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JANE ROE, et al.,

Appellants,

vs.

HENRY WADE,

Appellee.

No. 70-18

Washington, D. C.
December 13, 1971

Pages 1 thru 49

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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JANE ROE, et al., Appellants, v. HENRY WADE, Appellee.	No. 70-18

Washington, D. C.,

Monday, December 13, 1971.

The above-entitled matter came on for argument at 10:08 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

MRS. SARAH R. WEDDINGTON, 709 West 14th, Austin, Texas 78701, for the Appellants.

JAY FLOYD, ESQ., Assistant Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711, for the Appellee.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in No. 18, Roe against Wade.

Mrs. Weddington, you may proceed whenever you're ready.

ORAL ARGUMENT OF MRS. SARAH R. WEDDINGTON,

ON BEHALF OF THE APPELLANTS

MRS. WEDDINGTON: Mr. Chief Justice, and may it please the Court:

The instant case is a direct appeal from a decision of the United States District Court for the Northern District of Texas.

The court declared the Texas abortion law to be unconstitutional for two reasons: first, that the law was impermissibly vague; and, second, that it violated a woman's right to determine to continue or terminate a pregnancy.

Although the court granted declaratory relief, the court denied appellants' request for injunctive relief. The Texas law in question permits abortions to be performed only in instances where it is for the purpose of saving the life of the woman.

The case originated with the filing of two separate complaints. The first being filed on behalf of Jane Roe, an unmarried pregnant girl, and the second being filed on behalf of John and Mary Doe, a married couple.

Jane Roe, the pregnant woman, had gone to several Dallas physicians seeking an abortion, but had been refused care because of the Texas law.

She filed suit on behalf of herself and all of those women who have in the past, at that present time, or in the future would seek termination of a pregnancy.

In her affidavit she did state some of the reasons that she desired an abortion at the time she sought one. But, contrary to the contentions of appellee, she continued to desire the abortion, and it was not only at the time she sought the abortion that her desire was to terminate the pregnancy.

Q When this case was in the District Court, the case of Vuitch against the United States had not been decided here, had it?

MRS. WEDDINGTON: That's correct.

Q Do you think that has disposed of some of the questions raised now?

MRS. WEDDINGTON: Your Honor, I do not. In the Vuitch decision, this Court was working with a statute which provided that an abortion could be performed for reasons of health or life. Our Texas statute provides an abortion only where it is for the purpose of saving the life of the woman.

Since the Vuitch decision was rendered, the Texas Court of Criminal Appeals, which is our highest court of criminal jurisdiction, has held that the Texas law is not vague,

citing the Vuitch decision; but saying that the Texas law is more definite than the D. C. law. So, obviously, the Court of Criminal Appeals doesn't feel that the two are the same.

And in the Vuitch decision, the Justices of this Court emphasized continuously that a doctor, as a matter of routine, works with the problem of what is best for the health of his patients.

We submit that a doctor is not used to being restricted to acting only when it's for the purpose of saving the life of the woman, and that health is a continuum which runs into life; and a doctor in our State does not know whether he can perform an abortion only when death is imminent or when the woman's life would be shortened. He does not know if the death must be certain, or if it could be an increase in probability of her death.

So here in the District, doctors are able to exercise their normal matter of judgment, whether or not the health of a woman, mental or physical, would be affected. But in Texas we tell a doctor that unless he can decide whether it's necessary for the purpose of saving her life, and for no other reason, that he is subject to criminal sanction.

I think it's important to note the range of problems that could be presented to a doctor. The Court, for example, cited the instance of suicide. If a woman comes in, alleging that she will commit suicide, is it then necessary for him to

do, or can he do an abortion for the purpose of saving her life, or is that a situation where he has to have something more?

I think all of those questions cannot be answered at this point.

This brings up the married couple in our case; the woman in that case had a neural-chemical condition. Her doctor had advised her not to get pregnant, and not to take the birth control pills. She was using alternative means of birth control, but she and her husband were fearful that she would become pregnant and that although the neural-chemical condition would impair her health, there was -- evidently her doctor did not feel that she would die if she continued the pregnancy, and certainly they were very concerned about the effect of the statute and her physician seemed uncertain about its implication.

The doctors in our State continue to feel that our law is vague. Certainly, we introduced affidavits in the lower court to that effect. Since the time of the lower court ruling, the District Attorney in Texas has said that he will -- that he considers the Federal Court decision there not to be binding, and we do have a letter from him; as the first thing in our Appendix to the Brief. Stating that he will continue to prosecute.

So the doctors in Texas, even with the federal decision

and even after the Vuitch decision do not feel free to perform abortions, and instead 728 women in the first nine months after the decision went to New York for an abortion. Texas woman are coming here.

It's so often the poor and the disadvantaged in Texas who are not able to escape the effect of the law. Certainly there are many Texas women who are affected, because our doctors still feel uncertain about the impact of the law, even in light of the Vuitch decision.

Q Well, then, of course, Mrs. Weddington, you make many additional constitutional attacks on the Texas statute, and only one was before us in the Vuitch case --

MRS. WEDDINGTON: Yes, Your Honor, we do.

Q -- only the claim of constitutional vagueness, that the Court explicitly didn't --

MRS. WEDDINGTON: Did not deal with it.

Q -- deal with the other claim. You make many other claims. Of course, before you get to any of those, there are a good many thresholds of questions, are there not, to get to your decision?

MRS. WEDDINGTON: Yes, Your Honor,there are.

I think it's of course important to point out to the Court that in my reading of Younger vs. Harris and the companion cases, all the Court was concerned about in those cases was a situation where there was an attempt to interfere with the

pending State crimin al prosecution.

In this case, as I pointed out, the original parties to this matter are women, and in one case the husband, the women certainly are not subject to prosecution in the State of Texas. They are -- it is impossible for them to stand in the criminal dock and litigate their interests. They came seeking injunctive relief, but it was not against pending State criminal prosecutions. They were not even aware of the prosecution against Dr. Hallford.

Q Could they, under Texas law, be charged as accomplices --

MRS. WEDDINGTON: No, Your Honor.

Q -- or as co-conspirators or anything like that?

MRS. WEDDINGTON: No. We have express Texas cases. In one situation, Woodrow vs. State, an 1880 case, the woman had taken a potion to induce abortion, and the Texas court specifically said that the woman is guilty of no crime, even in that situation; and that in fact she is the victim of our law.

There is no declaratory relief available for these plaintiffs. Their only forum was the Federal Court, and it was to those courts that they turned.

Q Your three plaintiffs here, representing classes, I gather --

MRS. WEDDINGTON: Yes, sir.

Q -- one, an unmarried pregnant woman --

MRS. WEDDINGTON: Yes, sir.

Q -- two, a married couple --

MRS. WEDDINGTON: Couple, yes.

Q -- where it was --

MRS. WEDDINGTON: And the doctor --

Q -- shown that it would be injurious to the wife's health to have a child, and also injurious to her health to use the most efficient form of birth control.

MRS. WEDDINGTON: Yes.

Q And then, third, the physician --

MRS. WEDDINGTON: Yes, but --

Q -- who is under indictment or was at the time of this complaint?

MRS. WEDDINGTON: Yes.

Q All right.

MRS. WEDDINGTON: The physician intervened after the order was entered granting Jane Roe a three-judge court, and he intervened again, asking only that future prosecution under the law be enjoined. He did not ask any relief of the court, relating to his pending State criminal prosecution.

He did specifically in his complaint reserve the right to ask for future relief, but that was never done, and certainly, in the future, if he were to ask for relief, the court would have the guidance of Younger vs. Harris and companion

cases.

But there was in no way any request for any action to interfere with the pending criminal prosecutions then in process.

As to -- there is an allegation that the question is moot, since the woman has now had -- has carried the pregnancy to term. And I think it is important to realize that there are several important aspects in which this case differs from the case that the courts might usually be presented.

First, the case is different in the nature of the interest which is involved, and in the extent to which personal determination is undermined by this statute; the effect that it has on women.

Second, it is unique in the type of injury that's presented. Certainly there are some injuries that can be compensated, and most last over a sufficient period of time for the courts to litigate the interest. But in this case, a progressing pregnancy does not suspend itself in order to give the time -- the courts time to act. Certainly Jane Roe brought her suit as soon as she knew she was pregnant, as soon as she had sought an abortion and been denied, she came to federal courts.

She came on behalf of a class of women, and I don't think there's any question but that women in Texas continue to desire abortions and to seek them out, outside our State.

There was an absence of any other remedy, and without the ability to litigate her claim, as a pregnant woman, who came seeking relief, and who was affected by the time required for the federal process, not because of any infirmity in her own attempts to litigate her interests, that this will in fact be a case certainly presenting substantial federal question and yet evading review in the future.

I think the third way in which it is unique is, as I've stated the fact, that it is the only forum available for these women. They have no other way to litigate their interests.

Q Does that mean that there is no possibility of getting a declaratory judgment under Texas law, even if --

MRS. WEDDINGTON: Yes, Your Honor, declaratory judgments in the State of Texas are limited to a situation where property rights are involved. And we also have a very unusual situation in Texas, where we have two concurrent jurisdictions, one the civil, and one the criminal. And even -- there are some cases which indicate that our State Supreme Court would not have the ability to mandamus any of the criminal prosecution officers because the Texas Court of Criminal Appeals has jurisdiction as to all criminal matters in the State of Texas.

So, even if the woman had been able to bring a declaratory judgment, which she couldn't, she couldn't have gotten any sort of relief against future prosecution. And it was exactly the absence of the court granting an injunction

against future prosecutions which has resulted in the irreparable injuries these women have suffered.

In Texas, the woman is the victim. The State cannot deny the effects that this law has on the women of Texas. Certainly there are problems regarding even the use of contraception. Abortion now for a woman is safer than childbirth. In the absence of abortion or legal medically safe abortions, women often resort to the illegal abortion, which certainly carries risks of death, all the side effects, such as severe infection, permanent sterility, all the complications that result.

And, in fact, if the woman is unable to get either a legal abortion or an illegal abortion in our State, she can do a self-abortion, which is certainly, perhaps by far the most dangerous; and that is no crime. She is, in our State, -- (microphone noises)

Q The microphone won't be effective if you have it covered over.

MRS. WEDDINGTON: Excuse me, Your Honor. Thank you.

Texas, for example, it appears to us, would not allow any relief at all, even in situations where the mother would suffer perhaps serious physical or mental harm. There is certainly a great question about it.

If the pregnancy would result in the birth of a deformed or defective child, she has no relief.

Regardless of the circumstances of conception, whether it was because of rape, incest, whether she is extremely immature, she has no relief.

I think it's without question that pregnancy to a woman can completely disrupt her life, whether she's unmarried, whether she's pursuing an education, whether she's pursuing a career, whether she has family problems; all of the problems of personal and family life for a woman are bound up in the problem of abortion.

For example, in our State there are many schools where a woman is forced to quit if she becomes pregnant. In the city of Austin, that is true. A woman, if she becomes pregnant and is in high school, must resign, or must drop out of the regular education process; and that's true of some colleges in our State.

In the matter of employment, she often is forced to quit at an early point in her pregnancy; she has no provision for maternity leave; she has -- she cannot get unemployment compensation, under our laws, because the law holds that she is not eligible for employment, being pregnant, and therefore is eligible for no unemployment compensation. At the same time, she can get no welfare, to help her at a time when she has no unemployment compensation and she's not eligible for any help in getting a job to provide for herself.

There is no duty for employers to rehire women, if

they must drop out to carry a pregnancy to term. And of course this is especially hard on the many women in Texas who are heads of their own households, and must provide for their already existing children.

And obviously the responsibility of raising a child is a most serious one. And the time and emotional investment that must be made cannot be denied.

So a pregnancy to a woman is perhaps one of the most determinative aspects of her life. It disrupts her body, it disrupts her education, it disrupts her employment, and it often disrupts her entire family life. And we feel that because of the impact on the woman this certainly, in as far as there are any rights which are fundamental, is a matter which is of such fundamental and basic concern to the woman involved, that she should be allowed to make the choice as to whether to continue or to terminate her pregnancy.

I think the question is equally serious for the physicians of our State. They are seeking to practice medicine in what they consider the highest method of practice. We have affidavits in the back of our brief from each of the heads of public -- heads of obstetrics and gynecology departments, from each of our public medical schools in Texas. And each of them points out that they were willing and interested to immediately begin to formulate methods of providing care and services for women who are pregnant and who do not desire to

continue the pregnancy.

They were stopped cold in their efforts, even with a declaratory judgment, because of the DA's position that they would continue to prosecute.

Q Mrs. Weddington, so far, on the merits, you've told us about the important impact of this law, and you've made a very eloquent policy argument against it. I trust you are going to get to what provisions of the Constitution you rely on, because, of course, we'd like to, sometimes --

MRS. WEDDINGTON: Very interested.

Q -- leave them out here, and be involved simply with matters of policy, as you know.

MRS. WEDDINGTON: Your Honor, in the lower court, as I am sure you're aware, the court held that the right to determine whether or not to continue a pregency rested upon the Ninth Amendment, which of course reserves those rights not specifically enumerated to the government to the people.

I think it is important to note, in a Law Review Article recently submitted to the Court and distributed among counsel by Professor Cyril Means, Jr., entitled "The Phoenix of Abortional Freedom"; that at the time the Constitution was adopted, there was no common law prohibition against abortion, that they were available to the women of this country.

Certainly, under the Griswold decision, it appears that the members of the Court in that case were obviously

divided as to the specific constitutional framework of the right which they held to exist in the Griswold decision.

I'm a little reluctant to aspire to a wisdom that the Court did not -- was not in agreement on. I do feel that it is that the Ninth Amendment is an appropriate place for the freedom to rest. I think the Fourteenth Amendment is an equally appropriate place, under the rights of persons to life, liberty, and the pursuit of happiness. I think, in as far as liberty is meaningful, that liberty to these woman would mean liberty from being forced to continue the unwanted pregnancy.

Q You're relying in this branch of your argument simply on the due process clause of the Fourteenth Amendment?

MRS. WEDDINGTON: We had originally brought the suit alleging both the due process clause, equal protection clause, the Ninth Amendment, and a variety of others. Since --

Q And anything else that might have been appropriate.

MRS. WEDDINGTON: (Laughing) Yes.

Since the District Court found the right to reside in the Ninth Amendment, we pointed out attention in the brief to that particular aspect of the Constitution. But I think we would not presume -- I do feel that in so much as members of the Court had said that the Ninth Amendment applies to rights reserved to people, and those which were most important, and certainly this is, that the Ninth Amendment is the appropriate

place.

Insofar as the Court has said that life, liberty, and the pursuit of happiness involved the most fundamental things of people, that this matter is one of those most fundamental matters.

I think in as far as the Court has said that there is a penumbra that exists, to encompass the entire purpose of the Constitution, that I think one of the purposes of the Constitution was to guarantee to the individual the right to determine the course of their own lives.

In so far as there was, perhaps, no compelling State interest, and we allege there is none in this case, that there again the right fixed within the framework of the previous decisions of this Court.

Q What is the asserted State interest? I mean, is there any legislative history about this statute?

MRS. WEDDINGTON: No, sir, Your Honor. No, sir, there is not. The only legislative history, of course, is that which is found in other States, which has been pointed out to the Court before, and Professor Means points out again, that these statutes were adopted for the health of the mother, certainly the Texas courts have referred to the woman as being the victim, and they have never referred to anyone else as being the victim.

Times have certainly changed. I think it's important

to realize that in Texas self-abortion is no crime. The woman is guilty of no crime, even though she seeks out the doctor, even though she consents, even though she participates, even though she pays for the procedure; she again is guilty of no crime whatsoever.

It's also interesting that our statutes -- the penalty for the offense of abortion depends on whether or not the consent of the woman was obtained prior to the procedure. It's double if you don't get her consent.

There is no indication in Fondren v. State?, for example. The court ruled that a woman who commits an abortion on herself is guilty of no crime. Again, she being regarded as the victim rather than the perpetrator of the crime.

Obviously, in our State, the offense is not murder. It is an abortion, which carries a significantly lesser offense. There is no requirement of -- even though the State, in its brief, points out the development of the fetus at an eight-week period, the same State does not require any death certificate or any formalities of birth; that the products of such a conception would be handled merely as a pathological specimen.

Q And the statute doesn't make any distinction based upon at what period of pregnancy the abortion is performed?

MRS. WEDDINGTON: No, Your Honor. There is no time

limit or indication of time whatsoever; so I think --

Q Well, do you make any distinction?

MRS. WEDDINGTON: No, sir. I do -- I feel that the question of a time limit is not strictly before the Court, because of the nature of the situation in which the case is handled. Certainly I think, as a practical matter, though, most of the States that do have some time limit indicated still permit abortions beyond the time limit for specified reasons. Usually where the health of the mother is concerned.

Q What's your constitutional position, though?

MRS. WEDDINGTON: As to a time limit?

Q What about -- whatever clause of the Constitution you rest on, Ninth Amendment, due process, the general pattern, penumbra --

MRS. WEDDINGTON: It is our position --

Q -- will that take you right up to the time of birth?

MRS. WEDDINGTON: It is our position that the freedom involved is that of a woman to determine whether or not to continue her pregnancy. Obviously I have a much more difficult time saying that the State has no interest in late pregnancy.

Q Why? Why is that?

MRS. WEDDINGTON: I think it's more the emotional response to a late pregnancy, rather than it is any constitu-

tional --

Q Emotional response by whom?

MRS. WEDDINGTON: I guess by persons considering the issue outside the legal context. I think as far as the State --

Q Well, do you or don't you say that the constitutional --

MRS. WEDDINGTON: I would say the constitutional --

Q -- right you insist on --

MRS. WEDDINGTON: Yes, sir.

Q -- reaches up until the time of birth, or what?

MRS. WEDDINGTON: The Constitution, as I read it, and as interpreted and documented by Professor Means, attaches protection to the person at the time of birth. Those persons born are citizens. The enumeration clause, we count those people who are born.

The Constitution, as I see it, gives protection to people after birth.

Q Mrs. Weddington, may I ask --

MRS. WEDDINGTON: Yes.

Q -- the issue here, I guess, on your appeal, is whether you are entitled to injunctive relief?

MRS. WEDDINGTON: Yes, sir.

Q Assuming that, in all other respects, your arguments are accepted, why do you think, in addition to declaratory relief, you are entitled to injunctive relief?

Those are different things, aren't they?

MRS. WEDDINGTON: Yes, sir.

Certainly, in your dissent, you point out, in Perez vs. Ledesma, concurring/dissent opinions --

Q That was a dissent?

MRS. WEDDINGTON: It was a dissent, I think.

-- that there are different standards which apply to the declaratory judgment and to injunctive relief.

Q Well, I guess we said that in two or three more --

??

MRS. WEDDINGTON: Yes, that's correct.

And that's what the Court said, following Zwickler vs. Koota, that even though they were granting declaratory relief, that different considerations applied as to injunctive relief.

But it seems that the opinions of this Court have established that where there is great and immediate threat of irreparable injury, with no adequate remedy in State courts, that an injunction is still proper; and it is our position that there is great and immediate threat or irreparable injury.

Q In what form?

MRS. WEDDINGTON: In the form of a continuing pregnancy, that will not abate, and that continues, that --

Q Well, so you're really -- you're asserting that the pregnant woman has standing --

MRS. WEDDINGTON: Yes.

Q -- in this case, and the married couple, where the wife is not pregnant, have standing.

MRS. WEDDINGTON: Yes, Your Honor.

Q What about the doctor, where a criminal prosecution was already pending against him?

MRS. WEDDINGTON: The doctor, as I said, was asking no relief as to the pending prosecution. He was only asking relief as to future prosecution.

Q But he was asking for a declaratory judgment?

MRS. WEDDINGTON: Yes, Your Honor, he joined in both: the request for the declaratory judgment, and --

Q Well, didn't Younger and its companion cases cover declaratory judgment? In Mackell?

MRS. WEDDINGTON: Where there were pending -- where the -- Samuels vs. Mackell, as I read it, did say that where you had an "I request for declaratory judgment", there would be an effect on a pending criminal prosecution.

Q And was one pending when this action was brought?

MRS. WEDDINGTON: There was one pending when this action was brought; those against Dr. Hallford.

However, in this case, we submit that if there is to be any meaning to the federal courts as the supreme arbiters of constitutional rights, that they must be able to act at least in some form when there are pending criminal prosecutions. Not particularly against the person involved in the prosecution,

but other --

Q Well, those cases have said that the federal courts may, but, I thought, to limited situations through harassment by the prosecution, improperly used as a device to harass the person prosecuted; wasn't that it?

MRS. WEDDINGTON: Yes, Your Honor. But again, as I understood it --

Q Well, are you suggesting it ought to be broader than that?

MRS. WEDDINGTON: I'm suggesting that in this case these -- the women in particular brought a declaratory action, having nothing to do with the pending State criminal prosecution --

Q I thought we were talking now about --

MRS. WEDDINGTON: -- and that the intervention of the doctor certainly should not be sufficient as to the --

Q Well, we're talking about the doctor's case, aren't we?

MRS. WEDDINGTON: Right. That the intervention -- that because the doctor intervened, when he was asking no relief as to the pending State criminal prosecution, that his intervention --

Q You mean he was asking -- he was asking what? No injunction against the continuance of that prosecution?

MRS. WEDDINGTON: That's correct. He was willing

to litigate his interest.

Q In other words, he wants declaratory judgment --

MRS. WEDDINGTON: As to future prosecutions.

Q Well, except that he wanted a declaratory judgment, as I understand it.

MRS. WEDDINGTON: Yes, sir.

Q And the underlying statute on which the --

MRS. WEDDINGTON: Yes.

Q -- prosecution was brought was unconstitutional; isn't that it?

MRS. WEDDINGTON: Yes.

Q Well, I thought that's what Samuels v. Mackell said you couldn't have.

MRS. WEDDINGTON: And which your dissent said was incorrect.

Q Well, I repeat that it was.

MRS. WEDDINGTON: (Laughing) It was a dissent, okay.

I think perhaps we would stress that there are two separate actions before the Court: first, that of the women; and, second, that of the doctor.

Q So that even though the --

MRS. WEDDINGTON: Even though the doctor -- even though the Court might find that the doctor was an inappropriate party for relief, it certainly would not affect the original action, as brought by the women.

Q All right. Then, I come back again: If we're left only with the ladies' action, are you suggesting that the declaratory relief they already obtained is not enough, because that doesn't help terminate the pregnancy?

MRS. WEDDINGTON: Because they are still subject to the irreparable injury, and have no adequate State remedy. And if they are not able to continue to litigate their interest in this situation, any time there was any prosecution pending against any one in the State, at any point in the appeal -- for example, the Thompson case was filed in 1968. It's been decided now in our State courts, it's on appeal, or it will be appealed here, I think.

And certainly if they cannot litigate their interest, while there is prosecution pending against the doctor, they will -- in many instance, where a statute -- where there's --

Q Well, I suppose the answer is that if there's prosecution against the doctor, there's not going to be any doctor that's going to be available; is that it?

MRS. WEDDINGTON: Yes. They cannot even decide to take the risk for themselves under the declaratory judgment. They must rely on another person to take that risk.

But certainly the doctor raised not only his own rights, but the rights of his patients; and those same patients are suffering the same sort of irreparable injury that the original plaintiffs were suffering.

Q Couldn't the doctor raise that same point in the criminal prosecution?

MRS. WEDDINGTON: Yes, Your Honor, he can; but I don't feel it's appropriate to make those women, who are most vitally affected -- certainly more so than the doctor, who can merely decided not to perform an abortion and thereby escape --

Q I'm only talking about the doctor. You said there were two separate issues here. On the issue involving the doctor --

MRS. WEDDINGTON: Yes, sir.

Q -- you could litigate everything he's now litigating in the State courts?

MRS. WEDDINGTON: Yes, Your Honor.

My point being that these women should not be compelled to leave it up to a doctor to litigate those interests.

Q Well, he's going to obviously defend himself in a criminal prosecution, isn't he? You can count on him to do that?

MRS. WEDDINGTON: Well, I think there are different interests involved, and in most criminal prosecutions the doctors would bring up other problems, such as --

Q "I didn't do it", or something like that?

MRS. WEDDINGTON: Yes. Or if the witnesses have disappeared, or it was really was for this reason, in this particular case.

Q Yes. But has this defense ever been interposed in a Texas criminal case?

MRS. WEDDINGTON: Yes, Your Honor.

Q Of constitutional defense?

MRS. WEDDINGTON: There is one recent opinion, Thompson vs. The State of Texas, which the Attorney General attempted to bring to the attention of the Court, and it was not printed, and the court rejected it. But it was a decision about a month and a half ago, which originated in Houston, a doctor there was indicted on a charge of abortion. At trial he used only an alibi defense. But on his appeal he did raise the same constitutional questions that we raised in the federal court.

Q The court said that was too late?

MRS. WEDDINGTON: No, Your Honor, they could have, but they didn't. They went ahead and litigated those issues. And our Texas Court of Criminal Appeals, which is our highest court, has now held that the statute is not vague, citing Vuitch, which again I would contend is an incorrect reliance.

Q That's the case you cited to the Chief Justice --

MRS. WEDDINGTON: Yes.

Q -- in your argument.

MRS. WEDDINGTON: And, second, that they specifically did not determine whether or not there was a right to privacy, but did hold there was a compelling interest.

So, in that particular situation, which is the only situation a doctor did attempt to litigate the same issues.

Q And the Texas Court of Criminal Appeals has basically upheld the constitutionality --

MRS. WEDDINGTON: Indirectly -- they have held --

Q -- constitutional validity of the statute?

MRS. WEDDINGTON: -- they have held, really, directly in opposition to the federal court opinion from which we are appealing.

Q Is that case coming here, do you know?

MRS. WEDDINGTON: They have filed a motion for rehearing in the State Court of Criminal Appeals, which will be argued tomorrow. I think it's very unlikely that the court would change its opinion, and it is the intention of those parties to appeal.

Q Yes.

However, does Texas law, in other areas of the law, give rights to unborn children in the areas of trusts and estates and wills, or --

MRS. WEDDINGTON: No, Your Honor, only if they are born alive. We have the Supreme Court of Texas that recently has held in one case that there is an action for prenatal injury at any stage prior to birth, but only upon the condition that it be born alive.

The same is true of our property law, the child must

be born alive.

And I think there is a distinction between those children which are ultimately born, and I think it is appropriate to give them retroactive rights; but I think that's a completely different question from whether or not they had rights at the time they were still in the womb.

Q What about the unborn child who is, as a result of an accident, killed, or whatever word you want to use for them?

MRS. WEDDINGTON: There has been no situation litigated like that in Texas. I suppose you noted that the Iowa --

Q What about around the country?

MRS. WEDDINGTON: The Iowa Supreme Court, about two weeks ago, held that where it was stillborn, there was no cause of action whatsoever. The child didn't --

Q Well, for the mother or for the unborn?

MRS. WEDDINGTON: Well, now -- oh, excuse me -- I'm speaking solely for the fetus. That the fetus had no independent right.

Q All right.

MRS. WEDDINGTON: That the mother --

Q What about the mother recovering for the death of the child? Or for the -- whatever you want to call it.

MRS. WEDDINGTON: Only for her injury.

Q Only for hers?

MRS. WEDDINGTON: Yes.

Q Does that include anything with regard to the child?

MRS. WEDDINGTON: No, Your Honor.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Weddington.

Mr. Floyd.

ORAL ARGUMENT OF JAY FLOYD, ESQ.,

ON BEHALF OF THE APPELLEE

MR. FLOYD: Mr. Chief Justice, and may it please the Court:

It's an old joke, but when a man argues against two beautiful ladies like this, they're going to have the last word.

Before I proceed to the original issue in this case, which was the propriety of the trial court denying injunctive relief, I would like to bring to the Court's attention some grave matters concerning what has been referred to as the standing of the parties.

The couple involved, they were a married couple, a childless married couple; the only matter, evidence, or whatever in the record concerning their contention is contained in their first amended original petition. That is, that the woman would have difficulty,if she became pregnant, in carrying a child to childbirth.

Further, that they were unprepared for parenthood. We submit to the Court that their cause of action is strictly based upon conjecture: Will they continue the marriage? Will her health improve? Will they then be, at some time in the future, prepared or unprepared for parenthood?

There is no fair prosecution by Mary Doe. If we accept all contentions of these -- this married couple, we submit that they still do not come under the prescribed conditions of Flask vs. Cohen, and Golden vs. Zwickler. We feel that the lower court properly denied them standing.

As to the unmarried, pregnant female, a unique situation arises in: Is her action now moot? Of course, if moot, there is no case or controversy --

Q It's a class action, wasn't it?

MR. FLOYD: It was a class action.

Q Surely, you would -- I suppose we could almost take judicial notice of the fact that there are, at any given time, unmarried, pregnant females in the State of Texas.

(Laughter.)

Couldn't we?

MR. FLOYD: Yes, Your Honor.

I would say that the only thing that could uphold her standing would be -- or eliminate the mootness issue, would be whether or not this is a class action on her part. Yes, Your Honor.

The record that came up to this Court contains the amended petition of Jane Roe, an unsigned, alias affidavit; and that is all.

She alleges that she was pregnant on April the 20th, 1970, which is some 21 months ago.

Now, I think that it is -- it has been recognized by the appellants' counsel that she is no longer pregnant.

This Court has consistently held that the time of determination of mootness is when the hearing is before the court; that is, a case can become moot from the hearing in the trial court up until the time it reaches this Court.

We do not feel that appellants' authority, contained in their brief, will substantiate her contention that the case is not moot.

I might add this, that I believe the law to be that if there is a reasonable possibility of reoccurrence of the situation, then the case would not be moot. Now, this is the W. T. Grant case.

The other case or cases concern orders of the Interstate Commerce Commission, which the Court holds that there is a possibility or a reasonable possibility of continuation of those orders, and the capability of repetition. It deals mainly with the capability of repetition.

We think the case of Jane Roe can be easily compared to Hall vs. Beals. In that particular case, a group

of voters instituted a class action, complaining of a Colorado statute, which prescribed a residency requirement of six months. They had, at the time, lived in the State -- or at the time of the election, lived in the State for some four or five months.

The case came up through the lower courts to this Court, and in the meantime Colorado repealed the statute, and established a two-month residency requirement. The election was held in the meantime.

The trial court plaintiffs complained of the two-month residency requirement. This Court held the cause of action moot, even though it was denomination as a class action.

Q But there's a big difference. Colorado had amended its statute, and Texas has not.

MR. FLOYD: That is correct, sir.

But the fact was that you still had, if it is what we want to call it, the evil still existing, of two months.

Q But it was the other statute that had been the subject of the litigation. And that statute had been amended, in Hall v. Beals. That's not true here.

MR. FLOYD: That's not what we call "white horse", no. I understand.

In connection with the class action aspect of this, and I say I have no authority to support this proposition, but it would appear that in order for a class action to continue, if there be one to begin with, is that one plaintiff must

remain, or else an intervenor or someone to be a representative of the class. Because this is the whole purpose of this class action, to have a representative in court.

Now, the position of the appellant Hallford --

Q How do you suggest, if you're right, how do you -- what procedure would you suggest for any pregnant female in the State of Texas ever to get any judicial consideration of this constitutional claim?

MR. FLOYD: Your Honor, let me answer your question with a statement, if I may.

Q All right.

MR. FLOYD: I do not believe it can be done. There are situations in which, of course as the Court knows, no remedy is provided. Now, I think she makes her choice prior to the time she becomes pregnant. That is the time of the choice. It's like, more or less, well, the first three or four years of our life, we don't remember anything; but once a child is born, a woman no longer has a choice; and I think pregnancy makes her make that choice, as well.

Q Maybe she makes her choice when she decides to live in Texas!

(Laughter.)

MR. FLOYD: May I proceed?

There's no restriction on moving, you know.

Q No.

MR. FLOYD: Your Honor, the appellant Hallford is under two indictments, charged with the offense of performing an abortion. There are no allegations in the complaint of appellant Hallford, or none in his affidavit, that there is any bad-faith prosecution, bad-faith arrest, harassment of him at all, to bring him within the Dombrowski "special circumstances".

We think the cases of Younger vs. Harris and Samuels vs. Mackell are controlling as to Dr. Hallford's position.

We also feel like that Dr. Hallford cannot rely upon his patients' rights to bring him into federal court. And I think the Tileston vs. Ullman case will be authority for that proposition.

As to the matter of injunctive relief, after a court once grants the declaratory relief, I will make this comment, that it appears the Court can consider the propriety of declaratory relief and can consider the propriety of injunctive relief. That is, the Court can divorce the two. And once granting declaratory relief, that a statute is unconstitutional, in its discretion can determine whether or not injunctive relief is proper and deny it, if it so feels.

Now, should this Court, as I understand it, and the other parties feel that if this Court wants to acquire jurisdiction of the matter, that the parties would like the Court to consider all the constitutional issues.

The --

Q Well, are you -- are you sustaining or are you saying that the denial of injunction was proper because the declaratory judgment was error?

MR. FLOYD: No, Your Honor. I say the Court can grant declaratory relief on the unconstitutionality and deny injunctive relief.

Q I know, but is that -- certainly if the judgment about the -- if the declaratory judgment was erroneous, it was also right to deny injunction on injunction?

MR. FLOYD: Yes, Your Honor. That's right.

Q Is that your position?

MR. FLOYD: That's correct. If the -- I think if the Court of course says --

Q You didn't cross-appeal here. We have had --

MR. FLOYD: We could not, to this Court, Your Honor. We have to go up to the Fifth Circuit.

Q Right.

MR. FLOYD: So we have --

Q But are you attempting to sustain the denial of an injunction here on the grounds that the declaratory judgment was improper?

MR. FLOYD: We are -- we are asking the Court, petitioning the Court to do this: that if the Court gets into the merits of injunctive relief, whether or not it was proper, under the circumstances, that this Court go forward and continue

the other -- or continue the constitutional issues and make a determination on the constitutional issues.

Q Can we do that? You're in the Fifth Circuit, because we said you couldn't cross-appeal from a declaratory judgment, you could only cross-appeal from an injunction and ?? grant a denial of appeal?

MR. FLOYD: Yes, Your Honor.

Q I suppose we could do it if we'd bypass the Court of Appeals and bring up your appeal, pending in the Fifth Circuit.

Q No, no. We could -- couldn't we -- you're here, your opponent has brought a direct appeal here, because your opponent --

MR. FLOYD: Yes, sure.

Q -- was denied an injunction by the three-judge District Court.

MR. FLOYD: Yes, sir.

Q You could not bring a cross-appeal here, because you won, from the point of view of successfully resisting the injunction.

MR. FLOYD: Yes, sir.

Q But now that you're here as the appellee, you're arguing that an injunction should not have issued, and part of that argument, as very legitimately can be, that on the merits the Court was wrong, and that it shouldn't have issued a

declaratory judgment or an injunction.

MR. FLOYD: That's correct, Your Honor.

Q And that is your position?

MR. FLOYD: Yes.

Now, the proceedings in the Fifth Circuit have been stayed, or abated --

Q Well, I must say, your position makes sense to me.

MR. FLOYD: Yes.

Q But don't some of our prior cases rather foreclose it unless we bypass the Circuit and bring your appeal pending that here?

MR.FLOYD: Well, Your Honor -- and I don't want to be repetitious, but a motion has been filed in the Fifth Circuit to hold the appeal in abeyance untila determination by this Court.

Q. But you didn't ask, you didn't file any motion here, asking us to bring your appeal pending in the Fifth Circuit here, for decision with this appeal?

MR. FLOYD: No, we have requested that in our reply to the jurisdiction, and in our brief. We have presented it in that manner.

Q I see.

MR. FLOYD: Your Honor, we feel that this Court can and should consider all issues in disturbing the Florida

lime and avocado growers and the Carter cases, which are cited in the briefs of the parties.

Q Mr. Floyd, what is Texas' interest in this statute?

MR. FLOYD: Mr. Justice, the Thompson case, which has been cited to this Court, Thompson v. State, the Court of Criminal Appeals did not decide the issue of privacy. It was not before the Court, or the right-of-choice issue. The State court, the Court of Criminal Appeals, held that the State had a compelling interest because of the protection of fetal life -- of fetal life; protection.

They recognize the human-ness of the embryo or the fetus. And they said, "We have an interest in protection of fetal life."

Whether or not that was the original intent of the statute, I have no idea.

Q And yet Texas does not attempt to punish a woman who, herself, performs an abortion on herself?

MR. FLOYD: That is correct, Your Honor. And the matter has been brought to my attention: why not punish for murder? Since you are destroying what you -- or what has been said to be a human being.

I don't know, except that I will say this: as medical science progresses, maybe the law will progress along with it. Maybe, at one time, it could be possible, I suppose, a statute

could be passed. Whether or not that would be constitutional or not --

Q Well, we're dealing with the statute as it is, there is no State, is there, that equates abortion with murder; or is there?

MR. FLOYD: There is none, Your Honor; except one of our statutes said if the mother dies, that the doctor shall be guilty of murder.

Q But that's ordinary --

MR. FLOYD: Yes, sir.

Q -- felony murder, isn't it?

MR. FLOYD: I would say so, Mr. Justice, yes, sir.

Q The Texas statute covers the entire period of pregnancy?

MR. FLOYD: Yes, it does, Mr. Justice; yes, sir.

Q Mr. Floyd, is that Thompson case -- I don't find that Thompson case cited in your brief here, I gather you say it has just been decided, is that it?

MR. FLOYD: Mr. Justice, this case is just a recent case.

Q Do you have a citation on it?

MR. FLOYD: It is not in the reported system, yet.

Q Are you going to provide us with a copy of that?

MR. FLOYD: I'll be happy to, yes, sir. I'll provide the Court with copies of it.

Q What was the date of it, and the number, do you know?

MR. FLOYD: This is No. 44-070, C. W. Thompson vs. the State of Texas.

The opinion was delivered on November the 2nd, 1971.

Q Thank you.

MR. FLOYD: I shall be happy to furnish the Court with this copy, if the Court so desires.

Q That's the Court of Criminal Appeals?

MR. FLOYD: Yes, Your Honor.

Q And that's the case Mrs. Weddington told me was pending on a motion for rehearing?

MR. FLOYD: Yes, Your Honor.

Now, there's --

MR. CHIEF JUSTICE BURGER: If you leave that with the Clerk, Mr. Floyd, we'll distribute the copies.

MR. FLOYD: Fine.

That, in addition, the Thompson case cited, the future case in regard to vagueness, and said that if it's controlling the issue.

And, as I recall, Dr. Thompson raised the issue of "Well, how can you find me guilty of murder -- I mean of abortion if you make no determination that the fetus is alive at the time I performed this?" in effect is what he's saying.

He never admitted to doing it, but he's saying: How

can you prove it?

Well, of course, the Texas court answered by saying: It is presumed the fetus is alive when an abortion is performed.

Q You cited, in answer to my brother Marshall's question as to what is the interest of the State in this legislation, or what is its purpose, what is its societal purpose; and your answer was that they relied on your opinion, the most opinion of the Court of Criminal Appeals of Texas, that it was a protection of fetal life. And then I think you also said that was perhaps not its original purpose.

MR. FLOYD: Well, I'm not sure of that. I --

Q Well, it may be rather important. In a constitutional case of this kind, it becomes quite vital, sometimes, to rather precisely identify what the asserted interest of the State is.

MR. FLOYD: I think that original purpose, Mr. Justice, and the present prevailing purpose may be the same, in this respect.

There have been statistics furnished to this Court in various briefs, from various groups, and from medical societies of different groups of different groups of physicians and gynecologists, or whatever it may be. These statistics have not shown me, for instance, for example, that abortion is safer than normal childbirth. They have not shown me that there are not emotional problems that are very important,

resulting from an abortion.

The protection of the moter at one time may still be the primary, but the policy considerations, Mr. Justice, would seem to me to be for the State Legislature, to make a decision.

Q Certainly that's true; policy questions are for legislative and executive bodies, both in the State and Federal Government. But we have here a constitutional question, and in deciding it, assessing it, it's important to know what the asserted interest of the State is in the enactment of this legislation.

MR. FLOYD: I am -- and this is just from my -- I speak personally, if I may -- I would think that even when this statute was first passed, there was some concern for the unborn fetus.

Q When was it enacted?

MR. FLOYD: I believe it was 1859 was the original statute; this, I believe, was around 1900, 1907, somewhere in that area.

Q So it goes back --

MR. FLOYD: It goes back fifty --

Q -- to the middle of the 19th Century?

MR. FLOYD: Yes, sir.

Q Before that, there were no criminal abortion laws in Texas, were there?

MR. FLOYD: As far as I know, there were not, no. I think this is maybe set out in some of the briefs. I --

Q Well, in any event, Mr. Floyd, apart from your personal attitude, your court has spoken on the intent of the statute, has it not?

MR. FLOYD: Yes.

Q Well, I can't quite square that most recent pronouncement with the earlier decisions of the Texas court that refer to the mother as the victim.

Can you?

MR. FLOYD: Well, as I say, Your Honor, the -- I don't think the courts have come to the conclusion that the unborn has had juristic rights. Not yet; maybe they will, I don't know. I just don't feel like they have at the present time.

Q In the first few weeks of pregnancy?

MR. FLOYD: Sir?

Q In the first few weeks of pregnancy?

MR. FLOYD: At any time, Mr. Justice; we make no distinction.

Q You make no distinction whether there's life there or not?

MR. FLOYD: We say there is life from the moment of impregnation.

Q And do you have any scientific data to support

that?

MR. FLOYD: Well, we begin, Mr. Justice, in our brief, with the development of the human embryo, carrying it through to the development of the fetus, from about seven to nine days after conception.

Q Well, what about six days?

MR. FLOYD: We don't know.

Q But this statute goes all the way back to one hour.

MR. FLOYD: I don't -- Mr. Justice, there are unanswerable questions in this field, I --

(Laughter.)

Q I appreciate it; I appreciate it.

MR. FLOYD: This is an artless statement on our part.

Q I withdraw the question.

(Laughter.)

MR. FLOYD: Thank you.

That's really when the soul comes into the unborn, if a person believes in a soul; I don't know.

I assume the appellants now are operating under the Ninth Amendment rights. There are allegations of First Amendment rights being violated. However, I feel there is no merit; this statute does not establish any religion, nor does it prohibit anyone from practising or being a part of any

religious group.

I see no merit in their contentions that it could possibly be under freedom of speech or press. In fact, there have been some articles recently in this city's newspaper -- yesterday, for instance, about this.

The other constitutional rights that the appellant speaks of, I think are expressed in two manners. The individual or marital right of privacy.

And, secondly, or the right to choose whether or not to abort a child.

Now, if the Does are out of the case, the marital privacy is out of the case. But, be that as it may, neither individual nor marital privacy has been held to be absolute. We have legal search and seizure; we have the possesion of illegal drugs. The practice of polygamy, and other matters. A parent, I do not believe -- a parent cannot refuse to give their child some form of education.

As far as the freedom over one's body is concerned, this is not absolute. The use of illicit drugs; the indecent exposure legislation; and, as Mr. Justice --Mr. Goldberg stated in the Griswold case, that adultery and fornication are constitutional, beyond doubt.

Q Are constitutional, or you mean the laws against them are constitutional?

MR. FLOYD: The laws against them are constitutional.

Sorry.

Now, there is nothing in the United States Constitution concerning birth, contraception, or abortion. Now, the appellee has not disagreed with the appellant's statement that a woman has a choice; but, as we have previously mentioned, we feel that this choice is left up -- is the woman's, prior to the time that she becomes pregnant. This is the time of the choice.

Now, this was brought out in the Rosen vs. Louisiana State Board of Medical Examiners case, and in Corky vs. Edwards which our lower court opinions, and my understanding is that that Corky vs. Edwards has been adopted in this Court.

Q Has been?

MR. FLOYD: Has been, yes, Your Honor. I am not positive, but I think it has been.

Q Texas doesn't grant any exemption in the case of rape, if the pregnancy has resulted from rape, either statutory or otherwise, does it?

MR. FLOYD: There is nothing in our statute about that. Now, the procedure --

Q And such a woman wouldn't have had a choice, would she?

MR. FLOYD: The procedure, and now I am telling the Court something that's outside the record; as I understand the procedure when a woman is brought in after rape, is to

try to estop whatever has occurred immediately by the proper procedure in the hospital, immediately she's taken there, she reports it and they go -- but, no, there is nothing in the statute.

Now, as I previously informed the Court, the statistics, or the people who prepare the statistics, and the different statistics are not in conformity, in connection with the medical aspect of abortion; that is, whether or not it's safer. There are some statistics that will say it is; there are statistics that say it's not.

There has been provided to this Court the common law and the legislative history of abortion. And that the morality of abortion has been injected in various cases and by various groups. We think these matters are matters of policy, and should be properly addressed by the State Legislature.

We think that a consideration should be given to the unborn, and, in some instance, a consideration should be given to the father, if he would be objective to abortion.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Floyd.

Your time is consumed, unless you have some correction you wish to make, Mrs. Weddington.

REBUTTAL ARGUMENT OF MRS. SARAH R. WEDDINGTON,

ON BEHALF OF THE APPELLANTS

MRS. WEDDINGTON: Your Honor, I would only like

to draw to the Court's attention, at page 130 of the record, the notice of appeal by defendant State of Texas, from the judgment of the District Court to the Supreme Court of the United States. They have filed an appeal in this Court.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Weddington.

Thank you, Mr. Floyd.

The case is submitted.

(Whereupon, at 11:11 a.m., the case was submitted.)