By reenacting legislation which declared the paramountcy of the human fetus' right to life over a woman's right to privacy, except where it could be demonstrated that the mother's life would be jeopardized, the Connecticut Legislature reaffirmed that basic choice.

Separate opinions of the majority declaring the prior statute unconstitutional disclosed conflicting judicial points of view. Judge Lumbard found that the 1860 statute was designed to protect the life of the unborn child, but considered the statute's purpose to be constitutionally insufficient. Judge Newman, on the other hand, found that the protection of the health of the mother was the primary legislative objective and that such purpose was not sufficient to justify a legislative invasion of the mother's con-

> laws would pose a legal question of extreme difficulty, since the legislative judgment on this subject would be entitled to careful consideration."

In response to the majority's decision, a Special Session of the Connecticut Legislature was called by the Governor to enact a new statute to fill the void. Public Act No. 1 was adopted by that Special Session and is the law which the plaintiffs are presently challenging. The preamble of that Act forthrightly declares the statute's purpose:

> "Section 1: The public policy of the State and the intent of the Legislature is to protect and preserve human life from the moment of conception . . . ."

The single exception to that protection, is the existence of circumstances wherein an abortion is required to preserve the physical life of the mother.

The dissenting opinion in Abele v. Markle, supra, is strengthened by the recent opinion of the New York Court of Appeals in Byrn v. New York City Health & Hosp. Corp., ___N.Y.2d ___ (1972), wherein the constitutionality of

> require legal personality for the unborn; the Legislature may, or it may do something less, as it does in limited abortion statutes, and provide some protection far short of conferring legal personality." (emphasis added).

The concurring opinion further reinforces this observation, when it added.

> "As Judge Breitel's opinion recognizes, the formidable task of resolving this issue is not for the courts. Rather, the extent to which fetal life should be protected 'is a value judgment not committed to the discretion of judges, but reposing instead in the representative branch of government.' . . . . Since the Constitution does not prohibit the determination made by the Legislature and there is a reasonable basis for it, the validity of the statute should be sustained."

The majority lightly brushes aside the time honored separation of powers and judicially declares ipse dixit that an unborn human fetus is not a person and has no constitutional rights requiring recognition. Such a sweeping statement would include, of course, unborn viable babies, who are physically able to exist outside the mother's body. Thus, an unborn full term baby could be killed with impunity

Clause 1, § 1 of the fourteenth amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The majority states that "[i]f the fetus survives the gestation period, it will be born and then become a person entitled to the legal protection of the Constitution," thereby construing birth to be a prerequisite to personage. This construction is compelled neither by logic nor the text of the amendment, for by its terms birth is a precondition only to citizenship. The fallacy of the majority's construction is accentuated by the fact that corporations have long been considered "persons" within the meaning of the fourteenth amendment despite the fact that they are not born. Santa Clara County v. Southern Pac.R.R. Co., 118 U.S. 394, 396 (1885); Hague v. C.I.O., 307 U.S. 496, 527 (1938); Merced Dredging Co. v. Merced County, 67 F.Supp. 598, 604 (S.D. Calif. 1946).

Imperfect though the comparison may be, the analogy

nature of a fetus nor the manner in which it is created may be deemed artificial. This conclusion is further buttressed by the eloquence of the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal . . . ." (emphasis added).

The second premise upon which the majority concludes that fetal life is not constitutionally protected is United States v. Vuitch, supra. The issue there, it must be borne in mind, was whether or not the District of Columbia Abortion Law was unconstitutionally vague, not whether fetal life should be constitutionally protected. McGarvey v. Magee-Woman's Hospital, 340 F.Supp. 751, 753 (W.D. Pa. 1971). Thus, Vuitch should not be viewed as a sub silentio constitutional adjudication, but rather a deliberate choice by the Court not to comment on fetal life in constitutional terms.

Since Eisenstadt v. Baird, 405 U.S. 438 (1972) and Griswold v. Connecticut, 381 U.S. 479 (1965) dealt with state regulation of the distribution and use of contraceptive devices, their focus was upon the choice as to the be-

> "[t]he family itself is not beyond regulation in the public interest . . . . And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. . . . The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." Prince v. Massachusetts, 321 U.S. 158, 166-167 (1943).

If the perimeters of first amendment freedoms may be shaped by the values of society, it follows that the penumbras emanating from other provisions of the Bill of Rights must be equally malleable. That such rights may be circumscribed by statute is unquestionable. See e.g. Braunfeld v. Brown, 366 U.S. 599 (1961), Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). And that the beneficiary of such statutory protection need not itself possess constitutional rights appears established. United States v. O'Brien, 391 U.S. 367 (1968).

The only real consideration is whether the state

interest is "subject to such a variety of viewpoint." Accordingly, it is claimed that a state interest is sufficiently compelling only when it is "broadly accepted" and it is broadly accepted only in the absence of "diverse personal judgments." The fallacy of this analysis is that diversity of viewpoint does not diminish state interest but often intensifies it. It is precisely for this reason that the weighing of conflicting values and viewpoints is a legislative, not a judicial, task.

"In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." Furman v. Georgia, 40 U.S.L.W. 4968 (Burger, C.J., dissenting). "We should not allow our personal preferences as to the wisdom of legislative and congressional action . . . to guide our judicial decision." Id. at 4977 (Blackmun, J., dissenting). That the majority has taken unto itself the legislative task of measuring degrees of public acceptance is evident in its pronouncement that "the state interest in protecting the life of a fetus capable of living outside the uterus could be shown to be

constitutionally protected rights. The Connecticut Legislature has weighed these factual considerations on society's scale of standards of decency.

The Legislature was undoubtedly aware that biologists, fetologists, and medical science commonly accept conception as the beginning of human life and the formation of an individual endowed with its own unique genetic pattern (Tr. 205); that the heart functions and circulates blood through the human fetus at three to five weeks (Tr. 286) and that blood groupings may be ascertained at eight weeks (Tr. 206); that while nutrients are fed to the baby from the mother through the placenta and the waste similarly excreted, the placenta is really part of the baby (Tr. 284); and that the latter's heart pumps its own blood through the umbilical vessels and lives as a separate entity suspended in amniotic fluid. (Tr. 210).

They had available to them medical information that, as early as seven weeks, brain waves are detectible in the unborn child and that it is known to react to drugs (Tr. 212); that physical reflexes such as contraction of the limbs, move-

medical research in the field of fetal medicine is a comparatively new branch of medicine (Tr. 252) and that the transplantation of life to artificial placentae is presently being studied.

Similarly available to the Connecticut Legislature were the abortion experience statistics of New York City under that State's statute which allowed abortion upon request.[1] During the twelve-month period from July 1, 1970, through June 30, 1971, in that one city alone, there were officially recorded 139,042 induced abortions[2]; and for the six-month period from July 1, 1971, through December 31, 1971, there were 111,590.[3] If these latter statistics were to be projected on a national population scale, the total number would amount to several million induced deaths of innocent victims annually. It is a legislative choice of societal values, which must decide a public policy of such magnitude, for that choice of values could either demean human life or enoble mankind's destiny.

All of these considerations were undoubtedly pondered by the Legislature before the determination was made that human life should not be compromised in the name of personal comfort or convenience. It is nothing less than judicial usurpation of a legislative prerogative to decide that at one point in fetal development, through an obscure process of legal metamorphosis (in this case, the degree and quality of "public acceptance") the state may constitutionally

protect fetal life, but that prior to such point in time, the state may not protect what it also regards, with substantial popular and medical justification, as human life.

It is for those reasons, and for those expressed in my earlier opinion in Abele v. Markle, supra, that I respectfully dissent.

T. Emmet Clarie
District Judge

FOOTNOTES

1/ By a vote of 79 to 68 in the Assembly on May 10, 1972, and 30 to 27 in the Senate the following day, the New York State Legislature voted to repeal this statute. Its action, however, was vetoed by the Governor of New York.

2/ New York City Department of Health, Bulletin on Abortion Program, End of First Year Report, at 1 (June 1971).

3/ New York City Department of Health, Bulletin on Abortion Program, at 1 (May 1972).

L. F. P. - File Copy

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 11/22/72

No. 70-18

Recirculated: _____

Jane Roe et al., Appellants, v. Henry Wade. | On Appeal from the United States District Court for the Northern District of Texas.

Renewed 11/25/72

[December —, 1972]

MR. JUSTICE BLACKMUN, Memorandum.

This Texas federal appeal and its Georgia companion, *Doe* v. *Bolton*, *post* ——, present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortive procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now vindicated dissent in *Lochner* v. *New York*, 198 U. S. 45, 76 (1905):

> "It [the Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

I

The Texas statutes that concern us here are Arts. 1191–1194 and 1196 of the State's Penal Code.[1] These

[1] "Article 1191. Abortion

"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.

"Art. 1192. Furnishing the means

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

"Art. 1193. Attempt at abortion

"If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided

make it a crime to "procure an abortion," as therein defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Similar statutes are in existence in a majority of the States.[2]

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it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

"Art. 1194. Murder in producing abortion

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

"Art. 1196. By medical advice

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

The foregoing Articles, together with Art. 1195, comprise Chapter 9 of Title 15 of the Penal Code. Article 1195, not attacked here, reads:

"Art. 1195. Destroying unborn child

"Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years."

[2] Ariz. Rev. Stat. Ann. § 13-211 (1971); Conn. Pub. Act. No. 1 (May 1972 special session) (in 4 Conn. Leg. Serv. 677 (1972)), and Conn. Gen. Stat. Rev. §§ 53-29, 53-30 (1968) (or unborn child); Idaho Code § 18-1505 (App. to Supp. 1971); Ill. Rev. Stats. c. 38, § 23-1 (1971); Ind. Code § 35-1-58-1 (1971); Iowa Code § 701.1 (1971); Ky. Rev. Stat. § 436.020 (1963); La. Rev. Stat. § 37:1285 (6) (1964) (loss of medical license) (but see § 14-87 (1972 Supp.) containing no exception for the life of the mother under the criminal statute); Me. Rev. Stat. Ann. Tit. 17, § 51 (1964); Mass. Gen. Laws Ann. c. 272, § 19 (1970) (using the term "unlawfully," construed to exclude an abortion to save the mother's life, *Kudish* v. *Bd. of Registration*, 350 Mass. 98, 248 N. E. 2d 264 (1969)); Mich. Comp. Laws § 750.14 (1948); Minn. Stat. § 617.18 (1971); Mo. Rev. Stat. § 559.100 (1969); Mont. Rev. Codes Ann. § 94-401 (1961); Neb. Rev. Stat. § 28-405 (1964); Nev. Rev. Stat. § 200:220 (1967); N. H. Rev. Stat. Ann. § 585.13 (1955); N. J. Stat. Ann. § 2A:87-1 (1969) ("without lawful justification"); N. D. Cent. Code §§ 12-25-

Texas first enacted a criminal abortion statute in 1854. Texas Laws 1854, c. 49, § 1, set forth in 3 Gammel, Laws of Texas, 1502 (1898). This was soon modified into language that has remained substantially unchanged to the present time. See Texas Penal Code of 1857, Arts. 531–536; Paschal's Laws of Texas, Arts. 2192–2197 (1866); Texas Rev. Stat., Arts. 536–541 (1879); Texas Rev. Crim. Stat., Arts. 1071–1076 (1911). The final article in each of these compilations provided the same exception, as does the present Article 1196, for an abortion by "medical advice for the purpose of saving the life of the mother."[3]

01, 12-23-02 (1960); Ohio Rev. Code § 2901.16 (1953); Okla. Stat. Ann., Tit. 21, § 861 (1972-1973 Supp.); Pa. Stat. Ann., Tit. 18, §§ 4718, 4719 (1963) ("unlawful"); R. I. Gen. Laws Ann. § 11-3-1 (1969); S. D. Compiled Laws § 22-17-1 (1967); Tenn. Code Ann. §§ 39-301, 39-302 (1956); Utah Code Ann. §§ 76-2-1, 76-2-2 (1953); Vt. Stat. Ann., Tit. 13, § 101 (1958); W. Va. Code Ann. § 61-2-8 (1966); Wis. Stat. § 940.04 (1969); Wyo. Stat. Ann. §§ 6-77, 6-78 (1957).

[3] Long ago a suggestion was made that the Texas statutes were unconstitutionally vague because of definitional deficiencies. The Texas Court of Criminal Appeals disposed of that suggestion peremptorily, saying only:

"It is also insisted in the motion in arrest of judgment that the statute is unconstitutional and void in that it does not sufficiently define or describe the offense of abortion. We do not concur in respect to this question." *Jackson v. State*, 55 Tex. Crim. R. 79, 89, 115 S. W. 252, 268 (1908).

The same court recently has held again that the State's abortion statutes are not unconstitutionally vauge or overbroad. *Thompson v. State*, — Tex. Crim. App. —, — S. W. 2d — (1971), appeal pending. The court held that "the State of Texas has a compelling interest to protect fetal life"; that Art. 1191 "is designed to protect fetal life"; that the Texas homicide statutes, particularly Art. 1205 of the Penal Code, are intended to protect a person "in existence by actual birth" and thereby implicitly recognize other human life that is not "in existence by actual birth"; that the definition of human life is for the legislature and not the courts; that Art. 1196 "is

II

Jane Roe,[4] a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. By an amendment to her complaint Roe purported to sue "on behalf of herself and all other women" similarly situated.

James Hubert Hallford, a licensed physician, sought and was granted leave to intervene in Roe's action. In

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more definite that the District of Columbia statute upheld in [*United States* v.] *Vuitch*" (402 U. S. 62); and that the Texas statute "is not vague and indefinite or overbroad." A physician's abortion conviction was affirmed.

In n. 2, — Tex. Crim. App., at —, — S. W. 2d, at —, the court observed that any issue as to the burden of proof under the exemption of Art. 1196 "is not before us." But see *Veevers* v. *State*, 172 Tex. Crim. App. 162, 168–169, 354 S. W. 2d 161 (1962). Cf. *United States* v. *Vuitch*, 402 U. S. 62, 69–71 (1971).

[4] The name is a pseudonym.

his complaint he alleged that he had been arrested previously for violations of the Texas abortion statutes and that two such prosecutions were pending against him. He described conditions of patients who came to him seeking abortions, and he claimed that for many cases he, as a physician, was unable to determine whether they fell within or outside the exception recognized by Article 1196. He alleged that, as a consequence, the statutes were vague and uncertain, in violation of the Fourteenth Amendment, and that they violated his own and his patients' rights to privacy in the doctor-patient relationship and his own right to practice medicine, rights he claimed were guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

John and Mary Doe,[2] a married couple, filed a companion complaint to that of Roe. They also named the District Attorney as defendant, claimed like constitutional deprivations, and sought declaratory and injunctive relief. The Does alleged that they were a childless couple; that Mrs. Doe was suffering from a "neural-chemical" disorder; that her physician had "advised her to avoid pregnancy until such time as her condition has materially improved" (although a pregnancy at the present time would not present "a serious risk" to her life); that, pursuant to medical advice, she had discontinued use of birth control pills; and that if she should become pregnant, she would want to terminate the pregnancy by an abortion performed by a competent, licensed physician under safe, clinical conditions. By an amendment to their complaint, the Does purported to sue "on behalf of themselves and all couples similarly situated."

The two actions were consolidated and heard together by a duly convened three-judge district court. The suits thus presented the situations of the pregnant single

[2] These names are pseudonyms.

woman, the childless couple, with the wife not pregnant, and the licensed practicing physician, all joining in the attack on the Texas criminal abortion statutes. Upon the filing of affidavits, motions were made to dismiss and for summary judgment. The court held that Roe and Dr. Hallford, and members of their respective classes, had standing to sue, and presented justiciable controversies, but that the Does had failed to allege facts sufficient to state a present controversy and did not have standing. It concluded that, with respect to the requests for a declaratory judgment, abstention was not warranted. On the merits, the District Court held that the "fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment," and that the Texas criminal abortion statutes were void on their face because they were both unconstitutionally vague and constituted an overbroad infringement of the plaintiffs' Ninth Amendment rights. The court then held that abstention was warranted with respect to the requests for an injunction. It therefore dismissed the Doe complaint, declared the abortion statutes void, and dismissed the application for injunctive relief. 314 F. Supp. 1217 (ND Tex. 1970).

DC's holding

The plaintiffs Roe and Doe and the intervenor Hallford, pursuant to 28 U. S. C. § 1253, have appealed to this Court from that part of the District Court's judgment denying the injunction. The defendant District Attorney has purported to cross appeal, pursuant to the same statute, from the court's grant of declaratory relief to Roe and Hallford. Both sides also have taken protective appeals to the United States Court of Appeals for the Fifth Circuit. That court ordered the appeals held in abeyance pending decision here. We postponed decision on jurisdiction to the hearing on the merits. 402 U. S. 941 (1971).

III

It might have been preferable if the defendant, pursuant to our Rule 20, had presented to us a petition for certiorari before judgment in the Court of Appeals with respect to the granting of the plaintiffs' prayer for declaratory relief. Our decisions in *Mitchell* v. *Donovan*, 398 U. S. 427 (1970), and *Gunn* v. *University Committee*, 399 U. S. 383 (1970), are to the effect that § 1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone. We conclude, nevertheless, that those decisions do not foreclose our review of both the injunctive and the declaratory aspects of a case of this kind when it is properly here, as this one is, on appeal under § 1253 from specific denial of injunctive relief, and the arguments as to both aspects are necessarily identical. See *Carter* v. *Jury Commission*, 396 U. S. 320 (1970); *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73, 80–81 (1960). It would be destructive of time and energy for all concerned were we to rule otherwise. Cf. *Doe* v. *Bolton*, *post*, —.

IV

We are next confronted with issues of justiciability, standing, and abstention. Have Roe and the Does established that "personal stake in the outcome of the controversy," *Baker* v. *Carr*, 369 U. S. 186, 204 (1962), that insures that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution," *Flast* v. *Cohen*, 392 U. S. 83, 101 (1968), and *Sierra Club* v. *Morton*, 405 U. S. 727, 732 (1972)? And what effect did the pendency of criminal abortion charges against Dr. Hallford in state court have upon the propriety of the federal court's granting relief to him as a plaintiff-intervenor?

A. *Jane Roe.* Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas.

Viewing Roe's case as of the time of its filing and thereafter until as late as May, there can be little dispute that it then presented a case or controversy and that, wholly apart from the class aspects, she, as a pregnant single woman thwarted by the Texas criminal abortion laws, had standing to challenge those statutes. *Abele* v. *Markle*, 452 F. 2d 1121, 1125 (CA2 1971); *Crossen* v. *Breckenridge*, 446 F. 2d 833, 838–839 (CA6 1971); *Poe* v. *Menghini*, 339 F. Supp. 986, 990–991 (Kans. 1972). See *Truax* v. *Raich*, 239 U. S. 33 (1915). Indeed, we do not read the appellee's brief as really asserting anything to the contrary. The "logical nexus between the status asserted and the claim sought to be adjudicated," *Flast* v. *Cohen*, 392 U. S., at 102, and the necessary degree of contentiousness, *Golden* v. *Zwickler*, 394 U. S. 103 (1969), are both present.

The appellee notes, however, that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970,[4] or on the following June 17 when the court's opinion and judgment were filed. And he suggests that Roe's case must now be moot because she and all other members of her class are no longer subject to any 1970 pregnancy.

[4] The appellee twice states in his brief that the hearing before the District Court was held on July 22, 1970. Appellee's Brief 13. The docket entries, Appendix, at 2, and the transcript, Appendix, at 76, reveal this to be an error. The July date appears to be the time of the reporter's transcription. See Appendix, at 77.

The usual rule in federal cases is that an actual controversy must exist at all stages of appellate or certiorari review, and not simply at the date the action is initiated. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950); *Golden* v. *Zwickler*, *supra*; *SEC* v. *Medical Committee for Human Rights*, 404 U. S. 403 (1972).

But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly is "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). See *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969); *Carroll* v. *President and Commissioners*, 393 U. S. 175, 178–179 (1968); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632–633 (1953).

We therefore agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot.

B. *Dr. Hallford.* The doctor's position is different. He entered Roe's litigation as a plaintiff-intervenor alleging in his complaint that he:

> "In the past has been arrested for violating the Texas Abortion Laws and at the present time stands charged by indictment with violating said laws in the Criminal District Court of Dallas County, Texas to-wit: (1) The State of Texas vs.

> James H. Hallford, No. C-69-5307-IH, and (2) The State of Texas vs. James H. Hallford, No. C-69-2524-H. In both cases the defendant is charged with abortion. . . ."

In his application for leave to intervene the doctor made like representations as to the abortion charges pending in the state court. These representations were also repeated in the affidavit he executed and filed in support of his motion for summary judgment.

Dr. Hallford is therefore in the position of seeking, in a federal court, declaratory and injunctive relief with respect to the same statutes under which he stands charged in criminal prosecutions simultaneously pending in state court. Although he stated that he has been arrested in the past for violating the State's abortion laws, he makes no allegation of any substantial and immediate threat to any federally protected right that cannot be asserted in his defense against the state prosecutions. Neither is there any allegation of harassment or bad faith prosecution. In order to escape the rule, articulated in the cases cited in the next paragraph of this opinion, that, absent harassment and bad faith, a defendant in a pending state criminal case cannot affirmatively challenge in federal court the statutes under which the State is prosecuting him, Dr. Hallford seeks to distinguish his status as a present state defendant from his status as a "potential future defendant" and to assert only the latter for standing purposes here.

We see no merit in that distinction. Our decision in *Samuels* v. *Mackell*, 401 U. S. 66 (1971), compels the conclusion that the District Court erred when it granted declaratory relief to Dr. Hallford instead of refraining from so doing. The court, of course, was correct in refusing to grant injuctive relief to the doctor. The reasons supportive of that action, however, are those expressed in *Samuels* v. *Mackell*, *supra*, and in *Younger* v.

Harris, 401 U. S. 37 (1971); *Boyle* v. *Landry*, 401 U. S. 77 (1971); *Perez* v. *Ledesma*, 401 U. S. 82 (1971); and *Byrne* v. *Karalexis*, 401 U. S. 216 (1971). See also *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). We note, in passing, that *Younger* and its companion cases were decided after the three-judge District Court decision in this case.

Dr. Hallford

Dismissed

Dr. Hallford's complaint in intervention, therefore, is to be dismissed.[1] He is remitted to his defenses in the state criminal proceedings against him. We reverse the judgment of the District Court insofar as it granted Dr. Hallford relief and failed to dismiss his complaint in intervention.

C. *The Does.* In view of our ruling as to Roe's standing in her case, the issue of the Does' standing in their case has little significance. The claims they assert are essentially the same as those of Roe, and they attack the same statutes. Nevertheless, we briefly note the Does' posture.

Their pleadings present them as a childless married couple, the woman not being pregnant, who have no desire to have children at this time because of their having received medical advice that Mrs. Doe should avoid pregnancy, and for "other highly personal reasons." But

[1] We need not consider what different result, if any, would follow if Dr. Hallford's intervention were on behalf of a class. His complaint in intervention does not purport to assert a class suit and makes no reference to any class apart from an allegation that he "and others similarly situated" must necessarily guess at the meaning of Art. 1196. His application for leave to intervene goes somewhat further for it asserts that plaintiff Roe does not adequately protect the interest of the doctor "and the class of people who are physicians . . . and the class of people who are . . . patients . . . ." The leave application, however, is not the complaint. Despite the District Court's statement to the contrary, 314 F. Supp., at 1225, we fail to perceive the essentials of a class suit in the Hallford complaint.

they "fear . . . they may face the prospect of becoming parents." And if pregnancy ensues, they "would want to terminate" it by an abortion. They assert an inability to obtain an abortion legally in Texas and, consequently, the prospect of obtaining an illegal abortion there or of going outside Texas to some place where the procedure could be obtained legally and competently.

We thus have as plaintiffs a married couple who have, as their asserted immediate and present injury, only an alleged "detrimental effect upon [their] marital happiness" because they are forced to "the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible pregnancy." Their claim is that sometime, in the future, Mrs. Doe might become pregnant because of possible failure of contraceptive measures, and at that time in the future, she might want an abortion that might then be illegal under the Texas statutes.

This very phrasing of the Does' position reveals its speculative character. Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place and all may not combine. In the Does' estimation, these possibilities might have some real or imagined impact upon their marital happiness. But we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy. *Younger* v. *Harris*, 401 U. S., at 41–42; *Golden* v. *Zwickler*, 394 U. S., at 109–110 (1969); *Abele* v. *Markle*, 452 F. 2d, at 1124–1125; *Crossen* v. *Breckenridge*, 446 F. 2d, at 839. The Does' claim falls far short of those resolved otherwise in the cases that the Does urge upon us, namely, *Investment Co. Institute* v. *Camp*, 401 U. S. 617 (1971);

Data Processing Service v. *Camp*, 397 U. S. 150 (1970); and *Epperson* v. *Arkansas*, 393 U. S. 97 (1968). See also *Truax* v. *Raich*, *supra*.

The Does therefore are not appropriate plaintiffs in this litigation. Their complaint was properly dismissed by the District Court, and we affirm that dismissal.

V

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *id.*, at 460 (WHITE, J., concurring); or among those rights reserved to the people by the Ninth Amendment, *Griswold* v. *Connecticut*, 381 U. S., at 486 (Goldberg, J., concurring). Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.

right formed in "liberty" of 14th Amend

VI

It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.

1. *Ancient attitudes.* These are not capable of precise determination. We are told that at the time of the Persian Empire abortifacients were known and that criminal abortions were severely punished.[8] We are also told, however, that abortion was practiced in Greek times as well as in the Roman Era,[9] and that "it was resorted to without scruple." [10] The Ephesian, Soranos, often described as the greatest of the ancient gynecologists, appears to have been generally opposed to Rome's prevailing free-abortion practices. He found it necessary to think first of the life of the mother, and he resorted to abortion when, upon this standard, he felt the procedure advisable.[11] Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion.[12]

2. *The Hippocratic Oath.* What then of the famous Oath that has stood so long as the ethical guide of the medical profession and that bears the name of the great Greek (460(?)–377(?) B. C.), who has been described as the Father of Medicine, the "wisest and the greatest

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[8] A. Castiglioni, A History of Medicine 84 (2d ed. 1947), E. Krumbhaar, translator and editor (hereinafter "Castiglioni").

[9] J. Ricci, The Genealogy of Gynaecology 52, 84, 113, 149 (2d ed. 1950) (hereinafter "Ricci"); L. Lader, Abortion 75–77 (1966) (hereinafter "Lader"); K. Niswander, Medical Abortion Practices in the United States, in Abortion and the Law 27, 38–40 (D. Smith, editor, 1967); G. Williams, The Sanctity of Life 148 (1957) (hereinafter "Williams"); J. Noonan, An Almost Absolute Value in History, in The Morality of Abortion 1, 3–7 (J. Noonan ed. 1970) (hereinafter "Noonan"); R. Quay, Justifiable Abortion—Medical and Legal Foundations, II, 49 Geo. L. J. 395, 406–422 (1961) (hereinafter "Quay").

[10] L. Edelstein, The Hippocratic Oath 10 (1943) (hereinafter "Edelstein"). But see Castiglioni 227.

[11] Edelstein 12; Ricci 113–114, 118–119; Noonan 5.

[12] Edelstein 13–14.

practioner of his art," and the "most important and most complete medical personality of antiquity," who dominated the medical schools of his time, and who typified the sum of the medical knowledge of the past?[13] The Oath varies somewhat according to the particular translation, but in any translation the content is clear: "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion,"[14] or "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy."[15]

Although the Oath is not mentioned in any of the principal briefs in this case or in *Doe* v. *Bolton*, *post*, it represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day. Why did not the authority of Hippocrates dissuade abortion practice in his time and that of Rome? The late Dr. Edelstein provides us with a theory:[16] The Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. See Plato, *Republic*, V, 461; Aristotle, *Politics*, VII, 1335 b 25. For the Pythagoreans, however, it was a matter of dogma. For them the embryo was animate from the moment of conception, and abortion meant destruction of a living being. The abortion clause of the Oath, therefore, "echoes Pythagorean doctrines," and "[i]n no other stratum of Greek opinion were such

[13] Castiglioni 148.
[14] *Id.*, at 154.
[15] Edelstein 3.
[16] *Id.*, at 12, 15–18.

views held or proposed in the same spirit of uncompromising austerity." [17]

Edelstein then concludes that the Oath originated in a group representing only a small segment of Greek opinion and that it certainly was not accepted by all ancient physicians. He points out that medical writings down to Galen (130-200 A. D.) "give evidence of the violation of almost every one of its injunctions." [18] But with the end of antiquity a decided change took place. Resistance against suicide and against abortion became common. The Oath came to be popular. The emerging teachings of Christianity were in agreement with the Pythagorean ethic. The Oath "became the nucleus of all medical ethics" and "was applauded as the embodiment of truth." Thus, suggests Dr. Edelstein, it is "a Pythagorean manifesto and not the expression of an absolute standard of medical conduct." [19]

This, it seems to us, is a satisfactory and acceptable explanation of the Hippocratic Oath's apparent rigidity. It enables us to understand, in historical context, a long accepted and revered statement of medical ethics.

3. *The Common Law.* It is undisputed that at the common law, abortion performed *before* "quickening"—the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy [20]—was not an indictable offense. [21] The ab-

[17] *Id.*, at 18; Lader 76.

[18] Edelstein 63.

[19] *Id.*, at 64.

[20] Dorland's Illustrated Medical Dictionary 1251 (24th ed. 1965).

[21] E. Coke, Institutes III *50 (1648); 1 W. Hawkins, Pleas of the Crown c. 31, § 16 (1762); 1 Blackstone, Commentaries *129-130 (1766); M. Hale, Pleas of the Crown 433 (1778). For discussions of the role of the quickening concept in English common law, see Lader 78; Noonan 223-226; C. Means, The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case-

sence of a common law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins. These disciplines variously approached the question in terms of the point at which the embryo or fetus became "formed" or recognizably human, or in terms of when a "person" came into being, that is, infused with a "soul" or "animated." A loose consensus evolved in early English law that these events occurred at some point between conception and live birth.[32] This was "mediate animation." Although

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of Cessation of Constitutionality, 14 N. Y. L. Forum 411, 418–428 (1968) (hereinafter "Means I"); L. Stern, Abortion: Reform and the Law, 59 J. Crim. L. C. & P. S. 84 (1968) (hereinafter "Stern"); Quay 430–432; Williams 152.

[32] Early philosophers believed that the embryo or fetus did not become formed and begin to live until at least 40 days after conception for a male, and 80 to 90 days for a female. See, for example, Aristotle, Hist. Anim. 7.3.583b; Gen. Anim. 2.3.736, 2.5.741; Hippocrates, Lib. de Nat. Puer., No. 10. Aristotle's thinking derived from his three-stage theory of life: vegetable, animal, rational. The vegetable stage was reached at conception, the animal at "animation," and the rational soon after live birth. This theory, together with the 40/80 day view, came to be accepted by early Christian thinkers.

The theological debate was reflected in the writings of St. Augustine, who made a distinction between *embryo inanimatus*, not yet endowed with a soul, and *embryo animatus*. He may have drawn upon Exodus xxi, 22. At one point, however, he expresses the view that human powers cannot determine the point during fetal development at which the critical change occurs. See Augustine, De Origine Animae 4.4 (Pub. Law 44.527). See also Reany, The Creation of the Human Soul, c. 2 and 53–86 (1932); Huser, The Crime of Abortion in Common Law 15 (Catholic Univ. of America, Canon Law Studies No. 162, Washington, D. C. 1942).

Galen, in three treatises related to embryology, accepted the thinking of Aristotle and his followers. Quay 426–427. Later, Augustine on abortion was incorporated by Gratian into the Decretum, published about 1140. Decretum Magistri Gratiani 2.32.2.7 to 2.32.2.10,

Christian theology and the canon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the 19th century, there was otherwise little agreement about the precise time of formation or animation. There was agreement, however, that prior to this point the fetus was to be regarded as part of the mother and its destruction, therefore, was not homicide. Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40–80 day view, and perhaps to Acquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point. The significance of quickening was echoed by later common law scholars and found its way into the received common law in this country.

Whether abortion of a *quick* fetus was a felony at common law, or even a lesser crime, is still disputed. Bracton, writing early in the 13th century, thought it homicide.[24] But the later and predominant view, following the great common law scholars, has been that

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in 1 Corpus Juris Canonici 1122, 1123 (2d ed. Friedberg ed. 1879). Gratian, together with the decretals that followed, were recognized as the definitive body of canon law until the new Code of 1917.

For discussions of the canon law treatment, see Means I, at 411–412; Noonan, 20–28; Quay 426–430; see also Noonan, Contraception: A History of Its Treatment by the Catholic Theologians and Canonists 18–29 (1965).

[24] Bracton took the position that abortion by blow or poison was homicide "if the foetus be already formed and animated, and particularly if it be animated." 2 H. Bracton, De Legibus et Consuetudinibus Angliae 279 (Twiss ed. 1879), or, as a later translation puts it, "if the foetus is already formed or quickened, especially if it is quickened." II Bracton, On the Laws and Customs of England 341 (Thorne ed. 1968). See Quay 431; see also 2 Fleta 60–61 (Book I, c. 23) (Selden Society ed. 1955).

it was at most a lesser offense. In a frequently cited passage, Coke took the position that abortion of a woman "quick with childe" is "a great misprision and no murder." [24] Blackstone followed, saying that while abortion after quickening had once been considered manslaughter (though not murder), "modern law" took a less severe view.[25] A recent review of the common law precedents argues, however, that those precedents contradict Coke and that even post-quickening abortion was never established as a common law crime.[26] This is of some importance because while most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law,[27] others followed Coke in stating that abor-

[24] E. Coke, Institutes III *50 (1648).

[25] 1 Blackstone, Commentaries *129–130 (1765).

[26] C. Means, The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?, 17 N. Y. L. Forum 335 (1971) (hereinafter "Means II"). The author examines the two principal precedents cited marginally by Coke, both contrary to his dictum, and traces the treatment of these and other cases by earlier commentators. He concludes that Coke, who himself participated as an advocate in an abortion case in 1601, may have intentionally misstated the law. The author even suggests a reason: Coke's strong feelings about abortion, coupled with his reluctance to acknowledge common law (secular) jurisdiction to assess penalties for an offence that traditionally had been an exclusively ecclesiastical or canon law crime. See also Lader 78–79, who notes that some scholars doubt the common law ever was applied to abortion; that the English ecclesiastical courts seem to have lost interest in the problem after 1527; and that the preamble to the English legislation of 1803, 43 Geo. 3, c. 58, § 1, at 203, referred to in the text, *infra*, states that "no adequate means have been hitherto provided for the prevention and punishment of such offenses."

[27] *Commonwealth* v. *Bangs*, 9 Mass. 387, 388 (1812); *Commonwealth* v. *Parker*, 50 Mass. (9 Met.) 263, 265–266 (1845); *State* v. *Cooper*, 22 N. J. L. 52, 58 (1849); *Abrams* v. *Foshee*, 3 Iowa 274, 278–280 (1856); *Smith* v. *Gaffard*, 31 Ala. 45, 51 (1857); *Mitchell*

tion of a quick fetus was a "misprision," a term they translated to mean "misdemeanor." [38] That their reliance on Coke on this aspect of the law was uncritical and, apparently in all the reported cases, dictum (due probably to the paucity of common law prosecutions for post-quickening abortion), makes it now appear doubtful that abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus.

4. *The English statutory law.* England's first criminal abortion statute, Lord Ellenborough's Act, 43 Geo. 3, c. 58, came in 1803. It made abortion of a quick fetus, § 1, a capital crime, but in § 2 it provided lesser penalties for the felony of abortion before quickening, and thus preserved the quickening distinction. This contrast was continued in the general revision of 1828, 9 Geo. 4, c. 31, § 13, at 104. It disappeared, however, together with the death penalty, in 1837, 7 Will. 4 & 1 Vic., c. 85, § 6, at 360, and did not reappear in the Offenses Against the Person Act of 1861, 24 & 25 Vic., c. 100, § 59, at 438, that formed the core of English anti-abortion law until the liberalizing reforms of 1967. In 1929 the Infant Life (Preservation) Act, 19 & 20 Geo. 5, c. 34, came into being. Its emphasis was upon the destruction of "the life of a child capable of being born alive." It made a willful act performed with the necessary intent a felony. It contained a proviso that

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v. *Commonwealth*, 78 Ky. 204, 210 (1879); *Eggart* v. *State*, 40 Fla. 527, 532, 25 So. 144, 145 (1898); *State* v. *Alcorn*, 7 Idaho 599, 606, 64 P. 1014, 1016 (1901); *Edwards* v. *State*, 79 Neb. 251, 252, 112 N. W. 611, 612 (1907); *Gray* v. *State*, 77 Tex. Crim. R. 221, 224, 178 S. W. 337, 338 (1915); *Miller* v. *Bennett*, 190 Va. 162, 169, 56 S. E. 2d 217, 221 (1949). Contra, *Mills* v. *Commonwealth*, 13 Pa. 631, 633 (1850); *State* v. *Slagle*, 83 N. C. 630, 632 (1880).

[38] *See Smith* v. *State*, 33 Me. 48, 55 (1851); *Evans* v. *People*, 49 N. Y. 86, 88 (1872); *Lamb* v. *State*, 67 Md. 524, 533, 10 A. 208 (1887).

one was not to be found guilty of the offense "unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother."

A seemingly notable development in the English law was the case of *Rex* v. *Bourne*, [1939] 1 K. B. 687. This case apparently answered in the affirmative the question whether an abortion necessary to preserve the life of the pregnant woman was excepted from the criminal penalties of the 1861 Act. In his instructions to the jury Judge Macnaghten referred to the 1929 Act, and observed, p. 691, that that Act related to "the case where a child is killed by a willful act at the time when it is being delivered in the ordinary course of nature." *Id.*, at 91. He concluded that the 1861 Act's use of the word "unlawfully," imported the same meaning expressed by the specific proviso in the 1929 Act even though there was no mention of preserving the mother's life in the 1861 Act. He then construed the phrase "preserving the life of the mother" broadly, that is, "in a reasonable sense," to include a serious and permanent threat to the mother's *health*, and instructed the jury to acquit Dr. Bourne if it found he had acted in a good faith belief that the abortion was necessary for this purpose. *Id.*, at 693–694. The jury did acquit.

Recently Parliament enacted a new abortion law. This is the Abortion Act of 1967, 15 & 16 Eliz. 2, c. 87. The Act permits a licensed physician to perform an abortion where two other licensed physicians agree (a) "that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated," or (b) "that there is a substantial risk that if the child were born it would

suffer from such physical or mental abnormalities as to be seriously handicapped." The Act also provides that, in making this determination, "account may be taken of the pregnant woman's actual or reasonably foreseeable environment." It also permits a physician, without the concurrence of others, to terminate a pregnancy where he is of the good faith opinion that the abortion "is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman."

5. *The American law.* In this country the law in effect in all but a few States until mid-19th century was the pre-existing English common law. Connecticut, the first State to enact abortion legislation, adopted in 1821 that part of Lord Ellenborough's Act that related to a woman "quick with child." [39] The death penalty was not imposed. Abortion before quickening was made a crime in that State only in 1860.[40] In 1828 New York enacted legislation [41] that, in two respects, was to serve as a model for early anti-abortion statutes. First, while barring destruction of an unquickened fetus as well as a quick fetus, it made the former only a misdemeanor, but the latter second-degree manslaughter. Second, it incorporated a concept of therapeutic abortion by providing that an abortion was excused if it "shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose." By 1840, when Texas had received the common law,[42] only eight American States

[39] Conn. Stat., Tit. 20, § 14 (1821).

[40] Conn. Pub. Acts, c. 71, § 1 (1860).

[41] N. Y. Rev. Stat., pt. IV, c. 1, Tit. II, Art. 1, § 9, at 661, and Tit. VI, § 21, at 694 (1829).

[42] Act of January 20, 1840, § 1, set forth in 2 Gammel, Laws of Texas 177–178 (1898); *see Grigsby* v. *Reib*, 105 Tex. 597, 600, 153 S. W. 1124, 1125 (1913).

had statutes dealing with abortion.[35] It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening. Most punished attempts equally with completed abortions. While many statutes included the exception for an abortion thought by one or more physicians to be necessary to save the mother's life, that provision soon disappeared and the typical law required that the procedure actually be necessary for that purpose.

Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950's, a large majority of the States banned abortion, however and whenever performed, unless done to save or preserve the life of the mother.[36] The exceptions, Alabama and the District of Columbia, permitted abortion to preserve *the mother's health*.[37] *Three other States* permitted abortions that were not "unlawfully" performed or that were not "without lawful justification," leaving interpretation of those standards to the courts.[38] In the past several years, however, a trend toward liberaliza-

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[35] The early statutes are discussed in Quay 435–438. See also Lader 85–88; Stern 85–86; and Means II 375–376.

[36] Criminal abortion statutes in effect in the States as of 1961, together with historical statutory development and important judicial interpretations of the state statutes, are cited and quoted in Quay 447–520. See Note, A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems, 1972 Ill. L. Forum 177, 179, classifying the abortion statutes and listing 25 States as permitting abortion only if necessary to save or preserve the mother's life.

[37] Ala. Code, Tit. 14, § 9 (1958); D. C. Code Ann. § 22–201 (1967).

[38] Miss. Gen. Laws Ann., c. 272, § 19 (1970); N. J. Rev. Stat. Ann. 2A:87–1 (1969); Pa. Stat. Ann., Tit. 18, §§ 4718, 4719 (1963).

tion of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code, § 230.3,[37] set forth as Appendix B to the opinion in *Doe* v. *Bolton, post* ——.

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country

At common law & at time of Court.

[37] Fourteen States have adopted some form of the ALI statute. See Ark. Stat. Ann. §§ 41–303 to 41–310 (Supp. 1971); Calif. Health and Safety Code §§ 25950–25955.5 (West Supp. 1972); Colo. Rev. Stats. Ann. §§ 40–2–50 to 40–2–53 (Perm. Cum. Supp. 1967); Del. Code Ann., Tit. 24, §§ 1790–1793 (Supp. 1972); Florida Law of Apr. 13, 1972, c. 72–196, 1972 Fla. Sess. Law Serv., at 380–382; Ga. Code §§ 26–1201 to 26–1203 (1972); Kan. Stat. Ann. § 21–3407 (Supp. 1971); Md. Ann. Code, Art. 43, §§ 137–139 (Repl. 1971); Miss. Code Ann. § 2223 (Supp. 1972); N. M. Stat. Ann. §§ 40A–5–1 to 40A–5–3 (Repl. 1972); N. C. Gen. Stat. § 14–45.1 (Supp. 1971); Ore. Rev. Stat. §§ 435.405 to 435.495 (1971); S. C. Code Ann. §§ 16–82 to 16–89 (Supp. 1971); Va. Code Ann. §§ 18.1–62 to 18.1–62.3 (Supp. 1972). Mr. Justice Clark described some of these States as having "led the way." Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loyola U. (L. A.) L. Rev. 1, 11 (1969).

By the end of 1970, four other States had repealed criminal penalties for abortions performed in early pregnancy by a licensed physician, subject to stated procedural and health requirements. Alaska Stat. § 11.15.060 (1970); Haw. Rev. Stat. § 453–16 (Supp. 1971); N. Y. Penal Code § 125.05 (McKinney Supp. 1972–1973); Wash. Rev. Code §§ 9.02.060 to 9.02.080 (Supp. 1972). The precise status of criminal abortion laws in some States is made unclear by recent decisions in state and federal courts striking down existing state laws, in whole or in part.

well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

6. *The position of the American Medical Association.* The anti-abortion mood prevalent in this country in the late 19th century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period.

An AMA Committee on Criminal Abortion was appointed in May 1857. It presented its report, 12 Trans. of the Am. Med. Assn. 73–77 (1859), to the Twelfth Annual Meeting. That report observed that the Committee had been appointed to investigate criminal abortion "with a view to its general suppression." It deplored abortion and its frequency and it listed three causes "of this general demoralization":

> "The first of these causes is a wide-spread popular ignorance of the true character of the crime—a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening.
>
> "The second of the agents alluded to is the fact that the profession themselves are frequently supposed careless of foetal life . . . .
>
> "The third reason of the frightful extent of this crime is found in the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors, which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowledges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it,

and to its life as yet denies all protection." *Id.*, at 75–76.

The Committee then offered, and the Association adopted, resolutions protesting "against such unwarrantable destruction of human life," calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies "in pressing the subject." *Id.*, at 28, 78.

In 1871 a long and vivid report was submitted by the Committee on Criminal Abortion. It ended with the observation, "We had to deal with human life. In a matter of less importance we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less." 22 Trans. of the Am. Med. Assn. 258 (1871). It proffered resolutions, adopted by the Association, *id.*, at 38–39, recommending, among other things, that it "be unlawful and unprofessional for any physician to induce abortion or premature labor, without the concurrent opinion of at least one respectable consulting physician, and then always with a view to the safety of the child—if that be possible," and calling "the attention of the clergy of all denominations to the perverted views of morality entertained by a large class of females—aye, and men also, on this important question."

Except for periodic condemnation of the criminal abortionist, no further formal AMA action took place until 1967. In that year the Committee on Human Reproduction urged the adoption of a stated policy of opposition to induced abortion except when there is "documented medical evidence" of a threat to the health or life of the mother, or that the child "may be born with incapacitating physical deformity or mental deficiency," or that a pregnancy "resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the

patient," and two other physicians "chosen because of their recognized professional competence have examined the patient and have concurred in writing," and the procedure "is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals." The providing of medical information by physicians to state legislatures in their consideration of legislation regarding therapeutic abortion was "to be considered consistent with the principles of ethics of the American Medical Association." This recommendation was adopted by the House of Delegates. Proceedings of the AMA House of Delegates, 40–51 (June 1967).

In 1970, after the introduction of a variety of proposed resolutions, and of a report from its Board of Trustees, a reference committee noted "polarization of the medical profession on this controversial issue"; division among those who had testified; a difference of opinion among AMA councils and committees; "the remarkable shift in testimony" in six months, felt to be influenced "by the rapid changes in state laws and by the judicial decisions which tend to make abortion more freely available;" and a feeling "that this trend will continue." On June 25, 1970, the House of Delegates adopted preambles and most of the resolutions proposed by the reference committee. The preambles emphasized "the best interests of the patient," "sound clinical judgment," and "informed patient consent," in contrast to "mere acquiescence to the patient's demand." The resolutions asserted that abortion is a medical procedure that should be performed by a licensed physician in an accredited hospital only after consultation with two other physicians and in conformity with state law, and that no party to the procedure should be required to violate personally held moral principles.[38] Proceedings

[38] "Whereas, Abortion, like any other medical procedure, should not be performed when contrary to the best interests of the patient

of the AMA House of Delegates 221 (June 1970). The AMA Judicial Council rendered a complementary opinion.[38]

7. *The position of the American Public Health Association.* In October 1970, the Executive Board of the APHA adopted Standards for Abortion Services. These were five in number:

"a. Rapid and simple abortion referral must be readily available through state and local public

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since good medical practice requires due consideration for the patient's welfare and not mere acquiescence to the patient's demand; and

"Whereas, The standards of sound clinical judgment, which, together with informed patient consent should be determinative 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 an accredited hospital acting only after consultation with two other physicians chosen because of their professional competency and in conformance with standards of good medical practice and the Medical Practice Act of his State; and 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 hospital personnel shall be required to perform any act violative of personally-held moral principles. In these circumstances good medical practice requires only that the physician or other professional personnel withdraw from the case so long as the withdrawal is consistent with good medical practice." Proceedings of the AMA House of Delegates 221 (June 1970).

[38] "The Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion that is performed in accordance with good medical practice and under circumstances that do not violate the laws of the community in which he practices.

"In the matter of abortions, as of any other medical procedure, the Judicial Council becomes involved whenever there is alleged violation of the Principles of Medical Ethics as established by the House of Delegates."

health departments, medical societies, or other nonprofit organizations.

"b. An important function of counseling should be to simplify and expedite the provision of abortion services; it should not delay the obtaining of these services.

"c. Psychiatric consultation should not be mandatory. As in the case of other specialized medical services, psychiatric consultation should be sought for definite indications and not on a routine basis.

"d. A wide range of individuals from appropriately trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors.

"e. Contraception and/or sterilization should be discussed with each abortion patient." Recommended Standards for Abortion Services, 61 Am. J. Pub. Health 396 (1971).

Among factors pertinent to life and health risks associated with abortion were three that "are recognized as important":

"a. the skill of the physician,

"b. the environment in which the abortion is performed, and above all

"c. the duration of pregnancy, as determined by uterine size and confirmed by menstrual history." *Id.*, at 397.

It was said that "a well-equipped hospital" offers more protection "to cope with unforeseen difficulties than an office or clinic without such resources. . . . The factor of gestational age is of overriding importance." Thus it was recommended that abortions in the second trimester and early abortions in the presence of existing medical complications be performed in hospitals as inpatient procedures. For pregnancies in the first trimester, abortion in the hospital with or without overnight

stay "is probably the safest practice." An abortion in an extramural facility, however, is an acceptable alternative "provided arrangements exist in advance to admit patients promptly if unforeseen complications develop." Standards for an abortion facility were listed. It was said that at present abortions should be performed by physicians or osteopaths who are licensed to practice and who have "adequate training." *Id.*, at 398.

8. *The position of the American Bar Association.* At its meeting in February 1972 the ABA House of Delegates approved, with 17 opposing votes, the Uniform Abortion Act that had been drafted and approved the preceding August by the Conference of Commissioners on Uniform State Laws. 58 A. B. A. J. 380 (1972). We set forth the Act in full in the margin.[40] The

[40] "UNIFORM ABORTION ACT

"SECTION 1. [*Abortion Defined; When Authorized.*]

"(a) 'Abortion' means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.

"(b) An abortion may be performed in this state only if it is performed:

"(1) by a physician [licensed to practice medicine [or osteopathy] in this state or by a physician practicing medicine [or osteopathy] in the employ of the government of the United States or of this state, [and the abortion is performed [in the physician's office or in a medical clinic, or] in a hospital approved by the [Department of Health] or operated by the United States, this state, or any department, agency, or political subdivision of either;] or by a female upon herself upon the advice of the physician; and

"(2) within [20] weeks after the commencement of the pregnancy [or after [20] weeks only if the physician has reasonable cause to believe (i) there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother, (ii) that the child would be born with grave physical or mental defect, or (iii) that the pregnancy resulted from rape or incest, or illicit intercourse with a girl under the age of 16 years of age].

"SECTION 2. [*Penalty.*] Any person who performs or procures an abortion other than authorized by this Act is guilty of a [felony]

Conference has appended an enlightening Prefatory Note.[41]

VII

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

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and, upon conviction thereof, may be sentenced to pay a fine not exceeding [$1,000] or to imprisonment [in the state penitentiary] not exceeding [5 years], or both.

"SECTION 3. [*Uniformity of Interpretation.*] This Act shall be construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.

"SECTION 4. [*Short Title.*] This Act may be cited as the Uniform Abortion Act.

SECTION 5. [*Severability.*] If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 6. [*Repeal.*] The following acts and parts of acts are repealed:

"(1)

"(2)

"(3)

"SECTION 7. [*Time of Taking Effect.*] This Act shall take effect ———— ———."

[41] "This Act is based largely upon the New York abortion act following a review of the more recent laws on abortion in several states and upon recognition of a more liberal trend in laws on this subject. Recognition was given also to the several decisions in state and federal courts which show a further trend toward liberalization of abortion laws, especially during the first trimester of pregnancy.

"Recognizing that a number of problems appeared in New York, a shorter time period for 'unlimited' abortions was advisable. The time period was bracketed to permit the various states to insert a figure more in keeping with the different conditions that might exist among the states. Likewise, the language limiting the place or places in which abortions may be performed was also bracketed to account for different conditions among the states. In addition, limitations on abortions after the initial 'unlimited' period were placed

It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously.[42] The appellants and *amici* contend, moreover, that this is not a proper state purpose at all and suggest that, if it were, the Texas statutes are overbroad in protecting it since the law fails to distinguish between married and unwed mothers.

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman.[43] This was particularly true prior to the development of antisepsis. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur, and others first announced in 1867, but were not generally accepted and employed until about the turn of the century. Abortion mortality was high. Even after 1900, and perhaps until as late as the development of antibiotics in the 1940's, standard modern techniques such as dila-

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in brackets so that individual states may adopt all or any of these reasons, or place further restrictions upon abortions after the initial period.

"This Act does not contain any provision relating to medical review committees or prohibitions against sanctions imposed upon medical personnel refusing to participate in abortions because of religious or other similar reasons, or the like. Such provisions, while related, do not directly pertain to when, where, or by whom abortions may be performed; however, the Act is not drafted to exclude such a provision by a state wishing to enact the same."

[42] See, for example, *YWCA v. Kugler*, 342 F. Supp. 1048, 1074 (N. J. 1972); *Abele v. Markle*, 342 F. Supp. 800, 805–806 (Conn. 1972) (Newman, J., concurring); *Walsingham v. Florida*, 250 So. 2d 857, 863 (Ervin, J., concurring) (Fla. Sup. 1972); *State v. Gedicke*, 43 N. J. L. 86, 90 (Sup. Ct. 1881); Means II, at 381–382.

[43] See C. Haagensen & W. Lloyd, A Hundred Years of Medicine 19 (1943).

tion and curettage were not nearly so safe as they are today. Thus it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

Modern medical techniques have altered this situation. Appellants and various *amici* refer to medical data indicating that abortion in early pregnancy, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth.[45] Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the area of health and medical standards do remain. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather

[45] Potts, Postconception Control of Fertility, 8 Int'l J. of G. & O. 957, 967 (1970) (England and Wales); Abortion Mortality, 20 Morbidity and Morality, 208, 209 (July 12, 1971) (U. S. Dept. of HEW, Public Health Service) (New York City); Tietze, United States: Therapeutic Abortions, 1963–1968, 59 Studies in Family Planning 5, 7 (1970); Tietze, Mortality with Contraception and Induced Abortion, 45 Studies in Family Planning 6 (1969) (Japan, Czechoslovakia, Hungary); Tietze & Lehfeldt, Legal Abortion in Eastern Europe, 175 J. A. M. A. 1149, 1152 (April 1961). Other sources are discussed in Lader 17–23.

than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

The third reason is the State's interest—some phrase it in terms of duty—in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception.[43] The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life.[44] Pointing to the absence of legislative history to support the contention, they claim that most state laws were designed solely to protect the woman. Because medical advances have lessened this concern, at least

[43] See Brief of Amicus National Right to Life Foundation; R. Drinan, The Inviolability of the Right to Be Born, in Abortion and the Law 107 (D. Smith, editor, 1967); Louisell, Abortion, The Practice of Medicine, and the Due Process of Law, 16 UCLA L. Rev. 233 (1969); Noonan 1.

[44] See, e. g., *Abele* v. *Markle*, 342 F. Supp. 800 (Conn. 1972).

with respect to abortion in early pregnancy, they argue that with respect to such abortions the laws can no longer be justified by any state interest. There is some scholarly support for this view of original purpose.[47] The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus.[48] Proponents of this view point out that in many States, including Texas,[49] by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another.[50] They claim that adoption of the "quickening" distinction through received common law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception.

It is with these interests, and the weight to be attached to them, that this case is concerned.

VIII

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back

[47] See discussions in Means I and Means II.

[48] See, e. g., *State* v. *Murphy*, 27 N. J. L. 112, 114 (1858).

[49] *Watson* v. *State*, 9 Tex. App. 237, 244–245 (1880); *Moore* v. *State*, 37 Tex. Crim. R. 552, 561, 40 S. W. 287, 290 (1897); *Shaw* v. *State*, 73 Tex. Crim. R. 337, 339, 165 S. W. 930, 931 (1914); *Fondren* v. *State*, 74 Tex. Crim. R. 552, 557, 169 S. W. 411, 414 (1914); *Gray* v. *State*, 77 Tex. Crim. R. 221, 229, 178 S. W. 337, 342 (1915). There is no immunity in Texas for the father who is not married to the mother. *Hammett* v. *State*, 84 Tex. Crim. R. 635, 209 S. W. 661 (1919); *Thompson* v. *State*, — Tex. Crim. R. — (1971), appeal pending.

[50] See *Smith* v. *State*, 33 Me. 48, 55 (1851); *In re Vince*, 2 N. J. 443, 450, 67 A. 2d 141, 144 (1949). A short discussion of the modern law on this issue is contained in the Comment to the ALI's Model Penal Code § 207.11, at 158 and nn. 35–37 (Tent. Draft No. 9, 1959).

perhaps as far as *Union Pacific R. Co.* v. *Botsford*, 141 U. S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts the Court or individual Justices have indeed found at least the roots of that right in the First Amendment, *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969); in the Fourth and Fifth Amendments, *Terry* v. *Ohio*, 392 U. S. 1, 8–9 (1968), *Katz* v. *United States*, 389 U. S. 347, 350 (1967), *Boyd* v. *United States*, 116 U. S. 616 (1886), see *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J. dissenting); in the penumbras of the Bill of Rights, *Griswold* v. *Connecticut*, 381 U. S. 479, 484–485 (1965); in the Ninth Amendment, *id.*, at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967), procreation, *Skinner* v. *Oklahoma*, 316 U. S. 535, 541–542 (1942), contraception, *Eisenstadt* v. *Baird*, 405 U. S. 438, 453–454 (1972); *id.*, at 460, 463–465 (WHITE, J., concurring), family relationships, *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944), and child rearing and education, *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925), *Meyer* v. *Nebraska*, *supra*.

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amend-

Decisional basis for a right of privacy

Only fundamental rights are included in the guarantee of personal privacy

Rests on 14th Amend

I agree

ment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellants and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy in whatever way and for whatever reason she alone chooses. With this we do not agree. Appellants' arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, is unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In

fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905) (vaccination); *Buck* v. *Bell*, 274 U. S. 200 (1927) (sterilization).

We therefore conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

We note that those federal and state courts that have recently considered abortion law challenges have reached the same conclusion. A majority, in addition to the District Court in the present case, have held state laws unconstitutional, at least in part, because of vagueness, or overbreadth and abridgement of rights. *Abele* v. *Markle*, 342 F. Supp. 800 (Conn. 1972), appeal pending; *Abele* v. *Markle*, — F. Supp. — (Conn. 1972); *Doe* v. *Bolton*, 319 F. Supp. 1048 (ND Ga. 1970), appeal decided today, *post* —; *Doe* v. *Scott*, 321 F. Supp. 1385 (ND Ill. 1971), appeal pending; *Poe* v. *Menghini*, 339 F. Supp. 986 (Kan. 1972); *YWCA* v. *Kugler*, 342 F. Supp. 1048 (NJ 1972); *Babbitz* v. *McCann*, 310 F. Supp. 293 (ED Wis. 1970), appeal dismissed, 400 U. S. 1 (1970); *People* v. *Belous*, 71 Cal. 2d 954, 458 P. 2d 194 (1969), cert. denied, 397 U. S. 915 (1970); *State* v. *Barquet*, 262 S. 2d 431 (Fla. 1972).

Others have sustained state statutes. *Crossen* v. *Attorney General*, 344 F. Supp. 587 (ED Ky. 1972), appeal pending; *Rosen* v. *Louisiana State Board of Medical Examiners*, 318 F. Supp. 1217 (ED La. 1970), appeal pending; *Corkey* v. *Edwards*, 322 F. Supp. 1248 (WDNC 1971), appeal pending; *Steinberg* v. *Brown*,

321 F. Supp. 741 (ND Ohio 1970); *Doe* v. *Rampton*, — F. Supp. — (Utah 1971), appeal pending; *Cheaney* v. *Indiana*, — Ind. —, 285 N. E. 2d 265 (1972); *Spears* v. *State*, 257 So. 2d 876 (Miss. 1972); *State* v. *Munson*, — S. D. —, 201 N. W. 2d 123 (1972), appeal pending.

Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach.

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest." *Kramer* v. *Union Free School District*, 395 U. S. 621, 627 (1969); *Shapiro* v. *Thompson*, 394 U. S. 618, 634 (1969), *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. *Griswold* v. *Connecticut*, 381 U. S. 479, 485 (1965); *Aptheker* v. *Secretary of State*, 378 U. S. 500, 508 (1964); *Cantwell* v. *Connecticut*, 310 U. S. 296, 307–308 (1940); see *Eisenstadt* v. *Baird*, 405 U. S. 438, 460, 463–464 (1972) (WHITE, J., concurring).

compelling state interest cases

In the recent abortion cases, cited above, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interest in protecting health and potential life and have concluded that neither interest justified limitations, or at least broad limitations, on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws have held that the State's

determination to protect prenatal life is dominant and constitutionally justifiable.

IX

The District Court held that the appellee failed to meet his burden of demonstrating that the Texas statute's infringement upon Roe's rights was necessary to support a compelling state interest, and that, although the defendant presented "several compelling justifications for state presence in the area of abortions," the statutes outstripped these justifications and swept "far beyond any areas of compelling state interest." 314 F. Supp., at 1222–1223. Appellant and appellee both contest that holding. Appellant, as has been indicated, claims an absolute right that bars any state imposition of criminal penalties in the area. Appellee argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest. As noted above, we do not agree fully with either formulation.

A. The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment. The appellant conceded as much on reargument.[51] On the other hand, the appellee conceded on reargument [52] that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment con-

[51] Tr. of Rearg. 20–21.

[52] Tr. of Rearg. 24.

tains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution: in the listing of qualifications for representatives and senators, Art. I, § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3;[53] in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl. 8; in the Electors provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave cl. 3; and in the Fifth, Twelfth, and Twenty-second Amendments as well as in §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.[54]

[53] We are not aware that in the taking of any census under this clause, a fetus has ever been counted.

[54] When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?

There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out, n. 49, *supra*, that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed

All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn.[55] This is in accord with the results reached in those few cases where the issue has been squarely presented. *McGarvey* v. *Magee-Womens Hospital*, 340 F. Supp. 751 (WD Pa. 1972); *Byrn* v. *New York City Health & Hospitals Corp.*, 31 N. Y. 2d 194, 286 N. E. 2d 887 (1972), appeal pending; *Abele* v. *Markle*, — F. Supp. — (Conn. 1972). Compare *Cheaney* v. *Indiana*, — Ind., —, 285 N. E. 265, 270 (1972); *Montana* v. *Rogers*, 278 F. 2d 68, 72 (CA7, 1960), aff'd *sub. nom. Montana* v. *Kennedy*, 366 U. S. 308 (1961); *Keeler* v. *Superior Court*, — Cal. —, 470 P. 2d 617 (1970); *State* v. *Dickinson*, 23 Ohio App. 2d 259, 275 N. E. 2d 599 (1970). Indeed, our decision in *United States* v. *Vuitch*, 402 U. S. 62 (1971), inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection.

The word "person" as used in Court does not include unborn

Fetus not a "person"...

This conclusion, however, does not of itself fully answer the contentions raised by Texas, and we pass on to other considerations.

B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing

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by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?

[55] Cf. the Wisconsin abortion statute, defining "unborn child" to mean "a human being from the time of conception until it is born alive." Wis. Stat. § 940.04 (6) (1969), and the new Connecticut statute, Public Act No. 1, May 1973 Special Session, declaring it to be the public policy of the State and the legislative intent "to protect and preserve human life from the moment of conception."

young in the human uterus. See Dorland's Illustrated Medical Dictionary, 478–479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt*, *Griswold*, *Stanley*, *Loving*, *Skinner*, *Pierce*, and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics.[58] It appears to be the predominant, though not the unanimous, attitude of the Jewish faith.[59] It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that

[58] Edelstein 16.

[59] Lader 97–99; D. Feldman, Birth Control in Jewish Law 251–294 (1968). For a stricter view, see I. Jakobovits, Jewish Views on Abortion, in Abortion and the Law 124 (D. Smith ed. 1967).

have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family.[58] As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception or upon live birth or upon the interim point at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid.[59] Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.[60] The Aristotelian theory of "mediate animation" that held sway throughout the Middle Ages and the Renaissance in Europe continued to be official Roman Catholic dogma until the 19th century, despite opposition to this "ensoulment" theory from those in the Church who would recognize the existence of life from the moment of conception.[61] The latter is now, of course, the official belief of the Catholic Church. As one of the briefs *amicus* discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substantial problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as menstrual extraction, the "morning-after" pill,

Viability - potentially able to live outside of womb

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[58] Amicus Brief for the American Ethical Union et al. For the position of the National Council of Churches and of other denominations, see Lader 99–101.

[59] L. Hellman & J. Pritchard, Williams Obstetrics 493 (14th ed. 1971); Dorland's Illustrated Medical Dictionary 1689 (24th ed. 1965).

[60] Hellman & Pritchard, *supra*, n. 58, at 493.

[61] For discussions of the development of the Roman Catholic position, see D. Callahan, Abortion: Law, Choice and Morality 409–447 (1970); Noonan 1.

implantation of embryos, artificial insemination, and even artificial wombs.[52]

In areas other than criminal abortion the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. For example, the traditional rule of tort law had denied recovery for prenatal injuries even though the child was born alive.[53] That rule has been changed in almost every jurisdiction. In most States recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few courts have squarely so held.[54] In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries.[55] Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been recog-

[52] See D. Brodie, The New Biology and the Prenatal Child, 9 J. Fam. L. 391, 397 (1970); B. Gorney, The New Biology and the Future of Man, 15 UCLA L. Rev. 273 (1968); Note, Criminal Law—Abortion—The "Morning-After" Pill and Other Pre-Implantation Birth-Control Methods and the Law, 46 Ore. L. Rev. 211 (1967); G. Taylor, The Biological Time Bomb 32 (1968); A. Rosenfeld, The Second Genesis 138–139 (1969); G. Smith, Through a Test Tube Darkly: Artificial Insemination and the Law, 67 Mich. L. Rev. 127 (1968); Note, Artificial Insemination and the Law, U. Ill. L. F. 203 (1968).

[53] Prosser, Handbook of the Law of Torts 335–338 (1971); 2 Harper & James, The Law of Torts 1028–1031 (1956); Note, 63 Harv. L. Rev. 173 (1949).

[54] See cases cited in Prosser, *supra*, n. 62, at 336–338; Annotation, Action for Death of Unborn Child, 15 A. L. R. 3d 992 (1967).

[55] Prosser, *supra*, n. 62, at 338; Note, The Law and the Unborn Child, 46 Notre Dame Law. 349, 354–360 (1971).

nized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*.[48] Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recogized in the law as persons in the whole sense.

As a consequence, we do not agree that by adopting one theory of life Texas may override the rights of the pregnant woman that are at stake. We repeat that the State does have an important and legitimate interest in the potentiality of human life and that this interest grows in strength as the woman approaches term. At some point this interest becomes "compelling." We fix that point at, or at any time after, the end of the first trimester, as the State may determine. If, during the first trimester, the attending physician decides in consultation with his patient that in his best medical judgment her pregnancy should be terminated, that judgment is sufficient.

Since Art. 1196 restricts legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," it sweeps too broadly by any appropriate constitutional measure. The statute makes no distinction between abortions performed early in pregnancy and those performed at a later stage, and it limits to a single reason, "saving" the mother's life, however that may be interpreted, the legally acceptable justifications for the procedure.

This conclusion makes it unnecessary for us to consider the attack made on the Texas statute on grounds of vagueness. See *United States* v. *Vuitch*, 402 U. S. 62, 67–72 (1971).

[48] D. Louisell, Abortion, The Practice of Medicine, and the Due Process of Law, 16 UCLA L. Rev. 233, 235–238 (1969); Note, 56 Iowa L. Rev. 994, 999–1000 (1971); Note, The Law and the Unborn Child, 46 Notre Dame Law. 349, 351–354 (1971).

X

To summarize:

1. A state criminal abortion statute, of the Texas type, that excepts from criminality only a *life saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

2. For the stage prior to the end of the first trimester, a state criminal abortion statute, in order to meet constitutional requirements, must do no more than to leave the abortion decision to the best medical judgment of the pregnant woman's attending physician.

3. For the stage subsequent to the first trimester, the State may, if it chooses, determine a point beyond which it restricts legal abortions to stated reasonable therapeutic categories that are articulated with sufficient clarity so that a physician is able to predict what conditions fall within the stated classifications.

4. A criminal abortion statute of the type involved in *United States* v. *Vuitch*, 402 U. S. 62 (1971), excepting from criminality, at all stages of pregnancy, only an abortion "necessary for the preservation of the mother's life or health and under the direction of a . . . licensed practitioner of medicine," and construed as that statute had been, is constitutional and meets the requirements specified in the preceding paragraphs 2 and 3.

5. The State may define the term "physician," as we have employed it in the preceding numbered paragraphs, to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.

In *Doe* v. *Bolton*, *post*, procedural requirements embraced in one of the modern abortion statutes are considered. That opinion and this one, of course, are to be read together.

This holding, we feel, is consistent with the relative weight of the respective interests involved, with the lessons and example of medical and legal history, with the lenity of the common law, and with the demands of the profound general problems of the present day. The decision also vindicates the important rights of the physician to administer medical treatment according to his best professional judgment up to the point where important state interests provide a compelling justification for intervention. Up to that point the abortion decision inherently is a medical one, and the responsibility for that decision must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, both judicial and intraprofessional, are available.

XI

Our conclusion that Art. 1196 is unconstitutional means, of course that the Texas abortion statutes, as a unit, must fall. The exception of Art. 1196 cannot be stricken separately, for then the State is left with a statute proscribing all abortion procedures no matter how medically urgent the case.

Although the District Court granted plaintiff Roe declaratory relief, it stopped short of issuing an injunction against enforcement of the Texas statutes. The Court has recognized that different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other. *Zwickler* v. *Koota*, 389 U. S. 241, 252–255 (1967); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). We are not dealing with a statute that, on its face, appears to abridge free expression, an area of particular concern under *Dombrowski* and refined in *Younger* v. *Harris*, 401 U. S., at 50.

Discussion of ~~[illegible]~~ validity –

L. F. P. - File Copy

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Blackmun, J.

Circulated: 11/22/72

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SUPREME COURT OF THE UNITED STATES

No. 70-40

Mary Doe et al., Appellants, v. Arthur K. Bolton, as Attorney General of the State of Georgia, et al. | On Appeal from the United States District Court for the Northern District of Georgia.

Reviewed 11/25/72

[November —, 1972]

Memorandum of MR. JUSTICE BLACKMUN.

In this appeal the criminal abortion statutes recently enacted in Georgia are challenged on constitutional grounds. The statutes are §§ 26–1201 through 26–1203 of the State's Criminal Code, formulated by Georgia Laws, 1968 Session, 1249, 1277–1280. In *Roe* v. *Wade*, *ante* —, we today have struck down, as constitutionally defective, the Texas criminal abortion statutes that are representative of provisions long in effect in a majority of our States. The Georgia legislation, however, is different and merits separate consideration.

I

The statutes in question are reproduced as Appendix A, *post* —.[1] As the appellants acknowledge,[2] the 1968 statutes are patterned upon the American Law Institute's Model Penal Code, § 230.3 (Proposed Official Draft, 1962), reproduced as Appendix B, *post* —. The ALI proposal has served as the model for recent legislation in approximately one-fourth of our States.[3] The new

[1] The portions italicized in Appendix A are those held unconstitutional by the District Court.

[2] Appellants' Brief 35 n. 5; Tr. of Oral Arg. 9.

[3] See *Roe* v. *Wade*, *ante* — n. 37.

Georgia provisions replaced statutory law that had been in effect for more than 90 years. Georgia Laws 1876, No. 130, § 2, at 113.[1] The predecessor statute paralleled the Texas legislation considered in *Roe* v. *Wade*, *ante*, and made all abortions criminal except those necessary "to preserve the life" of the pregnant woman. The new statutes have not been tested on constitutional grounds in the Georgia courts.

Section 26-1201, with a referenced exception, makes abortion a crime, and § 26-1203 provides that a person convicted of that crime shall be punished by imprisonment for not less than one nor more than 10 years. Sec-

[1] The active provisions of the 1876 statute were:

"Section I. *Be it enacted, etc.*, That from and after the passage of this Act, the wilful killing of an unborn child, so far developed as to be ordinarily called 'quick,' by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be guilty of a felony, and punishable by death or imprisonment for life, as the jury trying the case may recommend.

"Sec. II. *Be it further enacted*, That every person who shall administer to any woman pregnant with a child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or mother be thereby produced, be declared guilty of an assault with intent to murder.

"Sec. III. *Be it further enacted*, That any person who shall wilfully administer to any pregnant woman any medicine, drug or substance, or anything whatever, or shall employ any instrument or means whatever, with intent thereby to procure the miscarriage or abortion of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished as prescribed in section 4310 of the Revised Code of Georgia."

It should be noted that the second section, in contrast to the first, makes no specific reference to quickening. The section was soon construed, however, to possess this line of demarcation. *Taylor* v. *State*, 105 Ga. 846, 33 S. E. 190 (1899).

tion 26–1202 (a) states the exception and removes from § 1201's definition of criminal abortion, and thus makes noncriminal, an abortion "performed by a physician duly licensed" in Georgia when, "based upon his best clinical judgment . . . an abortion is necessary because

> "(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health, or
>
> "(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect, or
>
> "(3) The pregnancy resulted from forcible or statutory rape."[3]

Section 26–1202 also requires, by numbered subdivisions of its subsection (b), that, for an abortion to be authorized or performed as a noncriminal procedure, additional conditions must be fulfilled. These are (1) and (2) residence of the woman in Georgia; (3) reduction to writing of the performing physician's medical judgment that an abortion is justified for one or more of the reasons specified by § 26–1202 (a), with written concurrence in that judgment by at least two other Georgia-licensed physicians, based upon their separate personal medical examinations of the woman; (4) performance of the abortion in a hospital licensed by the State Board of Health and also accredited by the Joint Commission on Accreditation of Hospitals; (5) advance approval by an abortion committee of not less than three members of the hospital's staff; (6) certifications in a rape situation; and (7), (8), and (9) maintenance and confidentiality of records. There is a provision (subsection (c)) for judi-

[3] In contrast with the ALI model, the Georgia statute makes no specific reference to pregnancy resulting from incest. We were assured by the State at reargument that this was because the statute's reference to "rape" was intended to include incest. Tr. of Rearg. 32.

cial determination of the legality of a proposed abortion on petition of the judicial circuit law officer or of a close relative, as therein defined, of the unborn child, and for expeditious hearing of that petition. There is also a provision (subsection (e)) giving a hospital the right not to admit an abortion patient and giving any physician and any hospital employee or staff member the right, on moral or religious grounds, not to participate in the procedure.

II

On April 16, 1970, Mary Doe,[*] 23 other individuals (nine described as Georgia-licensed physicians, seven as nurses registered in the State, five as clergymen, and two as social workers), and two nonprofit Georgia corporations that advocate abortion reform, instituted this federal action in the Northern District of Georgia against the State's attorney general, the district attorney of Fulton County, and the chief of police of the city of Atlanta. The plaintiffs sought a declaratory judgment that the Georgia abortion statutes were unconstitutional in their entirety. They also sought injunctive relief restraining the defendants and their successors from enforcing the statutes.

Mary Doe alleged:

> "(1) She was a 22-year-old Georgia citizen, married, and nine weeks pregnant. She had three living children. The two older ones had been placed in a foster home because of Doe's poverty and inability to care for them. The youngest, born July 19, 1969, had been placed for adoption. Her husband had recently abandoned her and she was forced to live with her indigent parents and their eight children. She and her husband, however, had become recon-

[*] Appellants by their complaint, Appendix 7, allege that the name is a pseudonym.

ciled. He was a construction worker employed only sporadically. She had been a mental patient at the State Hospital. She had been advised that an abortion could be performed on her with less danger to her health than if she gave birth to the child she was carrying. She would be unable to care for or support the new child.

"(2) On March 25, 1970, she applied to the Abortion Committee of Grady Memorial Hospital, Atlanta, for a therapeutic abortion under § 26–1202. Her application was denied 16 days later, on April 10, when she was eight weeks pregnant, on the ground that her situation was not one described in § 26–1202 (a).[1]

"(3) Because her application was denied, she was forced either to relinquish 'her right to decide when and how many children she will bear' or to seek an abortion that was illegal under the Georgia statutes. This invaded her rights of privacy and liberty in matters related to family, marriage, and sex, and deprived her of the right to choose whether to bear children. This was a violation of rights guaranteed her by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. The statutes also denied her equal protection and procedural due process and, because they were unconstitutionally vague, deterred hospitals and doctors from performing abortions. She sued 'on her own behalf and on behalf of all others similarly situated.'"

The other plaintiffs alleged that the Georgia statutes "chilled and deterred" them from practicing their respective professions and deprived them of rights guaranteed

[1] In answers to interrogatories Doe stated that her application for an abortion was approved at Georgia Baptist Hospital on May 5, 1970, but that she was not approved as a charity patient there and had no money to pay for an abortion. Appendix 64.

by the First, Fourth, and Fourteenth Amendments. These plaintiffs also purported to sue on their own behalf and on behalf of others similarly situated.

A three-judge district court was convened. An offer of proof as to Doe's identity was made, but the court deemed it unnecessary to receive that proof. The case was then tried on the pleadings and interrogatories.

The District Court, *per curiam*, 310 F. Supp. 1048 (ND Ga. 1970), held that all the plaintiffs had standing but that only Doe presented a justiciable controversy. On the merits, the court concluded that the limitation in the Georgia statute of the "number of reasons for which an abortion may be sought," *id.*, at 1056, improperly restricted Doe's rights of privacy articulated in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), and of "personal liberty," both of which it thought "broad enough to include the decision to abort a pregnancy," *id.*, at 1055. As a consequence, the court held invalid those portions of §§ 26–1202 (a) and (b)(3) limiting legal abortions to the three situations specified; § 26–1202 (b)(6) relating to certifications in a rape situation; and § 26–1202 (c) authorizing a court test. Declaratory relief was granted accordingly. The court, however, held that Georgia's interest in protection of health, and the existence of a "*potential* of independent human existence" (emphasis in original), *id.*, at 1055, justified state regulation of "the manner of performance as well as the quality of the final decision to abort," *id.*, at 1056, and it refused to strike down the other provisions of the statutes. It denied the request for an injunction, *id.*, at 1057.

Claiming that they were entitled to an injunction and to broader relief, the plaintiffs took a direct appeal pursuant to 28 U. S. C. § 1253. We postponed decision on jurisdiction to the hearing on the merits. 402 U. S. 941 (1971). The defendants also purported to appeal, pur-

suant to § 1253, but their appeal was dismissed for want of jurisdiction. 402 U. S. 930 (1971). We are advised by the defendant-appellees, Brief 42, that an alternative appeal on their part is pending in the United States Court of Appeals for the Fifth Circuit. The extent, therefore, to which the District Court decision was adverse to the defendants, that is, the extent to which portions of the Georgia statutes were held to be unconstitutional, technically is not now before us.* *Swarb* v. *Lennox*, 405 U. S. 191, 201 (1972).

III

Our decision in *Roe* v. *Wade*, *ante* —, establishes (1) that, despite her pseudonym, we may accept as true, for this case, Mary Doe's existence and her pregnant state on April 16, 1970; (2) that the constitutional issue is substantial; (3) that the interim termination of Doe's and all other Georgia pregnancies in existence in 1970 has not rendered the case moot; and (4) that Doe presents a justiciable controversy and has standing to maintain the action.

Inasmuch as Doe and her class are recognized, the question whether the other appellants—physicians, nurses, clergymen, social workers, and corporations—present a justiciable controversy and have standing is perhaps a matter of no great consequence. We conclude, however, that the physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes. The physician is the one against whom these criminal statutes directly operate in the event he procures an

* What we decide today obviously has implications for the issues raised in the defendants' appeal pending in the Fifth Circuit.

abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief. *Crossen* v. *Breckenridge*, 446 F. 2d 833, 839–840 (CA6 1971); *Poe* v. *Menghini*, 339 F. Supp. 986, 990–991 (Kans. 1972).

In holding that the physicians, while theoretically possessed of standing, did not present a justiciable controversy, the District Court seems to have relied primarily on *Poe* v. *Ullman*, 367 U. S. 497 (1961). There a sharply divided Court dismissed an appeal from a state court on the ground that it presented no real controversy justifying the adjudication of a constitutional issue. *But the challenged Connecticut statute, deemed to prohibit* the giving of medical advice on the use of contraceptives, had been enacted in 1879, and, apparently with a single exception, no one had ever been prosecuted under it. Georgia's statute, in contrast, is recent and not moribund. Furthermore, it is the successor to another Georgia abortion statute under which, we are told,[9] physicians were prosecuted. The present case, therefore, is closer to *Epperson* v. *Arkansas*, 393 U. S. 97 (1968), where the Court recognized the right of a school teacher, though not yet charged criminally, to challenge her State's anti-evolution statute. See also *Griswold* v. *Connecticut*, 381 U. S., at 481.

The parallel claims of the nurse, clergy, social worker, and corporation-appellants are another step removed and as to them, the Georgia statutes operate less directly. Not being licensed physicians, the nurses and the others are in no position to render medical advice. They would be reached by the abortion statutes only in their capacity

[9] Tr. of Oral Arg. 21–22.

as accessories or as counselor-conspirators. We conclude that we need not pass upon the status of these additional appellants in this suit, for the issues are sufficiently and adequately presented by Doe and the physician-appellants, and nothing is gained or lost by the presence or absence of the nurses, the clergymen, the social workers, and the corporations. See *Roe* v. *Wade*, *ante*, at —.

IV

The appellants attack on several grounds those portions of the Georgia abortion statutes that remain after the District Court decision: undue restriction of a right to personal and marital privacy; vagueness; deprivation of substantive and procedural due process; improper restriction to Georgia residents; and denial of equal protection.

A. Our decision today in *Roe* v. *Wade*, *ante*, sets forth our conclusion that a pregnant woman does not have an absolute constitutional right to an abortion on her demand. What is said there is applicable here and need not be repeated.

B. The appellants go on to argue, however, that the present Georgia statutes must be viewed historically, that is, from the fact that prior to the 1968 Act an abortion in Georgia was not criminal if performed to "preserve the life" of the mother. It is suggested that the present statute, as well, has this emphasis on the mother's rights, not on those of the fetus. Appellants contend that it is thus clear that Georgia has given little, and certainly not first, consideration to the unborn child. Yet it is the unborn child's rights that Georgia asserts in justification of the statute. Appellants assert that this justification cannot be advanced at this late date.

Appellants then argue that the statutes do not adequately protect the woman's right. This is so because

it would be physically and emotionally damaging to Doe to bring a child into her poor "fatherless" [18] family, and because advances in medicine and medical techniques have made it safer for a woman to have a medically induced abortion than for her to bear a child. Thus, "a statute which requires a woman to carry an unwanted pregnancy to term infringes not only on a fundamental right of privacy but on the right to life itself." Brief 27.

The appellants recognize that a century ago medical knowledge was not so advanced as it is today, that the techniques of antisepsis were not known, and that any abortion procedure was dangerous for the woman. To restrict the legality of the abortion to the situation where it was deemed necessary, in medical judgment, for the preservation of the woman's life was only a natural conclusion in the exercise of the legislative judgment of that time. A State is not to be reproached, however, for a past judgmental determination made in the light of then-existing medical knowledge. It is perhaps unfair to argue, as the appellants do, that because the early focus was on the preservation of the woman's life, the State's present professed interest in the protection of embryonic and fetal life is to be downgraded. That argument denies the State the right to readjust its views and emphases in the light of the advanced knowledge and techniques of the day.

C. Appellants argue that § 26–1202 (a) of the Georgia statute, as it has been left by the District Court's decision, is unconstitutionally vague. This argument centers in the proposition that, with the District Court's having stricken the statutorily specified reasons, it still remains a crime for a physician to perform an abortion except when, as § 26–1202 (a) reads, it is "based upon his best clinical judgment that an abortion is necessary." The

[18] Appellants' Brief 25.

appellants contend that the word "necessary" does not warn the physician of what conduct is proscribed; that the statute is wholly without objective standards and is subject to diverse interpretation; and that doctors will choose to err on the side of caution and will be arbitrary.

The net result of the District Court's decision is that the abortion determination, so far as the physician is concerned, is made in the exercise of his professional, that is, his "best clinical" judgment in the light of *all* the attendant circumstances. He is not now restricted to the three situations originally specified. Instead, he may range farther afield wherever his medical judgment, properly and professionally exercised, so dictates and directs him.

The vagueness argument is set at rest by the decision in *United States* v. *Vuitch*, 402 U. S. 62, 71–72 (1971), where the issue was raised with respect to a District of Columbia statute making abortions criminal "unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine." That statute has been construed to bear upon psychological as well as physical well-being. This being so, the Court concluded that the term "health" presented no problem of vagueness. "Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered." 402 U. S., at 72. This conclusion is equally applicable here. Whether, in the words of the Georgia statute, "an abortion is necessary," is a professional judgment that the Georgia physician will be called upon to make routinely.

We agree with the District Court, 319 F. Supp., at 1058, that the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-

being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.

D. The appellants next argue that the District Court should have declared unconstitutional three procedural demands of the Georgia statute: (1) that the abortion be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals; [11] (2) that the procedure be approved by the hospital staff abortion committee; and (3) that the performing physician's judgment be confirmed by the independent examinations of the patient by two other licensed physicians. The appellants attack these provisions not only on the ground that they unduly restrict the woman's right of privacy, but also on procedural due process and equal protection grounds. The physician-appellants also argue that, by subjecting a doctor's individual medical judgment to committee approval and to confirming consultations, the statute impermissibly restricts the physician's right to practice his profession and deprives him of due process.

1. *JCAH Accreditation.* The Joint Commission on Accreditation of Hospitals is an organization without governmental sponsorship or overtones. No question whatever is raised concerning the integrity of the organization or the high purpose of the accreditation process.[12]

[11] We were advised at reargument, Tr. of Rearg. 10, that only 54 of Georgia's 159 counties have a JCAH accredited hospital.

[12] Since its founding, JCAH has pursued the "elusive goal" of defining the "optimal setting" for "quality of service in hospitals." JCAH, Accreditation Manual for Hospitals, Foreword (Dec. 1970). The Manual's Introduction states the organization's purpose to establish standards and conduct accreditation programs that will afford quality medical care "to give patients the optimal benefits that medical science has to offer." This ambitious and admirable goal is illustrated by JCAH's decision in 1966 "to raise and strengthen the

That process, however, has to do with hospital standards generally and has no present particularized concern with abortion as a medical or surgical procedure.[13] In Georgia there is no restriction of the performance of non-abortion surgery in a hospital not yet accredited by the JCAH so long as other requirements imposed by the State, such as licensing of the hospital and of the operating surgeon, are met. See Georgia Code §§ 88-1901 (a) and 88-1905 (1971) and 84-907 (Supp. 1971). Furthermore, accreditation by the Commission is not granted until a hospital has been in operation at least one year. The Model Penal Code, § 230.3, Appendix B hereto, contains no requirement for JCAH accreditation. And the Uniform Abortion Act (Final Draft, August 1971),[14] approved by the American Bar Association in February 1972, contains no JCAH accredited hospital specification.[15] Some courts have held that a JCAH accredita-

standards from their present level of minimum essential to the level of optimum achievable . . . ." Some of these "optimum achievable" standards required are: disclosure of hospital ownership and control; a dietetic service and written dietetic policies; a written disaster plan for mass emergencies; a nuclear medical services program; facilities for hematology, chemistry, microbiology, clinical microscopy, and sero-immunology; a professional library and document delivery service; a radiology program; a social services plan administered by a qualified social worker; and a special care unit.

[13] "The Joint Commission neither advocates nor opposes any particular position with respect to elective abortions." Letter dated July 9, 1971, from John L. Brewer, M. D., Commissioner, JCAH, to the Rockefeller Foundation. Brief for *amici*, American College of Obstetricians and Gynecologists, et al., p. A-3.

[14] See *Roe* v. *Wade*, *ante* —, n. 40.

[15] Some state statutes do not have the JCAH accreditation requirement. Alaska Stat. § 11.15.060 (1970); Hawaii Rev. Stat. § 453.16 (Supp. 1971); N. Y. Penal Code § 125.05.3 (McKinney Supp. 1972-1973). Washington has the requirement but couples it with the alternative of "a medical facility approved . . . by the state board of health." Wash. Rev. Code § 9.02.070 (Supp. 1972). Florida's new statute has a similar provision. Law of Apr. 13, 1972, c.

tion requirement is an overbroad infringement of fundamental rights because it does not relate to the particular medical problems and dangers of the abortion operation. *Poe* v. *Menghini*, 339 F. Supp. 986, 993–994 (Kan. 1972); *People* v. *Barksdale*, 96 Cal. Rptr. 265, 273–274 (Cal. App. 1971).

We hold that the JCAH accreditation requirement does not withstand constitutional scrutiny in the present context. It is a requirement that simply is not "based on differences that are reasonably related to the purposes of the Act in which it is found." *Morey* v. *Doud*, 354 U. S. 457, 465 (1957).

This is not to say, as the appellants themselves concede, Brief 40, that Georgia may not or should not adopt standards for licensing all facilities where abortions may be performed so long as those standards are legitimately related to the objective the State seeks to accomplish. The appellants contend that such a relationship would be lacking even in a lesser requirement that an abortion be performed in a licensed hospital, as opposed to a facility, such as a clinic, that may be required by the State to possess all the staffing and services necessary to perform an abortion safely (including those adequate to handle serious complications or other emergency, or arrangements with a nearby hospital to provide such services). Appellants and various *amici* have presented us with a mass of data purporting to demonstrate that some institutions other than hospitals are entirely adequate to perform abortions if they possess these qualifications.

72-196, § 1 (2). Others contain the specification. Ark. Stat. Ann. §§ 41–803 to 41–810 (Supp. 1971); Cal. Health and Safety Code §§ 25950–25955.5 (West Supp. 1972); Colo. Rev. Stats. Ann. §§ 40–2–50 to 40–2–53 (Perm. Cum. Supp. 1967); Kan. Stat. Ann. § 21–3047 (Supp. 1971); Md. Ann. Code Art. 43, §§ 137–139 (Repl. 1971). Cf. Del. Code Ann. §§ 1790–1793 (Supp. 1970) specifying "a nationally recognized medical or hospital accreditation authority." § 1790 (a).

The State, on the other hand, has not presented persuasive data to show that only hospitals meet its acknowledged interest in insuring the quality of the operation and the full protection of the patient. We feel compelled to agree with appellants that the State must show more than it has shown to prove that only the full resources of a licensed hospital, rather than those of some other appropriately licensed institution, satisfy these health interests. We hold that the hospital requirement of the Georgia law is also invalid. In so holding we naturally express no opinion on the medical judgment involved in any particular case, that is, whether the patient's situation is such that an abortion should be performed in a hospital rather than in some other facility.

2. *Committee Approval.* The second aspect of the appellants' procedural attack relates to the hospital abortion committee and to the pregnant woman's asserted lack of access to that committee. Relying primarily on *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), concerning the termination of welfare benefits, and *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971), concerning the posting of an alcoholic's name, Doe first argues that she was denied due process because she could not make a presentation to the committee. It is not clear from the record, however, whether Doe's own consulting physician was or was not a member of the committee or did or did not present her case, or, indeed, whether she herself was or was not there. We see nothing in the Georgia statute that explicitly denies access to the committee by or on behalf of the woman. If the access point alone were involved, we would not be persuaded to strike down the committee provision on the unsupported assumption that access is not provided.

Appellants attack the discretion the statute leaves to the committee. The most concrete argument they advance is their suggestion that it is still a badge of infamy "in many minds" to bear an illegitimate child, and that

the Georgia system enables the committee members' personal views as to extramarital sex relations, and punishment therefor, to govern their decisions. This approach obviously is one founded on suspicion and one that discloses a lack of confidence in the integrity of physicians. To say that physicians will be guided in their hospital committee decisions by their predilections on extramarital sex unduly narrows the issue to pregnancy outside marriage. (Doe's own situation did not involve extramarital sex and its product.) The appellants' suggestion is necessarily somewhat degrading to the conscientious physician, particularly the obstetrician, whose professional activity is concerned with the physical and mental welfare, the woes, the emotions, and the concern of his female patients. He, perhaps more than anyone else, is knowledgeable in this area of patient care, and he is aware of human frailty, so-called "error," and needs. The good physician—despite the presence of rascals in the medical profession, as in all others, we trust that most physicians are "good"—will have a sympathy and an understanding for the pregnant patient that probably is not exceeded by those who participate in other areas of professional counseling.

It is perhaps worth noting that the abortion committee has a function of its own. It is a committee of the hospital and it is composed of members of the institution's medical staff. The membership usually is a changing one. In this way its work burden is shared and is more readily accepted. The committee's function is protective. It enables the hospital appropriately to be advised that its posture and activities are in accord with legal requirements. It is to be remembered that the hospital is an entity and that it, too, has legal rights and legal obligations.

Saying all this, however, does not settle the issue of the constitutional propriety of the committee requirement. Viewing the Georgia statute as a whole, we see

no constitutionally justifiable pertinence in the structure for the advance approval by the abortion committee. With regard to the protection of potential life, the medical judgment is already completed prior to the committee stage, and review by a committee once removed from diagnosis is basically redundant. We are not cited to any other surgical procedure made subject to committee approval as a matter of state criminal law. The woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it are substantially limited by this statutorily imposed overview. And the hospital itself is otherwise fully protected. Under § 26–1202 (e) the hospital is free not to admit a patient for an abortion. It is even free not to have an abortion committee. Further, a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital. Section 26–1202 (e) affords adequate protection to the hospital and little more is provided by the committee prescribed by § 26–1202 (b)(5).

We conclude that the interposition of the hospital abortion committee is unduly restrictive of the patient's rights and needs that, at this point, have already been medically delineated and substantiated by her personal physician. To ask more serves neither the hospital nor the State.

3. *Two-Doctor Concurrence.* The third aspects of the appellants' attack centers on the "time and availability of adequate medical facilities and personnel." It is said that the system imposes substantial and irrational roadblocks and "is patently unsuited" to prompt determination of the abortion decision. Time, of course, is critical in abortion. Risks during the first trimester of pregnancy are admittedly lower than during later months.

The appellants purport to show by a local study [38] of Grady Memorial Hospital (serving indigent residents in Fulton and DeKalb Counties) that the "mechanics of the system itself forced . . . discontinuation of the abortion process" because the median time for the workup was 15 days. The same study shows, however, that 27% of the candidates for abortion were already 13 or more weeks pregnant at the time of application, that is, they were at the end of or beyond the first trimester when they made their applications. It is too much to say, as appellants do, that these particular persons "were victims of [a] system over which they [had] no control." If higher risk was incurred because of abortions in the second rather than the first trimester, much of that risk was due to delay in application, and not to the alleged cumbersomeness of the system. We note, in passing, that appellant Doe had no delay problem herself; the decision in her case was made well within the first trimester.

It should be manifest that our rejection of the accredited hospital requirement and, more important, of the abortion committee's advance approval eliminates the major grounds of the attack based on the system's delay and the lack of facilities. There remains, however, the required confirmation by two Georgia-licensed physicians in addition to the recommendation of the pregnant woman's own consultant (making under the statute, a total of six physicians involved, including the three on the hospital's abortion committee). We conclude that this provision, too, must fall.

The statute's emphasis, as has been repetitively noted, is on the attending physician's "best clinical judgment that an abortion is necessary." That should be sufficient.

[38] L. Baker & M. Freeman, Abortion Surveillance at Grady Memorial Hospital Center for Disease Control (June and July 1971) (U. S. Dept. of HEW, PHS).

The reasons for the presence of the confirmation step in the statute are perhaps apparent, but they are insufficient to withstand constitutional challenge. Again, no other voluntary medical or surgical procedure for which Georgia requires confirmation by two other physicians has been cited to us. If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure or deprivation of his license are available remedies. Required acquiescence by co-practitioners has no rational connection with a patient's needs and unduly infringes on the physician's right to practice. The attending physician will know when a consultation is advisable—the doubtful situation, the need for assurance when the medical decision is a delicate one, and the like. Physicians have followed this routine historically and know its usefulness and benefit for all concerned. It is still true today that "[r]eliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he [the physician] possesses *the requisite qualifications*." *Dent v. West Virginia*, 129 U. S. 114, 122–123 (1889). See *United States* v. *Vuitch*, 402 U. S., at 71.

E. The appellants attack the residency requirement of the Georgia law, §§ 26–1202 (b)(1) and (b)(2), as violative of the right to travel stressed in *Shapiro* v. *Thompson*, 394 U. S. 618, 629–631 (1969), and other cases. We see in the statute no undue restriction on the travel right as such. One is no less free, because of the statute, to come to or to depart from the State of Georgia. Further, it cannot be said that the residency requirement might not have a possible relationship to the availability of post-procedure medical care for the aborted patient.

Nevertheless, we do not uphold the constitutionality of the residence requirement. It is not based on any policy

of preserving state-supported facilities for Georgia residents, for the bar also applies to private hospitals and to privately retained physicians. There is no intimation, either, that Georgia facilities are utilized to capacity in caring for Georgia residents. Just as the Privileges and Immunities Clause, Const. Art. IV, § 2, protects persons who enter other States to ply their trade, *Ward* v. *Maryland*, 79 U. S. (12 Wall.) 418, 430 (1870); *Blake* v. *McClung*, 172 U. S. 239, 248–256 (1898), so must it protect persons who enter Georgia seeking the medical services that are available there. See *Toomer* v. *Witsell*, 334 U. S. 385, 396–397 (1948). A contrary holding would mean that a State could limit to its own residents the general medical care available within its borders. This we could not approve.

F. The last argument on this phase of the case is one that often is made, namely, that the Georgia system is violative of equal protection because it discriminates against the poor. The appellants do not urge that abortions should be performed by persons other than licensed physicians so we have no argument that because the wealthy can better afford physicians, the poor should have nonphysicians made available to them. The appellants acknowleged that the procedures are "nondiscriminatory in . . express terms" but they suggest that they have produced invidious discriminations. The District Court rejected this approach out of hand. 319 F. Supp., at 1056. It rests primarily on the accreditation and approval and confirmation requirements, discussed above, and on the assertion that most of Georgia's counties have no accredited hospital. We have set aside the accreditation, approval, and confirmation requirements, however, and with that, the discrimination argument collapses in all significant aspects.

V

The appellants complain, finally, of the District Court's denial of injunctive relief. A like claim was made in *Roe* v. *Wade, ante.* We declined decision there insofar as injunctive relief was concerned, and we decline it here. We assume that Georgia's prosecutorial authorities will give full recognition to the judgment of this Court.

In summary, we hold that the JCAH accredited hospital provision and the requirements as to approval by the hospital abortion committee, as to confirmation by two independent physicians, and as to residence in Georgia are all violative of the Fourteenth Amendment. Specifically, the following portions of § 26–1202 (b), remaining after the District Court's judgment, are invalid:

(1) Subsections (1) and (2).

(2) That portion of Subsection (3) following the words "such physician's judgment is reduced to writing."

(3) Subsections (4) and (5).

The judgment of the District Court is modified accordingly and, as so modified, is affirmed. Costs are allowed to the appellants.

APPENDIX A

Criminal Code of Georgia

(The italicized portions are those held unconstitutional by the District Court)

CHAPTER 26–12. ABORTION.

26–1201. Criminal Abortion. Except as otherwise provided in section 26–1202, a person commits criminal abortion when he administers any medicine, drug or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion.

26–1202. Exception. (a) Section 26–1201 shall not apply to an abortion performed by a physician duly licensed to practice medicine and surgery pursuant to Chapter 84–9 or 84–12 of the Code of Georgia of 1933, as amended, based upon his best clinical judgment that an abortion is necessary *because:*

(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or

(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or

(3) The pregnancy resulted from forcible or statutory rape.

(b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met:

(1) The pregnant woman requesting the abortion certifies in writing under oath and subject to the penalties of false swearing to the physician who proposes to perform the abortion that she is a bona fide legal resident of the State of Georgia.

(2) The physician certifies that he believes the woman is a bona fide resident of this State and that he has no information which should lead him to believe otherwise.

(3) Such physician's judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery pursuant to Chapter 84-9 of the Code of Georgia of 1933, as amended, who certify in writing that based upon their separate personal medical examinations of the pregnant woman, the abortion is, in their judgment, necessary *because of one or more of the reasons enumerated above.*

(4) Such abortion is performed in a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals.

(5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

(6) If the proposed abortion is considered necessary because the woman has been raped, the woman makes a written statement under oath, and subject to the penalties of false swearing, of the date, time and place of the rape and the name of the rapist, if known. There must be attached to this statement a certified copy of any report of the rape made by any law enforcement officer or agency and a statement by the solicitor general of the judicial circuit where the rape occurred or allegedly occurred that, according to his best information, there is probable cause to believe that the rape did occur.

(7) Such written opinions, statements, certificates, and concurrences are maintained in the permanent files of such hospital and are available at all reasonable times to the solicitor general of the judicial circuit in which the hospital is located.

(8) A copy of such written opinions, statements, certificates, and concurrences is filed with the Director of the State Department of Public Health within ten (10) days after such operation is performed.

(9) All written opinions, statements, certificates, and concurrences filed and maintained pursuant to paragraphs (7) and (8) of this subsection shall be confidential records and shall not be made available for public inspection at any time.

(c) *Any solicitor general of the judicial circuit in which an abortion is to be performed under this section, or any person who would be a relative of the child within the second degree of consanguinity, may petition the superior court of the county in which the abortion is to be performed for a declaratory judgment whether the performance of such abortion would violate any constitutional or other legal rights of the fetus. Such solicitor general may also petition such court for the purpose of taking issue with compliance with the requirements of this section. The physician who proposes to perform the abortion and the pregnant woman shall be respondents. The petition shall be heard expeditiously and if the court adjudges that such abortion would violate the constitutional or other legal rights of the fetus, the court shall so declare and shall restrain the physician from performing the abortion.*

(d) If an abortion is performed in compliance with this section, the death of the fetus shall not give rise to any claim for wrongful death.

(e) Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the

purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b) (5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person.

26-1203. Punishment. A person convicted of criminal abortion shall be punished by imprisonment for not less than one nor more than 10 years.

APPENDIX B

American Law Institute
MODEL PENAL CODE

Section 230.3. Abortion.

(1) *Unjustified Abortion.* A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.

(2) *Justifiable Abortion.* A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable. [Additional exceptions from the requirement of hospitalization may be incorporated here to take account of situations in sparsely settled areas where hospitals are not generally accessible.]

(3) *Physicians' Certificates; Presumption from Non-Compliance.* No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any

of the requirements of this Subsection gives rise to a presumption that the abortion was unjustified.

(4) *Self-Abortion.* A woman whose pregnancy has continued beyond the twenty-sixth week commits a felony of the third degree if she purposely terminates her own pregnancy otherwise than by a live birth, or if she uses instruments, drugs or violence upon herself for that purpose. Except as justified under Subsection (2), a person who induces or knowingly aids a woman to use instruments, drugs or violence upon herself for the purpose of terminating her pregnancy otherwise than by a live birth commits a felony of the third degree whether or not the pregnancy has continued beyond the twenty-sixth week.

(5) *Pretended Abortion.* A person commits a felony of the third degree if, representing that it is his purpose to perform an abortion, he does an act adapted to cause abortion in a pregnant woman although the woman is in fact not pregnant, or the actor does not believe she is. A person charged with unjustified abortion under Subsection (1) or an attempt to commit that offense may be convicted thereof upon proof of conduct prohibited by this Subsection.

(6) *Distribution of Abortifacients.* A person who sells, offers to sell, possesses with intent to sell, advertises, or displays for sale anything specially designed to terminate a pregnancy, or held out by the actor as useful for that purpose, commits a misdemeanor, unless:

(a) the sale, offer or display is to a physician or druggist or to an intermediary in a chain of distribution to physicians or druggists; or

(b) the sale is made upon prescription or order of a physician; or

(c) the possession is with intent to sell as authorized in paragraphs (a) and (b); or

pp. 33, 34, 35, 38, 39
40, 41, 43, 44, 47
48, 49, 50

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: 12/1/72

No. 70-18

Jane Roe et al., Appellants, v. Henry Wade. | On Appeal from the United States District Court for the Northern District of Texas.

Reviewed 12/2 & 3/73

[December —, 1972]

Join ZAP

MR. JUSTICE BLACKMUN, Memorandum.

This Texas federal appeal and its Georgia companion, *Doe* v. *Bolton*, *post* ——, present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

(This is generally in accord with my views as to viability)

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortive procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now vindicated dissent in *Lochner* v. *New York*, 198 U. S. 45, 76 (1905):

> "It [the Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

I

The Texas statutes that concern us here are Arts. 1191–1194 and 1196 of the State's Penal Code.[2] These

[2] "Article 1191. Abortion

"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.

"Art. 1192. Furnishing the means

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

"Art. 1193. Attempt at abortion

"If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided

make it a crime to "procure an abortion," as therein defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Similar statutes are in existence in a majority of the States.[2]

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it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

"Art. 1194. Murder in producing abortion

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

"Art. 1196. By medical advice

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

The foregoing Articles, together with Art. 1195, comprise Chapter 9 of Title 15 of the Penal Code. Article 1195, not attacked here, reads:

"Art. 1195. Destroying unborn child

"Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years."

[2] Ariz. Rev. Stat. Ann. § 13-211 (1971); Conn. Pub. Act. No. 1 (May 1972 special session) (in 4 Conn. Leg. Serv. 677 (1972)), and Conn. Gen. Stat. Rev. §§ 53-29, 53-30 (1968) (or unborn child); Idaho Code § 18-1505 (App. to Supp. 1971); Ill. Rev. Stats. c. 38, § 23-1 (1971); Ind. Code § 35-1-58-1 (1971); Iowa Code § 701.1 (1971); Ky. Rev. Stat. § 436.020 (1962); La. Rev. Stat. § 37:1285 (6) (1964) (loss of medical license) (but see § 14-87 (1972 Supp.) containing no exception for the life of the mother under the criminal statute); Me. Rev. Stat. Ann. Tit. 17, § 51 (1964); Mass. Gen. Laws Ann. c. 272, § 19 (1970) (using the term "unlawfully," construed to exclude an abortion to save the mother's life, *Kudish* v. *Bd. of Registration*, 356 Mass. 98, 248 N. E. 2d 264 (1969)); Mich. Comp. Laws § 750.14 (1948); Minn. Stat. § 617.18 (1971); Mo. Rev. Stat. § 559.100 (1969); Mont. Rev. Codes Ann. § 94-401 (1961); Neb. Rev. Stat. § 28-405 (1964); Nev. Rev. Stat. § 200.220 (1967); N. H. Rev. Stat. Ann. § 585.13 (1955); N. J. Stat. Ann. § 2A:87-1 (1969) ("without lawful justification"); N. D. Cent. Code §§ 12-25-

Texas first enacted a criminal abortion statute in 1854. Texas Laws 1854, c. 49, § 1, set forth in 3 Gammel, Laws of Texas, 1502 (1898). This was soon modified into language that has remained substantially unchanged to the present time. See Texas Penal Code of 1857, Arts. 531–536; Paschal's Laws of Texas, Arts. 2192–2197 (1866); Texas Rev. Stat., Arts. 536–541 (1879); Texas Rev. Crim. Stat., Arts. 1071–1076 (1911). The final article in each of these compilations provided the same exception, as does the present Article 1196, for an abortion by "medical advice for the purpose of saving the life of the mother." [8]

01, 12–25–02 (1960); Ohio Rev. Code § 2901.16 (1953); Okla. Stat. Ann., Tit. 21, § 861 (1972–1973 Supp.); Pa. Stat. Ann., Tit. 18, §§ 4718, 4719 (1963) ("unlawful"); R. I. Gen. Laws Ann. § 11–3–1 (1969); S. D. Compiled Laws § 22–17–1 (1967); Tenn. Code Ann. §§ 39–301, 39–302 (1968); Utah Code Ann. §§ 76–2–1, 76–2–2 (1953); Vt. Stat. Ann., Tit. 13, § 101 (1958); W. Va. Code Ann. § 61–2–8 (1966); Wis. Stat. § 940.04 (1969); Wyo. Stat. Ann. §§ 6–77, 6–78 (1957).

[8] Long ago a suggestion was made that the Texas statutes were unconstitutionally vague because of definitional deficiencies. The Texas Court of Criminal Appeals disposed of that suggestion peremptorily, saying only,

"It is also insisted in the motion in arrest of judgment that the statute is unconstitutional and void in that it does not sufficiently define or describe the offense of abortion. We do not concur in respect to this question." *Jackson* v. *State*, 55 Tex. Crim. R. 79, 89, 115 S. W. 262, 268 (1908).

The same court recently has held again that the State's abortion statutes are not unconstitutionally vague or overbroad. *Thompson* v. *State*, — Tex. Crim. App. —, — S. W. 2d — (1971), appeal pending. The court held that "the State of Texas has a compelling interest to protect fetal life"; that Art. 1191 "is designed to protect fetal life"; that the Texas homicide statutes, particularly Art. 1205 of the Penal Code, are intended to protect a person "in existence by actual birth" and thereby implicitly recognize other human life that is not "in existence by actual birth"; that the definition of human life is for the legislature and not the courts; that Art. 1196 "is

II

Jane Roe,[4] a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. By an amendment to her complaint Roe purported to sue "on behalf of herself and all other women" similarly situated.

James Hubert Hallford, a licensed physician, sought and was granted leave to intervene in Roe's action. In

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more definite that the District of Columbia statute upheld in [*United States* v.] *Vuitch*" (402 U. S. 62); and that the Texas statute "is not vague and indefinite or overbroad." A physician's abortion conviction was affirmed.

In n. 2, — Tex. Crim. App., at —, — S. W. 2d, at —, the court observed that any issue as to the burden of proof under the exemption of Art. 1196 "is not before us." But see *Veevers* v. *State*, 172 Tex. Crim. App. 162, 168–169, 354 S. W. 2d 161 (1962). Cf. *United States* v. *Vuitch*, 402 U. S. 62, 69–71 (1971).

[4] The name is a pseudonym.

his complaint he alleged that he had been arrested previously for violations of the Texas abortion statutes and that two such prosecutions were pending against him. He described conditions of patients who came to him seeking abortions, and he claimed that for many cases he, as a physician, was unable to determine whether they fell within or outside the exception recognized by Article 1196. He alleged that, as a consequence, the statutes were vague and uncertain, in violation of the Fourteenth Amendment, and that they violated his own and his patients' rights to privacy in the doctor-patient relationship and his own right to practice medicine, rights he claimed were guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

John and Mary Doe,[5] a married couple, filed a companion complaint to that of Roe. They also named the District Attorney as defendant, claimed like constitutional deprivations, and sought declaratory and injunctive relief. The Does alleged that they were a childless couple; that Mrs. Doe was suffering from a "neural-chemical" disorder; that her physician had "advised her to avoid pregnancy until such time as her condition has materially improved" (although a pregnancy at the present time would not present "a serious risk" to her life); that, pursuant to medical advice, she had discontinued use of birth control pills; and that if she should become pregnant, she would want to terminate the pregnancy by an abortion performed by a competent, licensed physician under safe, clinical conditions. By an amendment to their complaint, the Does purported to sue "on behalf of themselves and all couples similarly situated."

The two actions were consolidated and heard together by a duly convened three-judge district court. The suits thus presented the situations of the pregnant single

[5] These names are pseudonyms.

woman, the childless couple, with the wife not pregnant, and the licensed practicing physician, all joining in the attack on the Texas criminal abortion statutes. Upon the filing of affidavits, motions were made to dismiss and for summary judgment. The court held that Roe and Dr. Hallford, and members of their respective classes, had standing to sue, and presented justiciable controversies, but that the Does had failed to allege facts sufficient to state a present controversy and did not have standing. It concluded that, with respect to the requests for a declaratory judgment, abstention was not warranted. On the merits, the District Court held that the "fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment," and that the Texas criminal abortion statutes were void on their face because they were both unconstitutionally vague and constituted an overbroad infringement of the plaintiffs' Ninth Amendment rights. The court then held that abstention was warranted with respect to the requests for an injunction. It therefore dismissed the Doe complaint, declared the abortion statutes void, and dismissed the application for injunctive relief. 314 F. Supp. 1217 (ND Tex. 1970).

The plaintiffs Roe and Doe and the intervenor Hallford, pursuant to 28 U. S. C. § 1253, have appealed to this Court from that part of the District Court's judgment denying the injunction. The defendant District Attorney has purported to cross appeal, pursuant to the same statute, from the court's grant of declaratory relief to Roe and Hallford. Both sides also have taken protective appeals to the United States Court of Appeals for the Fifth Circuit. That court ordered the appeals held in abeyance pending decision here. We postponed decision on jurisdiction to the hearing on the merits. 402 U. S. 941 (1971).

III

It might have been preferable if the defendant, pursuant to our Rule 20, had presented to us a petition for certiorari before judgment in the Court of Appeals with respect to the granting of the plaintiffs' prayer for declaratory relief. Our decisions in *Mitchell* v. *Donovan*, 398 U. S. 427 (1970), and *Gunn* v. *University Committee*, 399 U. S. 383 (1970), are to the effect that § 1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone. We conclude, nevertheless, that those decisions do not foreclose our review of both the injunctive and the declaratory aspects of a case of this kind when it is properly here, as this one is, on appeal under § 1253 from specific denial of injunctive relief, and the arguments as to both aspects are necessarily identical. See *Carter* v. *Jury Commission*, 396 U. S. 320 (1970); *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73, 80-81 (1960). It would be destructive of time and energy for all concerned were we to rule otherwise. Cf. *Doe* v. *Bolton*, *post*, —.

IV

We are next confronted with issues of justiciability, standing, and abstention. Have Roe and the Does established that "personal stake in the outcome of the controversy," *Baker* v. *Carr*, 369 U. S. 186, 204 (1962), that insures that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution," *Flast* v. *Cohen*, 392 U. S. 83, 101 (1968), and *Sierra Club* v. *Morton*, 405 U. S. 727, 732 (1972)? And what effect did the pendency of criminal abortion charges against Dr. Hallford in state court have upon the propriety of the federal court's granting relief to him as a plaintiff-intervenor?

A. *Jane Roe.* Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas.

Viewing Roe's case as of the time of its filing and thereafter until as late as May, there can be little dispute that it then presented a case or controversy and that, wholly apart from the class aspects, she, as a pregnant single woman thwarted by the Texas criminal abortion laws, had standing to challenge those statutes. *Abele* v. *Markle*, 452 F. 2d 1121, 1125 (CA2 1971); *Crossen* v. *Breckenridge*, 446 F. 2d 833, 838–839 (CA6 1971); *Poe* v. *Menghini*, 339 F. Supp. 986, 990–991 (Kans. 1972). See *Truax* v. *Raich*, 239 U. S. 33 (1915). Indeed, we do not read the appellee's brief as really asserting anything to the contrary. The "logical nexus between the status asserted and the claim sought to be adjudicated," *Flast* v. *Cohen*, 392 U. S., at 102, and the necessary degree of contentiousness, *Golden* v. *Zwickler*, 394 U. S. 103 (1969), are both present.

The appellee notes, however, that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970,[6] or on the following June 17 when the court's opinion and judgment were filed. And he suggests that Roe's case must now be moot because she and all other members of her class are no longer subject to any 1970 pregnancy.

[6] The appellee twice states in his brief that the hearing before the District Court was held on July 22, 1970. Appellee's Brief 13. The docket entries, Appendix, at 2, and the transcript, Appendix, at 76, reveal this to be an error. The July date appears to be the time of the reporter's transcription. See Appendix, at 77.

The usual rule in federal cases is that an actual controversy must exist at all stages of appellate or certiorari review, and not simply at the date the action is initiated. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950); *Golden* v. *Zwickler, supra; SEC* v. *Medical Committee for Human Rights*, 404 U. S. 403 (1972).

But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly is "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). See *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969); *Carroll* v. *President and Commissioners*, 393 U. S. 175, 178–179 (1968); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632–633 (1953).

We therefore agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot.

B. *Dr. Hallford.* The doctor's position is different. He entered Roe's litigation as a plaintiff-intervenor alleging in his complaint that he:

> "In the past has been arrested for violating the Texas Abortion Laws and at the present time stands charged by indictment with violating said laws in the Criminal District Court of Dallas County, Texas to-wit: (1) The State of Texas vs.

> James H. Hallford, No. C–69–5307–IH, and (2) The State of Texas vs. James H. Hallford, No. C–69–2524–H. In both cases the defendant is charged with abortion. . . ."

In his application for leave to intervene the doctor made like representations as to the abortion charges pending in the state court. These representations were also repeated in the affidavit he executed and filed in support of his motion for summary judgment.

Dr. Hallford is therefore in the position of seeking, in a federal court, declaratory and injunctive relief with respect to the same statutes under which he stands charged in criminal prosecutions simultaneously pending in state court. Although he stated that he has been arrested in the past for violating the State's abortion laws, he makes no allegation of any substantial and immediate threat to any federally protected right that cannot be asserted in his defense against the state prosecutions. Neither is there any allegation of harassment or bad faith prosecution. In order to escape the rule, articulated in the cases cited in the next paragraph of this opinion, that, absent harassment and bad faith, a defendant in a pending state criminal case cannot affirmatively challenge in federal court the statutes under which the State is prosecuting him, Dr. Hallford seeks to distinguish his status as a present state defendant from his status as a "potential future defendant" and to assert only the latter for standing purposes here.

We see no merit in that distinction. Our decision in *Samuels* v. *Mackell*, 401 U. S. 66 (1971), compels the conclusion that the District Court erred when it granted declaratory relief to Dr. Hallford instead of refraining from so doing. The court, of course, was correct in refusing to grant injuctive relief to the doctor. The reasons supportive of that action, however, are those expressed in *Samuels* v. *Mackell*, *supra*, and in *Younger* v.

Harris, 401 U. S. 37 (1971); *Boyle* v. *Landry*, 401 U. S. 77 (1971); *Perez* v. *Ledesma*, 401 U. S. 82 (1971); and *Byrne* v. *Karalexis*, 401 U. S. 216 (1971). See also *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). We note, in passing, that *Younger* and its companion cases were decided after the three-judge District Court decision in this case.

Dr. Hallford's complaint in intervention, therefore, is to be dismissed.[7] He is remitted to his defenses in the state criminal proceedings against him. We reverse the judgment of the District Court insofar as it granted Dr. Hallford relief and failed to dismiss his complaint in intervention.

C. *The Does.* In view of our ruling as to Roe's standing in her case, the issue of the Does' standing in their case has little significance. The claims they assert are essentially the same as those of Roe, and they attack the same statutes. Nevertheless, we briefly note the Does' posture.

Their pleadings present them as a childless married couple, the woman not being pregnant, who have no desire to have children at this time because of their having received medical advice that Mrs. Doe should avoid pregnancy, and for "other highly personal reasons." But

[7] We need not consider what different result, if any, would follow if Dr. Hallford's intervention were on behalf of a class. His complaint in intervention does not purport to assert a class suit and makes no reference to any class apart from an allegation that he "and others similarly situated" must necessarily guess at the meaning of Art. 1196. His application for leave to intervene goes somewhat further for it asserts that plaintiff Roe does not adequately protect the interest of the doctor "and the class of people who are physicians . . . and the class of people who are . . . patients . . . ." The leave application, however, is not the complaint. Despite the District Court's statement to the contrary, 314 F. Supp., at 1225, we fail to perceive the essentials of a class suit in the Hallford complaint.

they "fear . . . they may face the prospect of becoming parents." And if pregnancy ensues, they "would want to terminate" it by an abortion. They assert an inability to obtain an abortion legally in Texas and, consequently, the prospect of obtaining an illegal abortion there or of going outside Texas to some place where the procedure could be obtained legally and competently.

We thus have as plaintiffs a married couple who have, as their asserted immediate and present injury, only an alleged "detrimental effect upon [their] marital happiness" because they are forced to "the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible pregnancy." Their claim is that sometime, in the future, Mrs. Doe might become pregnant because of possible failure of contraceptive measures, and at that time in the future, she might want an abortion that might then be illegal under the Texas statutes.

This very phrasing of the Does' position reveals its speculative character. Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place and all may not combine. In the Does' estimation, these possibilities might have some real or imagined impact upon their marital happiness. But we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy. *Younger* v. *Harris*, 401 U. S., at 41–42; *Golden* v. *Zwickler*, 394 U. S., at 109–110 (1969); *Abele* v. *Markle*, 452 F. 2d, at 1124–1125; *Crossen* v. *Breckenridge*, 446 F. 2d, at 839. The Does' claim falls far short of those resolved otherwise in the cases that the Does urge upon us, namely, *Investment Co. Institute* v. *Camp*, 401 U. S. 617 (1971);

Data Processing Service v. *Camp*, 397 U. S. 150 (1970); and *Epperson* v. *Arkansas*, 393 U. S. 97 (1968). See also *Truax* v. *Raich*, *supra*.

The Does therefore are not appropriate plaintiffs in this litigation. Their complaint was properly dismissed by the District Court, and we affirm that dismissal.

V

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *id.*, at 460 (WHITE, J., concurring); or among those rights reserved to the people by the Ninth Amendment, *Griswold* v. *Connecticut*, 381 U. S., at 486 (Goldberg, J., concurring). Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.

VI

It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.

1. *Ancient attitudes.* These are not capable of precise determination. We are told that at the time of the Persian Empire abortifacients were known and that criminal abortions were severely punished.[8] We are also told, however, that abortion was practiced in Greek times as well as in the Roman Era,[9] and that "it was resorted to without scruple." [10] The Ephesian, Soranos, often described as the greatest of the ancient gynecologists, appears to have been generally opposed to Rome's prevailing free-abortion practices. He found it necessary to think first of the life of the mother, and he resorted to abortion when, upon this standard, he felt the procedure advisable.[11] Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion.[12]

2. *The Hippocratic Oath.* What then of the famous Oath that has stood so long as the ethical guide of the medical profession and that bears the name of the great Greek (460(?)-377(?) B. C.), who has been described as the Father of Medicine, the "wisest and the greatest

[8] A. Castiglioni, A History of Medicine 84 (2d ed. 1947), E. Krumbhaar, translator and editor (hereinafter "Castiglioni").

[9] J. Ricci, The Genealogy of Gynaecology 52, 84, 113, 149 (2d ed. 1950) (hereinafter "Ricci"); L. Lader, Abortion 75–77 (1966) (hereinafter "Lader"); K. Niswander, Medical Abortion Practices in the United States, in Abortion and the Law 27, 38–40 (D. Smith, editor, 1967); G. Williams, The Sanctity of Life 148 (1957) (hereinafter "Williams"); J. Noonan, An Almost Absolute Value in History, in The Morality of Abortion 1, 3–7 (J. Noonan ed. 1970) (hereinafter "Noonan"); E. Quay, Justifiable Abortion—Medical and Legal Foundations, II, 49 Geo. L. J. 395, 406–422 (1961) (hereinafter "Quay").

[10] L. Edelstein, The Hippocratic Oath 10 (1943) (hereinafter "Edelstein"). But see Castiglioni 227.

[11] Edelstein 12; Ricci 113–114, 118–119; Noonan 5.

[12] Edelstein 13–14.

practioner of his art," and the "most important and most complete medical personality of antiquity," who dominated the medical schools of his time, and who typified the sum of the medical knowledge of the past?[13] The Oath varies somewhat according to the particular translation, but in any translation the content is clear: "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion,"[14] or "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy."[15]

Although the Oath is not mentioned in any of the principal briefs in this case or in *Doe* v. *Bolton*, *post*, it represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day. Why did not the authority of Hippocrates dissuade abortion practice in his time and that of Rome? The late Dr. Edelstein provides us with a theory:[16] The Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. See Plato, *Republic*, V, 461; Aristotle, *Politics*, VII, 1335 b 25. For the Pythagoreans, however, it was a matter of dogma. For them the embryo was animate from the moment of conception, and abortion meant destruction of a living being. The abortion clause of the Oath, therefore, "echoes Pythagorean doctrines," and "[i]n no other stratum of Greek opinion were such

[13] Castiglioni 148.
[14] *Id.*, at 154.
[15] Edelstein 3.
[16] *Id.*, at 12, 15–18.

views held or proposed in the same spirit of uncompromising austerity." [17]

Edelstein then concludes that the Oath originated in a group representing only a small segment of Greek opinion and that it certainly was not accepted by all ancient physicians. He points out that medical writings down to Galen (130–200 A. D.) "give evidence of the violation of almost every one of its injunctions." [18] But with the end of antiquity a decided change took place. Resistance against suicide and against abortion became common. The Oath came to be popular. The emerging teachings of Christianity were in agreement with the Pythagorean ethic. The Oath "became the nucleus of all medical ethics" and "was applauded as the embodiment of truth." Thus, suggests Dr. Edelstein, it is "a Pythagorean manifesto and not the expression of an absolute standard of medical conduct." [19]

This, it seems to us, is a satisfactory and acceptable explanation of the Hippocratic Oath's apparent rigidity. It enables us to understand, in historical context, a long accepted and revered statement of medical ethics.

3. *The Common Law.* It is undisputed that at the common law, abortion performed *before* "quickening"—the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy [20]—was not an indictable offense.[21] The ab-

[17] *Id.*, at 15; Lader 76.

[18] Edelstein 63.

[19] *Id.*, at 64.

[20] Dorland's Illustrated Medical Dictionary 1281 (24th ed. 1965).

[21] E. Coke, Institutes III *50 (1648); 1 W. Hawkins, Pleas of the Crown c. 31, § 16 (1762); 1 Blackstone, Commentaries *129–130 (1765); M. Hale, Pleas of the Crown 433 (1778). For discussions of the role of the quickening concept in English common law, see Lader 78; Noonan 223–226; C. Means, The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case

sence of a common law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins. These disciplines variously approached the question in terms of the point at which the embryo or fetus became "formed" or recognizably human, or in terms of when a "person" came into being, that is, infused with a "soul" or "animated." A loose consensus evolved in early English law that these events occurred at some point between conception and live birth.[22] This was "mediate animation." Although

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of Cessation of Constitutionality, 14 N. Y. L. Forum 411, 418–428 (1968) (hereinafter "Means I"); L. Stern, Abortion: Reform and the Law, 59 J. Crim. L. C. & P. S. 84 (1968) (hereinafter "Stern"); Quay 430–432; Williams 152.

[22] Early philosophers believed that the embryo or fetus did not become formed and begin to live until at least 40 days after conception for a male, and 80 to 90 days for a female. See, for example, Aristotle, Hist. Anim. 7.3.583b; Gen. Anim. 2.3.736, 2.5.741; Hippocrates, Lib. de Nat. Puer., No. 10. Aristotle's thinking derived from his three-stage theory of life: vegetable, animal, rational. The vegetable stage was reached at conception, the animal at "animation," and the rational soon after live birth. This theory, together with the 40/80 day view, came to be accepted by early Christian thinkers.

The theological debate was reflected in the writings of St. Augustine, who made a distinction between *embryo inanimatus*, not yet endowed with a soul, and *embryo animatus*. He may have drawn upon Exodus xxi, 22. At one point, however, he expresses the view that human powers cannot determine the point during fetal development at which the critical change occurs. See Augustine, De Origine Animae 4.4 (Pub. Law 44.527). See also Reany, The Creation of the Human Soul, c. 2 and 83–86 (1932); Huser, The Crime of Abortion in Common Law 15 (Catholic Univ. of America, Canon Law Studies No. 162, Washington, D. C. 1942).

Galen, in three treatises related to embryology, accepted the thinking of Aristotle and his followers. Quay 426–427. Later, Augustine on abortion was incorporated by Gratian into the Decretum, published about 1140. Decretum Magistri Gratiani 2.32.2.7 to 2.32.2.10,

Christian theology and the canon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the 19th century, there was otherwise little agreement about the precise time of formation or animation. There was agreement, however, that prior to this point the fetus was to be regarded as part of the mother and its destruction, therefore, was not homicide. Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40–80 day view, and perhaps to Aquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point. The significance of quickening was echoed by later common law scholars and found its way into the received common law in this country.

Whether abortion of a *quick* fetus was a felony at common law, or even a lesser crime, is still disputed. Bracton, writing early in the 13th century, thought it homicide.[25] But the later and predominant view, following the great common law scholars, has been that

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in 1 Corpus Juris Canonici 1122, 1123 (2d ed. Friedberg ed. 1879). Gratian, together with the decretals that followed, were recognized as the definitive body of canon law until the new Code of 1917.

For discussions of the canon law treatment, see Means I, at 411–412; Noonan, 20–26; Quay 426–430; see also Noonan, Contraception: A History of Its Treatment by the Catholic Theologians and Canonists 18–29 (1965).

[25] Bracton took the position that abortion by blow or poison was homicide "if the foetus be already formed and animated, and particularly if it be animated." 2 H. Bracton, De Legibus et Consuetudinibus Angliae 279 (Twiss ed. 1879), or, as a later translation puts it, "if the foetus is already formed or quickened, especially if it is quickened," II Bracton, On the Laws and Customs of England 341 (Thorne ed. 1968). See Quay 431; see also 2 Fleta 60–61 (Book I, c. 23) (Selden Society ed. 1955).

it was at most a lesser offense. In a frequently cited passage, Coke took the position that abortion of a woman "quick with childe" is "a great misprision and no murder."[24] Blackstone followed, saying that while abortion after quickening had once been considered manslaughter (though not murder), "modern law" took a less severe view.[25] A recent review of the common law precedents argues, however, that those precedents contradict Coke and that even post-quickening abortion was never established as a common law crime.[26] This is of some importance because while most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law,[27] others followed Coke in stating that abor-

[24] E. Coke, Institutes III *50 (1648).

[25] 1 Blackstone, Commentaries *129–130 (1765).

[26] C. Means, The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?, 17 N. Y. L. Forum 335 (1971) (hereinafter "Means II"). The author examines the two principal precedents cited marginally by Coke, both contrary to his dictum, and traces the treatment of these and other cases by earlier commentators. He concludes that Coke, who himself participated as an advocate in an abortion case in 1601, may have intentionally misstated the law. The author even suggests a reason: Coke's strong feelings about abortion, coupled with his reluctance to acknowledge common law (secular) jurisdiction to assess penalties for an offence that traditionally had been an exclusively ecclesiastical or canon law crime. See also Lader 78–79, who notes that some scholars doubt the common law ever was applied to abortion; that the English ecclesiastical courts seem to have lost interest in the problem after 1527; and that the preamble to the English legislation of 1803, 43 Geo. 3, c. 58, § 1, at 208, referred to in the text, *infra*, states that "no adequate means have been hitherto provided for the prevention and punishment of such offenses."

[27] *Commonwealth* v. *Bangs*, 9 Mass. 387, 388 (1812); *Commonwealth* v. *Parker*, 50 Mass. (9 Met.) 263, 265–266 (1845); *State* v. *Cooper*, 22 N. J. L. 52, 58 (1849); *Abrams* v. *Foshee*, 3 Iowa 274, 278–280 (1856); *Smith* v. *Gaffard*, 31 Ala. 45, 51 (1857); *Mitchell*

tion of a quick fetus was a "misprision," a term they translated to mean "misdemeanor."[28] That their reliance on Coke on this aspect of the law was uncritical and, apparently in all the reported cases, dictum (due probably to the paucity of common law prosecutions for post-quickening abortion), makes it now appear doubtful that abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus.

4. *The English statutory law.* England's first criminal abortion statute, Lord Ellenborough's Act, 43 Geo. 3, c. 58, came in 1803. It made abortion of a quick fetus, § 1, a capital crime, but in § 2 it provided lesser penalties for the felony of abortion before quickening, and thus preserved the quickening distinction. This contrast was continued in the general revision of 1828, 9 Geo. 4, c. 31, § 13, at 104. It disappeared, however, together with the death penalty, in 1837, 7 Will. 4 & 1 Vic., c. 85, § 6, at 360, and did not reappear in the Offenses Against the Person Act of 1861, 24 & 25 Vic., c. 100, § 59, at 438, that formed the core of English anti-abortion law until the liberalizing reforms of 1967. In 1929 the Infant Life (Preservation) Act, 19 & 20 Geo. 5, c. 34, came into being. Its emphasis was upon the destruction of "the life of a child capable of being born alive." It made a willful act performed with the necessary intent a felony. It contained a proviso that

v. *Commonwealth*, 78 Ky. 204, 210 (1879); *Eggart* v. *State*, 40 Fla. 527, 532, 25 So. 144, 145 (1898); *State* v. *Alcorn*, 7 Idaho 599, 606, 64 P. 1014, 1016 (1901); *Edwards* v. *State*, 79 Neb. 251, 252, 112 N. W. 611, 612 (1907); *Gray* v. *State*, 77 Tex. Crim. R. 221, 224, 178 S. W. 327, 328 (1915); *Miller* v. *Bennett*, 190 Va. 162, 169, 56 S. E. 2d 217, 221 (1949). Contra, *Mills* v. *Commonwealth*, 13 Pa. 631, 633 (1850); *State* v. *Slagle*, 83 N. C. 630, 632 (1880).

[28] *See Smith* v. *State*, 33 Me. 48, 55 (1851); *Evans* v. *People*, 49 N. Y. 86, 88 (1872); *Lamb* v. *State*, 67 Md. 524, 533, 10 A. 208 (1887).

one was not to be found guilty of the offense "unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother."

A seemingly notable development in the English law was the case of *Rex* v. *Bourne*, [1939] 1 K. B. 687. This case apparently answered in the affirmative the question whether an abortion necessary to preserve the life of the pregnant woman was excepted from the criminal penalties of the 1861 Act. In his instructions to the jury Judge Macnaghten referred to the 1929 Act, and observed, p. 691, that that Act related to "the case where a child is killed by a willful act at the time when it is being delivered in the ordinary course of nature." *Id.*, at 91. He concluded that the 1861 Act's use of the word "unlawfully," imported the same meaning expressed by the specific proviso in the 1929 Act even though there was no mention of preserving the mother's life in the 1861 Act. He then construed the phrase "preserving the life of the mother" broadly, that is, "in a reasonable sense," to include a serious and permanent threat to the mother's *health*, and instructed the jury to acquit Dr. Bourne if it found he had acted in a good faith belief that the abortion was necessary for this purpose. *Id.*, at 693–694. The jury did acquit.

Recently Parliament enacted a new abortion law. This is the Abortion Act of 1967, 15 & 16 Eliz. 2, c. 87. The Act permits a licensed physician to perform an abortion where two other licensed physicians agree (a) "that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated," or (b) "that there is a substantial risk that if the child were born it would

suffer from such physical or mental abnormalities as to be seriously handicapped." The Act also provides that, in making this determination, "account may be taken of the pregnant woman's actual or reasonably foreseeable environment." It also permits a physician, without the concurrence of others, to terminate a pregnancy where he is of the good faith opinion that the abortion "is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman."

5. *The American law.* In this country the law in effect in all but a few States until mid-19th century was the pre-existing English common law. Connecticut, the first State to enact abortion legislation, adopted in 1821 that part of Lord Ellenborough's Act that related to a woman "quick with child." [29] The death penalty was not imposed. Abortion before quickening was made a crime in that State only in 1860.[30] In 1828 New York enacted legislation [31] that, in two respects, was to serve as a model for early anti-abortion statutes. First, while barring destruction of an unquickened fetus as well as a quick fetus, it made the former only a misdemeanor, but the latter second-degree manslaughter. Second, it incorporated a concept of therapeutic abortion by providing that an abortion was excused if it "shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose." By 1840, when Texas had received the common law,[32] only eight American States

[29] Conn. Stat., Tit. 20, § 14 (1821).

[30] Conn. Pub. Acts, c. 71, § 1 (1860).

[31] N. Y. Rev. Stat., pt. IV, c. I, Tit. II, Art. 1, § 9, at 661, and Tit. VI, § 21, at 694 (1829).

[32] Act of January 20, 1840, § 1, set forth in 2 Gammel, Laws of Texas 177–178 (1898); see *Grigsby* v. *Reib*, 105 Tex. 597, 600, 153 S. W. 1124, 1125 (1913).

had statutes dealing with abortion.[33] It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening. Most punished attempts equally with completed abortions. While many statutes included the exception for an abortion thought by one or more physicians to be necessary to save the mother's life, that provision soon disappeared and the typical law required that the procedure actually be necessary for that purpose.

Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950's, a large majority of the States banned abortion, however and whenever performed, unless done to save or preserve the life of the mother.[34] The exceptions, Alabama and the District of Columbia, permitted abortion to preserve the mother's health.[35] Three other States permitted abortions that were not "unlawfully" performed or that were not "without lawful justification," leaving interpretation of those standards to the courts.[36] In the past several years, however, a trend toward liberaliza-

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[33] The early statutes are discussed in Quay 435–438. See also Lader 85–88; Stern 85–86; and Means II 375–376.

[34] Criminal abortion statutes in effect in the States as of 1961, together with historical statutory development and important judicial interpretations of the state statutes, are cited and quoted in Quay 447–520. See Note, A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems, 1972 Ill. L. Forum 177, 179, classifying the abortion statutes and listing 25 States as permitting abortion only if necessary to save or preserve the mother's life.

[35] Ala. Code, Tit. 14, § 9 (1958); D. C. Code Ann. § 22–201 (1967).

[36] Mass. Gen. Laws Ann., c. 272, § 19 (1970); N. J. Rev. Stat. Ann. 2A:87–1 (1969); Pa. Stat. Ann., Tit. 18, §§ 4718, 4719 (1963).

tion of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code, § 230.3,[37] set forth as Appendix B to the opinion in *Doe v. Bolton, post* ——.

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country

[37] Fourteen States have adopted some form of the ALI statute. See Ark. Stat. Ann. §§ 41-303 to 41-310 (Supp. 1971); Calif. Health and Safety Code §§ 25950-25955.5 (West Supp. 1972); Colo. Rev. Stats. Ann. §§ 40-2-50 to 40-2-53 (Perm. Cum. Supp. 1967); Del. Code Ann., Tit. 24, §§ 1790-1793 (Supp. 1972); Florida Law of Apr. 13, 1972, c. 72-196, 1972 Fla. Sess. Law Serv., at 380-382; Ga. Code §§ 26-1201 to 26-1203 (1972); Kan. Stat. Ann. § 21-3407 (Supp. 1971); Md. Ann. Code, Art. 43, §§ 137-139 (Repl. 1971); Miss. Code Ann. § 2223 (Supp. 1972); N. M. Stat. Ann. §§ 40A-5-1 to 40A-5-3 (Repl. 1972); N. C. Gen. Stat. § 14-45.1 (Supp. 1971); Ore. Rev. Stat. §§ 435.405 to 435.495 (1971); S. C. Code Ann. §§ 16-82 to 16-89 (Supp. 1971); Va. Code Ann. §§ 18.1-62 to 18.1-62.3 (Supp. 1972). Mr. Justice Clark described some of these States as having "led the way." Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loyola U. (L. A.) L. Rev. 1, 11 (1969).

By the end of 1970, four other States had repealed criminal penalties for abortions performed in early pregnancy by a licensed physician, subject to stated procedural and health requirements. Alaska Stat. § 11.15.060 (1970); Haw. Rev. Stat. § 453-16 (Supp. 1971); N. Y. Penal Code § 125.05 (McKinney Supp. 1972-1973); Wash. Rev. Code §§ 9.02.060 to 9.02.080 (Supp. 1972). The precise status of criminal abortion laws in some States is made unclear by recent decisions in state and federal courts striking down existing state laws, in whole or in part.

well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

6. *The position of the American Medical Association.* The anti-abortion mood prevalent in this country in the late 19th century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period.

An AMA Committee on Criminal Abortion was appointed in May 1857. It presented its report, 12 Trans. of the Am. Med. Assn. 73–77 (1859), to the Twelfth Annual Meeting. That report observed that the Committee had been appointed to investigate criminal abortion "with a view to its general suppression." It deplored abortion and its frequency and it listed three causes "of this general demoralization":

> "The first of these causes is a wide-spread popular ignorance of the true character of the crime—a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening.
>
> "The second of the agents alluded to is the fact that the profession themselves are frequently supposed careless of foetal life . . . .
>
> "The third reason of the frightful extent of this crime is found in the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors, which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowledges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it,

and to its life as yet denies all protection." *Id.*, at 75–76.

The Committee then offered, and the Association adopted, resolutions protesting "against such unwarrantable destruction of human life," calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies "in pressing the subject." *Id.*, at 28, 78.

In 1871 a long and vivid report was submitted by the Committee on Criminal Abortion. It ended with the observation, "We had to deal with human life. In a matter of less importance we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less." 22 Trans. of the Am. Med. Assn. 258 (1871). It proffered resolutions, adopted by the Association, *id.*, at 38–39, recommending, among other things, that it "be unlawful and unprofessional for any physician to induce abortion or premature labor, without the concurrent opinion of at least one respectable consulting physician, and then always with a view to the safety of the child—if that be possible," and calling "the attention of the clergy of all denominations to the perverted views of morality entertained by a large class of females—aye, and men also, on this important question."

Except for periodic condemnation of the criminal abortionist, no further formal AMA action took place until 1967. In that year the Committee on Human Reproduction urged the adoption of a stated policy of opposition to induced abortion except when there is "documented medical evidence" of a threat to the health or life of the mother, or that the child "may be born with incapacitating physical deformity or mental deficiency," or that a pregnancy "resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the

patient," and two other physicians "chosen because of their recognized professional competence have examined the patient and have concurred in writing," and the procedure "is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals." The providing of medical information by physicians to state legislatures in their consideration of legislation regarding therapeutic abortion was "to be considered consistent with the principles of ethics of the American Medical Association." This recommendation was adopted by the House of Delegates. Proceedings of the AMA House of Delegates, 40–51 (June 1967).

In 1970, after the introduction of a variety of proposed resolutions, and of a report from its Board of Trustees, a reference committee noted "polarization of the medical profession on this controversial issue"; division among those who had testified; a difference of opinion among AMA councils and committees; "the remarkable shift in testimony" in six months, felt to be influenced "by the rapid changes in state laws and by the judicial decisions which tend to make abortion more freely available;" and a feeling "that this trend will continue." On June 25, 1970, the House of Delegates adopted preambles and most of the resolutions proposed by the reference committee. The preambles emphasized "the best interests of the patient," "sound clinical judgment," and "informed patient consent," in contrast to "mere acquiescence to the patient's demand." The resolutions asserted that abortion is a medical procedure that should be performed by a licensed physician in an accredited hospital only after consultation with two other physicians and in conformity with state law, and that no party to the procedure should be required to violate personally held moral principles.[38] Proceedings

[38] "Whereas, Abortion, like any other medical procedure, should not be performed when contrary to the best interests of the patient,

of the AMA House of Delegates 221 (June 1970). The AMA Judicial Council rendered a complementary opinion,[38]

7. *The position of the American Public Health Association.* In October 1970, the Executive Board of the APHA adopted Standards for Abortion Services. These were five in number:

"5. Rapid and simple abortion referral must be readily available through state and local public

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since good medical practice requires due consideration for the patient's welfare and not mere acquiescence to the patient's demand; and

"Whereas, The standards of sound clinical judgment, which, together with informed patient consent should be determinative 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 an accredited hospital acting only after consultation with two other physicians chosen because of their professional competency and in conformance with standards of good medical practice and the Medical Practice Act of his State; and 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 hospital personnel shall be required to perform any act violative of personally-held moral principles. In these circumstances good medical practice requires only that the physician or other professional personnel withdraw from the case so long as the withdrawal is consistent with good medical practice." Proceedings of the AMA House of Delegates 221 (June 1970).

[38] "The Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion that is performed in accordance with good medical practice and under circumstances that do not violate the laws of the community in which he practices.

"In the matter of abortions, as of any other medical procedure, the Judicial Council becomes involved whenever there is alleged violation of the Principles of Medical Ethics as established by the House of Delegates."

health departments, medical societies, or other nonprofit organizations.

"b. An important function of counseling should be to simplify and expedite the provision of abortion services; it should not delay the obtaining of these services.

"c. Psychiatric consultation should not be mandatory. As in the case of other specialized medical services, psychiatric consultation should be sought for definite indications and not on a routine basis.

"d. A wide range of individuals from appropriately trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors.

"e. Contraception and/or sterilization should be discussed with each abortion patient." Recommended Standards for Abortion Services, 61 Am. J. Pub. Health 396 (1971).

Among factors pertinent to life and health risks associated with abortion were three that "are recognized as important":

"a. the skill of the physician,

"b. the environment in which the abortion is performed, and above all

"c. the duration of pregnancy, as determined by uterine size and confirmed by menstrual history." *Id.*, at 397.

It was said that "a well-equipped hospital" offers more protection "to cope with unforeseen difficulties than an office or clinic without such resources. . . . The factor of gestational age is of overriding importance." Thus it was recommended that abortions in the second trimester and early abortions in the presence of existing medical complications be performed in hospitals as inpatient procedures. For pregnancies in the first trimester, abortion in the hospital with or without overnight

stay "is probably the safest practice." An abortion in an extramural facility, however, is an acceptable alternative "provided arrangements exist in advance to admit patients promptly if unforeseen complications develop." Standards for an abortion facility were listed. It was said that at present abortions should be performed by physicians or osteopaths who are licensed to practice and who have "adequate training." *Id.*, at 398.

8. *The position of the American Bar Association.* At its meeting in February 1972 the ABA House of Delegates approved, with 17 opposing votes, the Uniform Abortion Act that had been drafted and approved the preceding August by the Conference of Commissioners on Uniform State Laws. 58 A. B. A. J. 380 (1972). We set forth the Act in full in the margin.[40] The

[40] "UNIFORM ABORTION ACT

"SECTION 1. [*Abortion Defined; When Authorized.*]

"(a) 'Abortion' means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.

"(b) An abortion may be performed in this state only if it is performed:

"(1) by a physician licensed to practice medicine [or osteopathy] in this state or by a physician practicing medicine [or osteopathy] in the employ of the government of the United States or of this state, [and the abortion is performed [in the physician's office or in a medical clinic, or] in a hospital approved by the [Department of Health] or operated by the United States, this state, or any department, agency, or political subdivision of either;] or by a female upon herself upon the advice of the physician; and

"(2) within [20] weeks after the commencement of the pregnancy [or after [20] weeks only if the physician has reasonable cause to believe (i) there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother, (ii) that the child would be born with grave physical or mental defect, or (iii) that the pregnancy resulted from rape or incest, or illicit intercourse with a girl under the age of 16 years of age].

"SECTION 2. [*Penalty.*] Any person who performs or procures an abortion other than authorized by this Act is guilty of a [felony]

Conference has appended an enlightening Prefatory Note,[47]

VII

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

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and, upon conviction thereof, may be sentenced to pay a fine not exceeding [$1,000] or to imprisonment [in the state penitentiary] not exceeding [5 years], or both.

"SECTION 3. [*Uniformity of Interpretation.*] This Act shall be construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.

"SECTION 4. [*Short Title.*] This Act may be cited as the Uniform Abortion Act.

"SECTION 5. [*Severability.*] If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

"SECTION 6. [*Repeal.*] The following acts and parts of acts are repealed:

"(1)

"(2)

"(3)

"SECTION 7. [*Time of Taking Effect.*] This Act shall take effect————————."

[47] "This Act is based largely upon the New York abortion act following a review of the more recent laws on abortion in several states and upon recognition of a more liberal trend in laws on this subject. Recognition was given also to the several decisions in state and federal courts which show a further trend toward liberalization of abortion laws, especially during the first trimester of pregnancy.

"Recognizing that a number of problems appeared in New York, a shorter time period for 'unlimited' abortions was advisable. The time period was bracketed to permit the various states to insert a figure more in keeping with the different conditions that might exist among the states. Likewise, the language limiting the place or places in which abortions may be performed was also bracketed to account for different conditions among the states. In addition, limitations on abortions after the initial 'unlimited' period were placed

It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously.[42] The appellants and *amici* contend, moreover, that this is not a proper state purpose at all and suggest that, if it were, the Texas statutes are overbroad in protecting it since the law fails to distinguish between married and unwed mothers.

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman.[43] This was particularly true prior to the development of antisepsis. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur, and others first announced in 1867, but were not generally accepted and employed until about the turn of the century. Abortion mortality was high. Even after 1900, and perhaps until as late as the development of antibiotics in the 1940's, standard modern techniques such as dila-

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in brackets so that individual states may adopt all or any of these reasons, or place further restrictions upon abortions after the initial period.

"This Act does not contain any provision relating to medical review committees or prohibitions against sanctions imposed upon medical personnel refusing to participate in abortions because of religious or other similar reasons, or the like. Such provisions, while related, do not directly pertain to when, where, or by whom abortions may be performed; however, the Act is not drafted to exclude such a provision by a state wishing to enact the same."

[42] See, for example, *YWCA* v. *Kugler*, 342 F. Supp. 1048, 1074 (N. J. 1972); *Abele* v. *Markle*, 342 F. Supp. 800, 805–806 (Conn. 1972) (Newman, J., concurring), appeal pending; *Walsingham* v. *Florida*, 250 So. 2d 857, 863 (Ervin, J., concurring) (Fla. Supp. 1972); *State* v. *Gedicke*, 43 N. J. L. 86, 90 (Sup. Ct. 1881); Means II, at 381–382.

[43] See C. Haagensen & W. Lloyd, A Hundred Years of Medicine 19 (1943).

tion and curettage were not nearly so safe as they are today. Thus it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

Modern medical techniques have altered this situation. Appellants and various *amici* refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth.[*] Consequently, any interest of the State in protecting the women from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the area of health and medical standards do remain. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather

[*] Potts, Postconception Control of Fertility, 8 Int'l J. of G. & O. 957, 967 (1970) (England and Wales); Abortion Mortality, 20 Morbidity and Mortality, 208, 209 (July 12, 1971) (U. S. Dept. of HEW, Public Health Service) (New York City); Tietze, United States: Therapeutic Abortions, 1963–1968, 59 Studies in Family Planning 5, 7 (1970); Tietze, Mortality with Contraception and Induced Abortion, 45 Studies in Family Planning 6 (1969) (Japan, Czechoslovakia, Hungary); Tietze & Lehfeldt, Legal Abortion in Eastern Europe, 175 J. A. M. A. 1149, 1152 (April 1961). Other sources are discussed in Lader 17–23.

than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

The third reason is the State's interest—some phrase it in terms of duty—in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception.[45] The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life.[46] Pointing to the absence of legislative history to support the contention, they claim that most state laws were designed solely to protect the woman. Because medical advances have lessened this concern, at least

[45] See Brief of Amicus National Right to Life Foundation; R. Drinan, The Inviolability of the Right to Be Born, in Abortion and the Law 107 (D. Smith, editor, 1967); Louisell, Abortion, The Practice of Medicine, and the Due Process of Law, 16 UCLA L. Rev. 233 (1969); Noonan 1.

[46] See, *e. g.*, *Abele* v. *Markle*, 342 F. Supp. 800 (Conn. 1972), appeal pending.

with respect to abortion in early pregnancy, they argue that with respect to such abortions the laws can no longer be justified by any state interest. There is some scholarly support for this view of original purpose.[41] The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus.[42] Proponents of this view point out that in many States, including Texas,[43] by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another.[44] They claim that adoption of the "quickening" distinction through received common law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and implicitly repudiates the theory that life begins at conception.

It is with these interests, and the weight to be attached to them, that this case is concerned.

VIII

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back

[41] See discussions in Means I and Means II.

[42] See, *e. g., State* v. *Murphy*, 27 N. J. L. 112, 114 (1858).

[43] *Watson* v. *State*, 9 Tex. App. 237, 244-245 (1880); *Moore* v. *State*, 37 Tex. Crim. R. 582, 601, 40 S. W. 287, 290 (1897); *Shaw* v. *State*, 73 Tex. Crim. R. 337, 339, 165 S. W. 930, 931 (1914); *Fondren* v. *State*, 74 Tex. Crim. R. 552, 557, 169 S. W. 411, 414 (1914); *Gray* v. *State*, 77 Tex. Crim. R. 221, 229, 175 S. W. 337, 341 (1919). There is no immunity in Texas for the father who is not married to the mother. *Hammett* v. *State*, 84 Tex. Crim. R. 635, 209 S. W. 661 (1919); *Thompson* v. *State*, — Tex. Crim. R. — (1971), appeal pending.

[44] See *Smith* v. *State*, 33 Me. 48, 55 (1851); *In re Vince*, 2 N. J. 443, 450, 67 A. 2d 141, 144 (1949). A short discussion of the modern law on this issue is contained in the Comment to the ALI's Model Penal Code § 207.11, at 158 and nn. 35-37 (Tent. Draft No. 9, 1959),

perhaps as far as *Union Pacific R. Co.* v. *Botsford*, 141 U. S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts the Court or individual Justices have indeed found at least the roots of that right in the First Amendment, *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969); in the Fourth and Fifth Amendments, *Terry* v. *Ohio*, 392 U. S. 1, 8–9 (1968), *Katz* v. *United States*, 389 U. S. 347, 350 (1967), *Boyd* v. *United States*, 116 U. S. 616 (1886), see *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J. dissenting); in the penumbras of the Bill of Rights, *Griswold* v. *Connecticut*, 381 U. S. 479, 484–485 (1965); in the Ninth Amendment, *id.*, at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967), procreation, *Skinner* v. *Oklahoma*, 316 U. S. 535, 541–542 (1942), contraception, *Eisenstadt* v. *Baird*, 405 U. S. 438, 453–454 (1972); *id.*, at 460, 463–465 (WHITE, J., concurring), family relationships, *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944), and child rearing and education, *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925), *Meyer* v. *Nebraska*, *supra*.

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amend-

ment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellants and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellants' arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, is unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore,

cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905) (vaccination); *Buck* v. *Bell*, 274 U. S. 200 (1927) (sterilization).

We therefore conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

We note that those federal and state courts that have recently considered abortion law challenges have reached the same conclusion. A majority, in addition to the District Court in the present case, have held state laws unconstitutional, at least in part, because of vagueness or because of overbreadth and abridgement of rights. *Abele* v. *Markle*, 342 F. Supp. 800 (Conn. 1972), appeal pending; *Abele* v. *Markle*, — F. Supp. — (Conn. Sept. 20, 1972), appeal pending; *Doe* v. *Bolton*, 319 F. Supp. 1048 (ND Ga. 1970), appeal decided today, *post* —; *Doe* v. *Scott*, 321 F. Supp. 1385 (ND Ill. 1971), appeal pending; *Poe* v. *Menghini*, 339 F. Supp. 986 (Kan. 1972); *YWCA* v. *Kugler*, 342 F. Supp. 1048 (NJ 1972); *Babbitz* v. *McCann*, 310 F. Supp. 293 (ED Wis. 1970), appeal dismissed, 400 U. S. 1 (1970); *People* v. *Belous*, 71 Cal. 2d 954, 458 P. 2d 194 (1969), cert. denied, 397 U. S. 915 (1970); *State* v. *Barquet*, 262 S. 2d 431 (Fla. 1972).

Others have sustained state statutes. *Crossen* v. *Attorney General*, 344 F. Supp. 587 (ED Ky. 1972), appeal pending; *Rosen* v. *Louisiana State Board of Medical Examiners*, 318 F. Supp. 1217 (ED La. 1970), appeal pending; *Corkey* v. *Edwards*, 322 F. Supp. 1248

(WDNC 1971), appeal pending; *Steinberg* v. *Brown*, 321 F. Supp. 741 (ND Ohio 1970); *Doe* v. *Rampton*, — F. Supp. — (Utah 1971), appeal pending; *Cheaney* v. *Indiana*, — Ind. —, 285 N. E. 2d 265 (1972); *Spears* v. *State*, 257 So. 2d 876 (Miss. 1972); *State* v. *Munson*, — S. D. —, 201 N. W. 2d 123 (1972), appeal pending.

Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach.

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest." *Kramer* v. *Union Free School District*, 395 U. S. 621, 627 (1969); *Shapiro* v. *Thompson*, 394 U. S. 618, 634 (1969), *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. *Griswold* v. *Connecticut*, 381 U. S. 479, 485 (1965); *Aptheker* v. *Secretary of State*, 378 U. S. 500, 508 (1964); *Cantwell* v. *Connecticut*, 310 U. S. 296, 307–308 (1940); see *Eisenstadt* v. *Baird*, 405 U. S. 438, 460, 463–464 (1972) (WHITE, J., concurring).

In the recent abortion cases, cited above, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interest in protecting health and potential life and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws the State's determinations to protect health or prenatal

have held that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable.

IX

The District Court held that the appellee failed to meet his burden of demonstrating that the Texas statute's infringement upon Roe's rights was necessary to support a compelling state interest, and that, although the defendant presented "several compelling justifications for state presence in the area of abortions," the statutes outstripped these justifications and swept "far beyond any areas of compelling state interest." 314 F. Supp., at 1222–1223. Appellant and appellee both contest that holding. Appellant, as has been indicated, claims an absolute right that bars any state imposition of criminal penalties in the area. Appellee argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest. As noted above, we do not agree fully with either formulation.

A. The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment. The appellant conceded as much on reargument.[51] On the other hand, the appellee conceded on reargument [52] that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment con-

[51] Tr. of Rearg. 20–21.
[52] Tr. of Rearg. 24.

tains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution: in the listing of qualifications for representatives and senators, Art. I, § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3;[53] in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl. 8; in the Electors provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave cl. 3; and in the Fifth, Twelfth, and Twenty-second Amendments as well as in §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application."

[53] We are not aware that in the taking of any census under this clause, a fetus has ever been counted.

[54] When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196 for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?

There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out, n. 49, *supra*, that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed

All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn.[55] This is in accord with the results reached in those few cases where the issue has been squarely presented. *McGarvey* v. *Magee-Womens Hospital*, 340 F. Supp. 751 (WD Pa. 1972); *Byrn* v. *New York City Health & Hospitals Corp.*, 31 N. Y. 2d 194, 286 N. E. 2d 887 (1972), appeal pending; *Abele* v. *Markle*, — F. Supp. — (Conn. Sept. 20, 1972), appeal pending. Compare *Cheaney* v. *Indiana*, — Ind. —, 285 N. E. 265, 270 (1972); *Montana* v. *Rogers*, 278 F. 2d 68, 72 (CA7 1960), aff'd *sub nom. Montana* v. *Kennedy*, 366 U. S. 308 (1961); *Keeler* v. *Superior Court*, — Cal. —, 470 P. 2d 617 (1970); *State* v. *Dickinson*, 23 Ohio App. 2d 259, 275 N. E. 2d 599 (1970). Indeed, our decision in *United States* v. *Vuitch*, 402 U. S. 62 (1971), inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection.

This conclusion, however, does not of itself fully answer the contentions raised by Texas, and we pass on to other considerations.

B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if

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by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?

[55] Cf. the Wisconsin abortion statute, defining "unborn child" to mean "a human being from the time of conception until it is born alive," Wis. Stat. § 940.04 (6) (1969), and the new Connecticut statute, Public Act No. 1, May 1972 Special Session, declaring it to be the public policy of the State and the legislative intent "to protect and preserve human life from the moment of conception."

one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary, 478–479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt*, *Griswold*, *Stanley*, *Loving*, *Skinner*, *Pierce*, and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics.[54] It appears to be the predominant, though not the unanimous, attitude of the Jewish faith.[55] It may be taken to represent also the position of a large segment of the Protestant community,

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[54] Edelstein 16.

[55] Lader 97–99; D. Feldman, Birth Control in Jewish Law 281–294 (1968). For a stricter view, see I. Jakobovits, Jewish Views on Abortion, in Abortion and the Law 124 (D. Smith ed. 1967).

insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family.[57] As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception or upon live birth or upon the interim point at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid.[58] Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.[59] The Aristotelian theory of "mediate animation," that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this "ensoulment" theory from those in the Church who would recognize the existence of life from the moment of conception.[60] The latter is now, of course, the official belief of the Catholic Church. As one of the briefs *amicus* discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substantial problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as menstrual extraction, the "morning-after" pill,

[57] Amicus Brief for the American Ethical Union et al. For the position of the National Council of Churches and of other denominations, see Lader 99–101.

[58] L. Hellman & J. Pritchard, Williams Obstetrics 493 (14th ed. 1971); Dorland's Illustrated Medical Dictionary 1089 (24th ed. 1965).

[59] Hellman & Pritchard, *supra*, n. 58, at 493.

[60] For discussions of the development of the Roman Catholic position, see D. Callahan, Abortion: Law, Choice and Morality 409–447 (1970); Noonan 1.

implantation of embryos, artificial insemination, and even artificial wombs.[62]

In areas other than criminal abortion the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. For example, the traditional rule of tort law had denied recovery for prenatal injuries even though the child was born alive.[63] That rule has been changed in almost every jurisdiction. In most States recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few courts have squarely so held.[64] In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries.[65] Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potential-

[62] See D. Brodie, The New Biology and the Prenatal Child, 9 J. Fam. L. 391, 397 (1970); R. Gorney, The New Biology and the Future of Man, 15 UCLA L. Rev. 273 (1968); Note, Criminal Law—Abortion—The "Morning-After" Pill and Other Pre-Implantation Birth-Control Methods and the Law, 46 Ore. L. Rev. 211 (1967); G. Taylor, The Biological Time Bomb 32 (1968); A. Rosenfeld, The Second Genesis 138–139 (1969); G. Smith, Through a Test Tube Darkly: Artificial Insemination and the Law, 67 Mich. L. Rev. 127 (1968); Note, Artificial Insemination and the Law, U. Ill. L. F. 203 (1968).

[63] Prosser, Handbook of the Law of Torts 335–338 (1971); 2 Harper & James, The Law of Torts 1028–1031 (1956); Note, 63 Harv. L. Rev. 173 (1949).

[64] See cases cited in Prosser, *supra*, n. 62, at 336–338; Annotation, Action for Death of Unborn Child, 15 A. L. R. 3d 992 (1967).

[65] Prosser, *supra*, n. 62, at 338; Note, The Law and the Unborn Child, 46 Notre Dame Law. 349, 354–360 (1971).

ity of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*.[66] Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

X

In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling."

With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now established medical fact, referred to above at p. 34, that until the end of the first trimester mortality in abortion is less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent

[66] D. Louisell, Abortion, The Practice of Medicine, and the Due Process of Law, 16 UCLA L. Rev. 233, 235-238 (1969); Note, 56 Iowa L. Rev. 994, 999–1000 (1971); Note, The Law and the Unborn Child, 46 Notre Dame Law. 349, 351–354 (1971).

that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period except when it is necessary to preserve the life or health of the mother.

Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The

statute, therefore, cannot survive the constitutional attack made upon it here.

This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness. See *United States* v. *Vuitch*, 402 U. S. 62, 67–72 (1971).

XI

To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a *life saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

2. For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

3. For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

4. For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

5. The State may define the term "physician," as it has been employed in the preceding numbered paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the State, and ~~may~~ proscribe any abortion by a person who is not a physician as so defined.

may

In *Doe* v. *Bolton*, *post*, procedural requirements contained in one of the modern abortion statutes are con-

sidered. That opinion and this one, of course, are to be read together.[67]

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and example of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

XII

Our conclusion that Art. 1196 is unconstitutional means, of course that the Texas abortion statutes, as a unit, must fall. The exception of Art. 1196 cannot be

[67] Neither in this opinion nor in *Doe v. Bolton, post*, do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances. North Carolina, for example, 1B N. C. Gen. Stat. § 14–45.1 (Supp. 1971), requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age, 42 N. C. A. G. 489 (1971); if the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional.

stricken separately, for then the State is left with a statute proscribing all abortion procedures no matter how medically urgent the case.

Although the District Court granted plaintiff Roe declaratory relief, it stopped short of issuing an injunction against enforcement of the Texas statutes. The Court has recognized that different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other. *Zwickler* v. *Koota*, 389 U. S. 241, 252–255 (1967); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). We are not dealing with a statute that, on its face, appears to abridge free expression, an area of particular concern under *Dombrowski* and refined in *Younger* v. *Harris*, 401 U. S., at 50.

We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional.

The judgment of the District Court as to intervenor Hallford is reversed, and Dr. Hallford's complaint in intervention is dismissed. In all other respects the judgment of the District Court is affirmed. Costs are allowed to the appellee.

It is so ordered.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
✓Mr. Justice Powell

1st DRAFT

From: Rehnquist, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 1/11/73

No. 70-18

Recirculated: _____

Jane Roe et al., Appellants, v. Henry Wade. | On Appeal from the United States District Court for the Northern District of Texas.

[January —, 1973]

MR. JUSTICE REHNQUIST, dissenting.

The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While its opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it which invalidate the Texas statute in question, and therefore dissent.

I

The Court's opinion decides that a State may impose virtually no restriction on the performance of abortions during the first trimester of pregnancy. Our previous decisions indicate that a necessary predicate for such an opinion is a plaintiff who was in her first trimester of pregnancy at some time during the pendency of her lawsuit. While a party may vindicate his own constitutional *rights, he may not seek vindication for the rights* of others. *Moose Lodge* v. *Irvis*, 407 U. S. 163 (1972); *Sierra Club* v. *Morton*, 405 U. S. 727 (1972). The Court's statement of facts in this case makes clear, however, that the record in no way indicates the presence of such a plaintiff. We know only that plaintiff Roe at the time of filing her complaint was a pregnant woman; for aught that appears in this record, she may have been in her *last* trimester of pregnancy as of the date the complaint was filed.

Nothing in the Court's opinion indicates that Texas might not constitutionally apply its proscription of abor-

tion as written to a woman in that stage of pregnancy. Nonetheless, the Court uses her complaint against the Texas statute as a fulcrum for deciding that States may impose virtually no restrictions on medical abortions performed during the *first* trimester of pregnancy. In deciding such a hypothetical lawsuit the Court departs from the longstanding admonition that it should never "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York and Philadelphia Steamship Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885). See also *Ashwander* v. *TVA*, 297 U. S. 288, 345 (1936) (Brandeis concurring).

II

Even if there were a plaintiff in this case capable of litigating the issue which the Court decides, I would reach a conclusion opposite to that reached by the Court. I have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case. Texas by the statute here challenged bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" which the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution which the Court has referred to as embodying a right to privacy. *Katz* v. *United States*, 389 U. S. 347 (1967).

If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with the statement of MR. JUSTICE STEWART in

his concurring opinion that the "liberty," against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, but only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 491 (1955). The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit on legislative power to enact laws such as this, albeit a broad one. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in *Williamson*, *supra*. But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors which the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.

The Court eschews the history of the Fourteenth Amendment in its reliance on the "compelling state interest" test. See *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 179 (1972) (dissenting opinion). But the Court adds a new wrinkle to this test by transposing it from the legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment. Unless I misapprehend the consequences of this transplanting of the "compelling state interest test," the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it.

While the Court's opinion quotes from the dissent of Mr. Justice Holmes in *Lochner* v. *New York*, 198 U. S. 45 (1905), the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in *Lochner* and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision here to break the term of pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

The fact that a majority of the States, reflecting after all the majority sentiment in those States, have had restrictions on abortions for at least a century seems to me as strong an indication there is that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934). Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the "right" to an abortion is not so universally accepted as the appellants would have us believe.

To reach its result the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut legislature. Conn. Stat. Tit. 22, §§ 14, 16 (1821). By the time of the adoption of the Fourteenth Amendment in 1868 there were at least 36 laws

enacted by state or territorial legislatures limiting abortion.[1] While many States have amended or updated their laws, 21 of the laws on the books in 1868 remain

[1] States having enacted abortion laws prior to the adoption of the Fourteenth Amendment in 1868:

1. Alabama—Ala. Acts, c. 6, § 2 (1840–1841).
2. Arizona—Howell Code, c. 10, § 45 (1865).
3. Arkansas—Ark. Rev. Stat., c. 44, div. III, Art. II, § 6 (1838).
4. California—Cal. Sess. Stats., c. 99, § 45, at 233 (1849–1850).
5. Colorado (Terr.)—Colo. Gen. Laws of Terr. of Colo., 1st Sess., § 42, at 296–297 (1861).
6. Connecticut—Conn. Stat. Tit. 22, §§ 14, 16, at 152, 153 (1821). By 1868 this statute had been replaced by another abortion law. Conn. Pub. Acts, c. LXXI, §§ 1, 2, at 65 (1860).
7. Florida—Fla. Acts 1st Sess., c. 1637, III, § 10, § 11, VIII, § 9, § 10, § 11, as amended now in Fla. Stat. Ann. §§ 782.09, 782.10, 797.01, 797.02, 782.16 (1944).
8. Georgia—Ga. Pen. Code §§ 56, 57, 58, 67, 68, 69 (1833).
9. Kingdom of Hawaii—Hawaii Pen. Code §§ 1, 2, 3 (1850).
10. Idaho (Terr.)—Idaho (Terr.) Laws §§ 33, 34, 42, at 435 (1863).
11. Illinois—Ill. Rev. Code §§ 40, 41, 46, at 130, 131 (1827). By 1868 this statute had been replaced by a subsequent enactment. Ill. Pub. Laws §§ 1, 2, 3, at 89 (1867).
12. Indiana—Ind. Rev. Stat. §§ 1, 3, at 224 (1838). By 1868 this statute had been superseded by a subsequent enactment. Ind. Laws c. LXXXI, § 2 (1859).
13. Iowa (Terr.)—Iowa (Terr.) Stat. 1st Legis., 1st Sess., § 18, at 145 (1838). By 1868 this statute had been superseded by a subsequent enactment. Iowa (Terr.) Rev. Stat. §§ 10, 18 (1843).
14. Kansas (Terr.)—Kan. (Terr.) Stat. c. 48, §§ 9, 10, 39 (1855). By 1868 this statute had been superseded by a subsequent enactment. Kan. Gen. Laws c. 28, §§ 9, 10 (1859).
15. Louisiana—La. Rev. Stat. § 24, at 138 (1856).
16. Maine—Me. Rev. Stat. c. 160, §§ 11, 12, 13, 14 (1840).
17. Maryland—Md. Laws c. 179, § 2, at 318 (1868).
18. Massachusetts—Mass. Acts & Resolves c. 27 (1845).
19. Michigan—Mich. Rev. Stat. c. 153, §§ 32, 33, 34, at 662 (1846).
20. Minn. (Terr.)—Minn. (Terr.) Rev. Stat. c. 100, §§ 10, 11, at 493 (1851).

[*Footnote 1 continued on p. 6*]

in effect today.[2] Indeed, the Texas statute struck down today was, as the majority notes, first enacted in 1857 and "has remained substantially unchanged to the present time." *Ante*, at —.

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21. Mississippi—Miss. Code §§ 8, 9, at 958 (1848).
22. Missouri—Mo. Rev. Stat. Art. II, §§ 9, 10, 36, at 168 (1835).
23. Montana (Terr.)—Mont. (Terr.) Laws § 41, at 184 (1864).
24. Nevada (Terr.)—Nev. (Terr.) Laws c. 28, § 42, at 63 (1861).
25. New Hampshire—N. H. Laws c. 743, § 1, at 708 (1848).
26. New Jersey—N. J. Laws, at 266 (1849).
27. New York—N. Y. Rev. Stat. pt. IV, c. I, Tit. II, §§ 8, 9, at 550 (1828). By 1868 this statute had been superseded by subsequent enactments. N. Y. Laws c. 260, §§ 1, 2, 3, 4, 5, 6, at 285 (1845); N. Y. Laws c. 22, § 1, at 19 (1846).
28. Ohio—Ohio Gen. Stat. §§ 111 (1), 112 (2), at 252 (1841).
29. Oregon—Ore. Gen. Laws, Crim. Code, c. 43, § 509, at 528 (1845–1864).
30. Pennsylvania—Pa. Laws No. 374, §§ 87, 88, 89 (1860).
31. Texas—Tex. Gen. Stat. Dig. c. VII, Arts. 531–536, at 524 (Oldham & White 1859).
32. Vermont—Vt. Acts No. 33, § 1 (1846). By 1868 this statute had been amended by a subsequent enactment. Vt. Acts No. 67, §§ 1, 3 (1867).
33. Virginia—Va. Acts Tit. II, c. 3, § 9, at 96 (1848).
34. Washington (Terr.)—Wash. (Terr.) Stats. c. II, §§ 37, 38, at 81 (1854).
35. West Virginia—Va. Acts, Tit. II, c. 3, § 9, at 96 (1848).
36. Wisconsin—Wis. Rev. Stat. c. 133, §§ 10, 11 (1849). By 1868 this statute had been superseded by a subsequent enactment. Wis. Rev. Stat. c. 164, §§ 10, 11; c. 169, §§ 58, 59 (1858).

[2] Abortion laws in effect in 1868 and still applicable as of August 1970:

1. Arizona (1865).
2. Connecticut (1860).
3. Florida (1868).
4. Idaho (1863).
5. Indiana (1838).
6. Iowa (1843).
7. Maine (1840).
8. Massachusetts (1845).
9. Michigan (1846).

[*Footnote 2 continued on p. 7*]

There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.

III

Even if one were to agree that the case which the Court decides were here, and that the enunciation of the substantive constitutional law in the Court's opinion were proper, the actual disposition of the case by the Court is still difficult to justify. The Texas statute is struck down *in toto*, even though the Court apparently concedes that at later periods of pregnancy Texas might impose these selfsame statutory limitations on abortion. My understanding of past practice is that a statute found to be invalid as applied to a particular plaintiff, but not unconstitutional as a whole, is not simply "struck down" but is instead declared unconstitutional as applied to the fact situation before the Court. *Yick Wo v. Hopkins*, 118 U. S. 356 (1886); *Street* v. *New York*, 394 U. S. 576 (1960).

For all of the foregoing reasons, I respectfully dissent.

10. Minnesota (1851).
11. Missouri (1835).
12. Montana (1864).
13. Nevada (1861).
14. New Hampshire (1848).
15. New Jersey (1849).
16. Ohio (1841).
17. Pennsylvania (1860).
18. Texas (1857).
19. Vermont (1867).
20. West Virginia (1848).
21. Wisconsin (1858).

pp. 1, 10, 34, 40, 49

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 70-18

Recirculated: 1/11/73

Jane Roe et al., Appellants, v. Henry Wade.	On Appeal from the United States District Court for the Northern District of Texas.

[December —, 1972]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This Texas federal appeal and its Georgia companion, *Doe* v. *Bolton*, *post* ——, present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortive procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now vindicated dissent in *Lochner* v. *New York*, 198 U. S. 45, 76 (1905)

> "It [the Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

I

The Texas statutes that concern us here are Arts. 1191–1194 and 1196 of the State's Penal Code.[1] These

[1] "Article 1191. Abortion

"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.

"Art. 1192. Furnishing the means

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

"Art. 1193. Attempt at abortion

"If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided

make it a crime to "procure an abortion," as therein defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Similar statutes are in existence in a majority of the States.[2]

it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

"Art. 1194. Murder in producing abortion

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

"Art. 1196. By medical advice

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

The foregoing Articles, together with Art. 1195, comprise Chapter 9 of Title 15 of the Penal Code. Article 1195, not attacked here, reads:

"Art. 1195. Destroying unborn child

"Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years."

[2] Ariz. Rev. Stat. Ann. § 13-211 (1971); Conn. Pub. Act. No. 1 (May 1972 special session) (in 4 Conn. Leg. Serv. 677 (1972)), and Conn. Gen. Stat. Rev. §§ 53-29, 53-30 (1968) (or unborn child); Idaho Code § 18-1505 (App. to Supp. 1971); Ill. Rev. Stats. c. 38, § 23-1 (1971); Ind. Code § 35-1-58-1 (1971); Iowa Code § 701.1 (1971); Ky. Rev. Stat. § 436.020 (1963); La. Rev. Stat. § 37:1285 (6) (1964) (loss of medical license) (but see § 14-87 (1972 Supp.) containing no exception for the life of the mother under the criminal statute); Me. Rev. Stat. Ann. Tit. 17, § 51 (1964); Mass. Gen. Laws Ann. c. 272, § 19 (1970) (using the term "unlawfully," construed to exclude an abortion to save the mother's life, *Kudish* v. *Bd. of Registration*, 356 Mass. 98, 248 N. E. 2d 264 (1969)); Mich. Comp. Laws § 750.14 (1948); Minn. Stat. § 617.18 (1971); Mo. Rev. Stat. § 559.100 (1969); Mont. Rev. Codes Ann. § 94-401 (1961); Neb. Rev. Stat. § 28-405 (1964); Nev. Rev. Stat. § 200.220 (1967); N. H. Rev. Stat. Ann. § 585.13 (1955); N. J. Stat. Ann. § 2A:87-1 (1969) ("without lawful justification"); N. D. Cent. Code §§ 12-25-

Texas first enacted a criminal abortion statute in 1854. Texas Laws 1854, c. 49, § 1, set forth in 3 Gammel, Laws of Texas, 1502 (1898). This was soon modified into language that has remained substantially unchanged to the present time. See Texas Penal Code of 1857, Arts. 531–536; Paschal's Laws of Texas, Arts. 2192–2197 (1866); Texas Rev. Stat., Arts. 536–541 (1879); Texas Rev. Crim. Stat., Arts. 1071–1076 (1911). The final article in each of these compilations provided the same exception, as does the present Article 1196, for an abortion by "medical advice for the purpose of saving the life of the mother."[3]

01, 12-25-02 (1960); Ohio Rev. Code § 2901.16 (1953); Okla. Stat. Ann., Tit. 21, § 861 (1972–1973 Supp.); Pa. Stat. Ann., Tit. 18, §§ 4718, 4719 (1963) ("unlawful"); R. I. Gen. Laws Ann. § 11-3-1 (1969); S. D. Compiled Laws § 22-17-1 (1967); Tenn. Code Ann. §§ 39-301, 39-302 (1956); Utah Code Ann. §§ 76-2-1, 76-2-2 (1953); Vt. Stat. Ann., Tit. 13, § 101 (1958); W. Va. Code Ann. § 61-2-8 (1966); Wis. Stat. § 940.04 (1969); Wyo. Stat. Ann. §§ 6-77, 6-78 (1957).

[3] Long ago a suggestion was made that the Texas statutes were unconstitutionally vague because of definitional deficiencies. The Texas Court of Criminal Appeals disposed of that suggestion peremptorily, saying only,

"It is also insisted in the motion in arrest of judgment that the statute is unconstitutional and void in that it does not sufficiently define or describe the offense of abortion. We do not concur in respect to this question." *Jackson* v. *State*, 55 Tex. Crim. R. 79, 89, 115 S. W. 262, 268 (1908).

The same court recently has held again that the State's abortion statutes are not unconstitutionally vague or overbroad. *Thompson* v. *State*, — Tex. Crim. App. —, — S. W. 2d — (1971), appeal pending. The court held that "the State of Texas has a compelling interest to protect fetal life"; that Art. 1191 "is designed to protect fetal life"; that the Texas homicide statutes, particularly Art. 1205 of the Penal Code, are intended to protect a person "in existence by actual birth" and thereby impliedly recognize other human life that is not "in existence by actual birth"; that the definition of human life is for the legislature and not the courts; that Art. 1196 "is

II

Jane Roe,* a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. By an amendment to her complaint Roe purported to sue "on behalf of herself and all other women" similarly situated.

James Hubert Hallford, a licensed physician, sought and was granted leave to intervene in Roe's action. In

more definite that the District of Columbia statute upheld in [*United States* v.] *Vuitch*" (402 U. S. 62); and that the Texas statute "is not vague and indefinite or overbroad." A physician's abortion conviction was affirmed.

In n. 2, — Tex. Crim. App., at —, — S. W. 2d, at —, the court observed that any issue as to the burden of proof under the exemption of Art. 1196 "is not before us." But see *Vuquez* v. *State*, 172 Tex. Crim. App. 162, 168–169, 354 S. W. 2d 161 (1962). Cf *United States* v. *Vuitch*, 402 U. S. 62, 69–71 (1971).

* The name is a pseudonym.

his complaint he alleged that he had been arrested previously for violations of the Texas abortion statutes and that two such prosecutions were pending against him. He described conditions of patients who came to him seeking abortions, and he claimed that for many cases he, as a physician, was unable to determine whether they fell within or outside the exception recognized by Article 1196. He alleged that, as a consequence, the statutes were vague and uncertain, in violation of the Fourteenth Amendment, and that they violated his own and his patients' rights to privacy in the doctor-patient relationship and his own right to practice medicine, rights he claimed were guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

John and Mary Doe,[2] a married couple, filed a companion complaint to that of Roe. They also named the District Attorney as defendant, claimed like constitutional deprivations, and sought declaratory and injunctive relief. The Does alleged that they were a childless couple; that Mrs. Doe was suffering from a "neural-chemical" disorder; that her physician had "advised her to avoid pregnancy until such time as her condition has materially improved" (although a pregnancy at the present time would not present "a serious risk" to her life); that, pursuant to medical advice, she had discontinued use of birth control pills; and that if she should become pregnant, she would want to terminate the pregnancy by an abortion performed by a competent, licensed physician under safe, clinical conditions. By an amendment to their complaint, the Does purported to sue "on behalf of themselves and all couples similarly situated."

The two actions were consolidated and heard together by a duly convened three-judge district court. The suits thus presented the situations of the pregnant single

[2] These names are pseudonyms.

woman, the childless couple, with the wife not pregnant, and the licensed practicing physician, all joining in the attack on the Texas criminal abortion statutes. Upon the filing of affidavits, motions were made to dismiss and for summary judgment. The court held that Roe and Dr. Hallford, and members of their respective classes, had standing to sue, and presented justiciable controversies, but that the Does had failed to allege facts sufficient to state a present controversy and did not have standing. It concluded that, with respect to the requests for a declaratory judgment, abstention was not warranted. On the merits, the District Court held that the "fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment," and that the Texas criminal abortion statutes were void on their face because they were both unconstitutionally vague and constituted an overbroad infringement of the plaintiffs' Ninth Amendment rights. The court then held that abstention was warranted with respect to the requests for an injunction. It therefore dismissed the Doe complaint, declared the abortion statutes void, and dismissed the application for injunctive relief. 314 F. Supp. 1217 (ND Tex. 1970).

The plaintiffs Roe and Doe and the intervenor Hallford, pursuant to 28 U. S. C. § 1253, have appealed to this Court from that part of the District Court's judgment denying the injunction. The defendant District Attorney has purported to cross appeal, pursuant to the same statute, from the court's grant of declaratory relief to Roe and Hallford. Both sides also have taken protective appeals to the United States Court of Appeals for the Fifth Circuit. That court ordered the appeals held in abeyance pending decision here. We postponed decision on jurisdiction to the hearing on the merits. 402 U. S. 941 (1971).

III

It might have been preferable if the defendant, pursuant to our Rule 20, had presented to us a petition for certiorari before judgment in the Court of Appeals with respect to the granting of the plaintiffs' prayer for declaratory relief. Our decisions in *Mitchell* v. *Donovan*, 398 U. S. 427 (1970), and *Gunn* v. *University Committee*, 399 U. S. 383 (1970), are to the effect that § 1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone. We conclude, nevertheless, that those decisions do not foreclose our review of both the injunctive and the declaratory aspects of a case of this kind when it is properly here, as this one is, on appeal under § 1253 from specific denial of injunctive relief, and the arguments as to both aspects are necessarily identical. See *Carter* v. *Jury Commission*, 396 U. S. 320 (1970); *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73, 80–81 (1960). It would be destructive of time and energy for all concerned were we to rule otherwise. Cf. *Doe* v. *Bolton*, *post*, —.

IV

We are next confronted with issues of justiciability, standing, and abstention. Have Roe and the Does established that "personal stake in the outcome of the controversy," *Baker* v. *Carr*, 369 U. S. 186, 204 (1962), that insures that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution," *Flast* v. *Cohen*, 392 U. S. 83, 101 (1968), and *Sierra Club* v. *Morton*, 405 U. S. 727, 732 (1972)? And what effect did the pendency of criminal abortion charges against Dr. Halliford in state court have upon the propriety of the federal court's granting relief to him as a plaintiff-intervenor?

A. *Jane Roe.* Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas.

Viewing Roe's case as of the time of its filing and thereafter until as late as May, there can be little dispute that it then presented a case or controversy and that, wholly apart from the class aspects, she, as a pregnant single woman thwarted by the Texas criminal abortion laws, had standing to challenge those statutes. *Abele* v. *Markle*, 452 F. 2d 1121, 1125 (CA2 1971); *Crossen* v. *Breckenridge*, 446 F. 2d 833, 838–839 (CA6 1971); *Poe* v. *Menghini*, 339 F. Supp. 986, 990–991 (Kans. 1972). See *Truax* v. *Raich*, 239 U. S. 33 (1915). Indeed, we do not read the appellee's brief as really asserting anything to the contrary. The "logical nexus between the status asserted and the claim sought to be adjudicated," *Flast* v. *Cohen*, 392 U. S., at 102, and the necessary degree of contentiousness, *Golden* v. *Zwickler*, 394 U. S. 103 (1969), are both present.

The appellee notes, however, that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970,[*] or on the following June 17 when the court's opinion and judgment were filed. And he suggests that Roe's case must now be moot because she and all other members of her class are no longer subject to any 1970 pregnancy.

[*] The appellee twice states in his brief that the hearing before the District Court was held on July 22, 1970. Appellee's Brief 13. The docket entries, Appendix, at 2, and the transcript, Appendix, at 76, reveal this to be an error. The July date appears to be the time of the reporter's transcription. See Appendix, at 77.

The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950); *Golden* v. *Zwickler*, *supra*; *SEC* v. *Medical Committee for Human Rights*, 404 U. S. 403 (1972).

But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). See *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969); *Carroll* v. *President and Commissioners*, 393 U. S. 175, 178–179 (1968); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632–633 (1953).

We therefore agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot.

B. *Dr. Hallford.* The doctor's position is different. He entered Roe's litigation as a plaintiff-intervenor alleging in his complaint that he

> "In the past has been arrested for violating the Texas Abortion Laws and at the present time stands charged by indictment with violating said laws in the Criminal District Court of Dallas County, Texas to-wit: (1) The State of Texas vs.

> James H. Hallford, No. C-69-5307-IH, and (2) The State of Texas vs. James H. Hallford, No. C-69-2524-H. In both cases the defendant is charged with abortion. . . ."

In his application for leave to intervene the doctor made like representations as to the abortion charges pending in the state court. These representations were also repeated in the affidavit he executed and filed in support of his motion for summary judgment.

Dr. Hallford is therefore in the position of seeking, in a federal court, declaratory and injunctive relief with respect to the same statutes under which he stands charged in criminal prosecutions simultaneously pending in state court. Although he stated that he has been arrested in the past for violating the State's abortion laws, he makes no allegation of any substantial and immediate threat to any federally protected right that cannot be asserted in his defense against the state prosecutions. Neither is there any allegation of harassment or bad faith prosecution. In order to escape the rule, articulated in the cases cited in the next paragraph of this opinion, that, absent harassment and bad faith, a defendant in a pending state criminal case cannot affirmatively challenge in federal court the statutes under which the State is prosecuting him, Dr. Hallford seeks to distinguish his status as a present state defendant from his status as a "potential future defendant" and to assert only the latter for standing purposes here.

We see no merit in that distinction. Our decision in *Samuels* v. *Mackell*, 401 U. S. 66 (1971), compels the conclusion that the District Court erred when it granted declaratory relief to Dr. Hallford instead of refraining from so doing. The court, of course, was correct in refusing to grant injuctive relief to the doctor. The reasons supportive of that action, however, are those expressed in *Samuels* v. *Mackell*, *supra*, and in *Younger* v.

Harris, 401 U. S. 37 (1971); *Boyle* v. *Landry*, 401 U. S. 77 (1971); *Perez* v. *Ledesma*, 401 U. S. 82 (1971); and *Byrne* v. *Karalexis*, 401 U. S. 216 (1971). See also *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). We note, in passing, that *Younger* and its companion cases were decided after the three-judge District Court decision in this case.

Dr. Hallford's complaint in intervention, therefore, is to be dismissed.[7] He is remitted to his defenses in the state criminal proceedings against him. We reverse the judgment of the District Court insofar as it granted Dr. Hallford relief and failed to dismiss his complaint in intervention.

C. *The Does.* In view of our ruling as to Roe's standing in her case, the issue of the Does' standing in their case has little significance. The claims they assert are essentially the same as those of Roe, and they attack the same statutes. Nevertheless, we briefly note the Does' posture.

Their pleadings present them as a childless married couple, the woman not being pregnant, who have no desire to have children at this time because of their having received medical advice that Mrs. Doe should avoid pregnancy, and for "other highly personal reasons." But

[7] We need not consider what different result, if any, would follow if Dr. Hallford's intervention were on behalf of a class. His complaint in intervention does not purport to assert a class suit and makes no reference to any class apart from an allegation that he "and others similarly situated" must necessarily guess at the meaning of Art. 1196. His application for leave to intervene goes somewhat further for it asserts that plaintiff Roe does not adequately protect the interest of the doctor "and the class of people who are physicians . . . and the class of people who are . . . patients . . . ." The leave application, however, is not the complaint. Despite the District Court's statement to the contrary, 314 F. Supp., at 1225, we fail to perceive the essentials of a class suit in the Hallford complaint.

they "fear . . . they may face the prospect of becoming parents." And if pregnancy ensues, they "would want to terminate" it by an abortion. They assert an inability to obtain an abortion legally in Texas and, consequently, the prospect of obtaining an illegal abortion there or of going outside Texas to some place where the procedure could be obtained legally and competently.

We thus have as plaintiffs a married couple who have, as their asserted immediate and present injury, only an alleged "detrimental effect upon [their] marital happiness" because they are forced to "the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible pregnancy." Their claim is that sometime, in the future, Mrs. Doe might become pregnant because of possible failure of contraceptive measures, and at that time in the future, she might want an abortion that might then be illegal under the Texas statutes.

This very phrasing of the Does' position reveals its speculative character. Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place and all may not combine. In the Does' estimation, these possibilities might have some real or imagined impact upon their marital happiness. But we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy. *Younger* v. *Harris*, 401 U. S., at 41–42; *Golden* v. *Zwickler*, 394 U. S., at 109–110 (1969); *Abele* v. *Markle*, 452 F. 2d, at 1124–1125; *Crossen* v. *Breckenridge*, 446 F. 2d, at 839. The Does' claim falls far short of those resolved otherwise in the cases that the Does urge upon us, namely, *Investment Co. Institute* v. *Camp*, 401 U. S. 617 (1971);

Data Processing Service v. *Camp*, 397 U. S. 150 (1970); and *Epperson* v. *Arkansas*, 393 U. S. 97 (1968). See also *Truax* v. *Raich*, *supra*.

The Does therefore are not appropriate plaintiffs in this litigation. Their complaint was properly dismissed by the District Court, and we affirm that dismissal.

V

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *id.*, at 460 (WHITE, J., concurring); or among those rights reserved to the people by the Ninth Amendment, *Griswold* v. *Connecticut*, 381 U. S., at 486 (Goldberg, J., concurring). Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.

VI

It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century

1. *Ancient attitudes.* These are not capable of precise determination. We are told that at the time of the Persian Empire abortifacients were known and that criminal abortions were severely punished.[8] We are also told, however, that abortion was practiced in Greek times as well as in the Roman Era,[9] and that "it was resorted to without scruple." [10] The Ephesian, Soranos, often described as the greatest of the ancient gynecologists, appears to have been generally opposed to Rome's prevailing free-abortion practices. He found it necessary to think first of the life of the mother, and he resorted to abortion when, upon this standard, he felt the procedure advisable.[11] Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion.[12]

2. *The Hippocratic Oath.* What then of the famous Oath that has stood so long as the ethical guide of the medical profession and that bears the name of the great Greek (460(?)–377(?) B. C.), who has been described as the Father of Medicine, the "wisest and the greatest

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[8] A. Castiglioni, A History of Medicine 84 (2d ed. 1947), E. Krumbhaar, translator and editor (hereinafter "Castiglioni").

[9] J. Ricci, The Genealogy of Gynaecology 52, 84, 113, 149 (2d ed. 1950) (hereinafter "Ricci"); L. Lader, Abortion 75–77 (1966) (hereinafter "Lader"), K. Niswander, Medical Abortion Practices in the United States, in Abortion and the Law 27, 38–40 (D. Smith, editor, 1967); G. Williams, The Sanctity of Life 148 (1957) (hereinafter "Williams"), J. Noonan, An Almost Absolute Value in History, in The Morality of Abortion 1, 3–7 (J. Noonan ed. 1970) (hereinafter "Noonan"), E. Quay, Justifiable Abortion Medical and Legal Foundations, II, 49 Geo. L. J 395, 406–422 (1961) (hereinafter "Quay").

[10] L. Edelstein, The Hippocratic Oath 10 (1943) (hereinafter "Edelstein"). But see Castiglioni 227.

[11] Edelstein 12; Ricci 113–114, 118–119; Noonan 5.

[12] Edelstein 13–14.

practioner of his art," and the "most important and most complete medical personality of antiquity," who dominated the medical schools of his time, and who typified the sum of the medical knowledge of the past?[13] The Oath varies somewhat according to the particular translation, but in any translation the content is clear. "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion,"[14] or "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy."[15]

Although the Oath is not mentioned in any of the principal briefs in this case or in *Doe* v. *Bolton*, *post*, it represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day. Why did not the authority of Hippocrates dissuade abortion practice in his time and that of Rome? The late Dr. Edelstein provides us with a theory:[16] The Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. See Plato, *Republic*, V, 461; Aristotle, *Politics*, VII, 1335 b 25. For the Pythagoreans, however, it was a matter of dogma. For them the embryo was animate from the moment of conception, and abortion meant destruction of a living being. The abortion clause of the Oath, therefore, "echoes Pythagorean doctrines," and "[i]n no other stratum of Greek opinion were such

[13] Castiglioni 148.
[14] *Id.*, at 154.
[15] Edelstein 3.
[16] *Id.*, at 12, 15–18.

views held or proposed in the same spirit of uncompromising austerity." [17]

Edelstein then concludes that the Oath originated in a group representing only a small segment of Greek opinion and that it certainly was not accepted by all ancient physicians. He points out that medical writings down to Galen (130–200 A. D.) "give evidence of the violation of almost every one of its injunctions." [18] But with the end of antiquity a decided change took place. Resistance against suicide and against abortion became common. The Oath came to be popular. The emerging teachings of Christianity were in agreement with the Pythagorean ethic. The Oath "became the nucleus of all medical ethics" and "was applauded as the embodiment of truth." Thus, suggests Dr. Edelstein, it is "a Pythagorean manifesto and not the expression of an absolute standard of medical conduct." [19]

This, it seems to us, is a satisfactory and acceptable explanation of the Hippocratic Oath's apparent rigidity. It enables us to understand, in historical context, a long accepted and revered statement of medical ethics.

3. *The Common Law.* It is undisputed that at the common law, abortion performed *before* "quickening"—the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy [20]—was not an indictable offense.[21] The ab-

[17] *Id.*, at 18; Lader 76.

[18] Edelstein 63

[19] *Id.*, at 64.

[20] Dorland's Illustrated Medical Dictionary 1261 (24th ed. 1965)

[21] E. Coke, Institutes III *50 (1648); 1 W. Hawkins, Pleas of the Crown c. 31, § 16 (1762); 1 Blackstone, Commentaries *129–130 (1765); M. Hale, Pleas of the Crown 433 (1778). For discussions of the role of the quickening concept in English common law, see Lader 78; Noonan 223–226; C. Means, The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case

sence of a common law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins. These disciplines variously approached the question in terms of the point at which the embryo or fetus became "formed" or recognizably human, or in terms of when a "person" came into being, that is, infused with a "soul" or "animated." A loose consensus evolved in early English law that these events occurred at some point between conception and live birth.[22] This was "mediate animation." Although

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of Cessation of Constitutionality, 14 N. Y. L. Forum 411, 418–428 (1968) (hereinafter "Means I"); L. Stern, Abortion: Reform and the Law, 59 J. Crim. L. C. & P. S. 84 (1968) (hereinafter "Stern"); Quay 430–432; Williams 152.

[22] Early philosophers believed that the embryo or fetus did not become formed and begin to live until at least 40 days after conception for a male, and 80 to 90 days for a female. See, for example, Aristotle, Hist. Anim. 7.3.583b; Gen. Anim. 2.3.736, 2.5.741; Hippocrates, Lib. de Nat. Puer., No. 10. Aristotle's thinking derived from his three-stage theory of life: vegetable, animal, rational. The vegetable stage was reached at conception, the animal at "animation," and the rational soon after live birth. This theory, together with the 40/80 day view, came to be accepted by early Christian thinkers.

The theological debate was reflected in the writings of St. Augustine, who made a distinction between *embryo inanimatus*, not yet endowed with a soul, and *embryo animatus*. He may have drawn upon Exodus xxi, 22. At one point, however, he expresses the view that human powers cannot determine the point during fetal development at which the critical change occurs. See Augustine, De Origine Animae 4.4 (Pub. Law 44.527). See also Reany, The Creation of the Human Soul, c. 2 and 83–86 (1932); Huser, The Crime of Abortion in Common Law 15 (Catholic Univ. of America, Canon Law Studies No. 162, Washington, D. C. 1942).

Galen, in three treatises related to embryology, accepted the thinking of Aristotle and his followers. Quay 426–427. Later, Augustine on abortion was incorporated by Gratian into the Decretum, published about 1140. Decretum Magistri Gratiani 2.32.2.7 to 2.32.2.10,

Christian theology and the canon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the 19th century, there was otherwise little agreement about the precise time of formation or animation. There was agreement, however, that prior to this point the fetus was to be regarded as part of the mother and its destruction, therefore, was not homicide. Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40–80 day view, and perhaps to Aquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point. The significance of quickening was echoed by later common law scholars and found its way into the received common law in this country.

Whether abortion of a *quick* fetus was a felony at common law, or even a lesser crime, is still disputed. Bracton, writing early in the 13th century, thought it homicide.[23] But the later and predominant view, following the great common law scholars, has been that

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in 1 Corpus Juris Canonici 1122, 1123 (2d ed. Friedberg ed. 1879). Gratian, together with the decretals that followed, were recognized as the definitive body of canon law until the new Code of 1917.

For discussions of the canon law treatment, see Means I, at 411–412; Noonan, 20–26; Quay 426–430; see also Noonan, Contraception: A History of Its Treatment by the Catholic Theologians and Canonists 18–29 (1965).

[23] Bracton took the position that abortion by blow or poison was homicide "if the foetus be already formed and animated, and particularly if it be animated." 2 H. Bracton, De Legibus et Consuetudinibus Angliae 279 (Twiss ed. 1879), or, as a later translation puts it, "if the foetus is already formed or quickened, especially if it is quickened." II Bracton, On the Laws and Customs of England 341 (Thorne ed. 1968). See Quay 431; see also 2 Fleta 60–61 (Book I, c. 23) (Selden Society ed. 1955).

it was at most a lesser offense. In a frequently cited passage, Coke took the position that abortion of a woman "*quick with childe*" is "*a great misprision and no* murder."[24] Blackstone followed, saying that while abortion after quickening had once been considered manslaughter (though not murder), "modern law" took a less severe view.[25] A recent review of the common law precedents argues, however, that those precedents contradict Coke and that even post-quickening abortion was never established as a common law crime.[26] This is of some importance because while most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law,[27] others followed Coke in stating that abor-

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[24] E. Coke, Institutes III *50 (1648).

[25] 1 Blackstone, Commentaries *129–130 (1765).

[26] C. Means, The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?, 17 N. Y. L. Forum 335 (1971) (hereinafter "Means II"). The author examines the two principal precedents cited marginally by Coke, both contrary to his dictum, and traces the treatment of these and other cases by earlier commentators. He concludes that Coke, who himself participated as an advocate in an abortion case in 1601, may have intentionally misstated the law. The author even suggests a reason: Coke's strong feelings about abortion, coupled with his reluctance to acknowledge common law (secular) jurisdiction to assess penalties for an offense that traditionally had been an exclusively ecclesiastical or canon law crime. See also Lader 78–79, who notes that some scholars doubt the common law ever was applied to abortion, that the English ecclesiastical courts seem to have lost interest in the problem after 1527, and that the preamble to the English legislation of 1803, 43 Geo. 3, c. 58, § 2, at 203, referred to in the text, *infra*, states that "no adequate means have been hitherto provided for the prevention and punishment of such offenses."

[27] *Commonwealth* v. *Bangs*, 9 Mass. 387, 388 (1812); *Commonwealth* v. *Parker*, 50 Mass. (9 Met.) 263, 265–266 (1845); *State* v. *Cooper*, 22 N. J. L. 52, 58 (1849); *Abrams* v. *Foshee*, 3 Iowa 274, 278–280 (1856); *Smith* v. *Gaffard*, 31 Ala. 45, 51 (1857); *Mitchell*

tion of a quick fetus was a "misprision," a term they translated to mean "misdemeanor." [23] That their reliance on Coke on this aspect of the law was uncritical and, apparently in all the reported cases, dictum (due probably to the paucity of common law prosecutions for post-quickening abortion), makes it now appear doubtful that abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus.

4. *The English statutory law.* England's first criminal abortion statute, Lord Ellenborough's Act, 43 Geo. 3, c. 58, came in 1803. It made abortion of a quick fetus, § 1, a capital crime, but in § 2 it provided lesser penalties for the felony of abortion before quickening, and thus preserved the quickening distinction. This contrast was continued in the general revision of 1828, 9 Geo. 4, c. 31, § 13, at 104. It disappeared, however, together with the death penalty, in 1837, 7 Will. 4 & 1 Vic., c. 85, § 6, at 360, and did not reappear in the Offenses Against the Person Act of 1861, 24 & 25 Vic., c. 100, § 59, at 438, that formed the core of English anti-abortion law until the liberalizing reforms of 1967. In 1929 the Infant Life (Preservation) Act, 19 & 20 Geo. 5, c. 34, came into being. Its emphasis was upon the destruction of "the life of a child capable of being born alive." It made a willful act performed with the necessary intent a felony. It contained a proviso that

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v. *Commonwealth*, 78 Ky. 204, 210 (1879); *Eggart* v. *State*, 40 Fla. 527, 532, 25 So. 144, 145 (1898); *State* v. *Alcorn*, 7 Idaho 599, 606, 64 P. 1014, 1016 (1901); *Edwards* v. *State*, 79 Neb. 251, 252, 112 N. W. 611, 612 (1907); *Gray* v. *State*, 77 Tex. Crim. R. 221, 224, 178 S. W. 337, 338 (1915); *Miller* v. *Bennett*, 190 Va. 162, 169, 56 S. E. 2d 217, 221 (1949). Contra, *Mills* v. *Commonwealth*, 13 Pa. 631, 633 (1850); *State* v. *Slagle*, 83 N. C. 630, 632 (1880).

[23] See *Smith* v. *State*, 33 Me. 48, 56 (1851); *Evans* v. *People*, 49 N. Y. 86, 88 (1872); *Lamb* v. *State*, 67 Md. 524, 533, 10 A. 208, (1887).

one was not to be found guilty of the offense "unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother."

A seemingly notable development in the English law was the case of *Rex* v. *Bourne*, [1939] 1 K. B. 687. This case apparently answered in the affirmative the question whether an abortion necessary to preserve the life of the pregnant woman was excepted from the criminal penalties of the 1861 Act. In his instructions to the jury Judge Macnaghten referred to the 1929 Act, and observed, p. 691, that that Act related to "the case where a child is killed by a willful act at the time when it is being delivered in the ordinary course of nature." *Id.*, at 91. He concluded that the 1861 Act's use of the word "unlawfully," imported the same meaning expressed by the specific proviso in the 1929 Act even though there was no mention of preserving the mother's life in the 1861 Act. He then construed the phrase "preserving the life of the mother" broadly, that is, "in a reasonable sense," to include a serious and permanent threat to the mother's *health*, and instructed the jury to acquit Dr. Bourne if it found he had acted in a good faith belief that the abortion was necessary for this purpose. *Id.*, at 693–694. The jury did acquit.

Recently Parliament enacted a new abortion law. This is the Abortion Act of 1967, 15 & 16 Eliz. 2, c. 87. The Act permits a licensed physician to perform an abortion where two other licensed physicians agree (a) "that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated," or (b) "that there is a substantial risk that if the child were born it would

suffer from such physical or mental abnormalities as to be seriously handicapped." The Act also provides that, in making this determination, "account may be taken of the pregnant woman's actual or reasonably foreseeable environment." It also permits a physician, without the concurrence of others, to terminate a pregnancy where he is of the good faith opinion that the abortion "is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman."

5. *The American law.* In this country the law in effect in all but a few States until mid-19th century was the pre-existing English common law. Connecticut, the first State to enact abortion legislation, adopted in 1821 that part of Lord Ellenborough's Act that related to a woman "quick with child." [38] The death penalty was not imposed. Abortion before quickening was made a crime in that State only in 1860.[39] In 1828 New York enacted legislation [40] that, in two respects, was to serve as a model for early anti-abortion statutes. First, while barring destruction of an unquickened fetus as well as a quick fetus, it made the former only a misdemeanor, but the latter second-degree manslaughter. Second, it incorporated a concept of therapeutic abortion by providing that an abortion was excused if it "shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose." By 1840, when Texas had received the common law,[41] only eight American States

[38] Conn. Stat., Tit. 20, § 14 (1821).

[39] Conn. Pub. Acts, c. 71, § 1 (1860).

[40] N. Y. Rev. Stat., pt. IV, c. I, Tit. II, Art. 1, § 9, at 661, and Tit. VI, § 21, at 694 (1829).

[41] Act of January 20, 1840, § 1, set forth in 2 Gammel, Laws of Texas 177–178 (1898); see *Grigsby* v. *Reib*, 105 Tex. 597, 600, 153 S. W. 1124, 1125 (1913).

had statutes dealing with abortion.[49] It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening. Most punished attempts equally with completed abortions. While many statutes included the exception for an abortion thought by one or more physicians to be necessary to save the mother's life, that provision soon disappeared and the typical law required that the procedure actually be necessary for that purpose.

Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950's, a large majority of the States banned abortion, however and whenever performed, unless done to save or preserve the life of the mother.[50] The exceptions, Alabama and the District of Columbia, permitted abortion to preserve the mother's health.[51] Three other States permitted abortions that were not "unlawfully" performed or that were not "without lawful justification," leaving interpretation of those standards to the courts.[52] In the past several years, however, a trend toward liberaliza-

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[49] The early statutes are discussed in Quay 435–438. See also Lader 85–88; Stern 85–86; and Means II 375–378.

[50] Criminal abortion statutes in effect in the States as of 1961, together with historical statutory development and important judicial interpretations of the state statutes, are cited and quoted in Quay 447–520. See Note, A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems, 1972 Ill. L. Forum 177, 179, classifying the abortion statutes and listing 25 States as permitting abortion only if necessary to save or preserve the mother's life.

[51] Ala. Code, Tit. 14, § 9 (1958); D. C. Code Ann. § 22-201 (1967).

[52] Mass. Gen. Laws Ann., c. 272, § 19 (1970); N. J. Rev. Stat. Ann. 2A:87-1 (1969); Pa. Stat. Ann., Tit. 18, §§ 4718, 4719 (1963).

tion of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code, § 230.3,[57] set forth as Appendix B to the opinion in *Doe* v. *Bolton*, *post* ——.

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country

[57] Fourteen States have adopted some form of the ALI statute. See Ark. Stat. Ann. §§ 41-303 to 41-310 (Supp. 1971); Calif. Health and Safety Code §§ 25950–25955.5 (West Supp. 1972); Colo. Rev. Stats. Ann. §§ 40-2-50 to 40-2-53 (Perm. Cum. Supp. 1967); Del. Code Ann., Tit. 24, §§ 1790–1793 (Supp. 1972); Florida Law of Apr. 13, 1972, c. 72-196, 1972 Fla. Sess. Law Serv., at 380–382; Ga. Code §§ 26–1201 to 26–1203 (1972); Kan. Stat. Ann. § 21-3407 (Supp. 1971); Md. Ann. Code, Art. 43, §§ 137–139 (Repl. 1971); Miss. Code Ann. § 2223 (Supp. 1972); N. M. Stat. Ann. §§ 40A-5-1 to 40A-5-3 (Repl. 1972); N. C. Gen. Stat. § 14-45.1 (Supp. 1971); Ore. Rev. Stat. §§ 435.405 to 435.495 (1971); S. C. Code Ann. §§ 16–82 to 16–89 (Supp. 1971); Va. Code Ann. §§ 18.1-62 to 18.1-62.3 (Supp. 1972). Mr. Justice Clark described some of these States as having "led the way." Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loyola U. (L. A.) L. Rev. 1, 11 (1969).

By the end of 1970, four other States had repealed criminal penalties for abortions performed in early pregnancy by a licensed physician, subject to stated procedural and health requirements. Alaska Stat. § 11.15.060 (1970); Haw. Rev. Stat. § 453-16 (Supp. 1971); N. Y. Penal Code § 125.05 (McKinney Supp. 1972–1973); Wash. Rev. Code §§ 9.02.060 to 9.02.080 (Supp. 1972). The precise status of criminal abortion laws in some States is made unclear by recent decisions in state and federal courts striking down existing state laws, in whole or in part.

well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

6. *The position of the American Medical Association.* The anti-abortion mood prevalent in this country in the late 19th century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period.

An AMA Committee on Criminal Abortion was appointed in May 1857. It presented its report, 12 Trans. of the Am. Med. Assn. 73–77 (1859), to the Twelfth Annual Meeting. That report observed that the Committee had been appointed to investigate criminal abortion "with a view to its general suppression." It deplored abortion and its frequency and it listed three causes "of this general demoralization":

> "The first of these causes is a wide-spread popular ignorance of the true character of the crime—a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening.
>
> "The second of the agents alluded to is the fact that the profession themselves are frequently supposed careless of foetal life . . .
>
> "The third reason of the frightful extent of this crime is found in the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors, which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowledges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it,

and to its life as yet denies all protection." *Id.*, at 75–76.

The Committee then offered, and the Association adopted, resolutions protesting "against such unwarrantable destruction of human life," calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies "in pressing the subject." *Id.*, at 28, 78.

In 1871 a long and vivid report was submitted by the Committee on Criminal Abortion. It ended with the observation, "We had to deal with human life. In a matter of less importance we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less." 22 Trans. of the Am. Med. Assn. 258 (1871). It proffered resolutions, adopted by the Association, *id.*, at 38–39, recommending, among other things, that it "be unlawful and unprofessional for any physician to induce abortion or premature labor, without the concurrent opinion of at least one respectable consulting physician, and then always with a view to the safety of the child—if that be possible," and calling "the attention of the clergy of all denominations to the perverted views of morality entertained by a large class of females—aye, and men also, on this important question."

Except for periodic condemnation of the criminal abortionist, no further formal AMA action took place until 1967. In that year the Committee on Human Reproduction urged the adoption of a stated policy of opposition to induced abortion except when there is "documented medical evidence" of a threat to the health or life of the mother, or that the child "may be born with incapacitating physical deformity or mental deficiency," or that a pregnancy "resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the

patient," and two other physicians "chosen because of their recognized professional competence have examined the patient and have concurred in writing," and the procedure "is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals." The providing of medical information by physicians to state legislatures in their consideration of legislation regarding therapeutic abortion was "to be considered consistent with the principles of ethics of the American Medical Association." This recommendation was adopted by the House of Delegates. Proceedings of the AMA House of Delegates, 49–51 (June 1967).

In 1970, after the introduction of a variety of proposed resolutions, and of a report from its Board of Trustees, a reference committee noted "polarization of the medical profession on this controversial issue"; division among those who had testified; a difference of opinion among AMA councils and committees; "the remarkable shift in testimony" in six months, felt to be influenced "by the rapid changes in state laws and by the judicial decisions which tend to make abortion more freely available;" and a feeling "that this trend will continue." On June 25, 1970, the House of Delegates adopted preambles and most of the resolutions proposed by the reference committee. The preambles emphasized "the best interests of the patient," "sound clinical judgment," and "informed patient consent," in contrast to "mere acquiescence to the patient's demand." The resolutions asserted that abortion is a medical procedure that should be performed by a licensed physician in an accredited hospital only after consultation with two other physicians and in conformity with state law, and that no party to the procedure should be required to violate personally held moral principles.[38] Proceedings

[38] "Whereas, Abortion, like any other medical procedure, should not be performed when contrary to the best interests of the patient

of the AMA House of Delegates 221 (June 1970). The AMA Judicial Council rendered a complementary opinion.[39]

7. *The position of the American Public Health Association.* In October 1970, the Executive Board of the APHA adopted Standards for Abortion Services. These were five in number:

> "a. Rapid and simple abortion referral must be readily available through state and local public

since good medical practice requires due consideration for the patient's welfare and not mere acquiescence to the patient's demand; and

"Whereas, The standards of sound clinical judgment, which, together with informed patient consent should be determinative 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 an accredited hospital acting only after consultation with two other physicians chosen because of their professional competency and in conformance with standards of good medical practice and the Medical Practice Act of his State; and 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 hospital personnel shall be required to perform any act violative of personally-held moral principles. In these circumstances good medical practice requires only that the physician or other professional personnel withdraw from the case so long as the withdrawal is consistent with good medical practice." Proceedings of the AMA House of Delegates 221 (June 1970).

[39] "The Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion that is performed in accordance with good medical practice and under circumstances that do not violate the laws of the community in which he practices.

"In the matter of abortions, as of any other medical procedure, the Judicial Council becomes involved whenever there is alleged violation of the Principles of Medical Ethics as established by the House of Delegates."

health departments, medical societies, or other nonprofit organizations.

"b. An important function of counseling should be to simplify and expedite the provision of abortion services; it should not delay the obtaining of these services.

"c. Psychiatric consultation should not be mandatory. As in the case of other specialized medical services, psychiatric consultation should be sought for definite indications and not on a routine basis.

"d. A wide range of individuals from appropriately trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors.

"e. Contraception and/or sterilization should be discussed with each abortion patient." Recommended Standards for Abortion Services, 61 Am. J. Pub. Health 396 (1971)

Among factors pertinent to life and health risks associated with abortion were three that "are recognized as important"

"a. the skill of the physician,

"b. the environment in which the abortion is performed, and above all

"c. the duration of pregnancy, as determined by uterine size and confirmed by menstrual history." *Id.*, at 397

It was said that "a well-equipped hospital" offers more protection "to cope with unforeseen difficulties than an office or clinic without such resources. . . . The factor of gestational age is of overriding importance." Thus it was recommended that abortions in the second trimester and early abortions in the presence of existing medical complications be performed in hospitals as inpatient procedures. For pregnancies in the first trimester, abortion in the hospital with or without overnight

stay "is probably the safest practice." An abortion in an extramural facility, however, is an acceptable alternative "provided arrangements exist in advance to admit patients promptly if unforeseen complications develop." Standards for an abortion facility were listed. It was said that at present abortions should be performed by physicians or osteopaths who are licensed to practice and who have "adequate training." *Id.*, at 398.

8. *The position of the American Bar Association.* At its meeting in February 1972 the ABA House of Delegates approved, with 17 opposing votes, the Uniform Abortion Act that had been drafted and approved the preceding August by the Conference of Commissioners on Uniform State Laws. 58 A. B. A. J. 380 (1972). We set forth the Act in full in the margin.[40] The

[40] "UNIFORM ABORTION ACT

"SECTION 1. [*Abortion Defined; When Authorized.*]

"(a) 'Abortion' means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.

"(b) An abortion may be performed in this state only if it is performed

"(1) by a physician licensed to practice medicine [or osteopathy] in this state or by a physician practicing medicine [or osteopathy] in the employ of the government of the United States or of this state, [and the abortion is performed [in the physician's office or in a medical clinic, or] in a hospital approved by the [Department of Health] or operated by the United States, this state, or any department, agency, or political subdivision of either;] or by a female upon herself upon the advice of the physician; and

"(2) within [20] weeks after the commencement of the pregnancy [or after [20] weeks only if the physician has reasonable cause to believe (i) there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother, (ii) that the child would be born with grave physical or mental defect, or (iii) that the pregnancy resulted from rape or incest, or illicit intercourse with a girl under the age of 16 years of age]

"SECTION 2. [*Penalty.*] Any person who performs or procures an abortion other than authorized by this Act is guilty of a [felony]

Conference has appended an enlightening Prefatory Note.[41]

VII

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

and, upon conviction thereof, may be sentenced to pay a fine not exceeding [$1,000] or to imprisonment [in the state penitentiary] not exceeding [5 years], or both.

"SECTION 3. [*Uniformity of Interpretation.*] This Act shall be construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.

"SECTION 4. [*Short Title.*] This Act may be cited as the Uniform Abortion Act.

"SECTION 5. [*Severability.*] If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

"SECTION 6. [*Repeal.*] The following acts and parts of acts are repealed:

(1)

(2)

(3)

"SECTION 7. [*Time of Taking Effect.*] This Act shall take effect———

[41] "This Act is based largely upon the New York abortion act following a review of the more recent laws on abortion in several states and upon recognition of a more liberal trend in laws on this subject. Recognition was given also to the several decisions in state and federal courts which show a further trend toward liberalization of abortion laws, especially during the first trimester of pregnancy.

Recognizing that a number of problems appeared in New York, a shorter time period for 'unlimited' abortions was advisable. The time period was bracketed to permit the various states to insert a figure more in keeping with the different conditions that might exist among the states. Likewise, the language limiting the place or places in which abortions may be performed was also bracketed to account for different conditions among the states. In addition, limitations on abortions after the initial 'unlimited' period were placed

It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously.[42] The appellants and *amici* contend, moreover, that this is not a proper state purpose at all and suggest that, if it were, the Texas statutes are overbroad in protecting it since the law fails to distinguish between married and unwed mothers.

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman.[43] This was particularly true prior to the development of antisepsis. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur, and others first announced in 1867, but were not generally accepted and employed until about the turn of the century. Abortion mortality was high. Even after 1900, and perhaps until as late as the development of antibiotics in the 1940's, standard modern techniques such as dila-

in brackets so that individual states may adopt all or any of these reasons, or place further restrictions upon abortions after the initial period.

"This Act does not contain any provision relating to medical review committees or prohibitions against sanctions imposed upon medical personnel refusing to participate in abortions because of religious or other similar reasons, or the like. Such provisions, while related, do not directly pertain to when, where, or by whom abortions may be performed: however, the Act is not drafted to exclude such a provision by a state wishing to enact the same.

[42] See, for example, *YWCA v. Kugler*, 342 F. Supp. 1048, 1074 (N. J. 1972); *Abele v. Markle*, 342 F. Supp. 800, 805–806 (Conn. 1972) (Newman, J., concurring), appeal pending; *Walingham v. Florida*, 250 So. 2d 857, 863 (Ervin, J., concurring) (Fla. Supp. 1972); *State v. Gedicke*, 43 N. J. L. 86, 89 (Sup. Ct. 1881); Means II, at 381–382.

[43] See C. Haagensen & W. Lloyd, A Hundred Years of Medicine 19 (1943).

tion and curettage were not nearly so safe as they are today. Thus it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

Modern medical techniques have altered this situation. Appellants and various *amici* refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth.[44] Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the area of health and medical standards do remain. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather

[44] Potts, Postconception Control of Fertility, 5 Int'l J. of G. & O. 957, 967 (1970) (England and Wales); Abortion Mortality, 20 Morbidity and Mortality, 208, 209 (July 12, 1971) (U. S. Dept. of HEW, Public Health Service) (New York City); Tietze, United States Therapeutic Abortions, 1963–1968, 59 Studies in Family Planning 5, 7 (1970); Tietze, Mortality with Contraception and Induced Abortion, 45 Studies in Family Planning 6 (1969) (Japan, Czechoslovakia, Hungary); Tietze & Lehfeldt, Legal Abortion in Eastern Europe, 175 J. A. M. A. 1149, 1152 (April 1961). Other sources are discussed in Lader 17–23.

than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

The third reason is the State's interest—some phrase it in terms of duty—in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception.[45] The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life.[46] Pointing to the absence of legislative history to support the contention, they claim that most state laws were designed solely to protect the woman. Because medical advances have lessened this concern, at least

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[45] See Brief of Amicus National Right to Life Foundation, R. Drinan, The Inviolability of the Right to Be Born, in Abortion and the Law 107 (D. Smith, editor, 1967); Louisell, Abortion, The Practice of Medicine, and the Due Process of Law, 16 UCLA L. Rev 233 (1969); Noonan 1

[46] See, *e. g.*, *Abele* v *Markle*, 342 F. Supp. 800 (Conn. 1972), appeal pending

with respect to abortion in early pregnancy, they argue that with respect to such abortions the laws can no longer be justified by any state interest. There is some scholarly support for this view of original purpose.[47] The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus.[48] Proponents of this view point out that in many States, including Texas,[49] by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another.[50] They claim that adoption of the "quickening" distinction through received common law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception.

It is with these interests, and the weight to be attached to them, that this case is concerned.

VIII

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back

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[47] See discussions in Means I and Means II.

[48] See, *e. g.*, *State* v. *Murphy*, 27 N. J. L. 112, 114 (1858).

[49] *Watson* v. *State*, 9 Tex. App. 237, 244–245 (1880); *Moore* v. *State*, 37 Tex. Crim. R. 552, 561, 40 S. W. 287, 290 (1897); *Shaw* v. *State*, 73 Tex. Crim. R. 337, 339, 165 S. W. 930, 931 (1914); *Fondren* v. *State*, 74 Tex. Crim. R. 552, 557, 169 S. W. 411, 414 (1914); *Gray* v. *State*, 77 Tex. Crim. R. 221, 229, 178 S. W. 337, 341 (1915). There is no immunity in Texas for the father who is not married to the mother. *Hammett* v. *State*, 84 Tex. Crim. R. 635, 209 S. W. 661 (1919); *Thompson* v. *State*, — Tex. Crim. R. — (1971), appeal pending.

[50] See *Smith* v. *State*, 33 Me. 48, 55 (1851); *In re Vince*, 2 N. J. 443, 450, 67 A. 2d 141, 144 (1949). A short discussion of the modern law on this issue is contained in the Comment to the ALI's Model Penal Code § 207.11, at 158 and nn. 35–37 (Tent. Draft No. 9, 1959).

perhaps as far as *Union Pacific R. Co.* v. *Botsford*, 141 U. S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts the Court or individual Justices have indeed found at least the roots of that right in the First Amendment, *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969); in the Fourth and Fifth Amendments, *Terry* v. *Ohio*, 392 U. S. 1, 8–9 (1968), *Katz* v. *United States*, 389 U. S. 347, 350 (1967), *Boyd* v. *United States*, 116 U. S. 616 (1886), see *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J. dissenting); in the penumbras of the Bill of Rights, *Griswold* v. *Connecticut*, 381 U. S. 479, 484–485 (1965); in the Ninth Amendment, *id.*, at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967), procreation, *Skinner* v. *Oklahoma*, 316 U. S. 535, 541–542 (1942), contraception, *Eisenstadt* v. *Baird*, 405 U. S. 438, 453–454 (1972); *id.*, at 460, 463–465 (WHITE, J., concurring), family relationships, *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944), and child rearing and education, *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925), *Meyer* v. *Nebraska*, *supra*.

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amend-

ment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellants and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellants' arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, is unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore,

cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905) (vaccination); *Buck* v. *Bell*, 274 U. S. 200 (1927) (sterilization).

We therefore conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

We note that those federal and state courts that have recently considered abortion law challenges have reached the same conclusion. A majority, in addition to the District Court in the present case, have held state laws unconstitutional, at least in part, because of vagueness or because of overbreadth and abridgement of rights. *Abele* v. *Markle*, 342 F. Supp. 800 (Conn. 1972), appeal pending; *Abele* v. *Markle*, — F. Supp. — (Conn. Sept. 20, 1972), appeal pending; *Doe* v. *Bolton*, 319 F. Supp. 1048 (ND Ga. 1970), appeal decided today, *post* —; *Doe* v. *Scott*, 321 F. Supp. 1385 (ND Ill. 1971), appeal pending; *Poe* v. *Menghini*, 339 F. Supp. 986 (Kan. 1972); *YWCA* v. *Kugler*, 342 F. Supp. 1048 (NJ 1972); *Babbitz* v. *McCann*, 310 F. Supp. 293 (ED Wis. 1970), appeal dismissed, 400 U. S. 1 (1970); *People* v. *Belous*, 71 Cal. 2d 954, 458 P. 2d 194 (1969), cert. denied, 397 U. S. 915 (1970); *State* v. *Barquet*, 262 S. 2d 431 (Fla. 1972).

Others have sustained state statutes. *Crossen* v. *Attorney General*, 344 F. Supp. 587 (ED Ky. 1972), appeal pending; *Rosen* v. *Louisiana State Board of Medical Examiners*, 318 F. Supp. 1217 (ED La. 1970), appeal pending; *Corkey* v. *Edwards*, 322 F. Supp. 1248

(WDNC 1971), appeal pending; *Steinberg* v. *Brown*, 321 F. Supp. 741 (ND Ohio 1970); *Doe* v. *Rampton*, — F. Supp. — (Utah 1971), appeal pending; *Cheaney* v. *Indiana*, — Ind. —, 285 N. E. 2d 265 (1972); *Spears* v. *State*, 257 So. 2d 876 (Miss. 1972); *State* v. *Munson*, — S. D. —, 201 N. W. 2d 123 (1972), appeal pending.

Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach.

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," *Kramer* v. *Union Free School District*, 395 U. S. 621, 627 (1969); *Shapiro* v. *Thompson*, 394 U. S. 618, 634 (1969), *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. *Griswold* v. *Connecticut*, 381 U. S. 479, 485 (1965); *Aptheker* v. *Secretary of State*, 378 U. S. 500, 508 (1964); *Cantwell* v. *Connecticut*, 310 U. S. 296, 307–308 (1940); see *Eisenstadt* v. *Baird*, 405 U. S. 438, 460, 463–464 (1972) (WHITE, J., concurring).

In the recent abortion cases, cited above, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interest in protecting health and potential life and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws

have held that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable.

IX

The District Court held that the appellee failed to meet his burden of demonstrating that the Texas statute's infringement upon Roe's rights was necessary to support a compelling state interest, and that, although the defendant presented "several compelling justifications for state presence in the area of abortions," the statutes outstripped these justifications and swept "far beyond any areas of compelling state interest." 314 F. Supp., at 1222–1223. Appellant and appellee both contest that holding. Appellant, as has been indicated, claims an absolute right that bars any state imposition of criminal penalties in the area. Appellee argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest. As noted above, we do not agree fully with either formulation.

A. The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment. The appellant conceded as much on reargument.[21] On the other hand, the appellee conceded on reargument[22] that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment con-

[21] Tr. of Rearg. 20–21.
[22] Tr. of Rearg. 24.

tains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution, in the listing of qualifications for representatives and senators, Art. I, § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3;[53] in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl. 8; in the Electors provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave cl. 3; and in the Fifth, Twelfth, and Twenty-second Amendments as well as in §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.[54]

[53] We are not aware that in the taking of any census under this clause, a fetus has ever been counted.

[54] When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?

There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out, n. 49, *supra*, that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed

All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn.[39] This is in accord with the results reached in those few cases where the issue has been squarely presented. *McGarvey* v. *Magee-Womens Hospital*, 340 F. Supp. 751 (WD Pa. 1972); *Byrn* v. *New York City Health & Hospitals Corp.*, 31 N. Y. 2d 194, 286 N. E. 2d 887 (1972), appeal pending; *Abele* v. *Markle*, — F. Supp. — (Conn. Sept. 20, 1972), appeal pending. Compare *Cheaney* v. *Indiana*, — Ind. —, 285 N. E. 265, 270 (1972); *Montana* v. *Rogers*, 278 F. 2d 68, 72 (CA7 1960), aff'd *sub nom. Montana* v. *Kennedy*, 366 U. S. 308 (1961); *Keeler* v. *Superior Court*, — Cal. —, 470 P. 2d 617 (1970); *State* v. *Dickinson*, 28 Ohio App. 2d 259, 275 N. E. 2d 599 (1970). Indeed, our decision in *United States* v. *Vuitch*, 402 U. S. 62 (1971), inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection.

This conclusion, however, does not of itself fully answer the contentions raised by Texas, and we pass on to other considerations.

B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if

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by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?

[39] Cf. the Wisconsin abortion statute, defining "unborn child" to mean "a human being from the time of conception until it is born alive." Wis. Stat. § 940.04 (6) (1969), and the new Connecticut statute, Public Act No. 1, May 1972 Special Session, declaring it to be the public policy of the State and the legislative intent "to protect and preserve human life from the moment of conception."

one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary, 478–479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt*, *Griswold*, *Stanley*, *Loving*, *Skinner*, *Pierce*, and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics.[38] It appears to be the predominant, though not the unanimous, attitude of the Jewish faith.[39] It may be taken to represent also the position of a large segment of the Protestant community,

[38] Edelstein 16.

[39] Lader 97–99; D. Feldman, Birth Control in Jewish Law 251–294 (1968). For a stricter view, see I. Jakobovits, Jewish Views on Abortion, in Abortion and the Law 124 (D. Smith ed. 1967).

insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family.[58] As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception or upon live birth or upon the interim point at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid.[59] Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.[60] The Aristotelian theory of "mediate animation," that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this "ensoulment" theory from those in the Church who would recognize the existence of life from the moment of conception.[61] The latter is now, of course, the official belief of the Catholic Church. As one of the briefs *amicus* discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substantial problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as menstrual extraction, the "morning-after" pill.

[58] Amicus Brief for the American Ethical Union et al. For the position of the National Council of Churches and of other denominations, see Lader 99–101.

[59] L. Hellman & J. Pritchard, Williams Obstetrics 493 (14th ed. 1971); Dorland's Illustrated Medical Dictionary 1689 (24th ed. 1965).

[60] Hellman & Pritchard, *supra*, n. 58, at 493.

[61] For discussions of the development of the Roman Catholic position, see D. Callahan, Abortion: Law, Choice and Morality 409–447 (1970); Noonan 1.

implantation of embryos, artificial insemination, and even artificial wombs.[54]

In areas other than criminal abortion the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. For example, the traditional rule of tort law had denied recovery for prenatal injuries even though the child was born alive.[55] That rule has been changed in almost every jurisdiction. In most States recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few courts have squarely so held.[56] *In a recent development,* generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries.[57] Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potential-

[54] See D. Brodie, The New Biology and the Prenatal Child, 9 J. Fam. L. 391, 397 (1970); R. Gorney, The New Biology and the Future of Man, 15 UCLA L. Rev. 273 (1968); Note, Criminal Law—Abortion—The "Morning-After" Pill and Other Pre-Implantation Birth-Control Methods and the Law, 46 Ore. L. Rev. 211 (1967); G. Taylor, The Biological Time Bomb 32 (1968); A. Rosenfeld, The Second Genesis 138–139 (1969); G. Smith, Through a Test Tube Darkly: Artificial Insemination and the Law, 67 Mich. L. Rev. 127 (1968); Note, Artificial Insemination and the Law, U. Ill. L. F. 203 (1968).

[55] Prosser, Handbook of the Law of Torts 333–338 (1971); 2 Harper & James, The Law of Torts 1028–1031 (1956); Note, 63 Harv. L. Rev. 173 (1949).

[56] See cases cited in Prosser, *supra*, n. 62, at 335–338; Annotation, Action for Death of Unborn Child, 15 A. L. R. 3d 992 (1967).

[57] Prosser, *supra*, n. 62, at 338; Note, The Law and the Unborn Child, 46 Notre Dame Law. 349, 354–360 (1971).

ity of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*.[48] Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

X

In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling."

With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now established medical fact, referred to above at p. 34, that until the end of the first trimester mortality in abortion is less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent

[48] D. Louisell, Abortion, The Practice of Medicine, and the Due Process of Law, 16 UCLA L. Rev. 233, 235–238 (1969); Note, 56 Iowa L. Rev. 994, 999–1000 (1971); Note, The Law and the Unborn Child, 46 Notre Dame Lawyer 349, 351–354 (1971).

that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period except when it is necessary to preserve the life or health of the mother.

Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The

statute, therefore, cannot survive the constitutional attack made upon it here.

This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness. See *United States* v. *Vuitch*, 402 U. S. 62, 67–72 (1971).

XI

To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a *life saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

2. The State may define the term "physician," as it has been employed in the preceding numbered paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.

In *Doe* v. *Bolton*, *post*, procedural requirements contained in one of the modern abortion statutes are con-

sidered. That opinion and this one, of course, are to be read together.[67]

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and example of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

XII

Our conclusion that Art. 1196 is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall. The exception of Art. 1196 cannot be

[67] Neither in this opinion nor in *Doe* v. *Bolton*, *post*, do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances. North Carolina, for example, 1B N. C. Gen. Stat. § 14–45.1 (Supp. 1971), requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age. 41 N. C. A. G. 489 (1971); if the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional

stricken separately, for then the State is left with a statute proscribing all abortion procedures no matter how medically urgent the case.

Although the District Court granted plaintiff Roe declaratory relief, it stopped short of issuing an injunction against enforcement of the Texas statutes. The Court has recognized that different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other. *Zwickler* v. *Koota*, 389 U. S. 241, 252-255 (1967); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). We are not dealing with a statute that, on its face, appears to abridge free expression, an area of particular concern under *Dombrowski* and refined in *Younger* v. *Harris*, 401 U. S., at 50.

We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional.

The judgment of the District Court as to intervenor Hallford is reversed, and Dr. Hallford's complaint in intervention is dismissed. In all other respects the judgment of the District Court is affirmed. Costs are allowed to the appellee.

It is so ordered.

The Abortion Decision

It was inevitable that the Supreme Court decision voiding the majority of State laws on abortion should arouse a storm of reaction. The issue is so charged with emotional and religious controversy that the response would have been as great regardless of how the court ruled.

In deciding that the state has no right to interfere with a woman's decision to have or not to have a baby during her first six months of pregnancy, the court followed an impeccable line of reasoning: The Fourteenth Amendment guarantees a right to privacy to all Americans, including women. During the first six months of pregnancy, a fetus cannot survive independent of its mother's body; therefore, a fetus does not constitute a "person" covered by constitutional guarantees.

The court's logic continued: During the first trimester, especially, pregnancy is a medical matter, and thus any decisions made about that pregnancy rightfully rest with the woman and her doctor. The efforts of the *state to infringe on a doctor's practice* of his profession, through the requirement for boards of approval, or for certification by other physicians, cannot be permitted under the Constitution. During the second trimester of pregnancy, the state can interfere only to the point of regulating medical circumstances under which abortions are performed, to guarantee a woman the best possible medical services. In the last trimester, when life theoretically could be sustained independently of the woman, the state has more compelling interests in the well-being of both mother and child.

Given the perceptible trends toward more libertarian interpretations of the rights of privacy in recent years, the court hardly could have ruled any other way on the abortion issue and maintained any consistency. Granted, abortion is the worst possible means of birth control. In an ideal society, there would be no unwanted pregnancies. Owing to the efforts of family planning programs, there are fewer unwanted pregnancies today than ever before, but there still are too many, especially among teen-agers who lack even fundamental knowledge of how conception occurs.

Millions of Americans do not believe in abortion at any stage of pregnancy. That is their right. Millions of other Americans do believe that women have the right to govern their own bodies to the extent of having a legal, safe abortion if they choose. Abortion proponents recognize the special agonies that can result from rape, incest, or deformed fetuses. Aside from these special instances, they also know that no birth control method is guaranteed to be 100 per cent effective, and unwanted pregnancies also can ruin lives and marriages when the state exercises absolute control over the circumstances under which abortions can be permitted. As in any other instance where the state attempts to regulate morals, stringent anti-abortion laws merely drive abortionists underground, where quacks and amateurs can maim and kill desperate women.

The issue offers no middle ground for opinion. Some men, still clinging to outdated chauvinistic views of women's role in society, feel that men alone should have the ultimate decision on abortion laws. Yet men never experience unwanted pregnancies. This may permit them to consider the issue dispassionately, but it also leads them to cruel conclusions. Catholic Church leaders may call the high court's opinion an "unspeakable tragedy," but the Catholic injunction against abortion is of rather recent origin in a religion two thousand years old. While Catholic spokesmen horror at the decision can be unde stood, a majority of the high cou properly recognized that no religio has a constitutional license to force its beliefs upon others.

The court's ruling does not compel any woman to have an abortion against her will. Neither does it prevent any woman from having an abortion under optimal medical conditions when she chooses. That decision now is hers alone to make. As long as a fetus, under the most conservative medical interpretation, cannot sustain its own life system, the continuation of a pregnancy is a medical concern. The high court was right in taking the state out of the doctor's consulting room.

By Dan Morgan

Washington Post Foreign Service

BELGRADE—One day last month, an unmarried 16-year-old girl and her mother went to a downtown medical clinic here where about 50 other women had gathered. Almost all the women in the waiting room had one thing in common: an unwanted pregnancy.

In most parts of the United States, where abortion policy is still restrictive, the young girl's plight might have thrown the family into a crisis. But not in the abortion culture of most nations in Eastern Europe. Here abortions are a routine event and were so long before the lines grew at clinics in New York City or Washington or Los Angeles.

Indeed, abortion has become a way of life over the past 15 years in much of Communist Eastern Europe, an extensive experience with many lessons to tell. It has helped reshape the family. It has helped change popular attitudes toward marriage, women and child-rearing. And, unexpectedly, it has turned up medical problems — particularly signs of a connection between abortions and later premature and stillbor births — that are worrying many doctors. But despite this and other concerns, abortion is likely to remain as commonplace and as simple as it was for the young girl who showed up at the Belgrade Gynecological Clinic.

She had already been certified by a doctor to be within the first three months of pregnancy, when the operation is legally permitted here for non-medical reasons. All that remained was to get approval for the operation from the hospital's three-member abortion commission, made up of a gynecologist, an internist and a social worker. The necessary "social" reasons were self-evident: The girl was a minor and unmarried.

The board approved the abortion, a two-minute operation that is performed about 35,000 times a year in the Yugoslav capital and that costs about $7.35. The doctor's services are free; the charge covers the cost of anesthesia, and a negligible hospital tax.

Like Visiting a Hairdresser

ON THE SAME MORNING, abortions were approved for "social reasons" for about 40 other women, including about 25 with two or more children, two other unmarried school girls, and 10 jobless or apartmentless women with one child.

Rejected for abortions were seven married, childless women who offered no convincing "social" reason for terminating the pregnancy.

A 22-year-old economist withdrew her application after the board's social worker promised to contact her employer to secure a pledge that the pregnancy would not cost her her new job. That, however, was an exceptional case in East European Communist societies in which abortion on non-medical grounds has become readily available, cheap and, in fact, the preferred means of birth control for probably the majority of women.

For most city women living under communism, an abortion carries about as much social stigma as a visit to the hairdresser. (In fact one Belgrade hairdresser says she has had 40 of them.)

At one Belgrade clinic, every married woman seeking an abortion in the past six months had had at least one such operation before marrying. At that same clinic a few days ago, a 20-year-old brunette, dressed in a blue sailor suit and yellow shoes with platform heels, applied for her ninth. When the doctor asked why she did not start using modern contraceptives, she just shrugged.

Abortions far outnumber births in Yugoslavia and Hungary, and the ratio is only narrowly in favor of births in Czechoslovakia and Poland. In Poland, they are free at hospitals but cost about $15 at doctors' "cooperatives" and up to $50 privately, where treatment is even more "discreet." Hungarian factory workers usually take three days' leave and are treated at a hospital.

The marvel is that abortion has become an accepted practice in societies where family structure remains strong, where three-generational and extended families are still common because of the housing shortage, where young students or workers often eat lunch at the same table with tradition-minded grandparents, and where the Catholic church is still a force.

Housing and Working Women

WHILE COMMUNISTS traditionally have espoused a progressive line on abortion, all Communist regimes actually pursued restrictive policies until the early 1950s. At that time it became clear that the baby boom was breeding future tensions in the form of overtaxed social services—particularly housing—by the end of the 1960s.

Such problems as housing shortages still play a big role in abortion's popularity. One Yugoslav journalist and his wife entertain in their one-room flat in New Belgrade with an infant sleeping at the side of the dining room table. "Don't whisper or she'll wake up," the host jokes. The couple clearly is not hoping for another child.

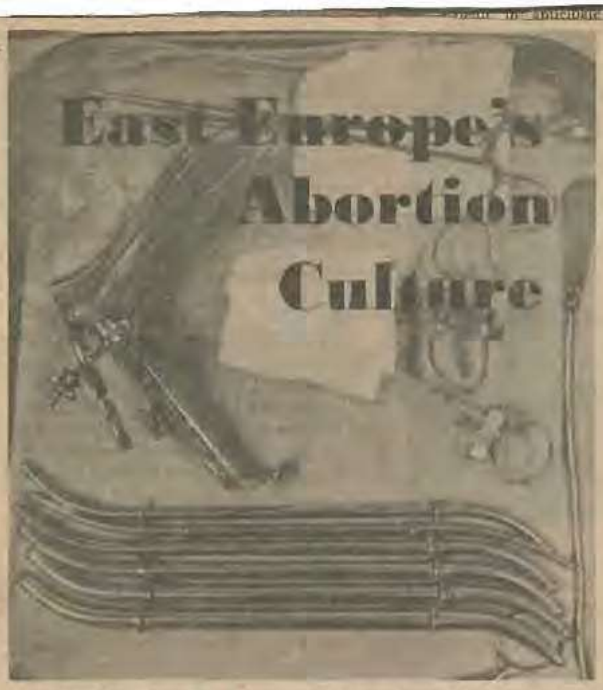
See ABORTION, Page B4

By Joe Heiberger—The Washington Post

Inside Outlook

Few men are more concerned about our rising energy needs than AEC chairman James R. Schlesinger. In an interview with Thomas O'Toole on Page B3, he discusses the current crises, urges actions, and has unexpected praise for environmentalists.

By procedural accident, the trial of Daniel Ellsberg and Anthony Russo starts tomorrow as the Democrats open their Miami Beach convention. Sanford J. Ungar's report on the Pentagon Papers trial appears on Page B5.



ABORTION, From Page B1

Another factor in the abortion culture has been the large number of working women (currently 60 to 85 per cent in Hungary of those between 18 and 55). The postwar policy of the Communist regimes has been to draw on women to increase the available labor pool. Though the original aim was purely economic, there undoubtedly has been a social side-effect. Women have grown more reluctant to leave their jobs to raise future generations of workers.

"Many of the women I talk with say they would continue to work even if they had the choice of staying home," said the editor of a Budapest ladies' magazine. "When a woman works it makes her feel equal in her marriage."

Tragi-Comedy in Romania

THE ABRUPT SWITCH in abortion policy in the 1950s was clothed in Marxist ideology and rationalized in the framework of socialist emancipation of women. But abortion policies have actually been influenced less by ideology than by political climates and practical considerations. Most of the 1950s liberalization occurred after the strict Stalinist period. It proved to be one of the most popular acts in that time of thaw.

Similarly, it was not ideology but practicality that prompted Romania in 1966 to go against the liberal trend. Shocked by the fact that abortions were virtually threatening to destroy its work force within a couple of decades, it implemented a tough anti-abortion law almost overnight. Romanian authorities moved to curtail what may have been a world record for abortions —1,115,000 in 1965 in a population of 20 million and about four times the number of live births.

The effects were tragi-comic. Within a year the birth rate tripled. Desperate Romanian women, who could find no modern contraceptives in their own stores, turned pleadingly to foreign visitors for help in obtaining them from abroad.

It also was not ideology that caused the East Germans to wait until this year to enact abortion-on-request legislation. East Germany did not participate in the general liberalization because of the population drain it suffered until the closing of its borders in 1961. Another factor in its recent switch is assumed to have been this spring's opening of the border with Poland, which put East German housewives in easy reach of Polish clinics.

A Car or a Baby?

THE RADICAL SHIFT in abortion policy in the 1950s probably is a central factor in the changing East European family, which is smaller than ever and more likely to have a working mother, if it has a mother present at all. Although the introduction of modern contraceptives and intensive education may have had the same effect, demographers agree that it would have been much slower in happening if not for abortion.

The ability to terminate pregnancies also has altered attitudes toward family and marriage. For many young couples, child-rearing seems less of a rationale for marriage than do convenience and economic realities. They see abortion as a means of maintaining rising living standards. This hesitance to raise children was depicted in a Hungarian cartoon that showed a couple standing in front of an automobile and pram and posed the question: "Which one?"

That choice is perhaps more difficult than ever as people sense that a better material life is finally in sight. Women in particular seem reluctant to give up the fulfillment of careers for a child they do not want until later.

The Moral Issue

ALL THIS IS NOT to say that abortion does not have its problems and its critics in Eastern Europe. It has both, with the critics tending to attack abortion on three points.

One, of course, is the moral issue that it takes life. A Belgrade doctor, who routinely certifies women for abortion but refuses to perform the operation himself, describes the act as "genocide," just as many do in the United States. He is not a Catholic, and his revulsion seems to be shared by many East European doctors who spend much time removing embryos from women. Some Catholic doctors refuse to perform abortions or to prescribe modern contraceptives.

But by and large the moral issue seems to have evaporated in this part of the world. "The moral discussion ended in the 1950s," says Mrs. Wanda Jakubovska, deputy general secretary of Poland's Society of Family Planning.

Another criticism is abortion's radical demographic and economic effects, an argument which has some validity. Almost overnight, abortion achieves—and, as in the case of Romania, overachieves—population curbs. This is worrying such other countries as Hungary and East Germany, where there are severe labor shortages and slowdowns in the rural runoff. Since 1958, for example, Hungary has had a net reproduction rate (the key figure because it shows growth in terms of new-born girls) of below one.

However, demographic experts warn against leaping to generalizations. Belgium and Austria, with restrictive abortion laws, have about the same birth rates as Hungary. And the Soviet Union, with legal abortion for social reasons, has a larger net growth rate than the United States.

The third argument concerns the effects on morality, particularly among young, unmarried girls. In this regard, the East European experience has shown that by far the largest group of abortion recipients are married women with several children. Unwed mothers still make up a small portion of the total.

Dubious Doctors

AS SEEN FROM Eastern Europe, abortion critics may actually have overlooked their strongest argument, the medical one.

Although doctors concede that legalized abortion has saved the lives of hundreds of women who formerly died from careless, illegal midwifery outside hospitals, 15 years' experience still has left many doctors, including Communist ones, surprisingly dubious about the practice. They note growing evidence that abortions do have an effect on the fertility of women and on the ratio of premature and stillborn infants in subsequent pregnancies, particularly when an abortion has been performed on a woman in her first pregnancy.

Although the evidence is still fairly unrefined and sometimes contradictory, it is strong enough for Dr. Egon Szabady, president of the demographic committee of the Hungarian Academy of Science, to state that there is a "significant correlation" between premature births and the incidence of abortion. Since abortion was made available in Hungary in 1956, the rate of premature births has doubled from 5 to 10 per cent. Dr. Szabady cautions that numerous factors may be responsible for this phenomenon, but he is convinced that free abortion is one of them.

Tentative studies of women patients at the Academy of Medicine's Warsaw Clinic for Women's Disease tend to bear this out. According to Prof. Ireneusz Roszkowski, premature births run about 1 in 10 for women who had abortion before their first birth and about 7 in 10 for women who have had more than three abortions. The mortality rate for premature babies is also dramatic; the clinic's deaths among premature babies run 6.06 per cent for children of women with no abortions, and 21.05 per cent for women who have had one or more abortions.

Though the correlation between infertility and abortions so far appears to lack definitive statistical proof in most of the countries, Dr. Dragomir Mladenovic, chief of the Belgrade Gynecological Clinic, is certain enough of a connection that he routinely tells prospective mothers that termination of their pregnancy could cause infertility. As an added incentive for them to keep their babies, he often sends them to visit an outpatient clinic where infertile women are receiving hormone and other treatment.

Polish planned parenthood people, meanwhile, claim there is a 1-in-10 chance of infertility from an abortion in the first pregnancy.

The method of abortion—suction or dilation and curettage—seems to make little difference. "Even with present medical techniques," Dr. Szabady of Budapest has written, "the operation cannot be regarded as a casual, problem-free thing. The widespread use of abortion as a means of birth control is unquestionably harmful."

A Cautious Reassessment

STILL UNKNOWN is the long-range psychological impact of the operation on women. Joint American-Hungarian studies on this question are now under way, using women subjects who have had multiple abortions. Doctors say that most of their patients show signs of emotional relief, that there is no evidence that having an abortion has a worse mental impact than having an unwanted child.

Yet a Yugoslav woman who had an abortion 10 years ago muses, "Every time I see a child who is 10 years old, I ask myself, 'What would mine be like?' "

Polish doctors particularly seem to have a horror of the very liberal law of New York State. "Is it true that abortions are given in the fifth month of pregnancy and that some of the embryos live?" asked one Warsaw physician.

All this has resulted in a cautious reassessment. Given the state of social tensions, no government seems about to follow the Romanian example. However, as the screening process in Yugoslavia shows, efforts are being made to curtail abortions for young married women. Doctors such as Prof. Roszkowski at Warsaw would like to eliminate abortions in first pregnancies altogether for health reasons, except for unmarried girls. Bulgaria already has such a regulation. And the draconian Romanian law only allows abortions for women over 40, for victims of rape or incest, and for medically endangered women.

Theoretically, some kind of screening process exists everywhere, but often approval has been "virtually automatic." "We are moved by the tears of women," conceded a Yugoslav doctor.

Themselves to Blame

TO THE EXTENT that education about contraceptives has been woefully neglected in Eastern Europe, the doctors now really have only themselves, and the somewhat backward state of Communist birth-control technology, to blame.

According to Hungarian studies, 20 to 25 per cent of women there at most use modern contraceptives, and only about 10 per cent have been using the birth-control pill. About 60 per cent practice natural methods only.

A university-educated couple in Yugoslavia recently recalled that they went 40 miles to their country doctor to get a prescription for birth-control pills because they were unaware that prescriptions were issued free at Belgrade women's clinics. That episode made a local doctor shake his head in despair.

Only recently has family planning begun to show results. Birth-control pill sales have climbed sharply in most of Eastern Europe in the past three years. Poland now manufactures its own, called Femigen. And the annual total of abortions in Poland has been cut to about half what it was in 1958.

Nevertheless, there are probably few if any women who would like to see their current range of choices abolished, and few Communist politicians who would like to abolish them.

Children and Jobs

SOME WOMEN in Eastern Europe, of course, find they can have both their children and their work. One young Hungarian psychologist, for example, drops her child off at her mother's place Monday mornings and picks the child up again Friday nights. In her world, the traditional roles of parents and grandparents have been reversed.

Communist regimes are trying to encourage this trend. Essentially, this has meant offering more services and money incentives for having babies.

Although there is still a shortage of day care and nursery facilities all over Eastern Europe, the existing network is considerably more extensive than in many Western countries. For example, 6 out of 10 Hungarian children between birth and school are in the centers, which are run by factories or by precinct authorities.

An even bigger push has occurred in offering financial incentives for child-raising. Child allotments are the third biggest social welfare expense in Hungary, after pensions and health insurance.

The allotments differ from the American system of tax reductions for dependents in that they are given in the form of straight cash handouts. In most of the countries, these allotments become significant only when a family has two or more children. For instance, a three-child family in Hungary would collect the equivalent of about $360 a year, and in Poland about $70.

Maternity leave provisions are often more generous. Hungary provides five months' leave with pay and about $22.50 a month to mothers for the next 31 months, with a guarantee that they can return to their jobs. Home leave with pay for mothers with sick children has also been increased in Poland, and Czechoslovakia has the most generous post-natal provisions of all: They provide all women with about $30 a month in cash for two years, whether or not the women stay home or go back to their jobs.

Yugoslavia, as so often happens, is an exception: It offers mothers the chance to draw Western-style unemployment compensation, but does not give child allotments except to very poor families.

Although the abortion culture of Eastern Europe has not been an unqualified success—mainly because of the way it has inhibited introduction of safer, modern contraceptive methods—doctors and demographers do not call it a failure either.

"It seems difficult, if not impossible to find the ideal solution, and in the formulation of laws we should apply the basic principle of the lesser evil," Budapest's Dr. Szabady has written. "It's beyond doubt that the legalization of abortion prevents the considerable psychological, social and physical injury which is produced by illegal abortions, though at the same time widespread practice of abortion brings other ills into being. The lesson to be drawn is that the broad legalization of abortion should be accompanied by propagation of modern methods of contraception."

The Import Problem

BELGRADE—The liberal abortion policies of Yugoslavia and the Communist bloc have had one undesired result: making the area seem a potential haven to West European and American women.

Yugoslavia, with its open borders to the West, has been especially appealing. Foreign women are not entitled to an abortion on demand, but sometimes one is arranged through connections.

Several years ago, an American woman and her husband arrived in Belgrade on a Yugoslav travel agency's package tour that included an abortion, a three-day stay in an A-category hotel and round-trip plane fare for slightly more than $1,000.

While thousands of Yugoslavs go to West Germany for jobs, the flow is the other way for abortions.

A few months ago, a Belgrade hotel worker noticed an agitated West German female guest who said she was the wife of an important industrialist. She had landed in Belgrade after trying in vain for an abortion in Switzerland and Spain. The family doctor was called in to give a certification to a local hospital. A few month's later the hotel worker received a grateful note of thanks from the visitor and a kitchen mixing machine produced by her husband's firm.

Yugoslav hospitals charge foreigners the equivalent of $50 for abortions. But they do not encourage foreigners to come.

Similarly, Poland has made it difficult for foreign women to get abortions since a scandal involving a doctor's extortion ring in the port city of Szczecin some years ago. Scandinavian women who came for cheap abortions were photographed and blackmailed, it was disclosed. The scandal was enough to warn away potential applicants.

PER POPULATION

40

20

10

1958 1968

Joint Economic Committee

When Romania cracked down on abortions in 1966, its birth rate took off.