IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No. 70-18

JANE ROE, JOHN DOE, AND MARY DOE, *Appellants,*
JAMES HUBERT HALLFORD, M.D., *Appellant-Intervenor,*
v.
HENRY WADE, *Appellee.*

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

No. 70-40

MARY DOE, *et al., Appellants,*
v.
ARTHUR K. BOLTON, *et al., Appellees.*

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

MOTION FOR LEAVE TO FILE A BRIEF WITH BRIEF AS AMICI CURIAE FOR PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., and AMERICAN ASSOCIATION OF PLANNED PARENTHOOD PHYSICIANS

HARRIET F. PILPEL
NANCY F. WECHSLER
Attorneys for Amici Curiae
437 Madison Avenue
New York, New York 10022

Of Counsel:
GREENBAUM, WOLFF & ERNST
RUTH JANE ZUCKERMAN
MICHAEL KENNETH BROWN

IN THE

Supreme Court of the United States

October Term, 1971

No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,
Appellants,

JAMES HUBERT HALLFORD, M. D.
Appellant-Intervenor,

v.

HENRY WADE,
Appellee.

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

No. 70-40

MARY DOE, *et al.*,
Appellants,

v.

ARTHUR K. BOLTON, *et al.*,
Appellees.

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

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

Planned Parenthood Federation of America, Inc., hereinafter called "Planned Parenthood," and the American

Association of Planned Parenthood Physicians, hereinafter called "AAPPP," hereby respectfully move for leave to file a brief annexed hereto as *amici curiae* in these cases.

The appellants consented in writing to the filing of this *amici* brief. The states of Georgia and Texas have declined to consent thereto.

Planned Parenthood Federation of America, Inc., is a not-for-profit corporation originally organized in 1922 and existing under the laws of the State of New York. Its headquarters are in New York City. It is the leading national voluntary public health organization in the field of family planning and birth control and a leading national organization in the field of educating the public concerning the danger to the United States and the world inherent in continuing population growth.

As of May, 1971, Planned Parenthood had 190 affiliates in 42 states and the District of Columbia, operating approximately 700 family planning clinics offering services to the public. Planned Parenthood provides its affiliates guidance in the areas of birth control, voluntary sterilization, treatment of infertility problems, abortion and education for marriage and parenthood. Each of the affiliates functions under strict medical standards promulgated by the National Medical Advisory Committee in conjunction with local medical advisory committees, all such committees consisting exclusively of physicians.

Planned Parenthood also functions as a clearing house for information and services relating to these same areas. It formulates nationwide medical and clinical standards and is active in developing guidelines and materials relating to public and professional education in this field. Its Medical Director and other consultants confer with medical school faculties and local agencies in relation to teaching techniques, formation of clinics and the like.

Many of Planned Parenthood's affiliates operate in cooperation with local public health facilities. The affiliates are also teaching and training centers for physicians, nurses, teachers and social workers and provide for referral services to qualified medical specialists.

Planned Parenthood's concern with family planning and family health necessarily includes concern with the availability of abortion and with the compelling problems which result from restrictive abortion laws which make medically safe, legal abortions unavailable to many women. Planned Parenthood has adopted a policy on abortion which states in part:

> "The optimum method of birth control is the consistent employment of effective contraception but in practice this goal is sometimes not achieved. It is, therefore, desirable that provisions respecting abortion not be contained in State Criminal Codes. Planned Parenthood believes that since abortion is a medical procedure, it should be governed by the same rules as apply to other medical procedures in general when performed by properly qualified physicians with reasonable medical safeguards."

This commitment to the principle that safe abortions should be available to all who seek them is a necessary corollary of Planned Parenthood's activities in the area of birth control. While Planned Parenthood does not view abortion as an alternative to contraception, it recognizes that abortion services are essential to protect women where contraception is unavailable, where it has not been used or where it has failed. Planned Parenthood believes that abortions must also be available to women who have been raped and in cases where the fetus may be deformed as a result of the mother's exposure to rubella, her use of drugs which affect fetal development or as a result of other factors.

Each year a number of the patients served by Planned Parenthood affiliates (in Georgia and Texas as well as in other states) experience unwanted pregnancies, often due to contraceptive failure. Contraceptive technology has not developed to a point where there is any perfect contraceptive and many of the techniques available to particular women do on occasion fail. Also, many women do not have

effective access to contraception. There are, therefore, vast numbers of unwanted pregnancies each year which do not involve failure of use or motivation on the part of the patient.

Throughout the United States many patients who experience unwanted pregnancies seek abortion services from the Planned Parenthood clinics, especially those women who have looked to those clinics for contraceptive services. Because of the Georgia and Texas abortion laws challenged herein, and similarly restrictive laws on the books in other states, the activities of Planned Parenthood affiliates are severely circumscribed and they are unable to provide patients with the medical services they urgently need.

The American Association of Planned Parenthood Physicians (AAPPP) was organized in 1963. As of May, 1971, its membership consisted of 650 physicians specializing in obstetrics and gynecology and having a special interest in the various aspects of human reproduction. Many such physicians are connected with Planned Parenthood affiliates, health departments, hospitals and other agencies; others are primarily private practitioners.

Papers presented at AAPPP conventions are published in *Advances in Planned Parenthood.* The 1970 volume reached 5,000 doctors, thus sharing the experience, studies and ideas of AAPPP physicians with other non-member doctors engaged in providing family planning services.

AAPPP adopted a resolution on abortion at its 1970 annual meeting which states in part:

> "The American Association of Planned Parenthood Physicians supports the principle that the decision whether or not to bear children is a right which belongs solely to each individual woman, to be exercised by her in any manner she may desire.
>
> Consequently the decision to undergo legal abortion, as one method of exercising this right, must rest with the individual woman and her physician.

> Therefore, the American Association of Planned Parenthood Physicians strongly urges the abolition of all statutes and criminal laws which in any way restrict the performance of abortion by qualified medical personnel.''

AAPPP believes that restrictive abortion statutes not only impair rights of women to receive medical treatment for abortion and to determine whether to bear children, but also interfere with the practice of good medicine by preventing physicians from providing their patients with a safe medical procedure which is often necessary for the health and well-being of the patient.

Both Planned Parenthood and the AAPPP by reason of their long experience in and knowledge of the field of family planning services believe that they are in a unique position to aid the Court in its resolution of the issues raised in these cases. Both organizations have a profound interest in vindicating the constitutional right of all women to have access to qualified medical services for abortion, insuring that no woman is denied her freedom to choose whether or not to bear a child, and establishing the right of physicians to provide the best available medical service to their patients.

Therefore, Planned Parenthood and AAPPP respectfully request that the Court grant this motion for leave to file the annexed brief *amici curiae.*

Respectfully submitted,

HARRIET F. PILPEL

NANCY F. WECHSLER
Attorneys for Amici Curiae
437 Madison Avenue
New York, New York 10022

Of Counsel:
GREENBAUM, WOLFF & ERNST
RUTH JANE ZUCKERMAN
MICHAEL KENNETH BROWN

IN THE

Supreme Court of the United States

October Term, 1971

No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,
Appellants,

JAMES HUBERT HALLFORD, M. D.,
Appellant-Intervenor,

v.

HENRY WADE,
Appellee.

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

No. 70-40

MARY DOE, *et al.*,
Appellants,

v.

ARTHUR K. BOLTON, *et al.*,
Appellees.

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

BRIEF FOR PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. and AMERICAN ASSOCIATION OF PLANNED PARENTHOOD PHYSICIANS AS *AMICI CURIAE*

HARRIET F. PILPEL
NANCY F. WECHSLER
Attorneys for Amici Curiae
437 Madison Avenue
New York, New York 10022

Of Counsel:
GREENBAUM, WOLFF & ERNST
RUTH JANE ZUCKERMAN
MICHAEL KENNETH BROWN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

IN THE

Supreme Court of the United States

October Term, 1971

No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,
Appellants,

JAMES HUBERT HALLFORD, M. D.,
Appellant-Intervenor,

v.

HENRY WADE,
Appellee.

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

No. 70-40

MARY DOE, *et al.*,
Appellants,

v.

ARTHUR K. BOLTON, *et al.*,
Appellees.

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

BRIEF FOR PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. and AMERICAN ASSOCIATION OF PLANNED PARENTHOOD PHYSICIANS AS *AMICI CURIAE*

Opinions Below

The opinion of the United States District Court for the Northern District of Georgia in *Doe* v. *Bolton* is reported at 319 F. Supp 1048 (1970). The opinion of the United States District Court for the Northern District of Texas in *Roe* v. *Wade* is reported at 314 F. Supp 1217 (1970).

Jurisdiction

The jurisdiction of this Court in both *Doe* v. *Bolton* and *Roe* v. *Wade* is invoked under 28 U.S.C. §1253 (1964 ed.). For full statements, as to jurisdiction, *amici* respectfully refer the Court to the statements incorporated in the briefs for the appellants in the two cases.

Statutes Involved

1. *Roe* v. *Wade*

TEXAS PENAL CODE ANN. art. 1191, at 429 (1961):

> "If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused."

TEXAS PENAL CODE ANN. art. 1192, at 433 (1961):

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

TEXAS PENAL CODE ANN. art. 1193, at 434 (1961):

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

TEXAS PENAL CODE ANN. art. 1194, at 435 (1961):

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

TEXAS PENAL CODE ANN. art. 1196, at 436 (1961):

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

2. *Doe* v. *Bolton*

(Those sections of the statute declared unconstitutional by the court below are italicized.)

GA. CODE ANN. §26-1201 at 85 (1970 revision): **Criminal Abortion**

Except as otherwise provided in section 26-1202, a person commits criminal abortion when he administers any medicine, drug or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion. (Acts 1968, pp. 1249, 1277.)

GA. CODE ANN. §26-1202 at 85-87 (1970 revision): **Exception**

(a) Section 26-1201 shall not apply to an abortion performed by a physician duly licensed to practice medicine and surgery pursuant to Chapter 84-9 or 84-12 of the Code of Georgia of 1933, as amended, based upon his best clinical judgment that an abortion is necessary *because*:

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

(b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met:

> (1) The pregnant woman requesting the abortion certifies in writing under oath and subject to the penalties of false swearing to the physician who proposes to perform the abortion that she is a bona fide legal resident of the State of Georgia.
>
> (2) The physician certifies that he believes the woman is a bona fide resident of this State and that he has no information which should lead him to believe otherwise.
>
> (3) Such physician's judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery pursuant to Chapter 84-9 of the Code of Georgia of 1933, as amended, who certify in writing that based upon their separate personal medical examinations of the

pregnant woman, the abortion is, in their judgment, necessary *because of one or more of the reasons enumerated above.*

(4) Such abortion is performed in a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals.

(5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

(6) If the proposed abortion is considered necessary because the woman has been raped, the woman makes a written statement under oath, and subject to the penalties of false swearing, of the date, time and place of the rape and the name of the rapist, if known. There must be attached to this statement a certified copy of any report of the rape made to any law enforcement officer or agency and a statement by the solicitor general of the judicial circuit where the rape occurred or allegedly occurred that, according to his best information, there is probable cause to believe that the rape did occur.

(7) Such written opinions, statements, certificates, and concurrences are maintained in the permanent files of such hospital and are available at all reasonable times to the solicitor general of the judicial circuit in which the hospital is located.

(8) A copy of such written opinions, statements, certificates, and concurrences is filed with the Director

of the State Department of Public Health within ten (10) days after such operation is performed.

(9) All written opinions, statements, certificates, and concurrences filed and maintained pursuant to Paragraphs (7) and (8) of this subsection shall be confidential records and shall not be made available for public inspection at any time.

(c) *Any solicitor general of the judicial circuit in which an abortion is to be performed under this section, or any person who would be a relative of the child within the second degree of consanguinity, may petition the superior court of the county in which the abortion is to be performed for a declaratory judgment whether the performance of such abortion would violate any constitutional or other legal rights of the fetus. Such solicitor general may also petition such court for the purpose of taking issue with compliance with the requirements of this section. The physician who proposes to perform the abortion and the pregnant woman shall be respondents. The petition shall be heard expeditiously and if the court adjudges that such abortion would violate the constitutional or other legal rights of the fetus, the court shall so declare and shall restrain the physician from performing the abortion.*

(d) If an abortion is performed in compliance with this section, the death of the fetus shall not give rise to any claim for wrongful death.

(e) Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b) (5). A physician, or any other person

who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person.

GA. CODE ANN. §26-1203 at 87 (1970 revision): **Punishment**

A person convicted of criminal abortion shall be punished by imprisonment for not less than one nor more than 10 years. (Acts 1968, pp. 1249-1280.)

Statement of the Cases

Amici respectfully refer the Court to the statements of the cases incorporated in the briefs for appellants.

Questions Presented

1. Whether Articles 1191, 1192, 1193, 1194 and 1196 of the Texas Penal Code by limiting the grounds for the performance of abortions deprive women and physicians of their fundamental rights of privacy and liberty in violation of the Ninth and Fourteenth Amendments to the Constitution.

2. Whether §26-1201 to §26-1203 of the Georgia Code by limiting the grounds for the performance of abortions deprive women and physicians of their fundamental rights of privacy and liberty in violation of the Ninth and Fourteenth Amendments to the Constitution.

Interest of Planned Parenthood Federation of America, Inc. and American Association of Planned Parenthood Physicians as *Amici Curiae*

We have in the accompanying notice of motion set forth the pertinent facts concerning Planned Parenthood Federation of America, Inc. and the American Association of Planned Parenthood Physicians and the reasons why we believe acceptance by this Court of this brief on their behalf as *amici curiae* is appropriate to consideration of the questions raised in these cases.

Planned Parenthood Federation of America, Inc. and the American Association of Planned Parenthood Physicians believe that they can provide the Court facts about contraceptive failure, unwanted births, and abortion which will not otherwise be presented. Moreover, the ability of Planned Parenthood and its affiliates to function effectively in the area of family planning and the ability of the member doctors of American Association of Planned Parenthood Physicians to practice medicine are drastically curtailed by the statutes such as those of Texas and Georgia which are at issue in these cases. *Amici* believe that the parties will not cover material presented herein.

Amici have not briefed separately either the question of whether the courts below improperly denied injunctive relief or the issues of jurisdiction as to which this Court has postponed determination. *Amici* support the arguments made by appellants in their briefs as to jurisdiction and injunctive relief.

With respect to arguments on the merits, *amici* will discuss only the question of whether the Georgia and Texas statutes, insofar as they restrict the grounds for the performance of abortion, are unconstitutional, since these are the questions as to which *amici* believe they are in a special position to be of aid to the Court and to present new material. *Amici* do, however, support the arguments developed in the appellants' brief in *Doe* v. *Bolton,* that the requirements in the Georgia statute as to residency, physician consultation, hospital committee approval and accreditation of hospitals by the Joint Commission are unconstitutional for the reasons stated by appellants in that case. *Amici* also concur with the appellants' contentions that both the Texas statute and the Georgia statute are unconstitutionally vague.

Summary of Argument

In this brief *amici* have presented factual material, as well as legal arguments, to demonstrate that the Texas and Georgia abortion statutes, by prohibiting all abortions other than those performed for the specific reasons set forth in the statutes, violate fundamental constitutional rights of women and their physicians.

The facts on contraception, abortion and unwanted births which *amici* discuss in Point I demonstrate the compelling need for a decision on the merits of these cases. Contraception, which provides the first line of defense against compulsory pregnancy and childbearing, is neither available to all nor fully effective when used. Literally millions of individuals have no access to the most effective, or indeed, any contraceptives because of their economic

situation or because of inadequate medical or pharmaceutical services. In addition, many women, for medical or other reasons, cannot avail themselves of the most effective techniques of contraception.

Childbirth may be dangerous or unsuitable for a girl or woman for a variety of reasons. Her physical or mental health may be adversely affected by pregnancy; there may be a risk of serious fetal defect; the pregnancy may occur in a teenager out of wedlock, or may have been the result of an act of rape or incest; she may be unable to support another—or any—child. There are in short, a whole host of reasons—medical, social, economic and psychological—why a pregnant girl or woman may wish to have an abortion.

Abortion is an accepted and safe medical procedure and various respected medical organizations have stated their views to the effect that there should be no statutorily imposed restrictions on the grounds for which an abortion is performed. Restrictive laws such as those in Texas and Georgia, however, deprive women of their right of choice and force most women, unless they are able to obtain a safe, legal abortion out of state, to choose between bearing a child against their wishes or seeking illegal and unsafe abortions. These alternatives involve risks to the pregnant woman and to society and, when the woman carries the pregnancy to full term, to the unwanted child as well, especially if the child is born out of wedlock.

Prior cases decided by this Court have established the fundamental nature of the rights of the individual in areas relating to marriage, the family and sex. Moreover, the

right to abortion must be viewed as a corollary of the right to control fertility which was recognized in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965). Also at issue are the woman's right to life and to needed health services and her physician's right to practice medicine in accordance with the highest standards of the profession.

Since it cannot be demonstrated that the Texas and Georgia abortion statutes are both narrowly drawn and necessary to promote a compelling state interest, the statutes must, under established principles of law, be declared unconstitutional.

ARGUMENT

POINT I

The facts relating to unwanted births, contraception and abortion show the compelling need for a determination by this Court of the issues raised in these cases.

Amici present the following material to bring to the Court's attention the serious health problems facing women and society where abortion is not available to terminate pregnancies which for a variety of reasons should not result in compelling the birth of a child. Such pregnancies include those resulting from contraceptive failure and from rape, as well as those which will probably result in the birth of a deformed or defective child. They also include pregnancies which if carried to full term will create severe hardship or utterly disrupt the life of the mother, particularly where she is an unmarried teenager.

A. The Facts About Contraception

1. Availability of Contraception

Although contraceptive services are legally available in all states to married persons and in almost all states without regard to marital status,[1] in fact contraceptives are not readily available to a substantial portion of the population. This is particularly true of urban and rural poor in many areas of the country. In some of these areas even non-prescription and relatively ineffective contraceptives cannot be obtained. Even if some form of contraception is available there is likelihood of unwanted pregnancy since the most effective and practical contraceptives, such as the birth control pill, the intrauterine device, and the diaphragm[2] can be obtained only on the prescription of a doctor whose services are denied to hundreds of thousands of poor. The extent to which the poor are unable to obtain effective or even any contraceptives is shown by a recent report of the Senate Committee for Labor and Public Welfare which states:

> "Problems of unwanted children do not occur only in low income and less educated families in this country, but the consequences are greater in this group because of the accumulation of difficulties this condition imposes upon the poor. * * *

1. In only two states—Wisconsin (WIS. STAT. ANN. §151.15), and Massachusetts (MASS. GEN. LAWS ch. 272 §§21, 21A)—is prescription and/or distribution of contraceptives to unmarried persons prohibited. The Massachusetts law was declared unconstitutional by the Court of Appeals for the First Circuit in Baird v. Eisenstadt, 429 F.2d 1398 (1st Cir. 1970), *prob. juris. noted,* 401 U.S. 934 (1971) (No. 804, 1970 Term; renumbered No. 70-17, 1971 Term).

2. *See* pp. 13-20, *infra.*

> * * * Medically indigent families (defined according to poverty levels established by the Social Security Administration) have an average annual fertility rate 53 per cent higher than the nonpoor. The couple with funds to purchase health care has relatively easy access to family planning services. The medically indigent couple—usually dependent on public and voluntary agencies for health care—is forced to do without, or to rely heavily on the least effective nonmedical techniques for fertility control unless they happen to reside in an area where family planning services are made readily available by public health services or voluntary agencies.
>
> *A number of studies have established the existence of a group totaling about 5 million medically indigent women in the United States of child bearing age having a need for subsidized family planning services.*" SEN. REP. No. 91-1004, 91st Cong., 2d Sess. 9 (1970) (footnote omitted) (emphasis added).

Because of the unavailability of contraceptives to so many women, and the unavailability in most states of legal abortions, many medically indigent women, who should not be forced to bear a child for medical or other reasons, have no alternative unless willing and able to obtain illegal abortions.

2. Contraceptive Failure

There is a wide variation among contraceptives respecting efficacy, safety and side effects. A recent study by Dr. Christopher Tietze, the Associate Director of the Bio-Medical Division of The Population Council and one of the leading experts in the field, examines the level of effective-

ness of the various contraceptive methods.[3] Tietze distinguishes between use-effectiveness or clinical effectiveness—"the protection from unwanted pregnancy achieved by users under real life conditions, including the effects of carelessness, ambivalence, and other manifestations of human frailty"[4]—and theoretical or biological or physiological effectiveness—"the antifertility action of a method under laboratory conditions."[5]

In his study, Tietze ranks currently utilized contraceptive methods according to estimated theoretical effectiveness[6] into four categories. The categories are "most effective," "highly effective," "less effective" and "least effective."[7]

Included in the "most effective" category are surgical sterilization, oral contraceptives, injectable progestational

3. Tietze, *Effectiveness of Contraceptive Methods* in CONTROL OF HUMAN FERTILITY: PROCEEDINGS OF THE FIFTEENTH NOBEL SYMPOSIUM, 303 (E. Diczfalusy & U. Borell eds. 1971) (hereinafter cited as Tietze). This section of *amici's* brief will also draw upon Segal & Tietze, *Contraceptive Technology: Current and Prospective Methods* in REPORTS ON POPULATION/FAMILY PLANNING, REPORT No. 1 (July 1971 Edition) (in press) (hereinafter cited as Segal & Tietze).

4. Tietze, *supra* note 3, at 304.

5. *Id.* at 303.

6. With respect to measurements of theoretical effectiveness he states: "Since these [laboratory] conditions are rarely achieved by human populations and can never be ascertained for most methods, theoretical effectiveness is not usually accessible to direct measurement. However, it can be inferred from the performance of the most successful group of users, supplemented by *a priori* anatomical and physiological considerations and by observations in the laboratory either *in vitro* or *in vivo,* or perhaps more accurately, *in viva.*" *Id.* at 303-304.

7. *Id.* at 304.

agents and temperature rhythm.[8] However, even as to techniques that are theoretically most effective, method failures occur. Also, each of these techniques has disadvantages and some are unavailable for medical reasons for many people.

Voluntary female or tubal sterilization is the most effective contraceptive method there is and a "method for which theoretical effectiveness and use-effectiveness coincide," although there are occasional failures of this technique.[9]

There is some data indicating "a somewhat lower level of effectiveness" achieved by male sterilization or vasectomy as opposed to tubal sterilization; however, such data is fragmentary.[10]

Despite its effectiveness, sterilization is not appropriate for many. A disadvantage of surgical sterilization as a method is that only in some cases is restoration of fertility in males and females possible after sterilization.[11] Thus, unless an individual is certain that he or she never wants any, or any more children, sterilization is inappropriate.

Oral contraceptives (OCs) of the combined type are "almost 100 percent effective" when "taken according to the prescribed regimen."[12] But the oral contraceptives

8. *Ibid.*

9. *Ibid.*

10. *Id.* at 305.

11. Segal & Tietze, *supra* note 3, at 10.

12. Tietze, *supra* note 3 at 305. Sequential medication according to Tietze is "somewhat less effective than combined medication." *Id.* at 306. Failures occur with both types of oral contraceptives, the only important reason for which is the patient's omission of one or more tablets in the course of the prescribed medication cycle. Segal & Tietze, *supra* note 3, at 5.

have disadvantages such as side effects during their early use.[13] Moreover, their use is medically contraindicated for certain patients, particularly those with a history of thromboembolic disease.[14]

Temperature rhythm is defined as "the determination of ovulation by means of basal body temperature and restriction of coitus to the post-ovulatory phase of the cycle"[15] and is placed by Tietze in the theoretically "most effective" category[16] whereas calendar rhythm, is in the "less effective"[17] or third category. Neither technique is suitable for many women particularly those with grossly irregular menstrual cycles.[18] The chief disadvantage of both of the rhythm methods is that "opportunity for coitus is greatly reduced, especially with temperature rhythm"[19] which is the more reliable method. Both techniques, if the sole methods relied upon, obviously require that the couple be highly motivated and disciplined,[20] since careful records must be kept and periods of abstinence observed.

---

13. Thus, "the early use of OCs is frequently associated with symptoms similar to those occurring during early pregnancy, such as nausea, vomiting, or breast engorgement * * *. Other common complaints are breakthrough bleeding during medication, weight gain, headache, dizziness, and brownish discoloration of the facial epidermis known as chloasma. Whereas most of these symptoms last only a few months, some users become discouraged and turn to other methods or even abandon their efforts at family planning." Segal & Tietze, *supra* note 3, at 6.

14. *Id.* at 6-7.

15. Tietze, *supra* note 3, at 307. Also included in the most effective category is the injectable progestational agent which is still in the testing stage. *Id.* at 306-307.

16. *Id.* at 307.

17. *Id.* at 310.

18. Segal & Tietze, *supra* note 3, at 5.

19. *Ibid.*

20. *Ibid.*

Tietze's second category—the theoretically "highly effective methods"—includes the intrauterine devices (IUDs), the diaphragm with cream or jelly, and the condom.[21] Tietze found that the most complete information on theoretical effectiveness is available for the intrauterine devices "since theoretical effectiveness and use-effectiveness are almost identical with this method."[22]

The clinical data available on IUD effectiveness indicates that "failure rates based on all pregnancies with the most widely used IUDs * * * ranged from 1.5 to 3.0 per 100 women during the first year of use and declined during later years."[23] In some cases in which pregnancy occurred, the IUD had been expelled without the user noticing it. However, the majority of the pregnancies occurred in women with the IUD *in situ*.[24] Tietze points out that "since some conceptions after an IUD had been expelled could have been avoided by careful self-examination, the theoretical effectiveness of the loop may be placed somewhere between the rate based on all pregnancies and the rate based on pregnancies with IUD *in situ*."[25]

There are other disadvantages to the IUD aside from the failure rate attributable to method, as opposed to use. Side effects may occur, the most common of which are

21. Tietze, *supra* note 3, at 307.

22. *Ibid.*

23. *Ibid.*

24. *Ibid.* "Failure rates based on pregnancies with the IUD verified as *in situ* averaged about one-fourth less than corresponding rates based on all pregnancies." *Ibid.*

25. *Ibid.*

"bleeding or spotting and pain, including cramps, backache, and similar discomforts. These symptoms most often occur soon after insertion and tend to disappear within a few months. In some cases, however, the bleeding or pain is sufficiently severe to require removal of the device."[26]

Segal and Tietze report that the association of pelvic inflammatory disease [PID] with the use of intrauterine devices is "a more important adverse experience."[27] As of July 1971 it was not yet known "whether the insertion of an IUD in women with healthy pelvic organs [as opposed to insertion in women with pre-existing chronic or subchronic conditions] can produce PID * * *."[28]

Tietze also reports that levels of theoretical effectiveness for the diaphragm and the condom are about the same as that for the IUD.[29] Pregnancy may occur with the condom due to a break or tear in the product.[30] There may be failure with even a well-fitted diaphragm due to improper insertion or due to displacement of the diaphragm during coitus.[31] However, use-effectiveness "is

26. Segal & Tietze, *supra* note 3, at 9.

27. *Ibid.*

28. *Ibid.* Segal & Tietze state: "The majority of cases of PID among women using IUDs are relatively mild and can be treated successfully with antibiotics and without removing the device. However, some patients with PID, with or without an IUD, develop serious complications and a few still die, even with adequate medical care." *Ibid.*

29. Tietze, *supra* note 3, at 307.

30. Segal & Tietze, *supra* note 3, at 3.

31. *Id.* at 4.

frequently lower'' with the diaphragm and condom,[32] and perfect use without omissions is rare.[33]

The ''less effective methods'' of contraception described by Tietze are chemical contraceptives such as vaginal foams, jellies, creams and the like, calendar rhythm and coitus interruptus.[34] Evidence indicates that *''vaginal foams* are more effective than *jellies* and *creams* which, in turn, are more effective than *foaming tablets* and *suppositories.''*[35]

Coitus interruptus, while of high theoretical effectiveness if correctly practiced, is, according to Tietze, a ''less effective'' technique because many males are physiologically unable to practice it effectively.[36]

The ''least effective'' techniques of contraception include the post-coital douche and prolonged breast feeding.[37] The former has a very high failure rate; in addition, rapid sperm migration to an area beyond the effective reach of the douche has been observed.[38] Hence, the very low rating of the douche. Breast feeding has a tendency to postpone the return of ovulation and menstruation. The

32. Tietze, *supra* note 3, at 307-308. The rates of unwanted pregnancies reported with these methods in clinical settings "are usually between 10 and 20 pregnancies per 100 women during the first year and less in later years." *Id.* at 308.

33. Segal & Tietze, *supra* note 3, at 3, 4.

34. Tietze, *supra* note 3, at 309-310. Calendar rhythm has already been discussed. *See* p. 16, *supra.*

35. Tietze, *supra* note 3, at 310.

36. *Id.* at 310-311.

37. *Id.* at 311.

38. *Ibid.*

duration of the protection cannot be predicted, and since the first post-delivery ovulation may precede menstruation, the woman may conceive without realizing that she is no longer protected.[39]

It is clear from the foregoing that even the theoretically most effective or highly effective methods of contraception are not always actually effective for a number of reasons. Except for voluntary sterilization which many people will not use, even the most effective or highly effective methods have shortcomings either in terms of method failures or in terms of side effects or medical contraindications. In addition some of the methods are so difficult to practice regularly and correctly that they have little practical utility.

Although the method failures for some techniques are not high in terms of *percentages,* a failure rate of 1.5 to 3 per 100 women with, for example, the IUD, is indeed significant when one considers the vast numbers of women using this device, *e.g.,* in 100,000 women, 1,500 to 3,000 would experience contraceptive failure.

The failure rates are, of course, much higher when the *use*-effectiveness is considered, and this too varies with the techniques in question, as well as with the motivation and education of the people using them.[40]

---

39. *Ibid.*

40. Tietze & Lewit, *The IUD and the Pill: Extended Use-Effectiveness,* FAMILY PLANNING PERSPECTIVES, April, 1971, at 53-55.

B. The Facts About Abortion

1. Abortion Is an Accepted Medical Procedure

There is no medical dispute as to the efficacy and safety of abortion as a procedure for the termination of an unwanted pregnancy. Indeed it has been shown that abortion in the early stages of pregnancy is far safer than childbirth.[41]

Modern medical opinion regards abortion as a procedure which should be available without state imposed restrictions as to the permissible reasons. Thus, on June 25th, 1970, the House of Delegates of the American Medical Association recommended that licensed physicians be permitted to perform abortions in hospitals or approved clinics without restriction after consultation with two other physicians.[42]

In August, 1970, the Executive Board of the American College of Obstetricians and Gynecologists approved a policy permitting performance of an abortion at the patient's request, which specifically states:

> "It is recognized that abortion may be performed at a patient's request, or upon a physician's recommendation.
>
> * * * When abortion is requested by a patient, a consultation is not necessary. When abortion is recommended by a physician, the indication for the proce-

41. *See, e.g.,* Tietze, *Mortality with Contraception and Induced Abortion,* 45 STUDIES IN FAMILY PLANNING 6 (1969). *See also* Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality,* 14 N. Y. L. FORUM 411, 511-513 (1968).

42. 213 J.A.M.A. 359 (1970).

> dure should be approved by a consultant knowledgeable in regard to the condition thought to indicate abortion * * *".[43]

Under this policy there are no restrictions to the grounds for abortion, and consultation is required only in those cases in which it is not the woman who requests abortion but rather the physician who recommends it.

The Committee on Family Planning of the Maternal and Child Health Section of the American Public Health Association recently stated that legal abortion as a safe health measure must be accepted as an essential component of maternal and child health services.[44] In addition, the American Psychiatric Association and the Group for Advancement of Psychiatry have recently endorsed the repeal of state abortion laws as applied to competent licensed physicians.[45]

2. The Dangerous Effects on Life and Health of Restrictive Abortion Laws

It has been estimated that about one million illegal abortions are performed each year.[46] While some of these illegal abortions are performed by physicians, the often tragic consequences of clandestine abortions, many of them self-induced, or performed by non-physicians, have created a serious state and national health problem. The most serious consequence of bungled illegal abortion is, of course,

---

43. Policy on Abortion Approved by the Executive Board of the American College of Obstetricians and Gynecologists, August, 1970.

44. Tyler & Schneider, *The Logistics of Abortion Services in the Absence of Restrictive Criminal Legislation in the Untied States,* 61 AM. J. PUB. HEALTH 489 (1971).

45. PSYCHIATRIC NEWS, January 1970, at 5.

46. BATES & ZAWADZKI, CRIMINAL ABORTION 3 (1964).

the death of the pregnant woman. It is estimated that abortion-related mortality is under-reported by as much as fifty percent.[47] Earlier estimates were that between 5,000 and 10,000 women died each year because of bungled illegal abortions.[48] However, the number of deaths from criminal abortion has decreased in recent years as a result of several factors including the advent of antibiotics, so that a figure of 500 to 1,000 such deaths per year is probably a more reliable national estimate.[49] Despite the fact that the death rate from illegal abortion has decreased, the adverse side effects of such abortions, including severe infection,[50] permanent sterility[51] or other serious compli-

47. Tietze, *Somatic Consequences of Abortion* (paper presented at National Institute of Health Workshop on Abortion, Obtained & Denied: Research Approaches) (December 15-16, 1969) (unpublished paper on file with the Population Council, New York City, N. Y.).

48. BATES & ZAWADZKI, *supra* note 46, at 3-4.

49. Hall, *Commentary* in ABORTION AND THE LAW 228 (D. Smith ed. 1967).

50. See, e.g., Decker & Hall, *Treatment of Abortion Infected with Clostridium Welchii,* 95 AM. J. OBST. & GYNEC. 394 (1966); Douglas, *Toxic Effects of the Welch Bacillus in Post-Abortal Infections,* 56 N.Y. STATE J. MED. 3673 (1956); Knapp, Platt & Douglas, *Septic Abortion,* 15 OBST. & GYNEC. 344 (1960); Mortiz & Thompson, *Septic Abortion,* 95 AM. J. OBST. & GYNEC. 46 (1966); Reid, *Assessment and Management of the Seriously Ill Patient Following Abortion,* 199 J.A.M.A. 805 (1967); Shenoi, Smits & Davidson, *Massive Removal of Small Bowel During Criminal Abortion,* 2 BRIT. MED. J. 929 (1966); Studdiford & Douglas, *Placental Bacteremia: A Significant Finding in Septic Abortion Accompanied by Vascular Collapse,* 71 AM. J. OBST. & GYNEC. 842 (1956).

51. "Will an abortion now lead to sterility later? If a criminal abortion is contemplated, the conscientious doctor will have to say 'Yes; it may well lead to sterility.' The first effect is scar tissue formation in the endometrium, which prevents proper implantation and nidation of the ovum. Or, it may give rise to an ascending infection starting with an endometritis which develops into a parametritis, pelvic cellulitis or salpingitis." ROMMER, STERILITY: ITS CAUSE AND ITS TREATMENTS 59 (1952)

cations are still epidemic. Thus, it has been found that "induced illegal abortion * * * is one of the important causes of subsequent infertility and pelvic disease."[52]

C. The Facts About Unwanted Births

The magnitude of the problem of unwanted births is discussed in the 1971 interim report of the President's Commission on Population Growth and the American Future. This report states:

> "Estimates made in 1965, based on married women's own reports about their childbearing experience, indicated that one-third of the married couples who did not intend to have any more children already had at least one unwanted child. In the period 1960-65 nearly 20 percent of all live births were reported as unwanted by their parents. Only one-fourth of all parents claimed to have been completely successful in preventing both unwanted and unplanned pregnancies.
>
> The 20 percent of births reported as unwanted by their parents represents nearly five million children born between 1960 and 1965 who theoretically would never have been born if their parents' desires had prevailed. Fortunately, many of these unwanted pregnancies and birth become wanted children. But many do not."

Commission on Population Growth and the American Future, *An Interim Report to the President and the Congress* 26 (1971).

It is obvious that unwanted births occurring in marriage frequently result in physical and mental harm to the mother, economic and social hardships to the existing fam-

52. KLEEGMAN & KAUFMAN, INFERTILITY IN WOMEN 361 (1966).

ily and often lead to the abuse and neglect of the children.[53]

The most disastrous unwanted pregnancies are those occurring out of wedlock. Illegitimacy rates are high in the United States and are increasing.[54] In 1968, the estimated number of illegitimate live births in the United States was 339,200. More than half of these births were to females between the ages of 15 and 24.[55] These figures do not reflect the number of out-of-wedlock conceptions since they do not take into account such factors as: out-of-wedlock pregnancies that are successfully concealed; out-of-wedlock pregnancies that result in forced marriages and legitimate births; and out-of-wedlock pregnancies that result in the delivery of stillborn infants. Also to be con-

53. *See* GIL, VIOLENCE AGAINST CHILDREN—PHYSICAL CHILD ABUSE IN THE UNITED STATES (1970); COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, AN INTERIM REPORT TO THE PRESIDENT AND THE CONGRESS 27 (1971).

54. Yurdin, *Recent Trends in Illegitimacy—Implications for Practice,* 49 CHILD WELFARE 373 (1970); Cutright, *Illegitimacy: Myths, Causes and Cures,* FAMILY PLANNING PERSPECTIVES (Special Feature) January, 1971 at 26-27.

55. The distribution by age of the illegitimate births in 1968 was as follows:

under 15 years	7,700
15 - 17 years	77,900
18 - 19 years	80,100
20 - 24 years	107,900
25 - 29 years	35,200
30 - 34 years	17,200
35 - 39 years	9,700
40 years and over	3,300

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DIVISION OF VITAL STATISTICS, PUBLIC HEALTH SERVICE, MONTHLY VITAL STATISTICS REPORT—TABLE 10: "Estimated Number of Illegitimate Live Births and Ratios by Age of Mother and Color—United States [Based on a 50 percent sample of births]" (1968). *See also* Yurdin, *supra* note 54, at 373-375.

sidered are the number of out-of-wedlock pregnancies terminated by spontaneous miscarriage or by abortion, legal or illegal. The extent to which premarital conception is not reflected in illegitimate births is partially revealed in a survey conducted by The National Center for Health Statistics which revealed that one-third of all first-born children in the United States in the years 1964 to 1966 were conceived out of wedlock. The study showed that "of the average 1,174,000 first births to women aged 15-44 which occurred in the United States each year during 1964-1966, 166,000 or 14 percent were illegitimate and 218,000, or 19 percent were premarital conceptions of legitimate babies."[56]

The unmarried girl or woman who becomes pregnant is faced with a number of alternatives, many of which depend on her economic status. In some instances a hastily arranged marriage will take place and an illegitimate birth will thus be prevented. Such forced marriages often between immature young people frequently lead to divorce or desertion. If the pregnant woman does not marry, she may seek an abortion. If she lives in a state in which the indications for abortion are circumscribed and/or in which the procedural hurdles for obtaining an abortion are great, she may, if she has sufficient funds, travel to another state or country to obtain a medically safe, legal abortion. If, however, she is young and/or ignorant and/or poor, she may try to abort herself or may turn to the unskilled quack abortionist and serious injury or even death may result from either course.

---

56. UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, PUBLIC HEALTH SERVICE, NATIONAL CENTER FOR HEALTH STATISTICS, "National Natality Survey," Monthly Vital Statistics Report Volume 18, No. 12 (Supplement 1970) at p. 1.

For the girl or woman who does not obtain an abortion, does not marry and bears the child, the costs to her, to the illegitimate child and to society are incalculable. She is likely to become a school dropout, economically dependent, poverty-stricken and trapped.[57] In addition, the occurrence of illegitimate births has adverse effects on the health of the unmarried mother and her child, many of which are related to her failure to obtain adequate prenatal care.[58] These effects include higher rates of prematurity and infant mortality than occur in legitimate births,[59] increased health hazards for the infant, including higher infant mortality rates during the first year,[60] and increase in child abuse and neglect.[61] Also important, because of the frequency with which illegitimate births occur to adolescents, is the direct relationship between

57. Campell, *The Role of Family Planning in the Reduction of Poverty,* 30 J. MARRIAGE AND THE FAMILY 236, 245 (1968).

58. *See generally* BERNSTEIN & HERZOG, HEALTH SERVICES FOR THE UNMARRIED MOTHER, United States Department of Health, Education and Welfare, Welfare Administration (Children's Bureau) (1964).

59. *Id.* at 2, 4.

60. Anderson, Jenss, Mosher & Richter, *The Medical, Social and Educational Implications of the Increase in Out of Wedlock Births,* 56 AM. J. PUB. HEALTH 1868, 1869 (1966).

61. *See generally* GIL, *supra* note 53. Gil reports that the victims of abuse are often unwanted children who live primarily in households headed by women, that is by women who are unmarried, widowed, divorced or separated. *Id.* at 146. Gil also found that 29 percent of the abused children revealed deviations in social interaction and general functioning, 14 percent suffered from deviations in physical functioning, 8 per cent revealed deviations in intellectual functioning, and that over 13 percent of the school age children in a sample of physically abused children attended special classes for retarded children or were in grades below their age level. *Id.* at 107.

early childbearing and the risks of particular diseases in offspring[62] and the risk of maternal death.[63]

At least one important study has analyzed the effects on children who are born after a request by their mother for a legal abortion on psychiatric grounds had been refused.[64] This study, which was conducted in Sweden following the first liberalization in 1939 of Sweden's abortion law, compared a series of 120 children born of unwanted pregnancies[65] as to which abortions on psychiatric grounds had been denied, with a control series of 120 children. The subjects of the study were followed from birth to the time of their 21st birthday.

The study found important differences between the unwanted and the control children. The authors summarized their findings as follows:

> "A study of the social features revealed that many more of the unwanted than control children had not

62. One study found "significantly elevated risks of intracranial and spinal injury at birth, postnatal asphyxia, atelectasis and club foot among children from very young mothers." Newcombe & Tavendale, *Maternal Age and Birth Order Correlations,* I MUTATION RESEARCH 446, 452 (1964). There are also special risks to children born to women who are over 35, including mental deficiency disorders, mongolism, cerebral spastic infantile paralysis, congenital malformations of the circulatory system, intracranial and spinal injury at birth and postnatal asphyxia. *Ibid.*

63. BERNSTEIN & HERZOG, *supra* note 58, at 3. It was also reported that, "generally maternal risk increases with decreasing maternal age below 20, and increases with increasing maternal age above 30." Perkin, *Assessment of Reproductive Risk in Non-Pregnant Women,* 101 AM. J. OBST. & GYNEC. 709, 710 (1968).

64. Fossman & Thuwe, *One Hundred and Twenty Children Born After Application for Therapeutic Abortion Refused* in ABORTION AND THE UNWANTED CHILD 123-145 (Carl Reiterman ed. 1971).

65. Most of these children were not born out of wedlock. *Id.* at 133.

> had the advantage of a secure family life during childhood. They were also registered more often in psychiatric services, and a few more of them than control subjects received psychiatric care. They were more often registered for antisocial and criminal behavior, and slightly more often for drunken misconduct, and they got public assistance more often than the control subjects. A few more of them were educationally subnormal and far fewer had pursued theoretical studies over and above what is obligatory. They were more often exempted from military service. More of the females married early and had children early than in the control series. The differences between the two series in these respects were often statistically significant, and when they were not significant they always pointed in the same direction—to the unwanted children being born into a worse situation than the control children."[66]

From the data gathered the authors concluded that "the very fact a woman applies for legal abortion means that the prospective child runs a risk of having to surmount greater social and mental handicaps than its peers, even when the grounds for the application are so slight that it is refused."[67]

Amici believe that the facts presented on unwanted births as well as on contraception and abortion demonstrate the importance of the cases at bar to individuals and to society.

---

66. *Id.* at 143.

67. *Ibid.*

POINT II

The Georgia and Texas statutes, by restricting the grounds for the performance of abortions, violate fundamental rights of women and their physicians under the Ninth and Fourteenth Amendments to the Constitution.

Amici contend that the legislative restrictions on the permissible grounds for abortion contained in the statutes here involved deprive women in Texas and Georgia of their fundamental constitutional right under the Ninth and Fourteenth Amendments to choose whether or not to bear a child. We contend further that these laws also infringe a woman's fundamental right to life and health, and a physician's right to practice medicine in accordance with the highest standards of his profession.

A. Statutory Framework

1. Texas

The Texas abortion statute proscribes all abortions except those which are "procured or attempted by medical advice for the purpose of saving the life of the mother." TEXAS PEN. CODE ANN. arts. 1191, 1196 (1961)

Abortions are completely denied all women in Texas other than those who fall within this narrow and vaguely worded exception; indeed, in practice abortions are denied to women who cannot convince a physician that they come within this exception.

Women in Texas whose pregnancy results from rape or incest, or for whom pregnancy would be dangerous to

physical or mental health, or whose pregnancy is contra-indicated, because of exposure to rubella or because of other intervening factors which result in there being a substantial risk of fetal defect or deformity—all are compelled to continue the pregnancy irrespective of their needs and the judgment of their physicians. Women unable for economic or other reasons to rear another or indeed any child are forced to become parents and have the quality not only of their lives but also that of their families adversely affected.[68] The Texas law also has the obvious effect of forcing most teenagers who become pregnant to bear children, many if not most of whom will be illegitimate.

2. *Georgia*

The Georgia statute prohibits abortions except where

> "(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or
>
> "(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or
>
> "(3) The pregnancy resulted from forcible or statutory rape." GA. CODE ANN. §26-1202(a) (1970 revision).

In Georgia, accordingly there are many women who do not fall within these categories and who cannot obtain needed abortions. Thus, if the injury to health, although "serious," is not "permanent," abortion is prohibited. Moreover, since the criminal law of Georgia provides that statutory rape is committed only where the female is 14

68. The effects of such restrictions on pregnant women and girls has been discussed. *See* pp. 24-29, *supra.*

years of age or younger,[69] teenagers over that age are unable to obtain abortions unless they fall within the terms of one of the other exceptions, which is highly unlikely. Also disregarded by the Georgia statute are the economic and social hardships imposed by unwanted pregnancy. That the pregnancy may have resulted because of contraceptive failure or unavailability is immaterial. Even if the pregnancy resulted from forcible rape, abortion is not assured.[70]

B. The Fundamental Right to Choose Whether or Not to Bear a Child

The right of a woman to choose whether or not to bear a child is an aspect of her right of privacy and liberty and, we submit, a fundamental right. This Court has frequently protected the individual's right of privacy and has emphasized the right of the individual "as against the Government * * * to be let alone,"[71] and the "right to be free, except in very limited circumstances from unwarranted governmental intrusions into one's privacy."[72]

---

69. GA. CODE ANN. §26-2018 (1970 revision).

70. The abortion statute requires, where abortion is considered necessary because of rape, that "the woman makes a written statement under oath, and subject to the penalties of false swearing, of the date, time and place of the rape and the name of the rapist, if known." In addition, a statement by the solicitor general of the judicial circuit where the rape allegedly occurred is required "that according to his best information, there is probable cause to believe that the rape did occur." GA. CODE ANN. §26-1202(b)(6) (1970 revision).

71. Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion of Mr. Justice Brandeis). The majority decision in Olmstead was overruled in Katz v. United States, 389 U.S. 347 (1967).

72. Stanley v. Georgia, 394 U.S. 557, 564 (1969).

A wide range of private individual activity in the areas of marriage, the family and sex has thus been safeguarded against governmental interference. The right to procreate, described by this Court as "one of the basic civil rights of man,"[73] led the Court to invalidate as a violation of equal protection an Oklahoma statute which imposed sterilization upon persons convicted two or more times of larceny but not upon similarly situated persons convicted of embezzlement. *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942). Similarly, the right to marry,[74] the right to direct the education of one's children,[75] the right to have possession of pornography in the privacy of one's own home,[76] have all been held to be fundamental rights under the Constitution.

We believe that the right of privacy recognized by this Court in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), includes the right of women to decide not only when but also whether to bear a child. As former Justice Tom C. Clark has cogently stated:

> "[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?" Clark, *Religion, Morality and Abortion: A Constitutional Appraisal,* 2 Loyola Univ. (L.A.) L. Rev. 1, 9 (1969).

73. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

74. Loving v. Commonwealth, 388 U.S. 1 (1967).

75. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

76. Stanley v. Georgia, 394 U.S. 557 (1969).

The force of Mr. Justice Clark's reasoning is apparent. *Griswold* recognized fundamental constitutional rights relating to the prevention of conception and established the substantive constitutional basis of the right to practice contraception and thus control fertility. As we have shown, recognition of the right to control conception by employing contraceptives by no means solves the problem of undesirable or unwanted pregnancies.[77] Even if the most reliable contraceptive techniques are employed, failures of use as well as failures of method occur. The most effective contraceptives are not 100 per cent effective and in many cases may be contraindicated for both medical and other reasons.[78] Moreover, there are literally millions of Americans for whom the most reliable, or indeed any reliable contraceptive is unavailable.[79]

The decision to bear or not to bear children is one of the most private and personal decisions that can be made. The responsibilities involved in raising a child are obviously serious ones and the implications of becoming a parent are far-reaching. Denial of an abortion to a woman who needs one thus infringes her freedom to regulate manifold aspects of her life, not only her reproductive potential.

The right to contraception implicitly includes the right to choose whether or not to become a parent. The right to control one's reproductive life even after fertilization has occurred is a corollary of the right this Court has recognized in *Griswold* and is at least equal in stature to similar private rights also previously acknowledged by

77. *See* pp. 12-29, *supra.*

78. *See* pp. 13-20, *supra.*

79. *See* pp. 12-13, *supra.*

this Court's decisions. *See, e.g., Stanley* v. *Georgia,* 394 U.S. 557 (1969); *Loving* v. *Commonwealth,* 388 U.S. 1 (1967); *Skinner* v. *Oklahoma, supra; Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923). Accordingly, we believe that in order to adequately implement the values protected by *Griswold* this Court should expressly recognize the right of abortion.

That there is a fundamental constitutional right to abortion was the conclusion of the courts below in the instant cases. *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); *Roe* v. *Wade,* 314 F. Supp. 1217 (N.D. Tex. 1970) (*per curiam*), *ques. of juris. postponed to merits,* 91 S. Ct. 1610 (1971) (No. 808, 1970 Term; renumbered No. 70-18, 1971 Term). Their view has also been accepted by a number of other courts which have considered the question and have affirmed that this is a fundamental right. *E.g., Doe* v. *Scott,* 321 F. Supp. 1384 (N.D. Ill. 1971), *appeals docketed, sub noms. Hanrahan* v. *Doe* and *Hefferman* 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*); *People* v. *Belous,* 71 Cal. 2d 954, 80 Cal. Rptr. 354, 458 P2d 194 (1969), *cert. denied,* 397 U.S. 915 (1970); *People* v. *Barksdale,* Docket No. 1 Crim. 9526 (Calif. Ct. of Appeal, First App. Dist., Division 1, July 22, 1971).[80]

80. *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); Steinberg v. Brown, 321 F. Supp 741 (W.D. Ohio 1970); 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).

C. The Fundamental Right to Life and Health

The woman's right to have access to needed medical services and more broadly her right to life and health are also at stake here. The right to life is, of course, self-evident and the right to protect health seems equally fundamental. *See Jacobson* v. *Massachusetts,* 197 U.S. 11 (1905). As this Court acknowledged in *United States* v. *Vuitch,* 91 S.Ct. 1294 (1971), health includes all aspects of physical and mental well-being. While, in *Vuitch,* this Court was construing the District of Columbia statute, we believe that implicit in that construction was the recognition that people must be free to safeguard health as defined broadly in that case.

Freedom to obtain medical services for safeguarding health (regardless of whether the risk is "permanent," as it must be under Georgia law) must be deemed an aspect of life and liberty if the Ninth and Fourteenth Amendments are to have meaning. There can hardly be a more basic attribute of freedom than the right to be secure from physical or emotional harm and the question of whether and how health should be protected is one uniquely suited to solution by the patient and the physician.

D. The Physician's Right to Provide His Patients with the Best Medical Treatment

The right of physicians to provide medical services to their patients must also be deemed fundamental and, as we have shown in Point I, abortion is a recognized medical service. Yet these Texas and Georgia laws prevent doctors from providing abortions for reasons wholly unrelated to medical and health considerations.

Amici suggest that there is no dispute as to the fundamental freedom of professionally trained people to pursue their calling on the basis of their training and expertise. This was the doctrine of *Dent* v. *West Virginia,* 129 U.S. 114 (1889), and is implicit in many later decisions of this Court. *See, e.g., Willner* v. *Committee on Character and Fitness,* 373 U.S. 96 (1963); *Greene* v. *McElroy,* 360 U.S. 474 (1959); *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957).

Physicians, like other members of learned professions, serve society by the exercise of expert judgment; they are responsible for the well-being of patients. Arbitrary government interposition of non-medical barriers between the patient and the exercise of the physician's professional judgment represents a serious infringement of the personal liberty of doctors. See *Dent* v. *West Virginia, supra. See also United States* v. *Freund,* 290 Fed. 411 (D. Mont. 1923); *United States* v. *One Package,* 86 F. 2d 737 (2d Cir. 1936). As this Court stated in *Dent*:

> "Few professions require more careful preparation by one who seeks to enter it than that of medicine. * * * The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal." 129 U.S. at 122.

And, as the district court concluded in *Freund,* a law which arbitrarily forbids a doctor from exercising his skill in a manner approved by medical consensus, is "an unreasonable mandate to malpractice * * * and is invalid." 290 Fed. at 413.[81]

81. *Amici* suggest that Lambert v. Yellowley, 272 U.S. 581 (1926), and Everard's Breweries v. Day, 265 U.S. 545 (1924), which overruled United States v. Freund, 290 Fed. 411 (D. Mont. 1923) by implication, are not relevant here because in *Lambert* and

In deciding the medical procedures to follow in all situations other than those involving abortion doctors are free to make objective decisions based on the medical situation and on medically relevant factors presented. It makes little sense to speak of the freedom to learn and to study if the state can interpose itself arbitrarily and direct a physician to disregard his skills and the well-being of his patients.

Moreover, the restrictive abortion laws often create for a doctor the dilemma of whether to follow the dictates of his conscience as a physician and use his medical skills to protect the patient or act in his own self-interest, regardless of the cost to the health and well-being of his patient and even when there are grounds to believe the patient is eligible for legal abortion. While the state may properly require doctors to act responsibly in the interest of the welfare of their patients, it may not, *amici* submit, require doctors to act irresponsibly to their patients because the state has put the doctor in the position of subordinating the patient's welfare to his own self-interest in avoiding risk of prosecution. Thus, the state has created a conflict of interest between the doctor and the patient and has restricted doctors in a manner wholly inconsistent with freedom to pursue their profession according to the best standards of medical practice.

Everard the Court found that there was "no consensus of opinion among physicians and medical authorities that they [the restricted liquors] have any substantial value as medicinal agents. * * *" Everard's Breweries v. Day, *supra* at 562. Indeed, the consensus of opinion appeared to be against the value of the prohibited liquors as medicinal agents. The holding in *Freund,* on the other hand, was based upon a finding of consensus in favor of the proscribed treatment. As pointed out in Point I, abortion is a fully accepted medical procedure.

E. Since Neither the Texas nor the Georgia Statute Promotes any Compelling State Interest, Both Violate the Ninth and Fourteenth Amendments to the Constitution.

Since the right to choose whether or not to bear a child and the right to give and receive medical treatment are fundamental rights of constitutional magnitude, the states of Georgia and Texas bear a heavy burden of justification for the severe restrictions on abortion contained in the laws at issue in these cases. As this Court stated in *Bates* v. *Little Rock,* 361 U.S. 516 (1960):

> "Where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling. *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449. See also *Jacobson* v. *Massachusetts,* 197 U.S. 11; *Schneider* v. *State,* 308 U.S. 147; *Cox* v. *New Hampshire,* 312 U.S. 569, 574; *Murdock* v. *Pennsylvania,* 319 U.S. 105; *Prince* v. *Massachusetts,* 321 U.S. 158; *Kovacs* v. *Cooper,* 336 U.S. 77." 361 U.S. at 524.

We believe that no more than four hypothetical state interests can be put forth by Texas and Georgia to support their statutory limitations on the permissible grounds for performance of abortions—(a) enforcing morals; (b) increasing population; (c) protecting the health of the pregnant woman; and (d) protecting the fetus. We shall discuss each of these interests separately but briefly in order to demonstrate that the statutes involved cannot stand on any of them.

1. Enforcing Morals

Any asserted state interest in enforcing morals by forbidding abortions, on the theory that this would prevent illicit sexual conduct, scarcely merits discussion. In the first place, if such an interest were asserted, the statutes would present clear instances of impermissible overbreath since neither Texas nor Georgia draws any distinction between pregnancies occurring within the marriage relationship and those outside it. Moreover, in Texas no distinction is drawn between consensual and non-consensual intercourse.

Narrowly drawn statutes exist or may be devised for the purpose of deterring sexual misconduct. Reliance upon anti-abortion statutes as a deterrent is not only overbroad but to "prescribe * * * [an unwanted pregnancy] * * * as a punishment for illicit intercourse would be a monstrous thing." *State* v. *Baird,* 50 N.J. 376, 383, 235 A. 2d 673, 677 (1967) (concurring opinion, Weintraub, C.J.). See also *Baird* v. *Eisenstadt,* 429 F. 2d 1398, 1402 (1st Cir. 1970), *prob. juris. noted,* 401 U.S. 934 (1970) (No. 804, 1970 Term; renumbered No. 70-17, 1971 Term). Moreover, there is no reasonable basis for believing that illegal sexual behavior has been or will be deterred by proscribing abortion.

Amici submit that any interest in deterring fornication or adultery cannot be deemed sufficiently compelling to justify the interference worked by these statutes on the rights of women (including married women pregnant by their husbands) and the rights of their physicians.

2. Increasing Population

With respect to any possible state interest in fostering population growth by unwanted pregnancies, *amici* need only point to the increasing concern of the United States Government and the governments of many of the states as well as of the United Nations and its constituent members with the threat posed by population increases.[82] In view of the widely acknowledged dangers of continued increase in population and of the myriad problems presented by unwanted pregnancies,[83] it is inconceivable that any serious attempt can be made to justify statutes restricting the grounds for abortion as a means of assuring continued population growth.

3. The Statutes Do Not Serve the Health Interests of Pregnant Women.

While the state admittedly has an interest in adopting appropriate narrowly drawn measures designed to protect the health and safety of all who seek medical care, no health interest can possibly be served by limiting the grounds for the performance of abortions.[84]

At one time, abortion, like other surgery, was dangerous. However, given the state of modern medical knowledge and present-day surgical techniques and procedures,

82. *See, e.g., Presidential Message on Population,* 115 CONG. REC. 20025-29 (1969); *Commission on Population Growth and the American Future, An Interim Report to the President and the Congress* (1971).

83. *See supra* at 24-29.

84. Georgia does not appear in the past to have argued that the purpose of its statutory limits on the grounds for abortion is to protect the health of women. See Jurisdictional Statement at 14-15, Bolton v. Doe, *appeal dismissed,* 91 S.Ct. 1614 (1971).

it can no longer be argued that these statutes are public health measures designed to protect the pregnant woman from hazards of abortion. For the fact is that today an abortion performed during the early stages of pregnancy in safe clinical surroundings by a physician involves less risk to the woman than does childbirth itself.[85]

The Texas and Georgia statutes and others like them, far from serving any health interest, have in fact created enormous public health problems by forcing women to bear unwanted children or resort to primitive methods of self-abortion or go to unqualified and/or discredited performers of abortions, which often result in serious injury or death.[86] If a woman is unable to justify her right to an abortion under the terms of the Texas or Georgia statutes, then unless she has the ability and the funds to seek a safe, legal abortion in another state or country, her only alternative is either to risk an unsafe, illegal abortion or to bear a child against her will, despite the fact that the pregnancy may be medically contraindicated.

The Texas law makes no pretext of considering the woman's health interests, except in the most extreme cases. The Georgia statute is somewhat less draconian, but in requiring "serious" and "permanent" injury to the woman's health before an abortion can be performed, it also demonstrates its lack of concern with real health needs. Moreover, the statute's onerous procedural requirements render abortion even in cases of threatened "serious" and "permanent" injury illusory for many women, and in ad-

85. Tietze, *supra* note 41. *See also* MEANS, *supra* note 41, at 511-513.

86. *See* pp. 22-24, *supra.*

dition contain no provision permitting abortion in emergencies. Thus, the threat to health is enhanced and the disregard of health made clear.

When the unwanted pregnancy occurs out of wedlock, particularly to a teenager, compulsory birth of an unwanted child is peculiarly detrimental to the child born and to the community as well as to the mother.[87] But whether the pregnancy occurs in or out of marriage, it is plain that the harmful effects of compulsory pregnancy and childbirth far outweigh any health danger to a woman for whom an abortion is performed by a licensed physician in proper clinical surroundings.

4. Protecting the Interest of the Fetus

The final interest that might be urged by Georgia and Texas is the states' alleged interest in the fetus after fertilization has occurred.

Amici contend that even assuming the states may be said to have interests in the potentiality for life that is represented by the fetus in the early stages of pregnancy, such interests cannot constitutionally be given precedence over the fundamental rights of women.

The California Supreme Court in *People* v. *Belous, supra,* correctly noted that "the law has always recognized that the pregnant woman's right to life takes precedence over any interest the state may have in the unborn,"[88] and both the Texas and Georgia statutes acknowledge this,

87. *See* pp. 24-29, *supra.*

88. People v. Belous, 71 Cal. 2d 954, 969, 80 Cal. Rptr. 354, 363, 458 P. 2d 194, 203 (1969) *cert. denied,* 397 U.S. 915 (1970).

although the inhibitions imposed on doctors by the threat of criminal prosecution tends to jeopardize women's lives. Georgia's more permissive statute also negates any claim that the state considers the fetus to have rights equal to those of the pregnant woman. Moreover, the states, through their criminal laws have neither equated abortion with murder nor made any effort to outlaw the use of the intrauterine device which in fact may function to prevent implantation after fertilization has occurred.[89]

Any assertion that the fetus' interests take precedence over the constitutional rights of women derives from non-secular considerations such as a conclusion as to "when life begins." In a culturally and religiously pluralistic society, the beliefs of individuals on matters such as this vary widely on the basis of religion and moral value systems. For those who equate abortion with murder, any state law sanctioning abortion in *any* situation, even where necessary to save life, is an anathema. But the differences which exist on this question in our society are religious and philosophical; they cannot be resolved by legislative fiat, nor, we believe, is it constitutionally permissible for the state to adopt the metaphysical belief of some about the nature of the fetus, particularly when, in so doing, it infringes the fundamental rights of living persons.

---

89. *See* Bengston & Mouvad, *The Effect of the Lippes Loop on Human Myometrial Activity,* 98 AM. J. OBST. & GYNEC. 957, 964 (1967); Tietze, *Contraception with Intrauterine Devices,* 96 AM. J. OBST. & GYNEC. 1043 (1966); Panchalingham, *Is the Contraceptive Intrauterine Device an Abortifacient?,* 1 LANCET 1391 (1965); Meloy, *Pre-Implantation Fertility Control and the Abortion Laws,* 41 CHI.-KENT. L. REV. 183 (1964).

Conclusion

For the reasons stated in this brief and in the briefs of the appellants, *amici* respectfully urge that this Court affirm the judgments of the three-judge courts below insofar as they held unconstitutional the limitations in the Georgia and Texas statutes on the grounds for the performance of abortions, reverse the judgment of the Texas three-judge court insofar as it denied injunctive relief, and reverse the judgment of the Georgia three-judge court insofar as it denied injunctive relief and upheld the constitutionality of the residency, consultation, committee approval and joint accreditation requirements of the Georgia law.

August, 1971

Respectfully submitted,

HARRIET F. PILPEL and
NANCY F. WECHSLER
Attorneys for Amici Curiae

Of Counsel:
GREENBAUM, WOLFF & ERNST
RUTH JANE ZUCKERMAN
MICHAEL KENNETH BROWN