ROE v. WADE ORAL ARGUMENTS

Editor's Note

In 1973, Justice Harry Blackmun wrote that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. . . . That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy." Twenty-five years later, the repercussions of the United States Supreme Court's decision in *Roe v. Wade* are still felt throughout the United States. What began as a legal skirmish over the constitutionality of a Texas abortion statute has escalated into a war on many fronts of American society and culture. Contrary to Justice Blackmun's statement that the decision in the case be resolved by "constitutional measurement, free of emotion and predilection," the decision in *Roe v. Wade* has, by its very nature, polarized American society into divergent camps separated by an unbridgeable abyss.

The pages that follow are a reproduction of the two oral arguments heard before the Supreme Court of the United States in the matter of *Roe v. Wade*. The transcripts are presented solely for their scholarly and historical value and hopefully offer a different perspective of the case than most students of the law receive from traditional study. Moreover, these oral arguments present unique insight into the minds of the participants who congregated twenty-five years ago to debate and shape the constitutional framework concerning abortion.

The *Seton Hall Constitutional Law Journal* would like to thank the United States Supreme Court Library and University Publications of America for aiding in the procurement of the transcripts. The first oral argument was obtained from University Publications of America from its *Landmark Briefs and Arguments of the Supreme Court of the United States*.

JANE ROE, et al.,

Appellants,

v.

HENRY WADE,

Appellee.

No. 70-18

Washington, D.C.,
Tuesday, 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 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.*

PROCEEDINGS

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 based; and, second, that it violated a woman's right 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 James 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 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.

THE COURT: When this case was in the District Court, the case of *Vuitch* against *The United States* had not been decided here?

MRS. WEDDINGTON: That's correct.

THE COURT: Now, that's—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 when 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 of whether or not the health of the woman—mental or physical—would be affected. But, in Texas, we tell the 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 sanctions.

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 neurochemical 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 neurochemical condition would impair her health, evidently her doctor did not feel that she would die if she continued the pregnancy. And certainly they were very concerned about the effects of the statute, and her physician seemed uncertain about its implications. 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 considers the Federal court decision there not to be binding. And we do have a letter from him—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 women 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.

THE COURT: Well then, Mrs. Weddington, of course you make many additional constitutional attacks upon the Texas statute, and only one was before us in the *Vuitch* decision—

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

THE COURT:—only the claim of unconstitutional basis. The Court explicitly didn't reach any of the other claims, and you make many other claims.

Of course, before you get to any of those, there are a good many threshold questions, are there not, of jurisdiction—

MRS. WEDDINGTON: Yes, Your Honor, there are. I think it important to point out to the Court that in my reading of *Younger* [versus] *Harris*, the companion cases, all the Court was concerned about in those cases was a situation where there was an attempt to interfere with a pending state criminal 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. 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 prosecution. They were not even aware of the prosecution against Dr. Hallford.

THE COURT: Could they, under Texas law, be charged as accomplices or as co-conspirators, or anything like that?

MRS. WEDDINGTON: No, we have express Texas cases. In one situation, *Woodrow v. 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 courts, and it was to those courts that they turned.

THE COURT: Your have three plaintiffs here representing a class, as I gather?

MRS. WEDDINGTON: Yes, sir.

THE COURT: One, an unmarried pregnant woman; two, a married couple—and the doctor told them 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; and, then third, is a physician who is under indictment, or was, at the time of this complaint.

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 the *Younger* [versus] *Harris* 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 Court 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 is 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 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 court. 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 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 by the Federal process; not because of any infirmity in their own attempt to litigate her interests—this will, in fact, be a case certainly presenting a substantial Federal question, and yet evading review in the future.

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

THE COURT: Does that mean that there is no possibility of getting a declaratory judgment under Texas law?

MRS. WEDDINGTON: Yes, Your Honor. Declaratory judgments in the State of Texas are limited to the 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 prosecutions. 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 effect 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 abortions—or, legal, medically safe abortions—women often resort to the illegal abortions, which certainly carry risks of death, all the side effects such as severe infections, 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—

THE COURT: The microphone won't be effective if you—

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 and 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 if in high school, must drop out of 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 laws hold 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 at times an 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 methods of practice. We have affidavits in the back of our brief from each of the heads of public—of heads of obstetrics and gynecology departments from each of our public medical schools in Texas. And each of them points our that they were willing and interested to immediately begin to formulate methods of providing

care and services for women who are pregnant and do not desire to continue the pregnancy. They were stopped cold in their efforts, even with the declaratory judgment, because of the DA's position that they would continue to prosecute.

THE COURT: Mrs. Weddington, so far on the merits, you've told us about the important impact of this law, and you made a very eloquent policy argument against it. And I trust you are going to get to what provisions of the Constitution you rely on. Sometimes the Court—we would like to, sometimes—but we cannot here be involved simply with matters of policy, as you know.

MRS. WEDDINGTON: Your Honors, in the lower court, as I'm sure you're aware, the court held that the right to determine whether or not to continue a pregnancy 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 abortions; 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 say what the Court 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 equally an appropriate place, under the rights of persons to life, liberty, and the pursuit of happiness. I think that in as far as "liberty" is meaningful, that liberty to these women would mean liberty from being forced to continue the unwanted pregnancy.

THE COURT: You're relying, in essence, in this branch of the argument simply on the Due Process Clause of the Fourteenth Amendment?

MRS. WEDDINGTON: We had originally brought this suit alleging both the Due Process Clause, Equal Protection Clause, the Ninth Amendment, and a variety of others.

THE COURT: And anything else that might obtain.

MRS. WEDDINGTON: Yeah, right.

Since that district court found that 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 have said that the Ninth Amendment applies to rights reserved to the 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 involve the most fundamental things of people; that this matter is one of those most fundamental matters. I

think, inasfar as the Court has said that there is a penumbra that exists to encompass the entire purpose of the Constitution, I think one of the purposes of the Constitution was to guarantee to individuals the right to determine the course of their own lives. Insofar as there was, perhaps, no compelling state interest—and we allege there is none in this case—that, there again, that the right fits within the framework of the previous decisions of this Court.

THE COURT: What is the asserted State interest? Is there any legislative history on 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, as 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.

Concepts 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 procedures. She, again, is guilty of no crime whatsoever.

It's also interesting that in 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 *Fondgren 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 in an eight-week period, the same State does not require any death certificate, or any formalities of birth. The product of such a conception would be handled merely as a pathological specimen.

THE COURT: And the statute doesn't make any distinctions 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—

THE COURT: Well, do you make any distinctions?

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 involved.

THE COURT: What's your constitutional position there:

MRS. WEDDINGTON: As to a time limit—

THE COURT: What about whatever clause of the Constitution you rest on—Ninth Amendment, due process, the general pattern penumbra—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 a pregnancy. Obviously I have a much more difficult time saying that the State has no interest in late pregnancy.

THE COURT: Why? Why is that?

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

THE COURT: Emotional response by whom?

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

THE COURT: Well, do you or don't you say that the constitutional—

MRS. WEDDINGTON: I would say the constitutional—

THE COURT:—right you insist on reaches up to the time of birth, or—

MRS. WEDDINGTON: The Constitution, as I read it, and as interpreted and as 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.

THE COURT: Mrs. Weddington, the issue here, I guess, on your appeal, is whether you're entitled to injunctive relief?

MRS. WEDDINGTON: Yes, Your Honor.

THE COURT: Assuming that in all other respects your argument were accepted, why do you think, in addition to declaratory relief, you're entitled to injunctive relief? Those are different things, aren't they?

MRS. WEDDINGTON: Yes, sir. Certainly, in your dissent, you pointed out in *Perez v. Ledesma*—not a concurring opinion—

THE COURT: It was a dissent?

MRS. WEDDINGTON: It was a dissent. —that there are different standards that apply to the declaratory judgment, and to injunctive relief.

THE COURT: So I guess we said that in *Zwickler v. Koota*, didn't we?

MRS. WEDDINGTON: Yes, that's correct. And that's what the Court said, following *Zwickler v. Koota*, that even though they were granting declaratory relief, that different considerations applied 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 court, that an injunction is still proper. And it is our position that there is great and immediate threat of irreparable injury in the form of a continuing pregnancy that will not abate, and that continues—

THE COURT: So, you're really—you're asserting that the pregnant woman has standing in this case, and the married couple where the wife is not pregnant has standing?

MRS. WEDDINGTON: Yes, Your Honor.

THE COURT: Then what about the doctor where a criminal prosecution is 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 prosecutions.

THE COURT: But he was asking for a declaratory judgment?

MRS. WEDDINGTON: Yes, Your Honor. He joined in both the request for declaratory judgment—

THE COURT: Well, didn't *Younger* against—*Younger* and its companion cases cover declaratory judgments?

MRS. WEDDINGTON: Where there were pending—where—*Samuels v. Mackell*, as I read it, did say that where you have a request for a declaratory judgment there would be an effect on a pending criminal prosecution.

THE COURT: There was one pending—

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 others.

THE COURT: But other cases say, at least, that Federal courts may in limited situation—harassment, prosecution improperly used as a device to harass the person prosecuted. Now, isn't that it?

MRS. WEDDINGTON: Yes, Your Honor. But again, as I understand it—

THE COURT: Are you suggesting it ought to be broader than that?

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

THE COURT: I thought we were talking now about—

MRS. WEDDINGTON:—and that the intervention of the doctor certainly should not be sufficient—

THE COURT: We're talking about the doctor's case, aren't we?

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

THE COURT: You mean he was asking—he was asking what? No injunction against the continuance of that prosecution?

MRS. WEDDINGTON: That's correct. He is willing to litigate—

THE COURT: But he did want a declaratory judgment—

MRS. WEDDINGTON: As to future prosecutions.

THE COURT: Well, except that he wanted a declaratory judgment, as I understand it, that the underlying statute on which the prosecution is brought is unconstitutional. Isn't that it?

MRS. WEDDINGTON: Yes.

THE COURT: Well, I thought that's what *Samuels* and *Mackell* said he couldn't have?

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

THE COURT: I repeat—

MRS. WEDDINGTON: 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.

THE COURT: 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 effect the original action as brought by the women.

THE COURT: 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 was 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 anyone 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 interests while there is a prosecution pending against the doctor, they will—in many instances where a statute—

THE COURT: Well, I suppose the answer is that if there's a 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 are suffering.

THE COURT: 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 decide not to perform an abortion, and thereby escape—

THE COURT: I want to talk about the doctor. You said there were two

separate issues here. And the issue involving the doctor, he could litigate everything he's now litigating in the State court?

MRS. WEDDINGTON: Yes, Your Honor. My point being that these women should not be compelled to leave it up to a doctor to litigate their interests.

THE COURT: Well, he's going to 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 interest involved. And in most criminal prosecutions the doctors would bring up other problems, such as—

THE COURT: "I didn't do it." Or something like that?

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

THE COURT: But has this defense ever been interposed in a Texas criminal case—a constitutional defense?

MRS. WEDDINGTON: Yes, Your Honor. There is one recent opinion, *Thompson v. 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 courts.

THE COURT: 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.

THE COURT: That's the case you cited to the Chief Justice earlier in your argument?

MRS. WEDDINGTON: Yes. 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.

THE COURT: And the Texas Court of Criminal Appeals has basically upheld the constitutionality—the constitutional validity—

MRS. WEDDINGTON: They have held, really, directly in opposition to the Federal Court opinion from which we are appealing.

THE COURT: Is that case coming to this Court?

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.

THE COURT: Does the Texas law in other areas of the law give rights to unborn children—in the areas of trusts, estates and wills, or any of the other—

MRS. WEDDINGTON: No, Your Honor, only—only if they are born alive. We have—the Supreme Court of Texas recently has held in one case that there is an action for prenatal injuries at any stage prior to birth, but only upon the condition that it must 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 is a completely different question from whether or not they had rights at the time they were still in the womb.

THE COURT: What about the unborn child who is, as a result of an accident, killed—or whatever word you want to use for it?

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

THE COURT: Well, 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 COURT: For either the mother—

MRS. WEDDINGTON: Oh, I'm speaking—excuse me—solely for the fetus; that the fetus had no independent right; that the mother—

THE COURT: What about the mother recovering on the death of the child, or for the whatever you want to call it?

MRS. WEDDINGTON: Only for her injury.

THE COURT: Only for hers?

MRS. WEDDINGTON: Yes.

THE COURT: 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 MR. JAY FLOYD, ESQ., ON BEHALF OF THE APPELLEE

MR. FLOYD: Mr. Chief Justice, may it please the Court: It's an old joke, but when a man argues against two beautiful ladies like this, they are going to have the last word.

Before I proceed to the original issue in this case—which was the propriety of the trial court grant, or denying of 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—childless married couple. The only matter—evidence, or whatever, in the record concerning their contentions 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 the man be, at some time in the future, prepared or unprepared for parenthood? There is no fear of prosecution by Mary Doe.

If we accept all contentions of this married couple, we submit that they still do not come under the prescribed conditions of *Flast v. Cohen* and *Golden v. 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.

THE COURT: It's a class action, wasn't it?

MR. FLOYD: It was a class action.

THE COURT: 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.

MR. FLOYD: Yes, Your Honor. I would say that the only thing that would 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 [twenty-one] months ago. Now I think that it is—it has been recognized by the appellant's 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, the case can become moot from the hearing in the trial court until the time it reaches this Court.

We do not feel appellant's authority contained in her brief will substantiate her contention that the case is not moot. I might add this: 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, concerned orders of the Interstate Commerce Commission, in which the Court holds that there is a possibility or a reasonable possibility of continuation of those orders, and the case would be a repetition. It deals mainly with the capability of repetition.

We think the case of Jane Roe can be easily compared to *Hall v. 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, 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 plaintiff complained of the two-month residency requirement. This Court held the cause of action moot even though it was denominated as a class action.

THE COURT: There's a big difference. Colorado had amended its statute, and Texas has not.

MR. FLOYD: That is correct, Your Honor. But the fact was that you still had—if it is what you want to call it—the evil still existing.

THE COURT: But, two months.

THE COURT: But it was the other statute that had been the subject of the litigation. And that statute had been amended in *Hall* against *Beals*. That is not true here.

MR. FLOYD: That's now what we call a white horse.

THE COURT: I understand.

MR. FLOYD: 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 the class action, to have a representative in court. Now, the position of the appellant Hallford—

THE COURT: 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. 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, 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 then terminates that choice. That's when.

THE COURT: Maybe she makes her choice when she decides to live in Texas.

[Laughter]

MR. FLOYD: May I proceed?

There is no restriction on moving.

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, or bad faith arrest, or harassment of him at all, to bring him within *Dombrowski's* special circumstances. We think the cases of *Younger v. Harris* and *Samuels v. Mackell* are controlling, as to Dr. Hallford's position. We also feel that Dr. Hallford cannot rely upon his patients' right to bring him into Federal court. And I think the *Tillston v. Ullman* case will be authority

for that proposition.

As to the matter of injunctive relief after the court once grants declaratory relief, I will make this comment: that it appears the Court can consider the propriety of declaratory relief, and can consider the proprietary 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 pleases.

Now, should this Court, as I understand it—and all of the parties feel that if this Court once acquired jurisdiction over the matter—that these parties would like the Court to consider all the constitutional issues.

THE COURT: Are you—are you sustaining—are you saying that the denial of injunction was proper, because the declaratory judgment was in error?

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

THE COURT: I know. But certainly, if the judgment about the—if the declaratory judgment was erroneous, it was also right to deny injunction.

MR. FLOYD: Yes, Your Honor.

THE COURT: And that's your position?

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

THE COURT: You didn't cross—appeal? You could have.

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

THE COURT: But are you attempting to sustain the denial of injunction here on the grounds that the declaratory judgment was improper?

MR. FLOYD: We argue—we are asking the Court—the Court, to do this: that is, 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.

THE COURT: Can we do that? We said you couldn't cross-appeal from the declaratory judgment. You could only cross-appeal from the grant or denial of an injunction?

MR. FLOYD: Yes, Your Honor.

THE COURT: I suppose we could do it, if we bypass the Court of Appeals and bring up your appeal pending in the Fifth Circuit.

THE COURT: Couldn't we—you're here. Your opponent has brought a direct appeal here, because your opponent was denied an injunction by the three judge district court?

MR. FLOYD: Yes, sir.

THE COURT: 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.

THE COURT: But now that you're here as the appellee, you're arguing

that an injunction should not have issued. And part of that argument, 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.

THE COURT: That is your position?

MR. FLOYD: Yes, Your Honor. Now, the proceedings in the Fifth Circuit have been stayed, or abated.

THE COURT: I must say, your position makes sense to me. But don't some of our prior cases rather foreclose it, unless we bypass the Fifth Circuit and bring your appeal pending right 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 until a determination by this Court.

THE COURT: 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, did you?

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

Your Honor, we feel that this Court can, and should consider all the issues. And, under the *Sterling, Florida Lime and Avocado Growers*, and the *Carter* cases, which are cited in the briefs of the parties—

THE COURT: What is Texas' interest? What is Texas' interest in the statute?

MR. FLOYD: Mr. Justice, the *Thompson* case, which has been cited to the 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—the State Court, Court of Criminal Appeals, held that the State had a compelling interest because of the protection of fetal life—of fetal life protection. They recognized the humanness of the embryo, or the fetus, and they said we have an interest in protecting fetal life.

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

THE COURT: 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, statutes could be passed. Whether or not that would be constitutional or not, I don't know.

THE COURT: But we're dealing with the statute as it is. There's no state, is there, that equates abortion with murder? Or is there?

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

THE COURT: Well, that's ordinary—

MR. FLOYD: Yeah.

THE COURT: —felony murder.

MR. FLOYD: Yes, Mr. Justice.

THE COURT: The Texas statute covers the entire period of pregnancy?

MR. FLOYD: Yes, it does, Mr. Justice. Yes.

THE COURT: Mr. Floyd, I don't find that *Thompson* case cited in the brief here. I gather you said it just had been decided recently?

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

THE COURT: Do you have a citation?

MR. FLOYD: It is not in the reporter system yet.

THE COURT: Are you going to provide us with a copy of it?

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

THE COURT: What is the date of it, and the number? Do you know?

MR. FLOYD: This is No. 44070, *C.W. Thompson v. The State of Texas*. The opinion was delivered on November the 2nd, 1971.

THE COURT: Thank you.

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

THE COURT: At the Court of Criminal Appeals?

MR. FLOYD: Yes, Your Honor.

THE COURT: And now, that's the case Mrs. Weddington told me was pending on a motion for rehearing?

MR. FLOYD: Yes, Your Honor. Now, there's one—

THE COURT: If you leave that with the Clerk, Mr. Floyd, we'll distribute copies.

MR. FLOYD: Now, in addition, the *Thompson* case cited this case, in regard to vagueness, and said that it was 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 doing it. But he's saying, how can you prove it? Of course the Texas Court answered by saying, it is presumed the fetus was alive when an abortion is performed.

THE COURT: You're saying, in answer to my brother Marshall's question—what is the interest of the State in this litigation; or, even, what is its purpose, its societal purpose—your answer was, I think, relying on you opinion, the most recent opinion of the Court of Criminal Appeals in Texas, it was the protection of fetal life?

MR. FLOYD: Yes, sir.

THE COURT: And I think you also said that that was not, perhaps, its original purpose.

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

THE COURT: 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 the 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 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 mother, 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.

THE COURT: Certainly that's true. Policy questions are for legislative and executive bodies, both in the State and Federal Governments. But we have here a constitutional question. And, in deciding 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.

THE COURT: When was it enacted?

MR. FLOYD: 1859 was the original statute. This, I believe, was around 1900, 1907.

THE COURT: It goes back—

MR. FLOYD: It goes back—

THE COURT: —to the middle of the nineteenth century?

MR. FLOYD: Yes, sir.

THE COURT: Before that there were no criminal abortion laws in Texas?

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

THE COURT: 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.

THE COURT: 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 full juristic rights — not yet. Maybe they will. I don't know. I just don't feel like they have, at the present time.

THE COURT: In the first few weeks of pregnancy?

MR. FLOYD: Sir?

THE COURT: In the first few weeks of pregnancy?

MR. FLOYD: At any time, Mr. Justice. We make no distinctions in our statute.

THE COURT: You make no distinctions whether there's life there or not?

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

THE COURT: 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 the development of the fetus from about seven to nine days after conception.

THE COURT: Well, what about six days?

MR. FLOYD: We don't know.

THE COURT: But the 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]

THE COURT: I appreciate it.

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

THE COURT: I withdraw the question.

MR. FLOYD: Thank you. When does the soul come 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 practicing of any 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 it.

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 possession of illegal drugs; the practice of polygamy, and other matters. A parent, I do not believe—or parents, 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. Goldberg

stated in the *Griswold* case, that adultery and fornication are constitutional beyond doubt.

THE COURT: "Are constitutional?" Or do you mean laws against them are constitutional?

MR. FLOYD: The laws against them are constitutional. Now there is nothing in the United States Constitution concerning birth, contraception, or abortion. Now, the appellee does not disagree with the appellants' statement that a woman has a choice. But, as we have previously mentioned, we feel that this choice is left up to the woman prior to the time she becomes pregnant. This is the time of the choice. Now this was brought out in the *Rosen v. Louisiana State Board of Medical Examiners* case, and in *Horton v. Edwards*, which are lower court opinions, and my understanding is that *Horton v. Edwards* has been adopted in this Court.

THE COURT: Has been?

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

THE COURT: Texas doesn't grant any exemption in the case of a rape, where the woman's pregnancy has resulted from rape—either statutory or otherwise—does it?

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

THE COURT: And such a woman wouldn't have had a choice, would she?

MR. FLOYD: The procedure—and now I'm telling the Court something that's outside the record—as I understand, the procedure when a woman is brought in after a rape, is to try to stop whatever has occurred, immediately, by the proper procedure in the hospital. Immediately she's taken there, if she reports it immediately. 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 aspects of abortion; that is, whether or not it's safer. There are statistics that say it is, and statistics that say it's not. It 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 by various groups. We think these matters are matters of policy which can be properly addressed by the State legislature. We think that the consideration should be given to the unborn, and in some instances, a consideration should be given for the father, if he would be objective to abortion. Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Floyd, your time is consumed. Unless you have some correction you wish to make, Mrs. Weddington—

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. Thank you, Mrs. Weddington. Thank you, Mr. Floyd. The case is submitted.

[Whereupon, at 11:11 o'clock a.m., the case was submitted.]

JANE ROE, et al.,

Appellants,

v.

HENRY WADE,

Appellee.

No. 70-18

Washington, D.C.,
Wednesday, October 11, 1972

The above-entitled matter came on for argument at 10:04 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*
LEWIS F. POWELL, Jr., *Associate Justice*
WILLIAM H. REHNQUIST, *Associate Justice*

APPEARANCES:

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

ROBERT C. FLOWERS, ESQ., *Assistant Attorney General of Texas, P.O. Box 12548, Capitol Station; Austin, Texas 78711, for the Appellee.*

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear argument first if No.

70-18, 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:

We are once again before this Court to ask relief against the continued enforcement of the Texas abortion statute. And I ask that you affirm the ruling of the three-judge [court] below which held our statute unconstitutional for two reasons: The first that it was vague, and the second that it interfered with the Ninth Amendment rights of a woman to determine whether or not she would continue or terminate a pregnancy.

As you will recall, there are three plaintiffs and one intervenor involved here. The first plaintiff was Jane Roe, an unmarried, pregnant girl, who had sought an abortion in the State of Texas and was denied it because of the Texas abortion statute, which provides an abortion is lawful only for the purpose of saving the life of the woman.

In the original action she was joined by a married couple, John and Mary Doe. Mrs. Doe had a medical condition, her doctor had recommended, first, that she not get pregnant, and, second, that she not take the pill.

After this cause was instituted, and after, in fact, the three-judge court had been granted, those three plaintiffs were joined by an intervenor, Dr. Hallford, who was, at the time he intervened, under a pending State criminal prosecution under the statute.

He did not ask that his prosecution be stopped by the court, but rather joined in the original request for a declaratory judgment and injunctive relief against future prosecution.

As a matter of fact, he has not, his prosecution has not been continued. But the district attorney, against whom we filed the suit, has taken a position that because there was no injunction, he is still free to institute prosecutions.

There is a letter from his office in the Appendix stating that he will continue prosecution, and in fact there have been a very limited number of prosecutions in the State of Texas since the three-judge court entered its declaratory judgment.

QUESTION: Prosecutions of doctors, you're speaking of?

MRS. WEDDINGTON: Prosecutions of doctors, yes, sir. The problem that we face in Texas is that even though we were granted a declaratory judgment, ruling the law unconstitutional, even though we've been before this Court once in the past, in Texas women still are not able to receive abortions from licensed doctors, because doctors still fear that they will be prosecuted

under the statute.

So if the declaratory judgment was any relief at all, it was an almost meaningful relief, because the women of Texas still must either travel to other States, if they are that sophisticated and can afford it, or they must resort to some other less—some other very undesirable alternatives.

QUESTION: You said "meaningful", you meant "meaningless", didn't you?

MRS. WEDDINGTON: Yes, it's just—.

In fact, we pointed out in our supplemental brief filed here that there have been something like 1600 Texas women who have gone to New York City alone for abortions in the first nine months of 1971.

In addition, I think the Court would recognize there are many other women going to other parts of the country.

One of the objections that our opponents have raised, the same in this Court, is moot, because, of course, the woman is no longer pregnant. It's been almost three years since we instituted the original action.

And yet we can certainly show that it is a continuing problem to Texas women. There still are unwanted pregnancies. There are still women who, for various reasons, do not wish to continue the pregnancy, whether because of personal health considerations, whether because of their family situation, whether because of financial situations, education, working situations, some of the many things we discussed at the last hearing.

Since the last hearing before this Court there have been a few cases decided that we wanted to draw the Court's attention to, and are covered in our supplemental brief.

In addition, there is a supplemental brief filed by an amicus party, Harriet Pilpel, on behalf of Planned Parenthood of New York, that seeks to point out to the Court, at pages 6 and 7 and subsequent pages, some of the changing medical statistics available regarding the procedure of abortion.

For example, that brief points out that the over-all material death rate from legal abortion in New York dropped to 3.7 per 100,000 abortions in the last half of 1971. And that that, in fact, is less than half the death rate associated with live delivery for women.

That, in fact, the maternal mortality rate has decreased by about two-thirds to a record low in New York in 1971. That now, in 1971, New York recorded the lowest infant mortality rate ever in that State. That during the first 18 months of—well, from July 1st, 1970, to December 31st, 1971, out-of-wedlock pregnancies have dropped by 14 percent.

We now have other statistics coming from California and other States that show that not only has the over-all birth rate declined, but the welfare birth rate has also declined accordingly.

As to the women, this is their only forum. They are in a very unique

situation, for several reasons: First, because of the very nature of the interest involved. Their primary interest being the interest associated with the question of whether or not they will be forced by the State to continue an unwanted pregnancy.

In our original brief we alleged a number of constitutional grounds. The [main] one we are relying on before this Court are the Firth, the Ninth, and the Fourteenth Amendments.

There is a great body of precedents. Certainly we cannot say that there is in the Constitution, so stated, the right to an abortion. Neither is there stated the right to travel, or some of the other very basic rights that this Court has held are under the United States Constitution.

The Court has in the past, for example, held that it is the right of the parents and of the individual to determine whether or not they will send their child to private school, whether or not their children will be taught foreign languages, whether or not they will have offspring, the *Skinner* case, whether—the right to determine for themselves whom they will marry, the *Loving* case, and even in *Boddie vs. Connecticut*, the choice of saying that marriage itself is so important that the State cannot interfere with termination of a marriage, just because the woman is unable to pay the cost.

Griswold, of course, is the primary case, holding that the State could not interfere in the question of whether or not a married couple would use birth control; and since then this Court, of course, has held that the individual has the right to determine whether they are married or single, whether they will use birth control.

So there is a great body of cases decided in the past by this Court in the areas of marriage, sex, contraception, propriation, child-bearing, and education of children. Which says that there are certain things that are so much a part of the individual concern that they should be left to the determination of the individual.

One of the cases decided since our last argument September 13th was the second Connecticut case, *Abele vs. Markel*, which Judge —

QUESTION: Newman.

MRS. WEDDINGTON: Excuse me?

QUESTION: Newman, I think.

MRS. WEDDINGTON: — Newman wrote the opinion, yes. Thank you.

And Judge Lombard concurred.

In that case that three-judge court held the Connecticut statute, a slightly revised statute, for the second time to be unconstitutional.

In part of the language of that case, it pointed out that no decision—and I'm quoting—of the Supreme Court has ever permitted anyone's constitutional right to be directly abridged to protect a State interest which is subject to such

a variety of personal judgments. And certainly the amicus briefs before the Court show the variety of personal judgments that come to bear on this particular situation.

To uphold such a statute, the Court said, would be to permit the State to impose its view of the nature of a fetus upon those who had the constitutional right to base an important decision in their personal lives upon a different view.

Again, this is a very special type case for the women, because of the very nature of the injury involved. It is an irreparable injury. Once pregnancy has started, certainly this is not the kind of injury that can be later adjudicated, it is not the kind of injury that can later be compensated by some sort of monetary reward.

These women who have now gone through pregnancy and the women who continue to be forced through pregnancy have certainly gone through something that is irreparable, that can never be changed for them. It is certainly great and it is certainly immediate.

There is no other forum available to them, as we talked last time, they are not subject in Texas to any kind of criminal prosecution, whether the woman performs self-abortion, whether she goes to a doctor, finds someone who will perform it on her, she is guilty of no crime whatsoever. And yet the State tries to allege that its purpose in this statute was to protect the fetus.

If that's true, the fact that the woman is guilty of no crime is not a reasonable kind of—it does not reasonably follow.

The women are not able to have any kind of declaratory judgment in Texas, because of our special declaratory judgment statutes in our concurring criminal and civil courts, the two different lines of cases that we have. So the federal court was the only court to which the women had any kind of access, and it was to the federal courts they came, and it's the federal court, in my judgment, that should determine this case.

It's a very unique kind of harm, certainly that was done to them. Even though there are many cases, some very recent, from this Court, talking about the problem of when a State may interfere, or the federal judiciary may interfere when there is a pending State criminal prosecution.

This case does come under the exceptions in that there is great, immediate, irreparable injury, where there is no other forum, it is something that, as far as these women are concerned, can never be adjudicated in a criminal prosecution, much less in a single criminal prosecution.

It certainly is an instance of a situation that is capable of repetition, yet evading review. The judiciary simply does not move fast enough for the case to be decided within the period of gestation, much less within the period within which an abortion would be medically safe for these women.

The State has alleged, and its only alleged interest in this statute is the interest in protecting the life of the unborn. However, the State has not been

able to point to any authority, of any nature whatsoever, that would demonstrate that this statute was in fact adopted for that purpose.

We have some indication that other State statutes were adopted for the purpose of protecting the health of the woman. We have an 1880 case in Texas, shortly after the 1854 statute was adopted, that states that the women is the victim of the crime, and is the only victim that the court talks about.

We have all the contradictions in the statute, and the way so many things that just don't make sense. If the statute was adopted for that purpose, for example, why is the woman guilty of no crime? If the statute was adopted for that purpose, why is it that the penalty for abortion is determined by whether or not you have the woman's consent?

QUESTION: Regardless of the purpose for which the statute was originally enacted, or the purpose which keeps it on the books in Texas today, you would agree, I suppose, that one of the important factors that has to be considered in this case is what rights, if any, does the unborn fetus have?

MRS. WEDDINGTON: That's correct.

There have been two cases decided since the September 13th argument that expressly hold that a fetus has no constitutional right, one being *Byrn vs. New York*, the other being the *Magee-Women's Hospital* case. In both situations persons sought to bring that very question to the court: does a fetus —in the one instance, *Byrn* was a challenge to the New York Revised Statutes; the other was a situation where a person sought to prevent Magee-Women's Hospital from allowing further abortions to be done in that hospital.

And in both cases it was held that the fetus had no constitutional rights.

Several of the briefs before this Court would also argue that this Court, in deciding the *Vuitch* case, which has allowed abortions to continue in the District of Columbia, certainly the Court would not have made that kind of decision if it felt there were any ingrained rights of the fetus within the Constitution.

There is also, of course,—

QUESTION: Well, is it critical to your case that the fetus not be a person under the due process clause?

MRS. WEDDINGTON: It seems to me that it is critical, first, that we prove this is a fundamental interest on behalf of the woman, that it is a constitutional right. And second—

QUESTION: Well, yes, but how about the fetus?

MRS. WEDDINGTON: Okay. And second, that the State has no compelling State interest.

And the State is alleging a compelling State interest in—

QUESTION: Yes, but I'm just asking you, under the federal Constitution. Is the fetus a person for the protection of due process?

MRS. WEDDINGTON: All of the cases, the prior history of this stat-

ute, the common law history would indicate that it is not. The State has shown no—

QUESTION: Well, what about—would you lose your case if the fetus was a person?

MRS. WEDDINGTON: Then you would have a balancing of interest.

QUESTION: Well, you say you have, anyway, don't you?

MRS. WEDDINGTON: Excuse me?

QUESTION: You have, anyway, don't you? You're going to be balancing the rights of the mother against the rights of the fetus.

MRS. WEDDINGTON: It seems to me that you do not balance constitutional rights of one person against mere statutory rights of another.

QUESTION: You think a State interest, if it's only a statutory interest or a constitutional interest, under the State law, can never outweigh a constitutional right?

MRS. WEDDINGTON: I think—it would seem to me that—

QUESTION: So all the talk of compelling State interest is beside the point. It can never be compelling enough.

MRS. WEDDINGTON: If the State could show that the fetus was a person under the Fourteenth Amendment, or under some other Amendment, or part of the Constitution, then you would have the situation of trying—you would have a State compelling interest which, in some instances, can outweigh a fundamental right. This is not the case in this particular situation.

QUESTION: Do you make any distinction between the first month and the ninth month of gestation?

MRS. WEDDINGTON: Our statute does not.

QUESTION: Do you? In your position in this case.

MRS. WEDDINGTON: We are asking in this case that the Court declare the statute unconstitutional, the State having proved no compelling interest at all.

There are some States that now have adopted time limits. Those have not yet been challenged, and perhaps that question will be before this Court.

Even those statutes, though, allow exceptions—well, New York, for example, says an abortion is lawful up to 24 weeks. But even after the 24 weeks it still lawful, where there's rape or incest, where the mother's mental or physical health is involved. In other words, even after that period it's not a hard-and-fast cutoff.

QUESTION: Then it's the weighing process that Mr. Justice White was referring to, is that your position?

MRS. WEDDINGTON: The Legislature in that situation engaged in the weighing process, and it seems to me that it has not yet been determined whether the State has the compelling interest to uphold even that kind of relation, but that's really not before the Court in this particular case.

We have no time limit, there is no indication in Texas that any would be applied at any future date. You know, we just don't know that. But—

QUESTION: Mrs. Weddington, you're attacking the statute on two grounds, are you not, vagueness—

MRS. WEDDINGTON: That's correct.

QUESTION: —and the Ninth Amendment. Do you base any weight on one argument as against the other?

MRS. WEDDINGTON: Our Texas Court of Criminal Appeals, in *Thompson vs. State*,—

QUESTION: That's a recent case?

MRS. WEDDINGTON: Yes. In November of last year.

QUESTION: Again on vagueness.

MRS. WEDDINGTON: Yes. That particular case held that the Texas statute was not vague, citing *Vuitch*. It's my opinion that that reliance was misplaced. That in *Vuitch*, this Court had before it the D.C. statute which allowed abortion for the purpose of saving the life or the health, and this Court adopted the interpretation that health meant both mental and physical health.

And it seemed to me the Court's language in that case talked a great deal about the fact that the doctor's judgment goes to saving the health of the woman, that that's the kind of judgment he is used to making.

In Texas that's not the judgment he's forced to make. The judgment in Texas is, is this necessary for the purpose of preserving the life of the woman. And the language of that statute has never been interpreted. That's not the kind of judgment that a doctor is accustomed or perhaps even able to make.

QUESTION: Well, I go back to my question: Are you—

MRS. WEDDINGTON: I still continue the argument that the Texas case is vague.

QUESTION: So you're relying on both?

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

QUESTION: Now, you referred a little bit to history, and let me ask you a question—

MRS. WEDDINGTON: Okay.

QUESTION: —based on history. You're familiar with the Hippocratic oath?

MRS. WEDDINGTON: I am.

QUESTION: I think—I may have missed it, but I find no reference to it in this—in your brief or in the voluminous briefs that we're overwhelmed with here. Do you have any comment about the Hippocratic oath?

MRS. WEDDINGTON: I think two things could be said. The first would be that situations and understandings change. In this case, for example, we have before the Court a medical amicus brief that was joined by all the deans of the public medical schools in Texas. It was joined by numerous other

professors of medicine. It was joined by the American College of Obstetricians and Gynecologists.

QUESTION: Of course there are other briefs on the other side joined by equally outstanding physicians.

MRS. WEDDINGTON: None of them has—

QUESTION: Tell me why you didn't discuss the Hippocratic oath.

MRS. WEDDINGTON: Okay.

I guess it was—okay—in part because the Hippocratic oath, we discussed basically the constitutional protection we felt the woman to have. The Hippocratic oath does not pertain to that.

Second, we discuss the fact that the State had not established a compelling State interest. The Hippocratic oath would not really pertain to that. And then we discuss the vagueness jurisdiction.

It seemed to us that the fact that the medical profession at one time had adopted the Hippocratic oath does not weigh upon the fundamental constitutional rights involved. It is a guide for physicians, but the outstanding organizations of the medical profession have in fact adopted a position that says the doctor and the patient should be able to make the decision for themselves in this kind of situation.

QUESTION: Of course it's the only definitive statement of ethics of the medical profession. I take it from what you said that you didn't even footnote it because it's old. That's about, really, what you're saying.

MRS. WEDDINGTON: Well, I guess it is old and not that it's out of date, but that it seemed to us that it was not pertinent to the argument we were making.

QUESTION: Let me ask another question, then. Last June 29th this Court decided the capital punishment cases.

MRS. WEDDINGTON: Yes, sir.

QUESTION: Do you feel that there is any inconsistency in the Court's decision in those cases outlawing the death penalty with respect to convicted murderers and rapists at one end of life's span, and your position in this case at the other end of life's span?

MRS. WEDDINGTON: I think, had there been established that the fetus was a person under the Fourteenth Amendment or under constitutional protection, then there might be a differentiation. In this case there has never been established that the fetus is a person or that it's entitled to the Fourteenth Amendment rights or the protection of the Constitution. It would be inconsistent to decide that after birth various classifications of persons would be subject to the death penalty or not.

But here we have a person, the woman, entitled to fundamental constitutional rights as opposed to the fetus prior to birth, where there is no establishment of any kind of federal constitutional rights.

QUESTION: Well, do I get from this, then, that your case depends primarily on the proposition that the fetus has no constitutional rights?

MRS. WEDDINGTON: It depends on saying that the woman has a fundamental constitutional right and that the State has not proved any compelling interest for regulation in the area.

Even if the Court at some point determined the fetus to be entitled to constitutional protection, you would still get back into the weighing of one life against another.

QUESTION: That's what's involved in this case? Weighing one life against another?

MRS. WEDDINGTON: No, Your Honor. I say that would be what would be involved if the facts were different, and the State could prove that there was a person, for the constitutional right.

QUESTION: Well, if—if—it were established that an unborn fetus is a person within the protection of the Fourteenth Amendment, you would have almost an impossible case here, would you not?

MRS. WEDDINGTON: I would have a very difficult case.

QUESTION: I'm sure you would. So if you had the same kind of thing, you'd have to say that this would be the equivalent after the child was born if the mother thought it bothered her health any having the child around, she could have it killed. Isn't that correct?

MRS. WEDDINGTON: That's correct. That—

QUESTION: Could Texas constitutionally—did you want to respond further to Justice Stewart?

Did you want to respond further to him?

MRS. WEDDINGTON: No, Your Honor.

QUESTION: Could Texas constitutionally, in your view, declare that, by statute, that the fetus is a person for all constitutional purposes after the third month of gestation?

MRS. WEDDINGTON: I do not believe that the State Legislature can determine the meaning of the federal Constitution. It is up to this Court to make that determination.

QUESTION: The States have to deal with statutes, don't they?

MRS. WEDDINGTON: The State could obviously adopt that kind of statute, and then the question would have to be adjudicated as to whether for all purposes that statute is constitutional.

We are not alleging that there cannot be some kind of protection. For example, the property rights, which, again, are contingent upon being born alive. It can be retroactive to the period prior to birth.

But in this particular situation we are alleging that this statute is unconstitutional.

QUESTION: But that has been recognized in the period before birth for

purposes of injury claims, and you put that, I take it, in the property category?

MRS. WEDDINGTON: In Texas it is only when they are born alive. And the fact that there is a—you know, the wrongful conduct of another is not the same as in this situation. As for property rights, for example, there are even property rights that relate back to prior to conception, children that are not yet conceived, who later inherit. But that did not prevent this Court in *Griswold* from holding people had the right to birth control.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Flowers.

ORAL ARGUMENT OF ROBERT C. FLOWERS, ESQ., ON BEHALF OF APPELLEE

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

The lower court in Dallas held the Texas abortion law unconstitutional primarily on the two grounds that have just been discussed, on the vagueness question and the rights of the mother under the Ninth Amendment.

The thrust of the whole argument of the State of Texas is against the rights of the mother under the Ninth Amendment, that it certainly is a balancing effect. There must be or, on the other side of the coin, Texas has no State.

It is impossible for me to trace, within my allocated time, the development of the fetus from the date of conception to the date of its birth. But it is the position of the state of Texas that upon conception we have a human being, a person within the concept of the Constitution of the United States and that of Texas, also.

QUESTION: Now, how should that question be decided, is it a legal question, a constitutional question, a medical question, a philosophical question, or a religious question, or what is it?

MR. FLOWERS: Your Honor, we feel that it could be best decided by a Legislature in view of the fact that they can bring before it the medical testimony, the actual people who do the research. But we do have —

QUESTION: So then it's basically a medical question?

MR. FLOWERS: From a constitutional standpoint, no, sir. I think it's fairly and squarely before this Court. We don't envy the Court for having to make this decision.

QUESTION: Do you know of any case anywhere that's held that an unborn fetus is a person within the meaning of the Fourteenth Amendment?

MR. FLOWERS: No, sir, we can only go back to what the framers of our Constitution had in mind.

QUESTION: Well, these weren't the framers that wrote the Fourteenth Amendment. It came along much later.

MR. FLOWERS: No, sir. I understand. But the Fifth Amendment,

under the Fifth Amendment: *no one shall be deprived of the right to life, liberty, and property without the due process of law.*

QUESTION: Yes, but then the Fourteenth Amendment defines, "person" as somebody who's born, doesn't it?

MR. FLOWERS: I'm not sure about that, sir. I—

QUESTION: All right.

Any person born or naturalized in the United States.

MR. FLOWERS: Yes, sir.

QUESTION: It doesn't—that's not the definition of a "person" but that's the definition of a "citizen."

MR. FLOWERS: Your Honor, it's our position that the definition of a person is so basic, it's so fundamental that the framers of the Constitution had not even set out to define. We can only go to what the teaching at the time the Constitution was framed.

We have numerous listings in the brief by Mr. Joe Witherspoon, a professor at the University of Texas, that tries to trace back what was in their mind when they had the "person" concept when they drew up the Constitution.

He quoted Blackstone here in 1765, and he observed, in his commentaries, that: "life. This right is inherent by nature in every individual, and exists even before the child is born."

I submit to you that the Declaration of Independence, "*We hold these*"—

QUESTION: Mr. Flowers, when you quote Blackstone, is it not true that in Blackstone's time abortion was not a felony?

MR. FLOWERS: That's true, Your Honor. But my point there was to see the thinking of the framers of the Constitution, from the people they learned from, and the general attitudes of the times.

QUESTION: Well, I think—I'm just wondering if there isn't basic inconsistency there, and let me go back to something else that you said. Is it not true, or is it true that the medical profession itself is not in agreement as to when life begins?

MR. FLOWERS: I think that's true, sir. But from a layman's standpoint, medically speaking, we would say that at the moment of conception from the chromosomes, every potential that anybody in this room has is present, from the moment of conception.

QUESTION: But then you're speaking of potential of right.

MR. FLOWERS: Yes, sir.

QUESTION: With which everyone can agree.

MR. FLOWERS: On the seventh day, I think that the heart, in some form, starts beating. On the twentieth day, practically all the facilities are there that you and I have, Your Honor.

I think that—

QUESTION: Well, if you're correct that the fetus is a person, then I don't suppose you'd have—the State would have great trouble permitting an abortion, would it?

MR. FLOWERS: Yes, sir.

QUESTION: In any circumstance?

MR. FLOWERS: It would, yes, sir.

QUESTION: To save the life of a mother or her health or anything else?

MR. FLOWERS: Well, there would be the balancing of the two lives, and I think that—

QUESTION: Well, what would you choose? Would you choose to kill the innocent one, or what?

MR. FLOWERS: Well, in our statute the State did choose that way, Your Honor.

QUESTION: Well,—

MR. FLOWERS: The protection of the mother.

QUESTION: Well, did the State of Texas say that if it is for the benefit of the health of the wife to kill the husband?

[Laughter]

MR. FLOWERS: I'm sorry, I didn't understand your question.

QUESTION: Could Texas say if it confronts the situation for the benefit of the health of the wife, that the husband has to die, could they kill him?

MR. FLOWERS: I wouldn't think so, sir.

QUESTION: Is there any statute in Texas that prohibits the doctor from performing any operation other than an abortion?

MR. FLOWERS: I don't—I don't think so, sir, and there is another thrust of our argument. If we declare, as the appellees in this case have asked this Court to declare, that an embryo or a fetus is a mass of protoplasm similar to a tumor, then, of course, the State has no compelling interest whatsoever.

QUESTION: But there is no—the only operation that a doctor can possibly commit that will bring on a criminal penalty is an abortion?

MR. FLOWERS: Yes, sir.

QUESTION: Why?

MR. FLOWERS: As far as—

QUESTION: Well, why don't you limit some other operations?

MR. FLOWERS: Because this is the only type of operation that would take another human life.

QUESTION: Well, a brain operation could.

MR. FLOWERS: Well, there again, that would be—I think that in every feat that a doctor performs that he is constantly making this judgment.

QUESTION: Well, if a doctor performs a brain operation and does it

improperly, he could be guilty of manslaughter, couldn't he?

MR. FLOWERS: I would think so, if he was negligent.

QUESTION: Well, why couldn't you charge him with manslaughter if he commits an abortion?

MR. FLOWERS: In effect, Your Honor, we did. In the statute 1195, that has been very carefully avoided all throughout these proceeding, it's not attacked as unconstitutional, for some reason.

If you will permit me to—

QUESTION: But is it in issue here?

MR. FLOWERS: No, sir. You asked the question about whether we had make manslaughter—or an abortion manslaughter.

QUESTION: Maybe the reason is: why have two statutes?

MR. FLOWERS: Well, this was in context with—this is 1195, they are attacking 1191 through 1196, but omitted 1195.

Here's what 1195 says—provides: Whoever shall, during the parturition of the mother, destroy the vitality or life in a child in a state of being born, before actual birth—and before actual birth, which child would have otherwise been born alive, which—shall be confined to the penitentiary for life or not less than five years.

QUESTION: What does that statute mean?

MR. FLOWERS: Sir?

QUESTION: What does it mean?

MR. FLOWERS: I would think that—

QUESTION: That it is an offense to . . . kill a child in the process of childbirth.

MR. FLOWERS: Yes, sir. It would be immediately before childbirth or right in the proximity of the child being born.

QUESTION: Which is not an abortion.

MR. FLOWERS: Which is not—would not be an abortion. Yes, sir, you're correct, sir. It would be homicide.

Gentlemen, we feel that the concept of a fetus being within the concept of a person, within the framework of the United States Constitution and the Texas Constitution, is an extremely fundamental thing.

QUESTION: Of course, if you're right about that, you can sit down. you've won your case.

MR. FLOWERS: Your Honor,—

QUESTION: Except insofar as maybe the Texas abortion law presently goes too far in allowing abortions.

MR. FLOWERS: Yes, sir. That's exactly right.

We feel that this is the only question, really, that this Court has to answer.

We have a—

QUESTION: Do you think the case is over for you? You've lost your case, then, if the fetus or the embryo is not a person, is that it?

MR. FLOWERS: Yes, sir, I would say so.

QUESTION: You mean the State has no interest of its own that it can assert, and—

MR. FLOWERS: Oh, we have interests, Your Honor, preventing promiscuity, say, maybe that's—

QUESTION: Mr. Flowers, your Legislature apparently, or you're asserting that your State law wants to protect the life of the fetus.

MR. FLOWERS: Yes, sir.

QUESTION: And under State law there is some right—that are some rights given to the fetus.

MR. FLOWERS: Yes, sir.

QUESTION: And you are asserting those rights against the right of the mother.

MR. FLOWERS: Balancing against the Ninth Amendment rights of the mother within the framework—

QUESTION: But that's wholly aside from whether the fetus is a person under the federal Constitution. You can still assert those rights, whether the fetus is a person or not.

MR. FLOWERS: Yes, sir.

QUESTION: Does Texas have judicial statutes on mutilation, making it a criminal act?

MR. FLOWERS: Yes, sir.

QUESTION: So that there are other assertions—

MR. FLOWERS: Yes, sir.

QUESTION: —or procedures which could be criminal?

MR. FLOWERS: That's right.

QUESTION: If a man walked into a doctor's office and said, "I want you to cut off my right arm" —

MR. FLOWERS: That's right, mutilation, castration. Yes, sir, I had forgotten about those, Your Honor.

QUESTION: Those statutes apply to doctors?

MR. FLOWERS: I would assume so, or anyone that would—

QUESTION: Do you have any case that says so?

MR. FLOWERS: No, sir.

I would say that there would have to be a culpability of proof in there as in most criminal cases.

You Honor, I'd like to call the attention of the Court, that the unborn child—that this Court has not been blind to the rights of the unborn child in the past. In the *Memorial* case, *vs. Anderson*, a New Jersey Supreme Court case,

the Court—this was the case where the pregnant woman had refused, on religious grounds, to undergo a blood transfusion in order to save the child.

The Court held that the right of the child to live and to be born was paramount over this pregnant woman's right of religion.

I think that here is exactly what we're facing in this case: is the life of this unborn fetus paramount over the woman's right to determine whether or not she shall bear a child?

In *Gleitman vs. Cosgrove*, it's a New Jersey Supreme Court case, it's a tort action instituted against the doctor as a result of his failure to warn the mother that she was suffering from German measles, in order that she could terminate her pregnancy.

The court recognized the life of the embryo, and stated that it would have been easier for the mother, and less expensive for the father; this alleged detriment cannot stand against the precariousness of one single life.

In *Jones vs. State*—excuse me, *Jones vs. Jones*, New York Supreme Court held that the unborn child was a patient of the mother's obstetrician as well as the mother herself.

In *Jackson vs. Indiana*, this Court zealously guarded the rights of a retarded child.

Now, if we're going to extend the right of a child who has reached its potential, it cannot go on and grow, it cannot go on and grow mentally and achieve, then how much more right should we afford to a child who is—has all of the potential of achieving?

The *Prince vs. Commonwealth of Massachusetts* case, this Court was faced with the contention that the State statute precluding labor by a child in tender years in distributing religious tracks was protected, that the child's right to grow up and to become educated and fully develop was paramount to these parents' religious belief.

This Court has been diligent in protecting the rights of the minority. And, gentlemen, we say that this is a minority, a silent minority, the true silent minority. Who is speaking for these children? Where is the counsel for these unborn children, whose life is being taken? Where is the safeguard of the right to trial by jury?

Are we to place this power in the hands of a mother and a doctor? All of the constitutional rights, if this person has the person concept. What would keep a Legislature under this ground from deciding who else might or might not be a human being, or might not be a person?

QUESTION: Well, generally speaking, I think you agree that up until now the test has been whether or not somebody has been born or not, and that's the word used in the Fourteenth Amendment.

MR. FLOWERS: Yes, sir.

QUESTION: That's what would keep the Legislature, I suppose, from

classifying people that have been born as not persons.

MR. FLOWERS: Your Honor, it seems to me that the physical act of being born—I'm not playing it down, I know it's—

[Laughter]

—a very momentous incident. But what changes? Is it a non-human and changing, by the act of birth, into a human? Or would—

QUESTION: Well, that's been the theory up until now on the law-books.

[Laughter]

MR. FLOWERS: Well, in other words, it has been the theory that we have, deriving from non-human material, a human being, after conception.

Well, Your Honor,—

QUESTION: You see, that's the reason I asked you at the beginning, within what framework should this question be decided? Should it be a theological one,—

MR. FLOWERS: Yes, sir.

QUESTION: —a philosophical one, or a medical one, or—that we could find here dealing with—

MR. FLOWERS: I think, Your Honor, that the Court—

QUESTION: —the judicial meaning of it.

MR. FLOWERS: I wish I could answer that. I believe that the Court must take these, the medical research, and apply it to our Constitution the best way they can. I said I'm without envy of the burden that the Court has.

I think that possibly we have an opportunity to make one of the worst mistakes here that we've ever made, from the—I'm sorry.

QUESTION: But there's no medical testimony that backs up your statement that it goes from [conception], is there?

MR. FLOWERS: Only that—

QUESTION: Medical.

MR. FLOWERS: Sir, in this case you're talking about?

QUESTION: No, is there any medical testimony of any kind that says that a fetus is a person at the time of [conception]?

MR. FLOWERS: Your Honor, I would like to call the Court's attention, in answering that question, to what I feel to believe one of the better culminations of the medical research, and that was Senior Judge Campbell's dissenting opinion in the *Doe vs. Scott*, which is very similar to the case we have before us.

He goes in chronological order of what the medical research has determined, from the chromosome structure at the time of conception, what the potential is, down through each day of life, until it's born.

QUESTION: But I understood you to say that the State of Texas says it extends from the date of [conception] until the child is born.

MR. FLOWERS: The date of conception until the day of—yes, sir.

QUESTION: And that's it?

MR. FLOWERS: Yes, sir.

QUESTION: Now, you're now quoting the judge, I want you to give me a medical, recognizable medial writing of any kind that says that at the time of conception the fetus is a person.

MR. FLOWERS: I do not believe that I could give that to you, without researching through the briefs that have been filed in this case, Your Honor. I'm not sure that I could give it to you after research.

QUESTION: Mr. Flowers,—

MR. FLOWERS: Yes, sir.

QUESTION: —did Judge Campbell rely on medical authorities in that statement you're summarizing?

MR. FLOWERS: Yes, sir, he did. This case was—the Court held there that really the problem could be answered on an extension of the *Griswold* case. And here's what my dissenting judge had to say about that, which we adopt, Your Honor.

He said: "In citing *Griswold*, the majority concludes we could not distinguish the interest asserted by the plaintiff in this case from those asserted in *Griswold*."

In other words, in their views there is no distinction that can be made between prohibiting the use of contraceptives and prohibiting the destruction of fetal life, which, as explained above, may be construed to be a human life.

I find this assertion incredible. Contraceptive prevents the creation of new life; abortion destroys the existing life. Contraceptives and abortion are as distinguishable as thoughts and dreams are distinguishable from a reality.

QUESTION: Well, where are the medical authorities you told Mr. Justice Rehnquist he cited? Are they there?

MR. FLOWERS: Yes, sir. He lists them day by day, just prior to this time, sir. But it's quite lengthy.

QUESTION: Where is that you're reading from?

MR. FLOWERS: It's 321 Fed. Supp. on page 394, sir. Or 392 it begins, Your Honor.

And I refer you to this medical condensation, because I have read most of the comments that he has to make through the—throughout these many, many briefs that we have had submitted in this case and other cases.

For instances, he starts off: We did—let's see—"as Illinois Legislature would have before us the following undisputed facts relating to fetal life, seven weeks after conception the fertilized egg develops into a well-proportioned, small-scale baby;" and then goes from there on.

Now, I know he doesn't address himself, Your Honor, to the moment of conception.

QUESTION: I didn't think so.

MR. FLOWERS: You're entirely right there; but I find no way that I know that any court or any legislature or any doctor anywhere can say that here is the dividing line. Here is not a life, and here is a life, after conception.

Perhaps it would be better left to that legislature. There they have the facilities to have some type of medical testimony brought before them, and the opinion of the people who are being governed by it.

QUESTION: Well, if you're right that an unborn fetus is a person, then you can't leave it to the Legislature to play fast and loose dealing with that person. In other words, if you're correct in your basic submission that an unborn fetus is a person, then abortion laws such as that which New York has are grossly unconstitutional, isn't it?

MR. FLOWERS: That's right, yes.

QUESTION: Allowing the killing of people.

MR. FLOWERS: Yes, sir.

QUESTION: A person.

MR. FLOWERS: Your Honor, in Massachusetts, I might point out—

QUESTION: Definitely it isn't up to the Legislature; it's a constitutional problem, isn't it?

MR. FLOWERS: Well, if there would be any exceptions within this—

QUESTION: The basic constitutional question, initially, is whether or not an unborn fetus is a person, isn't it?

MR. FLOWERS: Yes, sir. And entitled to the constitutional protection.

QUESTION: And that's critical to this case, is it not?

MR. FLOWERS: Yes, sir, it is.

And we feel that the treatment that the courts have given unborn children in dissent in distribution of property rights, tort laws, have all pointed out that they have, in the past have given credence to this concept.

QUESTION: Mr. Flowers, doesn't the fact that so many of the State abortion statutes do provide for exceptional situations in which an abortion may be performed, and presumably these date back a great number of years, following Mr. Justice Stewart's comment, suggest that the absolute proposition that a fetus from the time of conception is a person just is at least against the weight of historical legal approach to the question?

MR. FLOWERS: Yes, sir, I would think possibly that that would indicate that. However, Your Honor, in this whole field of abortion here, we have, on the one hand, great clamoring for this liberalization of it. Perhaps this is good. Population explosion. We have just so many things that are arriving on the scene in the past few years, that might have some effect on producing this type of legislation, rather than facing the facts squarely.

I don't think anyone has faced the fact, in making a decision, whether

this is a life, in a person concept.

Thank you, Your Honors.

QUESTION: Mr. Flowers, when was the first abortion statute adopted in your State?

MR. FLOWERS: Your Honor, in 1854.

QUESTION: Prior to 1854, what was the situation in Texas?

MR. FLOWERS: I do not think it was an offense, Your Honor. I think it was silent, the State was silent.

QUESTION: So, on you theory, destruction of the person in the form of a fetus was legal?

MR. FLOWERS: Yes, sir—well, at least, the Legislature hadn't spoken on it, Your Honor.

QUESTION: Then it was legal.

MR. FLOWERS: Yes, sir.

QUESTION: Mr. Flowers, did Texas have an abortion statute on the books at the time, at least in the eyes of the north, when it was readmitted to the Union after the Civil War?

MR. FLOWERS: No, sir, the State was admitted to the Union in 1845, Your Honor, and—

QUESTION: Well, at the time that it was—passed muster with the—

MR. FLOWERS: When it was a Republic?

QUESTION: Well, my historical impression is that following the Civil War Congress went through the procedure, at any rate, of readmitting the States which had seceded, and passing on their constitutional provisions and that sort of thing. Did Texas have an abortion statute at that time?

MR. FLOWERS: Yes, sir. It was passed in 1854, Your Honor.

QUESTION: Do you know as a matter of historical fact when most of these abortion statutes came on the books?

MR. FLOWERS: I think it was, most of them were in the mid-1800's, Your Honor.

QUESTION: In fact, the latter half of the nineteenth century?

MR. FLOWERS: Yes, sir.

QUESTION: Do you know why they all came on at that time?

MR. FLOWERS: No, sir, I surely don't.

QUESTION: So that the materials indicate that, during that period, they were enacted to protect the health and lives of pregnant women because of the danger of operative procedures generally around that time?

MR. FLOWERS: I'm sure that was a great factor, Your Honor.

QUESTION: Well, isn't it historically pretty well accepted as a fact that in the early period of the history of this country there was general reliance upon religious disciplines to preclude this kind of activity, abortions, and when that didn't seem to cover it, then the States began to enact the statutes?

MR. FLOWERS: Yes, sir.

QUESTION: As had been done in England.

MR. FLOWERS: Also in the exploration and the Indian days, if you wish, frontier days, I don't imagine that too many abortions, intentional abortions were created in this, these United States. People were of such a necessity to develop the United States.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mrs. Weddington, you have four minutes left.

REBUTTAL ARGUMENT OF MRS. SARAH R. WEDDINGTON, ON BEHALF OF THE APPELLANTS

MRS. WEDDINGTON: Thank you, Your Honor.

I think Mr. Flowers well made the point when he said that no one can say, here is the dividing line; Here is where life begins—life is here and life is not over here.

In a situation where no one can prove where life begins, where no one can show that the Constitution was adopted, that it was meant to protect fetal life, in those situations where it is shown that that kind of decision is so fundamentally a part of individual life of the family, of such fundamental impact on the person.

QUESTION: Well, I gather your argument is that a State may not protect the life of the fetus or prevent an abortion even at any time during pregnancy?

MRS. WEDDINGTON: At this—

QUESTION: Right up until the moment of birth.

MRS. WEDDINGTON: At this time my point is that this particular statue is unconstitutional.

QUESTION: I understand that, but your argument, the way you state it, is that it wouldn't make any difference when in the pregnancy that the State attempts to prevent the abortion? It would still be unconstitutional.

MRS. WEDDINGTON: At this time there is no indication to show that the Constitution would give any protection prior to birth. That is not before the Court, and that is the question that—

QUESTION: Well, I don't know whether it is or it isn't. If the statute—you're claiming that the statute is void on its face.

MRS. WEDDINGTON: That's correct.

QUESTION: Now, isn't it possible, if the statute—before you can declare the statute void on its face that you have to say that it's void no matter when in the pregnancy the abortion takes place?

MRS. WEDDINGTON: It seems to me in this situation the Court is—excuse me, I must—would you ask the question again?

xcuse me, I must—would you ask the question again?

QUESTION: Well, is the statute void—would the statute be void on its face if the State could prevent abortion at any time after six months?

MRS. WEDDINGTON: You mean if the State in fact did that?

QUESTION: Well, let's assume it were constitutional for the State to prevent abortions after six months.

MRS. WEDDINGTON: It would still be void on its face in this situation because it's overly broad. It interferes at a time when a State has no—

QUESTION: Well, this isn't a free speech case. The statute might be perfectly valid in part and invalid in part. You're saying it's invalid on its face, totally invalid, that it may not apply to—the statute may not prevent an abortion, no matter when the abortion takes place.

MRS. WEDDINGTON: My argument would first be that it's void on its face, and second, if the Court finds it's not void on its face, it certainly is void because it infringes upon the fundamental right at a time when the State can show no compelling interest early in pregnancy.

QUESTION: What did this Court say about voidness in the *Vuitch* case? What did we say there?

MRS. WEDDINGTON: There you said the particular D.C. statute was not void for vagueness. It's a different statute. There was an interpretation of the meaning of the statute. And the Court there said the doctor could work within that context, and could tell what the statute meant.

QUESTION: Well, then, isn't the only difference between the Texas statue and the D.C. statute that the Texas statute does not have the health factor?

MRS. WEDDINGTON: That's correct, which makes it much more difficult for the doctor to tell when it is—when he can—

QUESTION: But in *Vuitch*, unless the Court is prepared to overrule it, not a fact, the Texas statute would be valid if it was construed to include abortions for the protection of health, treating life as broad enough to do that.

MRS. WEDDINGTON: Including mental and physical. But then the question is raised as to the right of privacy, which was not before the Court in the *Vuitch* case, and is before the Court in this particular situation.

As to the Hippocratic oath, it seems to me that that oath was adopted at a time when abortion was extremely dangerous to the health of the woman; and, second, that the oath is to protect life, and here the question is: what does life mean in this particular context?

It's the sort of same vagueness, it seems to me, that you're—well, okay, life there could be slightly different because of the constitutional implications here. It seems to me that—

QUESTION: Well, the Hippocratic oath went directly and specifically to providing procedures.

MRS. WEDDINGTON: To providing a—

QUESTION: However life was defined.

MRS. WEDDINGTON: That's correct.

As to mutilation, there, it seems to me that the purpose of those statutes was to prevent the citizen from becoming a dependent or ward of the State, and also to insure that its citizens would be available for service in the military.

In this particular instance, the rationale works just the opposite. Here a woman, because of her pregnancy, is often not a productive member of society. She cannot work, she cannot hold a job, she's not eligible for welfare, she cannot get unemployment compensation. And furthermore, in fact, the pregnancy may produce a child who will become a ward of the State.

We do not object to the cases, such as the transfusion case, where there is a decision already made by the woman that she desires to carry the pregnancy to term; and, when that decision is made, that the child should be given every opportunity to come into life a healthy person.

We do not believe that that necessitates the conclusion that therefore, under the Constitution, prior to birth, a person under the Fourteenth Amendment would exist.

In this case, this Court is faced with a situation where there have been fourteen three-judge courts that have ruled on the constitutionality of abortion statutes. Nine courts have favored the woman, five have gone against her. Twenty-five judges have favored the woman, seventeen have gone against her. Nine circuit judges have favored the woman, five have gone against her. Sixteen district court judges have favored the woman, ten have gone against her.

No one is more keenly aware of the gravity of the issues or the moral implications of this case, that it is a case that must be decided on the Constitution. We do not disagree that there is a progression of fetal development. It is the conclusion to be drawn from that upon which we disagree.

We are not here to advocate abortion. We do not ask this Court to rule that abortion is good or desirable in any particular situation.

We are here to advocate that the decision as to whether or not a particular woman will continue to carry or will terminate a pregnancy is a decision that should be made by that individual, that in fact she has a constitutional right to make that decision for herself, and that the State has shown no interest in interfering with that decision.

Our supplemental brief, on page [fourteen], points out that the brief of the opposition can't quite decide when life does begin. At one point they suggest it's when there's implantation. A few pages later they suggest it's with conception.

QUESTION: But any doctor, I suppose, you would say, may refuse her?

MRS. WEDDINGTON: Certainly, Your Honor. He may refuse any kind of medical procedure whatsoever.

QUESTION: But the State may not; yes.

MRS. WEDDINGTON: Here it's the question of whether or not the State, by the statute, will force the woman to continue. The woman should be given that freedom, just as the doctor has the freedom to decide what procedures he will carry out and what he will refuse to his patients.

QUESTION: To be sure that I get your argument in focus, I take it from your recent remarks that you are urging upon us abortion on demand of the woman alone, not in conjunction with her physician?

MRS. WEDDINGTON: I am urging that in this particular context this statute is unconstitutional. That in the *Baird vs. Eisenstadt* case this Court said, "If the right of privacy is to mean anything, it is the right of the individual, whether married or single, to make determinations for themselves."

It seems to me that you cannot say this is a woman of this particular doctor, and this particular woman. It is, it seems to me,—

QUESTION: Well, doesn't it follow from that, then, that a woman can come into a doctor's office and say, "I want an abortion."

MRS. WEDDINGTON: And he can say, "I'm sorry, I don't perform them."

QUESTION: And then what does she do?

MRS. WEDDINGTON: She goes elsewhere, if she so chooses. If she stays with that—you know, that's an impossible question. Certainly, I don't think the State could say the first doctor a woman goes to shall make that determination and she cannot go elsewhere.

MR. CHIEF JUSTICE BURGER: Your time is up now, Mrs. Weddington.

MRS. WEDDINGTON: Thank you.

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

The case is submitted.

[Whereupon, at 11:09 o'clock, a.m., the case was submitted.]