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HENRIE v. DERRYBERRY AND THE CURRENT STATUS OF THE OKLAHOMA ABORTION LAWS

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In view of the recent United States Supreme Court decisions in the abortion cases,[1] it was inevitable that numerous restrictive state criminal abortion statutes would be challenged and found unconstitutional for exceeding the guidelines established by the Court in respect to the area of permissible state regulation of abortion.

The *Roe v. Wade*[2] decision struck down the Texas criminal abortion laws, article 1191—1194 and 1196 of the Texas Penal Code, as violative of the fourteenth amendment. The statutes in essence made it illegal to knowingly administer to or procure administration to a pregnant woman any drug, medicine or violence, to produce the destruction of premature birth of the fetus; or furnish the means for procuring an abortion, or attempting to produce the means to effect an abortion. However, the statutes exempted procuring or attempting an abortion under medical advice for the purpose of saving the life of the mother.

The Supreme Court held that the Texas statutes, which only permitted an abortion as a lifesaving procedure, were invalid for abridging the right of privacy under the due process clause of the fourteenth amendment.[3] This amendment guarantees certain fundamental rights, including a woman's decision whether or not to terminate her pregnancy within determined limits.[4]

The Oklahoma anti-abortion statutes were first passed in 1910 and modeled after other similar statutes passed in the nineteenth century. These earlier statutes were passed for various purposes such as encouraging the growth of the population or protecting the mother from the

1. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).
2. 410 U.S. at 164.
3. *Id.* at 153.
4. *Id.*

deficient surgical practices then existing.[5] In addition, the laws attempted to protect the fetus which influential religious views deemed to be a human being.[6] Furthermore, the abortion laws strengthened and gained impetus from the restrictive puritanical ideas prevalent at the time.

The Oklahoma Supreme Court in *Bowlan v. Lunsford*[7] articulated the purpose of the Oklahoma anti-abortion statutes as being "enacted and designed for the protection of the unborn child and, through it, society."[8]

On January 31, 1973, the Oklahoma Court of Criminal Appeals in the case of *Jobe v. State*[9] declared that two of the Oklahoma criminal abortion statutes, sections 861 and 862 of title 21, were unconstitutional as violative of the due process clause of the fourteenth amendment under the same reasoning as *Roe v. Wade*.[10]

Soon afterward, the Federal District Court for the Northern District of Oklahoma decided the case of *Henrie v. Derryberry*[11] which also challenged the Oklahoma abortion laws as well as other related statutes on constitutional grounds. The original plaintiff in this suit was Dr. W.J. Henrie, an osteopathic physician licensed to practice in Oklahoma, who was convicted in 1962 under section 861. Subsequently, he was incarcerated and had his physician's license revoked.

A collateral suit was then instituted seeking declaratory and injunctive relief against enforcement of the Oklahoma abortion statutes but since Dr. Henrie had died after his conviction, his successor was substituted in order to bring this suit. Shortly thereafter, the court permitted Dr. S. Allison, a psychologist, Dr. F. Hladky, a psychiatrist, and Reverend J. Wolf to intervene and join the challenge to the statutes.

Relief sought by Dr. Henrie's successor on the constitutional claims was denied because the state conviction was final and the federal court held that a declaratory judgment attacking the validity of a state conviction was not appropriate.[12] However, as to the intervenors, limited relief was granted.

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5. Pain, *A Call for Statutory Abortion Law Reform in Oklahoma*, 24 OKLA. L. REV. 243 (1971).
6. *Id.*
7. 176 Okla. 115, 54 P.2d 666 (1936).
8. *Id.* at 117, P.2d at 668.
9. 509 P.2d 481 (Okla. Crim. App. 1973).
10. 410 U.S. 113 (1973).
11. 358 F. Supp. 719 (N.D. Okla. 1973).
12. *Id.* at 723.

The intervenors were allowed to join since their occupations frequently placed them in a position where they were requested to advise and counsel pregnant women who were concerned for various reasons about the advisability of bearing children and the possibility of obtaining an abortion. Under sections 861, 862, and 714, one who advises a woman to procure an abortion is also subject to the grave risk of criminal prosecution if such advice leads to the procurement of an abortion.

In asserting the challenge to sections 861, 862, and 714, the court held that since the intervenors were subject to direct personal detriment, standing was granted.[13] Further, the intervenors' own interests were at stake rather than those of the general public, thereby presenting a case or controversy subject to judicial resolution under article III of the United States Constitution.

The Oklahoma statutes regarding the suspension or revocation of a physician's license were also challenged. Under the provisions of section 503 of title 59, the State Board of Medical Examiners is authorized to suspend or revoke the license of any physician or surgeon practicing in Oklahoma for unprofessional conduct; and section 509 of the same title defines unprofessional conduct to include "procuring, aiding or abetting a criminal operation or abortion." Thus a doctor performing an abortion in Oklahoma is subject to having his license revoked or suspended.

Yet the court held that since the State Board of Medical Examiners and its members who must enforce the statutes, were not joined in the suit, the challenge to section 503 and section 509 was not presented in an adversary context and not justiciable.[14] Therefore, the court did not have a case or controversy required under article III for federal jurisdiction and the constitutionality of section 503 and section 509 was not considered.

As written, it appears that the authority granted to the Medical Examiners to revoke a physician's license is too broad to be acceptable under the *Roe v. Wade*[15] decision which permits the woman under the advisement of her attending physician to determine, during approximately the first trimester, whether pregnancy should continue.[16] State

13. *Id.* at 722; *accord,* Doe v. Bolton, 410 U.S. 179 (1973); Flast v. Cohen, 392 U.S. 83, 101 (1968).

14. Henrie v. Derryberry, 358 F. Supp. 719, 722 (N.D. Okla. 1973); *accord,* Flast v. Cohen, 392 U.S. 83, 101 (1968); Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 241 (1937).

15. 410 U.S. 113, 164 (1973).

16. *Id.*

intervention is prohibited during this period since "fundamental rights" are involved and there is no "compelling state interest" in the health of the mother sufficient to allow a limitation on her rights until about the end of the first trimester.[17]

In considering the challenge to sections 861 and 862 of title 21, the court assessed its similarity to the Texas statutes struck down in *Roe v. Wade*.[18] Section 861 makes it illegal to administer to, or advise, or procure any woman to take any drug or substance or use any instrument with the intent to procure a miscarriage, unless it is necessary to preserve her life. Section 862 proscribes the solicitation by the woman of any person, medicine or means, or submission to an operation with the intent to produce a miscarriage unless it is necessary to preserve her life. The court concluded that the Oklahoma statutes were similarly broad as the Texas statutes invalidated in *Roe v. Wade*[19] in their proscription of acts related to an abortion except where the mother's life was endangered. Thus the district court ruled section 861 and section 862 unconstitutional and unenforceable as violative of the due process clause of the fourteenth amendment.

The question of the constitutionality of section 714 of title 21 was treated differently. Under this statute, it is manslaughter in the first degree, if the child or mother dies, to administer to any woman pregnant with a quick child or prescribe for, advise or procure any substance or use any instrument with the intent to destroy the child unless such procedure is necessary to preserve the life of the mother.

In considering section 714, the court recognized Oklahoma's strong public policy of protecting the life of a quick child by imposing a more severe sentence on one who destroys such a child than for an abortion before the child quickens. Although section 714 is clearly broader in its prohibition of abortion than as defined in *Roe v. Wade*,[20] due to the extremely sensitive and controversial nature of abortion and the compelling state policy against it, the court abstained from interpreting section 714 or adjudicating its constitutionality.

Under the rules established by the Supreme Court,[21] the state may regulate the abortion procedure from and after the first trimester to

17. *Id.* at 155; *accord,* Kramer v. Union Free School District, 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).
18. 410 U.S. 113 (1973).
19. *Id.* at 164.
20. *Id.*
21. *Id.* at 165.

promote the preservation and protection of the health of the mother. Only for the stage subsequent to viability may the state proscribe abortion except when it is necessary to preserve the life or health of the mother.

Consequently, as written, section 714 appears to be substantially broader than would be constitutionally permitted, since the Supreme Court recognized that viability is usually placed at about 28 weeks while quickening is usually accepted as occuring at 16 to 18 weeks.[22] Yet the court abstained from passing on the constitutionality of the statute by recognizing the established right of state courts to interpret or narrow a statute in order to uphold its constitutionality.[23] Also cited was *Grayned v. City of Rockford*[24] in which the Supreme Court stated that "it is not within our power to construe and narrow state laws."[25]

In regard to the federal abstention doctrine, the Supreme Court has set out certain principles indicating that the rule should not automatically be applied where a federal court is dealing with a doubtful issue of state law but rather in "special circumstances" which must be determined on a case by case basis.[26] One of these circumstances was delineated in *Harman v. Forssenius*[27] where it was declared that if the state statute "is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction."[28]

The doctrine has been further defined to be properly invoked in deference to the state courts only in situations where the question of state law is "uncertain" such that a state construction would substantially alter the constitutional question.[29] The reason given is the desirability of avoiding undue conflict in federal-state relations as well as avoiding unnecessary interference with proper state functions and premature constitutional adjudications. However, the abstention rule cannot be

22. *Id.* at 132; DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1261 (24 ed. 1965).

23. Henrie v. Derryberry, 358 F. Supp. 719, 726 (N.D. Okla. 1973); *accord*, United States v. Vuitch, 402 U.S. 62 (1971); Skinner v. Oklahoma, 316 U.S. 535 (1942).

24. 408 U.S. 104, 110 (1972).

25. *Id. See also* United States v. 37 Photographs, 402 U.S. 363, 369 (1971).

26. Baggett v. Bullitt, 377 U.S. 360, 375 (1964); Propper v. Clark, 337 U.S. 472, 492 (1949); Meredith v. Winter Haven, 320 U.S. 228, 236 (1943).

27. 380 U.S. 528 (1965).

28. *Id.* at 535. *See also* Baggett v. Bullitt, 377 U.S. 360, 376 (1964); Livingston v. United States, 364 U.S. 281 (1960); England v. Louisiana St. Board of Medical Examiners, 375 U.S. 411 (1964).

29. Lake Carrier's Ass'n v. MacMullan, 406 U.S. 498, 510 (1972); Harman v. Forssenius, 380 U.S. 528, 535 (1965); Davis v. Mann, 377 U.S. 678, 690 (1964).

properly ordered for the sole purpose of allowing the state courts the first chance to vindicate the federal claim.[30]

The question therefore is whether section 714 presents the "special circumstances" necessary to apply the abstention doctrine. In other words, is section 714 uncertain such that state court determination would substantially modify the constitutional issue? Also, is it fairly subject to an interpretation that would render the constitutional question unnecessary? If not, the federal court had a duty to exercise its jurisdiction and deal with the constitutional issue.

Section 714 does not seem to qualify under the rubric of "special circumstances," for it appears to be no less vague or uncertain nor substantially less subject to an interpretation that would free it from "constitutional infirmity"[31] than section 861 which was held to be violative of the fourteenth amendment. The main difference between the two statutes, aside from punishment, is that section 714 does not apply to an abortion procurement or operation until the fetus becomes a quick child at about 16 to 18 weeks.[32]

As the dissent by Justice Douglas in *Harrison v. NAACP*[33] points out, the judge-made rule of federal abstention to adjudicate an unnecessary constitutional issue has been greatly expanded since the original precedent in *Railroad Commission v. Pullman Co.*[34] to the point where it can be a "convenient excuse for requiring the federal court to hold its hand while a second litigation is undertaken in the state court."[35] This tactic unquestionably produces years of delay and the multiplying of litigation expenses.

The question therefore, of the constitutionality of section 714 will have to await further state litigation.

Two other Oklahoma statutes relating to abortion were also challenged. Section 713 of title 21 makes unlawful the willful killing of an unborn quick child by any injury to the mother while section 863 proscribes the concealing of a stillborn child as well as the death of a child under the age of two years. But since the intervenors were not in a position to be subject to prosecution under these statutes, no

30. McNeese v. Board of Education, 373 U.S. 668 (1963); Turner v. City of Memphis, 369 U.S. 350 (1962); NAACP v. Bennett, 360 U.S. 471 (1959).
31. Fornaris v. Ridge Tool Co., 400 U.S. 41, 43 (1970).
32. Roe v. Wade, 410 U.S. 113 (1973).
33. 360 U.S. 167, 179 (1959).
34. 312 U.S. 496 (1941). *See also* Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101 (1944).
35. Harrison v. NAACP, 360 U.S. 167, 180 (1959).

genuine case or controversy was present to allow the court to adjudicate the constitutionality of these statutes.[36]

What, then, is the impact of *Henrie v. Derryberry*[37] and the Supreme Court abortion decisions on the Tulsa area in regard to an actual change of policy or practice of performing abortions? It appears to be minimal. Of the four hospitals serving the community, none have admitted performing abortions or changing their policy to conform with the woman's right to terminate her pregnancy under the fourteenth amendment. The two religiously affiliated hospitals, St. John's and St. Francis, still hold to the position that abortion is immoral because it is the killing of a human being. At Hillcrest hospital, the issue is under study by the board of trustees and the hospital as yet has not changed its policy. The most flexible stance was offered by Doctors' Hospital which takes the position that until the Oklahoma State Legislature acts to change the laws, they will conform with the Oklahoma statutes on criminal abortion notwithstanding the fact that sections 861 and 862 have been held unconstitutional. When and if the Oklahoma abortion statutes are changed to conform with the Supreme Court guidelines, they indicate that the performance of an abortion at Doctors' Hospital will be left to the individual conscience of the doctor.

Recently however, an abortion clinic has opened in the city of Tulsa. The clinic uses the vacuum method and performs abortions up to ten weeks of pregnancy. Beyond that period it is still necessary for one to seek a pregnancy termination outside the area.

Concerning the right of the hospitals to establish a policy of disallowing abortions, the Supreme Court in *Doe v. Bolton*[38] assured adequate protection to hospitals to determine their own positions regarding this matter. In that decision the Court upheld the validity of a Georgia statute which leaves to the discretion of the hospital the decision of performing an abortion, although legal, and prohibits the coercion of staff doctors to perform abortions where it is objected to on moral and religious grounds.

In the wake of the Supreme Court abortion decisions and *Henrie v. Derryberry*,[39] the status of the Oklahoma abortion and related statutes is still uncertain. Although sections 861 and 862, making it illegal to perform or solicit an abortion, have been invalidated, one who per-

36. Henrie v. Derryberry, 358 F. Supp. 719, 726 (N.D. Okla. 1973).
37. *Id.*
38. 410 U.S. 179 (1973).
39. 358 F. Supp. 719, 726 (N.D. Okla 1973).

forms an abortion still runs the risk of prosecution for manslaughter under section 714 for procuring the destruction of an unborn quick child, and under section 713 for the willful killing of an unborn quick child by an injury committed upon the mother. Furthermore, under section 863, if the woman conceals the aborted fetus she is subject to prosecution. Lastly, to serve as a forceful deterrent, under sections 503 and 509 of title 59, a physician can still have his license revoked or suspended for performing an abortion.

In order to eliminate the present uncertainty and the cloud of ambiguity that envelops the entire issue of abortion in Oklahoma, it is imperative that the state legislature redraft the abortion laws in conformance with the United States Supreme Court guidelines. Only in this way will the state's legitimate interest in preserving and protecting the health of the expectant mother and the potential life of the fetus be effectively promoted. Likewise, women will then be able to take full advantage of their constitutional right to terminate pregnancies in an ambience of safety and security.