14

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 70-18, 1972 TERM

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

v.

HENRY WADE,
DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS
Appellee

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

SUPPLEMENTAL BRIEF FOR APPELLANTS

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INDEX

TABLE OF AUTHORITIES

Statutes:

Cases:

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STATEMENT

The instant case was argued before this Court on December 13, 1971. It is a direct appeal from the decision of a three-judge federal panel declaring the Texas abortion law to be unconstitutional but refusing to grant injunctive relief and denying standing to Appellants Doe.

On June 27, 1972, the case was restored to the calendar for reargument. 40 U.S.L.W. 3617. Reargument is scheduled for October 11, 1972.

Several pertinent decisions have been rendered since the submission of Appellants' original brief. This supplemental brief is submitted to inform the Court of those decisions.

REQUEST FOR INJUNCTIVE RELIEF.

As to their request for injunctive relief, Appellants would once again point out that the injunction requested was one against *future* prosecutions only. Appellant Hallford had *not* requested injunctive relief to prevent continuation of the state criminal charge pending against him.

THE CONTINUING SITUATION IN TEXAS.

Despite the District Court holding in June, 1970, that the Texas abortion law is unconstitutional, in November, 1971, the Texas Court of Criminal Appeals (Texas' highest criminal court), in *Thompson v. State,* No. 44,071 (Tex. Ct. Crim. App., Nov. 2, 1971), *petition for cert. filed,* 40 U.S.L.W. 3532 (U.S. March 20, 1972) (No. 71-1200), rendered a decision which directly contradicted that of the District Court. Without interpreting the abortion statute, the Texas court held that the Texas law was not vague. It specifically did not reach the issue of privacy but held that the State has a compelling interest in protecting the fetus through legislation.

Since the District Court refused to grant injunctive relief and since there is now a direct dichotomy between state and federal decisions, Texas physicians continue to refuse to perform abortions for fear of prosecution. During the last nine months of 1971, 1,658 Texas women travelled to New York to obtain abortions. Texas women continue to be unable to obtain abortion procedures in Texas and thereby continue to suffer irreparable injury.

ACTIONS REGARDING ABORTION.

At its 1972 Midyear Meeting, the American Bar Association House of Delegates approved the Uniform Abortion Act as drafted by the National Conference of Commissioners on Uniform State Laws. 58 A.B.A.J. 380 (1972). The Uniform Abortion Act allows termination of pregnancy up to twenty

weeks of pregnancy and thereafter for reasons such as rape, incest, fetal deformity, and the mental or physical health of the woman.

The Rockefeller Commission on Population and the American Future has recommended that the matter of abortion should be left to the conscience of the individual concerned. *Abele v. Markle,* 342 F. Supp. 800, 802 (D. Conn. 1972).

ARGUMENT

I.

RECENT CASES SUPPORT APPELLANTS' CONTENTIONS REGARDING STANDING.

In the oral argument before the three-judge panel, the attorney for Henry Wade, the sole defendant herein, admitted that Appellant Dr. Hallford has standing and that Appellant Roe has standing as an individual and as the representative of the class. (A. 104). The defendent-appellee did not accede standing to John and Mary Doe.

Several recent cases support Appellants' arguments regarding standing.

This Court, in *Eisenstadt v. Baird,* 405 U.S. 438 (1972), held that Appellee Baird had standing to assert the rights of unmarried persons denied access to contraceptives even though he was not a physician or pharmacist and was not an unmarried person denied access to contraceptives.

Just as Baird was allowed to raise the rights of persons who were affected by the statute but who were not subject to prosecution thereunder, here Appellant Hallford should be allowed to raise, in addition to his own constitutional claims, the claims of women who are vitally affected by the Texas abortion law but not subject to prosecution thereunder.

Young Women's Christian Association v. Kugler, 342 F.Supp. 1048 (D.N.J. 1972), declared the New Jersey abortion laws unconstitutional. Such laws prohibited persons from causing miscarriage "without lawful justification."

Saying that "the alleged deprivations of constitutional rights depend upon the contingency of pregnancy," 342 F.Supp. at 1056, the Court dismissed all the women plaintiffs since none had alleged pregnancy. There is no indication that any had alleged status as persons wishing to give advice or assistance to women seeking abortions.

The Court recognized that all the physician plaintiffs, two of whom had lost their licenses to practice medicine and one of whom was incarcerated at the time of the action, had standing to raise the constitutional questions both on behalf of and pertaining to themselves and their women patients.

The plaintiff physicians alleged that they had been forced to turn away patients seeking advice and information about the possibility of obtaining abortions, as have Dr. Hallford and the class he represents in the instant case. Dr. Hallford and his fellow physicians are also subject to prosecution under the law if they should perform an abortion that a jury finds was not for the purpose of saving the life of the woman.

Dr. Hallford should be recognized to have standing to litigate the constitutional claims of his class of physicians and those of women patients.

In *Abele v. Markle,* 342 F.Supp. 800 (D. Conn. 1972), the Connecticut anti-abortion statutes were declared to be unconstitutional. Much like the Texas law, the statutes prohibited all abortions except those necessary to preserve the life of the mother or fetus. Prior to the District Court's consideration of the merits the Circuit Court held that pregnant women and medical personnel desiring to give advice and aid regarding abortions had standing to challenge the statute. *Abele v. Markle,* 452 F.2d 1121 (2 Cir. 1971).

In this Texas case, Appellant Jane Roe was pregnant when the action was filed. Appellants John and Mary Doe in their complaint outlined their desire to actively participate in organizations giving advice and counselling regarding abortions, along with information to specifically assist in securing abortion. (A. 18). Although the Connecticut abortion laws more specifically applied to giving aid, advice, and encouragement to bring about abortion, Texas law is such that Appellants Doe have been effectively stopped from giving such aid, advice, and encouragement for fear of being subjected to prosecution under either 1 TEXAS PENAL CODE art. 70 (1952) as accomplices to the crime of abortion, or 3 TEXAS PENAL CODE art. 1628 (1953) for conspiring to commit the crime of abortion. (A. 19).

Like the Connecticut medical personnel desiring to give advice and aid regarding abortions, Appellants Doe should be recognized to have standing to challenge the Texas law.

In *Poe v. Menghini,* 339 F.Supp. 986 (D. Kan. 1972), the three-judge panel recognized that two women who were pregnant when the action was commenced and a doctor had standing to challenge certain restrictions applicable to the performance of abortions. In the instant case, Appellant Jane Roe, who was pregnant when the action was commenced, and Appellant Dr. Hallford would correspondingly have standing to challenge the Texas abortion laws.

Beecham v. Leahy, 287 A.2d 836 (Vt. 1972), declared unconsitutional the Vermont abortion law which, like Texas law, made abortion a criminal offense unless the same is necessary to preserve the life of the woman. The Vermont statute stated that the woman was not liable to the penalties prescribed by the section.

The plaintiffs in *Beecham* were an unmarried pregnant woman who wanted an abortion and a physician who, except for the law, was willing to terminate the pregnancy but who had not done so and who (unlike Appellant Dr. Hallford) was not the subject of pending state criminal action. The Court held that the unmarried pregnant woman had standing but that the physician did not. There is no indication in the opinion as to whether or not the physician sought to adjudicate the rights of his patients, which other cases have allowed.

Regarding the woman the Court said:

> By reducing her rights to ephemeral status without confronting them, the ability of the plaintiff to produce a case or controversy in the ordinary sense is likewise frustrated. She cannot sue the doctor for an action by him that cannot be compelled. She is not herself subject to legal action, by statutory exemption. Yet a very real wrong, in the eyes of the law, exists. . . . Therefore, . . . we declare that she is entitled to proceed in her action founded on her petition. . . .

287 A.2d at 840. Appellant Jane Roe was similarly found by the lower court to have standing. She, too, was pregnant, had

sought but been unable to find a physician to terminate the pregnancy, was not subject to state prosecution, and yet had suffered a very real wrong.

II.

THE RIGHT TO SEEK AND RECEIVE MEDICAL CARE FOR THE PROTECTION OF HEALTH AND WELL-BEING IS A FUNDAMENTAL PERSONAL LIBERTY.

As shown in the original brief of Appellants, the Texas abortion law effectively denies Appellants Jane Roe and Mary Doe access to health care.

Although under Texas case law it is not a crime for a pregnant woman to terminate her own pregnancy or to persuade someone else to perform an abortion on her, the Texas law effectively denies her the assistance of trained medical personnel in doing what she is otherwise legally allowed to do.

The Supreme Court of Vermont, in *Beecham v. Leahy, supra,* observed that:

> On the one hand the legislation, by specific reference, leaves untouched in the woman herself those rights respecting her own choice to bear children now coming to be recognized in many jurisdictions. . . . *Yet, tragically, unless her life itself is at stake, the law leaves her only to the recourse of attempts at self-induced abortion, uncounselled and unassisted by a doctor, in a situation where medical attention is imperative.*

287 A.2d at 839 (emphasis added).

The woman is guilty of no crime in Texas, although by case law rather than by statute. Tragically, Texas women are effectively prevented from securing the services of a doctor when medical expertise and experience is imperative to avoid such pitfalls as the piercing of the uterine wall and infection. By preventing the availability of medical assistance, the state effectively endangers the health and well-being of citizens in direct contravention of their best interests and fundamental rights.

III.

THE TEXAS ABORTION LAW VIOLATES FUNDAMENTAL RIGHTS OF PRIVACY.

As the opinion of this Court in *Eisenstadt v. Baird, supra,* states:

> If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or begat a child.

405 U.S. 438.

In *Vuitch v. Hardy,* Civil No. 71-1129-Y (D. Md. June 22, 1972), the Court stated: "However, this Court is convinced that a woman does have a constitutionally protected, 'fundamental personal right' to seek an abortion," citing *Griswold* and the above language from *Eisenstadt.*

Y.W.C.A. v. Kugler, supra, resulted in the New Jersey abortion law being declared unconstitutional in part as a violation of rights of privacy.

> The scope of interests found to be constitutionally protected by the Supreme Court demonstrates that it views both the sanctity of the individual's person and his relationships within a family as so vital to our free society that they should be ranked as fundamental, or implicit in the concept of ordered liberty.

342 F.Supp. at 1071.

> Accordingly, we are persuaded that the freedom to determine whether to bear a child and to terminate a pregnancy in its early stages is so significantly related to the fundamental individual and family rights already found to exist in the Constitution that it follows directly in their channel and requires recognition. Whether a constitutional right of privacy in this area is conceptualized as a family right, as in *Griswold,* as a personal and individual right, or as deriving from both sources is of no significance and applies equally to all women regardless of marital status, for the restriction on abortion by the New Jersey statutes immediately involves and interferes with the protected

> areas of both family and individual freedom. Hence we hold that a woman has a constitutional right of privacy recognizable under the Ninth and Fourteenth Amendments to determine for herself whether to bear a child or to terminate a pregnancy in its early stages, free from unreasonable interference by the State.

342 F.Supp at 1072.

The fundamental impact of the question of abortion on women was emphasized by the *Abele* Connecticut panel:

> The decision to carry and bear a child has extraordinary ramifications for a woman. Pregnancy entails profound physical changes. Childbirth presents some danger to life and health. Bearing and raising a child demands difficult psychological and social adjustments. The working or student mother must curtail or end her employment or educational opportunities. The mother with an unwanted child may find that it overtaxes her and her family's financial or emotional resources. *Thus, determining whether or not to bear a child is of fundamental importance to a woman.*

342 F.Supp. at 801 (emphasis added).

As the lower Court found in the instant case, the Texas abortion law must be declared unconstitutional because it deprives women of their right, secured by the Ninth and Fourteenth Amendments, to choose whether or not to carry a pregnancy to term.

IV.

THE TEXAS STATUTE DOES NOT ADVANCE ANY STATE INTEREST OF COMPELLING IMPORTANCE IN A MANNER WHICH IS NARROWLY DRAWN.

The legislative purposes that the Texas abortion law was meant to serve are not altogether clear. No legislative history specifically applicable to Texas is available.

Appellee during the oral argument before the lower court said the State has only one interest, that of protecting the

unborn (A. 104-05). Appellee's brief and Dec. 13th argument before this Court advance no other State interest.

It is important to note that Appellee gives no authority whatsoever that even tends to establish that the purpose of the Texas legislature in adopting the abortion law was in fact what Appellee suggests.

On the other hand, Appellants' original brief establishes that the legislative purpose in other states was to protect the pregnant woman from the dangers of antiseptic surgery.

Further *Watson v. State,* 9 Tex. App. 237 (Tex. Crim. App. 1880), states that the *woman* is the *victim* of the crime of abortion.

People v. Nixon, Dkt. No. 9579 (Ct. App. 2 Div., Aug. 23, 1972), involved a challenge to the constitutionality of the Michigan abortion statute making criminal actions to terminate a pregnancy unless the same was necessary to preserve the life of the woman. The Court concluded that the "so-called 'abortion' statute was not intended to protect the 'rights' of the unquickened fetus" but rather that the obvious propose was to protect the pregnant woman.

The Court pointed out that the woman was not subject to prosecution for self-induced abortion and concluded:

> . . . it must be assumed that the harm the statute was attempting to punish ran only to the woman and not to the fetus. If the statute were intended to protect the continued existence of the fetus, then there would be no reason for exempting the woman from prosecution.

Opinion at 4, n.9.

Similarly, since self-abortion is not a crime in Texas, it is not logical to assume that the purpose of the legislature in passing the so-called "abortion" law was to protect the fetus. It is logical that the legislative purpose was to protect the woman and her health.

Appellants' original brief establishes that the Texas abortion law no longer serves to protect the health of the pregnant woman; in fact it is a hindrance to health.

Even if Appellee could establish that the legislative purpose of the Texas abortion law was to protect the life of the unborn, the state certainly cannot meet its burden of proving that the statute now has a compelling interest in such regulation nor that the law is sufficiently narrow.

The fetus, as such, is not and never has been protected in Texas, with the possible exception of the abortion statutes. In Texas, the so-called protections for the "unborn child" are dependent on the live birth of the child. Thus under Texas law, once born a child may have rights retroactive to the time prior to birth but such rights are meant to benefit those who have survived birth.

Under the criminal laws of Texas, the fetus is given little protection. Self-abortion is not a crime, and the pregnant woman who seeks or receives the help of others in terminating her pregnancy is guilty of no crime. Even the severity of the penalty for another having performed an abortion depends upon whether or not the woman consented to the procedure.

To destroy the life of a fetus has never been considered as homicide in Texas. In order to obtain a murder conviction, the state must " . . . prove that the child was born alive; (and) that it had an existence independent of the mother. . . ." *Harris v. State,* 28 Tex. App. 308, 309, 12 S.W. 1102, 1103 (1889). In *Wallace v. State,* 7 Tex. App. 570, 10 S.W. 255 (1880), the mother strangled her child with string. The court overturned her murder conviction, saying that the state failed to prove either that the child was born live or that the actual childbirth process had been completed before the child was killed.

Texas courts are not alone in following the common law rule that a child must be born alive to be the subject of the crime of murder. *State v. Dickinson,* 28 Ohio St. 2d 65, 275 N.E.2d 599 (1971); *Keeler v. Superior Court,* 2 Cal. 3d 619, 470 P.2d 662, 87 Cal. Rptr. 481 (1970); *Clark v. State,* 117 Ala. 1, 23 So. 671 (1898); *Abrams v. Foshee,* 3 Clark 274 (Iowa 1856). In those cases where a person has actually been convicted of a crime for causing the death of a fetus, it has not been under the regular homicide statute but under some special statutory provision,

such as a feticide statute. Most feticide statutes have as one of their essential elements a *malicious intent to kill the mother. Passley v. State,* 194 Ga. 327, 21 S.E.2d 230 (1942); *State v. Harness,* 280 S.W.2d 11 (Mo. 1955). An intent to cause a miscarriage without an intent to kill the woman would not be sufficient to sustain a conviction of feticide. The penalties under such statutes are also generally lighter than those prescribed by the homicide laws.

Viewed from another angle, there are ironical contradictions between some Texas criminal laws and the abortion law. As stated in *Abele v. Markle, supra,* "(t)he statutes force a woman to carry to natural term a pregnancy that is the result of rape or incest. Yet these acts are prohibited by the state at least in part to avoid the offspring of such unions." 342 F.Supp at 804.

Similarly, Texas makes rape and incest criminal offenses, 2A TEXAS PENAL CODE, art. 1183 at 372 (1961), and 1 TEXAS PENAL CODE, art. 495, at 553 (1952), and prohibits the marriage of persons closely related, TEXAS FAMILY CODE section 2.21, at 17 (1971). Persons who have any infectious condition of syphilis or other veneral disease cannot obtain a marriage license. TEXAS FAMILY CODE, sections 1.21, at 9, and 1.31 at 11 (1972).

The fetus gets no more protection under Texas tort laws than it does under Texas criminal laws. The Texas courts did not recognize a right to recover for injuries received prior to birth until 1967 (113 years after the Texas abortion law was enacted) in *Leal v. C.C. Pitts Sand and Gravel, Inc.,* 419 S.W.2d 820 (Tex. 1967). *Leal* involved a wrongful death action brought by the parents of a child who died two days after birth as the result of pre-natal injuries received in an automobile collision. In allowing the wrongful death action, the Texas Supreme Court held that the child, *had it lived,* could have maintained an action for damages for the pre-natal injuries.

In *Delgado v. Yandell,* 468 S.W.2d 475 (Tex. Civ. App. 1971), *appr. per curiam,* 471 S.W.2d 569 (1971), the Texas Supreme Court approved the holding of the Court of Civil Appeals that a cause of action does exist for pre-natal injuries

sustained at any pre-natal stage *provided the child is born alive and survives.* The damages in such a case are not paid to the fetus; they are compensation to a *living* child for having to spend all or a part of his life under a disability caused prior to birth by another's wrongful act.

Thus the claimed "rights" of the fetus in the tort area are actually rights which may only be exercised by a live child after birth or are the right of bereaved potential parents to be compensated for their loss.

Though much has been written concerning the property rights of the fetus, these rights are really legal fictions which have developed to protect the rights of living children. In order to receive the benefit of its supposed rights, the fetus must be born alive. There has never been a case in Texas where a fetus which was stillborn or destroyed through miscarriage or abortion has been treated as a person for the purpose of determining property rights. When certain kinds of inheritances are involved, even unconceived children can be considered to have some property "rights" in that they may receive a legacy on their subsequent birth. *Byrn v. New York City Health & Hospitals Corp.,* No. 210 72 (Ct. App. 1972). However, this has not prevented the United States Supreme Court from finding a constitutional right on the part of a woman to practice contraception. *Griswold v. Connecticut,* 381 U.S. 479 (1965).

There are other areas where Texas does not treat a fetus as a person. For example, under the rules of the Texas Welfare Department, a needy pregnant woman cannot get welfare payments for her unborn child. The state compels the birth of the child, yet does not provide the assistance often needed to produce a healthy child.

Texas does not regard the fetus as a person and has made no attempt to put the fetus on an equal footing with a living child.

Several courts have recently dealt directly with the question of whether the fetus is a person within the meaning of the United States Constitution. Arguably this Court's opinion in

Vuitch implicitly rejected the claim that the fetus is a person under the Fifth and Fourteenth Amendments.

McGarvey v. Magee-Womens Hospital, Civil Action No. 71-196 (W.D.Pa. Mar. 17, 1972), held that the embryo or fetus is not a person or citizen within the meaning of the Fourteenth Amendment or the Civil Rights Act.

In *Byrn v. New York City Health & Hospitals Corp., supra,* the issue was whether children in embryo are and must be recognized as legal persons or entities entitled under the State and Federal Constitutions to a right to life. The Court's conclusion was that the Constitution does not confer or require legal personality for the unborn.

The Appellee has failed to produce any authority for the proposition that the fetus is considered a person under the Constitution. There is evidence in the Constitution that "person" applies only to a live born person. The clause requiring a decennial census says "the whole Number of * * * Persons" in each state must be counted. U.S. Const. Art. I, § 2, Cl. 3. From the first census in 1790 to the present, census takers have counted only those born. Means, *The Phoenix of Abortional Freedom,* 17 N.Y.L. Forum 335, 402-03 (1971).

Although on its face, the Texas abortion law applies any time after conception, the Brief for Appellee submitted to this Court at page 30 states:

> It most certainly seems logical that from the stage of differentiation . . . the fetus implanted in the uterine wall deserves respect as a human life.

Here Appellee seems to suggest that the law should apply instead only after implantation. Yet on page 32 Appellee devotes a paragraph to describing the "child" during the seven to nine days *before* implantation. During oral argument Appellee suggested that Texas hospitals intervene to terminate pregnancy when a rape victim is brought in (Tr. 47-48), although there is no exception for rape in the Texas statute.

Appellee's ambivalence is but one indication that the statute does not evidence a compelling interest which could not be protected by less restrictive means.

V.

THE TEXAS ABORTION LAW IS UNCONSTITUTIONALLY VAGUE.

In *Thompson v. State, supra,* the Texas Court of Criminal Appeals upheld the conviction of a physician who allegedly had performed an abortion. The court held, relying on *United States v. Vuitch,* 402 U.S. 62 (1971), that the Texas abortion law was not vague.

The Court in *Thompson* erred. Whether or not a statute is vague is to be determined from the standpoint of the person who is considering performing an act. The Supreme Court in *Vuitch* emphasized that a doctor's day-to-day task was one of consideration for the *health* of his patients; the District of Columbia statute allowed physicians to act to preserve the life or *health* of patients. Texas, however, allows physicians to act only when necessary to protect *life;* that is not the sort of criteria physicians are accustomed to dealing with. From the physician's standpoint, as the District Court in this case pointed out, there are many uncertainties inherent in the language of the statute. *Vuitch* is not authority for upholding the Texas abortion law.

Further, in *Vuitch* the Court upheld the D. C. statute as interpreted by lower courts to include both mental and physical health. In Texas there has been no interpretation of the Texas statute. *Thompson* does not even discuss application of the statute.

Recent decisions have declared laws in New Jersey and Florida to be unconsitutionally vague. In *Y.W.C.A. v. Kugler, supra,* a federal panel declared vague the New Jersey statute against performing an abortion "without lawful justification." Florida's statute against performing an abortion "unless the same shall have been necessary to preserve the life of the mother" was declared unconstitutionally vague by the Florida Supreme Court in *State v. Barquet,* 262 So.2d 431 (1972).

The Florida court stated that "if the statutes contained a clause reading 'necessary to the preservation of the mother's life *or health*' instead of the clause 'necessary to preserve *the* life,' the statutes could be held constitutional. . . ." 262 So.2d at 433.

Chaney v. Indiana, No. 1171 S 321 (Ind. July 24, 1972), however, rejects the vagueness arguments as to a non-medical person.

VI

THE TEXAS ABORTION LAW PLACES AN UNCONSTITUTIONAL BURDEN OF PROOF ON THE PHYSICIAN.

Appellant's original brief details the unconstitutionality of placing upon the physician charged with allegedly performing an abortion the burden of showing that the procedure was necessary for the purpose of saving the life of the woman. Although the burden of proof issue was not before them, the Texas Court of Criminal Appeals in a footnote in *Thompson, supra,* recognized that the *Vuitch* case does call into question the validity of Texas' statutory scheme as to who has the burden of proof on the exemption.

CONCLUSION

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

Respectfully submitted,

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