IN THE

Supreme Court of the United States

No. 70-18, 1971 Term

JANE ROE, JOHN DOE AND MARY DOE,

Appellants,

JAMES HUBERT HALLFORD, M.D.,

Appellant-Intervenor,

—v.—

HENRY WADE,

Appellee.

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

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BRIEF OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE AMERICAN MEDICAL WOMEN'S ASSOCIATION, THE NEW YORK ACADEMY OF MEDICINE, AND A GROUP OF 178 PHYSICIANS AS *AMICI CURIAE*

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Vol. 2

(Additional *Amici* appear on inside cover)

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the New York Academy of Medicine, and the following physicians:
(*continued on inside front cover*)

INDEX

Table of Authorities

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Interest of *Amici Curiae*

The individuals whose names are appended hereto as *amici curiae* are deans and vice presidents of medical schools, heads of departments of obstetrics, gynecology

The American Psychiatric Association is a non-profit, tax exempt, scientific and educational medical organization, comprised of those 18,783 qualified Doctors of Medicine who specialize as psychiatrists in the diagnosis, care and treatment of mental diseases and defects of the mind. Abortions are of prime interest to psychiatrists because pregnancy, child bearing, birth and abortions can have material effects upon the mental processes of patients requiring psychiatric diagnosis, evaluation and care.

The Board of Trustees of the APA on December 12-13, 1969, upon recommendation of the Committee on Psychiatry and Law, approved the following:

"Position Statement on Abortion

A decision to perform an abortion should be regarded as strictly a medical decision and a medical responsibility. It should be removed entirely from the jurisdiction of criminal law. Criminal penalties should be reserved for persons who perform abortions without medical license or qualification to do so. A medical decision to perform an abortion is based on the careful and informed judgments of the physician and the patient. Among other factors to be considered in arriving at the decision is the motivation of the patient. Often psychiatric consultation can help clarify motivational problems and thereby contribute to the patient's welfare."

ARGUMENT

I.

The Statute* Is Unconstitutionally Vague.

A. *The Statutory "Saving Life" Test Is Void For Vagueness.*

Under Texas law, abortion is permitted only "for the purpose of saving the life of the mother." If, following the performance of an abortion, under this law, a physician is brought to trial and the jury disagrees with the physician's interpretation of the meaning of these quoted words, the physician is liable to imprisonment for from two to five years in the penitentiary.**

This Court has declared that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). "No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939). See also *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402-403 (1966). Under this standard the statute must fall, because *amici* respectfully submit that neither they, nor Dr. Hallford nor any other similarly situated physician receive proper

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* The criminal laws relating to abortion, i.e., 2A Texas Penal Code, arts. 1191-94, 1196 at 429-35, 436 (1961) are collectively referred to as "the statute."

** 2A Texas Penal Code, arts. 1191-94, 1196, at 429-35, 436 (1961).

notice from the statute of what acts and consultations in their daily practice of medicine will subject them to criminal liability. This Court's rejection of the vagueness argument in *United States* v. *Vuitch,* 91 Sup. Ct. 1294 (1971) does not vitiate the point in the instant case. In *Vuitch* the District Court rested its finding that the District of Columbia statute prohibiting abortions was vague on two grounds: first, that the burden of establishing that the decision to abort was within the statutory exception fell upon the accused physician in violation of the Fifth Amendment; and, second, that the statute prohibiting abortions except "as necessary for the preservation of the mother's life or health. . . ." * was vague for failing to make clear, *inter alia,* whether mental health as well as physical health was included. This Court held that the burden of pleading and proving that an abortion was not within the statutory exception fell not upon the defendant-physician, but upon the prosecutor, and that the term "health" included mental as well as physical well-being.

Amici rest their vagueness argument upon different grounds. *Amici* contend that the phrase "for the purpose of saving the life" is so indefinite and vague that physicians must guess at its meaning and do in fact differ as to the meaning of the phrase.** The word "save" has a broad range of possible meanings. The Random House Dictionary lists, *inter alia,* "to rescue from danger or possible harm, . . . to avoid . . . the waste of, . . . to treat carefully in order to reduce wear, fatigue, etc. . . ."

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* 22 D. C. Code 201.

** Calderone, Abortion in the United States, 34, 35, 52, 167 (1958).

The term "life" has been defined as:

> 1. "That state of animals and plants or of an organized being, in which its natural functions and motions are performed or in which its organs are capable of performing such function." Black, Law Dictionary (4th ed. 1951).

And as

> 2. "The sum of forces by which death is resisted." *Id.*

Life may mean the vitality, the joy, the spirit of existence, as well as merely not dying. The possible interpretations of the statute range therefore from a test requiring imminence of death to one which would permit abortion if desirable to preserve an enjoyable life, *i.e.,* a test under which the physician could consider the effect of pregnancy upon the quality of the patient's life and not merely upon the fact of life as not death. The statute forces the physician to decide at his peril whether a strict or liberal interpretation, or one in between, is the one intended by the statute. It forces him at his peril to make a decision which may be gainsaid by a jury of non-peer laymen whose guess will be as good as his as to the meaning of this statute. In sum the statute fails to provide the certainty required of penal laws.

B. *The Statute Mandates The Use Of A Test Which Is Inconsistent With The Best Medical Practice And Sets No Standards For The Application Of Its Test.*

Physicians have a professional obligation to preserve and advance the health of their patients. Assuming *arguendo* that the statute should be read as requiring a judg-

ment by the physician that without an abortion the patient will die, the statute conflicts with the physician's obligation because it commands him to ignore all the health interests of his patient with respect to termination of pregnancy unless he can predict that she will die without an abortion. Moreover, the statute does not tell the doctor what factors he may properly consider in making this prediction; nor how certain his prediction must be before he may decide to terminate his patient's pregnancy; nor how soon she must die if she does not have an abortion.

The process of predicting whether a person will die is highly complex. One of the factors in making such a prediction is the treatment given the patient. Often, alternative treatments are available to the doctor, and which treatment he will use depends on many factors and assumptions about his patient. The statute does not give the doctor any guidance as to the factors and assumptions he may take into account in determining if he may use termination of pregnancy to save his patient's life.

From a purely physiological viewpoint, other treatments than abortion may be available to save the life of the patient. However, doctors commonly must take account of factors that are not purely physiological. The factors that must be taken into account include: (1) the relative physical risk of alternative treatment, (2) the ability of a patient to sustain a rigid course of treatment, (3) her willingness to complete other treatment, (4) whether she will have good medical facilities available to her, (5) the doctor's own ability to effectively prescribe and complete alternative treatments, (6) the availability of alternative treatment from scarce specialists, (7) whether her mode of life will allow alternative treatment (*e.g.*, must she care for a family

or work, rather than take an extended rest cure), and (8) what she can afford.

In deciding whether he may terminate a woman's pregnancy, the doctor must guess at which of these factors he may consider in predicting whether abortion is necessary to save life, and he must guess at the relative weight he may give to any factor.

After examining his patient and considering all the information available to him, the physician may arrive at a probability that the woman will die if she does not have an abortion. The statute does not tell the doctor how certain of her death he must be before he may terminate her pregnancy. The statute does not tell him that he may terminate pregnancy only if it is more likely than not that she will otherwise die, or only if there is an even chance she will die, or only if there is a "significant" or "substantial" chance that she will die.

If a doctor predicts that a woman may die without an abortion, he may also be able to predict when she will die. Death may be imminent, it may come before delivery, it may come at or soon after delivery, or it may come some time after delivery. The only definite statutory requirements for an abortion appear to be that death be caused by continued pregnancy, and that death be sooner than if the woman did not complete her pregnancy. But almost any impairment of health will shorten life; continued pregnancy may impair a woman's health and shorten her life by some period of time. Her doctor then must guess at what life shortening must occur before he may terminate her pregnancy. He must guess whether the statute allows abortion only if his patient would otherwise die before de-

livery or if it is sufficient that her life would be significantly shortened thereafter.

If a patient threatens suicide, physicians do not know if they may rely upon the threat as a basis for abortion to save life. Psychiatric consultation may not be available because the woman may refuse such treatment. The non-psychiatrist may then be forced to evaluate the probability of suicide. The physician does not know how he may determine safely whether the patient is sincere in her threat. Furthermore, a woman who does not overtly threaten may be as inclined toward suicide as one who makes clear her threat. The non-psychiatrist doctor is not told whether he may consider suicidal tendencies whether they are stated by his patient, or not.

If a doctor may properly consider the fact that his patient may take her own life unless she receives an abortion, the question is opened whether he may consider the fact that she may seriously imperil her life by obtaining an illegal abortion. *See* WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 171 (1957). For a doctor to consider his patient's threat to obtain an illegal abortion by an unlicensed person is a logical step from his considering her threat of suicide, because such illegal abortions are extremely hazardous and are in fact a common cause of maternal deaths.

Physicians are unable to agree on the meaning of the statute because its words have no medical meaning. Medical standards have been established for treating patients and for terminating pregnancy as part of that treatment. The statute cuts across those standards and requires physicians to apply an unclear legal test which supersedes and may negate their medical judgment.

II.

The Texas Anti-Abortion Statute Infringes Upon Constitutionally Protected Fundamental Rights of Physicians and of Patients.

A. *The Statute Unconstitutionally Interferes With The Physician's Right To Practice Medicine.*

Unquestionably there is a constitutionally protected right to practice one's chosen profession.

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 238-9 (1957). See also *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96 (1963).

The practice of medicine clearly includes the treatment of pregnancy and its attendant conditions. The statute interferes with a physician's practice of medicine by substituting the mandate of a vague legalism for the doctor's best professional judgment as to the medically indicated treatment for his pregnant patients.

Physicians and surgeons in many special branches of medicine routinely make extremely serious decisions regarding their patients' best medical welfare, often with life or death in the balance. But those physicians treating pregnant women run the risk of criminal charges as the result of their professional decisions.

The statute unfairly discriminates against those physicians treating pregnant women and thus denies these physicians equal protection of the laws.

A criminal lawyer must often make weighty decisions on behalf of his client and sometimes the client's very life hangs in the balance. But no lawyer runs the risk of criminal prosecution and of being judged on his professional decisions by a jury of non-peer laymen.

The statute also burdens the physician-patient relationship in this situation with conflicting objectives, rendering candor and confidence impossible to achieve. Normally physician and patient share the same goal and work together in an atmosphere of mutuality and privacy toward that goal. In the situation of a pregnant woman seeking an abortion the physician-patient relationship deteriorates into an adversary proceeding with the patient trying to persuade and the physician trying to judge correctly to protect himself. Aarons, *Therapeutic Abortion and The Psychiatrist,* 124 Am. J. Psychiatry, 745 (1967).

B. *The Statute Deprives Patients Of Their Constitutionally Protected Right To Medical Treatment.**

The statute forbids all abortions except those necessary to save the life of the mother. Construing the statute to intend its narrowest possible meaning, *i.e.,* that abortions are lawful only when they will prevent certain and imminent death, it is clear that the operation of the statute may deny women abortions when the abortion would prevent injury or safeguard or preserve the patient's mental or physical health. Thus a woman suffering from heart disease, diabetes or cancer whose pregnancy worsens the underlying pathology may be denied a medically indicated therapeutic abortion under the statute because death is

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* Physicians have standing to assert the constitutional rights of their patients. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965). cf Hall v. D.

not certain. Such a patient is effectively denied a fundamental constitutional right reserved to her under the Ninth Amendment—the right to medical treatment.

In *Jacobson* v. *Massachusetts,* 197 U.S. 11 (1905) this Court upheld a compulsory vaccination law, on the ground that the State could validly require vaccinations under its police power to protect the public health from contagious disease. Anyone for whom the vaccination would pose a serious impairment of health would, however, be excepted from the statute's application. This Court held:

> "It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his health or body, would be cruel and inhuman in the last degree. We are not to be understood as holding that . . . the judiciary would not be competent to interfere and protect the health and life of the individual concerned." *Id.* at 38-39.

A state may not require that a citizen impair his or her health, even if the individual's right to good health and medical care infringes upon some legitimate state interest. The State of Texas may not in pursuit of its policy infringe upon the constitutionally protected right of its pregnant citizens to the medical treatment they require to maintain their good health.

The anti-abortion statute denies women their right to secure the best medical treatment available and, further, positively and seriously impairs their health by forcing them to turn to illegal abortionists, most of whom are not licensed physicians and do not have the most advanced and safest medical techniques available for their

use. Statistics are necessarily uncertain, but a frequent estimate is that over one million criminal abortions occur in the United States each year, resulting in an estimated 5,000 maternal deaths annually. Moritz & Thompson, *Septic Abortion,* 95 Am. J. Obst. & Gynec. 46 (1966); Bates & Zawadzki, Criminal Abortion 3 (1964).

That 5,000 American women a year should be denied medically safe procedures and thus be driven to their untimely deaths to avoid bearing unwanted children is unconscionable.

Death due to complications following illegal abortion procedures are only part of the problem. Many thousands of other women needlessly suffer serious infections following these procedures in addition to pain, suffering and emotional trauma.

C. *The State, Through The Physician, Denies Patients Due Process Because The Physician Making The Decision Has A Direct Personal Interest In Deciding Against Abortion.*

The State of Texas is ultimately responsible for the decisions not to terminate pregnancies made by physicians in the course of their private medical practices. The State is imposing its will upon the behavior of private parties and cannot claim these decisions are private ones. See *Lombard* v. *Louisiana,* 373 U.S. 267 (1963); *Peterson* v. *City of Greenville,* 373 U.S. 244 (1963); *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961).

The physician is not disinterested in the decision he renders; he cannot make an impartial decision. The State declares that if he wrongly decides that an abortion is necessary to save life, he will be subject to criminal penalties. It shocks one's sense of justice when the person

who administers the law stands to gain or lose personally by a decision he makes. If that person has a direct, personal, substantial, pecuniary interest in the decision it violates the Fourteenth Amendment to the Constitution. *Tumey* v. *Ohio,* 273 U.S. 510, 523 (1927). A doctor has a direct, personal, substantial interest for his decision may send him to jail.

Not only does the State prevent the physician from making an impartial decision about terminating his patient's pregnancy, it unfairly influences this decision in a shocking way. The State says that only if the physician wrongly decides that the operation is needed to preserve her life is he criminally liable. If he wrongly decides the operation is not needed to preserve her life, he is subject to no criminal penalties. The State of Texas thus requires that all errors in a doctor's evaluation of his patient's need for termination of pregnancy be on the side of her death.*

One of the oldest and most famous cases stating that an impartial decision is required by the basic precepts of law involved medical doctors. *Bonham's Case,* 8 Coke 113b, 77 Eng. Reprint 646 (1610); *see also Annotation, Judge, Interest in Fine or Penalty,* 50 ALR 1256 (1927). In *Bonham's Case,* Lord Coke held that a panel of doctors could not decide a case, as required by Parliament, in which they had a personal, pecuniary interest. Moreover, the necessity of an impartial decision has been confirmed by a New York Court reviewing the decision of a panel of doctors to per-

* That this is not merely suppositious is evident from the comments of doctors who have examined therapeutic abortion practices. See Rosen, Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy, 17 W. Res. L. Rev. 435, 443-444 (1965). See also Niswander, Medical Abortion Practices in the United States, 17 W. Res. L. Rev. 403, 418-419 (1965).

form an abortion. *McCandless* v. *State,* 166 N.Y.S. 2d 272 (Ct. Cl. 1956), *rev'd on other grounds and modified,* 3 A.D. 2d 600 (3d Dept. 1957), *aff'd* 4 N.Y.2d 797 (1958). In *McCandless,* the court stated that the decision to perform an abortion "should have been carried on by physicians and/or psychiatrists *whose only concern was the life of the patient.*" 166 N.Y.S. 2d at 276 (emphasis added).

A physician practising medicine under the Texas statute cannot keep as his sole concern his patient's life. A doctor would have to be superhuman if he were able to ignore the fact that his decision can be second-guessed by a jury which may totally disregard medical evidence. Therefore, his patient cannot receive the impartial decision required by due process of law.*

D. *The Statute Interferes With The Constitutionally Protected Right Of Patients To Privacy.*

The opinion of Mr. Justice Goldberg in *Griswold* v. *Connecticut,* 381 U.S. 479, 494 (1965) refers to the following statement of Mr. Justice Brandeis in his dissent in *Olmstead* v. *United States,* 277 U.S. 438 (1928) as "comprehensively summariz[ing] the principles underlying the Constitution's guarantees of privacy":

> "the makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the

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* *Amici* do not contend that a formal adversary hearing is required to meet the standards of due process. Within the legal bounds which might be established, *amici* believe that the decision is a medical one, requiring a technical, medical judgment. For this reason, an adversary hearing is not required by due process standards. See 1 DAVIS, ADMINISTRATIVE LAW TREATISE, 445-448 (1958). Due process however, does require an unbiased medical decision, where that decision determines whether a woman may live or die.

> most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." 277 U.S. at 478.

The right to "personal security" and "privacy" against unreasonable governmental intrusion has been consistently protected as a basic right. See, *e.g., Terry* v. *Ohio,* 392 U.S. 1 (1968); *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

> "[F]undamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969).

The freedom to be the master of her own body, and thus of her own fate, is as fundamental a right as a woman can possess.

The Texas statute, by forcing a woman to carry to full term an embryo—regardless of her wishes, her health, her circumstances, her finances, her family or her future—is the most severe and extreme invasion of her right to privacy.

She is forced to function as a baby factory for an unwanted child. In addition to the gross invasion by the state into a pregnant woman's physical autonomy, the law imposes enormous additional obligations on this woman toward her child once it is born. Furthermore, these obligations, involuntarily assumed, continue for many years throughout the child's minority.

This Court has repeatedly recognized the right to privacy in matters involving the family. Thus, matters involving child rearing (*Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Meyer* v. *State of Nebraska,* 262 U.S. 390 (1923)), marriage (*Loving* v. *Virginia,* 388 U.S. 1 (1967)) and child bearing (*Skinner* v. *Oklahoma,* 316 U.S. 535 (1942); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965)) have been held by this Court to involve fundamental rights not subject to abridgement by the state. The statute clearly has its major impact on intimate intra-family relations—compelling reproduction which is not wanted. Most abortions are obtained by married mothers. Rosen, *Psychiatric Implications of Abortion: A Study In Social Hypocrisy,* 17 W. Res. L. Rev. 435, 436 (1965).

Both the *Skinner* and *Griswold* cases dealt with the issue of the constitutionality of state regulation of the right to reproduce and on both occasions this Court acted to protect those rights from state interference.

It is unthinkable for a state to compel reproduction against a woman's wishes. The right of a woman to avoid pregnancy following conception has been recently recognized in State and Federal Courts.

People v. *Belous,* 71 Cal. 2d 996 (1969); *People* v. *Barksdale,* —— Cal. App. 3d ——, —— Cal. Rptr. ——, 1 Crim. 9526 (Calif. Dist. Ct. App. July 22, 1971); *Rogers* v. *Danforth,* No. 315512 (Mo. Cir. Ct., St. Louis, June 7, 1971); *Babbitz* v. *McCann,* 310 F. Supp. 293 (E.D. Wis. 1970), *per curiam, appeal dismissed, McCann* v. *Babbitz,* 400 U.S. 1 (1970); *Doe* v. *Bolton,* 319 F. Supp. 1048 (N.D. Ga. 1970) *supplemental opinion* Oct. 14, 1970 *per curiam, juris. postponed,* 402 U.S. —— (No. 971, 1970 Term; renumbered

70-40, 1971 Term); *Doe* v. *Scott,* 321 F. Supp. 1385 (N.D. Ill. 1971), *appeal docketed sub nom. Hanrahan* v. *Doe,* 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (No. 1522, 1970 Term; renumbered No. 70-105, 1971 Term). This Court should not fail to protect the fundamental constitutional right of women to decide whether they want to have children.

CONCLUSION

For the reasons hereinabove stated, it is respectfully requested that the relief sought by appellants and the appellant-intervenor be granted.

Respectfully submitted,

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