44-070 PCA Tex
Oct 1971

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 70-18, 1971 TERM

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

vs.

HENRY WADE
DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS,
Appellee.

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

BRIEF FOR APPELLEE

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 70-18, 1971 TERM

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

Appellants,

VS.

HENRY WADE,
DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS

Appellee.

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

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Appellant Jane Roe instituted an action, suing on behalf of herself and all others similarly situated, contending she was an unmarried pregnant female who desired to terminate her pregnancy by "abortion" and that she was unable to secure a legal abortion in the State of Texas because of the prohibitions of the Texas Penal Code, Articles 1191, 1192, 1193, 1194, and 1196.[1] She further contends she cannot *afford* to travel to another jurisdiction to secure a legal abortion.[2]

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[1]A. 11. (The Statutes in issue are commonly referred to as the Texas Abortion Laws and are set out verbatim, *infra,* at pp. 5-6.

[2]A. 12.

Appellants John and Mary Doe instituted their action, suing on behalf of themselves and all others similarly situated, contending they were a childless married couple and that Appellant Mary Doe's *physician had advised her to avoid pregnancy because of a neural-chemical disorder.*[3] They further contend *their physician has further advised against the use of birth control pills a*nd, though they are now practicing an alternative method of contraception, *they understand* there is nevertheless a significant risk of contraceptive failure.[4] They contend that *should* Appellant Mary Doe become pregnant, she would want to terminate such pregnancy by abortion and would be unable to do so in the State of Texas because of the above prohibitory statutes.[5]

Appellant James Hubert Hallford, M.D., filed his Application for Leave to Intervene in Appellant Roe's action[6] and his Application was granted.[7] He contends he is in the active practice of medicine and contends the Texas Abortion Laws are a principal deterrent to physicians and patients in their relationship in connection with therapeutic hospital and clinical abortions.[8] Appellant Hallford was under indictment in two (2) cases in Dallas County, Texas, charged with the offense of abortion in violation of the Statutes in issue.[9]

In substance, Appellants contended in their Complaints filed in the lower court that (1) the Texas Abortion Laws are unconstitutionally vague and uncertain on their face,

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[3]A. 16.
[4]A. 16-17.
[5]A. 17.
[6]A. 22-23.
[7]A. 36.
[8]A. 28.
[9]A. 30. (These cases are still pending).

(2) they deprive a woman of the "fundamental right to choose whether and when to bear children", (3) they infringe upon a woman's right to personal privacy and privacy in the physician-patient relationship, (4) they deprive women and their physicians of rights protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States.[10]

Appellants sought declaratory relief that the Texas Abortion Laws were unconstitutional in violation of the Constitution of the United States and injunctive relief against the future enforcement of such Statutes.[11] They prayed that a three-judge court be convened to hear and determine their causes of action.[12]

Appellee Henry Wade filed his Answer to Appellant Roe's Complaint[13], his Motion to Dismiss the Complaint of Appellants John and Mary Doe[14] and his Answer to Appellant Hallford's Complaint.[15] The State of Texas was granted leave to respond to the Appellants' Complaints and filed its Motion to Dismiss all Complaints and its alternative plea for Judgment on the Pleadings.[16] Both Motions to Dismiss challenged the standing of Appellants John and Mary Doe[17] and the State of Texas' Motion to Dismiss challenged the standing of Appellants Roe and Hallford.[18] In addition, the State of Texas' Motion to Dismiss asserted that Appellants (1) failed to state a claim upon which relief may be granted, (2) failed to raise a

[10]A. 12-13, 19-20, 31-32, 34.
[11]A. 14, 20-21, 34.
[12]A. 13, 20, 34.
[13]A. 37-39.
[14]A. 40-41.
[15]A. 42-46.
[16]A. 47-49.
[17]A. 40, 48.
[18]A. 48.

substantial Constitutional question, (3) failed to show irreparable injury and the absence of an adequate remedy at law, and (4) Appellant Hallford's Complaint was barred by 28 U.S.C. 2283.[19]

In the course of proceeding in the lower court, Appellants filed their Motions for Summary Judgment.[20] In support of Appellant Jane Doe's Motion for Summary Judgment, she filed her affidavit[21] and an affidavit of one Paul Carey Trickett, M.D.[22] Appellant Hallford filed his affidavit in support of his Motion for Summary Judgment[23] and annexed copies of the indictments pending against him.[24]

The cases were consolidated and processed to a hearing before the Honorable Irving L. Goldberg, Circuit Judge, and the Honorable Sarah T. Hughes and W. M. Taylor, Jr., District Judges.[25] Neither the Appellants nor the Appellee offered any evidence at such hearing[26] and arguments were presented by all parties. The Court tendered its Judgment[27] and Opinion[28] on June 17, 1970.

Appellants filed Notice of Appeal to this Court pursuant to the provisions of 28 U.S.C. 1253.[29] Appellants Roe and Hallford and Appellee Wade filed Notice of Appeal to the United States Court of Appeals for the Fifth Circuit.[30]

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[19]A. 47-48.
[20]A. 50, 59-60.
[21]A. 56-60. (an alias affidavit)
[22]A. 51-55.
[23]A. 61-72.
[24]A. 73, 74.
[25]A. 75-110.
[26]A. 77.
[27]A. 124-126.
[28]A. 111-123.
[29]A. 127-129.
[30]A. 133, 134, 135.

Appellants filed their Motion to Hold Appeal to Fifth Circuit of Appellee Wade in Abeyance Pending Decision by the Supreme Court of the United States[31], which Motion was granted.[32]

The lower court found that Appellants Roe and Hallford and the *members of their respective classes*[33] had standing to bring their lawsuits, but that Appellants John and Mary Doe had failed to allege facts sufficient to create a present controversy and did not have standing.[34] That court held the Texas Abortion Laws unconstitutional in that they deprived single women and married persons of the right to choose whether to have children in violation of the Ninth Amendment to the Constitution of the United States and that such Laws were void on their face for unconstitutional overbreath and vagueness.[35] The court denied Appellants' applications for injunctive relief.[36]

STATUTES IN ISSUE

The Texas Abortion Laws and the statutes in issue are contained in the Texas Penal Code and consist of the following:

Article 1191. ABORTION

> If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use toward her any violence or means whatsoever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary for not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is

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[31]A. 136-138.
[32]A. 139-140. (The Court of Appeals has taken no further action in these cases).
[33]A. 124.
[34]A. 124.
[35]A. 125-126.
[36]A. 126.

meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth shall be caused.

Art. 1192. FURNISHING THE MEANS

Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

Art. 1193. ATTEMPT AT ABORTION

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

Art. 1194. MURDER IN PRODUCING ABORTION

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

Art. 1196. BY MEDICAL ADVICE

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.[37]

QUESTIONS PRESENTED

In Appellee's opinion the questions presented may be precisely stated as follows:

I. WHETHER APPELLANTS JANE ROE, AND JOHN AND MARY DOE, PRESENT A JUSTICIABLE CONTROVERSY IN THEIR CHALLENGE TO THE TEXAS ABORTION LAWS?

II. WHETHER THE COURT SHOULD ENJOIN THE ENFORCEMENT OF THE TEXAS ABORTION LAWS AS TO APPELLANT HALLFORD IN THE LIGHT OF PENDING STATE CRIMINAL CHARGES?

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[37] The omitted article, Article 1195, concerns destruction of the vitality or life of a child in a state of being born and before actual birth, which such child would otherwise have been born alive.

III. DID THE DISTRICT COURT ERR IN REFUSING TO ENJOIN FUTURE ENFORCEMENT OF THE TEXAS ABORTION LAWS AFTER DECLARING SUCH LAWS UNCONSTITUTIONAL?

IV. WHETHER THIS COURT CAN CONSIDER PLENARY REVIEW OF AN ENTIRE CASE WHEN A LOWER COURT GRANTS DECLARATORY RELIEF HOLDING A STATE STATUTE UNCONSTITUTIONAL, BUT REFUSES TO ENJOIN FUTURE ENFORCEMENT OF SUCH STATUTE, AND THE APPEAL TO THIS COURT IS FROM THAT PORTION OF THE JUDGMENT DENYING INJUNCTIVE RELIEF?

V. WHETHER ARTICLES 1191, 1192, 1193, 1194 AND 1196 OF THE TEXAS PENAL CODE ARE VOID ON THEIR FACE BECAUSE OF UNCONSTITUTIONAL OVERBREATH AND VAGUENESS?

VI. WHETHER THE CONSTITUTION OF THE UNITED STATES GUARANTEES A WOMAN THE RIGHT TO ABORT AN UNBORN FETUS?

VII. WHETHER THE STATE OF TEXAS HAS A LEGITIMATE INTEREST IN PREVENTING ABORTION EXCEPT UNDER THE LIMITED EXCEPTION OF "AN ABORTION PROCURED OR ATTEMPTED BY MEDICAL ADVICE FOR THE PURPOSE OF SAVING THE LIFE OF THE MOTHER"?

SUMMARY OF ARGUMENT

Appellant Jane Roe has not presented a justiciable controversy admitting of specific relief for this Court in her challenge to the Texas Abortion Laws. She has not shown that she has sustained or is immediately in danger of sustaining some direct injury as a result of enforcement of the Texas Abortion Laws. Any cause of action that she may have had is not established by the record and has been mooted by the termination of her pregnancy.

Appellants John and Mary Doe's cause of action is based on speculation and conjecture and they also have not

shown they have sustained or are immediately in danger of sustaining some direct injury as a result of enforcement of the Texas Abortion Laws essential to standing and a justiciable controversy.

Appellant Hallford is under indictment in two cases for violation of the statutes he attacks in the controversy before the Court. The Court should abstain from exercising jurisdiction under the principles enunciated in *Younger* v. *Harris*, etc. Appellant Hallford is not entitled to assert a cause of action on behalf of his patients in the physician-patient relationship.

For a federal court to grant injunctive relief against the enforcement of a state statute, there must be a clear and persuasive showing of unconstitutionality and irreparable harm. The lower court can divorce injunctive and declaratory relief under its equity power and declare a statute unconstitutional, yet refuse to enjoin the enforcement of such statute.

Once a federal court has assumed jurisdiction of a cause, it may properly assume jurisdiction of the entire controversy and render a decision on all questions presented and involved in the case. If this Court determines that it has jurisdiction to consider the denial of injunctive relief to Appellants by the lower court, it may consider the constitutionality of the Texas Abortion Laws determined to be unconstitutional by the Court below.

The Texas Abortion Laws are not violative of the Constitution of the United States as being unconstitutionally vague and overboard. *United States v. Vuitch* is decisive of the issues in this case as to vagueness and overbreath.

Though the right of "marital privacy" and "personal privacy" are recognized, they have never been regarded as

absolute. The "right to privacy" is a relative right that, in the matter of abortion, is not attached to an express right guaranteed under the Constitution of the United States. The right to life of the unborn child is superior to the right of privacy of the mother.

The state has a legitimate, if not compelling, interest in prohibiting abortion except under limited circumstances. In the light of recent findings and research in medicine, the fetus is a human being and the state has an interest in the arbitrary and unjustified destruction of this being.

ARGUMENT

I. APPELLANTS JANE ROE, JOHN AND MARY DOE, HAVE NOT PRESENTED A JUSTICIABLE CONTROVERSY IN THEIR CHALLENGE TO THE TEXAS ABORTION LAWS.

A. JUSTICIABILITY AND STANDING.

Article III of the Constitution of the United States limits the judicial power of Federal Courts to "cases" and "controversies". This has been construed by the courts to prohibit the giving of advisory opinions. *Flast v. Cohen,* 392 U.S. 83 (1968); *Bell v. Maryland,* 378 U.S. 226 (1964); *United States v. Fruehauf* 365 U.S. 146, (1961). There must be a real and substantial controversy admitting of specific relief as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. *Aetna Life Insurance Company v. Hayworth,* 300 U.S. 227 (1937); accord, *Public Service Commission of Utah v. Wycoff Company,* 344 U.S. 237 (1952); *Baker v. Carr,* 369 U.S. 186 (1962); *Golden v. Zwickler,* 394 U.S. 103 (1969). Correlatively, a party challenging a statute as invalid must show that he has sustained or is immediately in danger of sustaining some direct injury as a result of the statute's enforcement before a three-judge court or any

Federal court can entertain the action. *Frothingham v. Mellon*[35], 262 U.S. 447 (1923); *Ex parte Levitt*, 302 U.S. 633 (1937); *Fairchild v. Hughes* 258 U.S. 126 (1922); *Poe v. Ullman*, 367 U.S. 497 (1961). In a per curiam opinion this Court stated in *Ex Parte Levitt*:

> "It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action and *it is not sufficient that he has merely a general interest common to all members of the public.*" (Emphasis added). 302 U.S. at 634.

In *Flask v. Cohen*, supra, this Court gave careful consideration to the nexus between *standing* and *justiciability* and stated that "Standing is an aspect of justiciability and, as such, the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability". 392 U.S. at 98-99. Most probably, the best known decision of this Court on standing is *Frothingham v. Mellon*, supra, in which Mrs. Frothingham claimed that she was a taxpayer of the United States and sued to restrain payments from the Treasury to the several states which chose to participate in a program created by the Maternity Act of 1921. She claimed that the Federal government lacked power to appropriate money for the reduction of maternal and infant mortality, and that such appropriations would cause an unconstitutional increase in her future taxes. After considerations of the interest of an individual taxpayer, remoteness, and other issues, this Court finally stated that its power to declare statutes unconstitutional exists only where the statute is involved in a justiciable case, and that to present such a case the plaintiff "must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining

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[35]This case is usually referred to as *Massachusetts v. Mellon*.

some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with the people generally". 262 U.S. at 488. See, *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *Baker v. Carr*, supra; *National Association for the Advancement of Colored People v. Button*, 371 U.S. 415 (1963).

A review and analysis of the decisions on standing indicate they are not easy to reconcile on the facts. It is frequently stated that to have standing a party must be able to demonstrate injury to a legally protected right or interest. *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1937); *Alabama Power Company v. Ickes*, 302 U.S. 464 (1938); *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

B. STANDING OF APPELLANTS JOHN AND MARY DOE.

Applying the standards of justiciability and standing stated above, an examination of the cause of action asserted by Appellants John and Mary Doe discloses they do not have standing. In their Complaint they contend they are a childless married couple and Mary Doe was not pregnant at that time.[39] Their cause of action is based upon their fear of contraceptive failure resulting in pregnancy to Mary Doe at a time *when they are not properly prepared to accept the responsibilities of parenthood* and upon the *advice of their physician to avoid pregnancy until her health condition improves.*[40] The record is wholly lacking in proof of these contentions. The lower court properly and correctly denied standing to these Appellants upon finding they failed to allege facts sufficient to create a present controversy.[41]

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[39]A. 16.
[40]A. 17.
[41]A. 124.

Initially, it may be stated that neither Appellants Doe nor Roe can be prosecuted under the Texas Abortion Laws for securing an abortion or for attempted abortion. *Gray v. State*, 178 S.W. 337 (Tex.Crim. 1915); *Shaw v. State*, 165 S.W. 930 (Tex.Crim. 1914). Appellants John and Mary Doe's cause of action is based upon speculation of future contraceptive failure resulting in pregnancy of Mary Doe and the future speculation that these Appellants will not at that time be prepared for parenthood and, further, that Appellant Mary Doe's health condition at that time will be impaired by pregnancy. These speculative fears cannot support a cause of action. See, *Younger v. Harris*, 401 U.S. 37 (1971); *Golden v. Zwickler*, supra. For a court to decide the merits of Appellants John and Mary Doe's cause of action would result in giving an advisory opinion upon a hypothetical state of facts contrary to Federal Constitutional limitations and this Court's holdings in *Flask v. Cohen*, supra, and cases cited, supra, at p. 9.

C. STANDING OF APPELLANT JANE ROE.

Appellant Jane Roe occupies a more unique position in regard to standing. She filed her Amended Complaint in the District Court on April 22, 1970,[42] and an "alias affidavit" on May 21, 1970.[43] *The only support in the record for her contentions and allegations giving rise to her cause of action is found in her Amended Complaint and her "alias affidavit"*. The affidavit filed after the commencement of her action indicates she did not desire an aboration at the time of its filing.[44] This affidavit further shows that Appellant Roe had been pregnant for several months prior to its

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[42]A. 10.

[43]A. 56.

[44]"At the time I filed the lawsuit I wanted to terminate my pregnancy by means of an abortion . . ." (A. 57) and "I wanted to terminate my pregnancy because . . ." (A. 57).

filing.[45] The hearing was held before the three-judge panel on July 22, 1970,[46] some four and one-half (4½) months after the filing of her Original Complaint[47] and on November 3, 1971, some twenty (20) months will have expired since the filing of said Original Complaint. There is no indication in the record that Appellant Jane Roe was pregnant at the time of the hearing on July 22, 1970, and it can be reasonably concluded that she is not now pregnant.[48]

The argument that Appellant Jane Roe has not presented a justiciable controversy to give her standing is not intended to be fictitious or spurious. If her statements in her affidavit did not moot her cause of action, resort may be had to *Golden v. Zwickler,* supra, wherein this Court stated:

> "The District Court erred in holding that Zwickler was entitled to declaratory relief if the elements essential to that relief existed '[w]hen this action was initiated.' The proper inquiry was whether a 'controversy' requisite to relief under the Declaratory Judgment Act existed at the time of the hearing on remand." 394 U.S. at 108.[49]

Golden v. Zwickler indicates that this Court should consider an issue as to standing *at the time* it reviews the case and not when the suit was filed. This is supported to some extent by *Bryan v. Austin.* 354 U.S. 933 (1957), wherein Plaintiffs sought to have a South Caroline statute declared unconstitutional and, pending appeal, the statute in question was repealed. In a per curiam opinion this Court stated that the repeal of the statute in issue after the de-

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[45]"Each month I am barely able to make ends meet" (A. 58).
[46]A. 77.
[47]Docket Entries in CA-3-3690-B (A. 1).
[48]The Court may desire to take judicial notice of this fact.
[49]This case was reversed and remanded with direction to enter a new judgment dismissing the complaint.

cision of the District Court, rendered the cause moot. *Atherton Mills v. Johnston*, 259 U.S. 13 (1922), involved a suit for injunctive relief to prevent the discharge of a minor employee because of the Child Labor Act of 1919, which was challenged as being invalid. While the case was on appeal, the minor employee involved became of age. This Court held that the case became moot by the lapse of time and the case could not be considered by the Court.

Mootness deprives a federal court of its judicial power since no case or controversy exists: *Mechling Barge Lines, Inc., v. United States*, 368 U.S. 3224 (1961); *Local No.8-6 v. Missouri*, 361 U.S. 363 (1960); *Flast v. Cohen*, supra; *Parker v. Ellis*, 362 U.S. 574 (1960).

D. CLASS ACTION ASPECTS.

It is questionable whether the requirements of Rule 23, Fed. Rules Civ. Proc., have been complied with in connection with Appellants Roe and John and Mary Doe's attempt to bring their suits as class actions. These Appellants have alleged the prerequisites required in Rule 23 (a),[50] but have not designated whether their actions are (b) (1) or (b) (2) actions under Rule 23. Again, the record is wholly void of any showing of the propriety of class action relief and the only other mention of this aspect of the case is found in the lower court's judgment as follows:

> "(1) Plaintiff Jane Roe, plaintiff-intervenor James Hubert Hallford, M.D. and the members of their respective classes have standing to bring this lawsuit." (A. 124).[51]

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[50] A. 12, 19.

[51] Appellant Hallford's Complaint makes no mention of class action relief. (A. 24-35).

The 1966 amendments to Rule 23 require the judgment in a (b) (1) or (b) (2) class action to include and describe those whom the court finds to be members of the class. In a Rule 23 (b) (3) class action the 1966 amendments require the judgment include and specify or describe those to whom notice was directed, as required by Rule 23 (c) (2), and who have not requested exclusion, and who are found by the court to be members of the class.

In *Hall v. Beals*, 396 U.S. 45 (1969), this Court had before it on direct appeal a case involving new residents of the State of Colorado, who had moved into the State four (4) or five (5) months prior to the November, 1968, presidential election. They were refused permission to vote because of a Colorado statute imposing a six (6) months residency requirement. They commenced a suit as a class action challenging the constitutionality of the statute. A three-judge court upheld the constitutionality of the statute. Thereafter, the election was held, and the State statute was amended to reduce the residency requirement for a presidential election to two (2) months. This Court, in a per curiam opinion, held that, aside from the fact that the election had been held, the case was rendered moot by the amendment to the statute that reduced the residency requirement to two (2) months, and under which the Appellants could vote, since the case had lost its character as a present, live controversy, notwithstanding that the Appellants had denominated their suit as a class action and had expressed opposition to residency requirements in general. In *Golden v. Zwickler*, supra, a distributor of anonymous handbills criticizing a congressman's voting record sought a declaratory judgment concerning the constitutionality of a New York statute which penalized the distributor of anonymous literature in connection with an election campaign. While the case was pending, the congressman left the House of Representatives and ac-

cepted a term as a justice on the Supreme Court of New York. The United States District Court held that the distributor was nevertheless entitled to a declaratory judgment because a genuine controversy had existed at the commencement of the action. This Court held there was no "controversy" of "sufficient immediacy and reality" to warrant a declaratory judgment and, in addition, stated as follows:

> "It is not enough to say, as did the District Court, that nevertheless Zwickler has a 'further and far broader right to a general adjudication of unconstitutionality . . . [in] [h]is *own interest as well as that of others* who would with like anonymity practise free speech in a political environment . . . .' The constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance." (Emphasis added). 394 U.S. at 118.

See, *Burrows v. Jackson*, 346 U.S. 249 (1953).

The Federal Constitution limitations in Article III cannot be extended or limited by asserting a "class action" under Rule 23. Rule 82, Fed. Rules Civ. Proc., in referring to the preceding rules, including Rule 23, provides in part that "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. . . ."

II. THIS COURT SHOULD REFUSE DECLARATORY AND INJUNCTIVE RELIEF TO APPELLANT JAMES HUBERT HALLFORD, M.D.

In Indictment No. 2023 A, Appellant James Hubert Hallford stands charged by the State of Texas with performing an abortion on Frances C. King,[52] and in Indictment No. 556 J with performing an abortion on Jane Wilhelm.[53] He sought and obtained leave to intervene in

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[52] A. 73.
[53] A. 74.

Appellant Roe's action[54] seeking a permanent injunction against the enforcement of the Texas Abortion Laws,[55] but reserving a right to make an application for an interlocutory injunction.[56] In reality, Appellant Hallford is seeking to avoid criminal prosecution in the criminal cases pending against him.

Historically there has been great reluctance by the federal courts to interfere in the operations of a state court. *Stefanelli v. Minard,* 342 U.S. 117 (1951). General principles should be enough to show that an independent federal action is not an appropriate means to raise what should be a state court defense, but this does not stand alone. A statute almost as old as the Republic, the Anti-Injunction Act of 1793, has, with some variations in language over the years, provided that a court of the United States "may not grant an injunction to stay proceedings in a State court . . ." 28 U.S.C. 2283. This statute is no happenstance. It is a "limitation of the power of federal courts dating almost from the beginning of our history and expressing an important Congressional policy—to prevent friction between state and federal courts." *Oklahoma Packing Co. v. Oklahoma & Elec. Co.,* 309 U.S. 4 (1940).

Appellant Hallford's Complaint allegations do not justify the conclusion that any criminal charges have been brought against him in bad faith or under any conditions that would place his case within *Dombrowski's* "special circumstances". *Dombrowski v. Pfister,* 380 U.S. 479 (1965.) There is no relationship worthy of note in the allegations contained in Paragraph 14 of this Complaint[57] to *Dom-*

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[54]A. 22, 36.
[55]A. 34.
[56]A. 34 (it is submitted that Appellate Hallford reserved this right in the event the pending cases were set for trial).
[57]A. 30.

browski's "special circumstances". He appears to indicate that the State of Texas must negate the exception provided in Article 1196, supra,[58] and that he cannot offer medical testimony to bring him within the purview of the exception.

In *Atlantic Coast Line R. Co. v. Engineers*, 398 U.S. 281 (1970), the railroad obtained a state injunction against a union's picketing and the union sought and obtained in the Federal District Court an injunction against the enforcement of the state court injunction. The Court of Appeals for the Fifth Circuit affirmed the Federal District Court's judgment and, on certiorari, this Court reversed and remanded stating as follows:

> "First, a federal court does not have inherent power to ignore the limitations of Section 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear. This rule applies regardless of whether the federal court itself has jurisdiction over the controversy, or whether it is ousted from jurisdiction for the same reason that the state court is." (Omitting authority). 398 U.S. at 294-295.

The above principle of federal abstention is further enunciated in *Spielman Motor Sales Co., Inc., v. Dodge*, 295 U.S. 89 (1935); *Cameron v. Johnson*, 390 U.S. 611 (1968); *Shaw v. Garrison*, 293 F.Supp. 937 (E.D.La. 1968), aff'd per curiam, 393 U.S. 220 (1968); *City of Greenwood v. Peacock*, 384 U.S. 808 (1966).

More recently, this Court has announced certain guidelines on the subject of federal court interference with

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[58] See Article 1196, supra, at p. 6 containing the exception "procured or attempted by medical advice for the purpose of saving the life of the mother."

pending state criminal proceedings in what is sometimes referred to as the "February 23rd Decisions". *Younger v. Harris*, supra, *Samuels v. Mackell*, 401 U.S. 66 (1971); *Boyle v. Landry*, 401 U.S. 77 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Byrne v. Karalexis*, 401 U.S. 216 (1971). These cases very strongly indicate the availability of federal injunctive relief against pending state criminal prosecutions has been severely curtailed even in the area of First Amendment rights of expression. Thus, federal interference, even to the extent of granting preliminary restraining orders and convening three-judge courts is by far the exception rather than the rule.

The above cases further indicate that, independent of any obstacles posed by the federal anti-injunction statute, the primary prerequisite to federal court intervention in the present context, is a showing of irreparable injury. Even irreparable injury is insufficient unless it is "both great and immediate". In *Younger v. Harris*, supra, this Court stated as follows:

> "Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term. Instead, the threat to the Plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." 401 U.S. at 46.

Accord, *Byrne v. Karalexis*, supra.

Samuels v. Mackell, supra, considered declaratory relief prayed for in relation to the federal court's reluctance to interfere with pending state criminal proceedings and this Court stated:

> "We therefore hold that, in cases where the state criminal prosecution was begun prior to the federal suit, same equitable principles relevant to the propriety of an injunction must be

taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that *where an injunction would be impermissible under these principles, declaratory relief should be denied as well* . . . . Ordinarily, however, the practical effect of the two forms of relief will be virtually identical, and the basic policy against federal interference with pending state criminal prosecutions will be frustrated as much by a declaratory judgment as it would be by an injunction." (Emphasis added). 401 U.S. at 73.

Nor can Appellant rely upon his patients' rights, which a statute supposedly threatens. See *Tileston v. Ullman*, 318 U.S. 44 (1943); accord, *Golden v. Zwicker*, supra; *Burrows v. Jackson*, supra.

Applying the guidelines set forth in *Younger v. Harris*, supra, and the other "February 23rd Decisions", this Court can properly conclude Appellant Hallford has not suffered, nor under the present state of the record, will suffer both great and immediate irreparable injury of the nature required to authorize federal injunctive or declaratory relief. His case is precisely the type to which this Court was addressing itself in the recent pronouncements condemning, except in very limited circumstances, federal court equitable injunctive and declaratory interference with pending state criminal prosecutions.

III. THE UNITED STATES DISTRICT COURT DID NOT ERR IN REFUSING TO ENJOIN FUTURE ENFORCEMENT OF THE TEXAS ABORTON LAWS AFTER DECLARING SUCH LAWS UNCONSTITUTIONAL.

This Court has been unwaivering in holding that a three-judge court cannot consider an action for injunctive relief under 28 U.S.C. 2281 on its merits without a preliminary showing of irreparable harm and no adequate legal remedy. In *Spielman Motor Sales Co. Inc., v. Dodge*, supra, a suit requesting a three-judge court to enjoin a New York district attorney from instituting criminal prosecutions against certain defendants under an alleged uncon-

stitutional state statute, this court affirmed the lower court's dismissal of the action and stated:

> "The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. . . . To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights." 295 U.S. at 95.

In *Mayo v. Lakeland Highlands Canning Co., Inc.*, 309 U.S. 310 (1940), a suit was brought before a three-judge court seeking to enjoin the Florida Agriculture Commission from enforcing an alleged unconstitutional state statute. This Court reversed the lower court's disposition on the merits and made the following observation:

> "The legislation requiring the convening of a court of three judges in cases such as this was intended to insure that the enforcement of a challenged statute should not be suspended by injunction except upon a clear and persuasive showing of unconstitutionality and irreparable injury." 309 U.S. at 318-319.

Accord, *Beal v. Missouri Pacific Railroad Corporation*, 312 U.S. 45 (1961); *Douglas v. City of Jeannette*, 319 U.S. 157 (1943); *Bryne v. Karalexis*, supra; *Dyson v. Stein*, supra; *Samuels v. Mackell*, supra; *Younger v. Harris*, supra.

The lower court cited *Dombrowski v. Pfister*, supra, and *Zwickler v. Koota*, 389 U.S. 241 (1967), as authority for the court to divorce injunctive and declaratory relief.[59] In *Powell v. McCormack*, 395 U.S. 486 (1969), this Court held that a court may grant declaratory relief even though it chooses not to issue an injunction or mandamus. 395 U.S. at 504. See, *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

IV. THIS COURT CAN CONSIDER PLENARY REVIEW OF THE ENTIRE CASE WHEN A LOWER COURT

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[59] A. 121, 122.

GRANTS DECLARATORY RELIEF HOLDING A STATE STATUTE UNCONSTITUTIONAL, BUT REFUSES TO ENJOIN FUTURE ENFORCEMENT OF SUCH STATUTE, AND THE APPEAL TO THIS COURT IS FROM THAT PORTION OF THE JUDGMENT DENYING INJUNCTIVE RELIEF.

Should this Court determine that it has jurisdiction to consider the propriety of injunctive relief in this case, it can properly assume jurisdiction of this entire controversy and render a decision on all questions involved in this case, including the constitutionality of the Texas Abortion Laws. Appellee joins Appellants in requesting this Court reach the issue of the Constitutionality of the Texas Abortion Laws. Appellee is in a somewhat awkward procedural position in that it lost on the merits in the lower court as to declaratory relief and neither the grant nor the refusal of a declaratory judgment, without more, will support a direct appeal to this Court under 28 U.S.C. 1253. *Mitchell v. Donovan,* 398 U.S. 427 (1970); *Gunn v. University Committee,* 399 U.S. 383 (1971). Appellee has the avenue of appeal to the Fifth Circuit.[60] Should this Court in the present case hold that the lower court properly granted declaratory relief but improperly denied injunctive relief, it then might be faced, at least indirectly, with the consideration and decision of the same constitutional issues that are being directly raised by the Appellee in the Court of Appeals for the Fifth Circuit.

Though not directly in point, *Public Service Commission of Utah v. Wycoff Co.,* supra, lends support to the premise that a federal court has the right, power, and authority to decide and determine the entire controversy and all the issues and questions involved in a case of which it has

[60]Appellee has appealed to the United States Court of Appeals for the Fifth Circuit (A. 135) and this appeal is being held in abeyance pending a decision of this Court (A. 139-140).

properly acquired jurisdiction. Accord, *Just v. Chambers*, 312 U.S. 383 (1941); *Florida Lime and Avocado Growers v. Jacobson*, 362 U.S. 73 (1960); cf, *Hartford Accident & Indemnity Company v. Southern Pacific Company*, 273 U.S. 207 (1927); *British Transport Commission v. United States*, 354 U.S. 129 (1957). In *Sterling v. Constantin*, 287 U.S. 378 (1932); this Court stated that:

> "As the validity of provisions of the state constitution and statutes, if they could be deemed to authorize the action of the Governor, was challenged, the application for injunction was properly heard by three judges. Stratton v. St. Louis S. W. R. Co., 282 U.S. 10, 75 L. ed. 135, 51 S. Ct. 8. The jurisdiction of the District Court so constituted, and of this Court upon appeal, extends to every question involved, whether of state or federal law, and enables the *court to rest its judgment on the decisions of such of the questions as in its opinion effectively dispose of the case." (Omitting authority). 287 U.S. at 393-394.

V. ARTICLES 1191, 1192, 1193, 1194 AND 1196 OF THE TEXAS PENAL CODE ARE NOT UNCONSTITUTIONAL ON THEIR FACE BECAUSE OF OVERBREATH AND VAGUENESS.

The possible vagueness of state abortion statutes which allow for such a procedure only when the life, or in some cases, health, of the expectant mother is threatened has recently come under judicial scrutiny in a number of instances. One author, in commenting on the decision of the California Supreme Court in *People v. Belous*, 71 Cal. Rptr. 354, 458 P.2d 194 (1969), cert. denied, 397 U.S. 915 (1970), stated as follows:

> "In attempting to define the phrase 'necessary to preserve . . . life . . .' the California Supreme Court first examined the isolated words of the statute, and concluded that no clear meaning of 'necessary' and 'preserve' could be ascertained. It is not surprising that a seriatim examination of the words convinced the court that the phrase was vague. Necessity is a relative concept and must refer to a particular object to be meaningful. Nor can the word 'preserve' be understood out of context. In

> the abstract, such words are not just vague, they are meaningless. Taken in context, however, these words do have meaning. The object of the necessity in this statute is 'to preserve life.' The term is defined by its object—life." 118 U. Penn. L. Rev. 643, 644 (1970).

There is some inherent vagueness in many homicide laws, such as laws which define justifiable homicide as self-defense, or those which differentiate between first- and second-degree murder. The courts, like society, however, have learned to live with a certain element of inevitable vagueness in all laws and have learned to apply it reasonably. See, *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Connally v. General Construction Company*, 269 U.S. 385 (1926). In order for a statute to be unconstitutionally vague, it must be so vague and lacking in standards so as to compel men of ordinary intelligence to guess at its meaning. *Adderley v. Florida*, 385 U.S. 39 (1967); *Cameron v. Johnson*, supra.

A number of three-judge panels have been convened recently to consider the constitutionality of abortion laws which allowed for the performance of such operations only when the life of the mother was threatened by continuance of the pregnancy. While one such court, in dealing with such a law in Wisconsin, did hold the statute to be unconstitutional on other grounds, it said that whatever vagueness existed in the law was not sufficient, of itself, for a declaration of unconstitutionality. *Babbitz v. McCann*, 310 F.Supp. 293 (E.D. Wis. 1970). The court observed:

> "We have examined the challenged phraseology and are persuaded that it is not indefinite or vague. In our opinion, the word 'necessary' and the expression 'to save the life of the mother' are both reasonably comprehensible in their meaning." 310 F.Supp. at 297.

Accord, *Rosen v. Louisiana State Board of Medical Examiners*, 318 F. Supp. 1217 (E.D. La. 1970).

In *United States v. Petrillo,* 332 U.S. 1 (1947), this Court stated:

> "There may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense, Robinson v. United States, 324 US 282, 285, 286, 89 L.ed 944, 946, 947, 65 S Ct 666. It would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossibly judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees. (Omitting authority). 332 U.S. at 7-8.

See *Jordan v. DeGeorge,* 341 U.S. 223 (1951); *United States v. Ragen,* 314 U.S. 513 (1942); *United States v. Wurzback,* 280 U.S. 396 (1930).

The court below did not have the advantage of this Court's decision in *United States v. Vuitch,* 402 U.S. 62 (1971), at the time it handed down its decision in this case. In *Vuitch* this Court reversed the decision of a district court judge who had found that the District of Columbia abortion law was unconstitutionally vague. The exception clause in *Vuitch* stated in part "unless the same were done as necessary for the preservation of the mother's life or health".[61] Though this Court directed its attention to the word "health", its holding should be dispositive of the case at bar in that the exception clause is less certain of meaning than the exception found in the Texas Abortion Laws. This Court in *Vuitch* further disposed of the contention of the physician that once an abortion is performed he is "presumed guilty".

VI. THE CONSTITUTION OF THE UNITED STATES DOES NOT GUARANTEE A WOMAN THE RIGHT TO ABORT AN UNBORN FETUS.

[61] 22 D C Code 201

A. THE INTEREST OF MARITAL PRIVACY.

One must recognize the interest of a husband and wife in preserving their conjugal relations from state interference, an interest which, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), was found to be violated by Connecticut's statute forbidding the use of contraceptives. This law interfered with the most private aspect of the marital relation, sexual intercourse, making it criminal for a couple to engage in sexual intercourse when using contraceptives. In contrast, the usual statute restricting abortions does not affect the sexual relations of a couple except under some circumstances and only for a limited time. Prevention of abortion does not entail, therefore, state interference with the right of marital intercourse, nor does enforcement of the statute requiring invasions of the conjugal bedroom.

Assuming arguendo that there are other marital rights the state must respect, may it then be urged that the right of marital privacy includes the freedom of a married couple to raise and educate a child they do not want, or commit infanticide, incest, engage in pandering and the like. Family privacy, like personal privacy, is highly valued, but not absolute. The news media may publicize the events that occur when a family is victimized by criminals though they seek seclusion. *Time v. Hill*, 385 U.S. 374 (1967). The family may not practice polygamy,[62] may not prohibit schooling for a child,[63] or prohibit the child's labor,[64] or expose the community or a child to communicable disease.[65] In *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967), the unborn child's right to live came into conflict with family privacy. The Gleitmans contended that their doctor

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[62] *Reynolds v. United States*, 98 U.S. 145 (1879).
[63] *Prince v. Massachusetts*, 321 U.S. 158 (1944).
[64] Id.
[65] Id.

failed to warn that Mrs. Gleitman was suffering from German measles and this failure deprived the family of the opportunity of terminating the pregnancy. They alleged the child was born with grave defects as a result of the doctor's omission. The court stated as follows:

> "The right to life is inalienable in our society. . . .
> We are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of the single human life is the decisive factor in this suit in tort. Eugenic considerations are not controlling. We are not talking here about the breeding of prize cattle. It may have been easier for the mother and less expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of a single human life to support a remedy in tort." 227 A.2d at 693.

B. PHYSICIAN–PATIENT RELATIONSHIP.

Proponents of abortion-on-demand assert that anti- abortion laws unlawfully intrude into the privacy of the physician-patient relationship. They assume necessarily that the doctor treating a pregnancy owes an obligation of good medical care to only one patient, the pregnant woman. In *Jones v. Jones*, 208 Misc. 721, 144 N.Y.S.2d 820 (Sup.Ct. 1955), the court stated (concerning an unborn child) as follows:

> ". . . became a patient of the mother's obstetrician, as well as the mother herself. In so holding, I can think of the infant as a third-party beneficiary of the mother-doctor contract or perhaps a principal for whom the mother acted as agent." 144 N.Y.S.2d at 826.

As a patient of the obstetrician, the child may recover damages for a prenatal injury suffered as the result of the negligence of his doctor. *Sylvia v. Gobeille*, 101 R.I. 76, 220 A.2d 222 (1966); *Seattle-First National Bank v. Rankin*, 59 Wash. 2d 288, 367 P.2d 835 (1962). It is elemental that a doctor cannot be freed from legal restraints in making socio-moral judgments. The state may regulate

the medical profession to protect the health and welfare of all its citizens. See *Wasmuth v. Allen*, 14 N.Y.2d 391, 200 N.E.2d 756, 252 N.Y.S.2d 65 (1964), appeal dismissed, 379 U.S. 11 (1964); *Barsky v. Board of Regents*, 347 U.S. 442 (1954). Appellants' contentions of intrusion upon physician-patient relationship are not self-sustaining and must be associated with and connected to a violation of some basic right.

C. THE INTERESTS OF THE WOMAN.

Personal privacy is an exalted right but, as in marital privacy, it has never been regarded as absolute. A person may be subjected to a "stop and frisk" though it constitutes an intrusion upon his person,[66] or a person may be required to submit to a vaccination,[67] and a blood sample may forcibly be extracted from the body of an individual arrested for suspicion of driving while intoxicated.[68] A woman has been required to submit to a blood transfusion necessary to preserve her life in order that her small child shall not be left without a mother.[69] The "right of privacy" is a highly cherished right—however one which is nowhere expressly mentioned in the Constitution of the United States or its amendments. Numerous examples in tort and criminal law indicate the right to privacy is a relative right.[70] A woman cannot in privacy, even though she harm no other person, legally utilize or even possess certain forbidden drugs, such as LSD or herion. The right to privacy was considered a mere relative right by the framers of the Constitution. Had they not considered the right to

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[66]*Terry v. Ohio*, 392 U.S. 1 (1968).

[67]*Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

[68]*Schmerber v. California*, 384 U.S. 757 (1966).

[69]*Application of President and Directors of Georgetown, Col.*, 331 F.2d 1000 (D.C. Cir. 1964), cert. denied, 377 U.S. 978 (1964).

[70]See Tort Law limitations on the Right of Privacy as outlined in *Prosser on Torts*, 3rd Edition, 1964, Chapter 22.

privacy a mere relative right, they would have carefully defined additional protection for the small portion of the right to privacy protected by the guarantee against unreasonable search and seizure. In *Katz v. United States*, 389 U.S. 347 (1967), referring to searches and seizures, stated that the Fourth Amendment to the Constitution of the United States cannot be translated into a general constitutional "right of privacy". See, *Lewis v. United States*, 385 U.S. 206 (1966).

When the "right of privacy" is attached to an "express right" such as the "right of freedom of religion" a very strong constitutional basis exists for upholding the "right"—except when in conflict with the most basic and fundamental of all rights—the "right to life". In *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964), cert. denied, 377 U.S. 985 (1964), the New Jersey Supreme Court was asked to decide just such an issue—a conflict between the mother's privacy and the life of the unborn child. The issue was whether the rights of a child *in utero* were violated by the pregnant woman's refusal on religious grounds to submit to a blood transfusion necessary to preserve the lives of both the mother and the unborn child. The Court's finding favored the right to life of the unborn child over the pregnant woman's freedom of religion and stated:

> "The blood transfusions (including transfusions made necessary by the delivery) may be administered if necessary to save her life or the life of the child, as the physician in charge at the time may determine." 201 A.2d at 538.

D. THE HUMAN-NESS OF THE FETUS.

The crux of the moral and legal debate over abortion is, in essence, the right of the woman to determine whether or not she should bear a particular child versus the right of the child to life. The proponents of liberalization of abortion laws speak of the fetus as "a blob of protoplasm" and

feel it has no right to life until it has reached a certain stage of development.[71] On the other hand, the opponents of liberalization maintain the fetus is human from the time of conception, and so interruption of pregnancy cannot be justified from the time of fertilization. It most certainly seems logical that from the stage of differentiation, after which neither twinning nor re-combination will occur, the fetus implanted in the uterine wall deserves respect as a human life. If we take the definition of life as being said to be present when an organism shows evidence of individual animate existence, then from the blastocyst stage the fetus qualifies for respect. It is alive because it has the ability to reproduce dying cells. It is human because it can be distinguished from other non-human species, and once implanted in the uterine wall it requires only nutrition and time to develop into one of us.

The recent recognition of autonomy of the unborn child has led to the development of new medical specialties concerning the unborn child from the earliest stages of the pregnancy.[72]* Modern obstetrics has discarded the unscientific the concept that the child in the womb is but tissue of the mother. Dr. Liley, the New Zealand pediatrician, who perfected the intrauterine transfusion, has said:

> "Another medical fallacy that modern obstetrics discards is the idea that the pregnant woman can be treated as a patient alone. No problem in fetal health or disease can any longer be considered in isolation. At the very least two people are involv-

[71]This is given variously as from 12 weeks to 28 weeks of intrauterine life, and some apparently feel it has no life at all until after full-term delivery.

[72]Gairdner, Douglas: *Fetal Medicine: Who Is To Practice It,* J. Obstet, and Gynec. Brit. Commonwealth, 75:1123-1124, Dec. 1968.

*The citations in this and the following are according to Medical Journal Practice.

ed, the mother and her child." Liley, H.M.I.: *Modern Motherhood*, Random House, Rev. Ed. 1969.

Yet the attack on the Texas statute assumes this discredited scientific concept and argues that abortions should be considered no differently than any medical measure taken to protect maternal health, (see appellant's brief pp. 94-98) thus completely ignoring the developing human being in the mother's womb.

The court has also abandoned that concept in *Kelly v. Gregory*, 282 App.Div. 542, 125 N.Y.S.2d 696 (1953), wherein the court stated:

> "We ought to be safe in this respect in saying that legal separability should begin where there is biological separability. We know something more of the actual process of conception and fetal development now than when some of the common law cases were decided; and what we know makes it possible to demonstrate clearly that separability begins at conception.
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> "The mother's biological contribution from conception on is nourishment and protection; but the fetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe the conditions under which life will not continue." 125 N.Y.S.2d at 697.

It is our task in the next subsections to show how clearly and conclusively modern science—embryology, fetology, genetics, perinatology, all of biology—establishes the humanity of the unborn child. We submit that the data not only shows the constitutionality of the Texas legislature's effort to save the unborn from indiscriminate extermination, *but in fact suggests a duty to do so.* We submit also that no physician who understands this will argue that the law is vague, uncertain or overbroad for he will understand that the law calls upon him to exercise his art for the benefit of his *two patients*: mother *and* child.

From conception the child is a complex, dynamic, rapidly growing organism. By a natural and continuous process the single fertilized ovum will, over approximately nine months, develop into the trillions of cells of the newborn. The natural end of the sperm and ovum is death unless fertilization occurs. At fertilization a new and unique being is created which, although receiving one-half of its chromosomes from each patient, it really unlike either.[73]

About seven to nine days after conception, when there are already several hundred cells of the new individual formed, contact with the uterus is made and implantation begins. Blood cells begin at 17 days and a heart as early as 18 days. This embryonic heart which begins as a simple tube starts irregular pulsations at 24 days, which, in about one week, smooth into a rythmic contraction and expansion.[74] It has been shown that the ECG on a 23 mm embryo (7.5 weeks) presents the existence of a functionally complete cardiac system and the possible existence of a myoneurol or humoral regulatory mechanism. All the classic elements of the adult ECG were seen.[75] Occasional contractions of the heart in a 6 mm (2 week) embryo have been

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[73]Ingleman-Sundberg, Axel, and Wirsen, Cloes: *A Child Is Born: The Drama Of Life Before Birth,* photos by Lennart Nilsson, Dell Publishing Co., New York, 1965.

Arey, Leslie B.: *Developmental Anatomy,* 6th Ed. Philadelphia W. B. Saunders Co. 1954 Chap. II VI.

Patten, Bradley M.: *Human Embryology,* 3rd Ed. McGraw-Hill Book Co. New York, 1968 Chap. VII.

[74]Ingelman-Sundberg, Axel, and Wirsen, Cloes: *A Child Is Born: The Drama Of Life Before Birth,* supra.

[75]Arey, Leslie B.: *Developmental Anatomy,* supra.

Patten, Bradley M.: *Human Embryology,* supra.

Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth: The Drama Of Life's Beginnings,* Harper and Row, New York 1971.

Straus, Reuben, et al: *Direct Electrocardiographic Recording Of A Twenty-Three Millimeter Human Embryo,* The American Journal of Cardiology, September 1961, pp. 443-447.

observed as well as tracings exhibiting the classical elements of the ECG tracing of an adult in a 15 mm embryo (5 weeks).[76]

Commencing at 18 days the developmental emphasis is on the nervous system even though other vital organs, such as the heart, are commencing development at the same time. Such early development is necessary since the nervous system integrates the action of all other systems. By the end of the 20th day the foundation of the child's brain, spinal cord and entire nervous system will have been established. By the 6th week after conception this system will have developed so well that it is controlling movements of the baby's muscles, even though the woman may not be aware that she is pregnant. By the 33rd day the cerebral cortex, that part of the central nervous system that governs motor activity as well as intellect may be seen.[77]

The baby's eyes begin to form at 19 days. By the end of the first month the foundation of the brain, spinal cord, nerves and sense organs is completely formed. By 28 days the embryo has the building blocks for 40 pairs of muscles situated from the base of its skull to the lower end of its spinal column. By the end of the first month the child has completed the period of relatively greatest size increase and the greatest physical change of a lifetime. He or she is ten thousand times larger than the fertilized egg and will increase its weight six billion times by birth, having in only

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[76]Marcel, M.P., and Exchaquet, J.P.: *L'Electrocardiogramme Du Foetus Human Avec Un Cas De Double Rythme Auriculaire Verifie*, Arch. Mal. Couer, Paris 31: 504, 1938.

[77]Arey, Leslie B.: *Developmental Anatomy*, supra.

Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth*: *The Drama Of Life's Beginnings*, supra.

Flannagan, G.L.: *The First Nine Months Of Life*, Simon and Schuster, 1962.

the first month gone from the one cell state to millions of cells.[78] [See Fig. 1.]

Shettles and Rugh describe this first month of development as follows:

> "This, then, is the great planning period, when out of apparently nothing comes evidence of a well integrated individual, who will form along certain well tried patterns, but who will, in the end, be distinguishable from every other human being by virtue of ultra microscopic chromosomal differences." Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth: The Drama Of Life's Beginnings, supra* at p. 35.

By the beginning of the second month the unborn child, small as it is, looks distinctly human. (See Fig. 1). Yet, by this time the child's mother is not even aware that she is pregnant."[79]

As Shettles and Rugh state:

> "And as for the question, 'when does the embryo become human?' The answer is that it *always* had human potential, and *no other*, from the instant the sperm and the egg came together because of its chromosomes." (Emphasis in original). Id at p. 40.

At the end of the first month the child is about ¼ of an inch in length. At 30 days the primary brain is present and the eyes, ears and nasal organs have started to form. Although the heart is still incomplete, it is beating regularly

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[78]Arey, Leslie B.: *Developmental Anatomy*, supra.
Patten, Bradley M.: *Human Embryology*, supra.
Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth: The Drama Of Life's Beginnings*, supra.
Ingelman-Sundberg, Axel, and Wirsen, Cloes: *A Child Is Born: The Drama Of Life Before Birth*, supra.
Flannagan, G.L.: *The First Nine Months Of Life*, supra.

[79]Ingelman-Sundberg, Axel, and Wirsen, Cloes: *A Child Is Born: The Drama Of Life Before Birth*, supra.

Fig. 1—40 days

and pumping blood cells through a closed vascular system.[80] The child and mother do not exchange blood, the child having from a very early point in its development its own and complete vascular system.[81]

Earliest reflexes begin as early as the 42nd day. The male penis begins to form. The child is almost ½ inch long and cartilage has begun to develop.[82] [See Fig. 2]

Even at 5½ weeks the fetal heartbeat is essentially similar to that of an adult in general configuration. The energy output is about 20% that of the adult, but the fetal heart is functionally complete and normal by 7 weeks. Shettles and Rugh describe the child at this point of its development as a 1-inch miniature doll with a large head, but gracefully formed arms and legs and an unmistakably human face.[83] [See Fig. 2]

By the end of the seventh week we see a well proportioned small scale baby. In its seventh week, it bears the familiar external features and all the internal organs of the adult, even though it is less than an inch long and weighs only 1/30th of an ounce. The body has become nicely rounded, padded with muscles and covered by a thin

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[80]Arey, Leslie B.: *Developmental Anatomy*, supra.

[81]Arey, Leslie B.: *Developmental Anatomy*, supra.

Patten, Bradley M.: *Human Embryology*, supra.

Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth: The Drama Of Life's Beginnings*, supra.

Marcel, M.P., and Exchaquet, J.P.: *L'Electrocardiogramme Du Foetus Human Avec Un Cas De Double Rythme Auriculaire Verifie*, supra.

Flannagan, G.L.: *The First Nine Months Of Life*, supra.

[82]Arey, Leslie B.: *Developmental Anatomy*, supra.

Patten, Bradley M.: *Human Embryology*, supra.

[83]Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth: The Drama Of Life's Beginnings*, supra at p. 54.

Fig 2–6 weeks

skin. The arms are only as long as printed exclamation marks, and have hands with fingers and thumbs. The slower growing legs have recognizable knees, ankles and toes.[84] [See Figs. 3 and 4]

The new body not only exists, it also functions. The brain in configuration is already like the adult brain and sends out impulses that coordinate the function of the other organs. The brain waves have been noted at 43 days.[85] The heart beats sturdily. The stomach produces digestive juices. The liver manufactures blood cells and the kidney begins to function by extracting uric acid from the child's blood.[86] The muscles of the arms and body can already be set in motion.[87]

After the eighth week no further primordia will form; *everything* is already present that will be found in the full term baby.[88] As one author describes this period:

> "A human face with eyelids half closed as they are in someone who is about to fall asleep. Hands that soon will begin to grip, feet trying their first gentle kicks." Rugh, Roberts, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth: The Drama Of Life's Beginnings*, supra at p. 71.

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[84]Arey, Leslie B.: *Developmental Anatomy*, supra.
Patten, Bradley M.: *Human Embryology*, supra.
Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth: The Drama Of Life's Beginnings*, supra.
Ingelman-Sundberg, Axel, and Wirsen, Cloes: *A Child Is Born: The Drama Of Life Before Birth*, supra.

[85]Still, J.W.: J. Washington Acad. Sci. 59:46, 1969.

[86]Flannagan, G.L.: *The First Nine Months Of Life*, supra.
Gesell, Arnold: *The Embryology of Behavior*, Harper & Bros. Publishers, 1945, Chap. IV, V, VI, X.

[87]Hooker, Davenport: *The Prenatal Origin Of Behavior*, Univ. of Kansas Press, 1952.

[88]Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth: The Drama Of Life's Beginnings*, supra at p. 71.

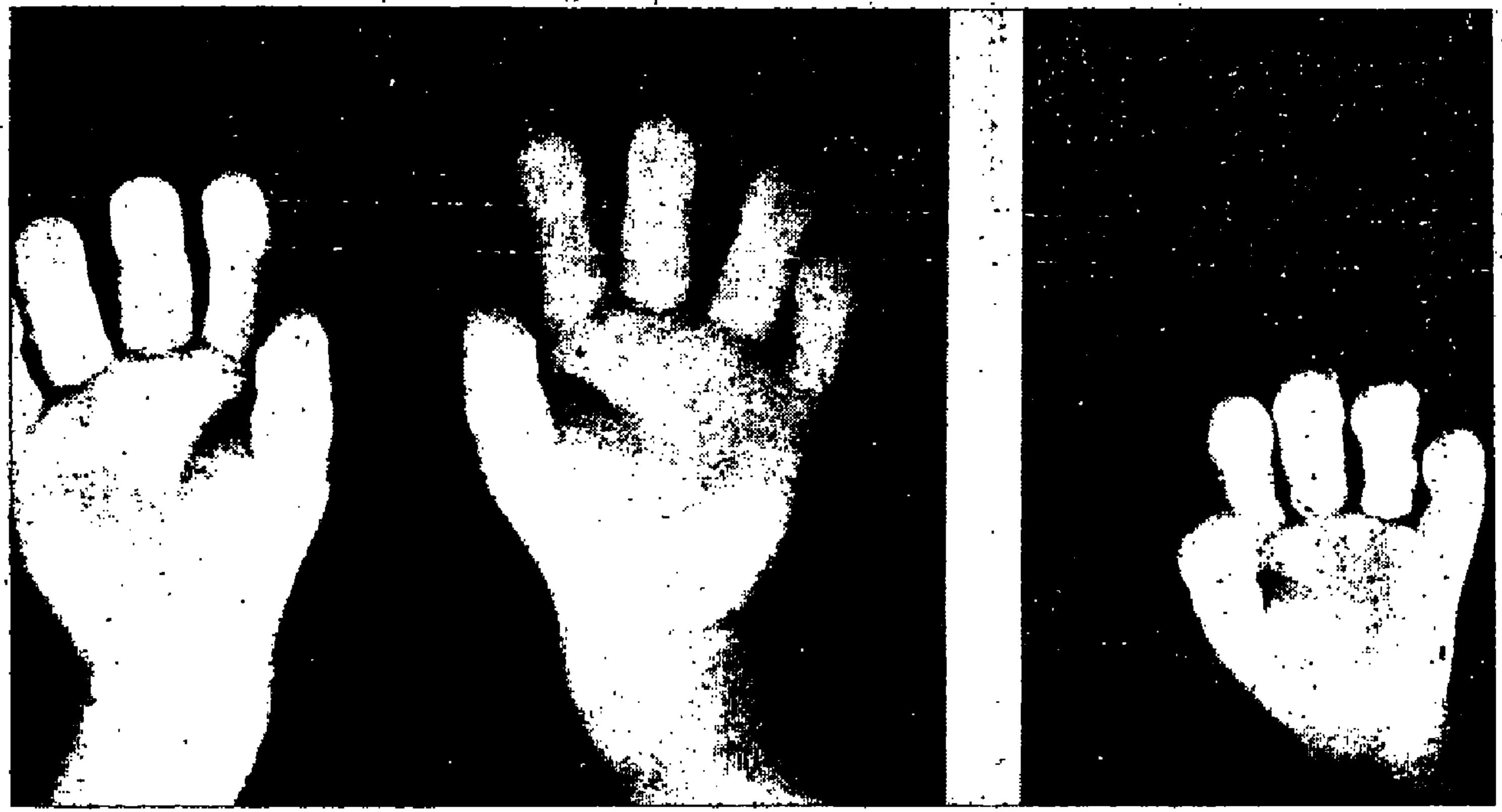

Fig. 3–9 weeks 7 weeks

Fig. 4—10 weeks 6 weeks

From this point until adulthood, when full growth is achieved somewhere between 25 and 27 years, the changes in the body will be mainly in dimension and in gradual refinement of the working parts.[89]

The development of the child, while very rapid, is also very specific. The genetic pattern set down in the first day of life instructs the development of a specific anatomy. The ears are formed by seven weeks and are specific, and may resemble a family pattern.[90] The lines in the hands start to be engraved by eight weeks and remain a distinctive feature of the individual.[91] [See Fig. 3]

The primitive skeletal system has completely developed by the end of six weeks.[92] This marks the end of the child's embryonic (from Greek, to swell or teem within) period. From this point, the child will be called a fetus (Latin, young one or offspring).[93] [See Fig. 2]

In the third month, the child becomes very active. By the end of the month he can kick his legs, turn his feet, curl and fan his toes, make a fist, move his thumb, bend his wrist, turn his head, squint, frown, open his mouth, press his lips tightly together.[94] He can swallow and drinks the amniotic fluid that surrounds him. Thumb sucking is first noted at this age. The first respiratory motions move fluid

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[89]Arey, Leslie B.: *Developmental Anatomy,* supra.
Potter, Edith: *Pathology Of The Fetus And Infant,* Year Book Publishers Inc., Chicago, 1961.

[90]Streeter, Geo. L.: *Development Of The Auricle In The Human Embryo,* Contributions to Embryology, Vol. XIII No. 61, 1921.

[91]Miller, James, R.: *Dermal Ridge Patterns: Technique For Their Study In Human Fetuses,* J. Pediatric, Vol. 73, No. 4, Oct. 1969, pp. 614-616.

[92]Arey, Leslie B.: *Developmental Anatomy,* supra.
Patten, Bradley M.: *Human Embryology,* supra.

[93]Patten, Bradley M.: *Human Embryology,* supra.

[94]Hooker, Davenport: *The Prenatal Origin Of Behavior,* supra.