these considerations, this Court has affirmed time and again that when absolutely necessary to protect federal rights the policy may be set aside. Certainly one basic factor to be considered in determining whether such absolute necessity exists is the availability of a state remedy by which one whose rights are affected may test the allegedly unconstitutional statute.

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

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

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

While the Texas Supreme Court recently held in *Passel* v. *Fort Worth Independent School District,* 440 S.W.2d 61 (1969), that it would be possible in the case of an unconstitutional statute to obtain an injunction even though only personal rights are involved, the opinion pointed out that

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

in that case the plaintiffs were not seeking to enjoin prosecutions. *Id.,* at 63.

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

As might be expected there are problems concerning the precedential value of one court's opinion over the other. A dramatic illustration of the problem may be found in *Barnes* v. *State,* 170 S.W. 548, 554 (Tex. Crim. App. 1914),

where the Court of Criminal Appeals was dealing with a penal statute which had been ruled constitutional by the State Supreme Court. The Court of Criminal Appeals pointed out that the two courts were of equal dignity, said the Supreme Court's opinion was not binding in any way, and held the statute to be unconstitutional.

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

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

Under the *holdings* of this Court, the special considerations and facts present in this case make it one in which federal intervention by injunction is both necessary and proper. The fact that all plaintiffs brought class actions; that no injunction against pending prosecutions was asked; that even if injunctive or declaratory relief might be considered improper in Dr. Hallford's case because of the decision in *Samuels* v. *Mackell,* 401 U.S. 66 (1971), plaintiffs Doe and Roe are claiming rights which are distinct from those of Dr. Hallford and do not and should not have to rely upon him to vindicate those rights; and finally that while Dr. Hallford may have some oppor-

tunity to present his claims at the defense of his prosecution, Plaintiffs Doe and Roe have no opportunity whatsoever to test the statutes either by incurring prosecution or seeking state adjudication of their rights, leave no doubt that the *actual holdings* of this Court do not foreclose *all* of the plaintiffs.

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

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

In the present case, Plaintiffs Roe and Doe initially brought their actions with no knowledge of the prosecution pending against Dr. Hallford. Because of his intervention the fact became apparent. Were there other

prosecutions pending in other parts of the state? At the time the actions resulting in *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), were brought, were there other, *good-faith* prosecutions pending in another part of the state? Must a federal plaintiff in Texarkana, Texas, ascertain that the statute he is contesting is not the basis of a prosecution in El Paso, Texas, 780 miles away and must the three-judge court also determine that fact? Obviously, if the statute in question has any vitality at all, there is always the danger that somewhere a state prosecution is pending which will be "affected," if not legally then psychologically, by either an injunction or declaratory judgment.

The special concerns over friction between the Federal and State judiciaries do not dictate that injunctions against future prosecutions should never issue when there is a pending state prosecution dealing with the statute in question. Obviously, in the situation posed in *Steffanelli* v. *Minard,* 342 U.S. 117 (1951), and *Cleary* v. *Bolger,* 371 U.S. 392 (1963), friction would be imminent, for the arm of the federal government would literally be interjected into the state court room to pluck out all or part of the case. It is easy to see why such an action would be unseemly. However, in the case of a federal injunction against future prosecutions issued while a prosecution concerning the statute dealt with in the federal action is in process, the state judge may use his own discretion. If he agrees with the interpretation of the federal court, he may stay proceedings pending this Court's review of the injunction and avoid the possible waste of both his time and that of everyone else concerned. If not, he may proceed in the belief that the federal court's ruling on the statute will be reversed.

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

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

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

While it seems likely that eventually the question of whether a woman has a right to an abortion will reach this Court in the context of review of a criminal conviction, that process might very well entail the convening of countless state courts, both trial and appellate, the assembling of countless jurors, and the occupation of countless prosecutors, not to mention the untold anxiety, expense and

humiliation of those physicians willing to offer themselves as potential sacrificial lambs to test the statutes.

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

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

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

sion" of a federal court, he may well welcome the end to his moral quandry—the reprieve from his threatened violation of oath and conscience.

On the state appellate level, the considerations involving the "politicization of the judiciary" also apply since, in Texas, all judges are elected. Also, should the Texas Court of Criminal Appeals hold the statute unconstitutional, the State must either violate Article 5, §26 of the Texas Constitution, which provides that the State shall have no appeal in a criminal case, by appealing the decision to this Court, or let the matter rest.

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

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

The three-judge court was presented with allegations and uncontroverted facts that set up a class action in which the right of women to have an abortion was claimed. The affidavit of a medical expert, whose qualifications and opinions were uncontroverted by any evidence from the defendant-district attorney, stated that physicians in Texas refused to do abortions because of fear of jeopardizing their careers. Were abortions legal, the physician-expert stated that he and other physicians would perform them. Affidavit of Paul C. Trickett, M.D. (A. 54-55). Plaintiff-Intervenor Dr. Hallford also testified by way of affidavit that physicians in the Dallas area feared criminal prosecution under the abortion statutes and for that reason refused to do abortions (A. 67). The Court below found that:

> "Since the Texas Abortion Laws infringe upon plaintiffs' fundamental right to choose whether to have children, the burden is on the defendant to demonstrate to the satisfaction of the Court that such infringement is necessary to support a compelling state interest. The defendant has failed to meet this burden." *Roe* v. *Wade,* 314 F. Supp. 1212, 1222 (1970) (A. 118, 119) [footnotes omitted].

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

In explaining the denial of injunctive relief, the Court below quoted from *Dombrowski* v. *Pfister,* 380 U.S. 479, 484-485 (1965):

> "It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." *Roe, supra* at 1224 (A. 122).

However, it is precisely the "mere possibility of erroneous initial application of constitutional standards" that effectively forecloses any possibility of the women within the classes represented being able to obtain an abortion. Having obtained an affirmance of their rights these women must still depend on the willingness of physicians to risk prosecution if state officials choose to ignore the declaratory judgment. If the women themselves were subject to prosecution, at least some of them might be willing to take the risk. But they must rely upon strangers for help. In view of the fact that a declaratory judgment "neither mandates nor prohibits state action" *Perez* v. *Ledesma,* 401 U.S. 82, 124 (1971) (Brennan, *J.*) individual physicians, having no personal issue at stake, would be foolhardy to risk performing an abortion.

In fact, the declaratory judgment was ignored, as is evidenced by the affidavits of the chairmen of obstetrics and gynecology (Appendices B, C, D at B-1, C-1, D-1) letter from Defendant's office, Appendix A at A-1 and indictments brought since the Three-Judge Court's judgment (Appendix E at E-1). No facts or pleadings were

presented to the Court below that could have led to any conclusion but that such would be the case.

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

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

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

III.

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

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

Although appellants technically "won" the issue of declaratory relief in the Court below, they join with appellee in urging this Court to decide the merits and constitutionality of the Texas abortion statute, regardless of its decision on other aspects of the case. That such action is within this Court's jurisdiction is illustrated by its action in the case of *Carter* v. *Jury Commission of Greene County,* 396 U.S. 320 (1969). There, the plaintiffs had requested (1) a declaration that qualified Negroes were systematically excluded from grand and petit juries; that the Alabama statutes governing jury selection were unconstitutional and that the jury commission was a deliberately segregated agency; (2) injunctions forbidding systematic exclusion of Negroes and the enforcement of the jury selection statutes; and, (3) an order vacating the appointments of the Governor to the commission. The

three-judge district court found that Negroes were being excluded and enjoined their systematic exclusion. The plaintiffs appealed the denial of injunctive relief against the jury selection statute and the Governor's appointments. In affirming the District Court, this Court not only discussed the questions concerning the constitutionality of the jury selection statute and the Governor's appointments, but also discussed the merits of the district court's finding of systematic exclusion and the injunction against that exclusion. No mention of appeal by the defendants from the granting of the injunction against systematic exclusion is made, so that theoretically the issue was not before the Court.

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

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

The statutes here were attacked on the basis of: overbroad denial of the fundamental rights of privacy, choice as to giving birth to children, to seek health care, and to practice medicine without arbitrary restraint; vagueness; and denial of due process concerning burden of proof. It is certain that appellee will base a major portion of his argument on a defense of the statutes, so as to insure that all of the issues above are fully briefed and argued

before the Court thus meeting the requirements set out in *Dandridge* v. *Williams,* 397 U.S. 471, 475, n. 6. (1970).[64]

Thus the question hinges, not on this Court's power to reach the merits, but on whether the judicial inefficiency and confusion which will result from its failure to do so outweigh the professed doctrine that the Court will usually avoid reaching a constitutional issue if possible. This Court's willingness to consider the effect of a decision upon pending cases in state and federal courts was illustrated last term in Mr. Justice Black's opinion in *United States* v. *Vuitch,* 402 U.S. 62 (1971).

> "In the last several years, abortion laws have been attacked as unconstitutionally vague in both state and federal courts with widely varying results. A number of these cases are now pending on the docket. A refusal to accept jurisdiction here would only compound confusion for doctors, their patients, and law enforcement officials. As this case makes abundantly clear, a ruling on the validity of a statute applicable only to the District can contribute to great disparities and confusion in the enforcement of criminal laws." 402 U.S. at 66.

The confusion spoken of in *Vuitch* has not subsided. The abortion laws of Texas,[65] Wisconsin,[66] Illinois,[67] Cali-

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

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

[65] The present case.

(footnotes continued on following page)

fornia,[68] and Georgia[69] have been partially or completely declared invalid as denying fundamental rights, while abortion laws in Ohio,[70] Louisiana[71] and North Carolina[72] have been upheld. At least three appeals involving physicians indicted for violations of abortion statutes are presently pending in state courts.[73]

Appellants respectfully submit that nothing will be gained by another round of consideration by lower courts. It seems obvious that, rather than reaching a consensus, the federal district courts will continue to split on the question. It also seems obvious that this difference of opinion will carry over to the courts of appeals if they are

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

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

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

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

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

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

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

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

required to decide the issue. Considering its effect on the area of marital relations, illegitimacy, poverty, women's rights, women's mental and physical health, mentally and physically deformed children, and the practice of medicine, the question of abortion potentially and actually affects virtually every person in the United States. The question itself compels an answer and appellants urge this Court to reach the merits.

IV.

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

As former Supreme Court Justice Tom C. Clark has said:

> "The result of [Griswold and its predecessors] is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children, and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution." Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal,* 2 LOYOLA UNIV. (L.A.) L. REV. 1, 8 (1969).

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

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

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

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

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

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

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

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

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

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

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

Appellants contend that fundamental rights[81] entitled to constitutional protection are involved in the instant case,

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

[81] The complaints of appellants invoked the jurisdiction of the district court under the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments (A. 10-11, 15-16, 24). The district court confined its consideration to the Ninth Amendment and vagueness arguments and did not pass upon the "array of constitu-

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

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

In *Jacobson* v. *Massachusetts,* 197 U.S. 11 (1904), the defendant resisted his conviction under a compulsory vaccination statute by asserting "the inherent right of every freeman to care for his own body and health in such way as to him seems best." 197 U.S. at 26. Appropriately, this Court responded that liberties secured by the Constitution are not wholly free from restraint and found the dangers of widespread smallpox justified the statute. Far from downgrading the importance of defendant's asserted rights, however, the Court repeatedly emphasized the imminence of pervasive disease; "the evils of smallpox . . .

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tional arguments" (A. 116). Appellants have chosen in this brief to stress the application of the First, Ninth, and Fourteenth Amendments. However, the arguments relating to application of other Amendments and particularly the Eighth Amendment, are well developed in the Brief *Amicus Curiae* filed in this case by Attorney Nancy Stearns. Brief *Amicus Curiae* on Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Coalition, at 34 *et seq.* (Eighth Amendment).

imperiled an entire population." 197 U.S. at 31. In explaining the principle underlying the decision, the Court paralleled the statute's intrusion upon personal liberty with military conscription to protect national security, and emphasized the compelling interest necessary to justify the invasion of personal rights:

> "There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government,—especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, *under the pressure of great dangers,* be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand . . . It is not, therefore, true that the power of the public to *guard itself against imminent danger* depends in every case involving the control of one's body upon his willingness to submit to reasonable regulations established by the constituted authorities, under the sanction of the state, for the purpose of protecting the public effectively against such danger." 197 U.S. at 29-30. [Emphasis added.]

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

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

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

A right of access to health care has been held necessary in other factual settings. *McCollum* v. *Mayfield,* 130 F. Supp. 112 (N.D. Cal. 1955), involved an accused prisoner injured while in custody awaiting trial. The sheriff and jailer refused him medical care. As a result he became paralyzed. The court upheld a claim for relief under the Civil Rights Act based on deprivation of the plaintiff's life, liberty, and property without due process. *Accord, Coleman* v. *Johnson,* 247 F.2d 273 (7th Cir. 1957); *Edwards* v. *Duncan,* 355 F.2d 993 (4th Cir. 1966); *Tolbert* v. *Eyman,* 434 F.2d 625 (9th Cir. 1970). Custodial patients have been afforded a constitutional right to receive sufficient treatment to provide a realistic opportunity to improve or to be cured. *Wyatt* v. *Stickney,* 325 F. Supp. 781 (M.D. Ala. 1971). *Chrisman* v. *Sisters of St. Joseph*

of Newark, Civ. No. 70-430 (D. Ore., July 22, 1971), held that a hospital's refusal, for non-medical reasons, to permit voluntary sterilization of a plaintiff violated her federal rights. And *EDF* v. *Hoerner Waldorf,* 1 E.R. 1960 (D. Mont. 1970), recognized a right to protection of health against environmental pollution.

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

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

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

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

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

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

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

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

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[83] Public Law 89-749.

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

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

1. The Right to Marital Privacy

The importance of the institution of marriage and of the family has long been recognized by this Court. Consequently the Court and its members have often affirmed the sanctity of the marital relationship and of the family union. In *Maynard* v. *Hill,* 125 U.S. 190, 211 (1888), marriage was called "the foundation of the family and of society, without which there would be neither civilization nor progress." The opinion of the Court in *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942), spoke of marriage and procreation as being "fundamental to the very existence and survival of the race." Mr. Justice Harlan, for example, has written:

> "[T]he integrity of [family] life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . . . Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations." *Poe* v. *Ullman,* 367 U.S. 497, 551-52 (1961) (Mr. Justice Harlan, dissenting).

Mr. Justice Douglas, in delivering the opinion of the Court in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), wrote of marriage as being

> "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not

> causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." 381 U.S. at 486.

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

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

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

right *to* marry is meaningful only to the extent that there are rights *of* marriage, *i.e.,* rights attendant to the marital state which promote the happiness of the couple.

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

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

Similar in principle is *Meyer,* a 7-2 decision invalidating a State statute which prohibited teaching German to pupils below the eighth grade. The *Meyer* Court stated that the due process clause includes "the right . . . to marry, establish a home and bring up children." 262 U.S.

at 399. Again the Court recognized a fundamental right not enumerated in the Constitution entitled to Constitutional protection.

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

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

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

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

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

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

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

2. The Related Rights to Personal Privacy and Physical Integrity

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

As early as 1891 this Court stated:

> "No right is more sacred, [n]or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said

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

> to be a right of complete immunity: to be let alone.'" *Union Pac. Ry.* v. *Botsford,* 141 U.S. 250, 251 (1891), quoted in *Terry* v. *Ohio,* 392 U.S. 1, 8-9 (1968).

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

In family matters relating to child rearing and procreation, the Court has recognized and sustained individual rights on a constitutional plane. "The freedom to marry . . . ," *Loving* v. *Commonwealth,* 388 U.S. 1, 12 (1967); "the right to have offspring," *Skinner* v. *Oklahoma,* 316 U.S. 535, 536 (1942); "the liberty of parents and guardians to direct the upbringing and education of children under their control," *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534-35 (1925); as well as the right, at least of a married woman, to use contraceptives, *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), are all protected constitutionally.

Most recently the Court reaffirmed the "fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy," *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969) (Marshall, J.), and embraced with approval Mr. Justice Brandeis' dissent in *Olmstead* v. *United States*:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They

> sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." 277 U.S. at 478.

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

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

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

Without the right to respond to unwanted pregnancy, a woman is at the mercy of possible contraceptive failure, particularly if she is unable or unwilling to utilize the most effective measures.[87] Failure to use contraceptives effec-

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

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

tively, if pregnancy ensues, exacts an exceedingly high price.

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

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

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

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

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

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

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

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

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

That there is a fundamental constitutional right to abortion was the conclusion of the court below in the instant case:

> "On the merits, plaintiffs argue as their principal contention that the Texas Abortion Laws must be

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

> declared unconstitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment to choose whether to have children. We agree.
>
> "The essence of the interest sought to be protected here is the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals." (A. 116)

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

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of

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

a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." *California* v. *Belous,* 71 Cal. 2d 954, 458 P.2d 194, 199, 80 Cal. Rptr. 354 (1969), *cert. denied,* 397 U.S. 915 (1970).

"For whatever reason, the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy. Like the decision to use contraceptive devices, the decision to terminate an unwanted pregnancy is sheltered from state regulation which seeks broadly to limit the reasons for which an abortion may be legally obtained." *Doe* v. *Bolton,* 319 F. Supp. 1048, 1055 (N.D. Ga. 1970) (per curiam).

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

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

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

The First, Ninth, and Fourteenth Amendments protect the right of every citizen to follow any lawful calling, business, or profession he may choose, subject only to rational regulation by the state as necessary for the protection of legitimate public interests. *See, e.g., Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957); *Smith* v. *Texas,* 233 U.S. 630 (1914); *Dent* v. *West Virginia,* 129 U.S. 114 (1889). In reviewing legislation affecting the medical profession, courts have particularly respected the knowledge and skill necessary for medical practice, the broad professional discretion necessary to apply it, and the concomitant state interest in guaranteeing the quality of medical practitioners:

> "Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which life and health depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind.
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> * * * * *
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> . . . Every one may have occasion to consult [the physician], but comparatively few can judge the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license . . . that he possesses the requisite qualifications." *Dent* v. *West Virginia,* 129 U.S. 114, 122-23 (1889).

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

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

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

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

believe indicated. They are not indictable for these actions. However, obstetricians and gynecologists who are asked to abort their patients for sound medical reasons risk a prison sentence if they do so. The statute severely infringes their practice and seriously compromises their professional judgments.

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

None of the above interests are applicable here, however. The statute in question here does not protect the public from unqualified practitioners. *Cf. Dent* v. *West Virginia,* 129 U.S. 114 (1889); *Douglas* v. *Noble,* 261 U.S. 168 (1923); *Graves* v. *Minnesota,* 272 U.S. 425 (1926); *Schware* v. *Board of Examiners,* 353 U.S. 232 (1957). Rather the statute applies to laymen and physicians alike. Indeed, it endangers patients' health by unduly confining doctors' exercise of medical judgment. This endangering of health distinguishes the case from *Williamson;* the court there afforded broad discretion to the legislature *because public*

health was at stake. Further, the statute addresses no other legitimate state interest. *See* pp. 115-124, *infra.*

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

In his concurring opinion in *Griswold* v. *Connecticut,* 381 U.S. 479, 497 (1965), Justice Goldberg indicated the stricter standard of review that applies when state laws affect personal rights:

> "In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.'"

This Court has applied the stricter standard to protect marital privacy, *Griswold* v. *Connecticut, supra;* religious freedom, *Sherbert* v. *Verner,* 374 U.S. 398 (1963); freedom of expression and of association, *N.A.A.C.P.* v. *Button,* 371 U.S. 415 (1963); freedom to travel, *Shapiro* v. *Thompson,* 394 U.S. 618 (1968); and access to courts, *Boddie* v. *Connecticut,* 401 U.S. 371 (1971). As argued above, the Texas abortion laws infringe privacy rights here as much as the Connecticut statute did in *Griswold.* As in that case, the compelling interest test is the proper standard for reviewing the Texas statute. See also *Roe* v. *Wade,*

314 F. Supp. 1217, 1222 (N.D. Tex. 1970); *Doe* v. *Scott,* 321 F. Supp. 1385, 1390 (N.D. Ill. 1971); *Babbitz* v. *McCann,* 310 F. Supp. 293, 301 (E.D. Wis. 1970); *California* v. *Belous,* 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354, 360 (1968), *cert. denied* 397 U.S. 915 (1970).

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

A further constitutional condition of the statute's intrusion upon fundamental rights is that the law must be minimally restrictive:

> "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Griswold* v. *Connecticut,* 381 U.S. 479, 498 (1965) (Goldberg, J., concurring).

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

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

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

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

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

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

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

the illegal abortions to which women are driven by laws like this one.[92]

Any notion that less restrictive abortion laws would produce excessive demands on medical resources and thereby endanger public health also is unfounded. The experience in New York City after one year under an elective abortion law dispels any such fears:

> "New York City has accounted for the lion's share of abortions in the State and has been a resource for women all over the country. Nevertheless, the catastrophe many foresaw a year ago failed to materialize: we have been able to serve our residents as well as substantial numbers of out-of-state women, and, most important, we are serving women safely." Chase, "Twelve Month Report on Abortions in New York City" (Health Services Administration, City of New York, June 29, 1971).

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

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

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

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

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

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

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

Moreover, if the state desires to discourage certain sexual conduct, it may enforce laws prohibiting adultery and fornication. To view the abortion law as protecting public morals by making pregnancy the penalty for forbidden conduct would ascribe a monstrous intention to the Texas legislature. *State* v. *Baird,* 50 N.J.L. 376, 235 A.2d 673, 677 (1967). Furthermore, using the abortion law for such a purpose would be overbroad and beyond the competence of the state. *Baird* v. *Eisenstadt,* 429 F.2d 1398, *jur. noted,* 401 U.S. 934 (1971) (No. 70-17, 1971 Term); *King* v. *Smith,* 392 U.S. 309, 320 (1968); *Griswold* v.

Connecticut, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring). *See also* Brief *Amicus Curiae* on Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Action Coalition, at 44 *et seq.*

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

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

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

First, the pregnant woman who searches out a person willing to perform an abortion and who consents to, if not pleads for, the procedure is guilty of no crime. Texas

courts have repeatedly held that the woman is neither a principal nor an accomplice. *Willingham* v. *State,* 33 Cr. R. 98, 25 S.W. 424 (1894); *Shaw* v. *State,* 73 Cr. R. 337, 165 S.W. 930 (1914); *Moore* v. *State,* 37 Cr. R. 552, 40 S.W. 287 (1897); *Cave* v. *State,* 33 Cr. R. 335, 26 S.W. 503 (1894). Similarly, the women who travel from Texas to states with less restrictive abortion laws in order to secure medical abortions and avoid the alleged state interest in protecting the fetus are guilty of no crime. Moreover, self-abortion has never been treated as a criminal act. The State has failed to seek to deter through criminal sanctions the person whose interests are most likely to be adverse to those of the fetus. This suggests a statutory purpose other than protecting embryonic life.

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

sidered equal to a "human being," and its destruction involves a significantly lesser penalty." [94]

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

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

Appellants realize that the fact that states have failed in most instances to protect the rights of the fetus does not automatically mean that a state would not have a compelling interest in doing so. One assumes that if a state

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

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

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

It is sometimes argued that scientific discoveries show that human life exists in the fetus. Scientific studies in embryology have greatly expanded our understanding of the process of fertilization and development of the fetus and studies relating to the basic elements of life have shown that life is not only present in the fertilized egg, sperm and ova but that each cell contains elements which could conceivably constitute the beginning of a new human organism. Such studies are significant to science but only confuse the problem of defining human life.

> "When a fetus is destroyed, has something valuable been destroyed? The fetus has the potentiality of becoming a human being. Therefore, is not the fetus of equal value? This question must be answered.
>
> "It can be answered, but not briefly. What does the embryo receive from its parents that might be of value? There are only three possibilities: substance,

> energy and information. As for the substance, it is not remarkable: merely the sort of thing one might find in any piece of meat, human or animal, and there is very little of it—only one and half micrograms, which is about a half of a billionth of an ounce. The energy content of this tiny amount of material is likewise negligible. As the zygote develops into an embryo, both its substance and energy content increase (at the expense of the mother); but this is not a very important matter—even an adult from this standpoint is only a hundred and fifty pounds of meat.
>
> "Clearly, the humanly significant thing that is contributed to the zygote by the parents is the information that 'tells' the fertilized egg how to develop into a human called 'DNA.' . . . The DNA constitutes the information needed to produce a valuable human being. The question is: is this information precious? I have argued elsewhere that it is not. . . .
>
> "People who worry about the moral danger of abortion do so because they think of the fetus as a human being, hence equate feticide with murder. Whether the fetus is or is not a human being is a matter of definition, not fact, and we can define it any way we wish." Hardin, *Abortion or Compulsory Pregnancy?* 30 J. MAR. & FAM. No. 2 (May, 1968).

Thus science only leads to a worse quandary for obviously if one goes far enough back along the continuum of human development one encounters the existence of sub-microscopic double-helix molecules which have human life potential. When does something become human? As Judge Cassibry pointed out in his dissent in *Rosen* v. *Louisiana State Board of Medical Examiners,* 318 F. Supp. 1217,

1232 (E.D. La. 1970) appealed docketed 39 U.S.L.W. 3302 (U.S. Dec. 27, 1970) (No. 1010), the "meaning of the term 'human life' is a relative one which depends on the purpose for which the term is being defined." [96]

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

It is obvious that the legislative decision forbidding abortions also destroys potential life—that of the pregnant woman—just as a legislative decision to permit abortions destroys potential life.[97] The question then becomes not one

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

[97] "Potential life" is used here in the sense that each living person has a life "potential" in the future which may or may not be realized (i.e., the person may die in the next few moments or

of destroying or preserving potential, but one of who shall make the decision. Obviously some decisions are better left to a representative process since individual decisions on medical facilities, wars, or the release of a convict would tend toward the chaotic. It is our contention that the decision on abortion is exactly the opposite. A representative or majority decision making process has led to chaos. Indeed, in the face of two difficult, unresolvable choices—to destroy life potential in either a fetus or its host—the choice can only be left to one of the entities whose potential is threatened.

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

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live "x" number of years). When speaking of the "potential life" of the mother being destroyed, not only is an actual cessation of brain waves included, but damage to her health, emotional security and happiness—all things which may result from an unwanted pregnancy, in effect those things which can destroy "life" while leaving a living organism.

V.

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

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

A vast body of case law exists on the problem of unconstitutional uncertainty.[98] This doctrine has, moreover, sev-

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

eral complementary, and competing strands. The test most frequently articulated has been that

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

This is partly because

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

Clearly, "[v]ague laws in any area suffer a constitutional infirmity," [101] be they of common law antiquity,[102] administrative,[103] or criminal.[104] Furthermore, statutes challenged

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

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

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

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

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

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

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

for vagueness which impinge upon sensitive human rights are to be closely scrutinized. *Griswold* dealt with "a right of privacy older than the Bill of Rights . . . "[105] and that right is invoked again here, as well as the rights to seek and administer medical care. Thus, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms."[106]

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

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

> "The increasing number of abortions subjects physicians to increased dangers of liability for incorrectly

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

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

> interpreting a statute . . . . [D]octors face an uncertain fate when performing an abortion. This uncertainty will continue unless the legislatures or courts provide relief from liability." [107]

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

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

Similarly, a 1967 study concluded:

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

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

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

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

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

For a vivid illustration of the variations among hospitals in assessing the legality of therapeutic abortion on a given set of facts, see the questionnaire study and analysis of results in Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine,* 11 STAN. L. REV. 417, 423 (1959). The study, directed to 29 San Francisco Bay Area and Los Angeles hospitals (*id.,* at p. 423) based on hypothetical cases involving pregnant women seeking abortions, yielded the following results (*id.,* at p. 444):

(footnote continued on following page)

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

The medical profession has no experience in applying the provisions of felony statutes to the day-to-day practice of their science.[111] It is not an offense to perform an appen-

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

[110] Guttmacher, *Therapeutic Abortion: The Doctor's Dilemma,* 21 J. Mt. Sinai Hosp. 111 (1954).

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

(1) M. Calderone, (ed.), Abortion in the United States 34-35, 52 (1958):

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

(2) White, *Induced Abortions: A Survey of their Psychiatric Implications, Complications, and Indications,* 24 Tex. Reps. of Biology & Medicine 531, 541 (1966):

"[T]he enormous variability in the frequency of therapeutic abortions from one hospital to another . . . must surely reflect, more than anything else, differences in the

dectomy far in advance of rupture, and when only necessary to prevent a risk that might never materialize. Gen-

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personal values, religious beliefs, and social ideology of the staffs of the respective hospitals about the matter of abortion."

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

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

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

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

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

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

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

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

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

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

"One of the controversial aspects of the situation is the undeniable effect of sociological factors on an individual's mental health. The stress and consequences of an unwanted pregnancy as they affect mental health must be determined for an individual patient, taking into consideration her

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

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total life situation. Factors such as marital status, family support, economic conditions, subcultural attitudes toward the pregnancy, and personality structure all contribute toward her ability to maintain and complete her pregnancy without damage to her mental functioning.

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

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

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

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

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

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

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

"Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

"The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition." [112]

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

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

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

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

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"[T]here are grave and manifold uncertainties in the application of Article 1196. How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered." *Roe* v. *Wade,* 314 F. Supp. 1217, 1223 (N.D. Tex. 1970) (per curiam); Supp. App. at 83.

"If courts cannot agree on what is the essential meaning of 'necessary for the preservation of the woman's life' and like words, we fail to see how those who may be subject to the statute's proscriptions can know what it prohibits. . . . One need not inquire in great depth as

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"We have examined the challenged phraseology and are persuaded that it is not indefinite or vague. In our opinion, the word 'necessary' and the expression 'to save the life of the mother' are both reasonably comprehensible in their meaning. * * * [T]he California court found that the words 'necessary to preserve her life' in that state's abortion statute were unconstitutionally vague. While the Wisconsin statute uses slightly different language ('necessary to save'), we doubt that the distinction between the words used in the two statutes is significant. However, we do not share the view of the majority in *Belous* that such language is so vague that one must guess at its meaning." *Babbitz* v. *McCann,* 310 F. Supp. 293, 297-98 (E.D. Wis. 1970) (per curiam); Supp. App. at 145-46.

"On the vagueness question I first observe that we have before us no contention by any party that an actual situation exists where a licensed physician acting in good faith is in jeopardy of prosecution for performing an abortion he believed to be 'necessary for the

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to the meaning of such words as 'necessary' and 'preserve' to conclude that the holdings of those cases are correct. 'Necessary' has been characterized as vague by the United States Supreme Court and has been similarly described by other courts. It is 'a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, proper, or conducive to the end sought.'	preservation of the woman's life.' In other words we are presented with no actual circumstance where the vagueness question is in issue. The rather forced game of semantics urged by plaintiffs and adopted by the majority has not presented any *actual* controversy but is merely a convenient vehicle for these plaintiffs to challenge a law which they believe is unwise. . . .
"The word 'preserve' is similarly susceptible of so broad a range of connotations as to render its meaning in the statute gravely amorphous, since it may mean anything from maintaining something in its status quo to preventing the total destruction of something." *Doe* v. *Scott*, 321 F. Supp. 1385, 1388-89 (N.D. Ill. 1971); Supp. App. at 128-29.	"The words of the Illinois Abortion Statute taken in their ordinary meaning sufficiently convey definite warning as to the proscribed conduct . . . ." *Doe* v. *Scott,* 321 F. Supp. 1385, 1392-93 (N.D. Ill. 1971) (Campbell, J., dissenting); Supp. App. at 132-33.
"Dictionary definitions and judicial interpretations fail to provide a clear meaning for the words, 'necessary' or 'preserve.' There is, of course, no standard definition of 'necessary to preserve,' and taking the words separately, no clear meaning emerges. 'Necessary' is defined as: '1. Essential to a desirable	"Amici for appellant, 178 deans of medical schools, state that . . . 'the medical profession has "approved" abortions in cases [in which the objective was not to preserve the life of the woman and therefore] clearly outside of Penal Code section 274. Packer & Gampell, Therapeutic Abortion: A

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or projected end or condition; not to be dispensed with without loss, damage, inefficiency, or the like; * * *' (Webster's New International Dictionary (2d ed.), unabridged.) The courts have recognized that '"necessary" has not a fixed meaning, but is flexible and relative.' (Westphal v. Westphal, 122 Cal. App. 379, 382, 10 P.2d 119, 120; see also, City of Dayton v. Borchers (Ohio Com. Pl., 1967) 13 Ohio Misc. 273, 232 N.E.2d 437, 441 ['A *necessary* thing may supply a wide range of wants, from mere convenience to logical completeness.'].)

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

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Problem in Law and Medicine, 11 Stan.L.Rev. 417, 447. * * *' However, that sentence must be understood to mean recognized and approved by such persons as being required to preserve the life of the patient.

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

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	75, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) (Burke, J., dissenting); Supp. App. at 112-13.
"Various possible meanings of 'necessary to preserve * * * life' have been suggested. However, none of the proposed definitions will sustain the statute." *California* v. *Belous,* 71 Cal. 2d 954, 961-62, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied,* 397 U.S. 915 (1970); Supp. App. at 104.	"[O]ne would think that the English language which has been the sensitive instrument of our system of law for over 500 years, has lost, by the mere passage of time, all capacity for clarity of expression. . . . There is no mystique enveloping the statute and . . . the clause now challenged has stood the test of over a hundred years, and presumably of countless human incidents falling within its scope, apparently without evoking a single whimpering cry against it." *Id.* at 979-80 (O'Sullivan, J., dissenting).
"It is my opinion that the difficulty with the statute in question is not its failure to be phrased in 'numerous paragraphs of fine-spun legal terminology', but rather its attempt to define a medical problem in terms that are not understandable by the medical profession. A continuing complaint of the medical profession is that the laws in general, and judicial decisions, are not responsive to the realities of medical science. It is interesting to note that while the body of the statute	"It appears to us that the vagueness which disturbs the plaintiffs herein results from their own strained construction of the language used, coupled with the modern notion among law review writers that anything that is not couched in numerous paragraphs of fine-spun legal terminology is too imprecise to support a criminal conviction. . . . The words of the Ohio statute, taken in their ordinary meaning, have over a long period of years proved entirely adequate to inform the

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

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

"There are other questions created by this statute. How imminent must the threat of death be to warrant an abortion

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public, including both lay and professional people, of what is forbidden. The problem of the plaintiffs is not that they do not understand, but that basically they do not accept, its proscription." *Steinberg* v. *Brown,* 321 F. Supp. 741, 745 (N.D. Ohio 1970); Supp. App. at 193.

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

The clause 'unless done for the relief of a woman whose life appears in peril' requires no guessing at its meaning. Rosen focuses upon the words 'relief,' 'appears,' and 'life.' These are widely used and well understood words, particularly when read

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'to preserve life?' If permitting a pregnancy to go to term would clearly shorten the mother's life by a substantial number of years, would a physician be justified in performing an abortion in accordance with the term 'necessary to preserve her life?'

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

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

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

"With regard to the assertion that the lessons of time have compensated for the deficiencies of the statute, I do not find that to be the case. I have endeavored to examine all recorded Ohio decisions construing O.R.C. §2901.16 and the predecessor thereto, and find that not one of the cases I have reviewed construes the statutory phrase 'necessary to preserve her life', or the language of similar import in the earlier statutes. (A listing of the said decisions is ap-

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in the context of section 37: 1285(6). We conclude that the statute was intended to permit an induced abortion of an embryo or fetus only when the physician, after due consultation with another licensed physician, determines in good faith that continuation of the pregnancy will directly and proximately result in the death of the woman. In our opinion, the statute so read provides fair warning that Louisiana does not suffer the performance of all medically indicated abortions, however wise in the physician's estimation such an operation might be in a particular case, but rather allows the induced abortion of an embryo or fetus to be performed without sanction only when the life of the mother is directly endangered by the condition of pregnancy itself." *Rosen* v. *Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217, 1220 (E.D. La. 1970); Supp. App. at 214.

pended hereto). A study of the Ohio case histories offers little guidance to the physician searching for the meaning of the language 'necessary to preserve her life.'" *Steinberg* v. *Brown,* 321 F. Supp. 741, 749-50 (N.D. Ohio 1970) (Green, J., dissenting); Supp. App. at 197-98.

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

VI.

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

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

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

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

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

This Court's decision in *United States* v. *Vuitch,* 402 U.S. 62 (1971), and the weight of authority, support the contention that lack of medical justification for the abortion "is an objective element of the crime." George, *Current Abortion Laws: Proposals and Movements for Reform,* 17 W. Res. L. Rev. 371, 377 (1965). As the Court in *Vuitch* stated:

> "Certainly a statute that outlawed only a limited category of abortions but 'presumed' guilt whenever the mere fact of abortion was established, would at the very least present serious constitutional problems under this Court's previous decisions interpreting the Fifth Amendment." 402 U.S. at 70.

An initial infirmity of the *Veevers* rule inheres in its inevitable invasion of the Fifth Amendment privilege against self-incrimination. *Veevers* requires that the physician bring forth evidence that the abortion was necessary to preserve the patient's "life." This means that

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[114] Hall, *Therapeutic Abortion, Sterilization, and Contraception,* 91 Am. J. Obstetrics & Gynecology 518, 524-25, Table VI, line 2 (1965); Supp. App. at 402.

[115] U. S. Bureau of the Census, *Statistical Abstract of the United States: 1970,* Table 57, at 49 (91st ed.).

the accused physician stands mute at penalty of certain conviction because of his failure to testify. If he testifies, however, he must admit the very fact of the abortion, *i.e.,* complicity in one element of the offense, and then attempt to persuade the jury that the second element of the offense was not present. If the jury finds his justifications insufficient, or that his "good faith" was not "good enough," the physician has been convicted upon his own testimony. Moreover, if the jury had not believed the prosecution's evidence that an abortion was performed, the physician's testimony could supply proof from his own mouth of *both* elements of the offense.

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

So it is with the *Veevers* rule. If the physician comes forward with evidence that the abortion was necessary for medical reasons, he must perforce admit presence at the scene, and performance of the very act charged in the indictment. His own testimony will suffice to corroborate the first element of the offense, namely, that he performed the abortion. Not only will his own testimony provide a "link" in the chain, it may provide both links to a two-link chain, that is, the entire chain. He will have admitted performing the abortion and the jury may not believe his reasons for justification. Accordingly, a weak prosecution

case may be fortified and proved from the physician's own testimony. Since *Veevers* requires that testimony, the rule invades the physician's privilege against self-incrimination. Under *Leary,* and earlier supporting decisions,[116] this is not permissible.

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

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

> " 'One of the rightful boasts of Western civilization is that the [prosecution] has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the

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[116] *See, e.g.,* Haynes v. United States, 390 U.S. 85 (1968); Tot v. United States, 319 U.S. 463 (1943).

[117] Authorities recognizing the constitutional status of the presumption of innocence go back to Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 328 (1866). *See also* United States v. Romano, 382 U.S. 136, 139-44 (1965) (presence at still does not justify inference that accused possesses or controls the still); Speiser v. Randall, 357 U.S. 513, 525-26 (1958); Morissette v. United States, 342 U.S. 246, 274-75 (1952); Morrison v. California, 291 U.S. 82 (1934).

> safeguards of a fair procedure.' Irving v. Dowd, 366 U.S. 717, 729. Among these is the presumption of the defendant's innocence." 367 U.S. 456, 471 (1961).

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

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

CONCLUSION

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

Respectfully submitted,

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Attorneys for Appellants

APPENDICES

APPENDIX A

HENRY WADE
DISTRICT ATTORNEY
DALLAS COUNTY GOVERNMENT CENTER
DALLAS, TEXAS 75202

July 22, 1971

Mrs. Sarah Weddington
c/o The James Madison Constitutional Law Institute
Four Patchin Place
New York, N. Y. 10011

Re: Roe v. Wade

Dear Mrs. Weddington:

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

Very truly yours,

John B. Tolle

JOHN B. TOLLE
ASSISTANT DISTRICT ATTORNEY
DALLAS COUNTY, TEXAS

JBT:hc

A-1

APPENDIX B

Affidavit of Paul C. MacDonald, M.D.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 70-18, 1971 TERM

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

Appellants,

—v.—

HENRY WADE, DISTRICT ATTORNEY
OF DALLAS COUNTY, TEXAS,

Appellee.

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

STATE OF TEXAS
COUNTY OF DALLAS

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

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

As the attached "Curriculum Vitae" indicates, I am Chairman of the Department of Obstetrics and Gynecology of The University of Texas Southwestern Medical School (5323 Harry Hines Boulevard, Dallas, Texas 75235), the only medical school located in Dallas, Texas. As Chairman of the Department of Obstetrics and Gynecology, I am also Chief of the Obstetrics and Gynecology Service at Parkland Memorial Hospital (the hospital associated with the medical school), which is the city and county hospital. The hospital has full responsibility for furnishing medical and hospital care to the medically indigent who reside in the hospital district, which includes the City of Dallas and Dallas County. My time is approximately equally divided between teaching and clinical duties.

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

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

The medical policies adopted and enforced by the hospital are important for at least two reasons: first, because Parkland is virtually the only source of medical services available to the medically indigent of Dallas and Dallas County; and second because the physicians of the city and of the surrounding area generally "key on" and

adopt the standards and policies of Parkland regarding evolving areas of medicine. Theoretically the policies and procedures of the medical school and thus of Parkland exemplify the scholarly and most advanced approach to the practice of medicine.

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

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

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

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

> Dear Paul:
>
> I have just returned from a conference with Wilson Johnson of District Attorney Henry Wade's Office where we discussed the possible affects of the recent three-judge Federal ruling on the constitutionality of the State's laws on abortion.
>
> Mr. Johnson reaffirmed our recent telephone conversation regarding this matter. The policy for us to follow is the same policy which has prevailed in the past, as regards to any abortion.
>
> Mr. Johnson stated that pertinent points which the District Attorney's Office considers of importance are:
>
> 1. The law is still what it has been,

2. The Statutes pertaining to abortion are still on the books,
3. The District Attorney's Office has ruling by the Federal judges under appeal.
4. The Federal judges did not issue any injunctions against the District Attorney to preclude prosecution or following the state law,
5. The District Attorney is prosecuting the Doctor involved in the case.

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

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

Very truly yours,

/s/ Jack
C. J. Price, FACHA
Administrator

In light of the letter and Henry Wade's stated attitude toward the federal decision, no meeting of the abortions policy committee was ever held and the pre-June 17, 1970,

requirements regarding abortion procedures continue to be in effect pending a Supreme Court decision.

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

Even the doctors on my staff do not agree as to the meaning of the statute or the medical indications it encompasses. Aside from the insurmountable difficulty of determining what conditions are severe enough to threaten a pregnant woman's life, in my view an entirely different and more pervasive vagueness is embodied in the current Texas law because of the impossibility of determining the precise degree of risk to life a given condition poses in regard to a particular patient's pregnancy. It is rare that a doctor can even confidently describe the risks attendant to a given condition of a given patient in such broad terms as "minimal risk", "some risk", "great risk", etc. Every woman who is pregnant is generally submitted to a greater degree of risk to her life than a woman of similar age and health who is not pregnant. There is a great arena of problems which accrue in pregnancy and which may increase the risk of pregnancy to one degree or another. Yet the Texas law requires a doctor to weigh intangibles in each individual case and to precisely determine the statistical risk applicable to a patient's individual accumulation of problems. Such is medically impossible.

The fear of prosecution under the Texas abortion law is the sole reason no change was made in Parkland

Memorial Hospital's abortion requirements. Because of a fear of prosecution, abortion procedures continue to be allowed only where deemed necessary to preserve the woman's life, as that standard can best be determined. It is my personal opinion that the policy of the hospital and of this obstetrics and gynecology department would undoubtedly have been significantly liberalized absent Henry Wade's position that the Texas abortion law, though declared unconstitutional, still has force and effect.

/s/ Paul C. MacDonald, M.D.

State of Texas
County of Dallas

Sworn to and subscribed to before me on this the 28 day of July, 1971.

/s/ Elizabeth A. Carey
Notary Public in and for
Dallas County, Texas

DALLAS COUNTY HOSPITAL DISTRICT

OFFICE MEMORANDUM

Thurs

To— Dr. Paul MacDonald, Chairman
MAC Sub Committee

June 29, 1970

Subject:

Dear Paul:

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

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

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

1. The law is still what it has been,

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

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

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

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

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

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

Very truly yours,

C. J. Price, FACHA
Administrator

g

cc - Charles F. Gregory, M.D.
M. T. Jenkins, M.D.
Robert L. Stubblefield, M.D.
Paul Gross

FORM # 4220

B-8

Curriculum Vitae

Name: Paul C. MacDonald

Born: September 14, 1930, McAlester, Oklahoma

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

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

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

Residency: Parkland Memorial Hospital, Dallas, 1957-60

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

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

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

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

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

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

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

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

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

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

Consultant, Dallas Presbyterian Hospital, Dallas, Texas

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

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Paul C. MacDonald, M.D.

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APPENDIX C

Affidavit of Joseph Seitchik, M.D.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 70-18, 1971 TERM

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

Appellants,

—v.—

HENRY WADE, DISTRICT ATTORNEY
OF DALLAS COUNTY, TEXAS,

Appellee.

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

STATE OF TEXAS
COUNTY OF BEXAR

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

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

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

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

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

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

Last year about 18,000 birth certificates were issued in the metropolitan hospitals; about 3,000 of the 18,000 birth certificates were issued in military hospitals and about

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

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

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

When I learned of the three-judge decision of June 17, 1970, holding the Texas abortion law to be unconstitutional, I called Mr. R. Emmett Cater, who at that time was the Assistant District Attorney of Bexar County assigned to the hospital district, to ask the implication of the decision

for medical practice. He called back about a week later and said that the Texas law still stood and that it would still be enforced. Thus it is my understanding and that of the doctors on my staff that the Texas abortion law still stands and a possibility of prosecution for allegedly performing an illegal abortion still exists.

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

Other local hospitals severely restrict their staff members regarding when an abortion may be performed; those hospitals enforce the traditional narrow interpretation of Texas law. However as stated, physicians on the staff of Bexar County and Robert B. Green Hospitals are now allowed to exercise their own judgment as to the legality of performing an abortion in a given medical context. Since individual physicians differ as to the meaning and appropriate interpretation of the statutory exception, the exercise of individual judgment often results in a more liberal approach to the Texas law. Thus when a local physician determines that a patient is within the statutory exception and should be aborted, the patient is often referred

to a member of my staff because the referring physician would not be allowed to perform the abortion in the hospitals where he has staff privileges. The physicians of Bexar County are reacting to the problem of unwanted pregnancy in two distinct manners: as individuals they often state in writing their opinion that a given patient comes within the statutory exception yet as a group in hospitals they are unwilling to allow the performance of the same procedure.

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

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

As to administrative steps preceding an abortion, the procedure must be recommended by two physicians and my own signature must be obtained. Not more than one

of the two recommending physicians may be a full-time member of the obstetrics and gynecology staff. The second recommending physician is generally a local physician or a staff member of another medical specialty. Only the consent of the woman is required if she is past 21 years of age and unmarried. If she is married, her husband's consent is also required. If she is a minor, the consent of a guardian or parent is also required.

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

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

Second, members of the staff and faculty are often asked to perform an abortion by patients experiencing an unwanted pregnancy. Such cases often involve medical indications or circumstances that seem to warrant abortion, yet it generally appears that the case would not come within the statutory exception, either because there does

not appear to be sufficient danger to the woman's health, because the health problem is one anticipated from sources other than the pregnancy, or because the woman is physically capable of carrying the pregnancy to term.

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

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

A recent example of the situations where an abortion seems indicated although the woman is physically capable of carrying the pregnancy to term is that of a feeble-minded patient who was pregnant. The 25-year-old girl had a feeble-minded mother and two feeble-minded sisters. The family was supported by the girl's 75-year-old grandfather and a normal brother who was married and support-

ing three children of his own. The apparent probability that the pregnancy would produce a feeble-minded child and the problem of its support indicated that an abortion should be considered, assuming effective consent, yet such pregnancy apparently does not come within the statutory exception. Another example was a pregnant 13-year-old girl who could not even care for herself to the point of menstruating on the schoolroom floor; she obviously could not care for herself during pregnancy nor for a baby.

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

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

It is my opinion that the staff of Bexar County and Robert B. Green Hospitals would now be caring for our medically indigent patients who need abortions, but who do not seem to be within the statutory exception, if the Texas abortion law were not in effect. Because of the stated policy of the local District Attorney's office and the resulting fear of prosecution, abortion procedures continue

to be performed only where deemed necessary for the purpose of saving the woman's life.

/s/ JOSEPH SEITCHIK, M.D.

STATE OF TEXAS
COUNTY OF BEXAR

SWORN TO AND SUBSCRIBED TO before me on this the 9th day of August, 1971.

/s/ RUTH E. RICHARDSON
Notary Public in and for
Bexar County, Texas