In the

Supreme Court of the United States

Robert P. Whalen, as Commissioner of Health of the State Of New York,

Appellant,

v.

Richard Roe, an infant by Robert Roe, his parent, et al.,

Appellees.

No. 75-839

Washington, D. C.
October 13, 1976

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v.	:	No. 75-839
RICHARD ROE, an infant by Robert Roe, his parent, et al., Appellees.	:	

Washington, D. C.,

Wednesday, October 13, 1976.

The above-entitled matter came on for argument at 2:05 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United STates
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

A. SETH GREENWALD, ESQ., Assistant Attorney General of New York, Two World Trade Center, New York, New York 10047; on behalf of the Appellant.

MICHAEL O. LESCH, ESQ., 330 Madison Avenue, New York, New York 10017; on behalf of the Appellees.

H. MILES JAFFE, ESQ., Norwick, Raggio, Jaffe & Kayser, 2 Pennsylvania Plaza, New York, New York 10001; on behalf of the Appellees.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 839, Whalen against Richard Roe, and others.

Mr. Greenwald, you may proceed whenever you're ready.

ORAL ARGUMENT OF A. SETH GREENWALD, ESQ.,

ON BEHALF OF THE APPELLANT

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

This is an appeal from a judgment of the United States District Court for the Southern District of New York, which declared unconstitutional and enjoined the operation of three sections of the New York Public Health Law, contained in Article 33 of that law, which deals with controlled substances, dangerous drugs, and the like.

Actually, only Section 3332(2)(a) is involved. That is the provision that requires that on filed official New York State prescriptions the names and addresses of the patients be contained thereon, and be filed with the New York State Department of Health, whose Commissioner is the appellant herein.

The district court enjoined this statute on the basis that this provision was an invasion of privacy of the appellees who are anonymous, basically anonymous patients and known doctors.

I would allude to the operation of the other sections,

which were enjoined, they require the use of the official New York State prescription in prescribing these certain dangerous drugs, and this applies to doctors and pharmacists in the State of New York.

QUESTION: Does New York have any legal requirement that either the pharmacist in question or the doctor in question keep a record of drugs he has prescribed, and that that record be available for inspection on the premises?

MR. GREENWALD: Basically yes. As it was in the prior law, under this triplicate prescription system, one copy of the prescription is kept by the doctor, if he self dispenses the drug, or the pharmacist who fills that prescription. So, therefore, the doctor or pharmacist does have to keep these records, and the statute so provides, for a period of five years; has to keep these records --

QUESTION: Did your opponents challenge the constitutionality of the requirement that that record be open for inspection?

MR. GREENWALD: No, and indeed the district court, in one of its prior decisions, I think in the decision that resulted in the judgment, stated that the appellees conceded the constitutionality of the prior requirement of law.

I would only point out, of course, that not being in issue, that provision or requirement not being in issue, certainly at this time, if nothing else, it's presumed

constitutional, it's not at issue in this case.

Now, --

QUESTION: And the name of the patient would be disclosed under the prior law, wouldn't it?

MR. GREENWALD: Oh, yes, of course.

QUESTION: It would be on the prescription.

MR. GREENWALD: Right. The name of the patient, under the prior law, and this is at least for forty years, was available to the New York State Department of Health.

QUESTION: Upon demand.

MR. GREENWALD: Upon demand, or, basically, the --

QUESTION: Or periodic inspection.

MR. GREENWALD: Periodic inspection of pharmacists' file, prescription records.

QUESTION: But it wasn't automatically filed in a computer in Albany.

MR. GREENWALD: Well, I would say that all the law, of course, requires is that it be each month, one copy be filed or sent up to the Department of Health in Albany.

QUESTION: Yes.

MR. GREENWALD: I would, at this point, like to point out the computerization is not a requirement of the law, it's an administrative operation.

QUESTION: Yes, I understand.

But that, in practical effect, was the difference

between the old law and the present law being attacked --

MR. GREENWALD: Well, --

QUESTION: -- part of the present law that's being attacked?

MR. GREENWALD: Yes. I think the requirement for filing and, I think, at this point, what was the purpose for filing of triplicate prescriptions.

QUESTION: Yes.

QUESTION: Does New York have a statute requiring gunshot wounds to be reported by physicians?

MR. GREENWALD: Oh, yes. They have a --

QUESTION: Has that been passed on by the Court of Appeals of New York?

MR. GREENWALD: I'm not aware, but I believe that it has the general variety of medical reporting statutes, such as gunshot wounds, venereal disease, contagious diseases, and the like, and I don't believe they have ever been filed, because it's rather obvious that they serve a public health need. As does this filing statute also.

And this is the question of purpose.

Now, --

QUESTION: That's the whole point in the case, isn't it? As to whether it does.

MR. GREENWALD: Well, I think that the --

QUESTION: I don't think the other side agrees with

that.

MR. GREENWALD: Yes.

I think that the purpose is rather obvious. No. 1, it's only for a certain type of dangerous and habit-forming drugs, but it's called the Schedule II drugs, which have been found to be forming psychologically dependent attitudes and the like. It does not cover the whole spectrum of prescription prescribing. The State of New York is not engaging in some wholesale supervision of the practice of medicine. We don't even know what ailments are involved here.

It only concerns narcotic and amphetamine type drugs, where the danger for abuse of the public health, or danger to the public health is the greatest.

Now, it has been conceded in the decision, I think my adversaries -- that abuse and diversion of these type of drugs from legitimate channels is a serious problem; and, indeed, there is a serious problem in this area of misapplication of what I'd say medical principles, a lot of these drugs are prescribed by doctors, studies have been made, for quasi-medical uses, for rather fallacious reasons.

And, further, I would submit that -- and I think it's rather obvious -- that inclusion of the names and addresses on the filed prescriptions do assist in deterring and exposing prescriptions which are not within the law. They assist in investigations.

And in this area, the State of New York is exercising its police power in the interest of the public health and safety. It is regulating the use of dangerous drugs, those which are habit-forming, which has, for over fifty years, since I cite the Whipple v. Martinson case, been recognized by this Court as clearly within a State's power. Vast discretion in the control of this type of dangerous drug.

QUESTION: Mr. Greenwald, so that I may be sure, you're taking the position that if you didn't have the names and addresses, the State could not effectively do what it wants to do under the statute?

MR. GREENWALD: That is quite -- that is quite clear and obvious. Even from the decision below. It tried to explain away the reasons for names and addresses on, I would say, a basis of a number of fallacious assumptions. And I would say, of course, it was the true primary purpose, perhaps, of the filing, to identify a patient going from doctor to doctor and receiving, say, even from one or more doctors, an over thirty-day supply; but that was not the only purpose.

And I would emphasize that the appellant never conceded that it was.

QUESTION: And I suppose this is to reach doctors like the late Dr. Moore, whose case we had here a year or two ago, who gave prescriptions to people who never came to his office, he just gave them out wholesale.

MR. GREENWALD: That is part of the --

QUESTION: Will this statute catch that kind of violation?

MR. GREENWALD: Quite clearly, it would catch that type of violation, and having the names and addresses of that doctor's patients would be quite valuable in the investigation of that doctor's activities.

QUESTION: And the record shows you didn't need it.

MR. GREENWALD: I say --

QUESTION: As witness the fact that he's in jail.

MR. GREENWALD: Now, the question, I think -- I'm not that well acquainted with the case of Dr. Moore; but I would emphasize that the case I do cite, a similar type of case, did not reach this Court, United States v. Warren. It takes months and months of laborious investigation to build a case against a doctor like this, when some of the activities of this type of doctor are so well known they are printed up in the newspapers.

The point being that filing with names and addresses, so we know who are the patients, the supposed patients, you might say, obviously enables the enforcement authorities to much more quickly bring proceedings against that type of doctor, to have a fuller picture of his type of activities, to better control this illegal activity, and, let's put it

quite bluntly, because this has been the record, to deter this activity from taking place, this type of medical practice not within any ethical principles from ever taking place in the first place.

Now, as I said, we do have, and it's rather obvious, that the problem or the situation, I will say the situation of a patient, it's a bogus patient basically, going from one doctor to another to obtain this type of dangerous drug. If he goes from doctor to doctor, there is really no conceivable way that this type of activity is going to be ex posed unless you have the patients' names and addresses because you correlate the patients --

QUESTION: Of course the patient could use a different name each place.

MR. GREENWALD: Now, that assumes that that patient, that patient is going to violate another section of the law. We have a prohibition against, of course, using false names or fraud and deception. And to just simply assume that that type of person is going to violate one law or two laws, three laws, I think is simply specious. It's no answer to --

QUESTION: Wait a minute. You mean that a person that's addicted to dope is worried about law violations?

MR. GREENWALD: I would say the --

QUESTION: You know about everything else, do you know about that?

MR. GREENWALD: I would --

QUESTION: They will commit murder for it!

MR. GREENWALD: My answer to you is that this Court a number of years ago held that the condition of being a drug addict is not a crime. I believe that was in --

QUESTION: But isn't the short answer to the broad question, that you can't catch them all, but you're going to try to catch as many as you can?

MR. GREENWALD: Well, certainly that's the case. We can't assume that every single person is going around using all types of names. And I would also say that if a doctor is doing his job, you might say, of practicing medicine properly, there are many situations where a patient or a person coming around to this cannot use a false name. Many times these people are on Medicare or Medicaid. Obviously there are other ways to check. The use of a false name would expose their type of activity even more quickly.

QUESTION: In New York City, the doctor doesn't know where the patient lives.

MR. GREENWALD: Suppose --

QUESTION: In New York City, believe it or not, I'll take judicial notice, is not a rural community.

MR. GREENWALD: I would also state that when -- I'm from New York City, and that when I go to my doctor, after I go, and this is, I think, a typical procedure, a bill is mailed

to me. If that bill didn't get to me, the doctor would be put on some notice that something's out of touch.

QUESTION: Well, I would imagine that the doctors you're talking about don't give bills.

MR. GREENWALD: That may be another thing we would like to investigate in this case, because what we find a lot of times is that these doctors who are engaging in this type of activity don't keep medical records. Indeed, the triplicate prescription, with the names and addresses, may be the only record of what's going on in this doctor's practice, or so-called practice.

QUESTION: These Schedule II drugs are, as I understand it, are various drugs that have a perfectly good medical and pharmaceutical purpose when properly used and prescribed for certain given ailments, physical or emotional, whatever. But whose use by people who don't need them, or whose overuse, maybe, by people who do need them, is an abuse and can become -- can lead to physical or psychological dependence; is that right?

MR. GREENWALD: Yes.

QUESTION: Schedule II drugs are not hard-core narcotics, are they?

MR. GREENWALD: Well, when you talk about -- Schedule II drugs are, in part, narcotics. You talk about hard-core narcotics, street drugs, such as, say, heroin, that

is in what is called the Schedule I, absolutely prohibited, because --

QUESTION: Right. Nobody can prescribe that.

MR. GREENWALD: -- that has no recognized medical use.

QUESTION: Right.

MR. GREENWALD: However, I would like to emphasize -- and we didn't make an issue of it in this case -- yes, these Schedule II drugs do have recognized medical uses; but even these recognized medical uses are the subject of great dispute.

QUESTION: But, let me ask it this way, without getting into -- I don't know anything about drugs or medicine, and I presume you don't, either. But --

MR. GREENWALD: More than when I started this case.

[Laughter.]

QUESTION: -- New York has not prohibited commerce in any of these Schedule II drugs, has it?

MR. GREENWALD: Absolutely not. We make no judgment, or we do not look over the doctor's shoulder, --

QUESTION: Right.

MR. GREENWALD: -- before he prescribes the drug.

QUESTION: So all of these are permissible for a doctor to prescribe, none of them are prohibited, such as heroin would be and is?

MR. GREENWALD: That's correct. These drugs do --

QUESTION: These are sleeping pills and various emotional --

MR. GREENWALD: Yes. Yes.

QUESTION: -- tranquilizers and so on. That sort of thing.

MR. GREENWALD: Yes. As I said, morphine would be one type, that's a narcotic type drug; for example, I believe an amphetamine type drug, one which is quite frequent in this case, is one called Ritalin, which has several uses.

QUESTION: Right.

QUESTION: You didn't say morphine was included?

MR. GREENWALD: Morphine, yes. Morphine is included --

QUESTION: As a Title II drug?

MR. GREENWALD: -- as a Title II drug, because morphine is an opium derivative and habit-forming, and dangerous.

QUESTION: I thought it was in Title I.

MR. GREENWALD: No, it's --

QUESTION: Well, let's not argue about it.

QUESTION: Does it make any difference, from your point of view, on the police power of the State in controlling any of these drugs? Is the police power --

MR. GREENWALD: Well, I think it is clearly within the police power of the State to control these drugs, and part

of the control is the method of distribution. And distribution to ultimate users is part.

Now, it could --

QUESTION: To make it clear to you, for the balance of your argument, the purpose of my question was to understand the context of this statutory requirement. We're not dealing here with contraband, as such?

MR. GREENWALD: No. Basically, and it's in the legislative history, this law is not designed to control perhaps the more serious problem of street drugs.

QUESTION: Right.

MR. GREENWALD: This statute is designed to control or better regulate the problem of diversion from apparently legitimate sources.

Now, --

QUESTION: Mr. Greenwald, one more question. If we affirm here, do you feel the existing reporting requirements as to venereal disease, infectious disease, gunshot wounds, of your State will be jeopardized?

MR. GREENWALD: Yes, I think quite seriously they will be in great jeopardy, and perhaps more important than -- I think it was my first point about the bad policy of the finding -- finding a doctor-patient relationship, in and of itself, is a fundamental interest, is that, as I think Your Honors are all aware, the doctor-patient privilege finds its

expression in law in confidentiality as provided for only in State laws. New York does provide for doctor-patient testimonial confidentiality.

Now, it was not known, even at common law, and, indeed, there are many variations on this privilege; and, furthermore, commentators have criticized the privilege, because many times it prevents courts from getting at the truth.

What should be emphasized is that it is not necessary for medical treatment for there to be a confidential relationship between doctor and patient, and I think this case demonstrates that.

There are allegations or, they would say, the record shows the testimony of the patients that they stopped using Schedule II because of the filing requirement.

Well, let's look at what happens. A patient goes to the doctor, he tells the doctor what ails him. The doctor then makes a diagnosis and determines on a course of treatment. In his complete discretion or his decision he may decide on a Schedule II drug, and only at that point does he write a prescription. How, I ask you, has the practice of medicine been interfered with?

The practice of medicine has not been interfered with in the thirty years, there's no record of it, in California, the fifteen years in Illinois, and I think about ten or twelve

years in Idaho. But the same type of filing and reporting has been in force.

Now, as we said, I said that problem or the situation of doctor to doctor.

Now, as to patients, the purpose of this statute. The patients who get from a doctor an over thirty-day supply. Now, this will more probably be the abuse of the patient by the doctor.

Now, obviously, we can still printout, as we do, we can still printout prescriptions, anonymous prescriptions -- they are as anonymous as the patients -- that contain over thirty days' supply, which is a violation of the law.

However, what we cannot know is, is this one person receiving multiple prescriptions from the same doctor? Or what? All we can do now is get a list of perhaps a hundred, a thousand of these type of prescriptions that come through each month, and send out investigators back to the drug store to find out who are the patients, to find out which are the most serious cases of abuse.

It's absolutely impossible to do with 24 investigators in the whole State of New York.

QUESTION: Does New York law prohibit the prescribing of a more than thirty-day supply of Schedule II drugs?

MR. GREENWALD: Yes. Quite specifically, under the triplicate prescription law, a doctor is limited to prescribing

a thirty-day supply with several exceptions, I believe some of the drugs for children, I believe with Ritalin they may be able to prescribe a three-month supply. But, basically, there is a limitation of a thirty-day supply.

In point of fact, the exception for, I think, three months would depend on knowing the age, which we require to be reported, and the drug and the patient, for example, to know whether that was being complied with.

Now, another point or another purpose is that basically filing of triplicate prescriptions with patient's name heightens the doctor's awareness of the status of this patient. There is, of course, -- and it was said that this law has no application to addicts. It's true. In the sense that the law prohibits prescribing this type of Schedule II dangerous drugs to addicts and habitual users. But how are we going to know whether that's being complied with unless we know, have some record of who are receiving them?

And another major proble, I submit, is if the names and addresses are missing from the filed prescriptions, a doctor could prescribe for himself with little danger of detection. He could use false names, his own name, whatever name he feels like. He could make sure it's under a thirty-day supply, because he has these, his own, you know, he has these matters.

And I would also say, and it's rather obvious from

your own cases, I think the Moore case, which I am not acquainted with, that there are unscrupulous doctors and pharmacists who are basically dispensers of drugs at will.

And finally you have the question of forgeries. Now, it's true a computer cannot, in and of itself, identify a name as a forgery. But -- and this is, of course, I think the cases that have come up -- usually forgery is when you have a forgery, the person who is using a false name does it in a rather large amount, just like when you print up counterfeit money, you do it in an amount to make it worthwhile. And, normally, because it's a false name, it's the same name.

Now, if we don't know the name, there's no way to, say, send out the alert that someone using the name of such-and-such is active in your area, if you get a prescription in that name -- this alert can be sent out to the druggist -- to report --

QUESTION: Are you talking about the forging of a registered doctor's name or the forging of a non-existent doctor?

MR. GREENWALD: It could be either way. It could be possibly in the true name of the patient, with a forged doctor's signature, it could be a false name with a true doctor's signature, a doctor -- it could be any number of things. The point is that there are countless variations.

QUESTION: It's also true that, as you said, you

only have twenty people who are going to do all of this.

MR. GREENWALD: Well, I think -- and the point is --

QUESTION: You haven't forgotten that, have you?

MR. GREENWALD: No, certainly. And that comes to the question that the district court seemed to consider the fact that because we hadn't gotten, you know, enough results here, that somehow it then became unconstitutional.

That if we had a good record of results in this area, if we produced enough cases, that then this would become constitutional.

I submit that this is not the test of constitutionality, that this Court has clearly stated the case in other similar situations, such as, I think, the Danforth case, that the filing or reporting requirement is reasonably directed to the preservation of health.

And I submit that this type of filing requirement clearly is so related.

Now, I also want to take up, very briefly -- my time has almost expired -- that filing clearly does not interfere with the doctor-patient relationship, and I submit that the doctor-patient relationship is not constitutionally protected.

QUESTION: Is there a doctor-patient privilege in New York?

MR. GREENWALD: Yes, there is. But, for purposes of this statute, as right in the law, and I cite it in my brief,

it is not applicable as to what investigation --

QUESTION: Is it a statutory privilege?

MR. GREENWALD: It's a statutory privilege, as is --

QUESTION: Well, is it operative in a criminal proceeding? May the doctor be called to prove a case against a patient? Which involves revealing of medical information.

MR. GREENWALD: We do have, and I wish to emphasize, the court below ignored our confidentiality provision in this law. They --

QUESTION: I know, but how about the answer to my question?

MR. GREENWALD: The answer is that in the course of a criminal investigation, under 3371, patient identity can only be revealed pursuant to court-ordered subpoena. It is available -- and I give the example in my --

QUESTION: Well, if a patient is indicted as a drug -- for drug trafficking, can you call his doctor, for example, and make him testify against him, if he has relevant evidence from his records?

MR. GREENWALD: I would question whether this is the direct enforcement, and I wish to emphasize that that's not, you know, it's not an answer to your question, truly; but, once again --

QUESTION: So you don't know what the answer is.

MR. GREENWALD: I really do not know what the answer

is, because it's not involved in this case. These appellees, the plaintiffs here --

QUESTION: Well, you argue that if you lose this case on constitutional grounds, there will be a constitutional doctor-patient privilege.

MR. GREENWALD: Oh, I think it's quite clear that an affirmance of the judgment below will establish a constitutionally protected doctor-patient privilege.

The district court clearly found such a privilege from its reading of the abortion Roe and Doe cases. I believe that those decisions did no such thing, that it was a misreading of those decisions. I think that, and as I have emphasized, that it would be improper to do so, there are valid policy reasons not to, and I don't think they have been at all answered by my adversary.

This Court also has declined, in any number of cases, just this last term, to extend any right of privacy, such as -- or, I'd say, going back more than the last term. But in the Planned Parenthood of Missouri v. Danforth, even in an abortion context, reporting abortions with names and addresses, was not violative of a patient's privacy.

And California Bankers Association v. Schultz, no violation of right of privacy in reporting bank records.

And perhaps the most obvious one is that income tax reporting is well known, and maybe people have some expectation

of privacy in that area. But for the operation of income tax laws, and, I would submit also, our drug control program, you have to have these reports. And it doesn't make any difference whether the statute is being properly administered.

If we had never computerized one prescription, this law would have a purpose. Computerization is not necessary to the operation of the law. Computers are not an unconstitutional machine. There is a spectre here.

Now, the spectre in this case is whether -- is the fear of unauthorized disclosure.

Now, the appellees, the patients here were totally ignorant of the, of this law, of what it really was. They thought that their records were going to be available to the police, to the Army, to the bar association, that they were going to be maintained forever and ever; and that simply was not and is not the case.

And a fear of hypothetical stigmatization has never been held to stay a cause of action, and only this past term this Court held, in Paul v. Davis, that even if what they feared, these appellees feared, disclosure of their drug records actually had occurred, there would not be any invasion of a federally protected right.

Indeed, their protection comes from the very statute they are attacking, Section 3371.

And, at this point, I would want to reserve my few

minutes remaining for rebuttal, if necessary.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Lesch.

ORAL ARGUMENT OF MICHAEL O. LESCH, ESQ.,

ON BEHALF OF THE APPELLEES

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

Perhaps I should state the issue in this case as I understand it.

The judgment of the court below enjoined enforcement and declared unconstitutional this statute, in so far as it required disclosure to the State of New York of the identity of patients receiving Schedule II drugs.

Now, Mr. Greenwald just referred to the Danforth case, in which this Court upheld record-keeping requirements. But yesterday I had the opportunity to look in the Library of the Supreme Court and to look at the forms that were actually required by the State of Missouri in the Danforth case, and those forms specifically said that they didn't want the patient's name, all they wanted was the patient's number. So that if the State of Missouri was interested in statistical information that related to a particular patient, and they wanted more information about that patient, they could then go back and get the name; but there was nothing on file in the State of Missouri. There was no computer printout of all

the names of the people who had had abortions.

QUESTION: Mr. Lesch, did you challenge or do you now question the constitutionality of a record-keeping requirement that a physician who prescribes these drugs keep those records in his office and that those records be open to inspection by the State of New York?

MR. LESCH: No, Your Honor. We are not challenging that here today.

QUESTION: You concede that's constitutional?

MR. LESCH: No, we don't concede it, either. But we don't think that that point has to be reached.

QUESTION: Well, what -- then all your constitutional argument boils down to is that if it's made easier through modern tachnology for the State of New York to enforce this law, that there's a constitutional difference?

MR. LESCH: There is a constitutional difference. It is our position, when the State of New York obtains 125,000 prescriptions per month through a massive computerization and record collection system, 2.5 million prescriptions over a period of a year, and it turns out that they have two suspects from that system, one of them, it turns out, is exonerated and the other one is unresolved at the time of trial, the whole system --

QUESTION: Well, no, now wait a minute. Wait a minute, Mr. Lesch. Can't that just as well be taken as evidence

that the system is working very well, that it is in fact deterring the abuse of the thing?

MR. LESCH: If the system -- well, the -- but the same thing happened before, Your Honor. There's nothing in the legislative history, there are no statistics that this type of system was necessary. Triplicate prescriptions are a fantasm, are a spectre, are an unsupported theory that the Mr. Greenwald and the Department of Health have found in this case.

For example, Mr. Greenwald gave a lot of hypothetical situations to the whole Court today, none of them are supported in this record. They had Mr. Cannizzaro testify, who is the head of their system, they had Mr. Bellizzi testify, we have the whole legislative history as part of the record before this Court, no one has ever suggested that this so-called doctor-to-doctor problem is really a problem.

And yet it was on that basis that they went to the Court of Appeals, and the Court of Appeals sent the case back to trial.

The principal argument that they made was that there was a doctor-to-doctor problem here, namely, that patients, using the same name, would go to more than one doctor in order to obtain illicit supplies of these drugs. But that problem turned out to be non-existent, and it is against that fact and against the fact that thousands of names of patients are

being put on the computer, as to which there is instant access, so that anybody who is authorized, and the statute provides for interdepartmental transfer of this information, can obtain that information.

Moreover, the record is also uncontradicted, Mr. Justice Rehnquist, that there is -- that the security system for this program is entirely inadequate.

There was one witness in this case, a man by the name of Wasserman. He was an expert on security. He pointed out defect after defact after defect in this system. By the way, these --

QUESTION: Well now, wait a minute. Does your constitutional argument then turn not on the fact that you have to turn the -- the doctor has to turn the records over to authorized New York personnel, but on the further fact that there may be leakage to unauthorized persons?

MR. LESCH: Our constitutional argument turns on the basic right of privacy, that when you have here, first of all, a relationship that has been historically recognized, for example, by the existence of the physician-patient privilege --

QUESTION: But not -- there's nothing in the Constitution about that.

MR. LESCH: There's nothing in the Constitution --

QUESTION: That's a matter of State law, State evidence law, isn't it?

MR. LESCH: That's quite right. But there is something in the Constitution, as this Court has found in Roe v. Wade and Doe v. Bolton, that there are certain attributes of that relationship that deserve protection. And similarly, --

QUESTION: You would find the same fault with the reporting of gunshot wounds?

MR. LESCH: No, I do not, Your Honor. I think that's an entirely different case.

QUESTION: The reporting of contagious and venereal diseases.

MR. LESCH: Absolutely not.

QUESTION: No problem.

MR. LESCH: That is entirely different. Yes.

Because in the reporting of gunshot wounds or in the reporting of contagious diseases, there is a compelling State interest. There is a legitimate interest of the State. If somebody shoots somebody else, the State ought to take action, and the State ought to find out about a gunshot wound as quickly as it can.

And if someone is --

QUESTION: But it invades a certain amount of privacy, doesn't it?

MR. LESCH: It invades a certain amount of privacy. In Doe v. Bolton and Roe v. Wade, this Court didn't hold that

there is an absolute right of privacy. It only referred to the first trimester, as to the right to make the abortion decision.

We're not saying that the right of privacy is absolute in any sense. But we are saying that the Court looks at the relationship, looks at the doctor's right to prescribe -- and there is testimony in this case, for example, by a psychiatrist, that he would not prescribe Schedule II drugs to patients of his, because he would have to tell them about the filing requirement.

QUESTION: Why is that any more significant than that there are some doctors who won't perform abortions? That's just a personal scruple on the part of the doctor, isn't it?

MR. LESCH: No, it's more than that, I believe, Your Honor. Because in Roe v. Wade and Doe v. Bolton, this Court talked about the right to practice medicine unhindered by non-medical considerations.

And it is a non-medical consideration, we urge, as to what the effect of the filing requirement will be on the future health of the patient. That shouldn't be what goes into the doctor's mind when he decides, Is this drug necessary for my treatment of this patient? It ought to be simply, What is the patient's medical history and what will the effect of this drug be on the patient?

This Court has held that there are other ways to

monitor doctors. There are licensing requirements. The State, for example, can, on the prescriptions -- we're not challenging this -- the State can require the doctors to file all of their prescriptions with the doctor's name on it.

The only thing that we object to, and that's why I restated the issue at the beginning of my argument, is the patient's name. So that in the case that you mentioned, Mr. Chief Justice, before, the Moore case, if a physician is giving out a large number of prescriptions of Schedule II drugs, the Department of Health can go to that physician and ask him to see the patient records, and check up on the bona fides of every one of those.

But what we do --

QUESTION: Did you say in your colloquy with brother Rehnquist that you would or would not concede the State could require the patient to give his name to the doctor?

MR. LESCH: The patient to give --

QUESTION: Who is getting a prescription.

MR. LESCH: Whether the State could require the patient to give his name to the doctor?

QUESTION: To the doctor. And there's no further requirement to report it to the State.

MR. LESCH: Oh, I have no problem with the State giving -- with the patient giving his own name to the physician.

QUESTION: And for the State requiring the physician to keep a record of the patient's name?

MR. LESCH: I have no problem with the State requiring the physician to keep the name.

QUESTION: So that at some time, if there were probable cause to suspect something, you could subpoena the doctor's records?

MR. LESCH: Exactly. Exactly.

QUESTION: You wouldn't see anything wrong with that?

MR. LESCH: No, I wouldn't, because there you have what you have in --

QUESTION: What about calling the doctor before a Grand Jury?

MR. LESCH: I would see nothing wrong with calling a doctor before a Grand Jury.

QUESTION: And asking him, "Tell me the names of the patients to whom you prescribed Title II drugs in the last year"?

MR. LESCH: Yes, and there is a basic distinction between that case and the case we have. And that is that that case provides for invocation of the judicial process, which the two concurring justices in the Schultz case --

QUESTION: But you need no probable cause to call him before the Grand Jury?

MR. LESCH: Youneed no probable cause, but you do have a district court judge supervising the conduct of the

Grand Jury proceedings.

QUESTION: Well, supervising it in what sense? He can claim the privilege against self-incrimination, but that's not in question here.

MR. LESCH: No, if he claims, on behalf of his patient, the doctor-patient privilege, and it is determined by the district court judge that the questions that are being asked of that doctor are simply a fishing expedition, he won't be required to answer them.

QUESTION: Well now, that's a question of State law, whether he can claim the doctor-patient privilege. Certainly there is no federal doctor-patient privilege that one can claim before a Grand Jury, is there?

MR. LESCH: Well, to the extent that there is -- okay, to the extent that we're talking about that, and that would only obtain in the State court proceeding.

QUESTION: So what is the difference between calling him before a Grand Jury and inspecting his records?

MR.LESCH: If there is a right of privacy that a patient has and that a physician can protect, then a court can supervise the exercise of that right of privacy during Grand Jury testimony or during demands for his records.

QUESTION: Oh, well, then you're saying, in response to Justice White, that he can be called before a Grand Jury, but if he's asked to disclose the names of his patients, he

then asserts this district court decision?

MR. LESCH: If, in fact, he has reason to believe that this is a fishing expedition, or there is no basis for such a request, he can do so. But that isn't our case.

QUESTION: But you're saying that's just like any witness before a Grand Jury, you wouldn't be saying that this would be special to the doctor?

MR. LESCH: I'm not saying that, yes. Excuse me, Your Honor is correct, that's what I'm saying.

QUESTION: If the normal rule would apply, whatever it is.

MR. LESCH: The normal rule would apply. But you would have the opportunity for judicial intervention, and that's what we don't have in this case.

QUESTION: Well, in New York, may witnesses before a Grand Jury decline to answer a question on the grounds that it's a fishing expedition, or are they limited to the Fifth Amendment?

MR. LESCH: Your Honor, I can't -- I can't answer that. I think that if --

QUESTION: Have you ever heard of a State that allows a witness to decline --

MR. LESCH: If a warrant is insufficiently specific, if a request for information is overly general, then I think the objection to the request for information can be made, that

it is a fishing expedition.

QUESTION: Well, you don't need a warrant to examine someone before a Grand Jury, all you need is a subpoena.

MR. LESCH: All right. I was talking about a request for information to a physician, by way of warrant or subpoena.

QUESTION: Well, Mr. Jaffe, your point, I understand, is --

MR. LESCH: I'm Mr. Lesch, Your Honor.

QUESTION: Oh, that's right. I understand that your point is that whatever position the doctor makes, a judge will decide it.

MR. LESCH: Exactly. Exactly. There is --

QUESTION: Whether it's -- if it's a fishing or whatever it is, it will be a judge who decides it.

MR. LESCH: That is the only point that I am trying to make here. Whereas here we have the collection of millions of prescriptions without any opportunity for a judge to decide anything.

And absolutely no need shown, either before the statute was enacted or since it's been enacted, that these had any effect whatsoever. We have 31 persons who are operating this system and have access to the information. We have exactly two suspects in the twenty months that the system was operated. And in that time one of them was discharged, and the other one was left unresolved.

QUESTION: Well, I take it you are not suggesting that if you win this case that there will be established a constitutional privilege, which would permit a patient to object to his doctor testifying against him?

MR. LESCH: No constitutional privilege.

QUESTION: In a criminal case.

MR. LESCH: What I amsaying, though, is --

QUESTION: In a criminal case.

MR. LESCH: That has nothing to do with this case, as far as I'm concerned. I'm not saying that it is impossible that this Court will some day decide that certain aspects of the physician-patient relationship are privileged.

For example, a psychoanalyst --

QUESTION: Well, but you -- the rule you've contending for, you don't suggest, would determine that question?

MR. LESCH: Absolutely not. It certainly wouldn't. That's a question for another day.

As are the questions relating to gunshot wounds, which is a much simpler case. As I said before, I have no problem with that. Or the reporting of venereal diseases, because --

QUESTION: But you are contending for a generalized constitutional right of privacy, which the Court's opinion in Katz v. United States said did not exist?

MR. LESCH: Well, following the Katz case, this Court decide Doe, Roe, it also decided the case of Buckley v. Valeo; in all of those cases the Court recognized that privacy is a constitutionally protected right.

Now, I'm not saying that it is a generalized right of privacy. What I'm referring to here is a right of a physician to prac-ice medicine, which is well within the confines of this Court's prior decisions, the right of a patient to receive advice untrammeled by non-medical considerations, which is also well within this Court's prior decisions.

I'm not saying that every aspect of privacy is constitutionally protected.

But I am saying that when you have the peculiar situation of, first of all, the physician-patient relationship, and secondly you have the effect on the practice of medicine by the physician, and thridly you have the total lack of any necessity for the disclosure of millions of names of highly personal information to the State, that under these circumstances the right of privacy ought to exist.

The Court in Poe v. Ullman talked about the right of privacy being a rational continuum. And I believe that this case is a rational continuation --

QUESTION: But Poe v. Ullman dismissed the writ as improvidently granted, didn't it?

MR. LESCH: I was referring to the concurring

opinion in that case, which was quoted by Judge Friendly in the court below.

QUESTION: The dissenting opinion, I think it was.

MR. LESCH: I think it was at that time, but that was also before Doe and Roe, Your Honor.

QUESTION: Did you say Judge Friendly -- I did not observe Judge Friendly as a member of this panel.

MR. LESCH: Well, there was a -- Judge Friendly -- originally this case was dismissed.

QUESTION: When it was before a single judge.

QUESTION: Yes. But not in the present case, is that it?

MR. LESCH: What happened in this case was that originally Judge Carter dismissed the case for want of a substantial federal question. It then went up to the Circuit Court of Appeals, and Judge Friendly instituted a temporary restraining order, or continued the one that Judge Carter had granted, in effect held that there was a substantial federal question and quoted the Poe v. Ullman case.

He then sent it back down for argument on the preliminary injunction motion. And it was only after we had established, in the record in this case, all of the facts that I am talking about now, that then the case came up to this Court with a full record, where it is shown that there is no need for this system.

I believe we have also shown the Federal Drug Abuse Prevention and Control Act has no triplicate prescription provision, the Uniform Controlled Substances Act has no triplicate prescription provision; 39 States of the Union have no such provision.

And this Court has often held that where so many other States have no triplicate prescription -- or have no comparable provisions in their statute, that is also an indication that those provisions are unnecessary.

The fact is, in this case, that there has not been a scintilla of evidence -- and Mr. Greenwald, for the State, has not pointed to a scintilla of evidence that there is any need whatsoever for the patient's name.

If there were some showing of need, as there is not in this case, at that point the State may well condition use of a more effective means, which involves a danger to a constitutionally protected privacy, on the taking of all reasonable precautions which limit the risk. So that is the point where the adequacy of the State security system comes into play, Justice Rehnquist, in response to your prior question. But we don't reach that point in this case. And the three-judge court didn't reach it in this case, because there was absolutely no showing.

MR. CHIEF JUSTICE BURGER: You are now on Mr. Jaffe's time, Mr. Lesch.

MR. LESCH: In that case, I will withdraw.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Jaffe.

ORAL ARGUMENT OF H. MILES JAFFE, ESQ.,

ON BEHALF OF THE APPELLEES

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

If I could go back to Mr. Justice Rehnquist's question, we do admit that it is the difference in the extent and intrusiveness of the system that is at the heart of this case. And the case really does take off from the concurring opinion of Mr. Justice Powell in the Schultz case, where he says: "at some point government intrusion upon these areas would implicate legitimate expectations of privacy."

And the key to this case is that, unlike the decision in Danforth or in Schultz, where the reporting was not systematic and in fact was not properly challenged, or as in the American Physicans case, which was affirmed by this Court in the last term, but not heard by this Court, there is systematic reporting here of the names of literally hundreds of thousands of patients.

It is our belief there comes a point at which the demand of the State for systematic reporting of absolutely innocent conduct becomes offensive.

And, in fact, the intrusiveness of the conduct was

seen at the trial, because, as Mr. Lesch has commented, this case went up and down, originally Judge Carter thought there was no substantial federal question, it was reversed by the Second Circuit, it came back down; we asked for a temporary injunction, and the Court said, No, you haven't shown us any real injury.

Well, when we finally got to trial, the witnesses who testified testified to substantial intrusion into the doctor-patient relationship, which is a part of this case, part is the intimacy of the information the government is seeking, part is the doctor-patient relationship.

Witnesses testified -- these witnesses, it is true, are innocent of illegal practices, but they testified that the thought of having the State have all this information made them very uneasy; or a doctor testified that he would not prescribe for a schizophrenic, in one case -- I think that's at page 169 of the record, Dr. Brody's testimony -- he would not prescribe for a schizophrenic patient these drugs because, as all of the other doctors testified, he felt he was required to inform the patient that the system existed and that the name would be forwarded to Albany.

He then felt that if he so informed the schizophrenic, that would upset the very treatment which he in fact intended to prescribe for the schizophrenic.

So here we are asking the Court to address itself to

the questions which were not raised in Danforth or Miller, where there was investigation, but the question where there is, in effect, a dragnet before, not an investigation afterward, and that is the distinction.

It is fine for the State to investigate, and we're for it, and we do not believe that drug abuse is a good thing, we think it's a bad thing; and we think doctors should have to report, and we do think that doctors should, in fact -- the computer can printout exactly what the doctor's use is. That is to say, if one doctor is prescribing hundreds of thousands of pills a month, or whatever would be the right quantum, you can then go and investigate that doctor, and the doctor is required, under the statute, and we do not object to this, the doctor is required under the statute to keep those records. And then when the State goes and conducts the investigation, so be it.

QUESTION: But now, the State does need probable cause, under the pre-existing system, to go and inspect a doctor's records.

MR. JAFFE: And does not here.

And that is not challenged in this case.

What is challenged in this case is the centralization and the data processing implications that are taking place in this case, whether it be medical information, the next we will have is income; in the Valeo case we have political

contributions, for which a reason was found there, which we think was compelling. The difference here is that the State's showing is totally inadequate.

The next case we may get is the filing at birth of all fingerprints, which -- it's true, if we asked any single citizen to come forward at any time, we could probably get his fingerprints. It's the systematic dragnet prior to any criminal conduct, with totally innocent patients here, who are compelled to be part of the system. No one goes to get a Schedule II drug because he wants to be happy about it. He is a patient, and he is presumably sick.

QUESTION: Well, you're compelled to be a part of the system when you're born in most States, aren't you, because the birth certificate is filed and forwarded to the State Registrar of Statistics?

MR. JAFFE: Exactly. And we would say to the Court there should be limits on the degree to which the State can then start cataloging your every activity.

QUESTION: Well, why not draw the line before that? Why not say no registration of birth certificates?

MR. JAFFE: Because the registration of birth certificates has a clear need.

QUESTION: Well, then you're saying that in every one of these cases where the States are out to collect any kind of data, the State has to show a compelling interest or a clear

need or something like that?

MR. JAFFE: Your Honor, that is not as hard as Your Honor makes it sound.

In fact, usually the State can show a very clear reason for spending millions of dollars taking in $125,000 -- 125,000 prescriptions per month. And, in fact, the need in the gunshot case, and the need in the venereal disease, those needs are clear.

But there comes a time, when we're dealing with medical records, when the need -- and this case -- and let me get to that point. This case was tried. This case does not come up on a motion to dismiss. It does not come up on summary judgment.

It comes up, after three judges originally, rather skeptical, heard the testimony of these patients, and what they said was, in the year or twenty months that this system was in effect, we had one case in which there's a suspect. There hasn't been any showing that the system has acted as a deterrent. We have no showing at all of any need here. And what we preserve, as we rule against the name requirement, we preserve, is the most comprehensive system of regulation of any drug -- of any drug regulation in the country, namely, everything must be filled out on a New York State form. It must include --

QUESTION: Mr. Jaffe, let me just ask one question

that's running through my mind.

If you look at it from the point of view of the individual whose privacy is being invaded, because his name is being put in a file some place, does it matter to him whether, when somebody wants to find out whether he's taking these drugs or not, whether the person trying to find out goes to the corner pharmacist and says, "Do you have any information about this man?" or he goes to Albany?

MR. JAFFE: Yes, it does --

QUESTION: I mean, presumably, he would patronize the local drug store, I suppose.

MR. JAFFE: Sure. It does make a difference, because most people recognize at this point that the possibility of abuse, if, in fact, the information is centralized within the control of the government, is incalcuable.

QUESTION: But I suppose the individual's concern only arises when he's under investigation, does it not?

MR. JAFFE: No. In other words, he's worried about the fact that if he takes a dangerous drug, and he says, "Well, I may run for office next year, and the Governor in this State in fact can simply push a button on the computer and find out, among other things, who my business associates are, because we have a list of those people, and who my drugs [sic] are, because we have a list of those people" -- in other words,

if this Court does not have --

QUESTION: Well, couldn't the Governor go to the corner pharmacy and take a look and see if he's been buying the drugs there?

MR. JAFFE: Well, yes, the Governor could carry out an extensive investigation.

QUESTION: Well, he's just investigating one person by your hypothesis.

MR. JAFFE: Well, he --

QUESTION: And the information is available either in Albany or in the local pharmacy.

MR. JAFFE: Yes, but the facility of --

QUESTION: What's the difference?

MR. JAFFE: The facility here. It is true that --

QUESTION: That it is easier to go to Albany than it is to go to the corner drugstore.

MR. JAFFE: It is easier to push the computer button and find out where all of our citizens have been, and what all the citizens do, and who their associations are, and who their political contributions are, and so forth and so on.

But are we going to authorize the State to make a collection of political contributions, without a showing that in fact there is a reason for that?

QUESTION: In income tax, federal income tax returns, they are supposed to be of the utmost sacred category of privacy,

and yet we know, as a practical matter, that they are leaked, especially in recent years.

Now, would you regard that as a flaw in it?

MR. JAFFE: No, that would be exactly on point, Your Honor. I would say that if federal income tax were not necessary, then we shouldn't have the forms. We all know it is necessary, and therefore we don't object to it.

QUESTION: Well, don't you think gun control is necessary?

MR. JAFFE: Yes, I do.

But I think -- but here we have a showing after trial, which is the difference in this case.

That the State has gotten literally nothing after trial, shown nothing as the product. And we say, as Mr. Justice Powell indicated in the Schultz case, there comes a point when the material turned up by a system which includes hundreds of thousands of prescriptions per month, almost, when it has gone too far.

And where, as YourHonor points out, where you find an immediate need, as in the income tax area, we would then uphold the system.

Where, for example -- we might even feel, in the income tax place, they went too far, as requiring everybody to report every check that he has.

And it is true that the IRS could get every check.

But we would still not want the government to have a record of every check. And checks are less personal, if one looks at Miller, than are the medical records of people here.

And, interestingly, in the Danforth case, in the Schultz case, and in the Association of American Physicians, none of the regulations required the centralized reporting of names. And the statute in Danforth does not have a central -- does not require the central reporting. And the regulations do not include, on the form, the name.

That's the distinction we call to the Court's attention, and urge. And we urge the Court to examine carefully the findings of the lower court and their narrowness, perhaps not the language but the narrowness of that finding, which said: Where there is no product from the system and where the system is requiring the massive centralization, there we think that the diminition of constitutionally protected right is too great.

Or, put otherwise, when you have regulation of this sort, precision must be the touchstone.

Thank you.

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

Do you have anything further, Mr. Greenwald?

You have a couple of minutes.

REBUTTAL ARGUMENT OF A. SETH GREENWALD, ESQ.,

ON BEHALF OF THE APPELLANT

MR. GREENWALD: Well, I would want -- yes. I think I did reserve a couple of minutes.

I wish to emphasize that my -- counsel for the Roe appellees has stated that interdepartmental communication is allowed under this statute. That's basically erroneous. The confidentiality provision in this law, once again ignored by the district court, provides that patient identity is only available to the Department of Health investigators, people who are responsible for the enforcement of Article 33, or other agencies that license people who deal in these controlled substances.

Thus, the example given by the attorney for the patient appellees, about the Governor getting information, is absolute nonsense. The Governor would be violating the law if he went to get this information.

And I think I can fairly state that under this law the Commissioner of Health, who, I admit, is an appointee of the Governor, has a legal duty and a legal right to tell the Governor, if this ever happened -- once again, a hypothetical -- to get out of his office.

And, of course, all this is in the height of hypothesis.

Now, I also would like to emphasize that the con-

fidentiality provision here is one of the most carefully drawn, I think, under-analysis, and when you speak about income tax records, indeed, the reason you find leaks perhaps of income tax records is that the law allows those records to be provided to any government official. This is not the case in the operation of our filing triplicate prescriptions.

And there's also the spectre of lack of results, claim of one or two in twenty months of operation. In point of fact, I think it's -- I have found it in the record. In point of fact, we did not have the capability of printing out patient names, or extracting patient names from the computer until about, roughly, August 1974, and there was a trial in December.

I think it's irrelevant to the constitutionality of this section whether we got one report, 50 reports or 150 reports.

But, basically, youhave a system in its infancy. There are certain priorities in the Department of Health. Constitutionality of a statute on its face, and that's what we're involved in here, cannot depend on the efficiency or proper operation by the appellant.

Indeed, as I have cited in my Reply Brief, if there had been a preliminary injunction, let's say, for example, granted against this sytem, and there was one for about four or five or six months, you'd have no results to discuss.

It's rather obvious that the constitutionality of this statute depends on whether it is reasonably directed to accomplishing its purpose.

The discussion --

QUESTION: Mr. Greenwald, if we could find a way to send this case back, don't you think, as broke as New York is, that they might forget about it?

MR. GREENWALD: I would submit that there's no necessity -- I don't think there's any necessity to send this case back. It has been mentioned by the amici, the amici curiae briefs, because it's rather obvious that the record, in later months, showed we were getting all types of reports. But I submit that that is a totally erroneous test of constitutionality. That would mean that in California, if they got proper results, or results that impressed the district court judges, it's constitutional in California. If, in Idaho, they might get only ten, because it's a small State, then there is no need.

MR. CHIEF JUSTICE BURGER: I think you've answered the question, counsel.

MR. GREENWALD: Thank you.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 3:03 o'clock, p.m., the case in the above-entitled matter was submitted.]